LEGAL PLURALISM IN THE NORTHERN STATES OF NIGERIA: CONFLICT OF LAWS IN A MULTI-ETHNIC ENVIRONMENT

by

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ABSTRACT

Legal anthropologists have been paying limited attention to legal pluralism. In the few works where this problem is broached, however, the issues of internal conflict of laws and related socio-legal processes are usually underscored. This essay is therefore partly designed to fill this gap in anthropological literature.

In the six Northern States of Nigeria, three interacting systems of law are identified: the Shari'a (applying mainly to the Moslem population), Customary law (a blanket term for the legal traditions of about 250 ethnic groups in the region), and General law (British-based and continually modified by Nigerian enactments). Ethnic heterogeneity Moslem conquest and Islamization, and British colonial rule are held to be the principal sources of the legal pluralism. Although the three different bodies of law have also been complementing one another (as in certain branches of law), their parallel existence in the region has been largely characterized by conflicts and inconsistencies.

The essay is divided into seven chapters. The first spells out the problem, objectives, methodology, and theoretical formulations of the dissertation. It also reviews relevant previous works, and then discusses certain assumptions behind

the research and how these assumptions guided the entire study. Chapter Two presents an overview of multi-ethnicity, along with a detailed description of the sources, structure, and application of Islamic law. Chapter Three examines substantive and procedural law of crime in three indigenous societies. In general, ethnic legal traditions seem to display a remarkable commonality in a number of fundamental respects. Chapter Four discusses the structure and historical development of General law; particular attention is given to some internal judicial reforms which have yet to eliminate entirely the inadequacies of the plural legal system. In Chapter Five, mixed-cause cases are used to illustrate the nature and direction of conflict-of-law situations. Chapter Six examines the general characteristics of mixed-cause litigations and the question of choice of law (or court). Tabulating some 450 legal actions, it is shown that the locales of mixed litigations are more urban than rural, and that choice of law is still being determined largely by ethnic (religious) considerations. Chapter Seven summarizes the thesis, and then examines the relevance of the study both to the viability of (Northern) Nigeria as a multi-ethnic unit, and to theory and method in legal anthropology.

Because of the preponderance of legal inconsistencies, and because choice of law is primarily determined by ethnicity, it is argued that plural societies with persistent institutional

cleavages will benefit more from judicial uniformity than diversity. It is further maintained that the eventual restatement and codification of Customary law can hardly constitute a barrier to legal development; neither is it likely to hinder the development of "national" body of law based upon consciously selected and rationally integrated elements from the different legal traditions.

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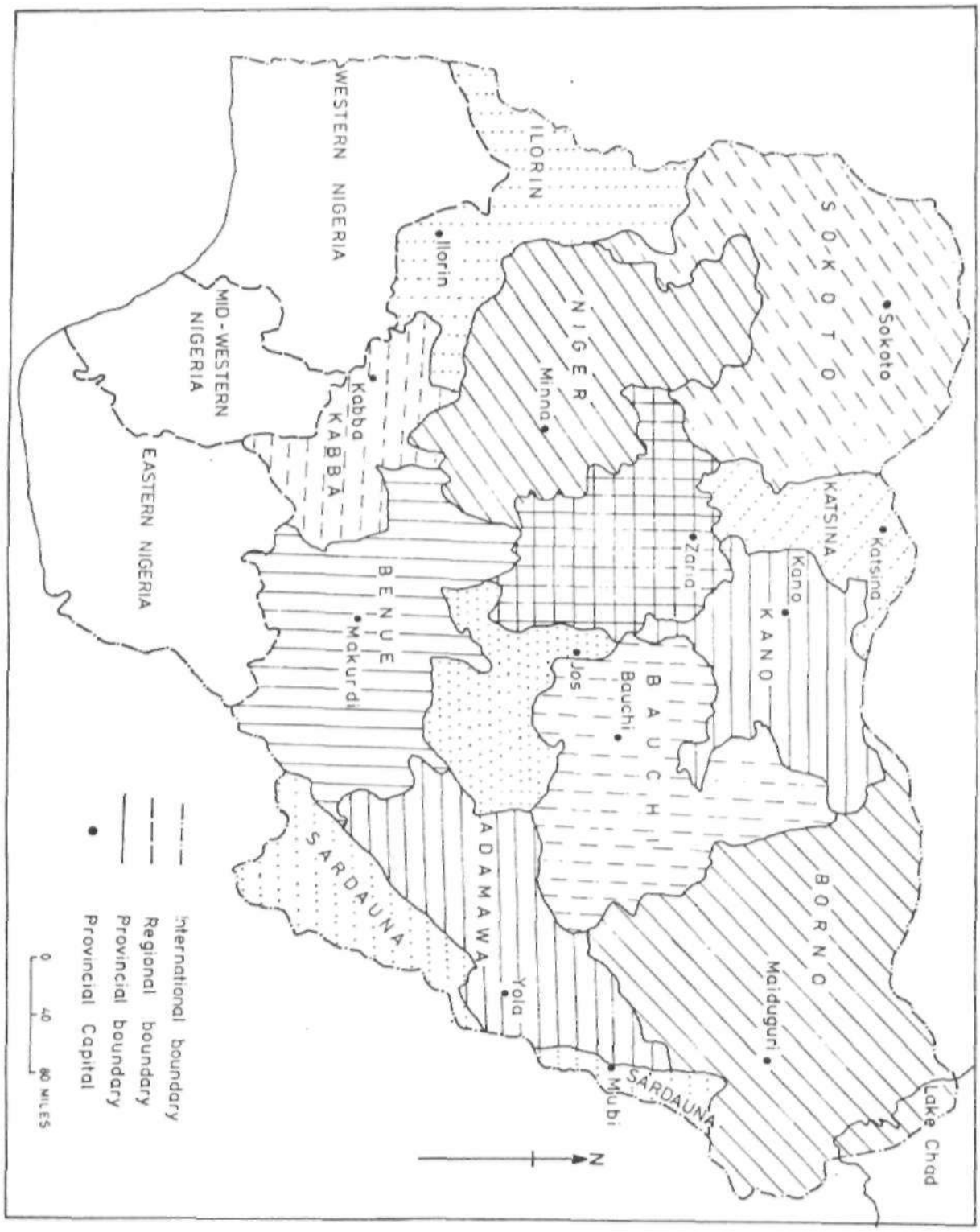
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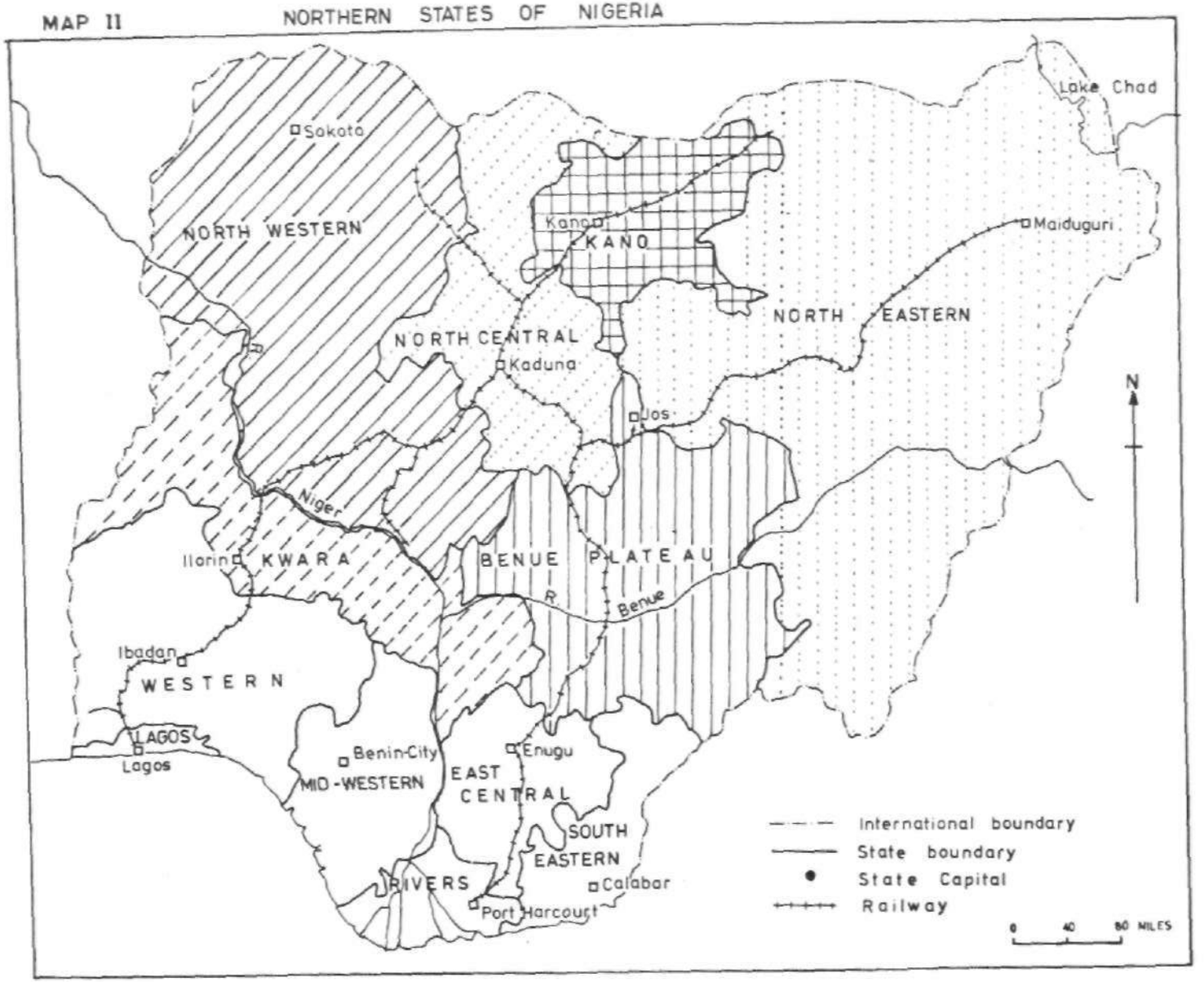
LIST OF ABBREVIATIONS

A.C. (C.A.)	Appeal Cases
F.S.C.	Federal Supreme Court of Nigeria, Lagos (Selected Judgments)
J.A.L.	Journal of African Law
KANOPROF	Kano Provincial Office Records, National Archives, Kaduna
M.I.A.	Ministry of Internal Affairs, Northern Region of Nigeria
M.L.R.	Modern Law Review
N.A.	Native Authority (Local Government)
N.A.K.	National Archives, Kaduna, Nigeria
N.A.L.N.	Native Authority Legal Notice, Northern Nigeria
N.L.J.	Nigerian Law Journal
N.L.R.	Nigerian Law Reports
N.M.L.R.	Nigerian Monthly Law Reports
N.N.	Northern Nigeria
N.N.C.N.	Case Notes of Northern Nigeria
N.N.L.R.	Northern Nigeria Law Reports
N.R.	Northern Region of Nigeria
N.R.L.N.	Northern Regional Legal Notice
N.R.N.L.R.	Northern Region of Nigeria Law Reports
S.C.A.	Shari'a Court of Appeal, Northern Nigeria (Kaduna)
S.N.P.	Secretariat for the Northern Provinces of Nigeria
SOKPROF	Sokoto Provincial Office Records, National Archives, Kaduna
W.A.C.A.	West African Court of Appeal (Selected Judgments)



MAP I NORTHERN NIGERIA — PROVINCES

MAP II NORTHERN STATES OF NIGERIA



If the integration of law and anthropology is to flourish, it must be on a truly functional basis. Each must contribute to the dynamics of the other; each must add to the operative effectiveness of the other; each must nourish the other as a process.

E. Adamson Hoebel

"Law and Anthropology"
32 Va. L. Rev. 835(1946)

Chapter One

INTRODUCTION

Consensus theory in social anthropology and sociology assumes a normative consensual basis for the internal social order of nation-states. Most countries of the world however, do not readily conform to such expectations. Even the so-called great democracies manifest only a minimum sharing of common values. For a large part, a great majority of nations are maintained more by coercion than by mutual consent. This is particularly true of the colonized countries of Africa, Asia, and Latin America where the principal unifying force has largely been colonial rule, which brought with it political domination and economic integration. These emerging states are peculiarly heterogeneous, ethnically. Historical accidents and social constituents distinguish them as pluralities of varying complexity and form. Each is internally divided into relatively distinctive ethnic groups which exhibit a remarkable array of languages, religions, traditional political organizations, legal institutions, and historical experiences. Structurally and culturally, each is internally characterized by some fundamental discontinuities and cleavages which are often sharp and persistent enough to threaten internal

stability.

It is therefore hardly surprising that the building of a single national community has been the guiding policy objective in the new nations. The political leaders of such countries have to face the crucial task of national development as a universal trend. They also have to commit themselves to welding together their melange of ethnic collectivities into a new and larger "homogeneous identity" or what Coleman and Rosberg (1964: 687-688) called a "terminal community." For the nationalist leaders committed to the task of unity and common identity, the transformation of these plural segments and their disparate institutions is no simple job. Nonetheless, the task is both desirable, essential, and urgent.

In Africa, certain countries have seriously begun attacking the disruptive influences of differing linguistic, educational, legal, and other institutional spheres. Tanzania, for one, has been emphasizing unity in the linguistic and socio-economic fields. More recently, the government of Nyerere has been paying particular attention to legal unity and legal development by harmonizing formal judicial structures and procedures, and by compiling and standardizing the substantive rules of marriage and inheritance of the various ethnic groups within the country.

Such legal changes will certainly lead to the

development of a legal system suitable for the changing aspects of these plural nations. The alterations will also serve to control the cleavages and conflicts inherent in the presence of numerous systems of indigenous and extraneous legal traditions. Above all, the unity that is to be realized in the legal sphere will no doubt constitute a solid base for political unity which is so essential to the viable consolidation and continuity of these states.

Therefore, an urgent inquiry into the nature of the multiple legal and other institutional aspects of these plural societies is both significant and challenging. Such an analysis, I am persuaded, may have considerable implications for the viability of these nations. At the same time, it may contribute immeasurably to theory and method in legal anthropology and related fields.

In this essay then, I shall attempt the preliminary task of identifying the various indigenous and extraneous legal traditions that are being enforced concurrently within the Northern States of Nigeria. The parallel existence of relatively disparate juridical units, as in Northern Nigeria, generally suggests a simultaneous presence of conflict and complementation, both processes which may have significant consequences for legal development generally as well as for related institutions, individuals and groups, and social change within the multi-cultural system at large. I shall

therefore also explore those inadequacies or socio-legal processes generated by the interaction of the different legal traditions. Finally, I shall discuss the possibility of evolving a less conflictual judicial structure for the region or for Nigeria at large.

