APPLICATION OF ISLAMIC PERSONAL LAW AND THE JUDICIAL PROCESS IN ADAMAWA STATE: ISSUES AND CHALLENGES[*]

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ABSTRACT

This paper has been targeted at addressing the issues and challenges bedevilling the application of Islamic Personal Law (IPL) within the Adamawa State judicial process. Thus, attempts have been made through employment of doctrinal and empirical methods of data collection to identify certain peculiar challenges that were premised on issues related to judicial structure, court administrative control, rules of procedure and evidence, manpower and expertise. In the end, the paper among other things recommends the amendment of the relevant state laws so as to pave way for restructuring of the state judiciary; by placing all the state Area Courts under the supervision of the Grand Kadi of the Sharia Court of Appeal (SCA); and by expanding the jurisdiction of the state District Courts to entertain civil matters other than IPL.

1. INTRODUCTION

Th-e application of Islamic law is not a new phenomenon within the context of the Nigerian legal system. Before the advent of British colonial administration in Northern Nigeria, Sharia Courts were established and constituted by learned Kadis (*Alkalai*) to entertain all civil and criminal matters in the society. This has been the practice continuously until the period of the colonialisation, where some changes began to manifest with gradual abrogation of some aspects of Islamic law (especially the criminal aspect); thereby subjecting it to the

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British concept of repugnancy test, compatibility test and that of public policy. To that effect, the application of Islamic law by the courts, especially during and after the colonial administration, has been reduced and limited to Islamic Personal Law (IPL). However, the application of IPL has been manifested in the Constitution of the Federal Republic of Nigeria (1999) which also confers on the Sharia Court of Appeal the specific judicial power to entertain civil matters involving all questions of IPL. While on one hand it is incumbent upon all Muslims to be governed by the IPL as inferred from the letters and spirit of the Constitution, on the other hand, the states are conferred with discretionary powers to establish Courts which can entertain IPL within its peculiar judicial system. Hence, as a result, various states in the federation have had divergent experiences on the application of IPL, especially within their peculiar judicial process. Most of these experiences have directly or impliedly faced by varieties of challenges connected with issues bothering on hybrid system, courts settings/judicial structure, court administrative control, rules of procedure and evidence, manpower and expertise among others. Thus, it is against this backdrop that this paper appraised the issues and challenges bedevilling the application of IPL and the judicial process in Adamawa State. While discussion has been preceded on the meaning, scope and legal basis of IPL, the paper has focused mainly on identification and explanation of some issues and challenges bedevilling the system. In the end, the paper outlined some recommendations as contained in the conclusion.

2. ISLAMIC PERSONAL LAW IN NIGERIA: MEANING, SCOPE AND LEGAL BASIS

The term Islamic Personal law has been conceived to mean "Islamic law of personal status" which regulates and deals with specific Muslim personal matters. This meaning of IPL has been derived from the provision of the Constitution of the Federal Republic of Nigeria FRN (1999), various legislations and judicial pronouncements. In the Constitution, the meaning of the term IPL can be inferred from the provision of sections 277 and 262 of the Constitution, which provides for the appellate and supervisory jurisdiction of the SCA of the States

and Federal Capital Territory respectively.[1] It has been paraphrased thus:

> The Sharia Court of Appeal shall be competent to decide: (a) any question of Islamic personal law regarding marriage, divorce, custody and guardianship of an infant; (b) where all the parties to the proceedings are Muslims, any question of Islamic personal law regarding a marriage, including the validity or dissolution of the marriage, or regarding family relationship, a founding or the guarding of an infant; (c) any question of Islamic personal law regarding wakf, gift, Will or succession where the endower, donor, testator or deceased person is a Muslim; (d) any question of Islamic personal law regarding an infant, prodigal or person of unsound mind who is a Muslim or the maintenance or guardianship of a Muslim who is physically or mentally infirm; or (e) where all the parties to the proceedings, being Muslims, have requested the court that hears the case in the first instance to determine the case in accordance with Islamic personal law, any other question.[2]

From the foregoing statement, one can easily and correctly deduced the meaning, scope and the legal basis of the IPL. It is a law regulating any question regarding marriage, divorce, custody and guardianship of an infant, waqf, gift, iinheritance and/or bequest, question regarding maintenance or guardianship of an infant, prodigal or person of unsound mind or the maintenance or guardianship of a Muslim. All these are exclusively Islamic personal matters which fall under the jurisdiction of SCA.[3] Furthermore, to have a better understanding about the meaning and scope of IPL, the Supreme Court (SC) in the locus classicus case of *Magaji v. Matari*[4] drew a line of demarcation between the dispute in question and matters of IPL listed under section 277(2) of the 1999 Constitution. Thus, it held that the dispute in question cannot fit in any of the matters listed under section 277(2) of the 1999

