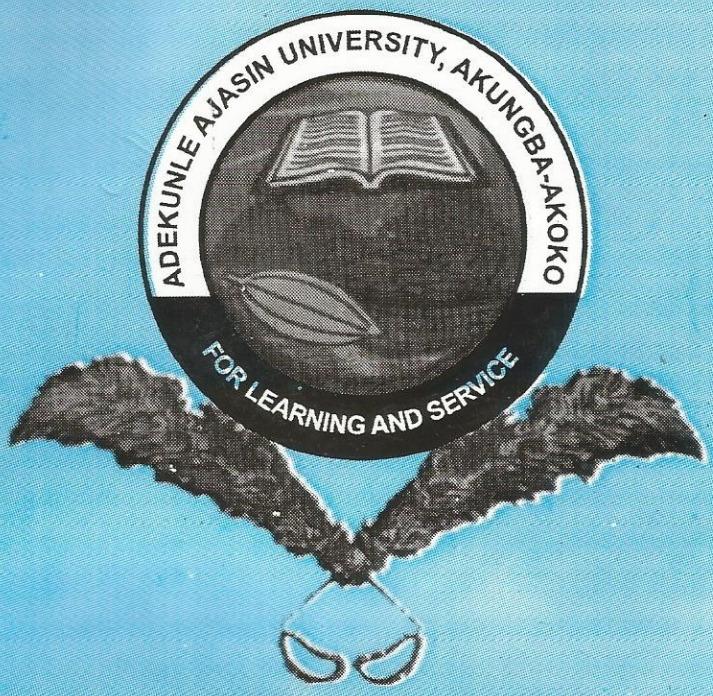
AKUNGBA LAW JOURNAL

VOL. 1 NO. 4 JANUARY, 2010 ISSN: 1595-0425



A PUBLICATION OF THE FACULTY OF LAW

ADEKUNLE AJASIN UNIVERSITY,

AKUNGBA-AKOKO, ONDO STATE, NIGERIA

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THE CONCEPT OF DUAL CUSTOMARY LEGAL SYSTEMS IN NIGERIA: FACTS AND FALACIES

Edu, Hamzat Oladipupo*

1.0. Introduction

Writers often classify Muslim law as customary or non-indigenous customary law in Nigeria. For example, "in Nigeria, customary laws are of two kinds", writes Prof. Funso Adaramola,[1] "(1) The indigenous customary laws operating within different ethnic or ethno-cultural areas. (2) The non-indigenous customary legal system, i.e. Islamic law known as the Shari'ah, operating in certain parts of northern Nigeria as customary law where the people have adopted Islamic tenets as such"[2] "but that notion is not correct."[3] That is putting it mildly, with due respect to this academic guru in the field of law and a very senior colleague, it is more serious than just 'not correct,' it is highly debatable if the term 'non-indigenous custom' is suitable for any customary legal system, and if suitable, then the received English law is as non-indigenous and non-ethnic to the Nigerian natives as the Islamic Law, one is left to wonder at the conclusive reference to Islamic law by the highly referred Professor when he writes "i.e. Islamic law known as Shari'ah,"[4] to the exclusion of the received Common Law which Lord Summers had described as a Christian law as far back as 1917,[5] considering the fact that it is a clear historical fact that both Islam and Christianity are non-indigenous and non-ethnical. However the background to this mistaken concept, i.e. that there are two customary legal systems in Nigeria, and they are of two classes namely, historical and legal.

1.1 Historical Background

After the full colonization of the territories now pieced together under the acronym 'Nigeria' in mid nineteenth century, the colonialists embarked on the project of quiet and smooth governing of their colony, but they were confronted by various challenges the most challenging of which was the diversified nature of the natives of this territory, not only in character but also in culture and identities e.g., custom and religion. So diverse were the people that it was written for example about one of the territories, "the Benin Kingdom which expanded and contracted over time has always included various ethnic groups within its shifting political and cultural boundaries."[6] The Benin kingdom is not

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[1] Funso Adaramola (Ph.D), Professor of Jurisprudence & International Law, was the Dean of Faculty of Law, Lagos State University. Ojo, Lagos, Nigeria, Aug., 2006-Dec., 2008.

[2] Adaramola, F.; Basic Jurisprudence, Lagos, Raymond Kunz Communications, 3rd Edition, 2004, p. 108.

