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RELIGIOUS AND CUSTOMARY LAWS IN NIGERIA

*Abdulumuni A. Oba**

This Essay discusses the “religious law” and “customary law” paradigms in the context of the Nigerian legal system. It also examines the pluralistic nature of Nigeria in terms of ethnicity, religion, and law, and argues that the religious law paradigm is problematic for the discussion of laws at the global level generally and within the Nigerian legal system in particular. Then this Essay identifies customary law, Islamic law, and English law (common law) as the three legal traditions in Nigeria, and then proceeds to discuss their status and scope, the conflicts between them, and the particular challenges facing the Islamic and customary laws in Nigeria. This Essay concludes with suggestions for the way forward.

I. ETHNIC, RELIGIOUS, AND LEGAL PLURALISMS IN NIGERIA

Nigeria is pluralistic in terms of ethnicity, religion, and laws. There are more than 250 ethnic groups in Nigeria and within these groups are distinctive subgroups and communities.¹ This heterogeneous ethnic character exists across the country. Although, the Hausa-Fulani, Yoruba, and Igbo (Ibo) are the largest ethnic groups in the northern, southwestern, and eastern parts of the country respectively, there are also other sizeable groups in those parts of the country.²

Muslims, Christians, and adherents of various traditional religions are the three main religious groups in Nigeria. Muslims constitute the majority,³ although Christians generally dispute this.⁴ Muslims and Christians are the most powerful religious groups in the country.⁵ Although the Nigerian

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¹ See P.A.O. OLUYEDE, *PETER OLUYEDE'S CONSTITUTIONAL LAW IN NIGERIA* 21 (1992).

² CRAWFORD YOUNG, *THE POLITICS OF CULTURAL PLURALISM* 276–81 (1976).

³ CIA, *Country Profile: Nigeria*, WORLD FACTBOOK, <https://www.cia.gov/library/publications/the-world-factbook/geos/ni.html> (last updated Oct. 18, 2011) [hereinafter *Country Profile: Nigeria*]. The U.S. Central Intelligence Agency puts the figures at now fifty percent Muslims, forty percent Christians, and ten percent followers of traditional religion. *Id.*

⁴ See, e.g., *Conflict in Nigeria Not Just About Religion!*, AFR. COUNCIL RELIGIOUS LEADERS: RELIGIONS FOR PEACE (Afr. Council Religious Leaders, Nairobi, Kenya), Apr. 2011, at 1.

⁵ See Enyinna S Nwauche, *Law, Religion and Human Rights in Nigeria*, 8 AFR. HUM. RTS. L.J. 568, 577–79 (2008).

Constitution emphatically forbids the State from having an official religion,⁶ some have rightly pointed out that Islam and Christianity, given their prominence and governmental recognition, are de facto state religions.⁷

Religion is often conflated with ethnicity and regionalism in Nigeria. There is the talk of the “Muslim North” and “Christian South.” However, these are misconceptions. In the north, although Muslims are overwhelmingly the majority, there are pockets of non-Muslims.⁸ Similarly, in the south, while Christianity has a very strong followership, Islam also has a huge following among the Yoruba in the southwest and some adherents in the southeast.⁹

Legal pluralism in Nigeria is very complex, taking three distinct forms. First, there is the legal pluralism arising from the multifarious legal traditions or legal cultures in the country. Laws in Nigeria are derived from three distinct laws or legal systems: customary law, Islamic law, and English-style laws. Customary law is indigenous to Nigeria with each of the various ethnic groups in the country having its own distinctive customary law.¹⁰

Islam was common by the end of the eighteenth century and subsequently emerged as state law in the Kanem-Bornu and Sokoto Caliphates, which now constitute northern Nigeria.¹¹ Within the caliphates, there were large pockets of non-Muslim peoples to whom customary law, not Islamic law, applied and still applies.¹² Islam also penetrated into the south, but apart from some isolated instances, there was no state enforcement of Islamic law in the precolonial south.¹³

The English laws owe their antecedents in the country to colonialism. Apart from the common law that formed the nucleus of received English law, many statutory laws in both the colonial and postcolonial era would be included among English-style laws simply because the laws are largely reflective of English laws.

⁶ CONSTITUTION OF NIGERIA (1999), § 10.

⁷ Nwauche, *supra* note 5, 577–79.

⁸ See, e.g., ‘ABDURRAHMAN I. DOI, ISLAM IN NIGERIA 86–95 (1984).

⁹ *Id.* at 109–18, 158–84.

¹⁰ Yemisi Dina et al., *Guide to Nigerian Legal Information*, GLOBALEX (Feb. 2005), <http://www.nyulawglobal.org/globalex/nigeria.htm>.

¹¹ DOI, *supra* note 8, at 57–60; MURRAY LAST, THE SOKOTO CALIPHATE, at lxix (1977).

¹² See AHMED BEITA YUSUF, NIGERIAN LEGAL SYSTEM: PLURALISM AND CONFLICT OF LAWS IN THE NORTHERN STATES 55, 71–75 (1982).