[1] See Sections 277(2) and 262(2) of the Constitution FRN (1999)
[2] Ibid, see also the Laws of Northern Nigeria CAP 136, 1960
[3] Abdulmumini Oba and Ismael Saka Ismael, "Challenges in the Judicial Administration of Muslim Estates in the Sharia Courts of Appeal in Nigeria", Electronic Journal of Islamic and Middle Eastern Law, Vol. 5 (2017) 84
[4] *Magaji v. Matari* (2000) 8 NWLR (pt.670) p,723 at 727

Constitution, as it is neither a case for a claim of inheritance, nor that of a gift, a waqf or a Will. It is simply a case involving ownership of the piece of land in dispute between the contending parties. It is therefore a misconception by learned counsel for the respondent to say that the dispute involves question of inheritance within the contemplation and provisions of the Constitution.[5] The above pronouncement therefore reiterated the meaning and scope of IPL, that is to say, for a matter to be qualified as subject of IPL must fall within the confine of section 277(2) of the 1999 Constitution or any question connected therewith. Furthermore, the pronouncement has equally explored a clear distinction between a question of declaration of title to land which is a civil matter simpliciter and subject matters of IPL enshrined under section 277(2) of the 1999 Constitution. Similarly, in the case of *Alh. Musa Dankoli v. Muhammad Maigari Katu,*[6] the court has equally made a distinction between a question of declaration of title to land and civil matters involving questions of IPL. It held that the claim in the case did not relate to any question or issue of IPL but rather to competing claims of title to farm land and a house, hence does not fall within the meaning and purview of matters related to IPL. In fact, in its decision, the Court has made reference to the case of *Magaji v. Matari* (supra), whereby reiterating that the Supreme Court has aptly pronounced the scope of the jurisdiction of SCA thus:

> the intention of the constitutional provision which is very clear is to confine and limit the exercise of the jurisdiction of the SCA to subject matter involving questions of IPL. The intention cannot be subverted by strained construction of the provision to give it an unintended meaning. The provision of s. 277 of the CFRN (1999) has clearly restricted the jurisdiction of SCA to exercising appellate and supervisory jurisdiction in civil proceedings involving questions of IPL.

In the same vein, the Court of Appeal, in the case of *Gimba v. Bawa & Anor*[7] determined whether the issue of jurisdiction raised by the party was proper in the circumstance. The Court held that the evidence on record shows that issue before the trial court was that of landed property. It is not a question of IPL. It was held that the appeal from

[5] Ibid
[6] *Alh. Musa Dankoli v. Muhammad Maigari Katu*,Suit No. CA/S/S/1675/2017
[7] *Gimba v. Bawa & Anor* (2021) LPELR 52926 CA.

the Upper Sharia Court, Lemu, Niger state was filed at a wrong forum and that the SCA was clearly in error to have assumed jurisdiction over the matter which was manifestly outside its area of jurisdiction as provided in s.277(1) & (2) of the CFRN (1999). It is therefore safe to set aside the decision of SCA Niger State and to remit this appeal to the Hon. Chief Judge Niger State with the directive that the appeal from the Upper Sharia Court Lemu be heard by Niger State H.C. in its appellate jurisdiction.[8]

To this effect therefore, all the decisions manifested in the cases above have clearly explored the meaning of IPL and as well, have defined the scope within which the IPL applies in the courts.

3. APPLICATION OF ISLAMIC PERSONAL LAW AND THE JUDICIAL PROCESS IN ADAMAWA STATE: ISSUES AND CHALLENGES

Having canvassed the legal and constitutional bases for the application of IPL in Nigeria through the SCA, the paper appraises the application of IPL and the judicial process in Adamawa State with a view to brainstorming the issues and challenges. There is an established SCA for Adamawa State and there shall be also inferior courts to it, in which IPL is applied and from which appeals to SCA may be heard.[9] These inferior courts include area courts and upper area courts of various grades level. The appellate jurisdiction of the State courts shall always be in ascending order as prescribed by the State Area Courts Edict (as amended). Thus, it provides that appeals shall lie from the Area Courts to Upper Area Courts, then to the High Court or the Sharia Court of Appeal as the case may be, depending on nature of the subject matter.[10] Appeals against a decision of an Area Court can be filed in the Upper Area Court as of right whenever a person is dissatisfied with the decision of the former, which is the trial court. Thus, the Edict provides: "Any party aggrieved by a decision or order of any Area Court may

[8] Ibid

[9] See the Area Courts Edict, CAP 11, Laws of Gongola State, 1988 (as amended). The Law provides for the establishment, regulations and limited jurisdictions of Area and Upper Area Courts especially in criminal matters. However, notwithstanding that, the Upper Area Courts have been conferred with unlimited original and appellate jurisdictions in civil matters.