[3] Egwummuo, J. N.; Dynamics in Nigerian Legal System, Enugu, Academic Publ. Co., 2003, p. 55.

[4] Adaramola; op. cit., p. 108.

[5] See Bowman v. Secular Society Ltd. (1917): All England Law Reports, 1920, p. 406.

[6] Kaplan, F. E. S.: Native Law and Custom in Benin & Early Colonial Courts in Nigeria; 1997, Annals of the New York Academy of Sciences vol. 816, pp. 245-313.

solitary about this, the territory hosted more than 250 diversified cultures, customs, and traditions. The Yorubas in the south west was home to such diverse entities like the Aworis, Ijebus, Egbas, Oyos, Ekitis, Akokos, Itsekiris, etc., and all these groups are homogenous and attempt by one group to lord it over others had resulted in serious wars that marked the history of these people, and that was the situation across the regions of this territory.

The colonization process came about when most of these diversified entities were at each others' throat for supremacy. For example, the Hausa-Fulani-Kanuri conflict of mid-17s; the Yoruba-Dahomey conflict in the south-west; "... the warlike Benin has complex and fractious relationship with its neighbours...";[7] and the clan segregation political set-up in the East.

Initially, the situation of these natives worked for the colonialists who made these conflicts a tripod to launch a successful slave trade. This helped as a channel to offload prisoners of war in these war-torn territories. The inherent problem of these conflicts became prominent after the abolition of slave trade 1865-6 and after the Berlin Conference of 1883 when colonialists were saddled with the problem of governing their territories. Kaplan wrote about the Binis, "the King-Oba of Benin-held the power of life and death over his people."[8] The same can also be said of the other Obas in the west, the Emirs and Sultans in the north and the Obis, Obongs and Amayanabos in the east and south-south.

Another source of problem where there was fragile tranquil, was that of faith or religion, these regions had differing customary beliefs and had been exposed to Islamic faith earlier as well as Christianity immediately prior to colonisation by European Missionaries who followed up the job of the explorers. While the south had well established traditional and Islamic faith, the north were mostly Muslims under deep-rooted Islamic Governmental Instruments under The Sokoto Caliphate after the 16th century Jihad of Uthman Dan Fodio and under El-Kanemi of Bornu Empire. The south-east was uniquely traditional until the advent of the western Christian Missionaries in the 17th century.

The business of governance did not come easy at the early stage of colonization, there were two vast bellicose empires in the north-the Sokoto Caliphate and the Borno-Kanemi; there were also two vast not particularly friendly Kingdoms in the south-west-the Old Oyo Empire and the Benin Kingdom;[9] the little that was heard about Igbos and their neighbours showed the existence of strong clannish segregation in the south-east[10] which was as strong and difficult in diversity, as the Kingdoms and Empires were in unity, to govern. These were the challenges faced by the colonialists initially but they decided to tackle them with the same tactic, thus ignore the vast socio-cultural diversity of the people of this territory, they regarded them as natives, and all legal rules used by them by which they directed their affairs were regarded as 'native law and customs' regardless of the nature of these rules.[11]

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[7] Ibid, p. 248.
[8] Kaplan, Ibid., p. 246.
[9] Boah, A.; The West African History, AUP, 5th edition, pp. 125-132.
[10] Chinua Achebe; Things Fall Apart, African Press, 3rd edition, p. 102.
[11] Parker A. E. W.; Sources of Nigerian Law, London, 1963, Sweet & Maxwell, p. 13.

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Conscious of the afore-mentioned challenges, the colonialists decided to intervene in the peoples' way of life by contacting the leadership, and directly or indirectly involving in the incessant conflicts in the territory, like supplying arms to a compromising party in a conflict as they did in Oyo in the Ekitiparapo war,[12] or starting a war of their own like they did in Sokoto Caliphate in 1901,[13] the Borno Kanemi in 1906.[14] Kaplan wrote in her essay about the Benin Kingdom "the kingdom's independence was finally ended by a British military expedition in 1897" and not to forget that such intervention in Lagos led to the ceding of Lagos to the British by King Dosunmu in 1887, the exile of Kings Ovweranme Nogbaisi of Benin in 1912 and Williams Dapper Pepple of Bonny in Niger Delta in the year 1920.[15]

After these conquests a form of governments was put in place. Some part of the territory were placed under 'direct rule' of the crown from Britain, while some were placed under a partial representative governance called 'indirect rule', but in the main laws were made for the territory and all the citizens were regarded as 'natives' and all previous legal systems were called 'native laws and customs.[16] Various native law and custom acts were enacted by the British Parliament to modify these existing systems irrespective of whether it was Islamic as in the north then or customary as in most of the south (a pocket of these areas in the west were having Islamic laws in place). "Before the advent of the British, two set of law had developed in Yoruba land, one was termed ethnic customary law and the other Muslim law," hence the commencement of this fallacious notion of a 'double customary legal system'.

