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ISLAMIC LAW AS AN ASPECT OF CUSTOMARY LAW IN NIGERIA – A CALL FOR REVIEW (S.)

BY

BUKOLA RUTH AKINBOLA (MRS.) *

INTRODUCTION

Nigeria operates a legal system that has several distinct qualities. One of its unique characteristics is legal pluralism, a phrase that is relevant because of the ethno-cultural history of what is today known as Nigeria, a conglomeration of territories in the former central Sudan, comprising about three hundred and fifty ethnic communities. Each of the ethnic groups had its own legal system, culture, and government.¹ As such there are several sources of Law in Nigeria today, including the received English law (Statutes of general application in England as at 1st January 1900, Common law principles, Precedents and the doctrines of Equity). Other sources include the constitution, local legislations, case law and customary law. In the classification of law in Nigeria, customary law has been used to refer to both the indigenous customary laws of the people and the Islamic law for many years. This article will examine the relationship between Customary Law properly so-called and Islamic law to show that they are two separate and distinct systems of law, notwithstanding the long period of their being classified as one. To do this, the nature and scope of customary law and Islamic law will first be examined.

NATURE AND SCOPE OF CUSTOMARY LAW

Customary law consists of customs, which are accepted by members of a community as binding among them. The concept of customary law has no universally accepted definition, like many other concepts in law. However, a number of definitions will be highlighted in an attempt to discuss its characteristics and its relationship with Islamic law. There is no doubt that customary law forms a key source of Nigerian law and governs the lives of

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¹ Jacob C. Anene and Godfrey Brown, *Africa in the Nineteenth Centuries*, Ibadan University Press and Nelson, p.129.

many who may never opt for any alternative because it is their way of life. It has been described by colonial overlords, jurists and others in different ways such as “native law and custom”, ‘native law’, ‘native customary law’, ‘local law’ and ‘ethnic customary law’. In view of the important role of customary law in the lives of Nigerians, it is important to know its components, characteristics and relationship with other laws in the legal system. In terms of the scope, customary law has been used to refer to a variety of laws other than English law in Nigeria. This has resulted in Islamic Law being classified as an aspect of customary law. According to Badaiki,² Obilade divided customary law into ethnic or non-Moslem customary law. This division has been predicated on the fallacy that Islamic law is customary law, a distortion that is traceable to the provision of section 2 of the High Court Law of Northern Nigeria, which provides that “native law and custom includes Moslem law”. The question with Obilade’s classification at this point is whether Islamic law can be regarded as customary law at all in Nigeria, not haven emanated from Nigeria first instance.

Evaluating the nature of customary law even in relation to international law context, Professor Teslim Elias, a former president of the International Court of Justice at the Hague has viewed “the polyglot peoples inhabiting the vast continent of Africa”. He believed the differentiation between African law and the laws of other people, is only superficial. This is because

*“African law forms part and parcel of law in general. All that there is is a number of admitted differences of content in respect of customary law in Africa generally inter se and customary law in Nigeria intra se”.*³

While Nigerian customary law has some peculiar characteristics, the basic character of law especially in terms of its binding nature, also characterizes it. Customary law binds members of the society in which it is recognized and upheld as law. Contrary to the views widely held by the western world in the early colonial days, customary law is just as much another system of law as the common law or any other law. As the historians, Kenneth Dike and A.E. Afigbo and Allagoa had to argue strenuously to convince the world that Africa had history, so did Teslim Elias have to argue to convince the western world that the African concept of law is the same as that of any other

² Badaiki A.O., development of Customary law, Tiken Publishers Nigeria Ltd (1997) p.12.

³ Elias Teslim, The Nature of African Customary law, Manchester University Press, (1972) p.1.

human specie every where on the globe.⁴ Law, customary or otherwise, is an expression of the ideals and aspirations of given people.⁵ If this statement is true, then customary law is in no way less a law than other kinds of laws whether they are Western or African.

