The Role of Custom in Canon, Jewish and Islamic Law: Supplemented, Superseded or Supplanted by Written Law?

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“THE ROLE OF CUSTOM IN CANON, JEWISH AND ISLAMIC
LAW: SUPPLEMENTING, SUPERSEDING, OR SUPPLANTED BY
WRITTEN LAW?”

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I. INTRODUCTION

Customs are arguably an integral part of every legal tradition throughout the world and reflect the practices and values of every system. As the 17th-century English philosopher John Locke has written, customs are “the de facto habits acquired by engaging in the practices and institutions of one’s society, from the most primitive and least reflective to the most civilized and enlightened.”

H. Patrick Glenn contends that custom, closely related to tradition, is the result of tradition being reformulated in a process of “massaging pre-existing information and deciding how to act.” Custom, as a source of law, carries a compelling normative force and supplements, even supersedes, codified law in religious traditions.

Customary law and written, codified law usually supplement each other but are also often in tension. This essay addresses the relationship between custom and written, codified law in three religious legal traditions: the Roman Catholic Canon Law tradition,
Jewish law, and Islamic law, and explores one concrete example in each tradition of the role of custom in the legal system. First, in the Roman Catholic Canon Law tradition, customary laws are viewed as “norms of action” which have a purpose of upholding values critical to community life and are crystallized into juridical norms with repeated actions and “peaceful uniformity in practice.” While customary law cannot contradict divine law in the tradition, canon law provides that customs, so long as they are reasonable, can become law even if they contradict specific canons in the Code of Canon Law. In practice, the tension between custom and written sources of law in the Roman Catholic legal tradition can be seen in monastic orders interpreting the Rule of Saint Benedict.

Secondly, in the Jewish legal tradition, custom (minhag) is viewed as a source of rabbinic law. Customary law has been defined by Justice Moshe Silberg of the Israeli Supreme Court as “certain conduct which the community takes on itself as a legal standard as obligatory as if decreed by the legislator.” In Jewish law, minhag can even supersede halakha (rabbinic, codified law). Today, minhag has been widely recognized as a suprastatutory source of law and possibly a “legitimizing factor for constitutional principle” in Israel.

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4 Id. at 74-75.

5 Fr. Ladislas Orsy, S.J., Foreword in J. McIntyre, S.J., CUSTOMARY LAW IN THE CORPUS IURIS CANONICI viii (1990). "Customary laws are norms of action, created by the community, through a process in which the laity and hierarchy participate, each according to its own charism. Their purpose is to uphold the values commonly judged necessary or useful for the life, prosperity, and mandated mission of the group. They are critically tested through repeated actions until a peaceful infirmity in practice develops. They are received by the community through the very process of their creation, and they reach maturity when they are accepted as legally binding."


7 Id. at 1264.
In the Islamic legal tradition, custom (urf) is a secondary source of law that is “derived from the established practices of common people in their daily dealings with each other.”\(^8\) In the tradition, urf generally has a supplementary role and can only provide authority for a mandatory rule. In Islamic law, urf cannot contravene divine law nor abrogate from the Qur’an, the primary text in the tradition. In some countries throughout the world today, particularly Nigeria, Islamic law has been classified as a type of customary law in itself,\(^9\) providing a major challenge to the juridical status of Islamic law.

II. ROMAN CATHOLIC CANON LAW

A. The Origins and Development of Canon Law

The origins of canon law lie in the ministry of the prophet Jesus Christ of Nazareth. In establishing a new divine covenant, Jesus remarked his role was not to replace, but to fulfill, the law: “Do not think I have come to abolish the law or the prophets; I have come not to abolish but to fulfill.”\(^10\) Jesus also gave the apostle Peter the authority to build the new Christian church: “And so I say to you, you are Peter, and upon this rock I will build my church, and the gates of the netherworld shall not prevail against it.”\(^11\)

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\(^10\) *Matthew* 5: 17 (New American).

After the death of Jesus of Nazareth, the persecution of Christians followed throughout the Roman Empire for two centuries. However, in 313 A.D., the Roman Emperor Constantine issued the Edict of Milan which officially ended state persecution of religion and granted toleration to its practice and the practice of other religions in the Empire. The Church under Constantine soon found itself in the Emperor’s favor throughout the Roman Empire.