¹³ See Muri Okunola, *The Relevance of Shar’ia to Nigeria*, in ISLAM IN AFRICA: PROCEEDINGS OF THE ISLAM IN AFRICA CONFERENCE 23, 24–26 (Nura Alkali et al. eds., 1993).

The second form of legal pluralism in the country arises from the country's federal system, whereby the federal and state governments share legislative power.¹⁴ This has resulted in differences between federal and state laws as well as differences among the individual states' laws. For example, federal laws govern statutory marriages while state laws govern Islamic and customary law marriages.¹⁵

The third expression of legal pluralism in the country is connected to the country's political history. Colonial authorities administered the northern and southern protectorates separately until their amalgamation in 1914.¹⁶ With the introduction of regionalism in 1954, the country was divided into three regions: northern, western, and eastern. These regions had a large measure of autonomy and thus developed along slightly different lines.¹⁷ Despite the subsequent creation of states beginning in 1967 (Nigeria now has thirty-six states and a Federal Capital Territory),¹⁸ this regionalism holds the key to understanding the current legal arrangements in the country. Until the regions were broken into states, uniform laws applied in each of the regions. Today, the bulk of the laws in the states owe their origin to the era of regionalism. Uniformity of laws in the northern states, particularly regarding Islamic and customary laws, continued largely until 1999, when twelve of the nineteen states in the north adopted Islamic law as the basic source of laws in their states in a largely uniform manner.¹⁹

II. THE PROBLEMATIC NATURE OF CLASSIFYING LAWS AS “RELIGIOUS” AND “CUSTOMARY”

The classification of some legal systems as “religious” is problematic at the global level. Three legal systems—Talmudic law, Islamic law, and Hindu

¹⁴ See CONSTITUTION OF NIGERIA (1999), § 4.

¹⁵ *Id.* sched. 2, pt. I, item 61.

¹⁶ See G. O. Olusanya, *Constitutional Developments in Nigeria 1861–1960*, in *GROUNDWORK OF NIGERIAN HISTORY* 518, 519–20 (Obaro Ikime ed., 1980).

¹⁷ See generally Ladipo Adamolekun, *The Nigerian Federation at the Crossroads: The Way Forward*, 35 *PUBLIUS* 3 (2005).

¹⁸ CONSTITUTION OF NIGERIA (1999), §§ 2(1)–3(1).

¹⁹ See INT'L CRISIS GRP., *NORTHERN NIGERIA: BACKGROUND TO CONFLICT* 5 (Dec. 20, 2010), available at <http://www.crisisgroup.org/~media/Files/africa/west-africa/nigeria/168%20Northern%20Nigeria%20-%20Background%20to%20Conflict.pdf>. The twelve Sharia states are Bauchi, Borno, Gombe, Jigawa, Kaduna, Kano, Katsina, Kebbi, Niger, Sokoto, Yobe, and Zamfara States. *Id.* at 5 n.1. The remaining seven northern states are Adamawa, Benue, Kogi, Kwara, Nassarawa, Plateau, and Taraba States.

law—are usually classified as religious legal systems.²⁰ However, these laws are not coherently homogenous. Apart from having their roots or sources in religion, these legal systems are conceptually and normatively different. While Talmudic law and Islamic law are based on Abrahamic faiths and are similar in some respects,²¹ there are often vast differences between them. Again, Talmudic law and Hindu law are based not only on religion, but also on race, whereas Islam is based exclusively on belief.²² Thus, Talmudic law and Hindu law are not only “religious law,” but also restricted to particular ethnic groups.

The notion of “religious law” is based on Western perceptions of religion, but there are differences between Western and Islamic conceptions of religion.²³ While in the West, religion is largely a system of beliefs,²⁴ in Islam religion is both a system of belief (*iman*) and a way of life (*minhaj*).²⁵ While in the West, “religious law” is limited to canon law, which is now merely the law regulating the Church,²⁶ Islamic law is a full-fledged legal system in the same manner as common law and civil law. In the Islamic law context, “religious law” would refer only to the laws relating to worship (*ibadat*) as distinct from the laws relating to human interactions (*muamalat*).²⁷ This “religious law” would exclude marriage, which is viewed legally as a “secular” contract

²⁰ Zweigert and Kötz include only Islamic law and Hindu law as religious legal systems. KONRAD ZWIEGERT & HANS KÖTZ, AN INTRODUCTION TO COMPARATIVE LAW 303–19 (Tony Weir trans., 3d rev. ed. 1998). Talmudic Law could also be included. See H. PATRICK GLENN, LEGAL TRADITIONS OF THE WORLD 99–132 (4th ed. 2010).

²¹ See, e.g., Judith Romney Wegner, *Islamic and Talmudic Jurisprudence: The Four Roots of Islamic Law and Their Talmud Counterparts*, 26 AM. J. LEGAL HIST. 25 (1982).

