

POWERS OF APPELLATE COURTS IN NIGERIA TO
ENTERTAIN SHARI'AH CRIMINAL APPEALS FROM
SHARI'AH COURTS

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ABSTRACT

This paper discussed powers of appellate courts in Nigeria to entertain Shari'ah Criminal Appeals from Shari'ah Courts. The paper examined relevant constitutional provisions with a view to discovering whether or not appellate courts in Nigeria have powers to entertain Islamic Criminal Appeals. The legal reforms embarked upon by some States of Northern Nigeria led to the enactment of various Shari'ah Court Laws and Shari'ah Court of Appeal Laws empowering the Shari'ah Court of Appeal of those States to hear Islamic Criminal Appeals from Shari'ah Courts. In analyzing relevant provisions of the Constitution, the paper adopted doctrinal methods where relevant materials of the topic were utilized. The study found that apart from the High Courts of the States and of the Federal Capital Territory, Abuja which have powers to entertain Islamic Criminal Appeal from Upper Area/Shari'ah Courts, the Shari'ah Court of Appeal, Court of Appeal and Supreme Court lack similar power to entertain Shari'ah Criminal Appeals from Shari'ah Courts.

Keywords: Criminal Law, *Shari'ah*, Constitution, Courts, Jurisdiction

1. INTRODUCTION

The focus of this paper is to examine powers of appellate courts in Nigeria to entertain *Shari'ah* Criminal Appeals from *Shari'ah* Courts. Jurisdiction of a court is the authority which court possesses to decide matters litigated before it. It is the pillar or foundation upon which the entire case stands. The issue of jurisdiction of court being a fundamental one that goes to the root of the whole proceedings. The legal reform embarked upon by some States of Northern Nigeria brought about the enforcement of the provisions of *Shari'ah* Penal Codes by the *Shari'ah* courts. The newly established courts have been conferred with criminal jurisdiction. These *Shari'ah* Courts are vested with jurisdiction and power to hear and determine both civil and criminal cases and

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matters in Islamic law.² Consequent upon this, the *Shari'ah* Courts of Appeal of these States were conferred with additional jurisdiction to hear and determine appeals in proceedings involving questions of Islamic Criminal Law from the newly established *Shari'ah* Courts.³ In other words, appeals from the Upper *Shari'ah* Court whether sitting in its original or appellate jurisdiction in all civil and criminal proceedings shall lie to the *Shari'ah* Courts of Appeal.⁴ Consequent upon this, various *Shari'ah* Courts of Appeals Laws⁵ were enacted by these States. These Laws conferred upon the *Shari'ah* Courts of Appeal of their respective States with additional jurisdiction to hear and determine appeal from the Upper *Shari'ah* Courts in both civil and criminal matters.

The paper seeks to examine the jurisdiction of *Shari'ah* Court of Appeal of the State with a view to determining whether or not it has power to hear and entertain *Shari'ah* Criminal Appeals from the Upper *Shari'ah* Courts. The paper further seeks to examine jurisdiction of the High Courts of the States and that of the Federal Capital Territory, Abuja with a view to determining whether or not they have power to entertain *Shari'ah* Criminal Appeals from the Upper *Shari'ah* Courts. In addition to this, the paper takes a critical look and equally examines the extent of right of appeal to the Court of Appeal from the decision of the *Shari'ah* Court of Appeal and the right of appeal to the Supreme Court from the Court of Appeal on *Shari'ah* matters with a view to determining whether or not both superior courts can entertain Islamic Criminal Appeals. The paper will conclude with suggestions and necessary recommendations.

² Section 5(1), (2) and (3), *Shari'ah* Courts Law, 2000, Jigawa State.

³ See *Shari'ah* Court of Appeal Law, No. 6, 1999 of Zamfara State *Shari'ah* Court of Appeal Law. Cap 133 Amendment) Law, 2000 of Zamfara State; *Shari'ah* Court Law, 2000 of Kano State; *Shari'ah* Court Law, 2000 of Sokoto and *Shari'ah* Court Appeal (Amendment) Law, No. 13 of Kaduna State, 2001.

⁴ Section 43, *Shari'ah* Court Law No. 5 of 1999, Zamfara State; sections 242(2) (b) and 247 of Criminal Procedure Code, No. 1, Vol. 4, Zamfara State 2001; sections 233(2) (b) and 238 of *Shari'ah* Criminal Procedure Code Law, Sokoto State, 2000 and section 240(2)(a) and (b), *Shari'ah* Criminal Procedure Code Law, 2002, Kaduna State.

⁵ For example, Zamfara State *Shari'ah* Court of Appeal Law, No. 1, Vol. 2 Cap. 133, Amendment Law 2000; *Shari'ah* Court of Appeal (Amendment) Law, No. 13, 2001, Kaduna State and *Shari'ah* Court of Appeal (Amendment) Law, No. 6, 1999, Zamfara State.

2. CONCEPTUAL FRAMEWORK

2.1 Meaning of *Shari'ah*

Shari'ah is an Arabic word meaning the path to be followed. Literally, it means 'the way to a watering place'.⁶ It is the path not only leading to Allah, the Most High, but the path believed by all Muslims to be the path shown by Allah, the Creator Himself through His Messenger, Prophet Muhammad (P.B.U.H.).⁷ The word also means 'to follow a good path', to enter, to commence and watering place.⁸ Water no doubt is very significant and essential in the life of everything.⁹ That is to say, since water brings about life and sound health, it is submitted that it is the source of all happiness and spiritual tranquility for all Muslims in the same way water is the source of all life.¹⁰ It is further submitted that it is the good path that leads Muslims to the right direction so as to perform whatever Allah has ordained them to do as an act of faith or whatever He has laid down as a part of religion such as a fasting, prayer, pilgrimage, regular charity and other good deeds.

Technically, *Shari'ah* is defined as the principles and laws which Allah revealed and which He requires all Muslims to adhere to strictly in all their actions, whether in their relationship with Him or in their dealings with mankind.¹¹ It also refers to the sum total of Islamic laws which were revealed to the Prophet Muhammed (P.B.U.H.) and which are recorded in the Qur'an as well as deducible from the Prophet's divinely-guided lifestyle (called The Sunnah).¹² From the above definitions *Shari'ah* is the sacred law of Allah revealed to the Prophet Mohammed in order to govern the conduct of Muslims in all ramifications, to guide mankind to follow and obey these revealed laws found both in the Qur'an and

⁶ Abdur Rahman I. Doi, *Shari'ah: The Islamic Law* (Ta Ha Publishers, London, 1984/1404 A.H.)2.

⁷ Ibid.

⁸ Is-haq Akintola, *Shariah in Nigeria: An Eschatological Desideratum*, (Shebiotimo Publications, Ijebu-Ode, 2001) 5

⁹ Yasir Anjola Quadri, *Shari'ah: The Islamic Way of Life*, (Ijebu Ode, Shebiotimo Publications, 2000) 2.

¹⁰ Monsur Ibrahim Sa'id, 'Application of Islamic Criminal Law in Nigeria', in Mohammed Lawal Ahmadu, Monsur Ibrahim Sa'id and Mohammed Isah (eds) *Contemporary Issues in Islamic Jurisprudence*, Rewal Fortune Resources, Benin City Edo State (2009) 66 – 67.

¹¹ Muhammed Higab, *Islam: The All Divine Messages in One*, (Islamic Publications Bureau Lagos, 1983) 40.

¹² Abu Ammeenah Bilal Phillips, *The Evolution of Figh* (Inter. Islamic Publishing House, 1990) 1 – 2.