The selection of this particular problem is partly related to my being attracted to a recent trend in the studies of African law which seeks commonalities in the variety of indigenous legal systems. Such "restatement" schemes may often serve as a building material for the internal unity of individual nation-states in Africa.

Another current trend in anthropology holds the view that anthropologists should seek to become more "involved," that is, to identify themselves more openly with the social problems and issues confronting the people they study. My view is that legal pluralism and the conflict of laws pose serious threats to national unity in multi-ethnic societies. As a native researcher, I therefore feel that merely identifying the legal discontinuities, cleavages, and unities within the Northern Nigerian social structure may not be enough. Consequently, some suggestions are being offered, in the concluding chapter, on how some of these discrepancies may be resolved. An ideology of unity or harmony in the legal sphere, beginning with the ethnic sector, might considerably assist in removing certain disruptive

influences within the wider society. The same ideology might also help eliminate one of the key areas of judicial discrimination against persons on the basis of ethnic, religious, or regional identities.

The choice of the same problem has also been guided by the need to fill a gap in the anthropological literature. Until quite recently, social anthropologists and other social scientists seem to have neglected the issue of legal pluralism. Their emphasis has mainly been directed to "political," "cultural," "religious," or "structural" pluralism. Besides, where legal pluralism is discussed, the question of conflict, adaptation, and other processes resulting from the cohabitation of multiple legal institutions has most frequently been ignored.

1.1 Working Definition and Research Method

For the purpose of this investigation, I shall define law as a body of rules considered to be binding on community members, and the violation of which calls for specific negative sanctions from a constituted authority. Institutionalized rules, sanctions, and authorities for legitimizing duty-right bonds between group members are what I construe to be the primary constituents of any legal system, regardless of its level of sophistication. Armed with such a fairly broad working definition, I shall in this essay examine the nature

and application of the Customary law,[1] the Shari'a,[2] and the General (British-based) law[3] in the six Northern States (formerly the Northern Region) of Nigeria. The study will cover the period roughly from 1800 to the present.

The data relevant to this research were collected intermittently between June 1974, and July 1975. A considerable time was spent observing court actions and the behavior of litigants involved in the judicial process. I attended sessions of Customary, Islamic, and General courts, and recorded how rural and municipal judges, mediators, chiefs, and open-air moots reached decisions on specific disputes. This observation of the judicial process is intended to serve as a background to the comprehension of the actual workings of the three legal systems under study.

In Chapter Three, an attempt has been made to "reconstruct" the criminal aspects of the substantive and procedural laws of three of the region's ethnic groups, namely the Maguzawa, Gwari, and Igala. For the purposes of such a

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[1]The term Customary law is used here to refer to the collectivity of the legal traditions of some 250 ethnic groups indigenous to Northern Nigeria. For a detailed discussion see Chapter Three, below.

[2]This is the Moslem (Islamic) law as enforced in the reconstituted alkalai and the former emirs' courts. For more details see Chapters Two and Four, below.

[3]See Chapter Four, below.

"reconstruction" or what Allott (1968) calls "Restatement of law," I have relied a great deal on:

(1) Local informants (students, merchants, farmers, and other ordinary citizens from each of the ethnic groups);

(2) Community elders;

(3) Court assessors, translators, and clerks;

(4) Chiefs and government administrators; and

(5) Judges, law panels, or community wisemen.

Questionnaires and scheduled interviews were used to elicit statements about the structure and functioning of the indigenous legal systems. At all stages, informants were asked to illustrate any cited rules or points of law by referring to specific cases heard within their localities during the last few decades.

The outcome of the interviews, questionnaires, and observations were supplemented with information found in administrative, archival and historical documents, legal texts, journals, handbooks, reports, legislation and decrees. These published and unpublished written materials have provided a wealth of cases. Within the year, I collected more than five hundred decided suits, the bulk of which dealt with mixed (or conflict-of-law) civil matters heard in various categories of courts. The selection of cases had to be eclectic, primarily in order to enable me to illustrate the degree of juridical conflict or adaptation obtaining

between them. This biased selection of cases is also intended to give some idea of how individuals and groups make choices between alternative possibilities of laws or courts.

Given the scope of my study, an indepth investigation of individual cases and life-histories of litigants (cf. Llewellyn and Hoebel 1941, Turner 1957) has been accorded little prominence. I have relied heavily on court cases, written materials and scanty oral testimonies. Moreover, the cases were not gathered on any valid random sampling plan; nor had I experienced any prolonged immersion in the communities I carried out fieldwork or collected cases. Hence, in essence, I did not see how litigation was immersed in daily social life.

One of the problems I encountered in the field involved the collection of enough cases to help illustrate legal rules elicited from local informants. There is a significant paucity of remembered legal actions from each of the three ethnic groups examined in Chapter Three. Because writing is only a recent innovation, legal experts and informants in rural societies naturally face the problem of citing precedents with live accuracy; and where the facts of a case are cited, precise dates, places, and names of principal parties are seldom remembered correctly. Reliance on such type of oral testimony can be useful, but it is also fraught with dangers beyond the problem of data accuracy.

One also has to point out the limitations of my approach with respect to the number and range of cases I collected and the interviews and questionnaires I employed. Memory lapse, error of informants, bias of court scribes, and selectivity bias by me and student informants may further mitigate against the accuracy of my data.

1.2 Assumptions and Predictions

Northern Nigeria has been characterized by multiple legal institutions which overtly conflict with one another. I therefore assume that the plural legal environment has created certain socio-legal problems, such as the question of choice of law on the part of both judges and litigants. The conflict factor may also adversely affect primordial relationships (e.g. marital) within indigenous communities that are poorly adjusting to the impact of another legal system.

It is further hypothesized that over the decades some degree of complementarity (or exchange of jural elements) must have occurred among the different legal systems within the region. I would, however, predict that legal inconsistency (conflict) rather than adaptation (or integration) is likely to prevail in the relationship between the interacting legal traditions. One may also infer that the longer and denser the interaction between two or more juridical units

within the same geo-political framework, the greater will be the movement towards integration or unity. Thus, integrational adjustments may for example be more pronounced between Islamic law and Customary law than between either of these two and General law.

The degree of conflict itself is likely to vary with time, social environment, and specific branches of law. For example, conflict might have been greater between Islamic law and General law in criminal jurisdictions during the colonial period. On the other hand, legal adaptation may turn out to be more significant between Islamic law and Customary law, particularly in civil matters.

It is further assumed that the Shari'a--written and codified as it is--can be flexible and receptive to change, just as Customary law has been. Consequently, the codification of Customary law may neither hinder its adaptability to rapidly changing conditions nor decelerate legal development in Nigeria or Africa in general.

One other objective of my investigation is to explore the chances of developing the conflicting legal systems into a uniform or harmonious structure. It is therefore assumed that basic differences initially exist between one ethnic law and another, and between customary law and either of the other two systems. I will hypothesize, however, that these variations, particularly at the inter-ethnic legal level,

may not be so great as to prevent a conscientious policy of judicial integration. I am therefore predicting that the majority of the ethnic groups in the region possess fairly similar laws of substance and procedure--a basic feature which will considerably facilitate the implementation of any policy designed to effect legal uniformity within the six Northern States.

Having thus briefly outlined my problem, objectives, methodology, assumptions, and predictions, I shall proceed to discuss the contributions anthropologists have made thus far to the understanding of legal phenomena, and the relevance of some of these studies to my own theoretical formulations and investigation.

1.3 Anthropological Contributions to the Study of Law

Anthropological studies of legal systems and legal phenomena are relatively few. However, these few works have generally been of high quality and of enormous significance to the understanding of the relationship of law to other segments of social systems in general. Most of the contributions largely involve the refining of concepts of law, classification of legal systems, searching for substantive rules and principles in simple societies, reforms and legislations, dispute settlement techniques, legal pluralism, and the exploration of the relationships between legal norms and social change.

In the course of these studies they have utilized and refined various concepts and techniques; they have also organized several inter-disciplinary (anthropology and law) conferences and publications (cf. Moore 1969:252-300). In the next few paragraphs I shall briefly examine a few areas of these contributions. I shall at the same time discuss the issue of "conflict of laws", an area which has so far remained untouched by anthropologists interested in legal phenomena generally. The relevance of some of these studies to my own investigation will be pointed out as the discussion progresses.

1.3.1 Clarifications

Anthropologists have employed a variety of approaches for classifying different forms of legal systems. Some of these classifications include: (a) A dichotomy based on organizational distinctiveness between simple and complex societies (e.g., Durkheim 1933, and Gluckman 1955, 1965b, 1965c); (b) a tradition using a more evolutionary approach, which focusses on development from decentralized into centralized politico-legal systems. Such models usually emphasize the role of law enforcement machineries, courts, and codes (e.g., Diamond 1951, 1965, Hoebel 1954); and (c) a tradition which focusses on dispute settlement rather than examining the whole field of law (e.g. Gulliver 1963, Bohannan 1957, 1965, 1967, Llewellyn and Hoebel 1941, and Gluckman 1955).

In all these traditions, there is the implicit assumption that law is an integral part of social life as a whole, and that relations between institutions should be so treated analytically. Many of these contributors also assert that every human society has law and that almost every social institution has a legal dimension. Some of these assertions will be evaluated on the basis of my findings in Northern Nigeria.

1.3.2 Definitions of Law

Perhaps one of the greatest contributions made by anthropologists in the field of legal studies is in the elucidation of the concept, law.

Malinowski's Crime and Custom (1959) is apparently the first major attempt, by an anthropologist, to have achieved a wide audience and raise some grave theoretical questions. Malinowski conceives law to be indistinguishable from obligations and social relationships, in other words, social control. Radcliffe-Brown (1952:208-212) and Hoebel (1954:28), on the other hand, speak of sanctions and norms as being legal when they are imposed by a constituted authority. Quite unlike Malinowski, these two scholars seem to echo the theoretical positions of jurists like Gray (1921) and Salmond (1935) who, in stressing the indispensability of authority and courts, have sought to make regulation of force as the touchstone of a rule of law. Furthermore, such

definitions merely suggest that law is absent in those simple societies lacking such formal machineries.

However, more recent anthropological approaches and conceptions have sought to incorporate those societies lacking formal courts, advocates, and specialized law enforcement agencies. Bohannan (1965), for example, considers law to be a doubly institutionalized phenomenon, a body of binding obligations which have been re-institutionalized within the legal system. Another study asserts that law consists of "rules or modes of conduct made obligatory by some sanction which is imposed by a controlling authority" (Pospisil 1958a, 1971:39-96, 1972). Pospisil recognizes, further, four main attributes of law, namely, authority, sanction, intention of universal application and obligatio (or right--duty--obligation cluster between litigants). For him, the term legal comprises a field where custom, political decision, and these four basic attributes overlap. He therefore sees no firm line between that which is legal and that which is not.

In these more recent conceptions one discovers a movement from Malinowski's vague and broad theorizing of mutual rights and obligations, and of sanctions and incentives, to those definitions emphasizing force, as well as the organizational and institutional contexts of legal obligation. Pospisil and Bohannan's conceptions, in particular, have stressed the anthropological view that law is common to all human

societies and that legal phenomenon is an integral part of social life. However, their definitions raise certain basic problems in the analysis of legal relationships solely based on rules and obligations. In holistic studies, it is often possible to demonstrate that only a full account of social relations in a society would adequately reveal and explain the content and workings of its law (cf. Malinowski 1959). In broader studies like mine, however, it can hardly be empirically possible to emphasize social obligations and the positive correlations between law and society. However, it will be possible to infer that law is a universal phenomenon, and that law both reflects and influences social life.

1.3.3 Some Techniques of Study

In trying to analyze and understand legal systems, anthropologists have employed various techniques. Here, I shall briefly discuss the case-study, comparative, and substantive rule techniques which I shall utilize in my study.

Many anthropologists hold the view that the best field technique for investigating dispute settlement, legal rules, and legal concepts is through the Case-Study Method. Llewellyn and Hoebel (1941) set the pace, and Pospisil (1958a, 1971) follows them closely in his "restatement" of the Kapauku Papuan substantive laws. He examines a number of cases and authority decisions on them, and draws rules therefrom as

being the types of principles governing individual and group behavior among the Kapauku. Pospisil's approach, however, differs from that of Llewellyn and Hoebel (1941), Epstein (1967), and Turner (1957). Pospisil is concerned more with detecting "ideal" rules from cases, whereas Turner and others dwell more on the social matrix of cases and individual litigants. This extended case-method treats each litigation (sequence episode or social drama) as a stage in an on-going process of social relations between specific persons and groups and groups in a social system. In other words, it views law cases as one kind of material by which one may study the ideas, values, and basic premises of a society (cf. Gluckman 1967: xv and Moore 1969:271-272).

In the study of Customary law, my approach approximates that of Pospisil; in other words, the social matrix of individual cases and litigants will not be rigorously explored. Cases were solicited from informants largely to illustrate and validate specific legal rules. Moreover, in my study of mixed-cause litigations (Chapters Five and Six), I will be strictly concerned with outcomes and conflict-of-law rules rather than with the actual processes of dispute settlement. Nonetheless, from my data, it will become apparent that cases can reveal certain trends in social life, thus partly supporting the proposition that law and social life influence one another.

Anthropologists have also used a number of Comparative Techniques in studying law. M. G. Smith (1965b), for example, has examined some variations in the legal theory of corporations. His comparison of Moslem, French, and British legal traditions has been acclaimed as the first definite attempt by anthropologists to analyse legal systems and procedures from a historical standpoint. Others have attempted comparisons within a single social system or region. Tanner (1966), for example, has identified the three legal systems operative in East Africa. He has also pointed out some of the complications inherent in areas with multiple laws and tribunals.

Both these approaches are particularly germane to my theoretical and methodological formulations; that is, in my attempt to identify the interacting judicial systems in Northern Nigeria, I find it necessary to also explore the political and judicial history of the region as a whole. Such a historical treatment is vital to the comparison of the three legal systems.

Finally, in the study of the laws of specific societies, some anthropologists have utilized the Substantive Rule Approach. Goldschmidt (1965) and Pospisil (1958a), as examples, base their studies on statements of substantive legal rules illustrated by accounts of specific disputes and their outcomes. In my essay, the substantive rule approach

will be utilized only in respect to Customary law, wherein cases will be cited to illustrate or validate given rules.