²² See GLENN, *supra* note 20, at 123–24, 217–21, 310–11. This is further supported by example in the Independent Sharia Panel in Lagos State wherein Muslims, regardless of race or tribal affiliation, can submit to arbitration under Sharia law. See Abdul-Fatah Kola Makinde & Philip Ostien, *The Independent Sharia Panel of Lagos State*, *infra* this issue.

²³ See generally T. Jeremy Gunn, *The Complexity of Religion and the Definition of “Religion” in International Law*, 16 HARV. HUM. RTS. J. 189 (2003).

²⁴ Hence, the U.S. Supreme Court defines “religious belief” as “an individual’s belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but [not including] essentially political, sociological, or philosophical views or a merely personal moral code.” *United States v. Seeger*, 380 U.S. 163, 172 (1965).

²⁵ SAYYID ABUL A’LA MAWDUDI, *THE ISLAMIC MOVEMENT: DYNAMICS OF VALUES, POWER AND CHANGE* 79–81 (Khurram Murad ed., 1984).

²⁶ E. C. ACHINIKE, *WHY LAW IN THE CHURCH?: AN INTRODUCTION TO CANON LAW AND GENERAL PRINCIPLES OF LAW* 7–8 (1995).

²⁷ David Yerushalmi, *Shari’ah’s “Black Box”: Civil Liability and Criminal Exposure Surrounding Shari’ah-Complaint Finance*, 2008 UTAH L. REV. 1019, 1030 n.47.

notwithstanding its religious aspects,²⁸ whereas before the secularization of the West, in line with Christianity, marriage was viewed as a sacrament.²⁹

The classification “religious law” is essentially a product of Eurocentric comparative law studies that focus on Western legal traditions—civil law, common law, and the socialist legal systems—as “[t]he three most important families of law in the modern world”³⁰ and either pointedly ignore non-Western legal traditions or, at best, lump them together in the marginal category of “other legal systems.”³¹ This approach affirms the status of Western legal systems as “legal systems” but denies Islamic law the status of a legal system beyond “religious law.”

The classification of “religious law” is especially problematic in the Nigerian context. First, Islamic law is not enforced ipso facto as a “religious law” in the country but as a customary law.³² Secondly, apart from the “religious law” classification being totally unknown in Nigerian law, all three legal traditions in the country are inseparably associated with religions.³³ The perception is that the common law is attributable to Christianity,³⁴ Islamic law is linked to Islam, and customary law is linked with African traditional religion.³⁵ It would therefore not make any sense, at least in the Nigerian context, to single out Islamic law as “religious law.”

The classifications “religious law” and “customary law” are therefore not appropriate for the discussion of Islamic law in the Nigerian legal system. It is better and more meaningful to discuss law and legal pluralism in Nigeria under customary law, Islamic law, and common law, which are the globally and nationally recognized legal traditions and categorizations.³⁶

²⁸ See, e.g., HAMMŪDAH ‘ABD AL ‘AṬĪ, *THE FAMILY STRUCTURE IN ISLAM* 57–59 (1982).

²⁹ *Id.*

³⁰ RENÉ DAVID & JOHN E. C. BRIERLY, *MAJOR LEGAL SYSTEMS IN THE WORLD TODAY: AN INTRODUCTION TO THE COMPARATIVE STUDY OF LAW* 453 (3d ed. 1985).

³¹ E.g., PETER DE CRUZ, *COMPARATIVE LAW IN A CHANGING WORLD* 3, 209 (3d ed. 2007). *But see* DAVID & BRIERLY, *supra* note 30, at 453–576 (giving extensive treatment to “Muslim law and the laws of India, the Far East, Africa, and the Malagasy Republic”).

³² See *infra* Part III.A.

³³ Abdul-Lateef Adegbite, *Sharia in the Context of Nigeria*, in *THE SHARIA ISSUE: WORKING PAPERS FOR A DIALOGUE* 57, 68–69 (2000).

³⁴ *Id.*

³⁵ *Id.*

³⁶ A. E. W. PARK, *THE SOURCES OF NIGERIAN LAW* 1–2, 117 (1963); see also GLENN, *supra* note 20, at 181–236 (recognizing Islamic law as a distinct legal system); ZWEIGERT & KÖTZ, *supra* note 20, at 303–12 (describing the Islamic legal system).

III. THE STATUS AND SCOPE OF ISLAMIC LAW AND CUSTOMARY LAW

A. *Definition of Islamic and Customary Laws*

Various statutes define the English law applicable in Nigeria as “the common law of England and the doctrines of equity.”³⁷ English “statutes of general application” and other statutes, which had formed part of the received English law in Nigeria, are no longer applicable in the country.