DEFINITIONS:

Although there is no universally accepted definition of customary law, there have been various attempts to define the phrase, both by legal writers and Jurists. Every writer defines an expression for his own purpose, and in the light of his own experiences. In attempting to define the concept of 'law' itself, much juristic ink has flowed and much energy has been dissipated; yet the phenomenon of law itself is not settled with any clear finality. Similarly, Customary law has been variously defined within the context of what is 'customary' and what is 'law'? Jurists, law text writer and even statutes have adduced definitions of customary law. Jurisprudentially, flowing from the definitions of 'custom' and 'customary', customary law appears to fit the perception of law from the viewpoint of the naturalists who see law as 'sprouting upwards from the deep recesses of society'. Indeed, customary law emanates from society and is energized by its acceptance and long usage, rather than the positivist's view of flowing downwards from a sovereign authority as law. Customary law has been described as 'a body of customs and traditions, which regulate the various kinds of relationship between members of the community in their traditional setting'.⁶ It is "a rule which in a particular district has from long usage, obtained the force of law".⁷ The customary courts law of Anambra State, Nigeria defines customary law as:

"a rule or body of rules regulating rights and imposing correlative duties, being a rule or body of rules which obtains and is fortified by established usage and which is appropriate and applicable to any particular cause, matter, dispute, issue or question".⁸

The customary court of Appeal Law of Plateau state of Nigeria defines customary law as

⁴ Justice A.P. Anyebe, *Customary law: The war without Arms*, Fourth Dimension Publishers (Nigeria) 1985 p.6.

⁵ *Ibid*, p.7.

⁶ C.O. Okonkwo, ed., *Introduction to Nigerian Law*. (London, Sweet and Maxwell, (1980), 41.

⁷ Section 291, Evidence Act, Cap.112, Laws of the Federation of Nigeria (LFN).

⁸ Customary Courts Laws of Anambra State, 1979.

*“the rule of conduct which governs legal relationships as establishing custom and usage and not forming part of the common law of England nor formally enacted by the Plateau State House of Assembly, but includes any declaration of customary law but does not include Islamic Personal law”.*⁹

The history, tradition and culture of a people form the root foundations of customary law and that is why it is sometimes interchangeably referred to as “custom”. The court of Appeal in *Aku v. Aneku*¹⁰ defined custom or usage as ‘the unrecorded tradition and history of the people which has “grown” with the ‘growth’ of the people to stability and eventually becomes an intrinsic part of their culture. It is a usage or practice of the people which by common adoption and acquiescence and by long and unvarying habit has acquired the force of law with respect to place or the subject matter to which it relates’.¹¹ While long usage and acceptance are important factors in the existence of a customary law, there are instances when a king or chief in the customary setting issues a command and it acquires the force of law, as it binds all his subjects. However, even in such instances, the will of the people is reflected in such commands from the sovereign. Customary law has also been described in *Oyewumi Ajagunbade III v. Ogunesan*¹² as:

“The organic or living law of an indigenous people of Nigeria regulating their lives and transactions. It is organic in that it is not static. It is regulatory in that it controls the lives and transactions of the community subject to it. It is said that custom is a mirror of the culture of the people. I would say that customary law goes further and imports justice to the lives of all those subjects to it? (Obaseki, J.S.C. 1990).¹³

Obaseki J.S.C. emphasizes here, growth as he refers to its “organic” as opposed to ‘static’ nature. Elementary science has established the law

⁹ Customary Court of Appeal Law of Plateau State, 1979.

¹⁰ (1991) 3 N.W.L.R. 182.

¹¹ (1991) 8 N.W.L.R., Part 209 at 280.

¹² (1990) 3 N.W.L.R. 182.

¹³ *Ibid.*, at 207.

that organic or living matter grows and if customary law is organic, then it must grow. There is no doubt that the direction of development of customary law is in the 'bottom up' direction emanating from the people themselves and not from a sovereign without the input of the community. The community is usually represented by their designated representatives in the persons of the chiefs who form the council of Obas in Yoruba land or whatever names the community calls them in other places.

For a rule of customary law to apply, it must satisfy three broad requirements, namely:

- 1) The rule must not be repugnant to natural justice, equity and good conscience.
- 2) The rule must not be incompatible either directly or by necessary implication with any law for the time being in force.
- 3) The rule must not be contrary to public policy.¹⁴

Since Islamic law has been regarded as a component of customary law, it is necessary to examine what Islamic law is at this point.

NATURE AND SCOPE OF ISLAMIC LAW

Islamic law refers to a set of rules and regulations, which are divine in nature, which govern the relationship of man with his creator, other human beings as well as the state.

