CANON LAW AND THE NIGERIAN LEGAL SYSTEM*

Abstract
Various jurists and schools of jurisprudence have held various views on the nature, structure, scope and method of law. John Austin of the positivist school merely sees law as 'a command from political superiors to political inferiors, and backed by sanction'. The Greek sophists, including Socrates, Plato and Aristotle consider law as 'a matter of social and political expediencies, having nothing to do with absolute and uniform standards'. This study finds that in Nigeria, customary and Islamic laws are respectively recognized in the Constitution and enforced with state machinery. Christian and other religions' laws are not accorded such recognition. The implication is that Islamic law, among other religious laws, is favoured in spite of the plurality of religions and laws in a multi-faith Nigeria. This paper examines the nature and role of canon law in relation to the Nigerian legal system. The study examines the possibility, propriety or otherwise of mainstreaming canon law into the Nigerian legal system as a response to the festering agitations from some quarters, especially Christian. Suffice it, for the purpose of this paper, to look at law as a body of ordinances and rules laid down for human interest and development.

Keywords: Canon Law, Christian Religion, Islamic Law, Nigerian Legal System, Civil Law.

1. Introduction: The Meaning of Canon Law

The term 'canon' has been defined as 'a law, rule or ordinance in general, and of the church in particular.' It denotes an ecclesiastical law or statute. It is also seen as a rule of doctrine or discipline. Hence, it is a 'body of principles, standards, rules or norms'. *Canon law* (from Ancient Greek: κανών, kanon, a 'straight measuring rod, ruler') is a set of ordinances and regulations made by *ecclesiastical* authority (Church leadership), for the government of a Christian organization or church and its members.[1] Black's Law Dictionary defines 'Canon Law' as 'a body of Roman ecclesiastical jurisprudence compiled in the 12th, 13th and 14th centuries from the opinions of the ancient Latin fathers, the decree of General Councils, and the decretal epistles and bulls of the Holy See'.[2] Canon law has grown steadily since that time, and it is now codified in the *Codex Juris Canonici* of 1983…'[3] This Code is expanded, modified or reviewed by the Pope who is the supreme legislative authority in the Church. Black's Law Dictionary further defines 'Canon Law' albeit more broadly as 'a body of law developed within a particular religious tradition'.[4] In this sense, it can include laws of other Christian denominations. Accordingly, the Encyclopedia Britannica puts it thus:

> Canon law**,** Latin *jus canonicum*, is body of laws made within certain Christian churches (Roman Catholic, Eastern Orthodox, independent churches of Eastern Christianity, and the Anglican Communion) by lawful ecclesiastical authority for the government both of the whole church and parts thereof and of the behaviour and actions of individuals. In a wider sense the term includes precepts of divine law, natural or positive, incorporated in the canonical collections and codes.[5]

Canon Law had been referred to in some quarters as 'Church Law'. It is however our considered view that the alternative nomenclature, 'Church Law' for the Code of Canon Law is a misnomer. This view finds support in the fact that in strict ecclesiastical jurisprudence, the application or applicability of the Code of Canon law is only germane to the administration of the Catholic Church. Hence, it is not every religious Christian organization that recognizes the existence and application of Canon Law. Most

***By Ikenga K.E. ORAEGBUNAM**, **PhD (Law), PhD (Phil.), PhD (Rel. & Soc.), MEd, MA, BTh, BA, BPhil, BL**, Formerly Head, Department of International Law and Jurisprudence, Faculty of Law, Nnamdi Azikiwe University, P.M.B. 5025, Awka, Anambra State, Nigeria. Email: ikengaken@gmail.com; ik.oraegbunam@unizik.edu.ng. Phone Number: +2348034711211; and
***Aloysius ENEMALI, DCL, JCL, LLM, BL, BPhil, BTh,** Senior Lecturer and Head, Department of Canon Law, Faculty of Canon Law, Catholic Institute of West Africa (CIWA), Port Harcourt, Rivers State, Nigeria. Email. fraloyudoka@yahoo.com. Phone: 08066894367.

[1] https://en.wikipedia.org › wiki › Canon law. Accessed on 4/6/2021.
[2] B. A. Garner (ed), *Black's Law Dictionary*, 7th Edition, West Group, St. Paul, Minnesota, 1999, p. 198).
[3] Ibid.
[4] Ibid.
[5] https://www.britannica.com/topic/canon-law. Accessed on 4/6/2021.