Sunnah. Allah said in the Qur'an: 'Then we put you on a straight path (*Shari'ah*) in your affairs, so follow it and do not follow the desires of those who have no knowledge.¹³ It is also clear from the above definitions that *Shari'ah* is rooted in the religion of Islam which denotes the total, complete and unalloyed submission to the will of Allah. It is further understood from the above definitions that *Shari'ah*/Islam is not a religion, but, it is a total way of life to which every Muslim must strictly adhere to in all their actions, whether their relationship with Allah or in their dealings with mankind. In this regard, the Qur'an says: 'O you who believe! Enter perfectly in Islam (by obeying all the rules and regulations of the Islamic religion) and follow not the footsteps of *Shaitan*. Verily! He is to you a plain enemy'.¹⁴

It is clear from this verse that Muslims must obey all the rules and regulations of the Islamic law (*Shari'ah*) without any exception.

3. ISLAMIC CRIMINAL LAW IN NORTHERN NIGERIA

The Islamic Criminal Law was operational in what is today known as the Northern States of Nigeria before the advent of the British Colonialists. Most of the present Northern States of Nigeria were once under the former Sokoto Caliphate. The Caliphate was established after the 19th Century revolutionary religious movement of Shaikh Uthman Dan Fodio.¹⁵ Entrenched by the Jihad (an Islamic revolution) of Uthman Dan Fodio in 1805, it put in place a highly centralized system of criminal administration and a distinct legal system¹⁶ as observed by Professor Okonkwo thus:

In much of the North, there was the highly systemized and sophisticated Moslem law of crime – so systemized in fact that there were several “schools” of jurists, and even differences within

¹³ Qur'an 45:18.

¹⁴ Qur'an 2:208.

¹⁵ Nasiru Abdulkadir Ahmad, *Administration of Islamic Criminal Law Under the Nigerian Constitutional Democracy*, (Ahmadu Bello University Press Limited, Zaria, 2011) 1.

¹⁶ Abdulmumin B. Ahmed, 'Administration of Islamic Criminal Law and Justice in a Constitutional Democracy: Problems and Prospect' a paper delivered at a Conference Organised by Women's Aid Collective (WACOL) Enugu/Port Harcourt/Abuja and Women Advocates Research and Documentation Centre (WARDC) Lagos and Published by WACOL, Enugu and WARDC, Lagos (2003) 165-166.

them, though, the dominant one was the Maliki School.¹⁷

In fact, in the area of criminal law, the Islamic Criminal System which comprises of *hudud*, *qisas* and *ta'azir* were duly applied and administered in the entire territory.¹⁸ In fact, before the advent of the colonial masters, the Islamic Criminal Justice System has been well entrenched in the sense that offences were clearly defined and punishments were provided. The Islamic Courts were put in place to hear and determine cases on Islamic law. *Alkali* courts served as lower courts while Emirs' courts were appellate courts which can hear and determine appeals in most cases involving homicide.¹⁹ This fact was conceded to by Sir Frederick Lugard himself when he said that he found throughout the region, especially in its principal cities, a complex network of courts where Islamic law was administered by an Alkali, and Islamic law judge who was a man of great respectability and considerable learning.²⁰

The colonial administrators first declared that they would not interfere with the people's faith and belief because they found the administrative machinery of the Caliphate so perfect, therefore, they went ahead adopted it. Thus, they governed the people through political institutions in what came to be known as the Indirect Rule.²¹ After consolidating their power however, they began to put in place policies that undermined Islam as an ideology and a way of life.²² The Caliphate was officially abolished and the *Shari'ah* was scrapped bit by bit by clipping its criminal law wings and supplanted their imported system of criminal justice rooted on common law rules and Euro-Christian moral principles.²³

¹⁷ C. O. Okonkwo, *Criminal Law in Nigeria*, (2nd Edition, Sweet & Maxwell Limited, 1980) 4.

¹⁸ Nasiru Abdulkadir Ahmad, (n 14) 1.

¹⁹ Ibid.

²⁰ Abdulmumin B. Ahmed, (n 15) 165.

²¹ Umar Muhammad Labdo, 'Application of *Shari'ah* in Nigeria' in Mohammed Lawal Ahmadu, Monsur Ibrahim Sa'id and Mohammed Isah (eds.) *Contemporary Issues in Islamic Jurisprudence*, Rewal Fortune Resources, Benin City, Edo State, (2009) 60.

²² Ibid.

²³ Monsur Ibrahim Sa'id, *Islamic Criminal Law and Practice in Nigeria* (Usman Danfodion University Printing Press, Sokoto, 2011) 2.

The practice continued unabated until much later it became clear that the aim of colonization was to do away with the entire Islamic Penal System in favour of the received English Law and thus, serious consternation took place following the celebrated case of *Tsoho Gubba v Gwandu Native Authority*.²⁴ In the end, the *Shari'ah* was confined to personal matters only (marriage, divorce, inheritance, gift, *waqf* etc.).²⁵ The fortune of *Shari'ah* diminished under colonial rule. It was stripped of its authority and its jurisdiction narrowed. Low grade courts (Native Courts later renamed Area Courts) with limited jurisdiction were allowed to administer justice in civil cases that were mainly limited to personal matters/issues.²⁶

Notwithstanding the aggressive nature with which the colonial masters pursued their plan, their mission was not well accomplished, for they were unable to remove every bit of *Shari'ah* principles hence, they saw their mission like a failure.²⁷

4. Power of *Shari'ah* Court of Appeal of a State to Entertain *Shari'ah* Criminal Appeals from *Shari'ah* Courts

Before the 1979 Constitution came into effect, the *Shari'ah* Court of Appeal existed only in each of the few Northern States. These courts were originally set up under the provisions of the *Shari'ah* Court of Appeal Law No. 16 of 1960 and subsequently amended in 1963.²⁸ The Constitution now provides for the establishment of the court at the Federal Capital Territory, Abuja and any other State they desires it.²⁹ Therefore, the establishment of the court is optional. The court shall consist of a Grand *Kadi* of that court and such number of *Kadis*³⁰ of that court as may be prescribed by the House of Assembly of the State.³¹ For the purpose of exercising

²⁴ (1947) 12 WACA 141.

²⁵ Umar Muhammed Labdo, (n 20) 60.

²⁶ Ibid.

²⁷ Monsur Ibrahim Sa'id, (n 22) 3.

²⁸ E. M. Joye, *Introduction to the 1979 Constitution*, The Macmillan Press Ltd., London and Basingstoke, 1982, 259.

²⁹ Sections 260(1) and 275(1) of Constitution of the Federal Republic of Nigeria, 1999.

³⁰ This is the spelling of Qadi adopted by Nigerian statutes especially the Constitution of the Federal Republic of Nigeria, 1999 (as amended) which we intend to follow only when the position is discussed in relation to the statutes.

³¹ Section 275 (2), Ibid.

any jurisdiction conferred upon it, the court shall be duly constituted if it consists of at least three *Kadis* of that court.³²

The legal reform embarked upon by some States of Northern Nigeria brought about the enforcement of the provisions of the *Shari'ah* Penal Codes by the *Shari'ah* Courts. The newly established *Shari'ah* Courts have been conferred with criminal jurisdiction and appeals from Upper *Shari'ah* Courts whether sitting in its original or appellate jurisdiction in all civil and criminal proceedings shall lie to the *Shari'ah* Court of Appeal.³³ In order to allow the State *Shari'ah* Court of Appeal to entertain criminal appeals from *Shari'ah* Courts, various *Shari'ah* Courts of Appeal Laws³⁴ were enacted by these States. These Laws conferred upon the *Shari'ah* Courts of Appeal of their respective States with additional jurisdiction to hear and determine appeals from the Upper *Shari'ah* Courts in both civil and criminal matters.

Our concern here is not to examine the jurisdiction of the *Shari'ah* Court of Appeal of the State, but, rather to find out whether the court has power to entertain *Shari'ah* criminal appeals from Upper *Shari'ah* Courts. In order to achieve this, one needs to carefully look at and examine the provision of section 277(1) and (2) of the Constitution which deals with the jurisdiction of the court. Section 277 of the Constitution of Federal Republic of Nigeria, 1999 has clearly defined the jurisdiction of the *Shari'ah* Court of Appeal. The main points of the definitions are that the jurisdiction is appellate and supervisory; it is limited to civil matters and that such jurisdiction must be exercised in relation to questions involving Islamic personal law regarding marriage, divorce, family relationship, *waqf*, gift, will or succession, etc. Subsection (2) of the section appears to limit those questions of Islamic Personal Law that will go on appeal to the *Shari'ah* Court of Appeal. It is also important to point out that section 277(1) and (2) of the

³² Section 278, *Ibid*.