The substantive rule approach in anthropology can be seen as the equivalent of what Allott calls the Restatement of Law Program. The latter project was established in 1959 with the objective of restating African Customary law (Allott 1967:13, 1968). Allott's program has been collecting data by using existing written materials, by assembling law panels to discuss hypothetical cases, and by discovering governing rules in given cases. The limitation of this approach is that it does not employ field work as a technique of investigation. Moreover, being a lawyer, Allott is not as concerned with the social context of legal phenomena.

In my own study all these methods had been utilized to a limited extent. I collected court cases, referred to archival and printed materials, talked to informants, judges, chiefs, and litigants, and observed courts in action. However, I did not take up long residence in any one locality, which would have enabled me to observe in greater detail the different stages of disputes and their resolution.

From the various conceptions of law surveyed so far, it becomes evident that any comprehensive definition of law must include rules, sanctions, and authority. In this regard, Pospisil's definition appears to be the most inclusive, and consequently the more acceptable, as a working definition for

my present investigation.[4] Such a broad definition enables me to categorize and incorporate as legal the majority of the substantive rules and cases which I collected orally. Also, the adoption of such a definition enables me to compare and contrast, on basically the same platform, Customary law with Islamic and General legal traditions.

Although anthropologists have begun to examine law in complex societies (cf. Nader 1969), the bulk of the current anthropological literature on legal phenomena seldom goes beyond particularistic or holistic studies of simple societies (cf. Bohannan 1965 and Gluckman 1955,). Moreover many of these works remain essentially synchronic. My thesis, which traces the historical development of law in the area under study, also involves an examination of certain aspects of the laws of at least three indigenous ethnic groups. The legal traditions of these peoples are then contrasted with Moslem and General systems, both of which apply jointly to more than half the inhabitants of Northern Nigeria.

1.3.4 Legal Pluralism or Multiplicity of Legal Levels and Legal Systems

A plural society is generally viewed as one characterized by cultural diversity and social cleavage arising largely from the contact and admixture of different ethnic groups

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[4] Indeed, the definition I submitted in the earlier part of this chapter partly echoes Pospisil's.

(Furnivall 1939, 1948, M. G. Smith 1971z and b). This view has been equated with a "conflict-model" of pluralism and differs from an "equilibrium model," which focusses on the dispersion of power between groups that are consensually bound together by cross-cutting loyalties and by common values, or by a competitive balance of power (e.g. Shils 1963, Kornhauser 1960).

Most plural nations of the world seem to possess elements of these two models, in varying doses. Northern Nigeria is apparently quite representative of the "conflict model" of plural society, However, elements of mutually adaptive or consensual relationship between the different sections of its population and institutions are also present.

Anthropologists have made attempts to distinguish cultural, social, religious, legal, and structural pluralism (e.g., Smith 1971b:415-449, Kuper and Smith 1971). In essence, all these and other forms of pluralism are not totally independent of one another. Analytically, they refer to various levels of pluralism which differ in their forms, properties, intensity, and range; and the fact that they are interrelated means that each is necessarily implicated in the other(s).

Legal pluralism may be defined as the differential

retention of relatively distinctive legal institutions by individual groups and organizations within a single society. Pospisil may be cited among the very few anthropologists who have attempted, in recent years, to popularize the concept of "multiplicity of legal levels and legal systems," in other words, "legal pluralism." The origin of this concept, however, goes back to Weber, Malinowski, Mauss, Hoebel, and Llewellyn and Hoebel.

In his Law in Economy and Society (1967), Weber postulated that every subgroup having some form of political organization is necessarily bound to possess distinct jural rules and structure designed to control the behavior of individual members. According to him, every segment of a society regardless of its structural and cultural complexity has what can be called a legal organization (Weber 1967:17). Elaborating on this concept, Hoebel (1949:376) emphasizes that:

> Where there are subgroups that are discrete entities within the social entirety, there is political (and legal) organization--a system of regulation of relations between subgroups, or members of different groups within the society at large.

In 1941, Llewellyn and Hoebel (1941:28) formulated the idea of "multiplicity of legal systems" within a geographically delimited society, and the relationship of the encapsulating society's law to the legal systems of the sub-units or associations. They argued that within individual subgroups may be found radically different bodies of law. This implies

that even within the most homogeneous society, several legal systems may be operating, "complementing, supplementing, or conflicting with each other" (Nader and Metzger 1963:584). Thus, Mauss (1906) and Malinowski (1959) discovered at least two legal systems among the Eskimo and the Trobrianders, respectively. Mauss (1906:103-124) described two legal levels that operated simultaneously among Eskimo nuclear and extended families. Among the Nunamuit Eskimo, Pospisil (1964:424-426, 1971:101) noted that two additional legal systems functioned simultaneously with those of the nuclear and the extended family: that of the band and that of the band faction.

Pospisil, in refining the above theoretical formulations, advances that no one human society possesses a single consistent legal organization. He maintains that there are always as many such legal organizations as there are functioning subgroups. Moreover, each social segment of a society regulates the relations of its members by its own legal structure which is, in many respects, distinguishable from those of the other social segments (Pospisil 1958a:272, 1971: 107). A member of every social group, association, or club of different inclusiveness is at once subject to all the different legal levels of the social units of which he is a member.

The legal system of any given group may thus serve to complement or supplement the legal organization of other subgroups within the larger political framework. In most

cases however, the jural structures, rules, and sanctions of subgroups are almost always in conflict (or complementation) with one another and with the dominant (or national) legal system. This conflict factor of plural legal systems has not been fully appreciated by anthropologists.

1.3.5 Internal Conflict of Laws

Theoretical lawyers distinguish two main classes of legal conflicts:

(1) Private International Law or (External) Conflict of Laws. This category of conflict arises whenever a court is confronted with litigation which contains some foreign legal element. In other words, such a situation calls for a choice between two laws, one internal and the other alien (cf. Cheshire 1965, Dicey and Morris 1967, Morris 1971, Graveson 1969, and Agbede 1973); and

(2) Internal Conflict of Laws, which obtains primarily between two or more interacting legal traditions that are being enforced concurrently within a delimited political unit.

In this essay, my main concern is with the latter type of conflict which has also been variously labelled as "Private Interpersonal Law" (Bartholomew 1952) and "Inter-gentiel Recht" (Conflicts), a term proposed by the Dutch in Indonesia. Other expressions include "Inter-tribal (ethnic) Conflicts of Laws" (as in Africa), and "Conflict of Laws".

One of the earliest use of the term "Internal Conflict" in Africa was by J. N. Matson (1953). Its current refinement and popularity, however, has to be credited to A. N. Allott. According to the latter scholar, an internal or local conflict-of-law case can be said to occur when a litigant or judge is compelled to choose between two or more bodies of law which apply simultaneously and without spatial separation within a single territorial jurisdiction (Allott 1958:164-165, 1970a: 107-144). Because this expression suggests a permanence of conflict between differing legal institutions, Farran (1963: vii) and others have sought to employ the phrase, "Cohabitation of Laws," when referring to internally differentiated but simultaneously enforced legal traditions. The objection to this term is that, by implication, it understates the degree of interaction (of a conflictual or cooperative nature) which may be taking place between the differing judicial structures within the society at large.

Allott's term appears more neutral and more universally applicable perhaps than do the others. Both interpersonal conflicts and intergentiel laws (that is, conflicts involving different peoples) are unsatisfactory because all legal disputes are between persons, and the concept of personal law has not been fully recognized in many countries of the world. The expression inter-ethnic or inter-racial conflict of laws is equally unacceptable because not all

disputes are necessarily inter-racial or inter-tribal, although many may well be so in urban or multi-ethnic environments. Moreover, when one ethnic group constitutes a political unit, one may still be forced to choose between their own traditional law and another which prevails within the same territory.

Institutional and structural pluralism is in most respects a precondition for internal conflicts of laws within a given political system. Thus in Northern Nigeria, four major realms of internal conflict can be distinguished: (1) Customary law versus Customary law, (2) Customary law versus Islamic law, (3) Customary law versus General law, and (4) Islamic law versus General law.[5]

By focussing my investigation on legal "pluralism" and "conflict," I am not deliberately attempting to overlook efforts being made by the governments in Nigeria to foster regional, national, or institutional integration and progressivism. In other words, by seeking to examine the depth, intensity, and relative permanence of internal juridical divisions, I am not at all attempting, at the same time, to underrate the fundamental unity, and complementarity between the differing legal institutions. Indeed, in my analysis, I shall discuss the adaptational as well as the conflictual adjustments between the different bodies of law in the Northern States.

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[5]For a fuller treatment of these realms of conflict see Chapter Five.

I am, on the whole, persuaded that the combined utilization of these two concepts will enable anthropologists to come closer to lawyers and vice versa; for, in essence, both approaches will enable one to present relatively objective analyses of institutional relations in multi-ethnic environments. Both concepts will enable one to identify particular systems of legal beliefs, values, and practices and to deduce how these systems affect, and are in turn affected by, social relations.

The next chapter will present an overview of multi-ethnicity in Northern Nigeria, along with a detailed discussion of the origin, structure, and functioning of Moslem law. Chapters Three and Four will examine Customary law and General law, respectively.

Chapter Two

ISLAMIC LEGAL SYSTEM (SHARI'A)

Legal pluralism and the conflict of laws in the six Northern States is a product of both historic circumstances and perduring systems of beliefs, values, and social relations. In this chapter I wish to examine first one of the three principal components of this pluralism, namely that which derives from Islam. In the following chapters I shall discuss some aspects of the legal traditions of selected indigenous populations living in the region. From then on I shall examine the arrival of the British and the introduction of General law, along with some judicial developments during both colonial and post-colonial periods.

As a background to the discussion of these three legal structures, I shall first provide some background on the general ethnic composition of the region.

2.1 Multi-ethnic Setting

The present area encompassed by the six Northern States (former Northern Region) is about 300,000 square miles in size. It is 720 miles wide and 410 miles long, bordering the Republic of Dahomey, Cameroun, and Niger. Up to 1966, it contained

more than one-half of the population of the Federal Republic of Nigeria; this may be true today, although unreliable censuses seem to preclude any certainty in knowing about the distribution of the population among the various states.

Prior to 1967, the territory was divided into thirteen provinces,[1] with Kaduna as the regional capital. Today, these provinces have been reorganized into six of the twelve states in the present Republic.[2] The six states to the north of the country constitute what is today popularly termed the (six) Northern States: Benue-Plateau, Kano, Kwara, North-Central, North-Eastern, and North-Western.[3]

These States are said to contain some 250 of the approximately 450 communities within Nigeria. The Hausa, Fulani, and Kanuri are by far the most numerous, each with a population of several million, according to recent estimates. The Tiv, Nupe, and Yoruba (of Ilorin and Kabba) to the south are also numerous, with each exceeding one million.

Some 70 percent of the population of the region, and about one-half of its territory, lies within pre-colonial chiefdoms, called emirates by the British, who ruled over the land from about 1900 to 1960. More than 70 per cent of the

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[1] See Map I, p. xiv.

[2] The States (Creation and Transitional Provisions) Decree, 1967, No. 14 of 1967, initiated the division of the country into twelve states.

[3] See Map II, p. xv.

inhabitants of the region are professed Moslems, the remainder being Christians and animists. For centuries, long-distance trading has been taking place between northern Nigerian towns and other parts of West and North Africa. The overwhelming majority of the population, however, have been subsistence farmers until recent decades. The region has diverse but overlapping ecozones in which a large variety of crops are grown.

Most of the Northern States are characterized by open savannah with scattered hills and trees. Rains are heavier and more frequent toward the south and south-east. The Guinea Savannah Zone to the south is much more luxuriant than the more northerly Sudan Savannah, which has fewer rainy months, shorter grasses, and sparser trees. The Sudan Savannah gradually phases into the Sahel Savannah and semi-desert to the north and north-east corners of Nigeria. The rains everywhere fall during a few summer months.

Despite the variability of climatic and rainfall conditions, there is throughout the region a common agricultural cycle falling into two distinct seasons--a short rainy period from mid-May to September; and a long dry spell, which begins with the harvest (October to December), is followed by two cold months, finishing with the hot dry months of the Harmattan, from February to May (M. G. Smith 1960a:1). Cash crops, such as cotton, groundnuts, and tobacco, flourish

mainly in the North, along with millet and guinea corn as the staples. Intensive farming is confined to the rainy season, which is traditionally the period of concentrated craft production, long-term trading expeditions, marriage celebrations, hunting, and bush-clearing for new farms.

By 1966, fewer than 10 per cent of Northern Nigerians were living in towns of 20,000 or more people. The average population density for the region exceeds 60 per square mile, with population concentration tending to be denser around the major cities of Kano, Kaduna, Katsina, Zaria, Maiduguri, Ilorin, Sokoto, Bida, and Makurdi.

Inter-ethnic relations in the pre-jihad (1800) period were largely characterized by warfare, slaving, group migration (such as the spread of the Bororo from the west), growth of towns and kingdoms, increased commercial trade (across the Sahara and to Guinea Coast), and spread of Islam. Information about most ethnic groups and their inter-relations during this period is very scanty indeed; hence a comprehensive reconstruction of their social, political, and legal traditions would be extremely difficult.

2.1.1 Consolidation of the Region: Jihad to Military Rule

According to myths of origin, the traditional Seven Hausa kingdoms or city-states of the pre-jihad period were founded by one Bayajidda, an adventurer from Baghdad. After

spending some time and marrying in Borno, he reached the city-state of Daura, where he is reputed to have killed a menacing snake and subsequently to have married the reigning Queen. From this union descended three sets of twins who later became the founding rulers of Daura and Gobir, Kano and Rano, and Katsina and Zaria (Zazzau). Bayajidda's son from a Borno wife founded a seventh state. Together, these polities make up the Seven Authentic Hausa states (Hausa Bakwai) in contradistinction to the Seven Illegitimate states (Banza Bakwai).[4]

Much of the northern part of Nigeria is thus known as Hausaland, and it comprises several city-states, emirates, or provinces. These were mostly conquered and brought under a single hegemony between 1804 and 1810 in the course of a holy war (jihad) led by Shehu Usman dan Fodio and his Fulani (Fulbe) supporters. In most of these Hausa states today, the nucleus of the ruling elite is of Fulani descent. The majority of the subjects (Hausa: talakawa) are Hausa or Habe. The Fulani rulers have gradually become fully assimilated to the culture and language of their Hausa subjects, however, so much that the sedentary or Town Fulani are now almost indistinguishable from the subject Habe.

The conquest by Usman dan Fodio resulted in the mass adoption of Islam and the imposition of the Shari'a over all

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[4]See Palmer (1958), M. G. Smith (1960, 1964), and Hogben and Kirk-Greene (1966:3-5, 145-148).

pre-existing traditional legal systems. Islamic law today is the principal code in predominantly Moslem areas, particularly in civil causes. It has not completely supplanted the customary legal systems of most unconverted ethnic groups, however, as we shall see later. Yet because of its historic and continuing importance throughout the six Northern States, it is essential to describe the origin and nature of Islamic legal conceptions and practices.