Christian denominations hold the Bible and that alone (*sola scriptura*) as the only acceptable code of principles, rules and norms. While the Catholic Church recognises the Bible as a fundamental source of its faith, it also looks unto other sources such as tradition, magisterium, liturgy, lives of saints, etc for its life, doing and being. The Catholic Church actually teaches that while the scriptures were inspired by God, they were written down by men of the Church, and that what was written down was so done from the tradition of the Church already existing and subsisting. This study, however, uses the Canon Law of the Catholic Church as an instance of how Christian religious law can relate to the Nigerian legal system.

2. Canon Law as a Legal System and Tradition

A legal system is a procedure or process for interpreting and enforcing the law[6]. In its narrowest sense, a legal system refers to the parties, the judges, the court staff, and the lawyers that make up the litigation process, and of course the laws and rules that guide that process. Canon law is a fully developed legal system, with all the necessary elements: courts, lawyers, judges, a fully articulated legal code,[7] principles of legal interpretation, and coercive penalties, though it lacks civilly-binding force in most secular jurisdictions. One example where it did not previously apply was in the English legal system, as well as systems, such as the U.S., that derived from it. Here criminals could apply for the benefit of clergy. Being in holy orders, or fraudulently claiming to be, meant that criminals could opt to be tried by ecclesiastical rather than secular courts. The ecclesiastical courts were generally more lenient. Under the Tudors, the scope of clerical benefit was steadily reduced by Henry VII, Henry VIII, and Elizabeth I. The Vatican disputed secular authority over priests' criminal offences, and this in turn contributed to the English Reformation. The benefit of clergy was systematically removed from English legal systems over the next 200 years, although it still occurred in South Carolina in 1827. In English Law, the use of this mechanism, which by that point was a legal fiction used for first offenders was abolished by the Criminal Law Act 1827.

The structure that the fully-developed Roman law provides is a contribution to the Canon Law.[8] The academic degrees in canon law are the J.C.B. (*Juris Canonici Baccalaureatus*, Bachelor of Canon Law, normally taken as a graduate degree), J.C.L. (*Juris Canonici Licentiatus*, Licentiate of Canon Law) and the J.C.D. (*Juris Canonici Doctor*, Doctor of Canon Law). Because of its specialized nature, advanced degrees in civil law or theology are normal prerequisites for the study of canon law. Much of the legislative style was adapted from the Roman Law Code of Justinian. As a result, Roman ecclesiastical courts tend to follow the Roman Law style of continental Europe with some variation, featuring collegiate panels of judges and an investigative form of proceeding called 'inquisitorial' (from the Latin '*inquirere*', to enquire). This is in contrast to the adversarial form of proceeding found in the common law system of English, U.S. law and the Commonwealth, which features such things as juries and single judges. The institutions and practices of canon law paralleled the legal development of much of Europe, and consequently, both modern civil law and common law bear the influences of canon law. Sampel, a Brazilian expert in canon law, says that canon law is contained in the genesis of various institutes of civil law, such as the law in continental Europe and Latin American countries. Sampel explains that canon law has significant influence in contemporary society.[9]

Canonical jurisprudential theory generally follows the principles of Aristotelian-Thomistic legal philosophy.[10]While the term 'law' is never explicitly defined in the Code,[11] the Catechism of the Catholic Church cites Aquinas in defining law as '...an ordinance of reason for the common good,

[6]https://www.google.com.ng/search?q=a+legal+system+can+be+defined+as&source=hp&ei=Wxd8YMuQD4emaIqBsdgM&iflsig=AINFCbYAAAAAYHwla4CfIsNcxI2Q4Yx-voyvnmk1p3Xt&oq=A+legal+system&gs_lcp=Cgdnd3Mtd2l6EAEYADICCAAyAggAMgIIADICCAAyAggAMgIIADoLCC4QsQMQgwEQkwI6CAgAELEDEIMBOgUIABCxAzoICC4QsQMQgwE6AgguOgUILhCTAjoFCC4QsQM6BwgAEEYQ-QFQ9hlY90hg1IUBaABwAHgAgAGKE4gBqYsBkgELNS0yLjIuNy4yLjGYAQCgAQGqAQdnd3Mtd2l6sAEA&sclient=gws-wiz. Accessed on 4/6/2021.

