Harmonisation of *Shari'ah*, Common Law and Customary Law in Nigeria: Problems and Prospects

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Abstract

Law in Nigeria is traceable to three distinct legal traditions namely customary law, Islamic law and the English common law. These laws often differ irreconcilably in substantive law, procedural law, concepts of justice, and worldviews. The colonial administration ensured the ascendancy of the common law in the country but the movement in support of Islamic law has remained very strong. Thus, there exist a lot of tensions within the Nigerian legal system. Various approaches have been suggested to resolve these conflicts. Some have suggested a unification of the three systems of law. Others, towing the colonial policy want the specialist courts administering Islamic and customary laws abolished. The biggest obstacle to unification of laws in Nigeria is that Islam does not permit for Muslims a hybrid law out of Islamic law and any other law. Muslims have argued in favour of a clear separation of Islamic law from common law and for the establishment of a parallel system of courts from the lowest to the highest court to deal with each of the three laws in the country. This parallel system of courts has many challenges and there may still be a case for administering Islamic law by specialists within a unified courts system. Law in Nigeria took a new turn in 1999 with the adoption of Islamic law as the basic law in many States in northern Nigeria. The changes introduced Sharia Penal Codes and Sharia Courts. Non-Muslims are not subject to Islamic law. The major obstacles to these reforms include constitutional limits, Muslims themselves, and non-Muslims both on the national and international fronts. Muslims must therefore show more commitment and dedication to the cause of Islamic law if they want to see full-fledged Islamic law entrenched firmly in the country.

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I. Introduction

The Nigerian terrain is complex in the sense that in addition to common law and *Shari'ah* (Islamic law), there is a third corpus of law which consists of a large variety of indigenous ethnic laws usually discussed under the broad term 'customary law'. Legal pluralism in Nigeria consists of these three laws which are all still relevant in varying degrees. This paper aims to discuss problems associated with and prospects of the harmonisation of these three laws in Nigeria. It is important to note at the very beginning that these are not just laws but also legal systems.[1] In other words, we are talking about harmonisation of three laws and legal systems which, often presents irreconcilable differences not only in substantive law, but also in procedural law, fundamental concept of justice, and worldviews.

Common law evolved in England and was brought into Nigeria in the middle of the 19th century by the British colonialists, who brought not only their system of administration but also their laws together with their legal system, particularly its methodology and methods of administration of justice. Islamic law and customary law had much longer antecedents in the country. Islamic law came with the Islamic religion, which penetrated into Kanem-Bornu and Sokoto Caliphates in the 8th and 11th Centuries respectively.[2] Since the 15th Century until the advent of colonialism, Qadis administering Islamic law have been continuously appointed in the northern part of the country.[3] There has also been since that period, a strong supporting traditional Islamic education. Many centres of learning in the area that is now northern Nigeria attained worldwide fame.[4] The revivalism movements of Uthman dan Fodio,

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1 See an overview of these legal systems in Rene David and JEC Brierly, *Major Legal Systems in the World Today* (London: Stevens and Sons, 1968) Part 3 (common law), Part 4 Title I (Muslim law) and Part 4 Title IV (Laws of Africa and Malagasy).

2 Lavers, JE,'Kanem and Borno to 1808' in Obaro Ikime (ed), *Groundwork of Nigerian History* (Ibadan: Heinemann Educational Books (for Historical Society of Nigeria), 1980) at pp 165–186 and Irving, TB, *Islam Resurgent: The Islamic World Today* (Lagos: Islamic Publication Bureau, 1979) at p 41.

3 Justice Abdulkadir Orire in an interview titled 'Secularity is a Foreign Notion', *THISWEEK*, October 24, 1988 at p 23 and Justice Gwarzo, *ibid* at p 19 and Hassan Ibrahim Gwarzo, 'The *Sharia* Courts in our Judicial System' in *All-Nigeria Judges Conference Papers*, 1988 (Ibadan: Spectrum Books Ltd, 1993) at p 500.

4 Such included Katsina: see generally Isma'ila A Tsiga and Abdalla U Adamu (eds), *Islam and the History of Learning in Katsina* (Ibadan: Spectrum Books, 1997) particularly the essays by Kani (pp 24 – 34), M. Katsina (pp 35-9), Bugaje (pp 77-87), Ingawa (pp 88-93), and Raji (pp 151–160); and Sokoto: Murray Last, *The Sokoto Caliphate* (London: Longman Group Ltd, 1976) at pp lxxvi–lxxx.

which culminated in the Sokoto Caliphate and others in the much older Kanem-Bornu empire, ensured a well-organised system of administering Islamic law in the north - so much so that at the advent of British occupation of the north, it ranked as one of those places in the British Empire where Islamic law was enforced to the fullest in the world.[5] Nonetheless, there were and still are pockets of tribes in the north who are not Muslims. In consonance with the Islamic principle of freedom of religion, customary law applied and still applies to such peoples.[6] In the southern part of Nigeria, although the southwest was and still is predominantly Muslim, there were no Islamic states and Islamic law was not enforced in an institutionalised manner except in a few isolated instances.[7] Customary law was the dominant official law in the south.[8]

II. The Colonial Legacy of Conflicts and Confusion

Although economic exploitation was the basic motive for colonialism, intellectual justifications were advanced for the enterprise. The theory was that colonialism was a civilising mission to help backward Africa attain to the level of civilised Europe. Thus in such circumstances, the colonial attitude was that of rejecting totally everything that was not of Europe.[9] The colonial attitude to law was a total rejection of everything that is different from theirs. To them, their common law would eventually supersede the other laws in the country.[10] That was the target towards which they worked.

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5 Anderson, JND, *Islamic Law in Africa* (London: Frank Cass, 1978) at pp 3, 171 and 219.

6 See Said Ramadan, *Islamic Law: Its Scope and Equity* (London, publisher not stated, 1970) at pp 146, 152-154 and 159-62; Anderson, *Islamic Law in Africa*, *id* at pp 191–192; Keay, EA, and Richardson, SS, *The Native and Customary Courts of Nigeria* (London: Sweet and Maxwell, 1966) at pp 20–21; Okonkwo, CO, *Okonkwo and Naish on Criminal Law in Nigeria* (London: Sweet and Maxwell, 2nd ed, 1980) at p 4 and the account of the legal systems of some of these non-Muslim peoples in northern Nigeria in Ahmed Beita Yusuf, *Nigeria Legal System: Pluralism and Conflict of law in the Northern States* (New Delhi: National, 1982) at pp 54-87.

7 By 1860-1894, Islamic law was firmly rooted in some Yoruba towns such Iwo, Ikirun, Ede, Epe, Ibadan, and Lagos: Okunola, M, 'The Relevance of Shar'ia to Nigeria' in Nura Alkali, Adamu Adamu, Awwal Yadudu, Rashid Motem and Haruna Salihi (eds), *Islam in Africa: Proceedings of the Islam in Africa Conference* (Ibadan: Spectrum Books, 1993) 23 at p 24.

8 See the overview in Okany, MC, *The Role of Customary Courts in Nigeria* (Enugu: Fourth Dimension Publishers, 1984) at pp 4–6.

9 Karibi-Whyte, AG, *History and Sources of Nigerian Criminal Law* (Ibadan: Spectrum Books Ltd, 1993) at p 268 and Oba, AA, 'The Legal Relevance of Religion in Nigeria' (1997) 54 *Punjab University Law Journal* 23, 36.

10 See Park, AEW, *The Sources of Nigerian Law* (London: Sweet and Maxwell, 1963) at pp 139-143, and Abdulmalik Bappa Mahmud, *A Brief History of Shariah in the defunct Northern Nigeria* (Jos University Press, 1988) at p 33.

In the south, the colonial masters did not provide any court for the administration of Islamic law. Rather, they established customary courts which had jurisdiction on all 'natives'. Only educated Muslims who can afford the luxury of litigation in the High Court had Islamic law applied to their affairs as their personal law. The overwhelming majority of Muslims had their affairs determined according to customary law in these courts.[11] However in the north, political expediency dictated that they proceed gradually, since any attempt at a radical change would have led to revolt. The colonial strategies in the north will be considered here in relation to criminal law, civil law, procedural law, administration of justice, and legal education.