There are various definitions of customary law.³⁸ “Customary law in Nigeria can be described simply as an amalgam of customs or habitual practices accepted by members of a particular community as having the force of law as a result of long established usage.”³⁹ There are statutory definitions in northern Nigeria that state that customary law includes Islamic law. Section 2 of the High Court Law has provided that the term “Native Law and Custom” includes Islamic law.⁴⁰ This definition was also adopted in the northern region’s Native Courts Law and is now found in the High Courts Law of some northern states.⁴¹ However, this approach is changing. For example, the Plateau State Customary Court of Appeal Law⁴² defines “customary law” as:

the rule of conduct which governs legal relationships as established by custom and usage and not forming part of the common law of England nor formally enacted by the Plateau State House of Assembly but includes any declaration or modification of customary law but does not include Islamic personal law.⁴³

There is generally no definition of Islamic law in Nigeria. The Islamic law applicable in northern Nigeria is that of the Maliki School. The Maliki School has been the dominant school in the north since around the thirteenth century.⁴⁴ Although the constitution does not refer to any school, the Sharia Court of Appeal laws of the states in northern Nigeria give legal endorsement to the

³⁷ Interpretation Act (1990) Cap. (192), § 32(1).

³⁸ See Abdulmumini A. Oba, *The Administration of Customary Law in a Post-Colonial Nigerian State*, 37 CAMBRIAN L. REV. 95–96 (2006).

³⁹ Ike Ehiribe, *The Validity of Customary Law Arbitration in Nigeria*, 18 COMP. L. Y.B. INT’L BUS. 131, 132 (1996).

⁴⁰ Laws of Northern Nigeria, High Court Law (1963) Cap. (49), § 34.

⁴¹ Laws of Northern Nigeria, Native Courts Law (1963) Cap. (78), § 2; e.g., Laws of Kwara State, High Court Law (2007) Cap. (H2), § 2.

⁴² Plateau State Customary Court of Appeal Law, 1979.

⁴³ *Id.* § 2.

⁴⁴ YUSUF, *supra* note 12, 26–28.

Maliki School.⁴⁵ Courts have held that where there are divergent opinions within the school, the majority (*mashur*) opinion is applicable.⁴⁶ However, this does not preclude English courts from enforcing any other school of Islamic law that is binding between non-Nigerian parties.⁴⁷

B. Status

As noted above, colonial authorities decreed that customary law includes Islamic law. Judge Ames explains this position clearly in *Bornu Native Authority v. Magudama*.⁴⁸ “Muhammadan Law has no privileged position [in Nigeria]: it prevails, where it does prevail, because it is there the local law and custom.”⁴⁹ Many have pointed out the inappropriateness of classifying Islamic law as customary law.⁵⁰ However, the classification continued in all the northern states until 1999 when some states repealed all the laws that made Islamic law part of customary law in their states.⁵¹ Thus, Islamic law now has a dual status in northern Nigeria.

The nonrecognition of Islamic law as a distinct legal tradition and its classification as customary law in Nigeria raise problems for Islamic law in the southern part of the country where ethnic customary law prevails.⁵² This is especially problematic in the southwest where there is a substantial Muslim population and there are Muslim-majority states, but Muslims are denied application of Islamic family law.⁵³ This was exemplified in the case *Estate of Alayo*,⁵⁴ notwithstanding that the deceased was a Muslim and married according to Islamic rites, Islamic law was not applied to her estate because the

⁴⁵ Laws of Northern Nigeria, Sharia Court of Appeal Law (1963) Cap. (122), § 14.

⁴⁶ *Alkamawa v. Bello*, [1998] 6 SCNJ 127, 136.

⁴⁷ For example, in *Zaidan v. Mohssen*, the court applied “(Moslem) Customary law of Lebanon” as the law binding between the parties. [1973] 11 S.C. 516, 525.

⁴⁸ J. N. D. ANDERSON, ISLAMIC LAW IN AFRICA 198 (1970); see also *Zaidan*, 11 S.C. at 525.

⁴⁹ ANDERSON, *supra* note 48, at 198 (quoting *Bornu Native Auth. v. Magudama*, [1946] (WACA) (Ames, J., dissenting) (unreported)) (internal quotation mark omitted) (footnote omitted).

⁵⁰ See generally, e.g., AA Oba, *Islamic Law as Customary Law: The Changing Perspective in Nigeria*, 51 INT’L & COMP. L.Q. 817 (2002).

⁵¹ See, e.g., Kano State Sharia Courts Law, § 29(2), (4) (2000).

⁵² See ANDERSON, *supra* note 48, 222–23.

⁵³ Abdul-Fatah ‘Kola Makinde, *The Institution of Shari’ah in Oyo and Osun States, Nigeria, 1890–2005* 270–71 (Mar. 2007) (unpublished Ph.D. thesis, University of Ibadan). In the southwest, Muslims are fifty-two percent of Ogun and Oyo States’ populations and twelve percent in Ondo State. *Id.*

⁵⁴ [1946] 18 NLR 88.

court found that Ijebu is not a Muslim area and that there was no provision for applying Muslim law in the area.⁵⁵

Nigerian law makes a distinction between “Islamic personal law” and all other civil aspects of Islamic law. Islamic personal law consists of questions involving marriages conducted under Islamic law, property—charitable endowment (*wakf*), gift, or succession—and administration of the affairs of persons with diminished capacities—infants, prodigals, or persons of unsound mind.⁵⁶ These are the only aspects of Islamic law that are constitutionally recognized.⁵⁷

There are instances where states have made statutory declarations of customary law; however, large-scale codifications are rare. One example is the restatement of the Igbo customary law in the *Customary Law Manual*,⁵⁸ compiled at the request of the defunct East Central State, but it technically has no force of law. The recently enacted Sharia Penal Codes in some northern states are perhaps the critical examples.⁵⁹ However, once codified, the Sharia Penal Codes take the character of statutory law for all legal purposes.