[7]M *Ramstein, (1948). Manual of Canon Law. Terminal Printing & Pub. Co.*, p. 49

[8] R E. *Rodes, (1964). 'The Canon Law as a Legal System-Function, Obligation, and Sanction': 47.* Accessed on 4/6/2021.

[9] 'Canon Law.' Encyclopædia Britannica. Encyclopædia Britannica Online Academic Edition. Encyclopædia Britannica Inc., 2013..

[10] Edward *Peters, JD, JCD, Ref. Sig. Ap. 'Home Page'. CannonLaw.info.*

[11] *Gray, Msgr. Jason. 'Home Page'. JGray.org. Retrieved 8 June 2013.*

promulgated by the one who is in charge of the community'[12] and reformulates it as '...a rule of conduct enacted by competent authority for the sake of the common good.'[13] In the Latin Church, positive ecclesiastical laws, based directly or indirectly upon immutable divine law or natural law, derive formal authority in the case of universal laws from the supreme legislator (i.e., the Pope), who possesses the totality of legislative, executive, and judicial powers in his person,[14] while particular laws derive formal authority from a legislator inferior to the supreme legislator. The actual subject material of the canons is not just doctrinal or moral in nature, but all-encompassing of the human condition[15].

3. Sources and Evolution of Canon Law

The most fundamental source of canon law is the Bible, especially the New Testament. The New Testament provides numerous clear instructions for various aspects of Christian life. The Gospels provide instructions on matters such as baptism and the Eucharist (Matt 28:19; Luke 22:19; 1 Cor 11:23–25), marriage (Matt 19:3–10), the payment of clergy (Luke 10:7–12), the Church's judicial authority (Matt 18:15–17), and relations with the state (Matt 22:17–22). Saint Paul's writings offer even more guidelines for the Christian community, including the payment of clergy (1 Tim 5:17), requirements for ordination (1 Tim 3:1–13), how to handle accusations against clergy (1 Tim 5:19), and how to relate with non-Christians (1 Tim 5:9–10). Many of these norms are later developed into legal language in future canonical collections.

Canon law developed in a more formalized sense following the first three centuries of the Christian Church. Prior to the time of legalization, one could not speak much in terms of a Church-state relation, beyond the simple facts of persecution or non-persecution. After legalization, and especially as theological disputes emerged dividing the Church, the Roman emperors began holding ecumenical councils (from the Greek οἰκουμένη γῆ, the inhabited world). These were councils where bishops from various local churches were present, understood as representing the entire Church. While the ecumenical councils were called in response to theological questions, the bishops present also used the opportunity to issue legislation addressing various issues facing the churches. While local councils often also issued canons, these ecumenical canons had a special authority because of the fact that they were issued by the οἰκουμένη and were thus seen as binding on all Christians. These ancient canons, called the Sacred Canons in the Christian East, form the common canonical foundation of the Church in both East and West. This canonical tradition was taken up into the civil law of the Roman Empire, where it was a normative part of civil law for centuries. The Code of Justinian (529), for example, has as its very first title the definition of the state Church as that of Nicene Christianity.[16] The fifth title of this same first book decrees the suppression of heresies.[17] In fact, if one examines the initial twenty titles of the first book of the *Codex*, the first thirteen concern ecclesiastical topics, while the remaining seven concern imperial privileges and general norms of legal interpretation. For the Romans living in the empire, canon law *was* civil law. Future redactions of Roman law, such as the *Ecloga* of Leo III the Isurian, maintained this practice. In fact, the inseparability of canon and civil law far outlasted the Roman Empire: it even remained the case for centuries after the fall of Byzantium, as the civil law of the Ottoman Empire placed Christians in a millet system where they were judged, primarily, by their historical Christian laws well into the nineteenth century.[18]

In the West, the canons of the ecumenical councils were taken up into various canonical collections and especially distilled through the writings of the Popes. This formed a genre of canonical sources called decretals.[19] In the twentieth century these writings were codified by the Holy See into a single volume, the *Code of Canon Law*.[20] The process of codification reflected the changing reality of the Church in

[12] In Brief §1976. *Catechism of the Catholic Church. USCCB Publishing.* ISBN 9781574557251. *Summa Theologica I-II, 90, 4*

[13] *Catechism of the Catholic Church*, The Moral Law§1951.