A. *Criminal Law*

In matters of criminal law, the colonialists adopted several tactics. First, they immediately banned some Islamic law penal sanction such as stoning and amputation, which they considered repulsive and barbaric.[12] Secondly, during the colonial era when some aspects of Islamic criminal law operated side by side with the English style Criminal Code, many areas of conflict between the two laws in matters of substantive criminal law came to light.[13] In evidence and procedural law, the use of *Qasama* oaths in homicide cases;[14] the non-acceptance of provocation as a mitigation for murder, and the homicide remedies[15] of pardon (*afw*), compensation (*diyya*) and retaliation (*qisas*) were frowned at by the colonial masters who never relented until they succeeded in replacing Islamic criminal law completely with a Penal Code based on English law of crimes.[16]

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[11] See the complaint of Muslims on this matter in Anderson, *Islam in Africa*, *supra*, n 5 at pp 222-223.

[12] *Id* at p 195.

[13] See accounts in Anderson, JND, 'Conflict of Laws in Northern Nigeria' (1959) 1 (2) *Journal of African Law* 87; Anderson JND, 'Conflict of Laws in Northern Nigeria: A New Start' (1959) 8 *International Comparative Law Quarterly* 442; Ahmed Beita Yusuf, *supra*, n 6 at pp 144–146 and Karibi-Whyte, *supra*, n 9 at pp 148-188.

[14] *Lyatawa v Katsina N A* (1961) NNCN 12 and Karibi-Whyte, *supra*, n 9 at p 201.

[15] Anderson, *Islam in Africa*, *supra*, n 5 at pp 198–201.

[16] Penal Code Law, Cap 89, Laws of Northern Nigeria, 1963. Notwithstanding its pretensions to being compatible with Islamic law, the Penal Code is based in English law of crimes: Karibi-Whyte, *supra*, n 9 at p 232, and Owoade, MA, 'Some Aspects of Criminal Law Reform in Nigeria' (1980) 16 *The Nigerian Bar Journal* 25 at p 25. It is very different from Islamic law.

B. *Civil Law*

In civil matters, the same tactics were adopted. First, they tagged Islamic law as a customary law.[17] This had for them, several advantages. They were able to take direct control of the administration of Islamic law by appointing common law trained lawyers as judges. A gradual process of Anglicisation of Islamic law was pursed. They were thus able to subvert Islamic law in an indirect manner, which masked their animosity against Islam. Secondly, validity tests were introduced for customary law, Islamic law inclusive. Before a rule of customary law or Islamic law can be enforced by the courts, it must not be repugnant to natural justice, equity and good conscience; incompatible either directly by implication with any law for the time being in force; or contrary to public policy.[18] Thirdly, obstacles were placed in the way of application of Islamic law to Muslims. They decreed that Islamic law was applicable only as a personal law.[19] This meant it was not applicable merely because one was a Muslim but only when it was proved that one was a 'good' Muslim.[20] They further provided ways by which Muslims coulds evade the application of Islamic law to them.[21] Again, while common law applied to Muslims, Islamic law or customary did not apply to a European even if he wanted.[22]

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[17] See the analysis and criticism of this position in Oba, AA, 'Islamic Law as Customary Law: The Changing Perspective in Nigeria' (2002) 51 *International and Comparative Law Quarterly* 817.

[18] See the critical analysis of the operation of these rules as regards Islamic law in Tabiu, M, 'Comparative Laws: Nature and Scope of Application of English Law, Customary Law and Islamic Law' in 1997 *All Nigeria Judges Conference Papers, Abuja* (Lagos: MIJ Professional Publishers Ltd, 1997) at pp 58–67; Aboki, Y, 'Are Some Nigerian Customary Laws Really Repugnant?' (1991-1992) Vol. 9–10 *ABU Law Journal* at pp 1-15; and as regards customary law in Ijaodola, JO, 'Application of Customary Law' (1969) 3 *Law in Society* 49; Uchegbu, A, 'The Repugnance of the Repugnancy Doctrine' (June 1980) 10 (1) *The Lawyer* 5; Achimu, BO, 'Wanted: A Valid Criterion of Validity for Customary Law' (1976) 10 *Nigerian Law Journal* 35; Smith, IO, 'Legal Transplants in a Developing Society: A Critical Appraisal of the Reception of English Law in Nigeria' in Akande, JO (ed), *LASU Seminar Series*, Vol 1, No 1, (Lagos: Lags State University, undated) 1 at pp 12–13 and Asein, JO, *Introduction to Nigerian Legal System* (Ibadan: Sam Bookman Publishers, 1997) at p 126.

[19] See *Mariyama v Sadiku Ejo* [1961] NRNLR 81 and Tabiu, *id* at pp 73-75.

[20] *Ibid* and Park, *supra*, n 10 at pp 130-131.

[21] For example a Muslim can make a will under the Wills: *Adesobukan v Yunusa* [1971] NNLR 77; contract marriage under the Marriage Act and so on and thus bring his estate outside the operation of Islamic law, Tabiu, *supra*, n 18 at pp 63-67. Many states in the federation have reversed the effect of this decision by making the testamentary powers subject to Islamic and customary laws respectively.

[22] *Savage v Macfoy* (1909) Ren 504, *Fonseca v Passman* (1958) WNLR and Asein, *supra*, n 18 at p 138.

C. *Procedural Law*

The Islamic criminal procedure, which was in existence before the colonial era, was replaced by the colonialists with the Criminal Procedure Code (CPC).[23] The Code was generally not binding on Area Courts but they were to be 'guided' by it.[24] The CPC adopted essentially the common law procedure although the summary trial procedure contained some elements of the inquisitorial system.[25] However, this was due to the scarcity of qualified legal personnel in the north at that time rather than a concession to Islamic law procedure.

D. *Administration of Justice*

The colonial masters interfered with the administration of Islamic law in many ways. First, they took over the control of the courts from the Emirs. They gradually anglicised these courts in terms of personnel and the law applied. Arabic, which had been for centuries in the north the language of conducting official business, was replaced first with *ajami*, namely Hausa written in Arabic script, which later was replaced with Hausa written with Roman script.[26]

Secondly, the colonialist created common law courts alongside native courts. These courts patterned after the English common law courts were given jurisdiction in Islamic law matters.[27]

Thirdly, courts were organised in a manner which gave common law courts a decided superiority.[28] At the level of inferior courts, there were three types of courts-Magistrate/District Courts, Native Courts (later Area Courts) and Customary Courts which catered for common law, Islamic law and customary respectively. The tripartite court arrangement was however absent at superior court level. Appeals from all the inferior courts went to the common law

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[23] Criminal Procedure Code Law, Cap 30, Laws of Northern Nigeria, 1963.

[24] *Id* at s 386.

[25] See further Oba, AA, 'Framing of Charges by Magistrates in Northern Nigeria: An Obsolete Procedure?' (Unpublished paper on file with the author).

[26] Murray Last, *supra*, n 4 at pp 190-192 and Abdulmalik Bappa Mahmud, *supra*, n 10 at pp 6–9.

[27] For example, in the north, the High Court had original and appellate jurisdiction in all matters of Islamic law except those relating to Islamic personal law, while in the south, it has jurisdiction in all Islamic law matters.

[28] See detailed examination of this and other related issues in Oba, AA, '*Kadis* (Judges) of the *Sharia* Court of Appeal: The Problems of Identity, Relevance, and Marginalisation within the Nigerian Legal System' (2003) 2 (2) *Journal of Commonwealth Law and Legal Education* at pp 49-72.

Provincial Courts and later High Courts from whence appeal went to the other common law courts terminating in the Privy Council. Pressure from Muslims led to the creation of the Muslim Court of Appeal in 1956.[29] This court which heard appeal from the native courts in matters of Islamic personal law was merely an ad hoc one with one standing membership. It was replaced by the *Sharia* Court of Appeal in 1960.[30] The *Sharia* Court of Appeal was conferred with equal status with the High Court to divert the attention of Muslims from the inferior jurisdiction of the court.[31] In reality, the *Sharia* Court of Appeal was a court of very limited jurisdiction and *Kadis* of the *Sharia* Court of Appeal were never and are still not equals of judges of High Court in terms of prestige, status, and official patronage.[32] The *Sharia* Court of Appeal established in the north had the same jurisdiction with the defunct Moslem Court of Appeal. Appeals from the area courts in other Islamic law matters went to the High Court.