With its significance throughout the Roman Empire, Christianity soon found itself facing challenges from within and outside its quarters. In 325 A.D., the First Council of Nicea, a gathering of bishops from throughout the Empire, formulated one of the first written compilations of uniform Christian law and doctrine. The Council formulated 20 new canons of church doctrine and the original Nicene Creed, a uniform statement of fundamental Christian beliefs.

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12 CHIDESTER, CHRISTIANITY: A GLOBAL HISTORY 75-90 (2000). Chidester describes the rise of martyrdom in the Roman Empire after the earliest mass persecution of Christians in Rome by the Emperor Nero in 64 A.D.


14 CHIDESTER, *supra* note 12, at 91-108. Chidester also discusses the rise of Christianity in the Roman Empire. He notes following the Edict of Milan in 313, the Roman Emperor Constantine provided support for Christianity by recognizing the authority of bishops and financing the construction of churches and other holy sites. By these actions in promoting Christianity throughout the Roman Empire, Chidester states the Empire became a “Christian empire.”

15 The major challenge in the fourth century was the Arian controversy – Arius, a prominent theologian, contended that God the Father was absolutely transcendant and cannot be equal to God the Son, differing from the trinitarian conception of God the Father, God the Son, and God the Holy Spirit. See DAVIS, THE FIRST SEVEN ECUMENICAL COUNCILS (325-787); THEIR HISTORY AND THEOLOGY 52, who writes of Arius’ theology: “Fundamental to his system is the absolute transcendence and unicity of God who is Himself without source but is the source of all reality. Since the very essence of God is transcendent, unique and indivisible, it cannot be shared. For God to impart His substance to some other being would mean that He is divisible and changeable. There can, of course, be no duality in divine beings for God is unique. Therefore, whatever else exists must come into being not by communication of God’s being but by creation from nothing.”

16 DAVIS, *supra* note 15, at 60. The following is the Nicene Creed: “We believe in one God, the Father Almighty, Maker of all things visible and invisible; and in one Lord Jesus Christ, the Son of God, begotten
Following the First Council of Nicea, other sources of church law began to develop. Six other church councils between 325 A.D. and 787 A.D. promulgated canons.\textsuperscript{17} Roman law also influenced the development of canon law,\textsuperscript{18} with Justinian’s *Corpus Iuris Civilis* and other compilations being the authoritative secular sources which provided the rules of how the church lived in the early Middle Ages.\textsuperscript{19} In 1140, Gratian’s *Concordantia discordantium canonum*, commonly known as the *Decretum*, a compilation of “canons of church councils, scriptural passages, excerpts from writings of the church fathers, decisions of popes, and parts of Roman law”\textsuperscript{20} were included in arguably the most influential compilation of church law until the First Code of Canon Law in 1917. The *Decretum* quickly reached the level of authoritative status in the Church and remained so until the twentieth century.\textsuperscript{21}

In 1904, Pope Pius X announced the formation of a commission to compile all the laws of the Roman Catholic Church into one document.\textsuperscript{22} After thirteen years of work in

\begin{itemize}
  \item<1-> of the Father, only-begotten, that is, from the substance of the Father, God from God, Light from Light, True God from True God, Begotten, not made, of one substance with the Father, through Whom all things were made. Who for us men and for our salvation came down and became incarnate, and was made man, suffered and rose on the third day, And ascended into heave, And is coming with glory to judge living and dead, And in the Holy Spirit.”
\end{itemize}