*"It is immutable and unchangeable. It is sacrosanct, indelible and constant. It is fixed by the Almighty Allah and must be obeyed by the people"*¹⁵

Other names that are used to describe Islamic law include 'Sharia' law and 'Muslim' law but they all refer to the personal religious law of Muslims in Nigeria.

In the view of Pearl David¹⁶, Islamic law is customary because it is the custom of the Arabs in Muhammed's time reduced into "writing" by the Holy Prophet who could neither read nor write. Islamic law has itself been heavily soaked in Nigerian local customary law.

"The administration of Muslim law is modified by the local law and custom in Pagan Districts, provided that by so doing the

¹⁴ S. 14(3), Evidence Act, Laws of the Federation of Nigeria, 1990 Cap 112 vol. VIII. See also the Evidence Laws of the States like the former Bendel State 1976, applicable in the present Edo and Delta States, The Supreme Court Act, LFN 2004, Cap 424 vol. xxii s. 17(3).

¹⁵ Niki Tobi, *Sources of Nigerian Law*, (1996) MIJ Professional Publishers Limited, Lagos, p.135.

¹⁶ Pearl David, *A Text Book on Muslim Law*, (Groom, Elms Ltd, 2-3 St. John's Road, London, SW 11.

Judge does not directly oppose the teaching of the Qur'an...the law, as administered today, especially in the Emirs' Judicial Council, is often modified by recognition of the native law and custom which has been much influenced by the system of the Fulani found in operation at the time of their conquest."¹⁷

Consequently, in Sokoto, Oyo, Kano, Lagos, Bauchi or Borno States, Islamic law wears different gowns but under the imposing umbrella of Muslim brotherhood.¹⁸ The practice and intensity of Islamic rules vary from one part of Nigeria to another and sometimes there could be an admixture of local customs and the Islamic religious rules, resulting in the different shades of Islamic practices in Nigeria.

SOURCES OF ISLAMIC LAW:

In terms of the sources the rules of Islamic law derive their origin from several primary sources including the following main:

Qur'an¹⁹: This is simply defined as a book that contains rules and regulations that govern the past, present and future, which was revealed to Angel Jibril (Gabriel) for the guidance of men in their relationship with their creator, fellow human beings as well as the state.²⁰

Sunnah²¹: (The traditions or *hadith* of the prophet): Actions, sayings and tacit approvals of the holy prophet interpreting the provisions of the holy Qur'an, legal issues and others. Sunnah *in essence signifies the ideal practices followed or enjoined by the Holy Prophet and includes what he said, did or approved.*²²

Ijma²³: (Consensus of Muslim Jurists): It is the agreement of Muslim jurists on certain legal issues based on the authority of the holy prophet.

It is said to be both rigid and flexible. These two attributes though contradictory, describe Ijma. Ijma is said to be rigid when it emanates from

¹⁷ Lugard, F., Political Memoranda, p.92, as cited by Niki Tobi, *Supra* at p. 137.

¹⁸ Justice A. P. Anyebe, *Customary: The war without Arms*, Fourth Dimension Publishing Co. Ltd Nigeria, (1985) p.1.

¹⁹ Chapter of Al-Nahali verse 89. Quoted in Mahmud, A.B., *A Brief History of Shar'ah in the Defunct Northern Nigeria*, Jos University Press Ltd, (1988) at p.3.

²⁰ *Wali v. Ibrahim*(1997) 9N.W.L.R. 160.

²¹ John Burton, *Sources of Islamic Law. Islamic Theories of abrogation*, Edinburgh University Press, 1990, p.10.

²² *Op.cit.*, p.143.

²³ Asein., *Op.Cit.* pp. 10 – 11.

the well settled and absolute principles of Islam. On the other hand, it is flexible as a source of Islamic Law as it responds to changing circumstances of the Muslim society in any given question of law. It recognizes that society is dynamic and strives to keep pace with changing times, especially in the Muslim world.²⁴

Quiyas²⁵: (Juristic analogical reasoning): This is employed in situations, which are not adequately covered by the books of *fikh*.²⁶

It is the most modern source of Islamic law relative to the three other main sources. According to Niki Tobi, the authenticity or veracity of Qui'yas as a source of Islamic Law, cannot be overemphasized.²⁷ The following basic requirements must be fulfilled before Quiya is valid:

1. The original order in text to which analogy is sought to be applied must be capable of being extended, thus it must have been confined to a particular state of facts.
2. Where the law of the text in the original order is beyond comprehension, analogy cannot be applied
3. The original order of the Qur'an or the Hadith to which Qui'yas is to be applied should not have been abrogated or repealed.
4. The result of the Quiyas should not be inconsistent with the rule laid down in the original prescription (Nais) i.e. the Qur'an and the Sunnah.
5. Quiyas should be applied to ascertain a point of law and not to determine the meaning of the words used.
6. The cause must be a compelling factor, that is, the idea intended by the Sharia. It should be apparent, complete in itself and not hidden or ambiguous.²⁸

Generally, Islamic law has relatively functioned in three interrelated capacities in Muslim societies, namely:

- (i) a religious system that provides a creed, a set of doctrines, a rite of prescriptive practices and moral- spirited attitudes;²⁹
- (ii) a historical phenomenon that provides its followers with

²⁴ Niki Tobi, Sources of Nigerian Law,, (1996) MIJ Publishers, Lagos, p.147.

²⁵ Op.Cit. p.142.

²⁶ This is a doctrinal system, based on the authority of sources that are either revealed or of recognized infallibility.

²⁷ Op.Cit., (Ref. 24 above), at p. 150.

²⁸ Mahmud Abubakar, 'The Fundamentals of Islamic Law of Evidence and Procedure within the Nigerian Legal System' as quoted in Niki Tobi , Op.Cit. at p.138.

- a transnational religious and cultural identity;
- (iii) a force that continues to shape the Muslim response to social-political realities and contingencies, allowing for necessary adjustments to membership in a global community.³⁰

Islamic law has been classified hitherto as a component of customary law in Nigeria. However, recent findings point to the fact that Islamic law differs from customary law in a number of ways. Although it appears like a customary law of the Northern states by virtue of its long usage and extent of acceptance, Islamic law is still a foreign law in Nigeria. This is because it was imported into Nigeria from Sudan. Asein, writing on the heavy volume of external influence on the Nigerian Legal system, sees Islamic law in the Northern Nigeria is a by-product of the nineteenth-century Fulani Jihad. The Penal Code applicable in Northern Nigeria is fashioned after the Sudanese Penal Code.³¹ As stated by Dr. Etannibi E.E. Alemika, Islamic law no matter the degree of the assimilation is alien just as the common law. If time and assimilation are relevant factors in becoming 'native', both more or less qualify to be so deemed.³²

DISTINCTIONS BETWEEN CUSTOMARY AND ISLAMIC LAW:

The meanings of the two systems of law are clear distinguishing marks between customary law and Islamic law in terms of their nature and components. There are several other features that differentiate the two from each other and those will form the next part of this paper.

Flexibility and Adaptability

Flexibility and adaptability are prominent features of customary law generally and judicial authorities have not only recognized but also commend these attributes. The flexible nature of customary law accounts for its ability to adapt to new developments that were not on ground at the time such customary laws evolved. The rules of customary law 'change from time to time'. They reflect the changing social and economic conditions. Taking

²⁹ *Sidi v. Sha'Aban* (1992)4N.W.L.R.113. See also *Surat Maida*

³⁰ Isa Hayatu Chiroma, *Reproductive Health and Rights Issues; Perspectives from Islamic Jurisprudence*,

³¹ Asein J. O., *Introduction to Nigerian Legal System*, 2nd Edition, Ababa Press Ltd., Nigeria, 2005, pp.5 –6.

³² *Towards Restatement of Nigerian Customary Laws*, Federal Ministry of Justice, Lagos, Nigeria, 85

particular note of the flexible nature of customary law, Osborne C.J. said in *Lewis v. Bankole*.³³

“One of the most striking features of West African native custom ... is its flexibility; it appears to have been always subject to motives of expediency, and it shows unquestionable adaptability to altered circumstances without entirely losing its character”.

Customary property law is highly illustrative of this. Receipts have been introduced as documentary evidence of sale of land under customary land transfers as the populace becomes more and more literate in the English civilization. At the time when most customary laws were taking root, writing was hardly known and the ability to read was not common either. Reading and writing were therefore not factors in the development of customary law but today, almost any customary law transaction can be written, especially the sale of property. In *Rotibi v. Savage*³⁴, the court refused to abandon the application of customary law, only on the grounds that written evidence of a land transaction were involved in the case. This ability of customary law to meet changing situations has been vividly painted by the Supreme Court in *Agbai v. Okogbue*³⁵ when Nwokedi J.S.C. said:

“Customary laws were formulated from time immemorial. As our society advances, they are more removed from its pristine social ecological. They meet situations which were inconceivable at the time they took root”.