2.2 Islamic Law

The concept of fiqh or Islamic jurisprudence developed over a long time.[5] Fiqh or jurisprudence is commonly defined as "knowledge of the practical rules of Islam" (Subki 1850:1, 23). More fully, it refers to "knowledge of the rules of Allah which concern the actions of persons who are themselves bound to obey the law respecting what is Required [Wajib], Forbidden [Mahzur], Recommended [Mandub], Disapproved [Makruh], or merely Permitted [Mubah]. Such knowledge is required from the Book (i.e., the Quran), the Sunna, and such arguments as legists may adduce for the necessary comprehension of the laws contained within them. It is the body of rules derived by these legal arguments that are called fiqh" (Ibn Khaldun 1858:1, Khadduri and Liebesny 1965). Combined with the science

[5] Schacht (1953:180-213) dates the starting period of Islamic jurisprudence to the Ummayyad era, approximately the beginning of the Second Century A.H.

of Kalam (word) or Dogmatics and Scholastic Theology, one obtains the science of Shari' or Shari'a.

Shari'a literally means the right "path" or "road," and hence the "Law of Islam" guiding the Moslem to Paradise. The Shari'a differs from the Christian common law in that, by definition, it incorporates all the laws compiled by competent leading Moslem jurists (Levy 1971:150). According to many observers, the Shari'a is not simply a body of law. It is a "total way of life," a moral code and a body of law all lumped together. It concerns itself with every aspect of the life of the Moslem believer. Its sacred laws are intended to regulate every aspect of a Moslem's life, from his religious obligations and personal status to the rules governing his political, economic, and social activities.

2.2.1 Sources of Islamic Law

As known today, the Islamic legal system is believed to have developed from five main sources: The Holy Quran, the Sunna, the Ijma', the Qiyas, and the Ra'y. The Quran, or direct injunctions of God, specifies what is wrong, right, forbidden, or recommended for all Moslem faithfuls, but it does not specifically regulate all aspects of human life. The Quran[6] forms the theoretical basis of Islam and Islamic law. The Prophet regarded the Book as containing a series of

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[6] Quran means "Reading." The name is derived from the Arabic root qara'a, meaning "he read" or "he recited."

"revelations" which descended to him at uneven intervals and at specific curcumstances, as dictated from an original code, "the Mother of the Book" (Umm al-Kitab). The Holy Quaran claims to contain the essence of truth which had existed from time immemorial.

The Sunna embodies the personal actions, sayings, and facts of the life of the Prophet Mohammed as contained in the hadiths. The hadith, in essence, is the report of the Prophet's Sunna or course of conduct, doings, and sayings (Subki 1850:II:83). Where the Quran fails to provide an answer to a particular problem, resort is most often made to the Sunna. Consequently, the Sunna has gradually acquired an authority only slightly less than that of the Quran. In fact, at a certain stage of the development of Islamic theology, the Sunna was held to be as of equal origin and equal validity with the Quran.

Moslems who accept the Sunna as being transmitted by well-established authorities are called Sunnites, while those who oppose this and certain points of doctrine are classified as Shi'ites.

Where precedents or solutions are not available in either the Quran or the Sunna (hadiths), Moslem judges and rulers of the earlier caliphates frequently employed their personal judgments to adjudicate cases. This exercise of personal opinion is termed ra'y, now a technical term in

Islamic jurisprudence. According to Goldziher (1884:212), the Prophet himself frequently exercised his own judgment when no revelation was available on a conflictual issue. The free and unrestricted use of ra'y was checked by the rule that such arbitrary views must be controlled by reference to the Quran. Where difficulty is encountered, inferences may be drawn from precedents on a similar point.

Thus evolved the principle of qiyas, "measurement," and hence "analogy." Qiyas, one of the principal roots of Islamic jurisprudence, is equated with analogical reasoning from either the Quran or the Sunna. It supplies the essential argument underlying the average and patent actions of the Prophet's companions. As an example, the Quran contains provision for the punishment of theft but remains silent about burglary. By analogy, qiyas, the penalty for theft (cutting off the offender's hand), is held legally applicable to a person who is convicted of burglary.

Too much reliance on "opinion" led to differences between legal scholars as well as between a scholar and his disciples.[7] In some instances, unrestricted use of personal views by judges and rulers led to abuse. Thus, the principle known as ijma', which defines the force and validity of any law obtained by qiyas, was adopted. As a source of Islamic jurisprudence, ijma' refers to the consensus of Moslem

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[7]See Goldziher (1889-90, vol. 11:77) and Levy (1971: 166-169).

scholars over a particular point of law. Traditionally, the agreement reached by the disciples and companions of the Prophet once carried great weight (Von Grunebaum 1953:150). By Imam Maliki's time, the majority opinion of Moslem jurists in the major urban centers, particularly Mecca and Medina, came to be accepted as final (Khadduri and Liebesny 1965:95, Von Grunebaum 1953:150). During the time of Muhammad al-Shafi',[8] ijma' was considered to be one of the three principal roots of Islamic law, after the Quran and the Sunna. Shafi'i held ijma' to be a manifestation of God, and he expanded the principle to include the body of ideas and decisions formulated and agreed upon by competent Islamic rulers and jurists. The principle came to be very important on emergency conflictual issues.

Today, ijma' has come to refer to the common opinion of the accredited jurists (fuqaha) of Islam in each era and, often, of every given Moslem community. "It was they alone who had the faculty to interpret the books of the law and to give decisions on doubtful points,[9] and they derived their exclusive authority to do so from the Quran itself" (Levy 1971:178).

Although usage or custom (Arabic: urf, adat) is

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[8]Both Imam Maliki and al-Shafi' are founders of Islamic schools of law.

[9]The decision on a point of law is termed fatwa and the person who delivers it is the mufti.

frequently ignored as a major source of Islamic law, it is undeniable that the subject matter of Islamic jurisprudence is derived from pre-Islamic Arab institutions. Scholars like Hourani (1962:9) are of the opinion that the Shari'a is unmistakably a blend of customs and practices from Byzantium, Persia, and Arabia which were subsequently modified and given Islamic respectability. Von Grunebaum (1953:149) is also of the view that Islamic law relates to the source rather than to the subject matter of it. He argues that Islam did not completely blot the existing institutions upheld by the pre-Islamic Arabian society. Consequently, traits that were considered "worthwhile" or "beneficial" became automatically incorporated into Islamic law. Indeed, it is true that had Islam attempted a total transformation of Arabian, Persian, or Byzantian society, it would probably have experienced more difficulties than it actually did in securing adherents. Thus Malik b. Anas (1825, II:76) found it expedient to recognize as lawful and incorporate unchanged a pre-Islamic custom of gift-giving, 'umra, made for the lifetime of the recipient, upon whose death it reverts to the donor or his heirs.

2.2.2 The Four Orthodox Schools of Islamic Law

The death of Prophet Mohammed and his four succeeding Caliphs resulted in the emergence of several schools of

Islamic law. The evolution of these "schools" or "rites" (madhab) is commonly traced to a series of disagreements among the fuqaha, or Islamic jurists, a few decades after the death of the Prophet. The four madhabs, which are still in existence, cover the Sunni world between them, and to one or other of them every Sunni belongs. These four major schools are the Hannafi, Shafi'i, Hanbali, and Maliki.[10] Each madhab bases its ideologies on the orthodox teachings of Islam.

The Hannafi rite is the earliest of the four major orthodox schools of law. As with the other three rites, the Hannafi madhab was named after its founder, Imam Abu Hanifa, who left the school's guiding ideologies in his major work entitled The Great Jurisprudence. The adherents of this rite are found chiefly in the former Turkish Empire, India, Pakistan, Iraq, Afghanistan, and Syria. Numerically, about half the Sunnites in the world adhere to the Hannafi madhab.

The followers of the Shafi'i school, styled after Idris al-Shafi'i, are today found mainly in Cairo, Lower Egypt, and parts of Yemen and Aden. A former disciple of both Maliki (see below) and Hannafi, al-Shafi'i found it expedient to set up his own school which, for the first time, revealed a clearer idea of the sources and nature of Islamic juris-

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[10]Our main concern in this thesis is with the Maliki rite, in other words, the dominant Islamic Code for Northern Nigeria.

prudence. He also included custom and long-established usage among the principal roots of the Islamic code (Levy 1971:177).

A pupil of al-Shafi'i, named Ahmad Ibn Hanbal, became one of the bitterest critics of the Shafi'i rite and subsequently established the Hanbali madhab. In his major work, the Musnad, Hanbali clearly agreed with any "rationalist interpretation" of the Quran and hadith, but he strongly rejected what he called an "unlawful innovation" (bid'a) of the ijma'. Hanbali's school is generally considered the most reactionary of the three described thus far. It also has the smallest following, with the bulk of its adherents scattered mainly in Saudi Arabi (the Wahhabis) and in parts of India and Pakistan.

The Maliki school closely follows the Hannafi in terms of historical sequence. It was founded by Maliki b. Anas (d. 795 A.D.) in Medina. It was from this city that the rite spread to cover Upper Eqypt, North Africa, former Moslem Spain, West Africa, Sudan, and various areas along the Arabian shore of the Persian Gulf. Maliki's ideas were mainly embodied in his famous work, al-Muwatta (The Introduction). A summary of this work was written by an Egyptian Maliki jurist, Khalil Ibn Ishaq (d. 1374). This summary, entitled al-Mukhtasar al-Khalil, has been widely used by the alkalai (Moslem judges) in the Northern States of Nigeria.

Maliki listed hadith as one of the key sources of

Islamic jurisprudence. He even appeared to prefer a doubtful hadith to qiyas or ra'y, as can be judged by the composition of his major work, the Muwatta, which is basically a collection of local traditions and customs arranged under headings, as a guide to legal decisions. Where there is no Quranic precedent, Maliki always adduced hadith. As an example, in deciding whether carnivorous animals are edibly harmful--a point on which the Quran was equivocal--Maliki states, "The Apostle of God said, 'the eating of all fanged animals is forbidden'" (Malik 1825:358).

My interviews[11] with mallamai and jurists in Maiduguri, Sokoto, Katsina, and Zaria reveal that the Maliki school of law has dominated all other rites in Northern Nigeria since the fifteenth century. Islam came into Northern Nigeria via Egypt and North African countries. In these places, the dominant code for the courts has always been the Maliki. Since the earliest and subsequent Arab traders, jurists, and scholars to Hausaland originated from these countries, it follows logically that Northern Nigeria accorded, and continues to accord, special preference for the Maliki teachings. It has at least been the predominant Code in Kano since the time of El-Maghili, who was apparently the first scholar to bring Maliki law books into Hausaland (Paden 1973:61). The jihad leaders did not strictly favor any madhab. Indeed, in most

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[11] Interviews carried out between August and December, 1974.

of their writings the jihadists recommended the application of any rule, from any of the four schools, for arriving at a just and fair judgment by an alkali.

Today, the Maliki code is widely held to be the most conservative among the four Sunni schools (Muhammad 1975:5).[12] Nonetheless, because of the wide circulation of books from this school and the fact that the alkalai are more familiar with this code, which they have been enforcing for more than five hundred years now, one has to admit that the Maliki madhab has virtually come to stay in Northern Nigeria.

The major sources of the Maliki law for the region are the Mukhtasar[13] of Khalil, the Risala of Ibn Abi al-Qayrawan (A.D. 999),[14] and the Kitab al-Muwatta of Imam Maliki, the founder of the Maliki madhab.[15]

The above four schools appear to have developed as a result of social and political changes in the Moslem world. As Islam expanded, different problems necessitating some basic changes within Islamic legal system arose to accommodate the challenge. However, the differences between the

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[12]Five judges from Kano, Zaria, and Kaduna confirmed this statement (interviews, June, 1975).

[13]This work was translated by Ruxton (1916) at the request of Lord Lugard, Governor-General of Nigeria.

[14]The Northern Nigerian Publishing Company (Gaskiya Corporation, Zaria) translated this work into Hausa in 1970.

[15]Others include Dasuqi's Sharh al-Kabir, Adawi's Commentary on Khirshi, Abi al-Azhari's Jawahir al-Ikhlil, Ibn Asim's Tuhfat al-Hukkam, the Mudawwana al-Kubra, and al-Qarafi's Furuq (cf. Kumo 1972:84-94).

various jurists and their schools are not over the basic organization of Islamic jurisprudence. All of them recognize the Quran and the Sunna as the principal roots of Islamic law. Their differences seem to have arisen mainly over the various points of law as laid down or stressed in the sources. For example, the Hannafi and Maliki rites recognize, within certain limits, the validity of local customs and traditions within the legal system.[16] This view is, however, totally rejected by the Shafi'i rite (Khadduri and Liebesny 1965:258).

Such differences and nuances of opinion run through the whole gamut of laws governing marriage, inheritance, homicide, and so on. Schacht (1953:7) comes close to being right in stating that the real distinguishing feature of these schools has more to do with geographical distribution than to personal allegiance to a given Moslem leader and to the excellence of his doctrine.

2.2.3 Concept of Islamic State (Caliphate)

Having briefly examined the origins and development of Islamic jurisprudence, it will be pertinent to discuss the concept of "caliphate," first with respect to the Middle East and then to Northern Nigeria. Such a background is essential to the understanding of the nature and application

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[16] Such a recognition partly explains the extreme adaptive nature of Islamic law in Northern Nigeria (see conclusions to this chapter).

of Islamic law in the Northern States of Nigeria.

An Islamic state or Caliphate is ideally a Moslem political community whose daily actions are supposed to be governed by the Shari'a. This Islamic utopia can be said to have been realized only during the Prophet's time. The concept of the Caliphate began with Abu Bakr, the first Successor or Caliph (Khalifa) to Mohammed. This period lasted from 632 to 661 A.D. and was immediately followed by the Ummayyad Caliphate (661-750 A.D.). Then followed the Abbasid Caliphate, which lasted from 750 to 1258 A.D.

In his book al-Ahkam al-Sultaniyya (The Statutes of Rulership), al-Mawardi (991-1031 A.D.) suggested that the appointment of an Imam (leader) was essential for every Moslem community. He opposed the vesting of too much power on the ruler or Caliph and insisted that the Imam was to command the obedience of all members of the community. Al-Mawardi and Ibn Khaldun both placed the Imam as the most immediate representative of God in any Moslem community. Such an Imam is to be guided by the principles laid down in the Shari'a. Al-Mawardi and many other theorists of the Caliphate are very detailed about the qualities and qualifications of an ideal Imam-elect (cf. Von Grunebaum 1953:156-164, Levy 1971).