\begin{itemize}
  \item<1-> These councils included the First Council of Constantinople (381 A.D.), the Council of Ephesus (431 A.D.), the Council of Chalcedon (451 A.D.), the Second Council of Constantinople (553 A.D.), the Third Council of Constantinople (680 A.D.), and the Second Council of Nicea (787 A.D.).
  \item<1-> HELMHOLZ, THE SPIRIT OF CLASSICAL CANON LAW 17 (1996). “Rules taken from the civil law worked their way into the canonical collections. They were part of the inheritance of the classical canon law. In many particulars, therefore, the canonists saw no need to deviate from the Roman law, no need to formulate a new set of rules.”
  \item<1-> *Id.*
  \item<1-> *Id.* at 7.
  \item<1-> *Id.* at 10.
\end{itemize}
1917, the First Codex Iuris Canonici, the “most radical revision of law the Church had ever effected,” was promulgated by Pope Benedict XV. Just over four decades later, in 1959 Pope John XXIII “inaugurated another stage in the evolution of canon law” and called for the establishment of a Pontifical Commission to revise the Code of Canon Law. The new Code was intended to reflect the needs of pastoral care and the people of God to reflect many changing conditions. On February 3, 1983, the 1983 Code of Canon Law was officially presented.

B. Custom in the 1983 Code of Canon Law

Law is an integral part of the Roman Catholic religious tradition. The Roman Catholic religious tradition places law at primary importance in the sources of the human production of law, followed by custom and then the administrative act. The 1983 Code outlines many general legal principles in the first canons: the Code only affects the Latin Church, the ecclesiastical laws in the Code only bind those baptized in the Catholic

23 Id.

24 Id.

25 Id. at 5. Pope Paul VI stated the following at the plenary session inaugurating the work of the Commission in 1969: “Now, however, with changing conditions – for life seems to evolve more rapidly – canon law must be prudently reformed; specifically, it must be accommodated to a new way of thinking proper to the Second Ecumenical Council of the Vatican, in which pastoral care and new needs of the people of God are met.”

26 Id. at 9.

27 Id. Pope John Paul II made the following remarks at the occasion of the official presentation of the Code on February 3, 1983: “Law is not conceived as a foreign body, nor as a now useless superstructure, nor as a residue of presumed temporal claims. Law is innate to the life of the Church, to which it is, in fact, extremely useful: it is a means, a help, and is also – in sensitive questions of justice – a protection.”

28 Silvio Ferrari, Adapting Divine Law to Change: The Experience of the Roman Catholic Church (With Some Reference to Jewish and Islamic Law), 28 CARDOZO L. REV. 53, 60 (October 2006).

29 1983 CODE c. 1. “The canons of this Code affect only the Latin Church.”
Church who have reached the sufficient age of reason, ecclesiastical laws are understood in accord with the proper meaning of the words considered in their text and context, penal laws are subject to strict interpretation, the official procedure to decide a case when a lacuna is present, and the complementary relationship between canon law and civil law.

In Roman Catholic Canon Law, customary law is a source of law that can only be approved by the legislator in one of two ways: 1) explicitly through a legislative act, or 2) implicitly through tacit respect for a custom. However, the divine law supersedes custom; as Canon 24, § 1 states, “No custom which is contrary to divine law can obtain the force of law.” The Code also outlines another important guideline: only a “reasonable” custom which contradicts or stands apart from canon law can obtain the

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30 1983 CODE c. 11. “Merely ecclesiastical laws bind those baptized in the Catholic Church or received into it and who enjoy the sufficient use of reason and, unless the law expressly provides otherwise, have completed seven years of age.”

31 1983 CODE c. 17. “Ecclesiastical laws are to be understood in accord with the proper meaning of the words considered in their text and context. If the meaning remains doubtful and obscure, recourse is to be taken to parallel passages, if such exist, to the purpose and the circumstances of the law, and to the mind of the legislator.”

32 1983 CODE c. 18. “Laws which establish a penalty or restrict the free exercise of rights or which contain an exception to the law are subject to a strict interpretation.”

33 1983 CODE c. 19. “Unless it is a penal matter, if an express prescription of universal or particular law or a custom is lacking in some particular matter, the case is to be decided in light of laws passed in similar circumstances, the general principles of law observed with canonical equity, the jurisprudence and praxis of the Roman Curia, and the common and constant opinion of learned persons.”

34 1983 CODE c. 22. “Civil laws to which the law of the Church defers should be observed in canon law with the same effects, insofar as they are not contrary to divine law and unless it is provided otherwise in canon law.”

35 Fr. Ladislas Orsy, S.J., Commentary, in J. CORIDEN, T. GREEN, and D. HEINTSCHEL, EDS., THE CODE OF CANON LAW: A TEXT AND COMMENTARY 39 (1985). “The approval of the legislator can be granted explicitly by a legislative act, or it can be given implicitly by tacit respect for a custom.”

