ARE CANON LAW AND CIVIL LAW FOES OR FRIENDS? REFERENCE TO NIGERIA*

Abstract

The call for Canon Law to be 'reviewed, collated, synthesized and fully incorporated into the judicial system' of Nigeria[1] was heard for the first time, so to speak, in the wake of the Sharia controversy during the 'great debate' that followed the publication of the recommendations of the Constitution Drafting Committee 1976-1977, and also at the constituent Assembly 1977-1978. The Committee had then recommended the establishment of a Sharia Court of Appeal with Grand Mufti, Deputy Grand Mufti etc.[2] to be integrated with the national judicial structure on the federal level. The intransigence with which some Muslims insisted on the adoption of this system and the equally unyielding and stiff opposition with which this demanded was met by a great majority of Nigerians are now history which we need not go into here. The call for Canon Law Courts for Christians was then made by way of reaction to this Muslim move. It was however not made with much insistence or zeal by its advocates. When the sharia controversy seemed to abate, the call for the canon law system apparently fizzled off; and not even the momentous promulgation of the then new Code of Canon Law on January 25, 1983 by Pope John Paul II[3] appeared to have awakened much enthusiasm on the part of even the enlightened Christians. Recently, this call for mainstreaming of Canon Law into the Nigerian legal system resurfaces again as a reaction to first, the expansion of Islamic law application to include criminal and other aspects and enforced with state machinery, and second to the agenda of Islamization of an entire country that is supposed to be a secular state. This study deems it apt and timeous once again to ask and respond to these questions: What is Canon Law, anyway? What is its scope and underlying philosophy? 'How do Canon Law principles relate or compare with the civil law system? In fact, are Canon Law and Civil Law friends or foes? Are both systems miscible or otherwise? A reflection on some of these and like posers on the subject will no doubt be rewarding.

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1. The Origin of Common Law

Codifications of universal codes of Canon Law for the Latin Church are relatively recent phenomena, even though canon law is the oldest continually functioning legal system in the world.[4] The next oldest legal system, namely, the common law system**,** is in terms of antiquity of origin 800 to 1,000 years younger than the Canon Law. In point of fact, the common law in which Nigerian lawyers are trained after the Anglo-American tradition had its genesis in the Canon Law.[5] Canon law was the means by which many concepts of Roman law (e.g. Corporations) entered the common law. When William the Conqueror invaded England (which led to the Norman Conquest) from Normandy in 1066, he brought along with him his first Chancellor Maurice, who was a cleric and a canon lawyer.[6] In establishing a legal system for the conquered land, Maurice drew largely from canonical and Roman legal concepts with which he was familiar as a canon lawyer. Gradually the common law developed from these systems. Hence, the Lord Chancellor of England who was invariably an ecclesiastic learned in Canon Law is a very well-known figure in the development of the English legal system upon which Nigerian legal system largely impinges. His role in the development of the common law system has been underscored, but it is in the other arm of the English legal tradition, namely Equity, that he is best known

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[1] See for example Adegbola E.A.A., 'Equality for all Religious Groups' THE GREAT DEDATE DEBATE – *A Daily Time* Publication (1977) at p. 74.

[2] See Reports of the Constitution Drafting Committee: Federal Ministry of Information (1976) vol. 1 Art. 180(1) (c) p. 73.

[3] *Acta Apostolicae Sedis* (ASS) Vol. 85, pars. 11 (January 25, 1983).

[4] Canon Law beginnings pre-dated the Council of Chalcedon 451 A.D.

[5] The English Common Law had its formative years about 1154 – 1307 A.D. See e.g. Arthur R. Hogue, *Origins of the common Law* (Indianapolis. Indiana U.P. (1961) p. 11. See also Bruce, R., *Success In Law* Cox & Wyman Ltd. (London) 1977, p. 22.

[6] Maida, AJ & Cafordi, N.P. *A Canon Law Handbook*, CHA. St. Louis, M.O. (1984) The Relationship of Canon and Civil Law p. 104 at 114 ftn. 4.

for. He was at once the Lord Chancellor of the realm, the king's chief secretary and chief advisor, the king's chaplain and 'keeper of the king's conscience'.[7] His standing can then be judged from all these and his distinct advantage sprang from his special grounding in canon law.