C. *Scope and Limits of Applicability of Islamic and Customary Laws*

When colonial authorities assumed power in Nigeria, they immediately abrogated some norms of Islamic and customary law that they thought to be barbaric and unacceptable.⁶⁰ They also enforced the remaining norms of Islamic and customary law subject to three tests, generally described as the validity tests.⁶¹ The first test is that an Islamic or customary law norm must not be repugnant to natural justice, equity, and good conscience.⁶² This test has been invoked to nullify at least two customs: one ascribing to a man whose wife had separated from him the legal paternity of all that woman’s subsequent children as long as the dowry had not been refunded;⁶³ and another

⁵⁵ *Id.* at 93.

⁵⁶ CONSTITUTION OF NIGERIA (1999), §§ 262(2), 277(2).

⁵⁷ Philip Ostien & Albert Dekker, *Sharia and National Law in Nigeria*, in SHARIA INCORPORATED (Jan Michiel Otto ed., 2010).

⁵⁸ CUSTOMARY LAW MANUAL (S. N. C. Obi ed., 1977).

⁵⁹ *E.g.*, Shari’ah Penal Code, No. (4) (2002) 36:17 KADUNA STATE NIGERIA GAZETTE, A15 (Supp. pt. A).

⁶⁰ J.N.D. Anderson, *Conflict of Laws in Northern Nigeria: A New Start*, 8 INT’L COMP. L.Q. 442, 443 (1959).

⁶¹ *See generally* JOHN O. ASEIN, INTRODUCTION TO NIGERIAN LEGAL SYSTEM 129–38 (2d ed. 2005).

⁶² *See, e.g.*, Laws of Kwara State, High Court Law (1994) Cap. (67), § 34(1).

⁶³ *Edet v. Essein*, [1932] 11 NLR 47, 48.

bequeathing a man's estate to his elder brother if the man dies leaving only daughters.⁶⁴ The second test is that an Islamic or customary law norm must not be incompatible, either directly or by implication, with any law presently in force.⁶⁵ This test was invoked in *Adesubokan v. Yinusa*,⁶⁶ when a Muslim's will validly made under the Wills Act stood, although the bequests therein conflicted with provisions of the Islamic law of inheritance.⁶⁷ However, the position was superseded by legislative amendment following protests by traditionalists and Muslims.⁶⁸ The last of the validity tests is that an Islamic or customary law norm must not be contrary to public policy.⁶⁹ The public policy test was invoked against the "woman-to-woman marriage" whereby a woman "marries" another woman, procures a man to have sexual relations with her, and the resultant children belong legally to the "woman husband" and not to the "wife" or her paramour.⁷⁰

A further validity test in the post-independence era holds that the constitution is the supreme law of the land.⁷¹ Any other law that is inconsistent with its provisions is null and void to the extent of the inconsistency.⁷² Some have suggested that the three previous validity tests, which are still in force in the postcolonial era, should be repealed now that there is a bill of rights in the constitution that provides enough guarantees for the rights of Nigerian peoples.⁷³

IV. CONFLICTS BETWEEN ISLAMIC, CUSTOMARY, AND ENGLISH SYSTEMS

A. *Jurisdiction of Courts*

Courts in Nigeria are divided into superior courts and courts with jurisdiction subordinate to the High Courts.⁷⁴ Superior courts include the High

⁶⁴ *Mojekwu v. Iwuchukwu*, [2004] 4 SCNJ 180, 196.

⁶⁵ *See id.*

⁶⁶ [1971], reprinted in 1 SHARIA LAW REPORTS 26 (1961–1989).

⁶⁷ *Id.* at 31–32.

⁶⁸ *See, e.g.*, Laws of Kwara State, Kwara State Wills Law (1991) Cap. (168), § 4 (1)(b); Abdulummini A. Oba, *Can a Person Subject to Islamic Law Make a Will in Nigeria?: Ajibaiye v Ajibaiye and Mr. Dadem's Wild Goose Chase*, 2 CALS REV. NIGERIAN L. & PRAC. 131, 131 (2008).

⁶⁹ *See Evidence Act* (1990) Cap. (112), § 14(3).

⁷⁰ *Meribe v. Egwu*, [1976] NSCC 181, 186.

⁷¹ *See CONSTITUTION OF NIGERIA* (1999), § 1(1).

⁷² *Id.* § 1(3).

⁷³ *See E.S. Nwauche, The Constitutional Challenge of the Integration and Interaction of Customary and the Received English Common Law in Nigeria and Ghana*, 25 TUL. EUR. & CIV. L.F. 37, 53 (2010).

⁷⁴ *CONSTITUTION OF NIGERIA* (1999), §§ 6(3), (5)(a)–(i).