36 1983 CODE c. 24, § 1.
force of law.\textsuperscript{37} Although the Code lays down a “reasonableness” standard, no precise
definition of “reasonable” is given. Nevertheless, a noted Jesuit canonist, Fr. Ladislas
Orsy, S.J., remarked in a commentary that practical guidance is offered toward what
“reasonable” is; that is, “whatever is reprobated by the legislator is unreasonable.”\textsuperscript{38}

Roman Catholic Canon Law also provides codified guidance toward customary
rules beyond and even against the law. Customs can obtain the force of law and
supersede codified law even if they contradict specific ecclesiastical laws in the Code.\textsuperscript{39}
However, the custom can become binding law only if it has been observed “for thirty
continuous and complete years.”\textsuperscript{40}

The Code of Canon Law also posits customary law as an important reflection on
the values of the community of believers in the Roman Catholic legal tradition. This is
exemplified by Canon 27, which states “Custom is the best interpreter of laws.”\textsuperscript{41} Custom
also plays an important role in the dialectic between law and the community: Fr. Ladislas
Orsy, S.J., notes that “law out to be become a vital force that shapes the community.”\textsuperscript{42}

\textsuperscript{37} 1983 CODE c. 24, § 2. “Unless it be a reasonable one, no custom which is contrary to or apart from
canon law (praeter ius) can obtain the force of law; however, a custom which is expressly reprobated in
law is not a reasonable one.”

\textsuperscript{38} ORSY, supra note 35, at 39. “In paragraph two the key word is “reasonable.” The norm laid down for the
future is that the legislator will not grant approval, explicitly or implicitly, to any custom which is not
reasonable. No precise definition of reasonable follows in the text, but a practical direction is given:
whatever is reprobated by the legislator is unreasonable; hence, it cannot ever become a custom having “the
force of law.” Thus, positive disapproval, voiced by the legislator, becomes the criterion of what is against
reason.”

\textsuperscript{39} 1983 CODE c. 26. “Unless it has been specifically approved by the competent legislator, a custom
contrary to the current canon law or one which is apart from canon law (praeter ius) obtains the force of
law only when it has been legitimately observed for thirty continuous and complete years; only a centenary
or immemorial custom can prevail over a canon which contains a clause forbidding future customs.”

\textsuperscript{40} Id.

\textsuperscript{41} 1983 CODE, c. 27.

\textsuperscript{42} ORSY, supra note 35, at 40.
But, the converse is also true, as “vital forces in the community ought to shape the law.” \(^{43}\) In Roman Catholic Canon Law, the community of believers decisively interprets the laws. \(^{44}\) In practice, however, the relationship of custom to law is not always clearly in synthesis with each other.

**C. The Rule of Saint Benedict: Custom vs. Law in Catholic Monasticism**

The relationship of custom to law has been in clear tension in the history of the interpretation of the Rule of Saint Benedict. In a 1997 article in the Harvard Journal of Law and Policy, Dr. James L.J. Nuzzo outlined the history of the debates over the interpretation of the Rule. Written in the sixth century by Saint Benedict and inspired by a long tradition of Christian ascetism and the “Desert Fathers”, \(^{45}\) the Rule outlines the standards for monastic living. \(^{46}\) The Rule does not, however, exclude external sources such as custom in understanding its meaning. \(^{47}\)

In the eleventh and twelfth centuries, Christian monastics generally took on a more active role in the world outside of monasteries. \(^{48}\) As Nuzzo notes, the Cluniac and

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\(^{43}\) *Id.*

\(^{44}\) *Id.* “All that the community is, all that it has, must come into play in creating “the best” or “a best” interpretation through intelligent and free operations.”

\(^{45}\) James L.J. Nuzzo, *The Rule of Saint Benedict: The Debates Over the Interpretation of an Ancient Legal and Spiritual Document*, 20 HARV. J.L. & PUB. POL’Y 867, 871 (Summer 1997). “The notion of entering the “desert” to be alone with God is an ancient tradition, common to most religious heritages. Christian monasticism is said to date from the Third Century when hermits in Egypt began to seek out acknowledged holy men to lead them in community.”