[10] See Section 52 Area Court Edict of Norther Nigeria (1967)

appeal therefrom to the Upper Area Court having jurisdiction in the Area in which such Area Court is situated."[11] Similarly, it further provides for appeals from an Upper Area Court to the Superior Courts (such as the Sharia Court of Appeal, the Customary Court of Appeal and the High Court as the case may be) as follows:

> Any party aggrieved by a decision or order of an Upper Area Court may appeal to: (a) the Sharia Court of Appeal in cases involving questions regarding Islamic Personal Law; (b) the Customary Court of Appeal in cases involving questions regarding customary law; and (c) the High Court in all other cases.[12]

Worthy of note however is that the two provisions above (particularly, section 51 of the Area Courts Edicts above) and some other provisions in the law were at certain point (precisely in the year 2016) amended. Such amendment is contained in the new law titled: "the Adamawa State Area Courts Edicts (Amendments) Law No. 7 of 2016." The amendment has removed the appellate jurisdiction of the Upper Area Courts and allowed the latter to maintain only the original jurisdiction. That is to say, all appeals from both the Area Courts and Upper Area Courts shall lie directly to the Sharia Court of Appeal or the Customary Court of Appeal or the State High Court as the case may be. One of the reasons attributed to this amendment was due to low return of cases experienced in the past by the state superior courts of records; as reported that most of the cases were used to be terminated at level of the Upper Area Courts for obvious reasons which may not be unconnected with financial unaffordability of litigants to further proceed with their case; and also the high level of bureaucracy encountered while prosecuting appeals to the Superior Courts.[13] However, this Amendment Law of 2016 was later received several criticisms and outcries from different quarters, most especially litigants, as it affects their interest particularly the one that has nexus with attainment of access to justice. In fact, it has been also realized that Upper Area Courts are closer and more accessible to litigants than the superior courts of records, especially in terms of filing the court

[11] Section 51 Area Courts Edicts, Laws of Adamawa State 1988 (as amended)
[12] Ibid Section 52
[13] Hon. Justice Abbas Adamu Hobon, Adamawa State High Court Judge and Former Deputy Chief Registrar DCR in charge of the Area Courts, Adamawa State Judiciary, interviewed by Author, via telephone Yola, Adamawa State, 26/05/2022 at 9:15 pm

processes, application for bail among others.[14] Consequence of the above therefore, another Bill titled "the Adamawa State Area Courts Edicts (Amendments) Law 2021" to repeal and replace the 2016 Amendment law was passed into law. The new law therefore maintains the former position prior to 2016, where in the first place, appeals shall lie from Area Courts to the Upper Area Courts.

It is important to further note that the Area Courts Edict of Adamawa State (as amended) has also conferred the on Chief Judge of the state with powers to make rules for the Courts. It states thus: "the Chief Judge may make Rules of Court generally for the carrying into effect of this Edict."[15] It further states: "Without prejudice to the generality of subsection (1), the Chief Judge may make Rules of Court for the practice and procedure of Area Courts in their original jurisdiction, on review and appeal."[16] By this provision, it is therefore implied that the Chief Judge (CJ), as supposed to be the Grand Kadi (GK), shall have the exclusive powers to make Rules of Procedure for Area Courts (i.e., Sharia Courts in some states).[17] As explained by the Hon. Kadi Usman Bello Umar during an interview, that the conferment of this power on the CJ has degenerated a lot of setback towards an effective application of IPL in the State.[18] This has indeed posed a serious challenge towards having a smooth prosecution of cases in the State Area Courts. As obviously anticipated, the Rules of Procedure for Sharia Courts (Area Courts in the case of Adamawa state) made by the Chief Judge are largely influenced by the Common Law principles to the detriment of the Sharia proceedings.

In a similar vein, the Edict generally, in relation to a subject matter before the Court provides as follows: "(1) the powers and jurisdiction of an Area Courts shall not, subject to subsection 2, exceed those prescribed in the first schedule in respect of each grade. (2) the Chief Judge may by order confer to any Area Court of any particular grade

[14] Ibid
[15] Section 71(1) Area Courts Edicts, Laws of Adamawa State 1988 (as amended)
[16] Ibid Section 71(2)(c)
[17] See Philip Ostien and Albert Dekker, "Sharia and National Law in Nigeria" in Ed. Jan Michiel Otto, *Sharia Incorporated: A Comparative Overview of the Legal Systems of Twelve Muslim Countries in Past and Present,* (Leiden University Press, Amsterdam, 2010) 579-580
[18] Hon. Justice Usman Bello Umar, Kadi Sharia Court of Appeal, Adamawa State, interviewed by Author, Adamawa State Sharia Court of Appeal Complex, Justice Buba Ardo Way, Yola, 5th October, 2022.

such additional powers or jurisdiction as he may think fit."[19] Worthy of note regarding the first schedule of the Edict, that all matters relating to succession or Bequest or administration of estate, the Area Courts are limited to ₦20,000.00. However, the Upper Area Courts in the state have unlimited jurisdiction in relation to all civil causes.[20] The implication of this provision is that the Area Courts are in most, if not all circumstances hindered from entertaining inheritance cases, as they always fall outside the purview of their financial limitation; hence leaving only the Upper Area Courts with jurisdiction to entertain such cases. This is indeed part of the challenges faced by the system.