2. Development and Codification of Canon Law

Canon law has its early beginnings in the collections of laws attributed to the Apostles of Christ. These are the so called 'Pseudo -Apostolic' collections which provide a good perspective on the religious life and habits of the early Church. By the year 451, at the Council of Chalcedon, reference was already being made to a '*Codex Canonum'* being a collection of the decrees of the Oriental Councils.[8] There were other collections in the West like the '*Corpus Canonum'* (Body of canons) by a monk called Denis (*Dionysiana Corpus Canonum*) in the sixth Century. Yet, the most famous compilation was the concordance by Gratian, a Tuscan monk, in the 12th century, called the 'Concordance of Discordant Canons' *(Concordantia Discordantium Canonum),* which was the first successful attempt to harmonise canons previously compiled through principles of interpretation. Other notable pre-code collections were compiled under Pope Gregory IX by St. Raymond of Penyafort. Popes Boniface VIII (1294 - 1303), Clement V (1305 – 1314) and John XXII (1314 – 1334) caused additions to be made to this compilation known as the *Decretals* of Gregory IX.[9] The Council of Trent issued many disciplinary laws which were promulgated by Pope Pius IV in 1564. Together with what has gone before, these disciplines of Trent formed the primary sources of canonical legislation till the first Vatican council (1869 -1870) where serious calls were made for the need for reform of Canon Law.

In 1904, Pope St. Pius X appointed Cardinal Pietro Caspari to head a commission of code reform. The commission worked until 1914 and had the code ready by 1915 but the Pope died. The promulgation was therefore delayed. It was Pope Benedict XV his successor, who later promulgated the new, and for the first time, universal code of Canon Law for the Western Church on Pentecost Day 1917, to take effect the following year.[10] This code is sometimes referred to as the Pio-Benedictine Code – the first codification of Canon law that abrogated and superseded all earlier compilation.[11] The Pio-Benedictine Code continued in force till the promulgation of the Code of Canon Law on January 25, 1983 by Pope John Paul II. This Code took effect on November 27, 1983.[12] It took nearly two decades of intense reform, revision and formulation which followed the original announcement of this revision on January 25, 1959 by Pope John XXIII when he also announced his intention to convoke the second Vatican Council.[13] A lot of work went into it before its final publication. Vatican II Council was called in order to bring the Church up to date or 'in tune with the times' (*aggionamento*). So this Code was to bring the Church's law' in tune with the times'. A number of reviews had been made on the Code by successive supreme legislators such as made by Pope Francis, recently.

3. Canon Law *versus* Civil Law: Jurisprudential Perspectives

The relationship between Canon Law and Civil Law for the purpose of this section of our study would be done under the following subjects:

Sources, Law Making and Application

Civil law orders a political community. Canon law is an instrument for the Church's mission which is the 'kingdom of God'. Civil law is an instrument of the mission of the state which is the common good. In terms of source and ambit, the very foundations of Nigerian legal system are so different that canon law only seems to be law by analogy *vis-à-vis* the kind of civil law practiced in Nigeria. Nigerian Civil law is rooted in the received English law (Anglo-Saxon), common law tradition and customary law.[14]

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[7] Bruce, R. *op. cit* at p. 25.

[8] Abbo. J. A. & Hannon J. D. *The Sacred Canons* Vol. 1 rev. ed. St.Lousi B. Herder Book Co. (1957) p. 11 cited in a *Canon Law Handbook* (supra 6.) p. 1. – *A Brief History of Canon Law*.

[9] Ibid at p.xv

[10] Ibid at p. XIX; Kuttner S. 'The Code of Canon Law in Historical Perspective' *The Jurist*, vol. 28 (1968) p. 137 cited in Maida and Carfordi *op. cit* p. 3.

[11] Kuttner *op. cit* at p. 139.

[12] Maida and Carfordi *Op cit*. p.6. See also 3 supra.

[13] Donald R. Heintschellin, 'A New Way of Thinking' *The Jurist*, 44 (1984: 1) p. 41.