\(^{46}\) *Id.*

\(^{47}\) *Id.* at 878.

\(^{48}\) *Id.* at 880. “Rather than living a life “in the desert alone only for God,” the monasteries had taken on a significant role in the secular medieval world. They had become landholders with a large number of lay men and women working for them as servants and serfs. They had long since ceased the agrarian pursuits
Cistercian orders differed over the proper role of custom in interpreting the Rule.\textsuperscript{49} The Cluniac Order accepted the new external customary changes of the eleventh and twelfth centuries, such as more elaborate liturgical services, as consistent and necessary with the Rule “and were based upon the continuing charism, as manifested by the acceptance of the customs by the community.”\textsuperscript{50} On the other hand, the emerging Cistercian Order refused to accept customs superior to or on par with the text of the Rule and that argued “each custom be grounded in some aspect of the “material” – either the Gospel or other sacred scripture, or the work of Cassian or another of the founders of Christian monasticism who had influenced Benedict or the Rule itself.”\textsuperscript{51} Ultimately, as Nuzzo observes, the differences in interpreting the role of custom led to a schism within the Benedictine tradition.\textsuperscript{52} Although custom and law were in tension in the Benedictine tradition, this challenge was not unique to Catholic law itself – Jewish and Islamic law have faced similar dilemmas as well.

### III. JEWISH LAW

#### A. An Introduction to Major Written Sources in Jewish Law

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\textsuperscript{49} Id. at 880-883.

\textsuperscript{50} Id. at 880-881.

\textsuperscript{51} Id. at 881.

\textsuperscript{52} Id. at 882.
Jewish law has its roots in the revelation of God’s word to the Prophet Moses on Mount Sinai during the thirteenth century B.C. The first five books of the Hebrew Bible (Genesis, Exodus, Leviticus, Numbers and Deuteronomy) comprise the Pentateuch and the “written Torah.” An oral tradition, starting with Moses, also developed which explained the written Torah and held divine status. There is also a written compilation of the oral Torah, the Mishnah, a compilation of opinions and questions which explain the written and oral Torah. The Talmud, which includes the written Torah, oral Torah, and Mishnah, serves as the primary text in Jewish law.

In addition to the Talmud, other sources contribute to Jewish law. Before the fall of the first Temple in 70 A.D., the Sanhedrin (Great Assembly of Elders) promulgated ordinances through early legislation. Commentaries have also influenced the application of Jewish law. Finally, responsa, written by rabbis who are learned in the law, constitute influential opinions and contribute to the written record.

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53 GLENN, supra note 2, at 94.
54 Id. at 94-95.
55 Id. at 95.
56 Id. at 96. “The oral interpretation and discussion of Mishnah went on, however, for some 300 years, through the declining years of roman law and the Roman empire, and the rise of Christianity. There were many questions put as to the meaning of the divine tradition, and many opinions expressed, including those of persons who had become learned in the intricacy of the teaching. So the accumulated, learned opinions, themselves not directly derived from Moses, began to have great weight in the ongoing application of the law. Their consensus was irresistible (the divine will was here most evident); their differences were also instructive, and the tradition had to retain a record of them (until the divine will became more clearly understood). So, as with the Mishnah, as the opinions grew in number so grew the necessity to record them.”
57 Id. at 97.
58 Id. at 97. “Legislation was one means, and the Great Assembly (of elders), the Sanhedrin (from the Greek synhedrion, or tribunal), functioned as a source of many ordinances once the monarchy of the time of the First Temple had ended.”
59 Id. at 97. “There has thus been a phenomenon of subsequent commentaries, even called codes, which have assumed great importance in the ongoing application of talmudic law. These began as early as the
B. The Role of Custom in Jewish Law

As Glenn notes, Jewish law is a “living tradition.” The living nature of the Jewish law mirrors the theological nature of the tradition in that law retains the perfection of God and can expand through time since everything new which is discovered flows from the primary source of the Talmud. The formal law, halakhah (the way or path to walk), is thus an expression of the divine will of God.