The colonialists adopted the term 'Natives'[17] to describe the people of their colony in their laws, and described their existing rules of law as 'customary.' "In many parts of Northern Nigeria, Islamic law is the predominant law of the area, and consequently comes within the statutory term "the native law and custom predominant in the area of jurisdiction"[18] disregarding the wide disparity between the people's customs and Islamic law, which like the received English law did not originate from the areas practicing it. The Muslims in the north had been resenting and ignoring these British Acts unlike their counterparts in the south. To avoid constant conflicts over this the British placed them under the "indirect rule", i.e. a partial autonomous government, while the south was placed under "direct rule" i.e. completely under the rule of the British Crown.

Important among their laws is the test for validity of the native laws, e.g., the Native Court Proclamation Act, 1906 (Ord. No. 1), repugnancy, inconsistency and public policy, this three-pronged test survives till today in our legal system as represented by the conclusion drawn in s. 14 of our Evidence Act which states

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[12] Boath A.; op. cit., pp. 128-130.

[13] Egwummuo, J. N.; Dynamics in Nigerian Legal System, Academic Publ. Co.,Enugu, 2003, p. 48. See also Park A.E.W; op. cit., p. 30.

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> Provided that in case of any custom relied upon in any judicial proceeding shall not be enforced as law if it is contrary to public policy and is not in accordance with natural justice, equity and good conscience.

Modern day discussion of this provision had confirmed a double standard as it is stated to be based on the assumption that it contains two distinctly separate tests.[19] 'The consequence of such an approach for any rule of customary law that is evaluated under this proviso is that it may be rejected either because it does not meet the requirement of the "pubic policy" test or because it fails to pass "repugnancy" test'.[20]

'Repugnancy test' stated that 'for any rule of customary law to be enforceable, it must not be found to be repugnant to natural justice, equity and good conscience', in *Labinjo v. Abake*[21] the full Crown Court declared:

> The general rule is that, if there is a native law and custom applicable to the matter in controversy, and if such native law and custom is not repugnant to natural justice, equity and good conscience or incompatible with any local ordinance, and if it shall not appear that it was intended by the parties that the obligation under the transaction should be regulated by English law, the matter in controversy shall be determined in accordance with such native law and custom.[22]

The wording of this provision had been flawed by several legal commentators and judges.[23] One fine example of the fallacies of the repugnancy test was summarised thus: "The words 'technical justice' were here clearly not used in their restricted modern sense but were synonymous with 'natural law' in the same way as the word 'equity' did not refer to technical equity i.e. the equity of the Chancery Court, but to *jus naturale*. In other words, 'natural justice' and 'equity' in this sense meant the same thing, i.e. Natural Law".[24] In practice all three tests of enforceability had been invoked, some time it had been successful as in the popular case of *Edet v. Essien*,[25] but it had been in the main confusing, as various interpretations had been given to this rule by courts as we shall see later. Suffice here to say the retention of the rule in our laws is, to say the least, a flaw. This is so because 'the combine effects of the constitution, our criminal codes and criminal procedures have been the abolition of all unwritten customary law offences and punishment'.[26] These rendered the repugnancy rule irrelevant in the modern term and as Snell concluded 'when the rules of natural justice enforced by the courts are examined it will be seen that many of them are rules of common law, many others statutory, and some