[14] Park A. E. *Sources of Nigerian Law* (Sweet & Maxwell) A.U.P. (1963) passim; Ogwurike C. *Concept of Law In English-Speaking Africa* (Nok Publishers Intern.) Lagos, 1979 Chap. I pp. 23 ff.

Canon law on the other hand is rooted in the Roman law particularly as codified by Emperor Justinian the *'Codex Justinianus'* which was better known as the '*Corpus Juris Civilis'*.[15] The Code of Canon Law under consideration is much a Roman Code in the sense that it is not a code for the entire Catholic Church but rather a code of law for the Latin or Roman Rite within the Catholic Church. Canon 1 makes this clear as it states that 'The Canons of this code affect only the Latin Church'. The law for Oriental Churches is contained in other documents. Moreover, the Code does not encompass all that is the law for the Church in every matter. Beside the canon law in the 1983 Code, there is an additional law for the Church called liturgical laws which are found in other places such as the sacramentary, lectionary and ritual for the administration of various sacraments and performance of other rites.

Canon law follows Roman law tradition in source, material and competences. Roman law was broadly divided into written law ('*jus scriptum'*) and unwritten law ('*jus non-scriptum'*) i.e. custom '*consueudo*'. Custom has an important place in canon law as seen in canons 23 through 28. In Canon Law, custom must be reasonable. A reasonable custom contrary to written law has status in canonical system provided that the custom must be that of a community within the Church capable of receiving law such as diocese, an ecclesiastical province, the region of an Episcopal conference etc. Moreover, custom must be approved by either the legislator or by thirty years duration.[16] Canon 27 states that custom is the best interpreter of law. Under the Nigerian law, a rule of customary law to be enforced must not only be reasonable but also must pass 'the repugnancy test' and not conflict with a statute in force.[17] With regard to written laws, the law maker under Canon Law is not a legislature or parliament or assembly of people as obtains in a civilian regime, but like under Roman law where the law issued from the Emperor ('constitutions' or the emperor), the legislator is fundamentally the Bishop, the Pope, or Assemblies of Bishops.[18] Yet, canon law respects the ideals of limited government or constitutionalism,**[19]** otherwise seen as checks and balances placed on the use of gubernatorial power. Paragraph 2 of Canon 391 names the bishop as the legislator in the diocese. Legislative power under Canon Law is generally not delegated.[20] Yet, Canon 445 describes the legislative authority of particular councils or councils of Bishops on the provincial or national levels. Interesting is the provision of Canon 445 where a conference of Bishops and special cases where the conference can legislate provided there is two-thirds majority and the legislation is recognized by the Holy See. Other legislative bodies with appropriate checks are found under Canon 341 such as College of Bishops in an ecumenical council; and Synod of Bishops in certain cases.[21] Above all, Canon 333 states that the Pope is the supreme legislator and against his legislation and/or decrees there is no appeal or recourse.

Judicial Review, Precedent, '*Stare Decisis'*

As we have seen earlier, even though canon law and civil law (Common law) have a common root, they developed differently. One of the pivotal pillars of constitutionalism in the common law system is what is called the principle of judicial review of legislative and administrative (executive) actions.[22] Canon law following from Roman law operates a system of 'legislative or executive supremacy'. In civil law, (common law system, that is), what obtains is a system of 'judicial supremacy', that is a system in which the judiciary (the court or judge) has the power to review legislation for consistency with provisions of a written constitution or an executive (administrative) act for consistency with enabling statute, also, on the principles of natural justice.[23] This concept of judicial review found in civil law is absent in canonical jurisprudence. The implications of this difference are quite far-reaching. In common law, it is the court (the judge, the judiciary) which ultimately says what the law is, and the Supreme Court which is at the apex of the judicial structure has the last word as the authentic interpreter of the law. In