Fourthly, they devised means by which common law judges who were totally ignorant of Islamic law could sit on Islamic law matters. By tagging Islamic law as a customary law which required proof before an English style court could act on it, common law practitioners were able to administer it, even if imperfectly.[33]

E. *Legal Education*

Although the colonial masters met a flourishing system of Islamic legal education in the north, they did nothing to encourage it. On the contrary, they did everything they could to discourage and marginalise it.[34]

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[29] See a review of this court in Keay and Richardson, *supra*, n 6 at pp 56-58.

[30] See a detailed examination of this court in Oba, AA, '*Sharia* Court of Appeal in Northern Nigeria: The Continuing Crises of Jurisdiction' (2004) 52 (4) *American Journal of Comparative Law* 859.

[31] Keay and Richardson, *supra*, n 6 at p 68 and Abdulmalik Bappa Mahmud, *supra*, n 10 at p 37.

[32] The court had only appellate jurisdiction in matters of Islamic personal law. On status of *Kadis* see generally Oba, '*Kadis* (Judges) of the *Sharia* Court of Appeal: The Problems of Identity, Relevance, and Marginalisation within the Nigerian Legal System', *supra*, n 28.

[33] Much harm was done to the elucidation and image of Islamic law by common law judges who are totally ignorant of Islamic law, yet adjudicate on it: Tabiu, M, 'The Impact of the Repugnancy Test on the Application of Islamic Law in Nigeria' (1991) 18 *Journal of Islamic and Comparative Law* 53.

[34] See the detailed study in Oba, AA, 'Lawyers, Legal Education and *Shari'ah* Courts in Nigeria' Lawyers, Legal Education and *Shari'ah* Courts in Nigeria (2004) 49 *Journal Legal Pluralism* 113.

The colonial approach was carried into the post-independence era. Islamic law was not taken into consideration when the law was introduced as a discipline in Nigerian universities and when the Nigerian Law School was established. Yet, the issue remained a nagging one. Coulson continuing the colonial dream opined that Islamic law 'rather than forming an isolated part of the curriculum, it should be merged and integrated into the substance of two basic existing courses – namely those of Jurisprudence and Family Law'.[35]

Eventually, Islamic law emerged as part of a combined law degree program with common law. This program is offered in some universities in the north. The basic and general degree in all Nigerian universities offering law is the common law degree program. The overwhelming majority of lawyers in the country are graduates of the common law degree program.

III. The Solutions Proffered

Various terms have been adopted by writers in the search for solutions to the crisis in Nigeria's legal pluralism. There has been talk of 'unification', 'fusion', and 'harmonisation'. It is therefore important to define the term 'harmonisation'. The dictionary meaning of 'harmony' is 'agreement, accord'.[36] Harmonisation is defined *inter-alia* as to make or form a pleasing or consistent whole.[37] Within the theme of this paper, this connotes a search towards the peaceful co-existence of all three laws and legal systems within the Nigerian legal system. Unification or fusion consists of creating a totally new law from the synthesis of the existing laws. In this case, the resultant law will borrow from all the previous laws.

A. *Unification of Laws*

Nigeria's legal pluralism has been a source of concern to some of Nigeria's leading legal scholars and they have suggested what they think the future of law in Nigeria should look like. The pioneering effort in this regard is that of Nigeria's leading jurist, Elias.[38] His was perhaps Africa's first response to the

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[35] Coulson, NJ, 'Legal Education and Islamic Law' (1966) 1 (1) *Journal of the Centre of Islamic Legal Studies* (ABU) at p 5 quoted in Aguda, TA, 'Towards a Nigerian Common Law' in Ajomo, MA (ed), *Fundamentals of Nigerian Law* (Lagos: Nigerian Institute of Advanced Legal Studies, 1989) at p 264.

[36] *Pocket Oxford English Dictionary* (Oxford University Press, 1994).

[37] *Ibid.*

[38] TO Elias later became Professor and Dean of Law, University of Lagos, Attorney General of the Federal Republic of Nigeria and President, International Court, Hague.

degrading aspersions casted on pre-colonial law in Africa. His book *The Nature of African Law*,[39] which has become the *locus classicus* on African Customary Law, was directed solely at proving that there was law in pre-colonial Africa. He sees the future of law in Nigeria in the evolvement of 'a common law for the country out of the existing bodies of law'.[40] Though a Muslim, his perception of the 'existing bodies of law' was limited to English common law, statutes, and customary law.[41] Islamic law was not within his contemplation at all. This attitude was the official attitude of the British and was theme of several conferences in the early years of independence.[42]

The next jurist to concern himself seriously with the problem is Aguda.[43] He sees the future of law in a 'Nigerian Common law' emerging out of the three broad systems of law operating in the country. He stressed the importance and 'desirability of uniformity of laws in a multi-ethnic, multi-cultural and multi-religious society as ours'.[44] He criticised Elias for ignoring Islamic law.[45] He advocated a broad-based legal education, which with include all the three laws so that every lawyer produced in the country will be learned in them all. They can then appear as advocates and sit as judges on all types of cases relating to Islamic law cases.

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[39] Elias, TO, *The Nature of African Customary Law* (Manchester: Manchester University Press, 1956).

[40] Elias, TO, *Law in a Developing Society* (Lagos: University of Lagos Inaugural Lecture, 1969) at pp 18-19.

[41] Elias, TO, *Groundwork of Nigerian Law* (London: Routledge and Kegan Paul, 1954) at p 25.

[42] These conferences include Judicial Advisers Conferences, 1953 and 1956; London Conference on the Future of Law in Africa, 1959–1960; Colloquium of French-speaking Law Faculties on Economic Development and Legal Change, Dakar, 1962; Conference on Local Courts and Customary Law in Africa, Dar es Salaam, 1963; Conference: 'From a Traditional to a Modern Law in Africa' Venice, 1963; and Conference on Integration of Customary and Modern Legal Systems in Africa, Ife, 1964. The report of the last conference is published in University of Ife and Institute of African Studies, *Integration of Customary and Modern Legal Systems in Africa* (New York: Africana Publishing Corporation and Ile-Ife, University of Ife Press, 1971). A summary of the previous conferences is available in Allott, AN, 'A Note of Previous Conferences on African Law', *id* at pp 4-16.

[43] Aguda, TA, *The Challenge for Nigerian Law and the Nigerian Lawyer in the Twenty-First Century* (Nigerian National Merit Award Lecture) (Lagos: Federal Government Press, 1988) at pp 23-28 and 33-36, and Aguda, TA, 'Towards a Nigerian Common Law' *supra*, n 35 at pp 249-266.

[44] Aguda, TA, *A New Perspective in Law and Justice in Nigeria* (Distinguished Lecture Series, National Institute For Policy and Strategic Studies, Kuru, 1985) at p 5.

[45] *Id* at p 249.

It has been pointed out earlier that the colonial position is that common law will eventually supersede both Islamic law and customary law in the country.[46] This view though unpopular has even now some supporters. Agbede,[47] a contemporary proponent of this view wants the *Sharia* Court of Appeal and the Customary Court of Appeal abrogated. According to him, Islamic law and customary law can be handled by the High Courts even if judges of the court are not versed in neither of the laws, since both laws are matters of fact that must be proved before a court can act on them.

From the above, three types of unification schemes are identifiable. There is the one proposed by Elias, another proposed by Aguda and thirdly the colonial version. The first and the last entail a gross violation of the rights of Muslims. Both proposals can no longer be taken seriously. The proposal by Aguda is different. It seeks to 'unite' the administration of all the three laws under a unified court system as a prelude to integrating them into one single corpus of law. It has proved an attractive option that has enjoyed support among non-Muslims. It is consistent with Allott's view of modern African law as a unity of all the laws in operation in these countries.[48] Most importantly, it is consistent as will be seen later herein with the Directive Principles of State Policy contained in the country's constitution. Thus, it is pertinent to examine the problems relating to the proposal.

1. *Proposed scope of Islamic law in a unified system*

Non-Muslims, whether they are in favour of unification or parallel system of courts are generally united in their wanting Islamic law restricted in all events to matters of personal law only. They will not contemplate matters such as Islamic criminal law.[49] However, proponents of Islamic law will not accept such an emasculated Islamic law.