The adjudication of cases is entrusted to a qadi, who is supposed to be a qualified Moslem jurist with sound education and faultless moral and physical qualifications.

In arriving at a fair decision, the qadi is expected to follow as closely as possible the rules and procedures set down in the law books. A mufti (chief scribe) has to be around as an aid and consultant to the qadi, but only the judge is empowered to give a verdict. Among the duties of the qadi, as outlined by al-Mawardi, are:

a) Settlement of litigations between parties;
b) Enforcement of rights established in court;
c) Protection of the weak against the powerful;
d) Administration of religious property (waqf);
e) Execution of wills;
f) Providing for unmarried women who have no guardians;
g) Application of the hudud, i.e., penalties laid down for crimes like homicide, theft, etc., as stated in the Quran;
h) Policing of public buildings and highways; and
i) Controlling shuhud, i.e., witnesses called to testify before the court, and judicial assistants such as messengers, as well as the selection and appointment of his own deputies (Al-Mawardi 1853: 117-19; quoted in Khadduri and Liebesny 1965:261-62).

Just like the Caliph and the Imam, the qadi is expected to be guided always by the Shari'a although he may receive orders (which do not conflict with the Shari'a) from

these two leaders.

During the Abbasid era, the institution of nazir al-mazalim developed. The mazalim[17] is delegated the task of looking into various forms of complaints against subordinate officials of the sovereign so as to check the abuse of power by officials and the oppression of commoners. The qadis can also be checked by the nazir al-mazalim (Redresser of Grievances). Quite unlike the qadi, however, the mazalim is not expected to be guided by the Shari'a in passing judgment; besides, he can use threat or coercive techniques (Von Grunebaum 1953:164).

From this brief sketch of Moslem political and judicial organization, one may clearly note the relative absence of independence of the judiciary within Islamic societies.

2.2.4 Dan Fodio's Jihad and the Conception of Islamic Law

As indicated above, Islam appeared to have been firmly rooted in urban centers like Kano, Katsina, and Sokoto by the 16th Century. In Kano, the application of the Shari'a by formal judges was already evident by the 15th Century,[18] and in Katsina a formal court of alkali was in existence by 1496

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[17] The equivalent of an emir in Northern Nigeria.

[18] Four Kano alkalai whom I interviewed in October, 1974, unanimously agreed with this dating. The jurists also held that the Maliki was the dominant school of law then.

(Usman 1974:65-66). However, a far wider recognition and enforcement of Islamic law in Northern Nigeria can safely be dated from the 19th Century jihad of Shehu Usman dan Fodio. In 1806 there were about 25 metropolitan alkalai within the Caliphate, as opposed to seven in the late 18th Century.[19]

Unhappy with the way Islam was being practised, Usman dan Fodio launched a holy war against Hausa chiefs in 1804. The outbreak of the jihad was a result of some thirty years of intense preaching for Islamic reform by Usman dan Fodio and his disciples around the Hausa State of Gobir. Through teaching and preaching, he gradually succeeded in building up a Moslem community (jama'a). By late 18th Century, this following had become strong enough to pose a serious threat to the kings of Gobir. The growing strength of Usman dan Fodio's supporters, together with the scholar's persistent attack on the excesses of the Hausa kingdoms of the time, resulted in an open rift between the Moslem community and the King of Gobir, Muhammadu Yunfa. In 1804, Usman dan Fodio declared an open jihad against all pagan kings and pagan practices, starting with Gobir. By about 1820, the jihad forces had successfully captured the areas of Kebbi, Gobir, Zamfara, Sokoto, Katsina, Zazzau (Zaria), Nupe, Ilorin, Kano, Gwandu, Adamawa, and Bauchi; in other words, the geographical area corresponding to the present Northern Nigeria, excepting

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[19] Interview with Alhaji Jinaidu, Waziri of Sokoto, 23 November, 1974.

Borno and Sardauna provinces, and parts of the adjoining countries.

As to the motives why the Holy War was launched against Hausa and Kanuri chiefs, many of whom were already Moslems, it is thought by some that the jihad leader was not at all a seeker of temporal power;[20] he did not start a jihad for the sake of gaining his ends by carving himself an empire (Usman dan Fodio 1913-15:189-92). It is, on the contrary, more widely believed that many of the charges against the Habe chiefs were genuine, and that Shehu was clearly concerned with reforming these Habe societies along the lines of Islamic ideals.

Reading Usman dan Fodio's major work, Kitab al-farq, one becomes persuaded that his preoccupation was with Islamic reform. Thus, with the conquest of most of Hausaland, he replaced all the Habe leaders of the kingdoms with eminent scholars from among his disciples. These new leaders were instructed to follow as closely as possible the rules of the Shari'a. As a guide to the running of the Caliphate according to Islamic ideals, Usman dan Fodio, together with his brother, Abdullah Ibn Muhammad Fodio, and his son, Muhammad

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[20]For an academic assessment of the jihad see M. G. Smith (1969:408-420). For detailed accounts of the jihad, see Bello (1922), Johnston (1967:35-91), Hiskett (1957, 1962a, 1963), Usman dan Fodio (1913-15, 1960, 1961), Adeleye (1971, 1974), and Last (1967).

Some observers continue to be perplexed by the attack on Borno which, at that time, was already an important Islamic state in the Western Sudan (Hiskett 1962a, Brenner 1973, Schultze 1968, and Johnston 1967:72-82, 102-112).

Bello, wrote numerous books, pamphlets, and letters.[21] Most of these works specifically aimed at: 1) stripping evil things from religious and temporal affairs of the Caliphate, 2) combatting every cause of corruption, and 3) forbidding everything disapproved by the Shari'a. The works also laid down the theoretical basis of an ideal Islamic state. In this, the jihad leaders fully acknowledged their indebtedness to earlier writings on Islamic political communities as pioneered by al-Mawardi (1853), Ibn Khaldun (1958, 1961), and El-Maghili (1932). Indeed, in both theory and practice, the jihad leaders sought to emulate the customs and practices of the earlier Caliphates, notably the late Abbasid era.

In their writings and letter-guides, the jihad leaders insisted that the life-blood of an ideal Moslem state is an Imam, Caliph, or Emir who would assume "general leadership in the affairs of the religion and the world on behalf of the Prophet" (Abdullahi 1956:11). Maliki orthodoxy was supposed

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[21] Usman dan Fodio's major works include (1) Kitab al-Farq, (2) Bayan Wujub al-Hijra, (3) Ihya al-Sunna, and (4) Wathiqat Ahl al-Sudan. Abdullahi ibn Mohammad Fodio's include (1) Diya al-Hukkam (The Light of the Governed), (2) Diya al-Siyasat (The Light of Politics), (3) Diya al-Wilayat, and (4) Diya al-Umma (Light of the Community). Muhammad Bello has one major work to his credit, Usul ul-Siyasat (The Origins of Statesmanship). These three jihad leaders wrote in addition several letters directing subordinate officials on the management of their states in line with the dictates of the Shari'a. Letter guides from Muhammad Bello to some Caliphate rulers are quite illuminating (cf. Aliyu 1974:413, Usman 1974:319, and Paden 1973:76-79, 215-21).

to guide the Moslem community within the Sokoto Caliphate. All sources of legitimacy and the governing principles for regulating the affairs of the Caliphate had to be sought from the Maliki school (cf. Tukur 1972:15-43, Aliyu 1974:408-409).

For a proper observance of the Shari'a, the jihad writers emphasized that an emir or ruler must appoint competent, loyal persons to key offices of the state and maintain proper supervision of their administrative and judicial functions. Among the recommendations of the jihad writers was the creation and filling of the following key positions:

(1) A vizier (waziri), who is to serve as a principal advisor to the caliph; he is also to supervise the performance of the judiciary;

(2) An ombudsman (mukhtasib), who is to serve as a sort of market judge;

(3) Governors or district heads (amirun), who also handle cases within their areas of jurisdiction;

(4) Revenue collectors ('amil);

(5) Judges (qadis); and

(6) Reviewer of wrongs (sahib al-nazar fi al-mazalim).[22]

The writers strongly emphasized the special positions of the vizier, the qadi, and the nazir al-mazalim. Justice,

[22]For a fuller discussion of such offices see al-Mawardi (1853), Ibn Khaldun (1961), Levy (1971:293-354), and Usman dan Fodio (1960). Abdullahi ibn Fodio's Diya al-Hukkam (1956) also discusses the judiciary in great detail.

according to Shari'a, was accorded great esteem. The judiciary and an equitable dispensation of justice were considered the foundation of a good Islamic government. Thus, judgeship came to be listed among the most important institutions in the Sokoto Caliphate (Usman dan Fodio 1960:570). Without the alkalai and the backing of the ruler and the vizier, Allah's law of Shari'a could hardly be strictly upheld.

The jihad writers also outlined the essential qualities of the Caliphate leaders. Such qualities included leniency, ability to administer justice, fairness, tolerance, and a sense of accountability to Allah. Tyranny and oppression of whatever degree were strongly condemned in the Islamic society which the jihadists intended to establish, reform, and direct.

From the foregoing, one may conclude that the founders and leaders of the Sokoto Caliphate clearly aimed at establishing a Moslem polity (something close to the Abbasid Caliphate) which was to be guided strictly by the letter of the Shari'a. The judiciary as well as all other organs of the Caliphate were intended to be based, as far as possible, on the rules of the Shari'a.

2.2.5 Organization and Application of Islamic Law in Northern Nigeria

The application of the Shari'a or Maliki code in Northern Nigeria has varied from period to period, from

locality to locality, from court to court, and from judge to judge. For example, it is widely held that the first few decades of the Sokoto Caliphate witnessed the most rigorous application of the Shari'a. During the peak of the Caliphate, we are told, the Fulani government of Bauchi was considerably better than the Moslem courts of Kano, Katsina, or Zaria, when it came to the administration of justice according to the Shari'a (Rohlfs 1875:148, quoted by Aliyu 1974:647-48). In post-jihad Sokoto and Argungu, rulers sought to uphold the rules of the Shari'a within their jurisdictions. In Argungu, an emirate which mainly contained a non-Moslem population, the alkalai administered Islamic law principally in the capital town; in the outlying rural areas, on the other hand, customary laws mainly prevailed.[23]

Islamic law is held to be the dominant law in Northern Nigeria, where the alkali courts used to handle more than three-fourths of the total case-load. Indeed, the Shari'a is more extensively followed and enforced in Northern Nigeria than anywhere else in the world, outside Arabia and perhaps Afghanistan (Anderson 1970:1-10, 171-224). Yet one continues to discover an infinite number of gradations, from a fairly strict application of the code to a strict application of

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[23] Judges in Sokoto confirmed that Argungu, very unlike Gwandu and Sokoto Provinces, has always been lax in the application of Islamic law. See Tibenderana (1974:86-101).

purely ethnic laws and customs in predominantly non-believer communities.[24]

The practice of pure Shari'a has always been impossible to achieve anywhere (cf. Schacht 1965:80-81). Thus apart from being variable from community to community, Islamic law as administered in the North has been fairly discriminatory. For example, slaves have always suffered certain legal disabilities vis-a-vis free men, and the same applies to women and non-Moslems. The testimony of a slave, for example, is given half the weight of a freeman's, and that of a non-Moslem is not at all admissible in a court which chooses to apply the Shari'a strictly.

The alkalai in the Northern States recognize on the whole three categories of offences.[25] as set out in the law books:

(1) Hudud, Hadd (Hausa:hululu, haddi): fairly minor litigations like drinking, punishable by caning;

(2) Jasad (Hausa: jasadi): offences which concern corporal or bodily harm, e.g., injury and murder; and

(3) Tadhahib (Hausa: tahazibi): offences which involve the state or community as a whole; as such, they are often referred to as siyasa (political) offences, and were

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[24] It is worth noting that Maliki law tolerates, within certain limits, the application of customary law, although it is not officially accommodated within Islam.

[25] For more details on Shari'a offences see Kumo (1972) and Anderson (1954:171-224).

most often tried by emirs at the head of their Judicial Councils.

Offences punishable by whipping or flogging include: (1) kazab (telling a lie, slandering, or false-swearing involving loss of honor), (2) drinking alcohol, (3) fornication, and (4) unavenged murder. Eighty lashes are usually prescribed for each of the first two categories of offences, and 100 for each of the last two. In addition, juvenile or disciplinary offences (ta'a ziri) are also punishable by flogging.[26] Hadd or hudud punishment is statutory; it is a "stated punishment" laid down in the law books. The alkalai, however, can exercise some discretion in adjudicating offences requiring "correctional punishment" (ladab or ta'azir). Litigations over manslaughter, attempted homicide, wounding, assault, rape, stealing, false report, robbery, burglary, abduction, abuse of office, riot, arson, fraud, extortion, larceny, etc. (which are classified as "criminal" under British Common law) come under jasad or correctional punishment. In other words, even offences like homicide and wounding are treated as torts rather than crimes. Mutilation for theft has been abolished since the first decade of colonial

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[26] After 1933, the Colonial Government forced the alkali courts to reduce the number of strokes for these types of offences. The maximum number of strokes an offender can receive now, with the exception of those convicted for drinking, is 24 lashes (cf. NAK/SNP 16816 and NAK/SNP 17415 volumes I-V). The alkalai greatly favored the continuance of corporal punishment.

rule in Northern Nigeria.

Up to 1959, when criminal law was made uniform and rendered a legislative issue, homicide cases had always been tried by Emirs, and, in some instances, by the Chief Alkalai. Moslem jurists in Northern Nigeria[27] recognize three types of homicide:

(1) Gila. This conforms to the English concept "murder by intention." The punishment for such offence is an obligatory execution. Most judges are convinced that the execution for such an offender is "God's punishment" (Hausa: Alhakin Allah).

(2) Hiraba. This can also be equated with willful homicide, as in the case of a robber who kills the person he is trying to rob. The murderer here, according to certain judges, deserves execution as dictated by Alhakin Allah. Other judges, however, would rather categorize the case under "manslaughter," and thus permit the intervention of the relatives of the murdered person.

(3) Amdiyya. This is also regarded as willful murder, but the decision of the "blood" relatives counts. Where such kin are unavailable, the Emir can come in as a fictive relation of the deceased, in which case he has the power to pardon or to order the execution of the convict. In amdiyya offences,

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[27] Interviews carried out between June and July, 1974. Results were cross-checked by questionnaires distributed in January, 1975.

many judges would rather recommend the payment of diyya (bloodwit).[28]

Payment of blood money, upon the request of the close relations or representatives of a murder victim, was a common practice in almost all the Moslem courts in Northern Nigeria. The rates of payment, however, varied greatly from court to court, and depended on whether a person was male or female, and Moslem or non-Moslem, as can be attested by Table 1 of data compiled in 1950.