[15] See Barry, Nicholas: *An Introduction to Roman Law* (Clarendon – Oxford, (1962) p. 39.
[16] Contrast with requirements of Civil Law which involves the 'repugnancy test' etc. See 17A (infra)
[17]A. rule of Customary Law sought to be enforced must among other things not be found to be repugnant to 'natural justice, equity and good conscience' or incompatible with any statute in force.
[18] This is also a logical deduction from what has been said above regarding canonical jurisprudence.
[19] See Nwabueze B. *Constitutionalism in Emergent States*; C. Hurst & Co. London (1973) Chapt. I pp. 1-3.
[20] Can. 135 par. 2.
[21] Canon 343.
[22] See e.g. Section 6 of the Constitution of the Federal Republic of Nigeria (1979) Federal Ministry of Information Lagos. See also Nowak, Rutunda and Young, *Constitutional Law* (West Publishing co. 1978.
[23] The principles that 'no one is a Judge in his own case' – *'nemo judex in causa sua'* and 'the other side must be heard' – '*audi alterem partem'*

the Canon Law system, the authentic interpreter of Canon Law is not the court or judge but the legislator, that is, the Apostolic see for universal law, and the diocesan Bishop for diocesan law.[24]

As a corollary to the above, in Canon Law, there is no case law developed by the courts, and '*stare decisis'* (binding precedent) does not apply. Lawyers trained in the common law system know what preponderant role the doctrine of precedent *'stare decisis'* plays both an a source of and in the development of the law. In canon law, on the other hand, Canon 16 lays down that a judicial sentences of the local ecclesiastical court i.e. diocesan courts and even the sentences of the sacred Roman Rota (i.e. the supreme Court of the Catholic Church) are not judicially binding on anyone also other than the parties to the case themselves only. The sentence of the Rota however is of course of the highest persuasive effect in the learned opinions of canonists especially where there is a lacuna or doubt in the law. But that is where the matter rests since the Rota is not bound even by its own previous decisions or precedents. In Canon Law, the administrative (governmental) acts of the Bishop in the strict sense are not subject to the regular court system. Canon 1400 states that controversies arising from acts of administrative power must be resolved by recourse the superior or an administrative tribunal rather than by the ordinary form of adjudication. In other words, this is something analogous to 'petition of rights' in the common law tradition. Controversies arising from administrative acts go to the *Apostolic Signatura*. So in the Catholic Church, there are two Supreme Courts, namely, the Roman Rota which is the court of appeal for regular controversies arising in the Church, and the *Apostolic Signatura* which is the supreme administrative tribunal.[25]

Dispensations

Another common feature of the exercise of executive/administrative power in the Church is the possibility of dispensations. This is a concept quite unknown to civil law. Canon 85 calls dispensation 'a relaxation of law in a particular case'. Commentators call this '*vulnus legis'*, a wounding of the law.[26] This concept is quite alien to civil law. Where the law has to be changed, the legislature does it. The courts may through a devious process of 'judicial legislation,' case law interpretation, find exceptions or make distinctions but the executive arm of civil government does not grant dispensations.

Privileges

Akin to dispensations in Church law is the feature of privileges. The clerics under the 1917 Code used to enjoy four special privileges called **'**clerical privileges', namely, the privilege of the canon, the privilege of the forum, the privilege of competence, and the privilege of immunity. Spectacular was the privilege of immunity by which a cleric was protected from arraignment before a civil tribunal. All the four privileges have been dropped in the 1983 Code. Privileges as conceptualized under Canon law are alien to the civil law of the common law tradition.[27] In civil law the judge can grant injunctions or court orders and can even impose penalties in certain cases. Under Canon law, it is the legislator (the Bishop) himself who grants injunctions or orders through particular precepts or penal precepts.

Rights and Obligations

Traditionally in the Church, only clerics could exercise the power of government (*munus regendi*) in the Church but Canon 129(2) now provides that non-clerics may cooperate in this power of governance. The extent of this cooperation is not spelt out yet. Hence, a novelty of the 1983 Code is the listing, in Title I of Book III of the Code, of the obligations and rights of the Christian faithful. In addition to this, there are three separate sections pertaining to the rights and obligations of the clerics, the rights and obligations of the religious, and the rights and obligations of the laity respectively. Here again, as is typical of Canon Law, the meaning of rights and obligations is to be determined by legislative interpretation, by the common and constant opinion of learned canonists and such things as the practice of the Roman Congregations. The determination, especially interpretation of the contents, of guaranteed rights in civil constitutions and generally under the civil law (common law) system fall within the proper province of the judiciary. Canon 208 states that among all Christians based on their regeneration in

[24] Cf. Canon 16.
[25] *Art. Cit* at p. 23.
[26]Okeke, H. O, 'Introducing the instruments of ecclesiastical administration' Seminar Paper on Diocesan Administration: IV. 6. P. 12 (1986).
[27] There are diplomatic and other privileges and immunities under civil law, anyway.