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[46] *Ibid.*

[47] Agbede, IO, 'Legal Pluralism: The Symbiosis of Imported, Customary and Religious Laws: Problems and Prospects' in Ajomo (ed), *supra*, n 35 at p 235.

[48] Allott, Antony N, 'The Future of African Law' in Kuper H and Kuper L (eds), *African Law: Adaptation and Development* (Berkeley and Los Angeles: University of California, 1965) 216 at pp 218–219.

[49] Aguda, The *Challenge for Nigerian Law and the Nigerian Lawyer in the Twenty-First Century supra*, n 43 at pp 27-28 and Anderson, *Islam in Africa*, *supra*, n 5 at p 219.

2. *Differences between Islamic law and common law*

There are many differences between Islamic law and common law. The differences between them in criminal law are more widely known, but there are also grave differences of approach between the two systems in matters of evidence and procedure.[50] Any unification will mean changes in certain fundamental aspects of either or both of these systems. Given the legal climate of the country, all the concessions will be expected to come from Islamic law alone. In such a case, the result will not be unification properly speaking, but a total displacement of Islamic law, which Muslims can never allow.

3. *Neglect of Islamic legal education*

But for the combine law degree program, Islamic law has so been totally neglected in the country's legal education that any unified courts system cannot but increase the domination by common law practitioners and the marginalisation of Islamic law in the country.

4. *Religious objections*

The biggest obstacle to unification is that Islamic law does not permit for Muslims a hybrid law out of Islamic law and any other law.[51] Islam provides clearly that Islamic law is for Muslims and that others have their own laws.[52] Professor

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[50] The features in common law which are not acceptable to Islamic law include *ex parte* applications; the doctrines of judicial precedent (*stare decisis*) and *res judicata*; judicial discretion in evaluation of evidence, privileged position of lawyers in court vis-à-vis ordinary litigants and among themselves (*ie* divisions into inner and outer bar) and undue technicalities.

[51] The Qur'an is very clear on this: 'If anyone desires a religion other than Islam, never will it be accepted of him and in the hereafter he will be in the ranks of those who have lost (all spiritual good)' (3:85); 'O you who believe! Enter into faith (Islam) completely' (2:208); 'Do you seek after a judgment of (the days) Ignorance? But who, for a people whose faith is assured, can give better judgment than Allah?' (5:53); and those who do not judge by revealed law are 'unbelievers … wrongdoers … [and] rebels' (5:47, 48 and 50). See the exposition of this theme in Abdulmalik Bappa Mahmud, *supra*, n 10 at pp 49-61 and Abdur-Rahman Iban Salih al-Mahmood, *Man-Made Laws Vs. Shari'ah – Rulings by Laws other than what Allah Revealed* (Riyadh: International Islamic Publishing House, English edition, 2003).

[52] Qur'an states ' … To each among you have we prescribed a Law (*Shari'ah*) and an open way (*Minhaj*), if Allah had so willed, he would have made you a single people ...' (5:51) The Qur'an also emphatically warns Muslim from following the ways of disbelievers: 'O you who believe! If you obey the unbelievers, they will drive you back on your heels, and you

Doi captured the position vividly when he said:

> The *Shari'ah* and the Western Common Law cannot be fused together completely nor will it be allowed by the *Ulama* of Islam and well-meaning Muslims.[53]

Although this statement has been cited as an example of the intolerant Islam,[54] it remains the true Islamic position. The solution to the problems arising from legal pluralism cannot be solved by unification of laws. It is worse that to many of its proponents, unification of laws means the uncritical acceptance of English style common law as the general law in the country.

B. *Parallel System of Laws*

Muslims emphasising the incompatibilities between Islamic law and common law have rejected any merger of the administration of both laws and argued in favour of the establishment of a parallel system of separate courts from the lowest to the highest court to deal with each of the three laws in the country. This agitation was formulated primarily by the step motherly treatment which the colonialists gave to Islamic law. Since the mid-1970s, there have been several conferences where this approach was articulated.[55]

In the suggested unified system of courts, Islamic law is denigrated and marginalised. Thus, a separate system of courts appears to be the only feasible method by which the sanctity, purity, and integrity of Islamic law can be guaranteed. The fear concerning administration of Islamic law is genuine indeed.

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will turn back (from faith) to your own loss' (3:149); 'O you who believe! Take not into your intimacy those outside your ranks: They will not fail to corrupt you ...'; (3:118); and 'Never will the Jews or the Christians be satisfied with thee unless thou follow their form of religion' (2:120).

53 Abdur Rahman I Doi, *Shari'ah: The Islamic Law* (London: Ta Ha Publishers, 1984, 1404 AH) at p 454 quoted in Aguda, *supra*, n 43 at p 26.

54 Aguda, supra, n 43 at p 26.

55 See Kukah, MH, *Religion, Politics and Power in Northern Nigeria* (Ibadan: Spectrum Books Ltd, 1993) at p 118. The proceedings of some of these conferences have been published: Suleimanu Kumo and Abubakar Aliyu (eds), *Issues in the Nigerian Draft Constitution: The Report of the Conference on Issues in the Nigerian Draft Constitution held at the Institute of Administration, ABU, Zaria 21-24 March, 1977* (Zaria: Ahmadu Bello University, 1977); Ibrahim Sulaiman and Siraj Abdulkarim (eds), *On the Political Future of Nigeria* (Zaria: Hudahuda Publishing Co Ltd, 1988); and Syed Khalid Rashid (ed), *Islamic Law in Nigeria (Application and Teaching)* (Lagos: Islamic Publications Bureau, 1988).

It was recognised by the Conference of Judges in 1970 which recommended the establishment of a Federal Court of Appeal as an intermediate court between the High Courts and the Supreme Court and a Federal *Shari'ah* Court of Appeal as the final court of appeal for all Islamic law matters in the[56] The Federal *Shari'ah* Court of Appeal which was to be manned by Islamic experts was to be of co-ordinate jurisdiction with the Federal Court of Appeal. In 1976, General Murtala Mohammed approved the establishment both courts.[57] However, he was assassinated before the actual establishment of the courts. His successor General Obasanjo went ahead with the establishment of the Court of Appeal but left the issue of the Federal *Shari'ah* Court of Appeal to the Constitution Drafting Committee (CDC).[58] The CDC accepting the recommendation of its sub-committee on the Judicial System endorsed the establishment of the court as an intermediate court between the *Shari'ah* Courts of Appeal and the Supreme Court.[59] However, at the Constituent Assembly which considered the recommendation of the CDC, this issue led to a vociferous debate which has become the hallmark of subsequent debates on Islamic law.[60]

The Constituent Assembly, after a walkout by the Muslim members of the house rejected the idea of a Federal *Shari'ah* Court of Appeal. They only approved the empanelling of a special panel of the Court of Appeal for Islamic and customary cases respectably, the retention of *Shari'ah* Court of Appeal at state level and the establishment of the Customary Court of Appeal also at State level.[61]

The parallel system of courts has many problems. But before the problems are examined, it may be useful to examine some recent developments.

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[56] See Belgore, AO, 'History of Shari'a in Nigeria' (1999 – 2003) 2 *Al-Maslaha* 1 at p 24.

[57] Abdur Rahman I Doi, 'The Impact of English Law Concepts on the Administration of Islamic Law in Nigeria' in Eckhard Breitinger (ed), *African and Western Legal Systems in Contact* (Bayreuth: Bayreuth African Studies Series 11, 1989) 25 at p 46.

[58] *Ibid.*

[59] *Id* at pp 46–47, see *Reports of the Constitution Drafting Committee* (Lagos: Federal Ministry of Information, 1976) Vol 1, pp 110, 113 and 124-125.

[60] Clarke accurately predicted that the matter will always be a contentious one anytime Nigeria deliberates on a Constitution: Peter Clarke, 'Islamic Reform in Contemporary Nigeria: Methods and Aims' (April 1988) 10 (2) *Third World Quarterly* 519 at p 528. The debate was re-enacted in 1988 and to a smaller extent in 1995.

[61] Doi, 'The Impact of English Law Concepts on the Administration of Islamic Law in Nigeria', *supra*, n 57 at pp 47–48 and Abdulmalik Bappa Mahmud, *supra*, n 10 at pp 44-45.