In view of the foregoing background therefore, the following issues relating to application of IPL and the judicial process in Adamawa State are identified to wit: hybrid system, courts settings/judicial structure, courts administrative control, rules of procedure and evidence, manpower and expertise among others.

i. Hybrid System

This is one of the important issues to consider in relation to application of IPL and the judicial process in Adamawa state. It is so important because, a law can be applied effectively by the court if and only if the latter fully assumes jurisdiction. As earlier on indicated, the SCA, the Upper Area Courts and the Area Courts, to the exclusion of any other court in Adamawa State, are conferred with jurisdiction to entertain civil matters involving questions of IPL. Other courts, especially the State High Court is conferred with jurisdiction to entertain all other matters (including Islamic civil causes). However, this issue has become complex and controversial one whereby degenerating certain level of conflicts within the court settings in the state. While on one hand, the state law (Area Courts Edict as amended) vests the power of entertaining appeal cases involving questions of IPL in the Sharia Court of Appeal. On the other hand, the High Court has been conferred with jurisdiction to hear all other cases (including Islamic civil causes);[21]

[19] Section 14 Area Courts Edicts, Laws of Adamawa State 1988 (as amended)
[20] Ibid
[21] See Section 52 Area Courts Edicts, Laws of Adamawa State 1988 (as amended). The Section provides: "Any party aggrieved by a decision or order of an Upper Area Court may appeal to: (a) the Sharia Court of Appeal in cases involving questions regarding Islamic Personal Law; (b) the Customary Court of Appeal in cases involving questions regarding customary law; and (c) the High Court in all other cases." See also Philip Ostien and Albert Dekker, "Sharia and National Law in

knowing fully that the latter is a conventional court established and governed based on the principles of English Common Law, which in most cases, contravene the Islamic Law principles. In fact, the conflict usually manifests when a matter before the High Court is Islamic. The question often arises as to what law or procedure is to be applied and how competent is the court to adjudicate on Islamic matters based on the principles and procedure of Common Law; coupled with the fact that most of the judges of the court have little or no knowledge of Islamic law. In fact, some of them are non-Muslims who are basically Common Law trainees. All these have posed a serious challenge on the application of Islamic Law in general and IPL in particular based on the premise that the High Court is empowered to apply principles of Islamic law treating it as a variety of native law and custom. However, it is the humble opinion of the author that it is a deliberate attempt to jeopardize the Islamic legal system, unmindful of the existing decision of the Supreme Court in *Alkamawa v. Bello,*[22] that Islamic law is a universal law which is distinct from the customary law (a law belonging to a particular group of people).

Importantly, regarding the issue of application of IPL, that a special court (i.e., SCA) has been established by the Constitution and equally conferred with jurisdiction to purposely and specifically determine matters related to IPL. Thus, the Constitution FRN (1999) placed all personal matters such as marriage and inheritance under the concurrent legislative list and at the same time allows the states to regulate on same. consequently, in all the states of the federation, there are legislations (which mostly derived from Islamic law and/or English law) governing inheritance and marriages. However, the English based legislations on inheritance and marriages usually apply only if one is married under the Marriage Act.[23] A typical example of this scenario could be well conceived when a Muslim man gets married to a woman whose marriage is officially registered under the Marriage Act then he died subsequently. In the circumstance, the question may probably

Nigeria" in Ed. Jan Michiel Otto, *Sharia Incorporated: A Comparative Overview of the Legal Systems of Twelve Muslim Countries in Past and Present,* (Leiden University Press, Amsterdam, 2010) 585

[22] *Alkamawa v. Bello* (1998) 8 NWLR (Pt. 561) 173

[23] Philip Ostien and Albert Dekker, "Sharia and National Law in Nigeria" in Ed. Jan Michiel Otto, *Sharia Incorporated: A Comparative Overview of the Legal Systems of Twelve Muslim Countries in Past and Present,* (Leiden University Press, Amsterdam, 2010) 586

arise as to which of the law/court can respectively regulate or administer the deceased estate? In fact, this issue has been manifested in the recent decision of the SCA, Kwara State, in the case of *Mohammed v. Mohammed,*[24] where the 2nd appellant claimed to be the sole wife and her children to inherit the deceased's estate because they were married under the Marriage Act; without recognizing the fact that the husband is a Muslim who was equally married to other wives in accordance with Sharia and blessed with children. Consequently, when the issue of jurisdiction and other matters arose, the court formulated two issues from the grounds of Appeal for determination, thus:

1. Whether the court below was right when it held that it has jurisdiction to entertaining the suit before it because it is Islamic Law that governs the administration of the estate of late Major Muhammed Adeniyi; and

2. Whether the court below was right when it held that abuse of court process was not established against the suit before it.