Christ, there is true equality in dignity and action by which all cooperate in building the Body of Christ according to each one's condition and office. This basic equality of dignity between all the people of God is a new clarification brought about by the 1983 Code stemming from the theology which inspired it.

The similarity/dissimilarity of canon law and civil law notwithstanding, the provisions for the rights and obligations of the 'Christian faithful' provided in the appropriate canons already mentioned, compare *'mutatis mutandis'*, very favourably with any civil code. For instance, Canon 212 provides for the 'right to be heard and to obey'. 'The right to their spiritual assistance and to their own spirituality' is stated in Canon 213-214. Canon 215 provides for the 'right to form associations'. The 'right to good name and privacy' is contained in canon 220. Canon 221 guarantees to Christ's faithful the right to 'legitimately vindicate and defend the rights which they enjoy in the Church before a competent ecclesiastical court in accord with the norms of law.' This right to access to justice appears the most vital and fundamental of the rights listed.

What has been shown so far go to substantiate the fact that canon law and civil law are only analogically the same law; they are more unlike than like, more dissimilar than similar.

4. 'Canonization' of Civil Law

Even though the jurisprudential perspectives of Canon Law and Civil Law as observed above are more dissimilar than similar, yet Canon Law and Civil Law are not two streams whose waters flow in two parallel channels that never mix. On the contrary, Canon Law occasionally adopts the very principles, procedures and formalities of the Civil Law in a given jurisdiction to be the applicable Canon Law in certain selected issues and transactions. In the 1983 *Code of Canon Law*, such occurs twenty-one times. Canon law does, at time, defer to civil norms. A canon may incorporate civil norms into the canonical sphere. This can also happen without explicitly citing the civil norm, but simply referring to the need to consult the civil law in an area. When this happens we have what is called 'canonization' of civil law. A '*locus classicus'* of this is found in canon 1290 of the 1983 Code which states:

> Whatever general and specific regulations on contracts and payments are determined in civil law for a given territory are to be observed in canon law with the same effects in a matter which is subject to the governing power of the Church, unless, the civil law regulations are contrary of divine law or canon law makes some other provision, with due regard for the prescriptions of canon 1547.

This means in effect that the Church generally accepts as applicable the principles of contract as laid down and observed in any particular civil territorial jurisdiction even when the said contract involves or touches the Church or any of the juridic persons. Canon Law, therefore, does not have any universal form of contracts. Even when two ecclesiastical juridic persons contract, the proper forum for both the civil and canonical realms is the civil forum for that territory, or proper international forum should that be the case.[28] This fact no doubt poses a lot of challenges and imposes much responsibility on lawyers, and at the same time offers new opportunities to them under the Code. These opportunities and challenges appear clearly, for example, in relation to an entirely new office in the Church created, for instance, under canon 492.[29] By virtue of this canon, there is to be in every diocese, a council, called the Financial Council (finance committee) presided over by the Bishop or his delegate. At least three of these members appointed by the Bishop must be persons who are experts ('*periti'*) in financial matters and the civil law. These appointees will hold office for a term of five years.[30] This provision for experts on the board of administration of the diocese has parallel provision for other juridic persons in the Church as in canon 1280. It is to be noted that this provision of the said canon is mandatory, provides tenure of office, contains no exceptions and is tied to a broad, general consultative role in the local Church and other juridic entities operated by the Church. It is quite significant that this canon 492 calls for experts, '*periti*' in civil law who participate in a role of advisors with general, not just a specific