Interpretation of the Talmud is thus the principal source of the human production of law, then legislation and finally custom (minhag). In Jewish law, customs required general, widespread practice and the authority of a recognized figure or accepted institution to crystallize it into binding halakhah. While in the Roman Catholic Canon Law tradition custom generates mainly from the general community and gradually received acceptance by elite authorities, in Jewish law the converse often occurs as single individuals can influence the community. As Ephraim Urbach notes, “Great weight was

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8th century; the most famous being those of Maimonides in the twelfth century (the Mishneh Torah), and Joseph Caro in the sixteenth century (the Shulhan Arukh, known today as the most authoritative of the codes)."

60 Id. at 97-98.

61 Id. at 98.

62 Id. at 103. “Law could expand because it was God’s law and once expanded it retains, in its entirety, the perfection of God. So talmudic law has a Perfect Author, which no human intelligence is ever going to be able to fault. The Talmud is never completed, and will go on being written by generation after generation, because all that is said in the name of the Talmud is contained in original divine intention. Nothing is new; all is discovery.”

63 Id. “The Jewish tradition is a normative or legal tradition in much the same measure as it is a religious tradition. The two have become fused in the idea that the divine will best expresses itself in legal norms, which have sanctions, leaving relatively little outside the reach of the law, or halakhah.”

64 FERRARI, supra note 28, at 60. Legislation “comes into play when it is impossible to solve a problem through interpretive means.”

65 Id.

given to customs practised by individuals when those individuals were men of high rank and authority. Urbach describes the story of Rabban Gamaliel, the nasi (head) of the Sanhedrin in the first century, as an instance where a leading figure changed traditional custom by his own example. In the first century, according to Jewish law the dead were often buried in expensive clothes. But one day, Rabban Gamaliel ordered that he be buried in shrouds of simple linen. Thereafter, “the people followed his custom to be buried in linen shrouds,” and this practice crystallized into binding halakhah.

In Jewish law, customs (minhag) sometimes conflict directly with the formal halakha. As one authority has commented, “should a custom (minhag) conflict with some established law (halakha), the custom frequently takes precedence.” Customs not only can supersede, but can replace, halakha. Urbach remarks, “A custom which is practised by the general public has the power to annul a halakhah even though the custom itself is only supported by the authority of an individual sage.” This principle is derived from the Talmudic aphorism, “Custom annuls halakhah.”

While customary law can supersede formal, written law in the Jewish legal tradition, customs often supplement binding legal norms of halakhah. In the commercial context, secular customs are generally considered valid and may even be incorporated

67 Id. at 37.
68 Id.
69 Id.
70 Id.
72 URBACH, supra note 66, at 38.
73 Id.
under Jewish law. Under Jewish law, 1) any condition that is agreed upon with respect to monetary matters is valid under Jewish law, and 2) customs established among merchants acquire Jewish law validity, provided that the practices stipulated or commonly undertaken are not otherwise prohibited by Jewish law.” While secular commercial law customs can be interpreted alongside Jewish law principles, there is controversial debate as to whether customs can “substantively alter Jewish law.” Regardless of the outcome of this controversial question, customary law remains a vital source of law in the Jewish legal tradition today.

C. Custom as a “Legitimizing Factor for Constitutional Principle”

While there is no written constitution in the state of Israel, the Israeli Supreme Court has asserted constitutional functions and “the right to read legislation in light of suprastatutory principles which are said to exist independently of the legislative authority.” For example, Israeli custom provides that most workers have the right to a pre-discharge hearing before being subject to a disciplinary discharge. In the 1966 case of Altagar v. Mayor, the government employee discharged was party to a collective

75 Id.
76 Id. at 87-88. “For example, there are various conventions on how to “seal a deal.” In some industries, it is said that a handshake is considered binding. These customs are referred to as situmta. It is agreed that situmta can effectuate the transfer of title to property (kinyan). This is true even though, but for the custom, the particular practice would not otherwise constitute a valid form of transferring title according to Jewish law. Thus, situmta can be used as a substitute for the normal procedures for achieving a kinyan. There is a classical controversy among medieval Talmudic commentators, however, as to whether the mechanism of situmta is capable of effecting actions or outcomes not normally possible according to Jewish law.”
77 ALBERT, supra note 6, at 1247.
78 Id. at 1262.
bargaining contract and was not given a pre-dismissal hearing. The Israeli Supreme Court held, relying on custom, that municipal employees have the right to a hearing by a Municipal Council. Despite the fact that Israel still has no formal Constitution, Albert concluded that custom “may well prove to be an important legitimizing factor for constitutional principle.” While custom retains an influential role in Roman Catholic Canon Law and Jewish law, customary law holds generally only a subsidiary role in the Islamic legal tradition.