³³ Section 43, *Shari'ah* Court Law No. 5 of 1999, Zamfara State; sections 242(2)(b) and 247 of Criminal Procedure Code, No. 1, Vol. 4, Zamfara State, 2001; sections 233(2) (b) and 238 of *Shari'ah* Criminal Procedure Code Law, Sokoto State, 2000 and section 240(2)(a) and (b), *Shari'ah* Criminal Procedure Code Law, 2002, Kaduna State.

³⁴ For example, Zamfara State *Shari'ah* Court of Appeal Law, No. 1, Vol. 2, Cap. 133, Amendment Law, 2000; *Shari'ah* Court of Appeal (Amendment) Law, No. 13, 2001, Kaduna State and *Shari'ah* Court of Appeal (Amendment) Law, No. 6, 1999, Zamfara State.

Constitution of the Federal Republic of Nigeria, 1999 is exactly the same with the provision of section 242(1) and (2) of the 1979 Constitution on the jurisdiction of the *Shari'ah* Court of Appeal.

Both the Supreme Court and the Court of Appeal have made several decisions and pronouncements on the jurisdictional scope and limitations of the *Shari'ah* Court of Appeal under the 1979 Constitution which is in *pari materia* with provision of section 277(1) and (2) of the current Constitution of the Federal Republic of Nigeria, 1999. For example, the Supreme Court, in the case of *Magaji v Matari*³⁵ was called to determine the extent and or limit of jurisdiction of *Shari'ah* Court of Appeal having regard to section 242(1) and (2) of the 1979 Constitution as amended which is in *pari materia* with section 277(1) and (2) of the Constitution of the Federal Republic of Nigeria, 1999. It was held by the Court of Appeal that the *Shari'ah* Court of Appeal has no jurisdiction to hear the appeal brought before it from Upper Area Court. On appeal to the Supreme Court, the Court, while setting aside the judgment of the Court of Appeal held thus: 'It is neither a case for a claim of inheritance, nor that of a gift, a *wakf* or a will. It is simply a case involving ownership of the piece of land in dispute between the contending parties.'³⁶

It is submitted that if both subsections (1) and (2) of the provision of section 277 of the Constitution are read together, it will be obvious that the State Houses of Assembly have no power to confer appellate criminal jurisdiction on the *Shari'ah* Court of Appeal. The essence of subsection 2 is to leave no one in doubt as to the scope of the jurisdiction of the *Shari'ah* Court of Appeal that once an appeal does not involve or raise question of Islamic Personal Law, the *Shari'ah* Court of Appeal has no jurisdiction to entertain may be expanded by the State House of Assembly to cover only civil proceedings and not criminal proceedings. In the light of the foregoing, it is this researcher's considered view that

³⁵ (2000) 5 SC 46, it is also reported in (2000) FWLR (Pt. 18) 237 SC. See also *Kanawa v Maikaset* (2007) 10 NWLR (Pt 1042) 283 C.A. and *Furfuri v Rawayyah* (2008) All FWLR (Pt 401) 1000 C. A. where it was held that it is a State High Court that has such jurisdiction. Same decision was also reached in *Korau v Korau* (1998) 4 NWLR (Pt. 545) P. 60.

³⁶ *Ibid*, per Wali, JSC pp. 146-147. See also the Supreme Court decisions in *Mallam Ado v Hajiya Dije* (1984) 5 N.C.L.R. 260 and *Fennani v Sarki* (1961 – 1989) 1 *Shari'ah* Law Reports of Nigeria (SLRN), p. 94.

the *Shari'ah* Court of Appeal of State has no power to hear and entertain criminal appeals from *Shari'ah* Courts.

5. Powers of High Courts of the States to Entertain *Shari'ah* Criminal Appeals from *Shari'ah* Courts

A State High Court is provided for each State of the Federation by virtue of section 270(1) of the Constitution of the Federal Republic of Nigeria, 1999. It consists of a Chief Judge of the State and such number of judges as prescribed by a law of the House of Assembly of the State.³⁷ Under the Constitution of the Federal Republic of Nigeria, 1999, the original and appellate or supervisory jurisdiction of the State High Court is prescribed by section 272(1) and (2) while those of the Federal Capital Territory High Court is prescribed by section 257, but they are subject to section 251 of the Constitution. Section 272(1) provides thus:

Subject to the provisions of section 251 and other provisions of this Constitution, the High Court of a State shall have jurisdiction to hear and determine any civil proceedings in which the existence or extent of a legal right, power, duty, liability, privilege, interest, obligation or claim is in issue or to hear and determine any criminal proceedings involving or relating to any penalty, forfeiture, punishment or other liabilities in respect of an offence committed by any person.³⁸

By this provision, except in respect of those matters within the exclusive jurisdiction of the Federal High Court under section 251 of the Constitution, the original jurisdiction of a High Court in civil and criminal matters covers matters provided for by the law of the State as well as matters provided for by an Act of the National Assembly. The original jurisdiction of the High Court of Federal Capital Territory, Abuja is the same with that of the State High Court. In respect of civil causes and matters, the High Court of each State of the Federation and that of the Federal Capital Territory, Abuja, have co-ordinate jurisdiction over all matters between persons, or between government or authority and any

³⁷ Section 270(2) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended).

³⁸ Section 272, *ibid.*

person within its territory in Nigeria, as well as to all actions and proceedings relating thereto for the determination of any questions as to the civil rights and obligations of that person.³⁹

The author's concern here is not to examine the jurisdiction of the State High Court but rather, to find out whether the appellate divisions of State High have powers to entertain *Shari'ah* Criminal Appeals from Upper *Shari'ah* Courts or Upper Area Court. In order to achieve this, one needs to carefully look at and examine the provision of section 272(2) of the Constitution which deals with appellate jurisdiction of the State High Court. Section 272(2) of the Constitution provides thus: 'The reference to civil or criminal proceedings in this section includes a reference to the proceedings which originate in the High Court of a State and those which are brought before the High Court to be dealt with by the court in the exercise of its appellate or supervisory jurisdiction.'

It is to be observed that the High Court of a State is conferred with jurisdiction to entertain appeals from decisions of subordinate courts, such as Magistrates Courts or its equivalent like the District Courts, Customary Courts, Area Courts, *Shari'ah* Courts and the like.⁴⁰ In States that Area Courts have been established, appeals from the decision of the court frequently lie to the State High Court. But, section 277 and 282 of the same Constitution curtailed the appellate jurisdiction conferred by the Constitution on the High Court of a State. Section 277 of the Constitution provides that appeal from the decisions of Area Court in civil proceedings involving question of Islamic Personal Law shall vest in the *Shari'ah* Court of Appeal and section 282 of the Constitution also provides that appeal from the decisions of Customary Court in civil proceedings involving question of Customary law shall vest in the Customary Court of Appeal and not the High Court of the State.

It is submitted that the fact that the Upper *Shari'ah* Court is a subordinate court, its civil and criminal decisions can be appealed to the appellate divisions of State High Courts of *Shari'ah* Implementing States provided that its civil appeal does not border on question of Islamic Personal Law. It is further submitted that

³⁹ See *Ogunsola v APP* (2003) 9 NWLR (Pt. 826), p. 462.