The Court held on the first issue (which is our main concern) that it is therefore trite law that where of own volition a person opted for a monogamous marriage under the Marriage Act, the person had made a choice of the statute (Administration of Estates Law) to regulate the administration of his/her estate after death. But where of own volition a person married under Islamic Law, the estate of the person will be exempted from the application of the Administration of states Law and will be governed by the principles of Islamic Law. According to the Court, in law, the deceased by opting for the registry marriage has changed his "factory setting" religion of Islam and the only way he could legally unbundle himself and return back to the "factory setting" from the status he willingly put himself, is by legally repudiating the - statutory marital relationship he had with the 2nd appellant, through a legal divorce. The court held that the court below was in grave error to have held that Islamic law governs estate of late Major Muhammed Adeniyi who was still in a valid and the subsisting marriage under the Marriage Act till his death. The applicable law to the administration of estate of the deceased is therefore the Administration of Estates Law of Kwara State and not Islamic Personal Law over which the court below being a sole Judge Court applying Islamic personal Law has

[24] Appeal No: KWS/SCA/CV/AP/II/14/2022, Unreported.

jurisdiction. Thus, the Court allowed the appeal and set aside the ruling of the trial court for lack of jurisdiction.[25]

ii. Courts Settings/Judicial Structure

Another issue to consider in respect of the application of IPL and the judicial process in Adamawa state is the nature of the judicial structure or courts settings in the state. The question now is how does it affect or impact on the application of IPL in Adamawa state? However, in the state, matters of IPL are first entertained by the Area courts, then appeals therefrom lies to the Upper Area Courts and from there, it shall lie directly to the Sharia Court of Appeal. Area Courts and the Upper Area Courts in the state are presided over or manned by persons who mostly, are not learned in the field of Sharia. In fact, sometimes the judges assigned to adjudicate matters in these courts are non-Muslims who are common law or civil law trainees.[26] This will definitely affect both issues of competence and merit of a case.

iii. Court Administrative Control

Taking full charge of the administrative control and/or supervision of the courts also matters a lot in the application of IPL. A control and/or supervision of any courts that adjudicate on Islamic matters is expected to be carried out by persons who are learned and trained in Islamic law; as this will help in attaining smooth coordination of the judicial process towards achieving justice in line with the dictates of Sharia. In Adamawa state however, the Area Courts which was hitherto known as Alkali's courts which ware purposely established to entertain matters of Islamic law including IPL relegated by a direct subjection of their supervision under the English system. In fact, the effective subjugation of Area courts to the English courts, and the occasional interference of English courts in the Area courts' application of IPL has undermined and debased the application of IPL in the state. To this effect, the application of IPL has been fully dominated and controlled

[25] *Mohammed v. Mohammed* (APPEAL NO: KWS/SCA/CV/AP/IL/14/2022), Unreported.

[26] Hon. Justice Ibrahim Wakili Sudi, Ag. Grand Kadi Sharia Court of Appeal, Adamawa State, interviewed by Author, Adamawa State Sharia Court of Appeal Complex, Justice Buba Ardo Way, Yola, 5th October, 2022.

by the English courts.[27] Consequently, as explained by some writers, the implication of this is that judges exclusively of common law background becomes the final arbiters not only in determining the scope of application of IPL, but also in actually interpreting the rules of the law.[28]

iv. Rules of Procedure and Evidence

Generally, having effective rules of procedure and evidence for courts is a sine qua non of attaining effective access to justice. Thus, an effective application of IPL by the courts always depends on the extent to which the rules of procedure and evidence become Sharia compliant. In Adamawa state, the Rules of Area Courts are founded based on the principles of Common Law whose technicalities in most cases contradict the principles of Sharia. Hence become one of the factors militating against the effectiveness of the application of IPL by the courts.[29] Common law technicalities have taken over whereby frustrating the course of justice. It abrogates the Shari'ah rules thereby forcing application of an admixture of the two laws (IPL and English law) along with the notion of equity and good conscience.[30]. Lack of a clear Sharia rules and procedures generally have some impacts on certain issues such as evidence and procedure, principle of stare decisis and evaluation of evidence.[31] These issues have been articulated extensively in *Chamberlain v Abdullahi Dan Fulani,*[32] where the court, in the majority (Jones CJ and Kalgo J) and minority (Gwarzo, Grand Kadi) decisions, made a clear distinction between Common Law and Islamic Law Systems of procedure as follows:

[27] Hon. Justice Usman Bello Umar, Kadi Sharia Court of Appeal, Adamawa State, interviewed by Author, Adamawa State Sharia Court of Appeal Complex, Justice Buba Ardo Way, Yola, 5th October, 2022.

[28] Ibrahim Abikan Abdulqadir and Hussain Ahmad Folorunsho, "The Status of Shari'ah in the Nigerian Legal Education System: An Appraisal of the Role of Mada'ris" *IIUM Law Journal Vol. 24 NO. 2, 2016, 460*

[29] Hon. Justice Ibrahim Wakili Sudi, Ag. Grand Kadi Sharia Court of Appeal, Adamawa State, interviewed by Author, Adamawa State Sharia Court of Appeal Complex, Justice Buba Ardo Way, Yola, 5th October, 2022.