[28]Coriden, J. A, et al (eds), *The Code of Canon Law: A Text and Commentary*, Geoffrey Chapman, London, 2001, p. 878.
[29]Canon 492 states; 'In each diocese a finance council is to be established by the bishop over which he himself or his delegate presides, and which is to be composed of at least three members of the Christian faithful truly skilled in financial affairs as well as in civil law, or outstanding integrity and appointed by the bishop'.
[30]Canon 492 par. 2.

advisory standing (as for instance, the Church lawyer, accountant etc.) in the diocese. Thus the Code has summoned civil lawyers to come right in to avail the local Church of their expertise and that not just as counsel briefed or retained on an '*ad hoc'* or case-to-case basis to assist the diocese, but now by virtue of a stable office required by Canon law itself. Hence, the 1983 Code has expanded and enhanced the position of the civil lawyer and called him to services in the Church.

More instances of canonization of civil law abound. Canon 105 indicates that legal emancipation of minors should follow the norm of civil law. Canon 877 indicates that the recording of adoptive parents should follow that which is practised in civil law. Canon 1540 assigns evidentiary value of documents in a canonical trial in line with that which is determined in the civil law of a jurisdiction. Other canons do not cite the civil law's regulation into the law, but simply instruct the party to follow civil law. For example, the canons on employment of laypersons refer to the need to follow civil law in a jurisdiction.[31] Pastors are also forbidden from marrying those who are unable to have their marriage recognized by civil law.[32] The Church also follows civil (international) law with respect to its diplomatic relations. While there is an ancient practice of the Pope sending legates to local Churches, in modern parlance apostolic nuncios are recognized not only as ecclesiastical representatives to a particular Church but also as civil ambassadors to a political entity.[33] Canon law indicates that these appointments are to follow the norms of international law with respect to the appointment and recalling of such ambassadors.[34]

The Code harps on the necessity to observe civil law requirements especially in the administration of the temporal goods of the Church. This call pervades all the provisions of Book V of the Code. Canon 1284 specifically lays down for administrators under paragraph 2 subsections 1, 2 and 3, especially subsections 2 and 3 which state: 2 Administrators must 'ensure the ownership of ecclesiastical goods is safeguarded in ways which are valid in civil law', and the stipulations of the founder or donor or lawful authority; they are to take special care that damage will not be suffered by the Church through, non-observance of civil law.

Civil actions can sometimes have definite effects in the canonical system. For example, a civil adoption creates legal effects in the canonical system. Thus, one who has legally adopted a person is neither free to contract a marriage with that individual nor their offspring, regardless of any civil restrictions on such a relationship.[35] Once the civil adoption has occurred, the legal relationship has begun and the impediment to marriage now exists.

In all these cases, civil law is 'canonised' and who is the minster of civil law other than the lawyer? From all this, it would appear that the waters of canon and civil law, though they may flow in different channels, do indeed mix at some points.

5. Civil Law Defers to Canon Law

One more issue is on how civil law looks at decisions obtained in ecclesiastical forums. We have seen, vide canon 1290, that canon law for certain matters adopts civil law prescriptions and procedure provided the prescription and procedure do not go against 'divine law or canon law'. Canon law would in such matters uphold a decision of the civil courts. But does civil law reciprocate this gesture? That we may see from some decided cases. As far as this study goes, it is not known whether there is a Nigerian decided case on the point.[36] In some other jurisdictions, however, there are a few. One of the major such decided cases is *Conzalez v. Roman Catholic Archbishop of Manila*[37] decided by the United States' Supreme Court in 1929. In that case, a pious foundation was created in a Will in 1820 for the offering of 60 Masses per annum for the repose of deceased members of the family of the testatrix. The Chaplain to this foundation was to be a member of the testatrix's family; under the canon law in force in 1820, a lay person could legitimately serve

[31] Canon 231, §1.
[32] Canon 1071, §1, 2º
[33] See Canon 362.
[34] Canon 362.
[35] Canon 1094; Code of Canon Law for the Oriental Churches, canon 812.
[36] Wrangles among some protestant groups in the country have been fairly common and except for what one sometimes reads in the news-papers, one has not been able to lay one's hand on a reputable law Report account.
[37] 280 U.S. 1. (1929) discussed in Nowak et al. *Constitutional Law op. cit* pp. 88-892.