⁴⁰ See sections 257(2) and 272(2) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended).

since by virtue of section 277 of the Constitution, only appeals from the decisions of Area/*Shari'ah* Court/Upper *Shari'ah* Court in civil proceedings involving questions of Islamic Personal Law would lie to the *Shari'ah* Court of Appeal, all other civil and Criminal Appeals may go to the State High Court especially when the High Court Laws of State make provision for such appeal. It may be further argued that by virtue of sections 272(2) both *Shari'ah* civil and Criminal Appeals may be brought to the State High Court from the decisions of Upper *Shari'ah* Court which has power to entertain and determine both *Shari'ah* civil and criminal proceedings. As long as the appeal does not border on question of Islamic Personal Law, the High Court of the State can competently receive such civil or criminal appeals.

It has been observed that the original jurisdiction of a High Court in civil and criminal matters covers matters provided for by the law of the State as well as matters provided for by an Act of the National Assembly.⁴¹ It has also been held that whilst any law cannot limit the jurisdiction of the High Court, subject to constitutional limitations, State law can add to it.⁴² In line with this decision, it is submitted that the State House of Assembly can enact law adding to the jurisdiction of the State High Court or empowering the appellate division of the Court to entertain criminal appeals from Upper *Shari'ah* Court or any lower court. Along this direction, Professor Oba forcefully argued that what section 272(1) of the Constitution does is to state the possible or potential jurisdiction of the High Court in criminal matters. The section does not confer any specific jurisdiction on the High Court. It leaves that to the various laws of the Federation and the States as legislative powers in matters of criminal law are shared between the Federal and the States governments.⁴³ He further argued that the original and appellate jurisdictions of the High Court of each State in criminal matters are conferred on it by other Federal and

⁴¹ Lawal Pedro, *Jurisdiction of Courts in Nigeria, (Materials and Cases)* (Law Review Series, Lagos State Ministry of Justice, 2006) 162.

⁴² *Gombe v Madaki* (1984) 5 NCLR 435 at 439.

⁴³ Abdulmumini Adebayo Oba, 'The Criminal Jurisdiction of the Sharia Court of Appeal and the False Analogy of the Customary Court of Appeal'. *The Jurist: An Annual Publication of Law Students' Society, University of Ilorin* (2003) (8) (13) 157. See also section 4, Part I and II Second Schedule, 1999 Constitution, which delimits the legislative powers of the Federal and State Governments.

State Laws, such as the High Court Laws⁴⁴ the Criminal Procedure Codes,⁴⁵ and the Criminal Procedure Laws.⁴⁶ It is submitted that as long as the State law confers additional jurisdiction on the State High Court to entertain *Shari'ah* criminal appeal from the Upper *Shari'ah* Court or other lower courts, such power shall be so exercised and it is in order. In some Northern States, appeals bordering on transactions *Mu'amalat* and non-capital offences normally go to the State High Court appellate division constituting of two justices of the court, who in most cases, were Muslims though not necessarily trained in Islamic Law.⁴⁷

6. POWERS OF HIGH COURT OF THE FCT TO ENTERTAIN SHARI'AH CRIMINAL APPEALS FROM SHARI'AH COURTS

The High Court of the Federal Capital Territory, Abuja is created by the Constitution of the Federal Republic of Nigeria, 1999.⁴⁸ Section 255(2) of the Constitution provides that the court shall consist of Chief Judge of the High Court of the Federal Capital Territory and such number of judges of the High Court as may be prescribed by an Act of the National Assembly.

Under the Constitution of the Federal Republic of Nigeria, 1999 (as amended) the original jurisdiction of the court is the same as that of the State High Court. In respect of civil causes and matters, the High Court of each State of the Federation and that of the Federal Capital Territory Abuja have co-ordinate jurisdiction over all matters between persons, or between Government or authority and any person within its territory in Nigeria, as well as to all actions

⁴⁴ For example, section 62, High Court Law, Cap. 67, Laws of Kwara State, 2004 and section 77 Criminal Procedure Law, Cap. 33, Laws of Lagos State, 1994 (now section 77 Administration of Criminal Justice Law, No. 10 of Lagos State, 2011. See also sections 109 and 110 of Administration of Criminal Justice Act, 2015.

⁴⁵ For example, the section 14 Criminal Procedure Code, Cap. 43, Laws of Kwara State, 2004.

⁴⁶ A. A Oba, (n 42) 157. See also section 77 Criminal Procedure Law of Lagos State, 1994 (now section 77 Administration of Criminal Justice Law, No. 10 of Lagos State, 2011.

⁴⁷ M. L. Yusufari, 'Sharia Implementation in Kano State', (2015) retrieved from <http://www.gamji.com/article3000/NEWS3706.htm> on the 10th of June, 2015 at 6:47 p.m.

⁴⁸ See section 255(1) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended).

and proceedings relating thereto for the determination of any questions as to the civil rights and obligations of that person.⁴⁹

Our intention and concern here is not to examine the jurisdiction of the High Court of the Federal Capital Territory, Abuja, but, rather, to find out whether the appellate division of the court has powers to hear and determine *Shari'ah* criminal appeal from Upper Area Court/Area Court *Shari'ah* Courts or Upper *Shari'ah* Courts. In order to achieve this recourse shall be had to the provisions of section 257(2) which provides thus:

The reference to civil or criminal proceedings in this section includes a reference to the proceedings which originate in the High Court of the Federal Capital Territory, Abuja and those which are brought before the High Court of the Federal Capital Territory, Abuja to be dealt with by the court in the exercise of its appellate or supervisory jurisdiction.

It is submitted that the import of the above provision is that reference to civil or criminal proceedings in the section includes a reference to the proceedings which are brought in form of appeal from the lower court such as magistrate court or Upper Area Court to the High Court of the Federal Capital Territory Abuja. It is further submitted that the appeal both in criminal and civil matters including Islamic criminal and civil appeals from the lower court can be entertained by the court especially if any Federal Law or High Court of Federal Capital Act or any Act of the National Assembly⁵⁰ makes provision or confers such Islamic criminal appeals on the court. The court will have such power to entertain Islamic criminal appeals from the lower/upper *Shari'ah* Court as long as the matter does not involve questions of Islamic Personal Law or question of customary law.⁵¹

With respect to the appellate jurisdiction of the High Court of the Federal Capital Territory, the court has appellate jurisdiction to hear appeals from decisions of Upper Area Court or any Area Court

⁴⁹ *Ogunsola v. APP* (2003) 9 NWLR (Pt. 826) 462.

⁵⁰ Section 259 of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) 207.

⁵¹ See sections 277(1) and (2) and 282(1) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended)

Grade I or II.⁵² Section 16 of the Federal Capital Territory Abuja (Appeal from Area Court) Act, Cap. F6, Laws of the Federation of Nigeria,⁵³ provides thus:

Notwithstanding anything to the contrary contained in the Area Court Act and the Sharia Court of Appeal Act made applicable to the Federal Capital Territory by the Federal Capital Territory Act, any party aggrieved by a decision or an order of an Upper Area Court or any Area Court Grade I or II -

- (a) on any matter involving a question of Islamic Law may appeal therefrom to *Shari'ah* Court of Appeal;
- (b) in a criminal matter, may appeal therefrom to the High Court;
- (c) in a civil matter, other than a matter involving a question of Islamic Law, may appeal therefrom to the High Court.

The import of the above provision is that the appellate jurisdiction conferred on the High Court in respect of criminal appeals from any decision of an Upper Area Court or any Area Court Grade I or II is unrestricted and exclusive.⁵⁴ But, in respect of civil causes or matters, the appellate jurisdiction of the court is limited to ordinary civil matters excluding any matter where question of Islamic Law or Customary law is in issue. The High Court lacks jurisdiction to entertain any appeal involving any question of Islamic Personal Law, as it is the *Shari'ah* Court of Appeal that is vested with exclusive jurisdiction over such appeals.

By virtue of the above provision, any party aggrieved by a decision or an order of an Upper Area Court or any Area Court Grade I or II which is equivalent to the Upper *Shari'ah* Court in a criminal matter may appeal therefrom to the High Court of the Federal Capital Territory, Abuja. It follows from this that in fact and indeed the appellate division of High Court of the Federal Capital Territory, Abuja has power to entertain *Shari'ah* criminal appeal from the decisions of the Upper Area Court or any Area Court

⁵² Lawal Pedro, (n 40) 159.