C. *Recent Developments*

Law in Nigeria took a new turn in 1999 when the Governor of Zamfara State declared the intention of his administration to adopt Islamic law as the basic law in the State.[62] The Zamfara State initiative was premised on the parallel system of courts. The state separated completely at state level, the administration of Islamic law from those of common law and customary law. It merged the administration of customary law with those of common law. This initiative which was given legislative backing was copied in several other states in the north.[63] The main features of the changes include the enactment of a *Sharia* Penal Code which incorporated *huduud, qisas* and *ta'zir* offences[64]; the creation of *Sharia* Courts at lower level to hear at first instance, all Islamic matters including the administration of the *Sharia* Penal Code;[65] the expansion of the jurisdiction of the *Sharia* Court of Appeal to appeals in criminal matters from the *Sharia* Courts arising from the *Sharia* Penal Code;[66] and the transfer of customary law matters to Magistrate courts.[67] In addition, the supervision of the *Sharia* Courts is vested in the Grand *Kadi*.[68] One noticeable feature of all these reforms is that non-Muslims are not subject to the *Sharia* Penal Code at all.[69] They are subject to the jurisdiction of the *Sharia* Court in civil matters only if they so wish.[70]

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[62] See the cover story on the launching of the *Sharia* which took place on 27 October 1999 in *TELL* No 49 November 15, 1999 at pp 12-24.

[63] See the overview of this reforms in Yakubu, John A, *The Dialectics of the Sharia Imbroglio in Nigeria* (Ibadan: Demyas Law Books, a Division of Demyaks Ltd, 2003); Peters, Ruud, *Islamic Criminal Law in Nigeria* (Spectrum Books Ltd, 2003) at pp 13-46, and appendices three, five and eight (*Id* at pp 51-53, 61-74 and 81-82 respectively), and Oba, AA, 'Improving Women's Access to Justice and the Quality of Administration of Islamic Criminal Justice in Northern Nigeria' in Joy Ngozi Ezeilo, Muhammed Tawfiq Ladan and Abiola Akiyode Afolabi (eds), *Shari'a Implementation in Nigeria: Issues and Challenges on Women's Rights and Access to Justice* (Enugu: Women's AID Collective, Enugu (WACOL) and Women Advocates Research and Documentation Centre, Lagos (WARDC, 2003) 44 at pp 52-53 (the full text of the book is also at www.boellnigeria.org/documents/Sharia%20Implementation%20%20Nigeria.pdf)

[64] See for example the *Shari'ah* Penal Code Law, No 10, 2000 (Zamfara State).

[65] See for example s 3, Kano State *Sharia* Courts Law, 2000.

[66] *Id* at s 6.

[67] *Id* at s 5 (4) and (5).

[68] *Id* at ss 3 (3), 7 (c) and 9.

[69] *Id* at s 5 (5).

[70] *Id* at s 5 (4).

The major obstacle to these reforms is that the states must act within constitutional limits.[71] The constitution being a federal one, shares power between the federal government and the state governments. States cannot legislate on the Court of Appeal and the Supreme Court. Those courts remain unaffected by the reforms. There are also human rights provisions and the rule against state adoption of any religion as a state religion which are constitutional entrenched. Some have argued that the reforms violate these provisions. The better view is that the reforms are carefully formulated in a manner that they are constitutional.[72]

D. *Obstacles to Parallel System*

1. *Weaknesses in Muslims*

The major obstacle to parallel system of courts is the Muslims themselves. Muslims disagree on some basic issues and often quarrel violently with themselves. Some Muslims oppose the implementation of Islamic law in its entirely while some oppose only Islamic criminal law. Others want only Islamic personal law. These weaknesses played an important part in the debates at the Constituent Assembly in 1978. One opponent of Islamic law noted the 'absence of a co-ordinated approach towards pressing the demands of the *Sharia* by Muslims' in the debates.[73] Anti-Islamic law forces are quick to capitalise on discordant Muslim voices.[74] Such contradictory positions inspire neither confidence nor respect from friends and foes alike.

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[71] The Constitution proclaims its supremacy. If any other law is inconsistent with the provisions of the Constitution, the Constitution prevails and that other law shall be void to the extent of the inconsistency: Section 1 (1) and (3), 1999 Constitution. See further the paper by the Attorney General and Commissioner for Justice, Zamfara State, Ahmed Bello Mahmud, '*Sharia* and Democracy: The Zamfara State Experience' (1999-2003) 2 *Al-Maslah* 43 at p 46.

[72] See the analyses in Oba, AA, 'The Revival of Islamic Law in Northern Nigeria: Some Constitutional Issues' (unpublished paper on file with the author).

[73] Kukah, *supra*, n 55 at p 135.

[74] *Id* at p 128. See also the cover story 'Islam: One Religion, Different Voices' in *Newswatch* October 10, 1988. It was published when the *Sharia* Controversy was raging in the Constituent Assembly of 1988! This is so even on the international level, see Bielefeldt, Heiner, 'Muslim Voices in the Human Rights Debate' (1995) 17 *Human Rights Quarterly* 587.

2. *The area court experience*

The Area Courts administer Islamic law at the grassroots level. These courts are the only symbol of justice that many communities in the more remote parts of the north know. Area courts have a very poor reputation. The judges of the court are too often accused of oppression, arbitrariness, incompetence, and corruption.[75] Many – Muslims and non-Muslims alike – despise them and have developed an aversion to the '*Sharia*' which these courts administer.

The identification of these courts with Islamic law is unfortunate for the courts also administer customary law and criminal law under the Penal Code. The true position is that these courts have lost contact with their Islamic law antecedents. Most of the judges of the court no longer think of themselves as occupying Islamic positions but see themselves as mere civil servants.[76] They are no longer truly Islamic courts. Islamic law requirements are ignored in their appointment, qualifications, and control. The courts were created as part of the executive arm of the government. They were until Area Court reforms in 1967, under control of the local councils which were manned by politicians.[77] Much of the negative reputation of the area courts amongst non-Muslim peoples in the north is due to the manner in which politicians used the courts to oppress their political opponents.[78]

It remains a serious criticism of the recent Islamic reforms that most of the newly created *Sharia* Courts are manned by former judges of the area courts whose knowledge of Islamic law or attitude to justice have not really changed.[79]

3. *Ignorance*

Non-Muslims generally in the country and even many Muslims are ignorant of Islamic law. They rely on their imagination in constructing what Islamic law

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[75] Odinkalu, AC, *Justice Denied (The Area Courts System in the Northern States of Nigeria)* (Ibadan: Kraft Books Ltd for Civil Liberties Organization (CLO), 1992), Abdulmalik Bappa Mahmud, *supra*, n10 at pp 29 and 33-34, and Kukah, *supra*, n 55 at pp 129-133.

[76] Yadudu, AH, 'Colonialism and the Transformation of Islamic Law in the Northern States of Nigeria' (1992) 32 *Journal of Legal Pluralism* 103 at p 125.

[77] Abdulmalik Bappa Mahmud, *supra*, n 10 at pp 28-30.

[78] *Ibid.*

[79] See generally Ladan, MT, 'Women's Rights, Access to and Administration of Justice under the *Sharia* in Northern Nigeria' in Ezeilo and Afolabi (eds), *supra*, n 63 at p 37 and pp 80-81 and Oba, 'Improving Women's Access to Justice and the Quality of Administration of Islamic Criminal Justice in Northern Nigeria', *supra*, n 63 at pp 62-63.

means or portends. Even successful lawyers and distinguished jurists are not free of this ignorance.[80] The result is that Islamic law was berated for faults which are really not part of Islamic law.

4. *Religious animosity*

Islamic law and common law derived from Islam and Christianity respectively. Nigerian Christians have inherited or acquired the age long animosity to Islam in the West. Even then, some retained enough objectivity to discuss in terms of 'the highly systematised and sophisticated Moslem law of crime'.[81]

However, since the constitutional debates of 1978, most Nigerian Christians have lost virtually all sense of objectivity on matters relating to Islam. They are generally antagonistic to any scheme that would benefit Islam. They protest any beneficial to Islam as a disguised attempt to 'Islamise' the country.[82] The Christian Priesthood in the country have made opposition to Islam a major part of their duty. It has become a rallying point for the country's divided and fragmented Christianity. This campaign against Islamic law has been conducted with much venom, abuse and unreasoning hatred.[83]

5. *Professional rivalry*

Legal practitioners constitute a strong opposition to Islamic law in the country. This has been attributed to professional jealousy and rivalry.[84] Even some lawyers who are Muslims publicly oppose Islamic law in its totality or some aspects of it. Their problem is essentially due to their ignorance of Islamic law.