[14] Canon 331, 1983 Code of Canon Law

[15] *Vatican Archive. 'Code of Canon Law'. Vatican.va. Archived from the original on 20 February 2008.* Accessed on 4/6/2021.

[16]https://www.cardus.ca/research/law/reports/the-role-of-canon-law-in-the-catholic-tradition-and-the-question-of-church-and-state/ Accessed on 4/6/2021.

[17] Ibid

[18]Ibid

[19] Ibid

[20] Ibid

the modern world and the complexity of using all of the gathered sources contained in the *Corpus iuris canonici* in a logical and effective manner. This complex task was made even more complicated by the growing body of canonical legislation not only from the Council of Trent but also decrees from the developing offices of the Roman curia. These texts were simply not gathered or gatherable into a single volume.[21] As a result, just as nation-states completed legal codes in the nineteenth century, it was determined that it was time for the Church to update its legal system in a systematic and codified manner. This was a process that had its first movements already at the Vatican Council (1869). The process of codification and the reform of canon law led to the issuance of three codifications of canon law in the twentieth century, the 1917 *Codex iuris canonici*, a revised 1983 *Codex iuris canonici*, and the 1990 *Code of Canons of the Eastern Churches*.[22] These canonical collections are understood as universal, exclusive, and authentic collections of law. Be that as it may, canon law should not be considered as an exclusively 'Catholic' thing. There is no shortage of books by Eastern Orthodox writers on the topic, and the Canons remain a very living system of law for these Christians, despite being over a millennium old.[23] This is a method with its own challenges, recognizing that using fifteen-hundred-year-old canons as a modern system of law can, at times, be inadequate.[24] Outside of the Christian East, canon law also finds itself used in some Reformation communities such as the Church of England.[25]

Pope John Paul II promulgated the revised *Codex iuris canonici* in 1983 by means of the Apostolic Constitution *Sacrae disciplinae legis*. The Pope offers four clear definitions for the role and function of canon law. First, canon law makes the hierarchical and organic structure of the Church visible. While the Church is the mystical body of Christ, it is incarnate in physical structures on earth. Canon law provides good order to the Church and defines how it is to function. This includes questions such as how bishops are to be appointed, how the supreme governing authority of the Church is to be exercised, and norms for the acquisition and alienation of property. This provides a defined and expectable order in the Church to its members. Second, canon law ensures the proper exercise of the sanctifying function of the Church.[26] This respects the salvation of humanity as its primary purpose. Sacraments are understood as ways that divine grace is made present, and canon law provides clear norms for their celebration. The Church understands itself as being bound to follow the sacraments as established by Jesus Christ, and, as a result, firm conditions are required to ensure their valid celebration. These requirements are present in canon law in detailed form, for example, the Eucharist can only be celebrated by a priest (*sacerdos*) using pure bread and wine and not by a deacon using rice crackers and grape juice.[27] These requirements ensure the sacrament is real and valid and, consequently, grace is offered in a definitive manner and is available to aid the salvation of the faithful. Third, canon law provides rights, obligations, and methods of resolving conflicts in the Church. Like any society, the Church's members, whether physical persons or legal (juridic) persons, have rights and obligations. These are articulated clearly in the canonical system. The canonical system also provides a system of trials and recourse to ensure the proper exercise of these rights and obligations. The Church is a firmly hierarchical society, and there are occasions where a juridic superior may not function according to the norm of law. In these cases, the one claiming harm may make recourse to a hierarchical superior.[28] Additionally, physical and juridic persons can vindicate their rights using canonical trials and seek redress.[29] Certain crimes can be punished according to the norm of law, and, in fact, a trial is necessary to impose certain penalties.[30] These procedures recognize that if rights are to have any meaning, they are by their nature in need of a mechanism that ensures their enforceability. Fourth, canon law attempts to provide the structures that sustain and direct the Church's common initiatives. These structures are defined and directed in canon law. For example, a parish or a diocese must have certain