⁵³ Section 16 of the Federal Capital Territory Act, Cap. F6, Laws of the Federation of Nigeria, volume 6, 2004.

⁵⁴ Lawal Pedro, (n 43) 159.

Grade I or II. The point here is not whether or not Federal Capital Territory, Abuja is one of the *Shari'ah* Implementing States, but, whether its High Court has power to entertain *Shari'ah* Criminal Appeals from the Area/*Shari'ah* Courts. By virtue of the above provision and provision of section 257(2) of the Constitution, the High Court of the Federal Capital Territory, has competence to entertain *Shari'ah* Criminal Appeals from the decision or an order of an Upper Area Court or any Area Court Grade I or II. The High Court of the Federal Capital Territory also has jurisdiction to entertain appeals from the decisions of Magistrate Courts within the Federal Capital Territory, Abuja.⁵⁵

Equally section 1 of the Federal Capital Territory Abuja (Appeal from Area Court) Act is also to the effect that the decisions of the lower courts including the Magistrate Courts within the Federal Capital Territory, Abuja are appealable to the High Court of Federal Capital Territory. It is submitted that these lower courts or Area Courts including the Magistrate Courts are all inferior courts and courts of first instance like *Shari'ah* courts which decisions both in civil and criminal matters can be appealed to the High Court of Federal Capital Territory, Abuja especially when the National Assembly Act makes provision for such appeal. It has been repeatedly argued that although, the Federal Capital Territory, Abuja is not one of the States implementing *Shari'ah* Criminal Law, but, by virtue of all the above relevant provisions of the law, its High Court has power to entertain criminal appeals from the subordinate courts such as Upper Area Court which is equivalent to the Upper *Shari'ah* Court in those *Shari'ah* States.

In Lagos State, in the exercise of its appellate jurisdiction, the High Court shall be constituted by a single judge except when in any particular case the Chief Judge directs that three judges hear the appeal. Such direction may be given before the hearing of the appeal or at any time before judgment is delivered.⁵⁶ In other States High Courts, particularly High Courts in Northern States, the exercise of the appellate jurisdiction of High Court is by a panel of more than a judge. Therefore, when the High Court sits to hear

⁵⁵ See Order 44 of the High Court of the Federal Capital Territory (Civil Procedure Rules) Act, Cap. 168, Laws of Federation of Nigeria, 2004.

⁵⁶ See section 29 of the High Court Law of Lagos State. See also Lawal Pedro, (n 40) 171.

appeals in such States, the court would not be properly constituted by a single judge.⁵⁷

7. RIGHT OF APPEAL TO THE COURT OF APPEAL FROM THE SHARI'AH COURT OF APPEAL

The Court of Appeal and States *Shari'ah* Courts of Appeal are creations of the Constitution and as such the extent of their jurisdictions has been clearly spelt out. In the hierarchical order of our superior courts, the Court of Appeal ranks second and next to the Supreme Court. Therefore, the *Shari'ah* Court of Appeal is inferior to the Court and its decisions are equally appealable to the Court of Appeal. Concerning the composition of the Court, the Constitution provides, thus:

For the purpose of exercising any jurisdiction conferred upon it by the Constitution or any other law, the Court of Appeal shall be duly constituted if it consists of not less than three Justices of the Court of Appeal and in the case of appeals from;

- a) Sharia Court of Appeal, if it consists of not less than three Justices of the Court of Appeal learned in Islamic Personal Law; and
- b) Customary Court of Appeal, if it consists of not less than three Justices of the Court of Appeal learned in Customary law.⁵⁸

When the Court of Appeal is sitting in its original jurisdiction or in its appellate jurisdiction to consider an appeal on question as to the interpretation or application of the Constitution or as to whether any of the provisions of Chapter IV of the Constitution has been or is likely to be contravened in relation to any person, the Court will still be duly constituted if the same number of three Justices hear the case or appeal.⁵⁹ At the sitting or hearing of any matter, one of the Justices shall preside and he is referred to as the Presiding Justice and two other Justices shall support him as members of the panel.⁶⁰ It is submitted that where the Court of Appeal or any court for that matter is not properly constituted as regards its membership,

⁵⁷ See decision in *Billiri v Billiri* (1991) 4 NWLR (Pt. 186) 473 at 485.

⁵⁸ Section 247(1) of the Constitution of the Federal Republic of Nigeria, 1999.

⁵⁹ See section 241(1) (a) (b) (c) and (d) of the Constitution, *ibid*.

⁶⁰ Lawal Pedro, (n 40)50.

it will lack jurisdiction to adjudicate over any matter brought before it.⁶¹ It should be noted that the jurisdiction of the Court of Appeal to entertain appeals from the decision of *Shari'ah* Court of Appeal is constitutional in view of the provision of sections 240 and 244 of the Constitution. Section 240 provides thus:

Subject to the provisions of this Constitution, the Court of Appeal shall have jurisdiction to the exclusion of any other court of law in Nigeria, to hear and determine appeals from the Federal High Court, the High Court of the Federal Capital Territory, Abuja, High Court of a State, Sharia Court of Appeal of the Federal Capital Territory, Abuja, Sharia Court of Appeal of a State, Customary Court of Appeal of the Federal Capital Territory, Abuja, Customary Court of Appeal of a State and from decisions of a court martial or other tribunals as may be prescribed by an Act of the National Assembly.⁶²

By the above provision, it is clear that the decisions of *Shari'ah* Courts of Appeal are appealable to the Court of Appeal to the exclusion of any other court of law in Nigeria. But, our concern here is the extent and scope of appeal to the Court of Appeal from the decision of the *Shari'ah* Court of Appeal. This is contained in section 244(1) of the Constitution which defines the jurisdictional scope of the Court of Appeal with respect to appeals which it is competent to receive from the *Shari'ah* Court of Appeal and provides thus:

An appeal shall lie from decisions of a Sharia Court of Appeal to the Court of Appeal as of right in any civil proceedings before the Sharia Court of Appeal with respect to any question of Islamic Personal Law which the Sharia Court of Appeal is competent to decide.⁶³

⁶¹ See Supreme Court decision in *State v Squad Leader Olatunji* (2002) 2-3 S.C. 85 at 95.

⁶² Constitution of the Federal Republic of Nigeria, 1999 (as amended).

⁶³ See also *Adamu v Bashiru* (1997) 10 NWLR (Pt. 523) 81 at 92; *Abuja v Bizi* (1989) 5 NWLR (Pt. 1190) 120; *Magaji v Matari* (2000) 8 NWLR (P.t. 670) 722 at 737.

The above provision of section 244(1) guarantees a right of appeal as of right in civil proceedings from the decision of the *Shari'ah* Court of Appeal with respect to any question of Islamic Personal Law which the *Shari'ah* Court of Appeal is competent to decide. The catch phrases here are civil proceedings and Islamic Personal Law. This means that not all decisions of the *Shari'ah* Court of Appeal on civil matters are appellable under the above provision to the Court of Appeal. Those decisions to be appealed against, must arise from civil proceedings and must be based on Islamic Personal Law.⁶⁴

In order to show that appeal from judgments of the State *Shari'ah* Court of Appeal is only open in cases involving Muslim Personal Law and not Islamic Criminal Law, section 237(2) (b) of the Constitution mandates the Court of Appeal Justices to include at least three Justices learned in Islamic Personal Law.⁶⁵ Equally, section 247(1) of the Constitution provides that for the purpose of hearing and determining appeals from *Shari'ah* Court of Appeal, the composition of the Court of Appeal shall consist of not less than three Justices of the Court learned in Islamic Personal Law.⁶⁶ It follows from this that if the legislature intended other jurisdictions or indeed Islamic criminal jurisdiction for the Court of Appeal, the phrase 'Islamic Personal Law' could not have been expressly inserted in sections 237, 244 and 247(1) of the Constitution. The insertion of the phrase 'Islamic Personal Law' in those sections truly reveals the true intention of the draftmen.