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[80] A typical example is Sam Mbakwe, a leading lawyer and member of the Constituent Assembly responsible for the making of the 1979 Constitution who contributing to the debate on *Sharia* Court of Appeal lamenting wondered why so much time should be spent on a subject he has never heard of in his life: see Kukah, *supra*, n 55 at p 123. He was subsequently the Governor of Imo State in the eastern Nigeria. Even the jurist Aguda, for all his learning and prolific contributions to the discussions on the future of law in Nigeria confessed to being virtually ignorant in matters of Islamic law: see Aguda, *A New Perspective in Law and Justice in Nigeria, supra*, n 44 at p 2.

[81] See Okonkwo*supra*, n 6 at p 4.

[82] See *The African Guardian*, October 24, 1998, p 20 and Kukah, *supra*, n 55 at p 230.

[83] See examples in Nwabueze, BO, *Constitutionalism in the Emergent States* (London: C Hurst and Co, in collaboration with Nwamife Publishers, Enugu, 1973) at pp 83-85 and Aniagolu, AN, *The Making of the 1989 Constitution of Nigeria* (Ibadan: Spectrum Books Ltd, 1993) at pp 55, 61-62 and 147-148.

[84] Gwarzo, 'The *Sharia* Courts in our Judicial System', *supra*, n 3 at p 508 and Kukah, *supra*, n 55 at p 131.

They, having acquired western values and common law training, do not see any good in Islamic law or they fear that the ascendancy of Islamic law will reduce the power and prestige ascribed to their profession in the society. Some of such lawyers as judges do the greatest damage to Islamic law by giving judgements which restrict or anglicise Islamic law.[85]

6. *Inadequacies of legal education in Nigeria*

Islamic legal education is not taken seriously in the country.[86] Legal education in Nigeria at both academic and professional levels is patterned after what obtains in England. The result is that Islamic law education at university level notwithstanding the few universities where a combine law degree in Islamic law and common law exist is not within the main stream of national university curriculum.[87] Islamic law is totally ignored at the Nigerian Law School which prepares would-be legal practitioners for call to bar. In short, legal education in Nigeria has not prepared most lawyers to function under Islamic law system.

7. *Intolerance*

The western arrogance is so much that even in contemporary times; leading textbooks on comparative law either do not discuss Islamic law at all or relegate it to a few pages under the heading 'other legal systems'.[88] In the west, Islamic values are derided and treated with contempt. This intolerant attitude to Islam treats rights of Muslims with an indifference that brings into disrepute the western concept of human rights and questions seriously, the ability of western

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[85] Abdulmalik Bappa Mahmud, *supra*, n 10 at pp 42, and 59-61.

[86] See the detailed analysis of this and related issues in Oba, 'Lawyers, Legal Education and *Shariah* Courts in Nigeria' *supra*, n 34; Oloyede, IO, 'Islamic Legal Education in Nigerian Universities: Some Problems and Vision' in Abdul-Rahmon, MO (ed), *Perspectives in Islamic Law and Jurisprudence* (Essays in Honour of Justice (Dr) MA Okunola (JCA) (Ibadan: National Association of Muslim Law Students (NAMLAS), 2001) at pp 112-124; and Abdul-Qadir Zubair, *Shari'ah in Our Citadels of Learning* (The Sixty-Sixth Inaugural Lecture, University of Ilorin, Ilorin delivered on 27 March 2003).

[87] The National Universities Commission (NUC) has Approved Minimum Academic Standards (AMAS) for all degree programs in Nigerian universities but there is none for the combine law degree program: Oloyede, *id* at pp 118–120.

[88] An example of the first type is Peter de Cruz, *Comparative Law in a Changing World* (London: Cavendish Publishers Ltd, 1995). Examples of the second type are David and Brierly, *supra*, n 1 at pp 473-483 and Zweigert, Konrad and Kotz, Hein, *Introduction to Comparative Law* (translated by Tony Weir) (Oxford: Clarendon Press, 2nd ed, 1992) at pp 329-338.

peoples to live on equal terms with non-western peoples.[89] By defining every issue and human value exclusively in terms of their limited experience, they are denying others the right to see things differently. With the world having become a global village, this attitude poses the greatest threat to world peace today.

8. *Foreign interference*

The undisguised feature of the foreign policy of many western countries is the 'containment of Islam'. Thus, given the large and active Muslim population in Nigeria, western governments take an active interest in the internal affairs of the country. Non-governmental organisations are created and sponsored to 'check' Islamic law. This global network ensures that opponents of Islamic law in the country are well co-ordinated and funded. In Nigeria, anti-Islamic law NGOs have become a major source of getting cheap foreign money. Unfortunately, this have also ensured that Islamic law is constantly given negative publicity and that many find it extremely profitably to toil restlessly in search of new ways to deal with the '*Sharia* threat'.

9. *Western concept of human rights*

The modern concept of human rights developed in the west together with its pretensions to universality has much significance for non-western cultures generally and Islamic law in particular.[90] According to human rights proponents, Islamic punishments such as whipping, cutting of hands, and stoning to death violate the rule against cruel and inhuman treatment.[91] Other aspects of Islamic law in their view violate the rule against discrimination on grounds of religion and sexes.[92] In addition, these views of human rights protect alternative lifestyles such as homosexualism which are illegal in Islamic law.[93]

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[89] See generally Oba, AA, 'The Right to Time for Worship: International Conventions and the Practice in England, America and Nigeria' (2001) 28 *Journal of Malaysian and Comparative Law* 69 and Oba, AA, 'The Restricted Blasphemy Law in Britain: A Critical and Comparative Law' (Summer and Winter 1999) 8 (2) *Religion and Law Review* 147.

[90] Donnelly, Jack, 'Human Rights and Human Dignity: An Analytic Critique of Non-Western Conceptions of Human Rights' (1982) 76 *American Political Science Review* 303.

[91] See Abdullahi Ahmed An'Na'im, *Towards an Islamic Reformation: Civil Liberties, Human Rights and International Law* (Syracuse, New York: Syracuse University Press, 1990) particularly chapters four, five, six and seven.

[92] *Ibid* and Heiner Bielefeldt, *supra*, n 74.

[93] See for example Rhoda E Howard-Hassmann, 'Gay Rights and the Right to a Family: Conflicts Between Liberal and Illiberal Belief Systems' (2001) 23 *Human Rights Quarterly* 73.

10. *Adverse propaganda*

The Press in Nigeria is dominated by Christians. Thus, there is in the mass media, a relentless propaganda against Islam. News are falsified and distorted to project a negative image of Islam and Islamic law.[94] This coupled with the steady stream of negative propaganda against Islam and Islamic law in the international press constitutes a big obstacle to the realisation of a parallel system of courts. Islamic law is portrayed in both the local and international press as a law directed towards forceful conversions and domination of non-Muslims. Islamic law is also painted as a barbaric 'medieval law' which can only thrive where there is poverty and backwardness. The technological sophistication of the west is cited as evidence of the correctness of western political and legal set up.

11. *Weakness of customary law*

African customary law is generally not well developed and sophisticated as Islamic law and common law. Thus in Nigeria, it has been easy for common law to fill the vacuum in customary law as common law was applied to all transactions which are unknown to customary law, and there are many of such instances.[95] Apart from family law (which the law even allows persons subject to customary law to opt out of by contracting statutory marriage) and land law (which has been overtaken largely by statutory law), customary law has no provisions for other challenges of modern life. The weakness of customary law has retarded the development of a full-fledged pluralistic system in the country and has for a long time, stunted the development of Islamic law since Islamic law was treated as a variant of customary law.

12. *Unification as a national policy*

The colonialists consistently advocated for a unified legal system as the only means of forging national unity.[96] They argued that a tripartite or dual legal arrangement does not augur well for national unity. They wanted their own common law and its system of courts to be the only law in the country. We

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[94] See the elucidation of this theme in Ibrahim Ado-Kurawa, *Shari'ah and the Press in Nigeria: Islam versus Western Christian Civilization* (Kano: Kurawa Holdings, 2000).