[21] Ibid
[22] Ibid
[23] For a single-volume introduction to the Orthodox Christian canonical tradition, see P. Rodopoulos, *An Overview of Orthodox Canon Law* (Rollinsford, NH: Orthodox Research Institute, 2007).
[24] See J.H. Erickson, *The Challenge of Our Past* (Crestwood,NY: St Vladimir's Seminary Press, 1991).
[25] See N. Doe, 'The Common Law of the Anglican Communion,' *Ecclesiastical Law Journal* 7 (2003): 4–16.
[26] Christian theology traditionally sees the Church as having three functions: teaching, sanctifying, and ruling.
[27] *Codex Iuris Canonici* (CIC) c. 924.
[28] CIC cc.1732–39; *Codex Canonum Ecclesiarum Orientalium* (hereafter CCEO) cc. 996–1006.
[29] CIC c. 1400, §1, 1º; CCEO c. 1055, §1, 1º.
[30] CIC c. 1400, §1, 2º; CCEO c. 1055, §1, 2º.

bodies that aid its superior in governing the parish or diocese. There are norms to ensure that Catholic schools, faculties, and universities follow the Church's mission.[31] Social communications are regulated to ensure the effective and authentic proclamation of the gospel and transmission of the Christian faith.[32] The simple facts of keeping the bills paid and the buildings open is guided by canon law.

Canon law has numerous elements in common with civil law.[33] Both are forms of positive law established by a legislator. Both derive their ultimate governing authority from God. Both govern relationships of members within an organization, in the case of one the Church, in the case of the other the state. Both systems attempt to provide the necessary structures of governance to ensure a well-functioning society. Each has its respective sphere, however, with separate, but certainly not incompatible, goals to be achieved. This leads to a natural discussion of the relationship between the Church and the state, which nevertheless is beyond the scope of this study.

4. The Place of Canon Law in the Nigerian Legal System

The relationship between the Code of Canon Law and the Nigerian legal system is an issue for consideration. Certain fundamental questions are germane. Is canon law a substantive or procedural law? Is it a customary or religious law limited in its application to members of the catholic faith? Can any state of the federation adopt the provisions of the canon law and enforce them with the state machinery as is the case with Islamic law in some northern Nigerian state? In fact, what is the scope and nature of the applicability and the limit of the enforcement of canon law in Nigeria? A substantive law provides various enactments designed to regulate and control a policy issue or subject matter, creates and defines offences under the particular law and makes provisions for forms of penalties attendant to the violation of the law, along with providing a system of courts or tribunals for the determination of causes and matters arising therefrom. While considering the establishment by a law of a system of courts or tribunals as an attribute or test of its substantiveness, reference may, at this juncture, be made to the decision of the Supreme Court of Nigeria in the case of *Legal Practitioners' Disciplinary Committee vs. Chief Gani Fawehinmi* where the Supreme Court in considering the ambit of the word *tribunal* as enacted in section 33 (1) of the 1979 Constitution of the Federal Republic of Nigeria, interpreted the word *Tribunal* to include the Legal Practitioners' Disciplinary Committee. Hence, Section 33 (1) of the 1979 constitution states: 'In the determination of his civil and obligations, including and question or determination by or against any government or authority, a person shall be entitled to a fair hearing within a reasonable time by a court or other tribunal established by law and constituted in such manner as to secure its independence and impartiality'. This provision is *in pari materia* with the provisions of section 36 (1) of the Constitution of the Federal Republic of Nigeria 1999 (as amended).

The 1983 Code of Canon Law in various enactments thereof makes reference to 'Tribunals', particularly in Book VII making provisions for 'processes', and running through Canons 1400 to 1752. Can. 1402 states: 'All tribunals of the church are governed by the canons which follow, without prejudice to the norms of the tribunals of the Apostolic See'. Can. 1408 provides that 'Anyone can be brought to trial before the Tribunal of domicile or quasi-domicile' The yet undetermined question arises as to whether the 1983 Code of Canon Law may be adjudged as being substantive in view of its provisions for sanctions, trials and processes. One sincerely doubts that the supreme Court of Nigeria, if it were confronted with the determination of a case arising from or relating to the Tribunals created by the canon law, would interpret the word 'court' or 'tribunal' to include the tribunals under the Code of Canon Law. This line of jurisprudential opinion seems to be buttressed by the fact that the code of canon law does not apply to all and sundry, but purely private and applies personally to the Christians of the

[31] See, for example, CIC cc. 796–821.

[32] CIC cc. 822–32.