In *Umaru Fannami v Bukar Sarki*,⁶⁷ it was held per A.B. Wali JCA (as he then was) with respect to section 242 of the 1979 Constitution which is in *pari materia* with section 277 of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) as follows: "From the foregoing, the Court of Appeal is only constitutionally competent to hear appeals from the *Shari'ah* Court of Appeal with respect to matters involving Islamic Personal Law".

Assuming the jurisdiction of *Shari'ah* Court of Appeal is wrongly expanded to cover Islamic Criminal Proceedings and the court

⁶⁴ See *Adamu v Bashiru* (1997) 10 NWLR (Pt. 523) 81 at 92; *Abuja v Bizi* (1989) 5 NWLR (Pt. 119) 120 and *Magaji v Matari* (2000) 8 NWLR (Pt. 670) 722 at 737.

⁶⁵ Section 237(2)(b) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended).

⁶⁶ Section 247(1) of the Constitution, *ibid.*

⁶⁷ *Shari'ah Law Reports of Nigeria*, 1 (1961-1989) 144 at p.160.

proceeds to convict a person, the problem that is likely to arise is that the right of appeal of such a person convicted by the court may be curtailed since appeal from judgments of the *Shari'ah* Court of Appeal is only open in cases involving Muslim Personal Law.⁶⁸

Under our Criminal Justice System and the Constitution, a person convicted for any type of offence has the right to appeal against his conviction and sentence.⁶⁹ In fact, such a person is constitutionally entitled to exhaust his right of appeal up to the Supreme Court which receives appeals from the Court of Appeal in both civil and criminal proceedings.⁷⁰ The appeal shall lie from decisions of the Court of Appeal to the Supreme Court as of right in any criminal proceedings in which any person has been sentenced to death by the Court of Appeal or in which the Court of Appeal has affirmed a sentence of death imposed by any other court.⁷¹ It is to be noted that this right of appeal is in respect of both interlocutory and final decision of the Court of Appeal in any civil or criminal proceedings.⁷²

In a scenario where a *Shari'ah* Court of Appeal of a State confirms the decision of an Upper *Shari'ah* Court, and a convicted person pursues his right of appeal in line with our criminal justice system and the Constitution, to the Court of Appeal, some serious constitutional questions are bound to arise. This is because by virtue of the provision of section 244(1) of the Constitution, the Court of Appeal is constitutionally empowered to receive or entertain appeal from the decisions of the *Shari'ah* Court of Appeal only in proceedings where Islamic Personal Law is involved. The Court of Appeal has clearly no constitutional power to receive appeals on the decisions of the *Shari'ah* Court of Appeal in proceedings involving Islamic Criminal Law. In other words, the current constitutional hierarchical order of the judicature does not contemplate the Court of Appeal receiving or entertaining appeals involving criminal proceedings from the *Shari'ah* Court of Appeal. In fact, this is one of the arguments advanced against the criminal jurisdiction of *Shari'ah* Court of Appeal that since appeals from the Court to the

⁶⁸ Ruud Peters, *Islamic Criminal Law in Nigeria*, (1st pub. Spectrum Books Limited, Ibadan, 2003) 17 and 35.

⁶⁹ See sections 240, 244, 242, 272, 277 and 233 of the Constitution of the Federal Republic of Nigeria, 1999 (as amended).

⁷⁰ See sections 233(1) and (2), *ibid.*

⁷¹ Section 233(2) (d), *ibid.*

⁷² Lawal Pedro, (n 40) 36.

Court of Appeal is limited by the provision of section 244(1) of the Constitution to any matter of Islamic Personal Law, the inference is that the Constitution does not contemplate any jurisdiction beyond this Islamic Personal Status for the *Shari'ah* Court of Appeal.⁷³

Concerning the above scenario, since the Court of Appeal is not constitutionally empowered to receive or entertain criminal appeals from the *Shari'ah* Court of Appeal, the logical conclusion is to hold that a convicted person for any offence under the *Shari'ah* Penal Code whose conviction has been affirmed by the *Shari'ah* Court of Appeal should forfeit his further right of appeal to the Court of Appeal and the Supreme Court. This in effect will definitely position the *Shari'ah* Court of Appeal as the Court of last resort on matters bordering on Islamic Criminal Proceedings.⁷⁴ The question here is that: can a state law take away a right conferred on a citizen by the Constitution which is the supreme law of the land? The answer is in negative. Therefore, the problem with the above view is that, the learned author failed to take into cognizance the fact that a State law cannot take away a right of appeal up to Supreme Court granted to the convict by the Constitution of the Federal Republic of Nigeria, 1999 (as amended). Besides that, the Court of Appeal has the power to set aside the conviction on the ground that *Shari'ah* Court of Appeal has no jurisdiction to entertain Islamic Criminal Proceedings.

It has been argued that there is nothing stopping the *Shari'ah* Court of Appeal from being the final court in any matter as it was before the enactment of the 1979 Constitution when it was a final court in all matters within its jurisdiction except those relating to fundamental rights and interpretation of the Constitution.⁷⁵ It was argued further that the 1999 Constitution must be construed to have intended this as it failed to provide as did the 1963 Constitution.⁷⁶

Arguing along the same direction is Ruud Peters who states that by virtue of section 244(1) of the Constitution, appeal from judgments of the State *Shari'ah* Courts of Appeal is only open in cases

⁷³ The Court of Appeal advanced substantially this argument in another context in *Umaru Fananami v Bukar Sarki* (1961 – 1989) 1 Sh. L.R.N. 94 at pp. 102-103. See also A. A. Oba, (n 42) 160.

⁷⁴ Monsur Ibrahim Sa'id, (n 23) 188.

⁷⁵ A. A. Oba, (n 42) 160.

⁷⁶ Section 119 (1) (c) Constitution of the Federation, 1963.

involving Muslim Personal Law, however, if by virtue of State legislation, these *Shari'ah* Courts of Appeal were to hear other cases outside the Islamic Personal Law, the *Shari'ah* Court of Appeal will have power to do so but, these judgments would be final and constitutional if there is no possibility to challenge them.⁷⁷ Good examples here are the cases of *Safiyatu Hussaini Tungar Tudu v Attorney General, Sokoto State*⁷⁸ and *Amina Lawal v Attorney General, Katsina State*⁷⁹ where criminal appeals were entertained by the Sokoto and Katsina States *Shari'ah* Courts of Appeal respectively. The judgments delivered by the two courts, despite the fact that they were bordered on Islamic Criminal Law, were arguably constitutional and final as long as there was no further appeal to the Court of Appeal. It has been observed that unless the National Assembly makes law to expand the scope of jurisdiction of the Court of Appeal to cover matters of Islamic Criminal Law, it is doubtful if the *Shari'ah* Court of Appeal may not be the terminal court for Islamic Criminal Causes and Matters.⁸⁰

Except and unless section 244(1) is amended to allow appeal from the *Shari'ah* Court of Appeal in criminal matter and except sections 237(2) and 288(1) are also amended to the effect that those three Justices of the Court of Appeal and Supreme Court be learned in Islamic Law which include Islamic Criminal Law, the *Shari'ah* Court of Appeal should be better served as a court of last resort in Islamic Criminal Law proceedings because the Justices of the two superior courts cannot do better than those Justices of the *Shari'ah* Court of Appeal in those areas. Equally, section 235 which is on the finality of decision of Supreme Court should be also amended accordingly.

However, looking at the powers of the Court of Appeal from another angle, it has been rightly argued that the Court may invoke its inherent powers of constitutional interpretation under the Constitution and treat the question of *Shari'ah* criminal causes and matters that come before it from the decisions of *Shari'ah* Courts of Appeal as purely constitutional matter. In this way, the Court of

⁷⁷ Ruud Peters, (n 67) 17.