[95] See the application of this rule in Park, *supra*, n 10 at pp 108-111, Obilade, AO, *Nigerian Legal System* (Ibadan: Spectrum Books Ltd, 1979) at pp 151-154 and Asein, *supra*, n 18 at pp 141-142.

[96] Park, *supra*, n 10 at pp 139-143.

have seen that many Nigerian scholars even in contemporary times have continued to parrot this argument. This was the argument proffered by the sub-committee on National Objectives and Public Accountability of the Constitution Drafting Committee (CDC) responsible for the 1979 Constitution. The subcommittee wanted to 'unite the society into one nation bound together by common attitudes and values, common institutions and procedures, and above all an acceptance of common social objectives and destiny'.[97] The sub-committee recommended further that the government should pursue this vision of national integration by encouraging free mobility of persons, intermarriages, and formation of associations that cuts across ethnic, linguistic and religious ties, so that 'loyalty to the nation shall override sectional loyalties'.[98] Most important to us here, the sub-committee recommended that:

> The State shall endeavour to secure for the inhabitants a uniform criminal code throughout the territory of Nigeria, and shall try as much as possible to harmonise the civil laws in the country.[99]

Harmonisation in this context is the same as uniformity. The recommendation of the sub-committee no doubt reflects in its totality, the views of proponents of the uniformity of laws in the country.[100] The CDC did not accept the suggestion relating to uniform criminal laws. The other suggestions were subsequently embodied as part of the Fundamental Objectives and Directive Principles of State Policy in chapter two of the 1979 Constitution and now same section the 1999 Constitution.[101]

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[97] *Reports of the Constitution Drafting Committee* (Lagos: Federal Ministry of Information, 1976) Vol I, p 35.

[98] *Id* at p 37.

[99] *Id* at p 39.

[100] The domineering influence of Professor Nwabueze who was chairman of the sub-committee is unmistakable. Prof Nwabueze is a well known proponent of uniformity of laws and who does not hide his contempt and disdain for Islam and its law: Nwabueze, *Constitutionalism in the Emergent States*, *supr*, n 83 at pp 83–85. Prof Nwabueze was again at the forefront of the opposition to the post 1999 Islamic law reforms: see for example, Nwabueze, BO,'Constitutional Problems of *Sharia*' in *The Sharia Issue: Working Papers for a Dialogue* (Privately printed by the Committee of Concerned Citizens, undated) at pp 14-21.

[101] See particularly ss 15 (2) and (3), 1979 and 1999 Constitutions respectively which enunciate uniformity as the means to national integration.

The main problem with the uniformity approach is that it is in reality, a vehicle for continuing western cultural imperialism. This is because all the uniform values suggested are usually based on western values.[102] This approach is definitely not consistent with the federal nature of the Nigerian State.

Muslims have rejected unification of laws and have insisted on harmonisation through a system of parallel courts from the lowest to the highest level. Yadudu captured vividly this approach when he said that Muslims should:

(a) Question the legitimacy of and justification for the continued supremacy of an alien and demonstrably unsuitable and unjust legal system, *ie* the English common law.
(b) Demand and work towards the removal of all restrictions on the application of Islamic law.
(c) Demand for and concertedly work towards the unhindered and unqualified application of the *Sharia* to Muslims in its entirety.[103]

E. *The Future: The Court of Appeal Model and other Alternatives*

The Court of Appeal is an intermediate appellate court between the High Court, the *Sharia* Court of Appeal, and the Customary Court of Appeal on the one part and on the other part, the Supreme Court which is the apex court in the country. The arrangement at the Court of Appeal was the outcome of the debates that preceded the enactment of the 1979 Constitution. The Court of Appeal is constitutionally required to have a mandatory minimum of three justices of the court who are learned in Islamic law and another three who are learned in customary law.[104] A panel consisting of three justices who are learned in the relevant law hears Islamic law and customary law appeals respectively.[105]

The one fault with this arrangement is that the justices who are appointed as being learned in Islamic law and customary law respectively are also required to be legal practitioners possessing the requisite common law requirements for appointment to the court. This means that persons having solely Islamic law qualifications or customary law qualifications cannot be appointed to the court

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[102] For example, see Nwabueze, *Constitutionalism in the Emergent States*, *supra*, n 83 at pp 85-87 and Aguda, *supra*, n 44 at p 6.
[103] Yadudu, AH, 'We Need a New Legal System' in Ibrahim Suleiman and Siraj Abdulkarim (eds), *On the Future of Nigeria* (Zaria: Hudahuda Publishing Co Ltd, 1988) 2 at p 7.
[104] Section 237 (2) (b), 1999 Constitution.
[105] *Id* at ss 247 (1) (a), 237 (2) (b) and 247 (1) (b).

even though they can be appointed to the *Sharia* Court of Appeal and the Customary Court of Appeal with those qualifications. The Court of Appeal remains the exclusive preserve of common law trained practitioners.[106] It will be better if the same qualifications acceptable at the *Sharia* Court of Appeal and the Customary Court of Appeal are also acceptable for appointment to the Islamic law and customary law quotas in the court. Another problem is the equation of Islamic law with customary law. Such thinking led to the establishment of the Customary Court of Appeal. The court has such a narrow jurisdiction that it is doubtful if the court is really worth retaining. The reality is that customary law itself is gradually disappearing. This together with the diversity of customary law in the country has made its enforcement difficult. Experience has shown that the common law courts can effectively handle customary law. Thus, in administration of law in the country, there should be two broad divisions - Islamic law on one hand and customary law and common law on the other hand.

There are three alternatives to the challenges of unification and harmonisation of administration of laws in Nigeria. The first is the retention of the current arrangement with the improvement that the arrangement at the Court of Appeal is duplicated at the Supreme Court and that the qualifications of judges regarded as experts in Islamic law in both courts be similar to those required for appointment as *Kadi* of the *Sharia* Court of Appeal. The second is the establishment of a Federal *Shari'ah* Court of Appeal as a final court in Islamic law matters as proposed by the Judges Conference in 1972. The third is a system of parallel courts from the lowest to the highest court culminating in a dual Supreme Court system. A variant of this is a unified courts system consisting at every level, distinct Islamic law divisions. The third is for Muslims the ideal, but any of the first two should be acceptable to both proponents of unification and parallel systems.

IV. Concluding Suggestions

The problems facing Muslims in Nigeria have national and international aspects. In the first place, Islam is not only a religion but also, a nation (*Ummah*).[107] Secondly, these problems are similar to those of other Muslims in many other

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[106] See further Oba, '*Kadis* (Judges) of the *Sharia* Court of Appeal: The Problems of Identity, Relevance, and Marginalisation within the Nigerian Legal System', *supra*, n 28 at p 65.

[107] Qur'an states 'And hold fast all together by the Rope which Allah (stretches out for you) and be not divided among yourselves' (3:103); ' ... To each among you have we prescribed a Law (Shari'ah) and an open way (*Minhaj*), if Allah had so willed, he would have made

States. Thirdly, Globalisation has turned Islamic law matters within municipal law into an international issue. Thus, lasting solutions to the problem of harmonisation of laws in Nigeria would require not only action on the part of Muslims in Nigeria, but a concerted action on the part of Muslims the world over regardless of the nations to which they may belong. Some of the actions required are discussed hereunder.

A. *Enlightenment Campaigns*

Muslims should embark on Enlightenment Campaigns directed towards three main goals. First, Muslims should be educated on the nature of the competing laws. Muslims should realise that common law is a Christian law.[108] It is the English attempt to find in Christianity, legal solutions to the myriad of problems that confront man. Secondly, Muslims and non-Muslims should be enlightened as to the divine nature of the *Sharia* and its being compulsory and binding on every Muslim. These will entail exegesis of the Quran and Sunnah to convince passive Muslims of the demands and dictates of Islam as a total package for man's sojourn on earth. Thirdly, Muslims should strive to convince the world as to the superiority of Islamic legal system over man-made legal systems. One decisive way in which the superiority of the *Sharia* can be shown is through works on comparative law focusing on the ways and manners in which *Sharia* and other legal systems treat the same legal or social problems.