Indeed, at the time most customary laws took their roots, a globalized world such as what obtains now was inconceivable. Communication at its current speed via Telephone and the Internet, faster transportation methods like flights and speedboats and cars, space shuttle and satellites were uncommon or non-existent. Advances have been recorded in medial science and technology also, to which customary law is adaptable as it cannot exist in isolation of these developments. Due to its flexible and adaptable nature, customary law has remained relevant even today. This capacity is due to its flexible

³³ (1908) 1 N.L.R. 81

³⁴ (1944) 17 N.L.R. 177.

³⁵ (1984) 4 N.W.L.R. 747.

nature and unquestionable adaptability to altered circumstances without entirely losing its character, a quality that has been commended as “one of the most striking features of West African native custom”.³⁶ On the other hand, Islamic law, which is largely codified already, is not as flexible as customary law. Express provisions of the Koran for instance, cannot be altered without incurring the wrath of adherents of the Islamic faith. Other sources of the Islamic law are supposed to be in conformity with the express provisions of the written Koran and were there is any inconsistency; the written code prevails over the inconsistent source of Islamic law.

Customary law has the ability to adjust to changing situations and circumstances in order to comply with the demands of a developing society. This explains why it is still relevant and applicable in Nigeria even in the 21st Century. According to the Supreme court Per Nwokedi, J.S.C., in *Agbai v. Okogbue*³⁷,

“Customary laws were formulated from time immemorial. As our society advances, they are more removed from its pristine social ecology. They meet situations which were inconceivable at the time they took root”.

Origin and geographical scope:

While Islamic law emanates from a divine origin, *Allah*, and is divine written, customary law grows from the people’s customs and its rules are not codified. It is important to note that customary law varies from place to place and differs from one ethnic group to another. There are almost as many variations of customary laws as there are ethnic groups in Nigeria. The same cannot be said of Islamic law, which has relative uniformity even across international boundaries. There are four different orthodox rites or schools of the Islamic law including the *Maliki* school founded by *Imam Malik of Medina* and applying mostly in North and Northwestern Africa and is said to be the most prevalent in Nigeria. There is also the *Hanfi*, founded by *Imam Abu Hanafi of Kufa* with a good followership in Turkey, Afganistan, Pakistan and India. Thirdly, there is the *Shafi’i*, founded by *Imam Al Shafi’i* and commonly found in Malaysia, Indonesia, and East Africa. Fourthly, there is the *Hambali*, founded by *Imam Ibn Hanbali* and predominantly found in Arabia. Apart

³⁶ *Ibid*, per Osborne, C.J., at 100 – 101.

³⁷ (1991) 7N.W.L.R. 391 AT 417.

from these, there are also the *Wahhabi* rites in Saudi Arabia, the *Abadi* (*Ibadi*) rites in parts of Africa and Zanzibar. There are also the heretic rites of the *Shi'ite* prevalent in Iran and Iraq and they differ from the *Sunnites*. There are still far less number of Islamic rites than customary law rules which vary from one ethnic group to another and Nigeria has over 300 of such ethnic communities.

There is a slight similarity between the two systems of law in respect of 'ethnic subscriptions'. There are traces of racial preference in the different

Criminal Jurisdiction:

The constitution of the Federal Republic of Nigeria 1999 clearly excludes customary law as an unwritten law, from having jurisdiction over criminal cases. Customary Law therefore has no criminal jurisdiction in Nigeria as this has been abolished. All criminal offences not contained in a written enactment have been abolished when the Constitution of the Federal Republic of Nigeria (CFRN) provides that:³⁸

"Subject as otherwise provided by this constitution, a person shall not be convicted of a criminal offence unless that offence is defined and the penalty therefore is prescribed in a written law; and in this subsection, a written law refers to an Act of the National Assembly or a Law of a state, any subsidiary, legislation or instrument under the provisions of a law".