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[21] (1924) vol. 5 NLR 1933.
[22] Park; Supra, p.105.
[23] See Randall, A.E.; Commentary on Equity Jurisprudence, 3rd edition, p.1; also Mcgarry & Baker; Snell's Principle of Equity, London, 1954, 24th edition, p. 3.
[24] Ladan, M. T. (citing Marshal) op. cit., p. 187.
[25] (1932) 11 NLR 47, see also *Mariyama v. Sadiku Ejo* (1961) NRNLR 81.
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[21] (1924) vol. 5 NLR 1933.
[22] Park; Supra, p.105.
[23] See Randall, A.E.; Commentary on Equity Jurisprudence, 3rd edition, p.1; also Mcgarry & Baker; Snell's Principle of Equity, London, 1954, 24th edition, p. 3.
[24] Ladan, M. T. (citing Marshal) op. cit., p. 187.
[25] (1932) 11 NLR 47, see also *Mariyama v. Sadiku Ejo* (1961) NRNLR 81.
[26] Ladan, op. cit., p. 191.

solitary about this, the territory hosted more than 250 diversified cultures, customs, and traditions. The Yorubas in the south west was home to such diverse entities like the Aworis, Ijebus, Egbas, Oyos, Ekitis, Akokos, Itsekiris, etc., and all these groups are homogenous and attempt by one group to lord it over others had resulted in serious wars that marked the history of these people, and that was the situation across the regions of this territory.

The colonization process came about when most of these diversified entities were at each others' throat for supremacy. For example, the Hausa-Fulani-Kanuri conflict of mid-17s; the Yoruba-Dahomey conflict in the south-west; "... the warlike Benin has complex and fractious relationship with its neighbours...";[7] and the clan segregation political set-up in the East.

Initially, the situation of these natives worked for the colonialists who made these conflicts a tripod to launch a successful slave trade. This helped as a channel to offload prisoners of war in these war-torn territories. The inherent problem of these conflicts became prominent after the abolition of slave trade 1865-6 and after the Berlin Conference of 1883 when colonialists were saddled with the problem of governing their territories. Kaplan wrote about the Binis, "the King-Oba of Benin-held the power of life and death over his people."[8] The same can also be said of the other Obas in the west, the Emirs and Sultans in the north and the Obis, Obongs and Amayanabos in the east and south-south.

Another source of problem where there was fragile tranquil, was that of faith or religion, these regions had differing customary beliefs and had been exposed to Islamic faith earlier as well as Christianity immediately prior to colonisation by European Missionaries who followed up the job of the explorers. While the south had well established traditional and Islamic faith, the north were mostly Muslims under deep-rooted Islamic Governmental Instruments under The Sokoto Caliphate after the 16th century Jihad of Uthman Dan Fodio and under El-Kanemi of Bornu Empire. The south-east was uniquely traditional until the advent of the western Christian Missionaries in the 17th century.

The business of governance did not come easy at the early stage of colonization, there were two vast bellicose empires in the north-the Sokoto Caliphate and the Borno-Kanemi; there were also two vast not particularly friendly Kingdoms in the south-west-the Old Oyo Empire and the Benin Kingdom;[9] the little that was heard about Igbos and their neighbours showed the existence of strong clannish segregation in the south-east[10] which was as strong and difficult in diversity, as the Kingdoms and Empires were in unity, to govern. These were the challenges faced by the colonialists initially but they decided to tackle them with the same tactic, thus ignore the vast socio-cultural diversity of the people of this territory, they regarded them as natives, and all legal rules used by them by which they directed their affairs were regarded as 'native law and customs' regardless of the nature of these rules.[11]

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[7] Ibid, p. 248.
[8] Kaplan, Ibid., p. 246.
[9] Boah, A.; The West African History, AUP, 5th edition, pp. 125-132.
[10] Chinua Achebe; Things Fall Apart, African Press, 3rd edition, p. 102.
[11] Parker A. E. W.; Sources of Nigerian Law, London, 1963, Sweet & Maxwell, p. 13.

In contrast, Islamic law being a divine law, sent by the Creator through His Messengers to govern mankind,[45] Egwummuo writes, "Writers often classify Muslim law as customary or indigenous law of Nigeria, but this notion is not correct".[46] It is wrong because it did not originate from Nigeria, "a law is indigenous if its origin blooms in Nigeria", e.g., customary law, local and national legislation and Nigerian case laws.[47] Islamic law thus has its source in the Holy Qur'an and referred Tradition of the Prophet (PBUH), primarily, there are other secondary sources of Islamic law among which we shall highlight later.

2.2.1 Custom as a Source of Islamic Law

Islamic Law has two components: the Divine and the Human components.