as chaplain to such a foundation but the 1917 code changed that rule limiting such chaplaincy to clerics only. The Archbishop of Manila refused to name a certain lay member of the testatrix's family to the chaplaincy and that person sued to be appointed. This case went all the way to the U.S. Supreme Court. It was held per Brandeis of the Supreme Court that Canon Law was the governing rule of the Roman Catholic Church to which its members had voluntarily submitted.[38] Brandeis stated: 'In the absence of fraud, collision or arbitrariness, the decisions of the proper Church tribunals on matters purely ecclesiastical, although affecting civil rights are accepted in litigation before the secular courts as conclusive, because the parties in interest made them so by contract or otherwise'[39] In effect, the court characterized the Church as voluntary association of peoples and the Canon Law as the association's by-laws. As long as a person remains a member of the association, he is bound by the association's by-laws and these by-laws relate to all internal proceedings of the association.

The above ratio was followed in another case *Kedroff v. St. Nicholas Cathedral*[40] in which a New York State statute purportedly vested title and control of Russian Orthodox Church property in New York in the American branch of the Church denying all ownership and control rights of the Moscow Patriarchy in the same. In reviewing this statute, the U.S. Supreme Court ruled that as a matter of First Amendment right, state courts and state legislators cannot decide matters of Church government, faith and doctrine, or clerical appointments. It therefore returned control of the New York Church property to the bishop appointed by the Moscow patriarchy. It may be remembered that First Amendment referred to in this decision simply means the first Amendment to the American Constitution 1791 which states that 'Congress shall make no law respecting an establishment of Religion or prohibit the free exercise thereof.…'[41]

In yet another U.S. Supreme Court case, *the Serbian Eastern Orthodox Church v. Milivojevich*,**[42]** an attempt by an American based Bishop (Milivojevich) to stop the division of his diocese and its re-organisation by the Yugoslavian patriarchy through a court action was upheld by the Illinois Supreme Court which sided with the American Bishop on the grounds that the measure adopted in the proposed division of the diocese and transfer of property were procedurally and substantively defective under the internal rules of the Church. But the U.S. Supreme Court in reviewing this decision threw out the 'arbitrariness' exception. It prohibited civil law review of Church tribunals on the grounds of 'arbitrariness' in the sense of an inquiring whether the decisions of the highest ecclesiastical tribunal of a hierarchical Church complied with Church laws and regulations'.[43] It stated that 'there is a constitutional mandate that civil courts are bound to accept the decisions of the highest judicatories of a religious organization of hierarchical polity on matters of discipline, faith and internal organization or ecclesiastical rule, custom or law'.[44]Civil law, therefore, can take into itself canon law. In some countries, this results from explicit terms in a concordat. For example, in many non-common law jurisdictions ecclesiastical declarations of nullity of marriage or ecclesiastical separations of the spouses will have corresponding civil effects.

However, canon law may be assigned civil effects in a more indirect manner. An example of this exists in a Canadian case, *Hart v. Roman Catholic Episcopal Corporation of the Diocese of Kingston*.[45] This is a 2010 case where a priest was placed on so-called administrative leave after repeated warnings from the Archbishop of Kingston regarding financial issues and business relationships. Fr. Hart took the Archdiocese to the Superior Court of Justice for damages related to constructive dismissal. In the matter, Justice Beaudoin stated:

> The essence of the claim between Father Hart and the Archdiocese is ecclesiastical in nature and this court has no jurisdiction over that dispute. Moreover, the internal processes that are designed to deal with that dispute do not offend the principles of natural justice and Father Hart has not exhausted the internal processes available to him. For these reasons, these proceedings constitute an abuse of process and are stayed.