IV. ISLAMIC LAW

A. An Introduction to Major Sources in Islamic Law

Islamic law has its foundation on the revelation from God given to the Prophet Muhammad in the sixth century A.D. The revelation of God through scripture in the Qur’an contains the primary source of Islamic law. The 70 verses on family and inheritance law, 70 verses on obligations and contract, 30 verses on criminal law, and 20 verses on procedure in the Qur’an comprises the most fundamental legal norms in Islamic law and are non-derogable. The other primary source of Islamic law, the Sunnah, “refers to the practice of the Prophet expressed in actions, in oral pronouncements..."

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79 Id. at 1252-1253.
80 Id. at 1252-1253, 1262.
81 Id. at 1264.
82 GLENN, supra note 2, at 171.
83 BASSIOUNI and BADAR, supra note 8, at 148.
84 Id. at 148-149. “They are immutable and cannot be contradicted or modified by rules derived from any of the other sources of the Shari’ah.”
(hadiths), or in concurrence in action by others.85 All sources in Islamic law exist to serve and fulfill God’s will, as all “human legislation must conform to the divine will as discerned from the Qur’an and Sunnah.”86

Several other major secondary sources contribute to the process of fiqh (understanding), by which principles of Islamic law are discovered and given meaning in the tradition.87 The acceptance of learned, scholarly opinion on a new norm, ijma (“consensus”), provides a secondary source of law.88 Qiyas, or analogies, also offer a source and are “based on the use of reason to conclude that an existing rule applies to a new situation because it is similar to the situation regulated by that rule, or to abstain from applying the existing rule to the new situation that is proven dissimilar.”89

B. The Role of Custom in Islamic Law

Custom (urf) is widely recognized as a secondary source of law among all schools of Islamic jurisprudence.90 One definition of urf in Islamic law is provided by the legal scholar Husayn H. Hassan: “What is established by custom is like what is stipulated

85 Id. at 150.


87 Y. HADDAD and B. STOWASSER, EDS., ISLAMIC LAW AND THE CHALLENGES OF MODERNITY 5 (2004). “Fiqh (“understanding”) connotes the efforts and activities, largely on the part of qualified scholars, to discover and give expression to the many facets of Qur’an and Sunna-derived principles of shari’a law. While shari’a is a focus of the faith, fiqh is esteemed mainly as an intellectual literary tradition and/or the sophisticated product of centuries of Islamic high legal culture.”

88 BASSIOUNI and BADAR, supra note 8, at 153.

89 Id. at 155.

90 Id. at 157.
(among contractual parties)."\textsuperscript{91} Although custom is recognized as a secondary source, unlike the Roman Catholic Canon Law and Jewish legal traditions, \textit{urf} cannot contravene any rule provided by the \textit{Qur'an, Sunnah, Ijma, or Qiyas}.\textsuperscript{92} Bassiouni and Badar remark that as a supplementary source of Islamic law, custom exists “only to fill in gaps in the body of the law that no other source has dealt with in a mandatory way. If there is a rule that is mandatory, then it cannot be changed by custom.”\textsuperscript{93}

While custom cannot contradict a mandatory rule in Islamic law, in practice Islamic customary law is still utilized in many areas to resolve conflicts outside of civil and religious courts. For example, in the Occupied Territories of Palestine many Palestinians handle cases today as varied as contract and land disputes, interfamilial feuds, and personal injury cases through \textit{urf}.\textsuperscript{94} Through \textit{urf}, disputes are mediated by a group of elders or reconciliation committees (\textit{ludjnat el-islah}) which aim to reach a settlement (\textit{suhl}) among all the parties.\textsuperscript{95} As Adrien Wing comments, “a case of honor” (\textit{qadiyat arad}), involving the crime of a sexual assault against a woman, are being resolved by \textit{urf} through elders and reconciliation committees in the Palestinian territories.\textsuperscript{96} While mandatory rules from the \textit{Qur'an} and \textit{Sunnah} always supersede

\textsuperscript{91} KUTTY, \textit{supra} note 86, at 589.