The Divine Component: This constitutes all that is contained in the Qur'an and the Tradition of the Prophet (PBUH) called the Sunnah. The Qur'an contains principles, exaltations and laws which the Absolute Sovereign-Allah- has revealed to guide mankind. The sunnah is the elaboration and exemplification of those principles, exaltations and laws in life situations by the Prophet of Islam. It is these two that constitute the divine, the immutable component of the law. They constitute the Shari'ah.

The Human Component: This constitutes all the efforts of Muslim scholars and Muslim generations in finding best means of applying Sharia'h according to their understanding and to their particular circumstances with due regard to the change in human conditions and experience, this is known as Ijtihad. It is purely human effort aimed at understanding the provisions of the divine sources, collectively-Ijma'a; or individually-Qiyas-Istihsan-Istislah- Masalih al-mursal, etc.

'Urf or custom of the people had also been used to interpret the provision of the divine sources of Islamic law in efforts to understand the best means of applying the law hence becoming an important source of Islamic law. For example, most of the trading customs received the blessing of the law. The Prophet was reported to have said, "for you is your custom and for us ours,"[48] thus any custom (which had been defined in Islamic law as 'the totality of historical and cultural experience of a given people, which gives trait, instinct, taste and other characteristics that distinguish them from others)[49] that is not in contrast with the Qur'anic provision, is deemed ratified, "For such customs to apply however the following conditions must be satisfied:

(a) the custom is acceptable to the Muslim community,
(b) it must have attained long usage,
(c) it must conform to the sources of Islamic law. It has been suggested that Islamic law does not look down upon custom of other people nor does it aim at destroying it.[50]

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[45] See Bello CJN, in *Usman v. Umaru* (supra).
[46] Egwummuo, J.N.; Dynamics of Nigerian Legal System (supra) p. 55.
[47] Egwummuo, ibid., p. 55.
[48] Bukhari, vol. II, p. 152.
[49] Ladan: supra, p. 198.
[50] Egwummuo, J. N., op cit., p. 45.

Some Arab cultures are ratified with or without modification, in inheritance for example, children and old persons could not inherit because they can not wield arms, but this was modified by Islam[51] and that remains the position of the law.

2.3 Scope

Islamic law is a complete set of legal rules, with all aspect of it well written in the Qur'an and explained by the practice of Prophet Muhammed (PBUH). Hence it is 'lex sciptum' unlike the customary law which is naturally unwritten (leges non scriptum) [52] unless those that are now decided by the court. Both 1979 and 1999 constitutions cannot deal decisively with the scope of the customary law as they did with Islamic law, may be because being an unwritten law, all issues within its scope had been properly taken care of by the common law which happened to be a combination of English customary law, hence, its jurisdiction was simply limited to 'civil proceeding involving question of customary law,'[53] but Islamic law covers all aspect of legal causes and matters just as the Qur'an says: "Nothing have we omitted from the book,"[54] criminal(Jinai جناى & jinayat جنايات) and civil law(madani مدني & teqsiriyyah تقصيرية); substantive(aamirah أمرة) and procedural(ijrai اجراى) law; evidence(ithbaat إثبات) and legal pleadings(marafi'at مرافعات), all in a manner that makes codification a mere formality. Knowledge of these causes and matters were actually acquired by scholars of Islam and practiced all over the territories strung together to be known as Nigeria today, particularly the South, West of River Niger and the North. History of the advent of the colonialists showed that they had to contend with Muslim rulers in both regions, but while the South had been penetrated by some early Christian Missionaries like, Thomas Birch Freeman and Father Damien Coquard, full blast Islamic legal system was encountered in the North, in both Sokoto Caliphate and Bornu-Kanem Empire.[55]

2.3.1 The Scope of Islamic Law in the 1999 Constitution.

Taking its cue from the 1979 Constitution, the 1999 Constitution of the Federal Republic of Nigeria, provided for the jurisdiction of Shari'ah Courts of Appeal that may be established in Nigeria, when and if successfully established both in sections 262(1-3) and 277(1-3), in the Federal Capital Territory, Abuja and states (which require it) respectively. This can not be regarded as the scope of Islamic law, it can only be relevant when the discussion is that of hierarchy of Courts in Nigeria. This Muhammad Uwais CJN, succinctly puts like this:

> On the argument that the nature of the dispute between the parties[56] and their status as Muslims, are matters pertaining to Islamic law under the 1979 Constitution; I am unable to agree. The phrase 'Islamic Law' is not defined in

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[51] Qur'an 4: 11,12.
[52] See Adaramola, supra, p. 108.
[53] S. 267 of the 1999 Constitution.
[54] The Holy Qur'an 6:38.
[55] Boah, A.; supra, pp. 150-6.
[56] The main claim of the plaintiff in the High Court of Kogi State was that he was the person properly appointed as the Chief Imam of Ikengwe Central Mosque.

the 1979 Constitution,[57] although the Constitution made reference in S.242(2) thereof to *certain aspect of it,*[58] namely marriage, family relationship, guardian of infant, foundling, waqf, gift, will or succession and prodigal or person of unsound mind. None of these subjects concerns the appointment of an Imam or Naibi or succession to such offices."[59]

All these despite the fact that issues of Imam, Naibi, other leadership offices in Islam are core issues in within the scope of Islamic law.

"The Sharia Court of Appeal has no appellate jurisdiction in criminal causes and matters"[60] in the Nigerian Constitutions, yet the scope of Islamic law encompasses such causes and matters.

Views and Conclusion

Islamic law from the account given so far cannot be equated comfortably with the customary law. It is a written law so detailed and comprehensive that it is out of imagination to consider it an unwritten law that needs to be explained by proof of fact'[61] like the customary law.

It is interesting to note that Professor Adaramola listed six basic characteristics of indigenous Nigerian customary law, none of them can suitably qualify the Islamic law; the first of these characteristics can suitably apply to any law-customary, Islamic or common- applicable in any geo-political area, it reads: "They reflect the generally accepted usages in the geo-political area or within the ethnic or sub-ethnic group where they operate." For any law to exist it must be accepted by the society it resides. As the respected Professor logically concluded after a long voyage into the sea of legal ideas "Law may be defined as a normative psychological social management, social motivation, social control and social change, ***produced from practical social necessity by which a politically organised society influences human conducts (emphasis mine)*** within its jurisdiction"[62] i.e. what is law, being a product of practical social necessity, must have the acceptance of the society to influence their conducts concerning the 'social necessity' which the law is set to address.

Islamic law is neither flexible nor rigid; neither inconsistent nor ambiguous, it is as pure in its source the first day it was revealed, any codification that deviates from its provisions is not part of it, that is why the Penal Code of 1959 (1990 after reform) can not be regarded as Islamic Criminal Law but can only suit a part of Islamic Criminal Law called "*ta'zir*". Likewise any codification that is taken from sources of Islamic law in conformity with its tenet is part of it. The opinion that modern scholars must look into the saying of various schools of Islamic thought, and come out with a code that will take all

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[57] Nor was it defined in the 1999 Constitution either.

[58] Note that s. 242(2) of the 1979 Constitution and s. 262(2) of the 1999 Constitution mentioned just "certain aspect of Islamic Law."

[59] Abdul Salam v. Salawu (2002) 6 SC (pt. II) p. 196.

[60] Pedro, Lawal: Jurisdiction of Courts in Nigeria (Materials & Cases) , Lagos, Lagos State Ministry of Justice Law Review, 2006, pp. 205-206.

[61] Dynamics in the Nigerian Legal System; op. cit., p. 59.

[62] Adaramola, supra, p. 11.

modern legal issues into consideration, is a sound opinion because any law that is taken from the Islamic Shari^{c}ah is also Shri^{c}ah.[63]

To conclude this article, it needs to be stated that customary law is local and indigenous in nature to every ethno-cultural group using it. So the term 'indigenous customary law' is a tautology to say the least, while the term 'non-indigenous customary law' is confusing to say the least, because it is no customary law if it is not indigenous *a la* Parker, "Islamic law is often treated in the same context as an Islamic equivalent of the indigenous customary law, it is not customary law so properly called. Islamic law does not share the same attributes as, and can not be said to derive from the custom and usage indigenous to the people.[64] Hence Islamic law is another distinct source of law in Nigeria and not a customary law.

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[63] Qardhawi, Yusuf: Madkhal liddirasat Ah-Shari^{c}atu al-Islamiyyah, Beirut, al-Maktab al-Islami, 1972, p. 23.

[64] Parker; supra, p. 105.