The area of comparative law is very important in the Muslim struggle to regain self-respect. Western education has inculcated in some Muslims an unconscious hatred for Islamic values, and a strong love for western values. Comparative studies will build a new confidence rooted not only in faith but also in intellectual certainty of the validity and correctness of the position of Islamic law. Opponents of Islamic law would also be silenced thereby.

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you a single people (*Ummah*) ... ' (5:51); and 'Ye are the best of Peoples (*Ummat*) evolved for mankind...' (3:110). The completeness of Islam as a nation does not admit modern nationalism in form of nation states: Ali Muhammad Naqavi, *Islam and Nationalism* (Teheran: Islamic Propagation Organization, 2nd ed, 1409 AH, 1988)

[108] See *Bowman v Secular Society Ltd* [1917] AC 406, Ibrahim Suleiman, 'The *Shariah* and the 1979 Constitution', in Syed Khalid Rashid (ed), *supra*, n 55 at pp 52-74, Oba, AA, 'Common Law is Christian Law' (2002) 1 (1) *Asirat* - Magazine of the Muslim Students Society, ABU, Kongo Campus, Zaria, at pp 10-12, and Oba, 'The Legal Relevance of Religion in Nigeria', *supra*, n 9 at pp 30-32.

B. *Islamic Centres of Academic Excellence*

It is useless in modern world to advocate any viewpoint without a strong intellectual movement behind it. The world has become a global village. Since the West controls the leading centres of learning, Islamic perspectives are disadvantaged in the global competition for ascendancy of ideals and worldviews.[109] It is therefore imperative that Muslims develop centres of excellence spread across the world. Such research centres, universities, or foundations which should attract scholars from all corners of the world should be the nucleus for Islamic revivalism and the centres for the defence and propagation of Islamic values. Islamisation of knowledge should be pursued with vigour and dedication.

One is aware that concrete attempts have been made in the direction of the suggested centres of excellence. An example is the International Islamic University, Malaysia. One major problem however is that of nationalism. National sentiments and patriotic feelings have replaced religious solidarity. Therefore, it has not been possible to admit all Muslims (students and staff) on the basis of equality with own nationals. Unless this attitude is corrected, the idea of a new Muslim or Islamic civilisation will remain in the realm of dreams.

It is also important that the centres of excellence sponsor journals wherein well-researched and articulated ideas are published. These journals should be available online at minimal or no cost. One reason why the west has retained its intellectual ascendancy is that they publish the most prestigious journals and thus are able to define 'leading scholarship'.

C. *Political Leadership for Muslims*

Today, Muslims are scattered across many nations. Islamic brotherhood is lost in nationalistic fervour. There is the urgent need for Muslims to rediscover the concept of Islam as an *Umma*.[110] Ideally, Muslims should be under a single political leadership. If this cannot be attained, at least Muslims countries should work together on the international arena. The need to be able to defend the territorial integrity of Muslim countries is now apparent. Unless Muslims put

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[109] For example, Muslims undergoing postgraduate studies complain of hostility and bullying methods of their supervisors who sometimes insist on the student adopting the teacher's opinion and are penalised if they refuse: Ado-Kurawa, *supra*, n 94 at p 100.

[110] See the discussions of these themes in Abdulmalik Bappa Mahmud, *supra*, n 10 at pp 49-61.

up a strong united front, it appears that they will fall one by one to western intellectual and cultural imperialism. It appears that now is the most appropriate time for Muslims to form a supra national Islamic body to defend Islamic lands and Islamic way of life. Thus, Muslims need to work together in the United Nations in the areas of human rights. Treaties should not be signed unless they are consistent with Islamic principles and values. There is need for reassessment of international human rights documents enacted under the auspices of the United Nations and its agencies to ensure their comparability with Islamic values.

D. *Legal Education*

There is need to improve and encourage the study of Islamic law in Nigeria, particularly at university level. The current combine law degree program is grossly deficient.[111] Islamic law courses patterned along common law subjects are taught in English mostly from translated works of orientalists. It is not surprising that the program have produced essentially common law practitioners with a smattering knowledge of Islamic law. this is not good enough. Any serious re-organisation of the learning of Islamic law must professionalise the discipline. This can be done by the establishment of a *Sharia* bar, that is, a professional body of Islamic law experts possessing the requisite academic and character requirements to which any one who wants to practise Islamic law either as 'advocate' or as Qadi must belong. It should be possible to standardise professional qualification in a manner that will be acceptable world-wide. There may be the need to think of international professional examinations and examining bodies in this regard.

It will also be useful if every would-be Nigerian lawyer is exposed to some measure of learning in Islamic law. This will reduce the near total ignorance of lawyers of the contents of Islamic law.

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[111] Yadudu, AH, 'Colonialism and the Transformation of Islamic Law in the Northern States', *supra*, n 76 at p 128.

E. *Arabic Language*

Arabic is the language of Islam. It is indispensable in the understanding of Islamic law.[112] It is also a vehicle for expression of Muslim solidarity.[113] There is need to encourage the language particularly in all Muslim lands where Arabic is not the native language.

F. *Tolerance in a Pluralistic World*

It is trite that the world is now a global village. Hence, there is need for non-Muslims to develop a tolerance to Islamic law. Islamic law cannot be wished away no matter the aversion some might have to it. It will be much more conducive to peace in the country and at world at large, if the inevitability of the continual existence of Islamic law is accepted by all. After all, Islamic law presents a highly developed and sophisticated system of laws. Even if its superiority to western legal systems is not conceded by the west, at least they should accord it respect as an equally valid legal system in the modern world.

It is equally necessary that Muslims should tolerate. Islamic law is for Muslims only; there is therefore no basis of imposing Islamic law and Islamic morality on non-Muslims. After nearly a decade of revival of Islamic penal laws in parts of northern Nigeria, non-Muslims generally and Christians in particular living in the area have seen that they have nothing to fear for the implementation of Islamic laws.

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[112] See Masud, MK, 'Teaching of Islamic Law in Nigeria: An Appraisal of the Teaching Methodology' in Syed Khalid Rashid (ed), *supra*, n 55 at p 149-150; Zubair, A, 'The Importance of Arabic Language in the Study of *Shari'ah*' in Syed Khalid (ed), *supra*, n 55 at pp 203–209; and Olagunju, 'The Importance of Expertise in Arabic Language in the Interpretation of Islamic Legal Texts' (1997) 6 *Kwara Law Review* 165 and the eloquent plea for recognition and encouragement of Arabic for persons wanting to study law in Pakistan in Muhammad Amir Munir, 'Re-Orientation of Legal Education in Pakistan: An Agenda for 21st Century' (1997) 54 *Punjab University Law Journal* 67 at pp 80-82.

[113] It is impossible to adequately describe the anguish and frustration of many Muslims in Nigeria who preferred to listen to *Al-Jazeera* during America's invasion of Iraq but were unable to do so because of their want of Arabic language.

On Modernity, Democracy, and Secularism: Reflections on the Malaysian Experience*

Alima Joned**

Abstract

As a myriad of challenges confront today's Muslims, some modernists believe the solution lies in democracy. However, they are divided on the strategy of making democracy take root in Muslim countries. Inspired by Turkey, a number of modernists call for the secularisation of the political system. Specifically, they propose that Islam is confined to a private creed, without legal, political, or economic influence in the government. Some even take a position that secularism is the sine qua non of democracy and modernity. This article is a reaction to this proposition by reflecting on Malaysia's experience with democracy and modernisation. As background, the article discusses briefly the ongoing debate on the compatibility of Islam and democracy. It then looks at Art 4 of the Malaysian Constitution to assess the extent to which Malaysia can be called a secular state before concluding that the Malaysian system is a mixed one where, as a matter of constitutional law, Malaysia is a parliamentary democracy with strong secular and Islamic institutions. In discussion that follows, the article offers analysis of several of the reasons why secular and Islamic traditions have enjoyed a peaceful co-existence. The article also evaluates measures put in place by the Malaysian Government to counter the growing appeal of political Islam during the 1980s that threatened the delicate balance between the secular and the religious. The article concludes by outlining some of the new challenges confronting Malaysia that must be addressed before the Malaysian system can mature as a viable alternative to the unbridled secularism of Turkey.

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