[33]It should be mentioned for a common law audience that the functioning of canon law has structures more closely corresponding to Continental civil law systems than English common law systems. For example, canon law has a lack of the concept of stare decesis, and canon law has a dual court of appeal and court of cassation system. This is not an exclusive relationship, however, and canon law does have some impact on English common law. On this topic see, for example, D.J. Seipp, 'The Reception of Canon Law and Civil Law in the Common Law Courts before 1600,' *Oxford Journal of Legal Studies* 13 (1993): 388–420.

Catholic Church. Reference may be made to Can. 1 which provides: 'The canons in this Code concern only the Latin church'.

The subject matter will be more appreciated if a bit of an exposition of the sources of the Nigerian legal system and the divisions of the Nigerian law is made. Nigerian law can be classified into the following namely Criminal law and civil law, Public law and Private law, Common law and Equity, substantive law and procedural law. Criminal law is the law of crime. A crime or an offence is an act or omission punishable by the state.[34] Civil law is the law governing conduct which is generally not punishable by the state. Although no clear distinction can be drawn between a crime and a civil wrong in terms of the quality of an act, so that an act may be both a crime and a civil wrong, yet in canon law there is apparently no such distinction whatsoever. Offences under the canon law may however fall into a class of crime or civil wrong but there is no distinction as to the punishment to be imposed and the body to punish or prosecute the offence, as the general rule as stated in the bible in Ezekiel 18:4 is 'The Soul that sins, shall die'. Offences are further classified into felonies, misdemeanours and simple offences depending on the seriousness of the offence. The importance of such classification lies with the determination of the punishment to be awarded, the power of arrest, when an arrest can be made without warrant, when bail shall be granted etc. However no such classification seems to exist under the canon law.

It may also be apt to take a look at the sources of the Nigerian legal systems. The term 'source of law' is used in various senses but for the purposes of this paper it means the fountain of authority of a rule of law, that is, the origin from which a legal rule derives its authority. It is the means through which a rule forms part of the body of law. The sources of Nigerian law are Nigerian legislation, English law (which consists of the common law, the doctrines of equity, statutes of general application in force in England on January 1, 1900), statutes and subsidiary legislation on specified matters, customary law, judicial precedents. It is worth mentioning that the application of the sources of Nigerian law involves, in varying degrees, interpretation of statutes. Three main rules of interpretation are applied by the courts in interpreting statutes namely: Literal rule, Golden rule, and Mischief rule.

Nigerian legislation consists of statutes and subsidiary legislations. Statutes are laws enacted by the legislature. Subsidiary legislation is law enacted in the exercise of powers given by a statute. It is also known as delegated legislation. It consists of rules, orders, regulations and byelaws. Nigerian statutes consist of (a) Ordinances (b) Acts (c) Laws (d) Decrees and (e) Edicts. Customary law consists of customs accepted by members of a community as binding among them. In Nigeria, Customary law may be divided in terms of nature, into two classes, namely, the ethnic or non-Muslim customary law and Muslim law. This division is made more explicit by section 2 of the Native Courts law which provides that: 'native law and custom includes Moslem law'. Ethnic law in Nigeria is indigenous. Each system of such customary law applies to members of a particular ethnic group. Muslim law is religious law based on the Muslim faith and applicable to members of the faith. In Nigeria, it is not indigenous law; it is received customary law introduced into the country as part of Islam. Consequently it is not grounded in any particular locality. In large parts of the North, however, it has supplanted the local systems almost entirely, and occupies the same position in relation to those areas as does Igbo law to most of the East, and Yoruba law to most of the West.

From this analysis, can there be any place for the canon law in the Nigerian legal system? Canon law being a doctrinal rule or administrative rule that governs the Roman Catholic Church does not seem to fall into any of the criteria of laws that operate in Nigeria, nor can it be said to fall into any of the sources. Canon *law prima facie* could be deemed to be of supposedly a form of customary law in Nigeria but a review of the characteristics of customary law will show the place of canon law as different from other rules which form customary law. The one feature of customary law that is stressed to the exclusion of all others is succinctly expressed in a dictum of Bairamian F. J. It is, he said, 'a mirror of accepted usage'[35]. Examined more fully, that statement would seem to suggest two points, each on the subject. The first is that a particular customary law must be in existence at the relevant time, and must be

[34] See Criminal Code (Lagos State Lagos, 1973, Cap 31), see. 2; Penal Code (Northern Nigeria Laws, 1963, Cap 89), see. 2; Criminal Code (federal and Lagos laws, 1958, Cap 42), see. 2.
[35] *Owonyin v Omotosho* (1961) All NLR 304.