[30] Ibrahim Abikan Abdulqadir and Hussain Ahmad Folorunsho, Op Cit

[31] Abdulmumini Oba, "Lawyers, Legal Education and Sharia"h Courts in Nigeria", *Journal of Legal Pluralism, 2004 – nr 49,* 134-139

[32] *Chamberlain v Abdullahi Dan Fulani* 44 (1961–1989) 1 Sh.L.R.N. 54

In relation to Evidence and procedure, Jones CJ aptly enunciated the role of judges under the Shari'ah thus:

> "The substantial procedural difference between English law and Islamic law is, therefore, that in the former the judge exercises a judicial discretion in deciding the credibility of witnesses and in the latter he does not. In English law the discretion cannot be exercised judicially unless the judge has heard all the witnesses of both parties. In Islamic law, once the party asserting has perfected the proof of his case there is no further discretion left to the judge. From this it follows that, if in the appeal before us the defendant and his witnesses gave evidence such evidence would not be relevant."[33]

Although Justice Gwarzo dissented on the relevant facts in the appeal. His lordship, *quoting Shittu v Biu*[34] and citing with approval *Biye v Maicatta*[35] agreed with this exposition of Islamic law by pointing out the "illegality of allowing any evidence for the defence to be entertained after the asserting party has perfected the proof of his case in accordance with Islamic Law procedure which insists on the provision of izar."[36]

In relation to *Stare Decisis*: The doctrine of *stare decicis* which forms the basis of judicial precedent, the very foundation upon which the common law rests, is unknown to Islamic law. Justice Gwarzo exposited the Islamic law position on judicial precedents thus: There is no question of relying on higher or lower court's interpretation when the prescription of law is vividly clear.

In Islamic law a judge is not bound by a precedent in a case which is similar. He made reference to *Jawahir al-Iklil* (the Commentary on *Mukhtasar Khalil*). [37] Thus, if a judge gave a judgment in a case, then a similar case came, his judgment in a similar case will not extend to a case which is similar to the one in which he gave judgment in the first instance because trying a case is non-integral, but if a similar case arose

[33] Ibid
[34] *Shittu v Biu* (1973) NNLR 193
[35] *Biye v Maicatta* 1974 NNLR 70
[36] Abdulmumini Oba, Op Cit
[37] The Commentary on *Mukhtasar Khalil,* vol. 2, p. 30

after the first judgement between same litigants or others, independent examination is required by law from the first judge or another judge. Justice Kalgo agreed but declined to follow this Shari'ah principle. His Lordship explained thus: "In deciding this issue this court will be guided by established authorities on this point. I am not unaware of the fact that in Islamic Law, there is no binding principle of precedents as we have in English type of courts."[38]

In relation to Evaluation of evidence: Under the Shari'ah, the judge is entitled to use all relevant facts and apply all relevant laws whether or not these were canvassed by the parties. This is because the judge has a duty to ensure that justice is done and that the appropriate laws are applied. Justice Gwarzo gave effect to this principle of Islamic law thus: "Notwithstanding that the appellant's counsel did not argue ground 2, but I observe in the proceedings of the trial court that certain questions which should have attracted the attention of learned Upper Area Court Judge."[39] His Lordship then proceeded to look into the matter. Kalgo J, complained of the action of the Grand Kadi thus: "The learned Grand Kadi has also delved into the record of appeal and discussed points in his judgement, which have neither been raised nor argued on appeal before us. Decisions of the Supreme Court and other Courts of Appeal in this country have shown that this cannot be validly done. I also disagree with the learned Grand Kadi on this."[40] However, Justice Gwarzo justified his action by citing Islamic law procedure: "With the greatest respect, the difference between the view of my learned brother and mine is probably the difference between two systems of law. In Islamic law, a judge is prohibited to make use of his knowledge of a case which has not come before him, but once evidence is before him, he is bound by it. He has to consider it according to the law. If he discovers a default, it is obligatory upon him to put it right with whatever authority he has. The Prophet (SAW) is reported as saying: Whosoever observes evil he should remove it with might, if he cannot he must do that with the weapon of the tongue, if he could not then he must hate it at heart."[41]