Terms of imprisonment and fines are imposed for various types of offences ranging from homicide, theft, and burglary to debt and injuries. Failure to pay debt is punishable by imprisonment. The length of prison terms and the value of fines have, since the colonial period, depended upon the grade of the court (see Chapter Four, below).

2.3 Emirate Judicial Structure

An elaborate judicial structure has existed in Northern Nigeria since jihad times. Every ruler or emir maintained a court, later styled by the British as Emir's judicial Council.[29] These courts mainly tried capital offences

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[28] Islamic law, as judged from these three types of homicide, makes very little distinction between murder by accident, intention, or provocation. Most cases of murder are regarded as the same, subject to the discretion of the presiding judge and the voice of the deceased's relations.

[29] The Emirs' Judicial Councils were abolished with the military reforms of 1967, but emirs still adjudicate minor cases of disputes.

Table I

RATES AT WHICH DIYYA WAS LEVIED FOR HOMICIDE BY MOSLEM COURTS IN NORTHERN NIGERIA[30]

Province	Court	Male	Female	Remarks
Adamawa	-	-	-	No diyya imposed since 1945. Levies were made for wounding and assault.
Bauchi	Emir of Bauchi	£25[31]	£12.10	Non-Moslems:[32] M. £ 5 F. £2.10
	Emir of Gombe	-do-	-do-	M. £12.10 F. £6.5
	Emir of Misau	-do-	-do-	M. £12.10 F. £6.5
Bornu	Shehu of Bornu	£60[33]	£30	-
	Shehu of Dikwa	-do-	-do-	-
Ilorin	Emir of Ilorin.	£12.10	-	Increased to £25 in a 1952 case. Accidental murder is £6.5.
	Emir of Lafiagi	£12.10	-	-
	Emir of Pategi	-do-	-	-
Kano	Emir of Kano	£25	-	Accidental homicide £20.
	Emir of Kazaure	£30	-	-
	Emir of Hadeija	£25	-	-
	Emir of Gummel	£25	-	-

Table I (cont.)

Province	Court	Male	Female	Remarks
Katsina	Emir of Katsina	£30	-	£25 for accidental homicide
	Emir of Daura	£20	-	-
Sokoto	Sultan of Sokoto	£25	-	-
	Emir of Argungu	-do-	-	-
	Emir of Gwandu	-do-	-	-
Zaria	Emir of Zaria	-do-	£12.10	-

[30]This table has been adopted from the NAK/SNP MIA 2/42/R417/1916-51.

[31]One Nigerian pound (£) equals two Nigerian naira (₦); one naira is equivalent to U.S. $1.55 in 1975.

[32]Certain courts have been discriminating between Moslems and non-Moslems. In general non-Moslems were paid half the amount due to a Moslem. A non-Moslem woman was paid half the amount due to her male counterpart. Moslem women, in most courts, have received nothing at all.

[33]Punishments have generally been harsher in Borno than in other provinces.

involving political issues, land tenure, and homicide. Before the imposition of the Shari'a Court of Appeal in 1959, an Emir's Judicial Council used to serve as the highest appellate court in every emirate. At the height of the Caliphate, it was regarded as a mazalim court. Dissatisfied parties from other territories occasionally appealed[34] to the Sultan at Sokoto, the headquarters of the Empire (cf. A. Smith 1974:1-6). As mazalim courts, emirs checked the trustworthiness, competence, and fairness of their judicial subordinates vis-à-vis the rest of the people. They also listened to complaints against the decisions of the alkalai and traditional administrative officials, such as the hakimai (district heads). But their main legal tasks involved the adjudication of disputes between individuals, border disputes between hakimai, and the misuse of authority by state officials. They could also handle serious cases and review homicide issues first-instanced at the alkali courts (Last 1967:182; Balogun 1967:269).

Even during the peak of the Caliphate, however, the emirs or mazalims delegated the bulk of their judicial powers to highly trained alkalai to try cases on their behalf.

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[34] The Shari'a does not seem to recognize a hierarchy of courts (Levy 1971:346, Ruxton 1916). In the case of Northern Nigeria, however, one clearly perceives highly structured levels of supervision and appeals within the Shari'a system. The judicial system of the Sokoto Caliphate in particular included provisions whereby appeals against judgments of emirs and alkalai could be heard by the Caliph.

According to Usman dan Fodio, an alkali in the services of God was the second most important pillar of any Islamic state, the other key judicial officers being the waziri (vizier), the mazalim, sahib al-shurta (or Chief of Police), and a tax collector (Al-Masri 1968:411-12).

The bulk of criminal and civil offences in Moslem Northern Nigeria have always been handled by the alkali courts. Under Islamic law, an ordinary tribunal is composed of a single judge, and it is this type of court that helped to maintain the rule of the Shari'a since the introduction of Islam into Hausaland. Throughout most of the 19th and 20th centuries, an alkali was assigned to each district capital[35] to uphold the rule of the Shari'a, settling disputes between litigants either by mutual reconciliation or by compelling them to accept a mandatory judgment, and by upholding hadd penalties (Al-Masri 1968:411-12). In metropolitan areas like Kano, there was an alkali for Waje, one for Gwagwarwa, a muhtasib or an alkali for the market (alkalin kasuwa), and one for juveniles (alkalin yara). There was a chief alkali (babban alkali or alkalin alkalan Kano) and a deputy chief alkali (karamin alkali), making a total of twenty-nine[36] alkalai in Kano Emirate (Paden 1973:62-63). Appeals from the rural alkalai lay to the deputy chief alkali or to the court

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[35]The hakimai (district heads) handle a considerable proportion of the disputes in rural areas. More serious disputes go to the district alkalai.

[36]Approximately one alkali for every 100,000 to 200,000 persons (1964 census).

of the chief judge (babban alkali). Capital cases were assigned to the Emir's Judicial Council. The kilishi listened to complaints from women who appealed to the king's court.

Court sessions of the alkalai were traditionally held in the homes of individual alkalai. At one time Abdullahi ibn Fodio had to speak against this practice by insisting that alkalai should make themselves more accessible to the weak and the strong alike (Ayagere 1971:302). At the commencement of colonial rule, a formal building was assigned to each "warranted" court of alkali.

The alkali dispenses justice when people bring a complaint (Hausa: kara) to him. For doing so, he is assisted by (1) a secretary or chief scribe, called mufti (Hausa: muhuti; maga takarda) or deputy, (mukaddam, Hausa: mukaddas), (2) dan wanka, who "bathes" oath-takers and summons the plaintiff or litigants before the judge, and (3) barwan alkali (ma kirari), a kind of bailiff who summons respondents. This person acts as an assistant to dan wanka.

For a proceeding to begin, a complainant first pays a summons fee (ijara), which varies from locality to locality. When the plaintiff's case is heard, the respondent is then sent for. Upon the latter's arrival both the defendant/respondent (mai ansa kara) and the complainant (maikara) squat[37]

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[37]The posture adopted is basically similar to the one commonly made before an emir or any key political figure. Since 1967, however, litigants and witnesses in alkali courts no longer have to crouch on the floor or mats. Benches are

reverently before the judge. The plaintiff renarrates his version of the case to the audience of the judge and his assistants, and the scribe (mufti) takes note. When the plaintiff completes his story, the judge then instructs the respondent to narrate his version. If the two stories conflict with one another or, more commonly, if the plaintiff contradicts himself to the extent of weakening his case, he is told to produce two or more witnesses (shaidu).

The witnesses have to be male, adult, "responsible" Moslems. Four witnesses are required in adultery or fornication cases to testify orally as to their direct knowledge of the truth of the plaintiff's claims. In certain cases, however, one reliable witness suffices, if the plaintiff takes an oath confirming his claim. In matters related to female defects, childbirth, or marital cruelty, women's testimony is accepted. But four women are required where two men would suffice. The alkali seldom passes judgment without witnesses or oath-taking.

If the defendant refuses to comply with the testimony of the plaintiff's witnesses, he is advised either to produce his own witness or to take an oath. In debt causes, the plaintiff may swear by the Quran in order to be paid. Upon taking the oath, the debtor or respondent is expected to pay

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provided for them, thus partially conforming alkali court procedure to the General (English Common law) system.

the judgment debt.[38] If the debtor swears, the judge divides the debt between the litigants. If neither side produces witnesses and the plaintiff as creditor refuses to swear on the Quran, the debt is cancelled and case struck out.

A major function of the alkali is to swear in litigants. Under the Shari'a, a properly administered oath[39] is recognized as one of the most effective methods of establishing legal proof. This is based on the conviction that even a habitual criminal will hesitate to swear on the Quran. True believers fear immediate retribution for perjury or false swearing. In Hausaland generally, it is widely held that a false oath brings forth misfortune in the form of death, leprosy, or other bodily harm to the swearer (cf. Yusuf 1975a:30-37). It is further held that Allah's punishment pursues the false swearer to the grave.[40]

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[38] Local policemen (yangadi) or bodyguards (dogarai) are employed to execute the orders or judgments of an alkali.

[39] Oath-taking, swearing on the Quran, is known as rantsuwa, or cin laya ("chewing an amulet") in Hausa. The person who "chews the amulet" is first taken by dan wanka to a purification ground. Here, the litigant purifies himself by bathing and performing an ablution, using water brought to him by dan wanka ("son of bathing"). After the purification, the oath-taker is next conducted to the Friday or nearest Mosque where he is instructed to stand before the altar (mumbari). He is then told to recite the kalmar shahada (a series of verses administered to new converts affirming their faith in Allah, his Prophet, Book, etc.) while handling a complete, open Quran. He also swears that his version of the case is true to the best of his knowledge (see Ferguson 1973: 234-235).

[40] *Oral evidence gathered throughout the North.* The oath is in many respects a weak method of establishing legal proof. It is, however, an exaggeration to suggest, as Coulson (1964) does, that the doctrine behind the oath was out of touch with modern, practical realities of day-to-day litigation.

Despite this general fear of false witnessing, one frequently comes across Moslems who specifically "specialize" in false testimony. Such persons sell their services to whomever approaches them. Kano City, in the 1950's, witnessed a proliferation of commercial false witnesses. Investigations have revealed that such individuals are mostly urban sophisticates who fear no immediate retribution at all. Many of them profess to be good Moslems, fully conversant with the Quran and Islamic law books. They are convinced that they are trying to make ends meet and that theirs is a genuine enterprise. They believe that no misfortune can befall a person simply for committing perjury: "You swear once, twice, and several times. Nothing happens to you. Then why should you believe that anything bad can ever befall you for swearing under false pretences?" affirmed a Kano citizen who specializes in this type of activity.

False witnesses or professional oath-takers of this nature are found all over the Northern States, but they are more commonly found in the cosmopolitan and commercial centers. The proliferation of this type of activity in Kano can be partly explained by the alteration of land tenure law in the 1950's, which made it legal for women to inherit houses and other immovable property for the first time. Women do not ordinarily inherit farms or houses under the traditional Hausa law of inheritence.[41] But with the reversal of this

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[41]Oral evidence collected throughout the Northern States (January to March, 1975).

rule during the reign of Emir Alhaji Mohammadu Sanusi, several men and women invented false maternal genealogies and engaged the services of professional oath-takers in order to win their cases before the courts.[42]

In general, the alkalai base their decisions on the law texts. The use of the texts serves as checks against arbitrary use of discretion or judicial power. In complicated matters, the alkalai seek legal adivce from mallamai (Moslem scholars), as required under the Shari'a. The legal opinion of alkalai or mallamai is called fatwa.

An example of the operation of fatwa was reported by Usman (1974:155-56) in a case of homicide. The facts of this case reveal two Katsina princes who murdered the son of a wealthy merchant in a quarrel over a girl. The presiding urban alkali, the ulama', local mallamai, and the people of Katsina city all recommended the execution of both princes. However, the then Emir of Katsina, Tsagarana (ca. 1768-1769), being the father of the princes, strongly opposed this decision, preferring a lighter sentence instead. The case dragged on for a number of years, and was only finally resolved by a fatwa sought from a mallam in Yandoto town. This mallam indicated that the Shari'a recommended an alternative to capital punishment, namely the payment of diyya; and

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[42] I am indebted to Ibrahim Tahir for this additional piece of information (Personal discussion: Cambridge and London, England, 29 July 1975).

the relatives of the murder victim, who accepted the diyya in return for retaliation, were to be further rewarded by Allah (Usman 1974:156).

In most of the emirates, the waziri (vizier) served as the chief deputy for judicial matters. In Zaria[43] and Sokoto he served primarily as "prime minister" rather than chief legal adviser. In Kano, the waziri was traditionally the chief inspector of all alkali courts. He supervised court administration and had powers to review cases and reverse decisions. Around 1937, such judicial functions reverted to the office of the wali, but in 1960 these functions came back to the waziri. By then, formally trained inspectors of courts had begun to take over the inspection of alkali courts.

In 1932, a judicial training school was founded at the Shahuci Elementary School within Kano City. The institution, an important judicial innovation, trained legal scribes and court assessors, many of whom eventually became alkalai. Except briefly in Sokoto, no facility for training alkalai had previously existed anywhere in Hausaland. In 1935, the judicial class at Shahuci was upgraded into a full-fledged Law School for Arabic Studies. Potential alkalai from all over the northern emirates have received their

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[43] In Zaria, the Chief Alkali, rather than the Waziri, was made the executive head of the judiciary (cf. M. G. Smith 1960a:214-222).

training there (Lindsell 1935:10).

Emirs and Sultans regularly exercised their powers by punishing or dismissing corrupt judges. The British also dismissed many alkalai whom they considered to be corrupt. During the reign of the 10th Fulani Emir of Kano, Abdullahi Bayero (1927-1953), for example, several corrupt judges were executed (Fika 1973:300).

2.4 Adaptation of Islamic Law

We can see that since the 19th century, the administration of justice in accordance with the Shari'a has been given the highest priority in all the Moslem emirates of Northern Nigeria. Islamic law has gradually become a pervasive feature in the area, and today it is considered to be the fundamental, that is, the most widely-enforced legal system within the Northern States. The Maliki code is applied almost mechanically whenever a case is brought before the alkali courts. It is also applied when non-Moslems voluntarily bring a case to an alkali. Furthermore, the Moslem courts have been consistently administering the Maliki code in situations of conflict involving Islamic law and customary practice, as in the cases of Liman Usman Madagali v. Risku District Head and Ardo Disa,[44] and Alhaji Ishaku v. Hadejia

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[44] Case notes of Northern Nigeria (N.N.C.N.), no. 27 of 1963. Also see Ijaodola (1969:129-140). The facts of this case are discussed in Chapter Five, section two).