recognized and adhered to by the community. Speed Ag. C.J. at first instance in *Lewis v. Bankole*[36] affirmed that the native law and custom which the courts enforce must be 'existing native law and customary and not that of by-gone days'. The key words here are (1) 'existence at the relevant time, (2) recognition, and (3) adherence to the community. There is no doubt that the canon law being a collection of rules written down, are in existence and are recognized and adhered to by the Catholic Community. But the question is what community is referred to here by Bairamian J. From the definition of customary law given above, the 'community' here means the ethnic groups or tribes in Nigeria which the Catholic Church cannot be said to be one.

However, a careful and patient investigation of the form and content of the Code of Canon Law (the Code) vis-à-vis Nigerian civil law reveals some similarities and differences of the two systems. One very serious area where there is similarity is statutory marriage law. It seems that apart from the provision on dissolution of marriage under the Matrimonial Causes Act,[37] all provisions on nullity of marriage and judicial separation are common to both systems. On the other hand, the most important area of conflict is the criminal law. Section 36 (12) of the 1999 Constitution provides thus: '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 therefor is prescribed in a written law; and in this subjection, a written law refers to an Act of the National Assembly or a Law of a State, or any subsidiary legislation or instrument under the provisions of a law. Yet, can. 1311 provides that 'the Church has its own inherent right to constrain with penal sanctions Christ's faithful who commit offences'.

There is no doubt that the immediate implication of the above constitutional provision in relation to Canon law criminal justice is that insofar as the canon law and principles are not enacted into a written law by the appropriate legislative body in Nigeria, the implementation and administration of canon law criminal justice would be clearly unconstitutional and illegal in Nigeria. The Nigerian courts have had the opportunity to make pronouncement on the provision. Hence, in *Aoko v. Fagbemi*,[38] the court declined jurisdiction on a charge of adultery because adultery is not one of the offences in the *Criminal Code* governing the Southern part of Nigeria. The court maintained the same attitude in *Udokwu v. Onugha*.[39] As if the above is not enough, section 36(4) of the Constitution provides that whenever any person is charged with a criminal offence, he shall, unless the charge is withdrawn, be entitled to a fair hearing in public within a reasonable time by a court or tribunal established by law.' This provision has enormous implications for criminal justice system under the Canon law. First and foremost, it provides that the hearing must be conducted in public. This means that hearing should be in a public place and accessible by the members of the public, male and female. This is quite the opposite of what obtains in Canonical criminal procedure in which hearing is done in camera as it is not accessible to the public. Secondly, the criminal trial, according to the provision, must take place in a court or tribunal established by law. The effect is that since the courts in question are those recognized by the Constitution expressly or by implication, such fora as the ecclesiastical tribunal, bishop's court, and so on by which criminal justice under canon law is dispensed can at best be described as kangaroo courts in the eye of Nigerian criminal justice system which views them as unconstitutional, illegal, and lack jurisdiction. At best, Canon law can be viewed as a foreign law which rather than binding has a mere persuasive effect on the adjudication of matters brought before civil courts in Nigeria.

5. An Evaluation

Canon law and civil law operate in respectively different spheres of life. The Church and the civil state do not possess the same role, and each has its own function. The Second Vatican Council in *Gaudium et Spes* states that 'the Church, by reason of her role and competence, is not identified in any way with the political community nor bound to any political system'. 'The Church and the political community in their own fields are autonomous and independent from each other. Yet both, under different titles, are devoted to the personal and social vocation of the same men'. 'The more that both foster sounder cooperation between themselves with due consideration for the circumstances of time and place, the more effective will their service be exercised for the good of all. For man's horizons are not limited

[36] (1908) 1 NLR 81 at 100.
[37] Cap M 7, Laws of the Federation of Nigeria 2004, sections 15 and 16.
[38] (1961) 1 All N.LR. 400.
[39] (1963) 7 EN. L.R.1.

only to the temporal order; while living in the context of human history, he preserves intact his eternal vocation'. 'The Church, for her part, founded on the love of the Redeemer, contributes toward the reign of justice and charity within the borders of a nation and between nations. By preaching the truths of the Gospel, and bringing to bear on all fields of human endeavor the light of her doctrine and of a Christian witness, she respects and fosters the political freedom and responsibility of citizens'.[40] Both the state and the Church have their proper areas of competence, and these interact with each other in a complementary relationship. This is reflected even in the canonical system, which frequently takes up civil norms into its own legal structures.