[38] Abdulmumini Oba, Op Cit
[39] *Chamberlain v Abdullahi Dan Fulani* 44 (1961–1989) 1 Sh.. L.R.N. 54
[40] Ibid
[41] Abdulmumini Oba, Op Cit

v. Manpower and Expertise

Issue of manpower and expertise is very fundamental thing to reckon with in respect of the application of IPL by the courts. That is to say, the application of IPL cannot be viable without having a required number of personnel who are eligible to carry out the function. The Constitution of the FRN (1999) is very particular about it when it comes to adjudicating or presiding over matters on IPL; it states that a person must have a knowledge or experience or expertise in Sharia for him to be appointed as a Kadi (Sharia judge).[42] So, it is definitely not an easy task to have qualified personnel who can adjudicate on Sharia matters, especially when the number of the personnel to be appointed is numerous. In Adamawa state for instance, at the lower level there are one hundred and thirty-eight (138) courts (i.e., 120 Area Courts and 18 Upper Area Courts) conferred with the original jurisdiction to entertain matters on IPL.[43] Whereas, at the higher level, the Sharia Court of Appeal has been established and conferred with powers to entertain appeals from the lower courts. To this effect therefore, it is required to have sufficient manpower and expertise who can adjudicate on or preside over these courts so that efficient justice delivery can be attained. A Sharia judge shall be a person of unquestionable integrity who shall be learned in Sharia and shall have a reasonable background in Arabic language. In fact, Arabic knowledge helps the judges in accessing the primary sources of Sharia and orthodox materials.[44]

The question of competence and qualification of a Sharia Court judge (i.e., person who adjudicates on Sharia matters) has legal implication to the court's decisions under Islamic corpus juris. That is to say, issue of competence has nexus with the question of court's jurisdiction. It is a trite Islamic law that for a person to be qualified as Sharia judge must be a Muslim in addition to having sound knowledge of Islamic law. Even though, some scholars argued and upheld the opinion that a non-Muslim who undergone training in Islamic law and who acquired

[42] See Section 276 (3) of the Constitution (1999) for the appointment of Kadi Sharia Court of Appeal.
[43] Umar Isa, Deputy Chief Registrar (DCR) in charge of the Area Courts, Adamawa State Judiciary, interviewed by Author, Adamawa State Sharia Court of Appeal Complex, Justice Buba Ardo Way, Yola, 5th October, 2022.
[44] Ibrahim Abikan Abdulqadir and Hussain Ahmad Folorunsho, Op Cit.

formal training and become well-versed in the application of Islamic law is qualified to adjudicate on matters involving question of IPL.

Similar position equally upheld by Muslim jurists in respect of non-Muslim lawyers who can be engaged to represent their clients in Sharia matters. Whether or not they are competent to represent their clients before Sharia Courts is a matter of Islamic jurisprudence. It all depends on or revolves around the interpretation and meaning given to the term "legal representation". If the term "legal representation" is or seems to be interpreted as issuance of expert legal opinion (fatwa), then a representation by non-Muslims lawyers would be unacceptable in that regard. But if it is or seems to be interpreted or considered as a mere contract of agency (*wakalah*) or *tawkil fil Qada'i* (agency in judicial matters), then the lawyer notwithstanding his faith can be regarded as an agent (*wakil*) of his principal (*muwakkal*). [45] Hence, in this circumstance, his representation is lawful. Aside from that, by virtue of Section 36 of the Constitution (1999) and the decision in *Karimatu Yakubu and Another v. Alhaji Yakubu Paiko and Anor*[46], the court held that all legal practitioners in Nigeria have the right of audience in all courts and in all matters, whether Sharia based or otherwise. Even though, this position has been criticized by some Muslim scholars, that a representation by non-Muslims (the common law trainees) on behalf of their clients in the Sharia court is unknown to Islamic law. [47] However, some scholars are of the view that Sharia does not prohibit a litigant from engaging a professional as his agent within the permissible limit of the law. This is because there is no such prohibition exists in the sources of Islamic law explicitly. [48]

Furthermore, the position of women adjudication who acquired knowledge of Islamic law on matters of IPL is debatable. Of course, this goes to the question as to whether women are eligible to be appointed as judges under Islamic corpus juris? There are divergent views among scholars of Islamic jurisprudence on whether or not women can be appointed as judges. The majority view among the classical Sunni Scholars,[49]is prohibition, and it is highly discouraged

[45] See Ibrahim Abikan Abdulqadir and Hussain Ahmad Folorunsho, Op Cit.
[46] *Karimatu Yakubu and Another v. Alhaji Yakubu Paiko and Anor,* (1961-19889) 1 Sh. L. R. N. 126
[47] Ibrahim Abikan Abdulqadir and Hussain Ahmad Folorunsho, Op Cit, *468*
[48] Ibid*, 469*
[49] These are Maliki, Shafi'i and the Hanbali Schools

for a woman to be appointed as a Sharia judge.[50] However, the Hanafi School have maintained the position that women can be judges in cases where they can give testimony, that is, in civil or family matters. There are other scholars belonging to various schools of law who have also allowed the concept of female judges in all cases, making reference to the fact that there is no clear and explicit prohibition of the said role for women in the Qur'an and Sunnah, they consider the evidence relied on by the majority as subject to other interpretations and therefore not conclusive evidence for a prohibition of women becoming Sharia judges.