Courts, the Sharia Courts of Appeal, the Customary Courts of Appeal, the Court of Appeal, and the Supreme Court.⁷⁵ The Customary Courts of Appeal are concerned exclusively with customary law, but the High Courts, which are English-style courts, share jurisdiction over Islamic law matters with Sharia Courts of Appeal, which are Islamic courts. This has resulted in jurisdictional incongruities between the High Courts and the Sharia Courts of Appeal.⁷⁶ It has also disadvantaged parties looking to apply Islamic law, because English law applies prima facie in the High Court, although parties can request Islamic law be applied to their case. In all cases, however, the courts use procedural rules and laws based on English law.⁷⁷ Attempts by some states to confer exclusive jurisdiction over all aspects of Islamic law to the Sharia Court of Appeal in the post-1999 era have been declared unconstitutional by the High Courts and the Court of Appeal.⁷⁸ Appeals under Islamic and customary laws from High Courts and Sharia Courts of Appeal go exclusively to the Court of Appeal and finally to the Supreme Court, both of which are English-style courts.⁷⁹ However, judges who operate English-style courts are not versed in Islamic law, and they rely on assessors (usually judges of subordinate Sharia courts who advise the courts on Islamic law) and sometimes on imperfect translations of Arabic texts.⁸⁰

In the subordinate state courts of northern Nigeria, Sharia courts administer Islamic law exclusively while the magistrate and customary courts (where they exist) administer customary law.⁸¹ In other northern states, area courts administer both customary and Islamic law.⁸² In the southern states, there are no Sharia Courts of Appeal; thus, only customary and magistrate courts exist as subordinate courts.⁸³ In these magistrate and customary courts, customary rather than Islamic law is applied to Muslims as personal law.⁸⁴

⁷⁵ *Id.*

⁷⁶ See Abdulummini Adebayo Oba, *The Sharia Court of Appeal in Northern Nigeria: The Continuing Crises of Jurisdiction*, 52 AM. J. COMP. L. 859, 867–77 (2004).

⁷⁷ See *Kowa v. Musa*, [2006] 5 NWLR 1, 36.

⁷⁸ See, e.g., *Faransi v. Noma* [2007] 9 NWLR 202, 219.

⁷⁹ CONSTITUTION OF NIGERIA (1999), §§ 233, 240, 244–45.

⁸⁰ See M. Tabiu, *The Impact of the Repugnancy Test on the Application of Islamic Law in Nigeria*, 18 J. ISLAMIC & COMP. L. 53, 54–55 (1991).

⁸¹ For example in Kaduna State, see Laws of Kaduna State, Sharia Courts Law (2001) No. (11), § 22(1) and Laws of Kaduna State, Customary Courts Law (2001) No. (9), § 21.

⁸² For Kwara State, see Laws of Kwara State, Area Courts Law (2006) Cap. (A9), § 20.

⁸³ Cf. *Sharia Law 'Reaches' Nigeria's South*, BBC NEWS (May 1, 2001 10:50 PM), <http://news.bbc.co.uk/2/hi/africa/1962827.stm>.

⁸⁴ Makinde, *supra* note 53, at 138–47.

However, the south now has arbitral panels to resolve conflicts among Muslims, the awards of which are recognized in some states' formal courts.⁸⁵ The Lagos State Independent Sharia Panel, established by the Supreme Council for Sharia in Nigeria (a voluntary civil organization) in 2003, has, in addition to the usual family law matters (divorce, maintenance, and child custody), heard other matters. In one case, a prospective couple wanted the panel to act as the bride's marriage guardian (*waliy*)⁸⁶ because the bride's family members refused.⁸⁷ The panel solemnized the marriage after appointing a member of the panel as her *waliy*. Additionally, a man troubled by a fornication (*zina*) he had committed wanted the panel to inflict the hundred lashes prescribed by Islamic law as the canonical punishment (*hadd*) for his sin. The panel declined to enforce the punishment because its jurisdiction is limited only to civil matters and only a sovereign Muslim leader (imam) can inflict or order such punishment.⁸⁸ The panel has also heard cases relating to contracts and land disputes.⁸⁹ The range of cases filed before the panel indicates an urgent need for the establishment of official Sharia courts in southern Nigeria.

B. Conflict of Laws Rules⁹⁰

In litigation between Nigerians and non-Nigerians, the general rule is that English law applies.⁹¹ In matters between Nigerians, the general rule is that customary law applies.⁹² One exception is that customary law is not applied where the parties have expressly or implicitly agreed to be bound by other laws.⁹³

⁸⁵ Ishaq Kunle Sanni, *Independent Sharia Court Enriching the Nigerian Legal System: Oyo State in Spectrum*, 4 AL-MASLAHA 35, 42–46 (2007–2008).

⁸⁶ Under Maliki Law, the consent of the bride's *waliy* is necessary for the validity of a marriage. M.A. AMBALI, *THE PRACTICE OF MUSLIM FAMILY LAW IN NIGERIA* 155, 160 (1998).