⁷⁸ (2003) 6 FR 106.

⁷⁹ Unreported Judgment of Katsina State *Shari'ah* Court of Appeal, Suit No. KTS/SCA/FT/25/002.

⁸⁰ Monsur Ibrahim Sa'id, (n 23) 186.

Appeal may entertain cases on *Shari'ah* criminal causes and matters and pronounce a verdict on the constitutionality of the punishment so imposed by the *Shari'ah* Courts at State levels as well as the constitutionality of the *Shari'ah* criminal legislation, if invited to do so.⁸¹ In the meantime, unless such opportunity is exploited and the Court of Appeal exercises its inherent powers of constitutional interpretation under the Constitution and makes a clear pronouncement on this controversial and thorny constitutional matter, opinions and views will continue to be diverse.⁸²

8. RIGHT OF APPEAL TO THE SUPREME COURT FROM THE COURT OF APPEAL ON SHARI'AH MATTERS

Unlike some other Federation of the world where each State or federating unit of the Federation has its separate appellate or Supreme Court to hear appeals from decisions of the High Court, Nigeria has one Supreme Court, which has exclusive jurisdiction to hear and determine appeals from the decision of the Court of Appeal.⁸³ The Supreme Court which is the apex court in Nigeria is a creature of the Supreme Court Act and the Constitution of the Federal Republic of Nigeria, 1999. The powers and jurisdictions exercised by the Supreme Court are those vested upon it by the Constitution and other statutes validly empowered to confer such jurisdiction.⁸⁴ In practice, it sits only in the Supreme Court Complex in the Federal Capital Territory, Abuja. However, there is no provision in the Constitution or any statute that prohibits the Supreme Court from sitting or holding session outside Abuja and in any of the States of Nigeria.

The Supreme Court Act as an existing law is saved under section 315 of the Constitution of the Federal Republic of Nigeria, 1999. Sections 230 to 236 of the Constitution under 'The Judicature', specifically deal with the establishment of the Supreme Court as a Federal and the Apex Court in Nigeria and state its powers and jurisdiction amongst others. The Supreme Court is the highest Court in Nigeria and the Constitution of the Federal Republic of Nigeria 1999 which establishes it has various provisions affecting its

⁸¹ Ibid, 188 – 189. See also section 241 (1)(c) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended).

⁸² Ibid.

⁸³ Lawal Pedro, (n 40) 19. See also *Kalu v Odili* (1992) 5 NWLR (Pt. 240) 130 at 190 SC.

⁸⁴ See *Adili v State* (1989) 2 NWLR (Pt. 103) 305 at 313 S.C.

powers and jurisdiction. Therefore, since the exercise of the function of the Supreme Court is statutory, its powers are circumscribed by the provisions of the Constitution and the Rules of practice made thereunder.⁸⁵

The Supreme Court cannot exercise its jurisdiction without a proper constitution of the required members of its panel qualified to hear and determine an appeal. The Supreme Court shall be constituted by not less than five Justices in the exercise of its jurisdiction under the Constitution. For matters relating to its appellate jurisdiction in respect of interpretation of the Constitution or enforcement of fundamental rights under Chapter IV of the Constitution, it shall be comprised of seven Justices.⁸⁶

On the issue of right of appeal to the Supreme Court from the Court of Appeal whether on *Shari'ah* or on any other matter, such a right of appeal must be conferred by statute as it is a curtailment of the jurisdiction of the court from which the appeal lies and an extension of the jurisdiction of the court to which the appeal goes. For the right to exist, it must come within the purview of the statute.⁸⁷ Section 233(1) of the Constitution provides that the Supreme Court shall have jurisdiction, to the exclusion of any other court of law in Nigeria, to hear and determine appeals from the Court of Appeal. Therefore, the Supreme Court lacks the jurisdiction to entertain any appeal directly from the decisions of a High Court, *Shari'ah* Court of Appeal or other lower courts except the Court of Appeal.⁸⁸

It is observed that section 232 of the Constitution provides for the original jurisdiction of the Court while section 233 provides for its appellate jurisdiction which is statutory. A cursory look and careful study of section 233(1) of the Constitution reveals that the Supreme Court shall equally have power and jurisdiction to hear and determine appeals from the Court of Appeal with respect to the civil

⁸⁵ See Supreme Court decisions in *Adigun v Attorney General of Oyo State* (No. 2) (1987) 2 NWLR (Pt. 56) 197 and *Alao v ACB* (2000) 9 NWLR (Pt. 672) 264 at 283.

⁸⁶ Section 234 of the Constitution of the Federal Republic of Nigeria, 1999 (as amended).

⁸⁷ *Ohai v Akpoemonye* (1999) 1 NWLR (Pt. 588) 521 SC; (1999) 1 SC 96, *Onitiri v Benson* (1960) SCNLR, 314; (1960) 5 FSC, 150-155.

⁸⁸ See *Guobadia v State* (2004) 6 NWLR (Pt. 869) 360 SC; (2004) 2 SC (Pt. 11) 1, (2004) 17 NSCQR 222; *Ogoyi v Umagba* (1995) 9 NWLR (Pt. 419) 283 SC and *Harriman v Harriman* (1987) 3 NWLR (Pt. 60) 244 SC.

appeal bordering on Islamic Personal Law which the latter has constitutional competence to receive from the *Shari'ah* Court of Appeal. In other words, appeal from *Shari'ah* Court of Appeal involving Islamic Personal Law already heard and determined by the Court of Appeal can be further constitutionally appealed to the Supreme Court which has constitutional power to receive. Although, the section does not expressly restrict such appeals from the Court of Appeal to matters involving Islamic Personal Law, section 288(1) of the Constitution requires the President to have regard to the need of having Justices learned in Islamic Personal Law in Supreme Court. The inference from this provision is that the Supreme Court can as well entertain *Shari'ah* appeals from the Court of Appeal on only matters bordering on Islamic Personal Law. Certainly, the reason for this constitutional requirement is that appeals from the *Shari'ah* Court of Appeal on matters involving questions of Islamic Personal Law go to the Court of Appeal and finally to the Supreme Court.⁸⁹

The implication of the above appeals arrangement under the Constitution is that where a *Shari'ah* Court decides a case on *Shari'ah*, then, all the courts exercising appellate jurisdiction over the case, including the Supreme Court are bound by law to apply *Shari'ah*.⁹⁰

A critical look at provision of section 233 which deals with appellate jurisdiction of the Supreme Court and sections 286 to 296 of the Constitution, it is not stated expressly or by implication that the Supreme Court has jurisdiction to entertain Islamic Criminal Proceedings. Constitutionally speaking, in order to determine whether or not the Supreme Court can entertain matters involving Islamic Criminal Proceedings, recourse shall be had to the provision of section 244(1) of the Constitution which expressly restricts appeals from the *Shari'ah* Court of Appeal to the Court of Appeal to matters of Muslim Personal Law and no more. The logical conclusion the provision of this section can take or lead us to is to

⁸⁹ See sections 244(1) and 233(1) and (2) of the Constitution of the Federal Republic of Nigeria, 1999.

⁹⁰ Bala Babaji, 'An Assessment of the Provisions Relating to *Sharia* Under the Constitution of the Federal Republic of Nigeria, 1999', *Journal of Islamic Law A.B.U. J.I.L.*, (2000 – 2001) (11) 49.. See also the Supreme Court decision in *Itada v Malumfashi* (1993) SCNJ (Pt. 11) 504 and the Court of Appeal decision in *Ibrahim v Muhammed* (1998) 4 NWLR (Pt. 545) 176.

hold that since the Court of Appeal has no constitutional competence to entertain appeal from the *Shari'ah* Court of Appeal on matters involving Islamic Criminal Proceedings, then, it follows that such Islamic criminal appeal can never be part of either original or appellate jurisdiction of the Supreme Court. Since the Court of Appeal does not entertain such appeal, and the appeal from the *Shari'ah* Court of Appeal does not and cannot directly go to the Supreme Court, then, the logical conclusion is that the Constitution does not even contemplate of such Islamic Criminal Appeal to go to the Supreme Court.