Having laid the proper foundation, the paper therefore identifies the following items as challenges bedevilling the application of IPL in Adamawa State:

i. Conflict of Systems

This is one of the challenges bedevilling the application of IPL in the state due to hybrid nature of the judicial process within and outside a particular court. This alone triggers some multiple conflicts such as conflict of laws, conflict of procedures and conflict of jurisdictions.

ii. Unhealthy Judicial Structure

The hybrid nature of the judicial process in the state has made the application of IPL so complex to be administered in a diverse

[50] The scholars hold the view that a woman cannot be appointed as a judge in any matter. This view is supported by a number of reasons but most importantly, an analogical reasoning (qiyas) with some verses of the Qur'an and with a hadith of the Prophet Muhammad (pbuh) inter alia: in Qur'an al Nisa'i (4:34), where Allah, the Most High says: 'Men are the protectors and maintainers (*Qawwamuna*) of women, because Allah has made one of them to excel the other, and because they spend to feed (and support women) from their means.' An analogy with the hadith of Prophet Muhammad (pbuh) is also used to support the prohibitive stand. The hadith is narrated by a companion of the Prophet (s.a.w.) called Nufay' b. Ma'ruq popular known as Abu Bakrah and it is reported thus: "During the days (of the Battle) of Al-Jamal (i.e the camel), Allah benefitted me with a word I had heard from Allah's apostle after I had been about to join the companions of Al-jamal (i.e the camel) and fight along with them. When Allah's apostle was informed that the Persians had crowned the daughter of Chosroe as their ruler, he said, 'such a people as ruled by a lady will never be successful." (Sahih al- Bukhari, No. 4425). However, according to some jurists, the hadith does not refer to judgeship, for only the kind of leadership referred in the Hadith is the one that is called '*Imaarah*' or '*Al-Imaama*' or '*Al-Khilafa al Kubrah*' in Islam.

community such as Adamawa State. This has degenerated a big problem for the application of IPL, especially in the lower courts where non-Muslims and common law trainees are said to have taken over.

iii. Deficiency in the Courts Administration

This is a challenge which has a direct bearing on powers and ability to control the administration of the courts and make rules of procedure for the courts. Once this control is lost or subverted, the system will completely loose direction.

iv. Cumbersome and Irrelevant Rules of Procedure and Evidence

This is also a serious challenge bedevilling the application of IPL in the courts. As this sub-title suggests, most, if not all of these rules of procedure and evidence are cumbersome and irrelevant to Sharia. Most of them are founded based on the principles of common law. Hence, they are unknown and alien to Islamic law. They cause more harm than good. In fact, most of such rules cause unnecessary delay and facilitate fraud and injustice in the system. Sometimes, the rules expose litigants to be vulnerable to extortion and corruption by unscrupulous courts officials and counsels.

v. Unavailability of Manpower and Lack of Expertise

This is the most worrisome among all the challenges bedevilling the application of IPL considering the large number of Area/Upper Area Courts existing in the state; with also the least number of qualified judges. This alone can affect the effective application of IPL in the courts. It is obvious that only the experts can effectively deliver, as rightly said by legal luminaries that one can only give what he does have "*Nemo dat quod non habet*." In fact, lack of expertise to adjudicate on or preside over the Area Courts in the state resulted in many things including frequent quashing or setting aside the trial courts' decisions by the appellate courts on grounds of incompetence and/or lack of jurisdiction.

5. CONCLUSION

The application of IPL has been constitutionally recognized in Nigeria through the provision set out for the establishment of the Sharia Courts of Appeal. Thus, various states in the country have established the SCA and their subordinate (lower) courts, whereby making provisions for the application of IPL in the courts. The judicial process in Adamawa state is a kind of hybrid and mixed of both Islamic and English systems. As a result, the application of IPL has become complex and challenging one. Some of these identified challenges have resulted to conflict of systems, unhealthy judicial structure, deficiency in the courts administration, cumbersome and irrelevant rules of procedure and evidence, unavailability of manpower and lack of expertise among others. In light of these therefore, the paper recommends as follows:

i. Amendment of the relevant state laws so as to pave way for restructuring of the state judiciary without prejudice to the powers and role of the Chief judge of the state as the head of the judiciary. The restructuring on one part should consider placing all the state Area Courts under the supervision of the Grand Kadi of the SCA and on the other part, it should consider expanding the jurisdiction of the state District Courts so that they can entertain civil matters other than IPL.

ii. Transformation of the Area Courts rules of procedure and evidence as well as that of the Sharia Court of Appeal into the Sharia based procedural rules; this of course, is less cumbersome and Sharia compliant. The Rules should be allowed to be made by the Grand Kadi of the SCA so that effective application of IPL can be attained.

iii. Appointment of qualified Area Courts judges of unquestionable integrity and of great respectability. They must have considerable and appreciable background in the field of Sharia; and they must equally have at least basic knowledge of Arabic language. In the alternative, Government should organize a regular and periodic training and re-training of the Area Courts judges through workshops, seminars, distance learning, provisions of scholarship, etc.