The Court of Appeal for Ontario upheld this decision in 2011. It based this on the reasoning that 'a person who voluntarily chooses to be a member of a self-governing organization and who has been aggrieved by a

[38] Gonzalez, 280 U.S. at 16 cf. supra at 29.
[39] Ibid.
[40] 344 U.S. 94 (1952).
[41] First Amendment to the American Constitution in 1791 and ratified by the states at various dates.
[42] 426 U.S. 696 (1976)
[43] Ibid.
[44] The Eastern Orthodox Diocese 426 U.S. at 714.
[45] Canada, 2011 ONCA 728 (Can LII).

decision of that organization must seek redress in the internal procedures of the organization: see *Levitts Kosher Foods v. Levin* (1999), 1999 CanLII 14818 (ON SC), 45 O.R. (3d) 147 (S.C.).' Additionally, it was clearly stated that 'the courts will interfere in the internal affairs of a self-governing organization in only two situations: where the organization's internal processes are unfair or do not meet the requirements of natural justice; or where the aggrieved party has exhausted the organization's internal processes. . . . The Roman Catholic Church is a self-governing organization. Its canon law provides an internal review process for ecclesiastical disputes. The expert evidence before the motion judge showed that where an administrative decree may affect the rights of a party, canon law requires that the party be given notice, an opportunity to respond and an unbiased tribunal. Canon law also provides a broad range of remedies, including the substitution of a different decree, monetary compensation and even a trial'. The Court clearly recognizes that canon and civil law have different purposes. This is a similar approach, in fact, to the approach of the canonical system to the civil sphere. The civil court recognized the basic concept of natural justice present in the prescriptions of the *Code of Canon Law*. It recognized that Fr. Hart was a voluntary participant in that organization, and it recognized that Fr. Hart did not make use of those means contained in Canon Law to advance his grievance.[46] In this sense, there is an indirect deferral to the canonical norms as they are written. The civil courts will certainly take action, however, when the internal rules are not followed, as the sex abuse crisis has repeatedly demonstrated.

It therefore seems settled that in a hierarchical Church such as the Catholic Church, the highest ecclesiastical authority, an assembly in some religious or a religious (clerical) superior in others is the final arbiter of doctrine and authority.[47] A ruling on ecclesiastical matter relating to doctrine, internal discipline, clerical appointments etc. could not be reviewed by the civil secular forum. Be that as it may, these foreign decisions, even though of the Supreme Court, are not directly binding in Nigeria, but given the constitutional jurisprudence of both countries as flowing from the common law tradition and the fundamental rights philosophy guaranteeing freedom of religion and the secularity of the state in both fora, the '*rationes decidendi'* of the cases in appropriate situations will be of the highest persuasive effect in Nigeria.

Courts, in general, have respected the authority of the Church to determine its own internal discipline. The Church sometimes 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 may 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 therefore 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.

6. Conclusion

Canon law has an old and time-honoured history. It differs in its jurisprudence and procedure from the Anglo-American system. It is very much like the Roman law and most West European civil law systems in which persons learned in the law called '*jurisprudentes*' or '*jurisconsulti', 'jurisperiti'* issue legal opinions applying statutory or code law to a set of facts. The difference in procedure between canon and common law systems do not in any way make the canon law an inferior legal system. It is just a different system from the Anglo-American system which is not necessarily by that fact, superior to canonical law. Canon law is law only by analogy. It is rooted more in Roman law rather than in common law. It is a special legal system which goes deeper and finds its roots not just in the code of Justinian, but in the spiritual law of the Scriptures. The purpose of canon law is to structure the people of God here on earth for the mission entrusted to the Church. The roots go back to the councils, the gospel and the sermon.[48] The world began on the Mount, moved to the Torah and the revelation of Mount Sinai, and to the Word of God which was with God before. Therefore, civil laws are to be observed by the Christian faithful in so far as they are not contrary to divine law and there is no contrary norm in canon law. Canon law thus does not yield to civil law in general, but only in certain specified matters. However, the challenge facing the Church is establishing an effective and credible system that does not provoke the state into interfering into the ecclesiastical sphere. The Church does not have temporal power that can confront the civil state. It is the moral authority of the Church of Christ that gives it credibility and authority. If this authority is lost, the state may assume interference with the internal affairs of the Church.

[46] A similar case can be found in *Anozie v. McGrattan*, 2017 HRTO 1208.
[47] Ibid. at 721.
[48] *Jurist op. cit* at p. 27.