It is to be observed that appeals relating to Islamic Law matters are heard and determined by a special panel in the Court of Appeal, consisting of at least three Justices of that Court learned in Islamic Personal Law.⁹¹ No such arrangement is made at the Supreme Court except that the President should ensure that there are among those Justices of the Court persons learned in Islamic Personal Law without stating a minimum mandatory number of Justices of the Supreme Court learned in either Islamic Personal Law or Islamic Law.⁹² It is submitted that since the Constitution uses the word 'persons' which is in plural form, it means that the Justices learned in Islamic Personal Law to be appointed to the Supreme Court must be more than one Judge. On the issue of number of Justices of Supreme Court to hear and determine appeals involving Islamic Personal Law from the Court of Appeal, it is submitted that since the matter does not touch or border on the interpretation or application of the Constitution or on question as to whether any provisions of Chapter IV of the Constitution has been, is being or is likely to be contravened,⁹³ a panel of not less than five Justices constituted by the Chief Justice of Nigeria will be constituted.

It is to be observed that *Shari'ah* Courts in Nigeria includes Court of Appeal and the Supreme Court. In other words, it can be seen that application of *Shari'ah* is not restricted to States Courts only but, also extends to Federal and constitutionally established courts.

⁹¹ See section 237(2) (b) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended).

⁹² See section 288(1), *ibid*.

⁹³ See sections 234 and 233(2) (b) and (c), *ibid*.

9. CONCLUSION

The paper carefully looked at the powers of a appellate courts in Nigeria. The paper carefully examined relevant constitutional provisions with a view to discovering whether or not appellate courts in Nigeria comprising of the State *Shari'ah* Court of Appeal, High Court of the States, High Courts of Federal Capital Territory, Abuja, Court of Appeal and Supreme Court have constitutional powers to entertain Islamic Criminal Proceedings. The paper carefully examined section 277(1) and (2) of the Constitution which deals with the jurisdiction of the *Shari'ah* Court of Appeal in the State, the provisions of sections 272(2) and 257(2) of the Constitution which deal with appellate jurisdiction of the State High Court and the High Court of the Federal Capital Territory, Abuja. The study found further that both the High Courts are conferred with jurisdiction to entertain appeals from decisions of subordinate courts such as Magistrate Courts, Upper Area Courts or Upper *Shari'ah* Courts provided that the *Shari'ah* matters do not raise or involve the questions of Islamic personal law under section 277 or the questions of customary law under section 282 of the Constitution which curtail the appellate jurisdiction conferred by the Constitution on the two High Courts.

The study found that the fact that the Upper *Shari'ah* Court is also a subordinate court, its civil and criminal decisions can be appealed to the appellate divisions of State High Court of *Shari'ah* implementing States provided that its civil appeal does not involve or raise questions of Islamic personal law under section 277 of the Constitution. The study further found that High Court of the Federal Capital Territory Abuja has power to entertain criminal appeals from the decisions of an Upper Area Court or any Area Court Grade I or II. The study further found that as far as the interpretation of the scope and extent of the jurisdiction of the *Shari'ah* Court of Appeal is concerned under the provision of section 277(1) and (2) of the Constitution, the position of the law is settled in view of several decisions of the Court of Court of Appeal and the Supreme Court to the effect that *Shari'ah* Court of Appeal has only appellate and supervisory jurisdiction in civil proceedings involving questions of Islamic Personal Law and it has no power or jurisdiction to entertain criminal proceedings/appeals.

The paper equally discussed and examined jurisdiction of the Court of Appeal and Supreme Court in relation to *Shari'ah* matters. The study revealed that although the decision of the *Shari'ah* Court of Appeal is appealable to the Court of Appeal, section 244(1) of the Constitution has patently and unambiguously restricted such appeals to any matter involving Islamic Personal Law. The study further found that the *Shari'ah* appeal that the Supreme Court can receive or entertain from the Court of Appeal is the only one involving or pertaining to the questions of Islamic Personal Law.

10. RECOMMENDATIONS

Section 277(1) of the Constitution is strongly recommended for amendment to, in clear terms, include appellate jurisdictions in civil and criminal proceedings. The section should be amended to read: “The *Shari'ah* Court of Appeal of a State shall, in addition to such other civil and/or criminal jurisdiction as may be conferred upon it by the law of the State, exercise...”

If this amendment is effected, it will empower the *Shari'ah* Court of Appeal to equally hear and determine appeals in *Shari'ah* civil and criminal proceedings and also all appeals in proceedings involving the enforcement of the provisions of the *Shari'ah* Penal and Criminal procedure Codes. Under this suggested arrangement, the constitutional right of a convicted person is thus safeguard. Appeals on the decisions of *Shari'ah* Courts in criminal proceedings will be constitutionally allowed to lie to the *Shari'ah* Court of Appeal of the concerned States.

The word ‘personal’ section 277 and wherever it appears in the Constitution is recommended to be deleted to give room to the *Shari'ah* Court of Appeal to entertain appeals in all Islamic law matters including Islamic penal system. Section 272 is also recommended for amendment in a manner that the State High Court will no longer entertain any appeals from the lower or Upper *Shari'ah* Courts so as to pave way for the *Shari'ah* Court of Appeal, whose judges are learned in Islamic law, to hear and determine such appeals in both civil and criminal proceedings. With this amendment, the constitutional right of a convicted person under various *Shari'ah* Penal Codes is thus safeguard.

On the problem of appealing the decisions of the *Shari'ah* Court of Appeal (in proceedings involving Islamic Criminal Law Matters), the relevant constitutional provisions, that is, sections 240, 241, 244, 247 and 237 of the Constitution regulating the appointments of the Justices of the Court of Appeal, its composition and jurisdiction should be accordingly amended. The amendment should cater for the appointment and inclusion of persons learned in Islamic law which includes Islamic Criminal Law, among the Justices of the Court of Appeal. In the same manner, the suggested amendments shall empower the Court of Appeal to receive appeals from the *Shari'ah* Court of Appeal even in proceeding involving Islamic Criminal Law and to mandate the composition of the Court to include among its Justices persons who are learned in Islamic Criminal Law while determining appeal from the *Shari'ah* Court of Appeal on matters that pertain to Islamic Criminal Law. Essentially, the word 'personal' in the above provisions should be deleted so as to pave way for both Court of Appeal and Supreme Court to entertain appeals in all Islamic matters including Islamic Criminal Proceedings.

In order to pave way for the Supreme Court to entertain appeals from Court of Appeal with respect to matters involving Islamic Criminal Law, provisions of sections 232, 233, 234, 235 and 288(1) of the Constitution regulating the appointments of the Justices of the Supreme Court, its constitution and jurisdiction is recommended for amendment. The amendment should allow the appointment and inclusion of persons learned in Islamic Law which includes Islamic Criminal Law among the Justices of the Supreme Court. In the same vein, the suggested amendments shall empower the Supreme Court to receive appeals from the Court of Appeal in proceeding involving Islamic Criminal Law and mandate the constitution of the Court to include among its Justices persons who are learned in Islamic Criminal Law while determining an appeal from the Court of Appeal on matters bordering on Islamic Criminal Law. It is suggested that as in the case of the Court of Appeal, a minimum mandatory number of Justices of the Supreme Court learned in Islamic Law/Islamic Criminal Law be included in its constitution.

With this suggested arrangement, the appeal from the *Shari'ah* Court of Appeal with respect to Islamic Criminal Matters will lie to the Court of Appeal and the appeal from the latter regarding the

same Islamic Criminal Law matters will finally lie to the Supreme Court which decision shall be final based on the provision of section 235 of the Constitution.