\textsuperscript{92} BASSIOUNI and BADAR, \textit{supra} note 8, at 157.

\textsuperscript{93} \textit{Id.} at 158.


\textsuperscript{95} \textit{Id.}

\textsuperscript{96} \textit{Id.} at 155-156.
Islamic customary law, these examples indicate that *urf supplements and perhaps even
synergetizes with divinely-inspired, non-derogable Islamic legal mandates in practice.97

C. Islamic Law – “Law” or “Customary Law” in Nigeria?

One of the major challenges of Islamic law today is its classification – for
instance, it is classified as “customary” law in Nigeria. During the colonial era, the
British officially classified Islamic law as “customary” through legislation.98 In all British
colonies where Muslims comprised a majority of the population, Islamic law was
classified as “customary.”99 In Nigeria, this classification has allowed common law
judges with no training in Islamic law to rule on cases interpreting Islamic law,100
providing a test to its vitality. The classification also wades into a controversial normative
debate: on the one hand, some Muslims argue that the classification of Islamic law as
“customary” violates their human rights,101 while some Christians have expressed
concerned that expanding the sphere of Islamic law may subject Christians to its
mandates.102

97 Id. at 156.

98 OBA, supra note 9, at 826.

99 Id. at 827.

100 Id.

101 Id. at 142. “Muslims argue that Islamic law is a matter relating to their fundamental human rights. In
Islam, law is an essential component of religion. …… A Muslim is under a duty to organise his life
according to the dictates of Islamic law. Thus for Muslims, the denial of their right to organise their lives
according to the dictates of their religion by adopting Islamic law amounts to a violation of their right to
practice their religion, a right which they argue, is constitutionally and internationally protected.”

102 Id. at 843. Some Christians “see the attempts at expanding the sphere of Islamic law in Muslims’ affairs
as evidence of the gradual ‘Islamisation’ of Nigeria.”
However, a 1998 Nigerian Supreme Court case points toward the view that Islamic law and customary law are separate and distinct. In Alkamawa v. Bello, Justice Abubakar Bashir Wali made the following pronouncement in dicta: “Islamic Law is not the same as customary Law as it does not belong to any particular tribe. It is a complete system of universal Law, more certain and permanent and more universal than the English Common Law.”¹⁰³ In addition, the 1979 Constitution created a Sharia Court of Appeal to adjudicate Shari’a law and a Customary Courts of Appeal to administrate issues of customary law.¹⁰⁴ As A.A. Oba argues, these developments support the view that “Islamic law is no longer part of customary law in Nigeria.”¹⁰⁵ Irrespective of how Islamic law and customary law are ultimately viewed by the courts in Nigeria, both remain an indispensable part of the Nigerian legal tradition.

V. CONCLUSION

In conclusion, firm, written, codified rules and the development and vitality of customary law both paradoxically complement but yet sometimes separate the other in the Roman Catholic Canon Law, Jewish, and Islamic legal traditions. In all three traditions, customary law is recognized as an important source of law. In Roman Catholic Canon Law and Jewish law, customs not only supplement, but often supersede, firm legal rules. In contrast, in Islamic law, Shari’a is supreme and custom has a clearly subsidiary

¹⁰³ Id. at 839.
¹⁰⁴ Id. at 846.
¹⁰⁵ Id. at 849.
role. But in the practical application of law in all three traditions, custom remains a vital part of the maintenance, regulation, and vigor of the wider community.

While the relationship between written law and custom remains paradoxical, it reflects an ongoing relationship and tension between the divine instruction of law in each tradition and the arguably fallible limits of humanity’s ability to reason and apply written laws as well as to apply customary rules to supplement, or even supersede, binding laws. This relationship and tension has existed since the very beginnings of each legal tradition; it continues to this day, as the unique abilities of the human person to adhere, adapt, change, and reformulate legal tradition will continue this process for years to come.