⁸⁷ *In re Taalib & Ogunsanlu*, Suit No. LIS/AECM/0006M/1424 A.H., 42, 42–43 (Lagos ISP, 2003). The bride's principal relatives were her mother, a Christian who is not qualified because under Maliki Law, the *waliy* must be male and a Muslim, and her maternal uncle, a Muslim who declined to act. *Id.*; see AMBALI, *supra* note 86, at 136.

⁸⁸ *In re Hamzat Ayeni*, Suit No. LISP/IEM/005 FH/1424/A.H., 39, 39–40 (2003).

⁸⁹ *See Mustapha v. Atunrashe*, Suit No. ISP/IEM/0007DR/1424 A.H., 49 (2003).

⁹⁰ *See generally* ASEIN, *supra* note 61, 140–48.

⁹¹ *See Koney v. Union Trading Co.*, [1934] 2 WACA 188, 196 (1934).

⁹² *Labinjoh v. Abake*, [1924] 5 NLR 33, 36.

⁹³ *Griffin v. Talabi*, [1948] 12 WACA 371, 371–73.

After deciding that customary law applies in a particular case, there are two general rules for deciding which law is applicable:⁹⁴ “the law prevailing in the area of the jurisdiction of the court”⁹⁵ or “the law binding between the parties.”⁹⁶ During the colonial era, courts did not always apply Islamic law as personal law among Muslims in the north where Islamic and customary laws coexist. According to A.E.W. Park, the question in these cases was “not solely whether they [are] Moslems, but whether they regard[] and conduct[] themselves as subject to Islamic law.”⁹⁷

Muslim scholars have criticized this approach as a ploy to stultify the application of Islamic personal law.⁹⁸ It is also arguable that given the constitutional recognition of Islamic personal law, the approach suggested by Park no longer represents the current position of the law. In recent times, the courts have departed from these cases and held that Islamic law is the personal law of all Muslims.⁹⁹

V. CHALLENGES TO ISLAMIC AND CUSTOMARY LAWS IN NIGERIA

Since the advent of colonialism, strong challenges have come against Islamic and customary laws in Nigeria. The colonial approach was that these laws would soon disappear to be replaced entirely with the colonialists’ own common law.¹⁰⁰ However, in northern Nigeria, the people’s strong attachment to Islamic law, the colonial authorities’ promise not to interfere with the practice of Islam in the region,¹⁰¹ and the real possibility of popular revolt precluded immediate application of this policy and thus a gradual approach was adopted.¹⁰² Within the Nigerian legal system, Islamic and customary law were placed in inferior positions vis-à-vis the common law, and their

⁹⁴ Laws of Kwara State, Area Courts Law (2006) Cap. (A9), § 20(1).

⁹⁵ *Regina v. Ilorin Native Court*, [1953] 20 NLR 144, 144.

⁹⁶ PARK, *supra* note 36, at 129–30 (internal quotation marks omitted).

⁹⁷ *Id.* at 131; *see also* Mariyama v. Ejo, [1961] NRNLR 81, 82 (1961).

⁹⁸ *See* Mohammad Tabi’u & S. Khalid Rashid, *The Administration of Islamic Law in Nigeria*, 6 ISLAMIC & COMP. L.Q. 27, 45–46 (1986).

⁹⁹ *Agbebu v. Bawa*, [1992] 6 NWLR 80, 90; *Shittu v. Shittu*, [1998] ANNUAL REPORT SHARIA COURT OF APPEAL (KWARA STATE) 93, 98.

¹⁰⁰ *See* ABDULMALIK BAPPA MAHMUD, A BRIEF HISTORY OF SHARI’AH IN THE DEFUNCT NORTHERN NIGERIA 33–34 (1988).

¹⁰¹ DOI, *supra* note 8, at 210. The promise was generally not to interfere with the use of Sharia as to personal law matters, but did ban the use of the capital punishments required by Sharia law. *Id.*

¹⁰² Awwalu Hamisu Yadudu, *We Need a New Legal System*, in ON THE FUTURE OF NIGERIA 2, 3–4 (Ibrahim Suleiman & Siraj Abdulkarim eds., 1988).

jurisdictions and institutions gradually eroded in favor of English law counterparts.¹⁰³

Colonial preference for unification or harmonization of laws has found support among some Nigerians who advocate for a “general law,” “common law,” or a “Nigerian common law” for the whole country and a unified court system to administer the unified law.¹⁰⁴ Muslim scholars generally are against unification of laws.¹⁰⁵ Some favor a system of parallel courts to administer the different systems of laws independently.¹⁰⁶ Some states in the north attempted unsuccessfully to give expression to this approach in the post-1999 era.¹⁰⁷

In addition to these domestic pressures, the international human rights regime has indicted Islamic and customary laws generally on gender rights and specifically on spousal rights relating to polygamy, divorce, and inheritance.¹⁰⁸ International human rights face two major hurdles in Nigeria. First, the constitution requires that international treaties be domesticated by local legislation and passed by the federal legislature before they attain legal force in the country.¹⁰⁹ Additionally, where the treaty involves a matter within the legislative competence of the states, the federal act must be ratified by a majority of the states’ Houses of Assembly,¹¹⁰ otherwise the treaty must be separately enacted by each state. This illustrates the legal difficulties encountered in the domestication of treaties on women’s and children’s rights in the country and variations in various states’ laws.¹¹¹

The second hurdle is that some have questioned particular international human rights norms in the African and Islamic contexts, especially those relating to women’s and children’s rights.¹¹² Often, the strict human rights, gender-equality perspective does not consider cultural context. For example,

¹⁰³ *Id.* See generally MAHMUD, *supra* note 100, at 9–22.