Native Authority.[45] The facts of these cases are basically similar, and both illustrate the determination of Moslem courts to replace customary laws by Islamic law.

Despite its prominence and determined efforts to prevail over any other legal system in the North, Islamic law, however, has not completely stamped out certain local laws and customs, even in the highly Islamized areas like Kano, Katsina, Sokoto, Bauchi, and Borno. Customary legal beliefs and practices, which evidently preceded the jihad period, still persist side by side with the Moslem judicial system. As repeatedly reported by many writers, land matters continue to be considered in accordance with local Hausa, Fulbe, Yoruba, or Kanuri customs.[46] More striking is the fact that almost all the Islamized societies in the North have retained their traditional laws of succession and constitution despite several decades of Islamic impact.[47] Laws of inheritance, particularly regarding land and cattle, have continued intact. Fully consistent with my enquiries within Kano and North-Central States, Abubakar (1970:386) has confirmed that, since the 19th Century, the majority of the Moslem Fulani in Adamawa preferred to settle inheritance disputes in accordance

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[45] Case Notes of Northern Nigeria (N.N.C.N.), No. 25 of 1962, p. 65.

[46] See Anderson (1954:184-87), Coulson (1964:157), and M. G. Smith (1965b:230-282). For a contrary, but empirically unconvincing view, see McDowell (1969:267-277).

[47] Oral data collected in the field, July-November 1974.

with Fulbe customs and laws. Many local registers and minute books reveal legal heirs of Cattle Fulani preferring to distribute their estates according to customary laws. In Adamawa, Kanam, and other regions with a pronounced Fulani population (sedentary or semi-sedentary), it was discovered that the Fulani still prefer customary legal procedure and rules to Islamic law, when it comes to sharing a deceased's estate (cf. Kanam 1968:79-98). Elsewhere, we are also told that Fulani system of inheritance "follows neither the traditional system nor the system presecirbed by Maliki law. For various reasons the traditional system holds with considerable force in some households, while a system predominantly in accordance with Maliki obtains in others" (Hopen 1958:137). Hopen observed further that the Fulani of Gwandu were generally averse to having questions of inheritance settled by the alkali courts because they felt their own (Fulani) customary law was more acceptable than Moslem law.[48]

Similarly, despite all efforts to apply the strict Shari'a, the alkali courts have continued to recognize a number of Hausa compulsory institutions relating to land tenure, marriage, family, and contract. The greatest discrepancy is perhaps in the domain of marriage and family laws, where the force and antiquity of local customs appear

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[48] Hopen (1958:138-40). Being a male-dominated society, the Fulani do not permit women to inherit cattle. Islamic law, on the other hand, recognizes inheritance of cattle by women.

to have compelled the Shari'a to allow for some concessions. Coulson, as one of the first to recognize this discrepancy, aptly reports that the system of allowing the removal of male children from their mothers after only two years continues to be enforced by the alkalai in the North, quite contrary to the Maliki rule which insists on the removal of the child only after the latter has attained puberty (Coulson 1964:138). The alkali courts also uphold the right of a wife to obtain the dissolution of her marriage by returning the bridewealth to her husband. Hausa custom traditionally recommends divorce upon the return of bridewealth to the husband.[49] This practice is wholly inconsistent with the Shari'a rule which stipulates that a wife cannot end the marriage without her husband's permission; the consent of the husband is necessary both before or after the termination of a marriage.

In the commercial sector, the pre-Islamic riba (interest) custom among the Hausa is recognized in the alkali courts under the guise of a double sale. The institution of noma mu raba (share-cropping or "farm-and-let-us-divide") among the Hausa also clearly violates a basic principle of the Shari'a which emphasizes that reward or rent should be determined and agreed to in advance. Yet courts in Sokoto,

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[49]This practice is probably one of the principal sources of the high rate of divorce among the Hausa. The return of bridewealth merely encourages men to "recycle" the same goods and money for a fresh wife.

Kano, and Katsina have been recognizing this practice.[50]

Consequently, I have come to agree with Coulson (1964) and Kanam (1968:87), who hold the view that local institutions among the Hausa and other Moslem societies have become a major source of Islamic law in the Northern States. The Shari'a has greatly, and is in turn significantly, influenced by local customs and practices of the Islamized peoples of the region. However, the nature and extent of this mutual influence, fusion, or adaptation seem to vary from community to community. For example, the urban populations manifest greater receptivity to, and recognition of, Moslem law than the rural populations, where Islam has yet to intrude fairly firmly in all aspects of life. Also it should be pointed out that certain communities have remained virtually non-Islamized since the jihad times. Many of these are predominantly animist communities, although occasionally they seek redress through alkali courts. Others even manifest a special preference for the Moslem courts, which they consider to be more equitable than their own traditional tribunals. On the whole, however, the majority of these populations have retained a great proportion of their laws of substance and procedure. During the jihad period, these communities were accorded

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[50]This information was gathered from the alkali court cases now being translated by the Ahmadu Bello University Centre for Islamic Legal Studies, Faculty of Law, Zaria (also see Kanam 1968:79-87). I thank Alhaji Bello Daura, Maaji Shani, and Yahya Kanam for making the translated works available to me.

dhimmi status (i.e., protected persons in a Moslem state) in return for peace and payment of homage to the encapsulating Moslem emirate. In Sokoto Emirate, such populations include the Kanoma, Morai, and Tuwan Bore (Augi 1974:31). Argungu, Southern Zaria, and Kano Provinces also contain significant pockets of such non-Moslem communities.

Receptivity to, and enforcement of, Islamic law in the Northern States can therefore be illustrated by means of a continuum, along which can be plotted practially every ethnic group or a subsection of it. The urban Hausa, Kanuri, Fulani, or Nupe, for example, may variously fit into the left-hand extremity of the continuum (see diagram below). The semi-urban and rural Hausa, Fulani, or Kanuri may be found midway along the gradient, while non-Moslem groups such as the Gwari, Maguzawa, Bororo (Cattle Fulani), and Angas may be differentially found near the right-hand extremity of the continuum.

CONTINUUM SHOWING DIFFERENTIAL RECEPTIVITY TO THE ENFORCEMENT OF ISLAMIC LAW AMONG THE POPULATIONS OF NORTHERN NIGERIA

Urban	Semi-Urban	Semi-Rural	Rural
Strongly Islamized	More Islamic than Customary Law	More Customary than Islamic Law	Strongly Non-Islamized

The differential recognition and enforcement of Islamic law in Northern Nigeria can in part be explained by the British colonial policy of setting up native tribunals in the predominantly non-Moslem communities. The establishment of English-style courts in the Region also served to limit the spread of Islamic law. The same can be said of the introduction of the Penal Code (1959) and the Criminal Procedure Code (1960), along with the law that every native court in the North had to be guided by these codes as well as by the by-laws (a dilution of customary and other non-Islamic rules) of the various Native Authorities (local governments).

The differential receptivity of Moslem law in the North can further be attributed to the adaptive nature of Islamic law in general. The Maliki law is particularly noted for its respect for the local customs of the receiving population (cf. Trimingham 1961:148-49). However, the degree to which this respect is exercised depends a great deal on the forcefulness and antiquity of the local customs. In the case of Northern Nigeria, certain compulsory institutions traditional to the Hausa and other ethnic groups (see above) have become so engrained that the court judges find it prudent to recognize them. A lot also has to do with the legal attitude and behavior of the political elites in these societies. By choice or compulsion, emirs or traditional rulers have been influencing the decisions of the alkali

courts. Besides, the doctrine of siyasa has given the emirs much latitude regarding the dispensation of cases related to land tenure, border disputes, inheritance, and the abuse of authority by subordainte officials. Indeed, the persistence of the pre-Islamic land tenure system among the Hausa can in part be attributed to the practice of siyasa. Furthermore, the position of the emirs is in itself symbolic in that they are supposed to identify with and uphold the institutions of the persons within their territories.[51] Thus, the duty of obedience to the ruler as enjoined in the Quran, and the overriding religious obligation of the ruler to maintain and expand Islam, serve to legitimate expedient deviations, and consequently to incorporate pre-existing customs of the Islamized populations. Consequently, land matters and capital offences such as homicide and treason in the past could only be heard in the Emirs' Judicial Councils.

Of great significance is the distribution of alkali courts in the Northern States. A great proportion of the litigations in the rural districts seldom reach the alkali courts, which in general are quite few and far between. In states like Kano, a single alkali court is known to have been serving a population of some 30,000 to 40,000 persons, and rural litigants are frequently compelled to travel several miles to the nearest alkali court. This naturally forces

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[51] See M. G. Smith (1965b:24-50).

litigants to settle disputes privately in compromise tribunals, away from alkali courts.[52]

2.5 Concluding Remarks

The Maliki code has been administered in Moslem Northern Nigeria since the fifteenth century. It received its greatest boost after the conquest of Usman dan Fodio. By the arrival of the British in 1900, Islamic legal influence had spread even among non-Moslem peoples.

Later, we shall see that much of the Shari'a has however remained unchanged. Paradoxically, its status seems to have been greatly enhanced by the British despite the imposition of English Common law and the formalization of customary legal conceptions and procedures. In 1967, however, some of the salient privileges formerly enjoyed by Islamic law were withdrawn in the wake of judicial reforms under a military regime.

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[52] In 1975, Kano State could only boast of one alkali court for every 100,000 persons. For people to develop greater interest in Islamic law, more Alkali courts (now Area courts) need to be established, particularly in the rural districts (Yusuf 1975b).

Chapter Three

CUSTOMARY LEGAL SYSTEMS: CRIMINAL LAW OF SUBSTANCE AND PROCEDURE IN THREE ETHNIC GROUPS

This chapter discusses the criminal law of substance and procedure in three societies indigenous to Northern Nigeria, namely, the Maguzawa, the Gwari, and the Igala. The six Northern States combined are reputed to contain more than one-half of the 450 ethnic groups in Nigeria. To describe the totality of the customary laws of more than two hundred peoples is a task which undoubtedly goes beyond the scope of this thesis.

The focussing of attention on the criminal laws of only three societies, and the complete omission of a detailed report on the civil laws of these same peoples, is therefore conditioned largely by considerations of space and time.

The stress on the criminal aspects of the laws of the Maguzawa, Gwari, and Igala here is, in the main, a mere attempt to present a glimpse of the legal beliefs, rules, and behavior patterns of some, if not the entire, sections of the numerous ethnic groups comprising Northern Nigeria.[1]

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[1] I have also collected some data on the traditional laws of the Bororo and the Hausa. I am persuaded that one can today isolate and record Bororo or Hausa customary laws which are still applied in varying degrees within the rural areas. Some of these laws are being enforced by alkali courts.

Furthermore, it is important to realize that criminal cases are still being handled by customary tribunals, despite British efforts to stamp out ethnic laws relating to criminal offenses after the passage of the Penal Code and the Criminal Procedure Code.[2] Also, it may be observed that, at least from a criminal law point of view, Customary legal systems are in principle, form, origin, and content relatively distinct from either Islamic law or General law, as enforced in Northern Nigeria.

Another rationale for the choice of these three groups is to seek for commonality among ethnic laws. From a social, cultural, and political point of view, practically every ethnic group in Northern Nigeria exhibits some measure of distinctiveness.[3] Culturally and politically, Igala society appears to be relatively more complex than both the Maguzawa and the Gwari. In turn, the latter is less loosely knit or relatively more complex than the Maguzawa. Despite these organizational differentiations, however, the laws of substance and procedure among these peoples are fairly similar in many

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[2]See Chapter Four.

[3]On the basis of organizational complexity, one can indeed conveniently plot most of these socieites on a three-point continuum: simple, simple-complex, and complex, the Maguzawa can be arbitrarily assigned to simple, the Gwari to simple-complex, and the Igala to complex. Thus, organizationally these three societies may be cited as being fairly representative of the differential complexity within the ethnic groups of Northern Nigeria.

fundamental respects.

The legal rules described for these three peoples are largely contemporary, as practiced and enforced in their tribunals (which are located mainly in the rural districts). The reader is therefore presented with the law as it is, or as it has been, and not as it ought to be. The sources on the pre-colonial period are too limited. Most on the data presented here, therefore, come from personal inquiries[4] and from 20th century investigations by colonial officers, anthropologists, travellers, and missionaries. Hence, most of the material from this century can only be considered as being probably true during the 19th century. This means that I have to assume considerable similarity in the legal rules and procedures of these ethnic groups during the last century or longer.

Modern developments have obviously modified these societies; hence their laws may have been in a fluid state at the time of recording, as a result of factors like education, migration, and social and economic development. Islamic influences have also become evident in the legal practices of

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[4]For the data on these three ethnic groups I have relied a great deal upon: 1) group and individual interviews, 2) local informants, 3) observations of legal behavior in and beyond the local tribunals, and 4) the scrutiny of law reports, court cases and records, archival documents, and Native Authority laws, registers, and minute books. I also benefited considerably from discussions with some Ahmadu Bello University staff knowledgeable about these societies or about the subject-matter of customary laws.

these peoples, since they have been interacting considerably with Moslem communities for several decades.[5]

The Maguzawa and the Gwari represent but two of the various pockets of non-Moslem groups encapsulated by Moslem peoples, whereas a considerable proportion of the Igala profess to be strict Moslems. Yet, despite Islamic and many other influences the customary laws of these peoples, notably rules relating to marriage, family, inheritance, and crime, have remained significantly uncontaminated. Thus, one of the reasons behind the selection of these three societies is to illustrate that the impact of Islam and other external social conditions has not entirely eliminated their legal traditions. On the contrary, both non-Moslem minorities encapsulated by more powerful Moslem peoples, and larger ethnic groups with significant Moslem numbers, have continued to retain and enforce much of their indigenous laws.

3.1 Problem of Concept and Definition

Several national and international conferences have been held on different aspects of "Customary law" in Africa.[6]

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[5] See, for example, the effects of Islamic contact upon Maguzawa religion and social organization as described by Greenberg (1946) and Barkow (1970).

[6] Several works have been compiled as a result of such seminars; for the key ones see Allott (1960), Kuper and Kuper (1965), Gluckman (1969), and Ife University (1971).

So far lawyers, jurists, administrators, and social scientists have not agreed on a single term or definition of (African) Customary law. A report from the 1960 Conference on the Future of law in Africa vividly attests to such absence of unanimity on what is to be defined:

> The use of the term "customary law" was . . . generally challenged by members of the Conference. Some regretted the disappearance or disuse of the traditional term "native law and custom," which they felt to be the most convenient label. Others said that, although "native customary law" was not a satisfactory term, it was not possible to think of any better one. The expression "local law" was proposed as a better term to describe the law which the African courts are entitled to administer. A further expression which was put forward was "unwritten local law." The Conference, while feeling that "native law" was perhaps the most satisfactory expression to use in these circumstances (since it could include such things, for example, as the Islamic law administered in the Northern Region of Nigeria), realized that there might be objections to the use of a term which included the word "native"; the expressions "native law" and "customary law" were in fact used interchangeably throughout the remainder of the proceedings of the Conference (Allott 1960:4).