Canon law is meant to make the proclamation of the gospel more effective. To this end, while the Church certainly recognizes the legitimate authority of the state, it should be noted that the laws of the state are to be restricted to the state's proper sphere and with a promotion of the common good. When these laws are contrary, they do not bind its subjects, and, in fact, Catholics may even have an obligation to engage in civil disobedience. The interaction with the civil government is not done in order to establish the Holy See as an equal partner as a subject of international law, but to ensure the good of religion and the proclamation of the gospel. Courts, in general, have respected the authority of the Church to determine its own internal discipline. The Church understands that as an absolute right. It seems manifest, however, that the civil state does not see this as absolute right for there are situations where the civil courts will intervene in conflicts between members of the Christian faithful, such as when the Church neglects its own canonical discipline. The courts have already established their authority in the common law system to do so. The Church also has the challenge of following its own discipline in order to credibly be able to speak, and especially criticize, the legal system of a state.

In Nigeria, the agitation from some quarters to have canon law mainstreamed into the Nigerian legal system is to be understood against the backdrop of the constitutional and government's bias in favour of Islamic law in spite of the religious pluralism in the country. Yet, the same argument against a wholesale adoption of Islamic law especially its criminal aspects would also go for adoption of the criminal provisions of canon law. This is clearly congenial to state secularity principle which in Nigeria pivots around section 10 of the Constitution of the Federal Republic of Nigeria 1999 (as amended). The section states that 'the Government of the Federation or of a state shall not adopt any religion as state religion'. By this principle, the government is required to be officially neutral in matters of religion, neither supporting nor opposing any particular religious beliefs or practices. The principle demands that all citizens should be treated equally regardless of religion, and that government does not give preferential treatment to a citizen from a particular religion over others. Secularity in Nigeria should prevent religion from controlling government or exercising political power. The constitution by section 10 should protect each individual including religious minorities from discrimination on the basis of religion. Be that as it may, Nigeria is not an atheistic state in which officially all religious beliefs and practices are opposed. The requirement of secularity or neutrality does not necessarily imply the fact that governments must not in any way relate to religious sect or communities, since they are part of the society for which the government is responsible. It does however require the fact that when they must act, it must be without partiality or discrimination.[41]

In the light of the above, the highest extent Canon law can be mainstreamed into the Nigerian legal system would be to the degree that it is confined to personal aspects in the same manner Islamic law is constitutionally allowed.[42] Personal aspects here relate to matters of personal life such as religion, marriage, gifts, family life, and subjects understood *ejusdem generis* to the mentioned items. It follows that any attempt to widen the scope of Sharia (as already done in 12 northern Nigerian states) or canon law enforcement to criminal and penal jurisdictions will certainly offend against the ideals of state secularity. This Muslim practice in Nigeria is indeed the cause of the unending crises in the nation today. Rather than itching for introduction of Canon law into the Nigerian legal system, agitation will be better channeled to the removal of all provisions relating to sharia law in the Constitution. The position of this study is not at all based on the difficulty that may be encountered, as some scholars would hold, in an attempt to entrench Christian laws into the Nigerian legal system as a result of multiple

[40] *Gaudium et Spes*, no. 76.
[41] See also *Transworld Airlines Incorporated v. Hardison* 432 U.S 83 (1977).
[42] See section 277 of the Constitution of the Federal Republic of Nigeria 1999 (as amended).

denominations and nay, multiple laws. Just as there is no monolithic Islamic law as there are sundry versions of Islam and schools of law, one cannot argue successfully that the adoption of Christian laws is unrealizable simply because there are many laws of Christian denominations. This is because, even under civil law in a federal state, there are different laws operating depending on the jurisdictions and federating units. The position of the study is simply based on the need to foster harmony, peaceful co-existence, and viable democracy, which ideals constitute the main reason for law. However, there is urgent need to have these religious laws rationalized into the curriculum of legal education in Nigerian universities. Such will surely enhance mutual understanding and dialogue among citizens. Islamic law is already part of the curriculum especially in many universities in the North, but should also be extended to the South. In the same manner, Christian and other religions' laws should also be made part of legal studies throughout the nation.