¹⁰⁴ See, e.g., T.A. Aguda, *Towards a Nigerian Common Law*, in *FUNDAMENTALS OF NIGERIAN LAW* 259–66 (M.A. Ajomo ed., 1989).

¹⁰⁵ Abdulmumini A. Oba, *Lawyers, Legal Education and Shari’ah Courts in Nigeria*, 49 *J. LEGAL PLURALISM & UNOFFICIAL L.* 113, 148–49 (2004).

¹⁰⁶ *Id.*

¹⁰⁷ See *supra* note 82 and accompanying text.

¹⁰⁸ Heiner Bielefeldt, *Muslim Voices in the Human Rights Debate*, 17 *HUM. RTS. Q.* 587, 595–97 (1995).

¹⁰⁹ CONSTITUTION OF NIGERIA (1999), § 12(1)–(2).

¹¹⁰ *Id.* § 12(3).

¹¹¹ See Tawfiq Ladan, *The Nigerian Child Rights Act, 2003: An Overview of the Rationale, Structure and Contents*, 2 *NIGERIAN BAR J.* 219, 230 n.19 (2004).

¹¹² See, e.g., Folake Olaleye, *Cultural Diversity, Child Discipline and the Child’s Rights Convention: The Quest for a Universal Child?*, 4 *U. IBADAN J. PRIVATE & BUSINESS L.* 162 (2005).

under the primogeniture practiced by the Bini people of midwestern southern Nigeria, the deceased's principal place of residence (*igiogbe*) passes exclusively to the oldest surviving son. This guarantees the continual discharge of religious obligations pertaining to the family shrine located in the *igiogbe* where the ancestral staff (*ukhuru*) is kept after the deceased's second burial.¹¹³ Consequently, a daughter who relocates and comes under her husband's authority cannot effectively discharge these obligations. Unless the religious belief of the Bini people changes, their inheritance rule on *igiogbe* cannot be varied without encountering stiff resistance. It is unsurprising that the Nigerian Supreme Court has consistently upheld this custom¹¹⁴ despite provisions in the Bill of Rights in the Nigerian Constitution prohibiting discrimination on gender grounds¹¹⁵ and the international treaties on women's rights that the country has signed.¹¹⁶ Another example is the Islamic inheritance law that gives to a son twice the share given a daughter, which human rights proponents see as indicative of general discrimination against women in Islamic law. Some Muslims argue that this should be viewed in the context of responsibilities that Islamic law places on males and the fact that in some instances, Islamic law gives the same inheritance portion to males and females.¹¹⁷ These examples illustrate the need to avoid criticizing Islamic and customary norms outside their cultural contexts.

VI. THE WAY FORWARD

At the global level, Islamic law should be considered a legal tradition or legal system rather than a religious law. Islamic and customary law should also be assessed in their proper contexts. These approaches are necessary in today's globalized but plural world.

Within the Nigerian legal system, the colonially imposed validity tests applicable to Islamic and customary law should be repealed, especially now that the constitution includes a comprehensive bill of rights. The court system should also be reorganized so that the High Courts administer English law,

¹¹³ Osaretin Aigbovo, *The Principal House in Benin Customary Law*, 8 U. BENIN L.J. 16, 17–19 (2005).

¹¹⁴ See *Lawal-Osula v. Lawal-Osula*, [1995] 10 SCNJ 84, 97–98; *Idehen v. Idehen*, [1991] 7 SCNJ 196, 212–13; *Arase v. Arase*, [1981] NSCC 101, 117; *Ogiamien v. Ogiamien*, [1967] NSCC 189, 192–93.

¹¹⁵ CONSTITUTION OF NIGERIA (1999), § 42(1); see also CONSTITUTION OF NIGERIA (1979), § 39(1).

¹¹⁶ Nigeria is a party to the Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13, and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, http://www.achpr.org/english/_info/women_en.html (last visited Oct. 24, 2011).

¹¹⁷ 'ATI, *supra* note 28, at 267–70.

while the Sharia Courts of Appeal and Customary Courts of Appeal exclusively administer Islamic and customary law, respectively. These exclusive jurisdictions will solve some of the conflicts and procedural incongruities in the administration of Nigerian law.

Despite various challenges and opposition, Islamic and customary laws have proven resilient in Nigeria, and it is safe to predict that the plural legal systems in the country will continue in the near future—particularly in family law, where one size does not fit all cultures.