By necessary implication of this provision, it is clear that there is no application of customary law to criminal matters. Criminal offences must be provided for in a written law and since customary law is an unwritten law, it lacks jurisdiction to try criminal cases.

The criminal code itself excludes customary courts from jurisdiction to try criminal cases. In its introductory parts, titled: Interpretation; Application: General Principles, it states that 'a court', "the court", includes-

- (a) *the High Court and the Chief Judge and other judges of the High Court;*
- (b) *a magistrate being engaged in any Judicial act or proceeding or inquiry;*

³⁸ Section 36 (12) CFRN 1999

- (c) *an administrative officer being engaged in any judicial act or proceeding or inquiry;*
- (d) *the Federal High Court and the Chief Judge and other Judges of that Court;*
- (e) *the Court of Appeal and the President and the Justices thereof sitting together or separately;*
- (f) *the Supreme Court, and the Justices thereof sitting together or separately;...*"

The list of courts for the purpose of hearing criminal cases is another clear exclusion of the customary court and the judges thereof as stated in the criminal code. Neither the customary court nor its judges are mentioned as having the jurisdiction to try criminal cases in any part of the criminal code.³⁹ The Islamic law on its part purports to have criminal jurisdiction in some states like Zamfara, Bauchi, Sokoto, Yobe and Kebbi. If Islamic law is a part of customary law, then there are far reaching implications of the purported criminal trials and convictions secured under the Shari'a law trials in some parts of the North. The constitutionality of such trials is still a subject of keen debate and highly volatile topic in public discourse today. The fact that criminal trials are conducted under Islamic law at all is evidence that it differs from customary law.

Writing, Codification And Uniformity:

Absence of writing, sometimes referred to as non-codification, is another of the distinct features of customary law in Nigeria. As earlier noted, although the description, customary law in Nigeria is used here, it does not refer to a unified and singular customary law, but to the varied and diverse ethnic customary laws in different parts of the country. The different ethnic customary laws however share the common attribute of being varied and unwritten. This attribute has been discussed and illustrated earlier while discussing the adaptability and flexibility of customary law. Thus, whenever the unwritten attribute of customary law is discussed, Islamic law has to be noted as an exception because it differs from others in this respect. Furthermore, Islamic law has a great degree of uniformity among Muslims

³⁹ Criminal Code Act, Laws of the Federation, 2004, Part 1.

in contrast to the many variations of customary laws.

Status as Fact or Law:

Customary law has been generally regarded as facts⁴⁰, which are required to be proved by anyone who alleges them, until they are proved to the point that they obtain judicial notice. It provides:

*"A custom may be adopted as part of the law governing a particular set of circumstances if it can be noticed judicially or can be proved to exist by evidence; the burden of proving a custom shall lie upon the person alleging its existence".*⁴¹

By virtue of being a written law, Islamic law is much more easy to reference and its provisions are more easily ascertainable in contrast to customary law, which depends heavily on oral rendition. The risk of being adulterated as a rule passes from one generation to another is much higher. The mode of reference and transmittance has the potential to allow individual custodians of the rules of customary law to affect the content based on individual experiences and idiosyncrasies. In the case of some aspects of Islamic law on the other hand, the written provisions of the Kur'an for instance, being written references, do not require such rigours of prove, as they are not facts, but laws in their own rights.

CONCLUSION

In this article, we have tried to examine the concepts of customary law and Islamic law in terms of what comprises each one, they sources from which they emanate, their scope, and their distinguishing characteristics. The ways in which they differ have been highlighted to justify the view that even though they have for long been lumped together as one and the same, they are separate and distinct both in form and origin. We have tried to show here that no matter how deeply assimilated Islamic law may be, it remains foreign to Nigeria just as much as the common laws of England. If length of usage is sufficient a reason for regarding Islamic law as indigenous to Nigeria, the received English law might as well be regarded as indigenous to Nigeria with the passage of time. It is recommended that the two systems of law should be regarded as different and under no circumstance should they be treated as if they were the same or that one is an offshoot of the other.

⁴⁰ Section 14(2), Evidence Act Chapter 112. Laws of the Federation of Nigeria, LFN, 2004.

⁴¹ Ibid, Section 14(1).

A review of the Nigerian Legal System that distinguishes the two systems of law will not only give clarity to the understanding of the law, but will also bring about more accuracy in their classification.

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