This lack of consensus should in fact be expected in that both "law" and "custom" may be used in different contexts and thus convey different meanings, depending on individual aims and approaches. Anthropologists have on the whole tended to use terms like "traditional law," "folk law," "indigenous law," "African law," "tribal law," and more frequently nominate versions such as "Tswana law," "Fanti law," and "Sebei law." Administrators and lawyers on the other hand have preferred to use terms like "native law and custom," "native law," "local law," or more commonly, "customary law."

Statutory use of such terms are found in the constitutions and law handbooks of virtually all African countries. But legislated definitions of the terms are few and variable. Ghana's Interpretation Act (C.A. 4), s. 18 (1) defines "Customary law" as "rules of law which by custom are applicable to particular communities in Ghana, not being rules included in the common law under any enactment providing for the assimilation of such rules of customary law as are suitable for general application." Uganda defines "civil customary law" as a body of law consisting of rules of conduct governing legal relationships as "established by custom and usage and not forming part of the common law nor formally enacted by Parliament."

Nigeria's definitions are particularly brief, and frequently avoid a clear elucidation of the expression, "customary law." In the Federal Evidence Act,[8] "custom" has been described as a territorial (district) rule which has obtained the force of law through long usage. In Northern Nigeria, "native law and custom" includes Islamic law and is intended to be applied as a territorial law.[9] The former Eastern Region of Nigeria was more explicit in defining

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[7] Magistrates' Courts Act 1964 (Cap. 36), s. 37 (1), Uganda.

[8] Federal Evidence Act of Nigeria (Cap. 62, 1958 Revision) s. 2 (1).

[9] See Handbook for Native Courts of the Northern Region of Nigeria, 1957:1-12. This definition is now incorporated in the High Court and Native Court Laws of each of the six Northern States.

"customary law" as a "local custom" or rule which in "a particular district or among the members of a tribe or clan or class of persons, has, from long usage, obtained the force of law and also local customary law."[10]

For most of these statutory definitions[11] from ex-British Africa, the enforceable things are rules which either have become law or have come to acquire the force of law. "Usage" or long-established practice is accepted as a major factor sanctioning the forcefulness of a given rule or customary law. The definitions also variously point to the key fact that "customary law" is directly associated with a specific "community," "chiefdom," "particular district," "tribe," "clan," or "class of persons."

All the definitions cited above were formulated during the colonial period and therefore sought to specify customary law or custom as any local rule which did not overtly conflict with a written law (namely, English Common Law) and with British sense of morality, humanity, equity, natural justice, and good conscience. This "repugnancy" rule has been maintained by many African countries. Yet, none of these nations

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[10](Former) Eastern Region High Court Law (cap. 61, 1963 Revision), s. 2.

[11]Others are included in Tanzania's Interpretation and General Clauses Ordinance (Cap. 1, as inserted by Magistrates' Courts Act 1963, Sixth Sched.), s. 2 (1).; Sierra Leone's Local Courts Act 1963 (No. 20 of 1963), s. 2.; and Botswana's Customary Law (Application and Ascertainment Act 1969 (No. 51 of 1969), s. 2.

has so far made any attempt to clarify the meanings of the terms "natural justice," "equity," "morality," and "good conscience."

The whole range of the legislated definitions of "customary law" lacks a clear specification of both "group membership" and how wide is the scope of enforcement of a given customary rule. In the past foreigners, Christian converts, and persons working under the British administration were placed beyond the jurisdiction of "customary law" or "ethnic law" in its strict sense. In Northern Nigeria and other Islamized areas of Africa, Moslems have clearly been excluded from the jurisdiction of "customary law." Gradually, however, "customary law" has come to be confined or applied largely to members of any ethnic groups who (irrespective of their class, religion, occupation or place of residence) voluntarily consent to be tried by customary courts.

From the above definitions, one may deduce that "Customary law" refers to any body of African law which is largely uncodified and unwritten,[12] and is overtly distinct from either General or Islamic law; in some countries, Customary law is considered inferior or subordinate to the General law and/or any other received law. In Nigeria, for

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[12] In Tanzania and Ghana and a few other African countries, customary law is now the subject of written "restatements," declarations, or court decisions.

example, a "repugnancy clause" seems to place the General law as a superior system above the traditional laws of the various ethnic groups. Within the Northern States, Islamic law is generally rated higher than the customary laws; and in situations of conflict, as in mixed causes, Islamic law is supposed to prevail over customary or ethnic laws.

Essential to the definition of Customary law is that it is almost always associated with a "particular community" whose members look upon this body of rule as obligatory and binding by right of cumulative and "established usage." Used in this sense, one can therefore conclude that Customary law is foremost an "Ethnic law"[13] which is at once "personal" and "particularistic." It is only enforceable between litigants claiming membership within the same ethnic group. The laws of the non-Moslem Maguzawa, for example, do not apply to, and therefore are not formally recognized by, Moslems and other animist or Christian individuals within Northern Nigeria.[14]

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[13]Within the context of Nigeria, and the Northern Sates in particular, I would indeed prefer to use the term "ethnic law" for the simple reason that Islamic law is essentially a religious law of foreign origin, while the General law applies basically to every ethnic group within the territory.

[14]The Shari'a is also held to be a "personal law" of Moslem litigants in the Northern States. However, I feel that it can no longer be so described because Moslems have long been opting out of alkali courts. Besides, these courts have also been handling cases involving strictly non-Moslem litigants, often without the express consent of the latter.

3.2 The Maguzawa

The Maguzawa (from the Arabic Al-Majus: magician, non-believer) are today regarded as the non-Moslem, Hausa-speaking peoples scattered in various rural communities within Kano, Sokoto, Zaria, Katsina, Daura, and Bauchi provinces. In Kano State they are found chiefly in Wudil, Gaya, Sumaila, Birnin Kudu, Gwaram, Tudun Wada, Ringim, and Roni areas.[15] In some of these, they are often addressed as Butawa, Ajawa, Warjawa, or other localized appellations. Practically every small clan or sub-community of Maguzawa claims to have originated elsewhere, usually from areas north of the Nigerian boundary. They may well have been ancestral to the present-day Moslem Hausa.

The total number of Maguzawa in Northern Nigeria today is estimated to be well above 100,000. The size of a localized group usually ranges from 50 to 170 people. The tightness of any one community greatly depends on such factors as Islamic influence and proximity to an urban center. Even in the past, the political integration of the Maguzawa was probably too uncentralized to enable them to be called an "ethnic group."

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[15] My research was focussed mainly on these communities and on other Maguzawa populations within Zaria and Katsina provinces. In Kano, a Bamaguje (s. for Maguzawa) is a non-Moslem Hausa. Upon conversion to Islam he automatically becomes a Ba-Kano. According to Meek (1925), Rowling (1936), and Palmer (1908), the Maguzawa are probably the descendants of the original inhabitants of Kano.

The Maguzawa are predominantly engaged in subsistence agriculture. Descent and succession are patrilineal and each clan or village community is headed by a chief, usually called Sarkin Arna or Sarkin Maguzawa. All major legal matters, even before the advent of the alkalai, are referred to lineage, clan, or village heads. Each community also maintains a Council of Elders who settle minor disputes and assist the Sarkin Arna in some functions. The voice of the Council is strictly conciliatory, and in view of the inroads made by Islamic law and emirate administrations the influence of the council is minimal. Even so, interviews reveal that the imposed Moslem courts are unpopular and seldom patronized. Thus, most minor litigations are privately settled by Maguzawa themselves. Certain councils still impose negative sanctions or penalties, usually in the form of fines, ostracisms, ordeals, ridicule, banishment, or death. Some of the punishments clearly exceed the limits prescribed by the Penal Code or the Criminal Procedure Code,[16] but obviously they conform with Maguzawa customary rules and practices.

All the non-Moslem communities seem to believe in a Supreme Being, whom they approach through local deities (cf. Greenberg 1946). Their religion involves a mixture of nature and ancestor worship, with great emphasis on fetishes and sacrifices. Religious headship is hereditary. Clans are

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[16]See Section 39 (1) of the Native Courts Ordinance, 1953.

exogamous but marriage outside the Maguzawa populations even with neighboring Moslem Hausa, is very rare. Unions are often polygynous, depending on a person's income. Marriage payment is made in public; and divorce, which is easy and common, becomes legally binding once a wife returns her husband's bridewealth.[17] Elopement, abduction, and adultery are generally considered to be criminal offences; the penalties for committing them, however, vary from community to community.

The amount of adjudication undertaken by Maguzawa councils depends largely upon local conditions, and more recently on the relationship of the communities with the Native Administration. Conciliation or compromise between disputants is always attempted, and if this is unsuccessful then witnesses are called. The defendant may refute the testimony of as many witnesses as are produced by venturing an oath on the local tsafi (sacred cult object or oracle). The decision of the tsafi is final, however; from it there is no further appeal, according to traditional Maguzawa law. In most cases, however, the Sarkin Tsafi or Sarkin Arna must attempt a compromise before applying the oath.

Matrimonial, inheritance, and most other civil litigations are primarily the concern of individual families.

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[17] This practice, which is evident among urban Hausa, is also recognized by alkali courts.

lineages, and clans. If the group is unable to contain a dispute, it then requires the use of the tsafi oath. False swearing or perjury among the Maguzawa is believed to be followed immediately by the death of the false swearer, his family, and children. Fines were traditionally paid in kind, usually in pots of local brew called giya.

Major criminal cases and disputes involving a Moslem as a party to an action are sent to the District Head or to the nearest alkali court. Otherwise, the Maguzawa strive to settle a good many of their criminal cases through compromise aided by the strength of public opinion.

3.2.1 Criminal Law of Substance and Procedure

(i). Homicide. The Maguzawa term for "willful murder" is kisan kan ganganci; manslaughter or non-deliberate murder is termed ta'annati. Willful killing of a member of one's clan, village, or lineage is punishable by execution. The murder of a member of another village or political unit usually calls for a retaliatory war (at least formerly).

The types of weapons and techniques used for executing murderers generally vary from locality to locality. For example, the Maguzawa of Kauyen Isa, who live along the Zaria-Kano road, thrust a pointed and roughly hewn club into the murderer's anus until he dies. The punishment is frequently administered by the headman. Some villages, on the

other hand, use swords, large knives, or axes for executing murderers publicly, as in the following unreported case[18] which I collected:

Case No. 1

Place: Kahur (Katsina)

Date: Ca. 1903

Parties: Plaintiff: Nagimba's father

Accused: Karma

Victim: Nagimba

Authority: Galadima of Kahur

Karma was notorious for deliberately killing fellow villagers and escaping execution. In this case, he publicly announced his intention to kill a fellow villager called Nagimba. A few days later he murdered Nagimba during a hunting expedition. The offence was therefore a premeditated one.

The father of Nagimba reported the incident to the community authorities, demanding retaliation. Karma was rounded up and executed with a sword at the village square (dandali).

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[18] A few criminal cases with slightly similar facts, proceedings, and outcomes have also been collected from among the Gwari and Igala. To avoid redundancy, I shall assume here that the Maguzawa cases cited here suffice as an illustration of how rules can be reinforced by remembered disputes and decisions.

In the case of manslaughter or murder by accident, the murderer generally goes free, as in the following unreported case from Kano-Katsina border:

Case No. 2

Place: Gidan Kaza

Date: Ca. 1912

Parties: Plaintiff: Bawa's relations

Accused: Barau

Victim: Bawa

Authority: Head of Gidan Kaza village

In this case, Bawa was killed accidentally in the course of a hunting expedition. Several witnesses testified that the murder was accidental. The village council headed by the Sarkin Arna weighed the evidence and decided that the victim's relatives should forget everything, since they were all members of the same community. The victim's relations duly accepted the verdict of the authorities, who at the same time insisted that the relatives of the murderer should supply the victim's relations with a day's beer as a consolatory gesture.

(ii). Battery or serious injury to a fellow villager is generally punished by reprimand. In a few cases, the victim is called upon to inflict an "equal amount" of injury to his offender.

(iii). Suicide is very rare among the Maguzawa. The

few cases cited to me had some relationship to adultery. Highly respected farmers who committed adultery usually took their lives for fear of "losing face."

(iv). Adultery is punishable by death among most Maguzawa communities.[19] Where a married woman is involved, only the male adulterer gets punished, and in most cases the latter is beaten to death by the husband. Before "helping himself," the husband has to summon witnesses and prove his case before the village authorities. The wife also receives some beating before being divorced shortly after. Where an unmarried girl is raped, the man is commonly beaten; and very unlike the Hausa custom,[20] he will not be permitted to marry the girl he raped. Most rapists simply run away from the village rather than risk being beaten and dishonored publicly.

(v). Killing by Witchcraft. The Maguzawa believe in witchcraft. Almost every community either maintains a "Chief of Witches" (Sarkin Mayu), or patronizes one from the neighboring districts. Attempted murder by witchcraft is punished by thorough beating until the alleged witch "releases" his victim. In certain villages, the witch is often forced to leave the community forever. If the victim dies, the

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[19] This could well be due to Islamic influence, for the emphasis on killing seems to be strongest in communities with heavy Moslem influence.

[20] A rapist among the traditional Hausa is first shamed publicly and made to convey the girl from door to door, before finally being forced to marry the girl (field data gathered from major Hausa towns and villages, 1974-75).

witch also dies in the hands of angry villagers.

(vi). Robbery without murder is punished by serious reprimands if the offender belongs to the same community. Where the robber comes from another village, the punishment is immediate execution. Robbery with murder is penalized by instant death, whether the culprit comes from a different or the same village. In such instances, the whole village administers the punishment, often without the consent of the village council. Indeed, their consent or approval is sought only after the execution of the robber, as in the following case:

Case No. 3

Place: Dankanjiba (Kano)

Date: 1955

Parties: Murdered Robber: Dodo

Reporters/Attacked: Two Women

Consenting Authority: Ward Head

A robber named Dodo was fond of attacking people from other villages. One day he struck the village of Dankanjiba and attempted to rob two women courtesans. Unexpectedly, it turned out that the women were extremely brave and hardy. They overpowered him and used stones to flatten his reproductive organs. Dodo died as a result of testes mutilation. The two women later reported the case to the ward head, who duly praised them for having killed the robber.

(vii). Theft. Stealing any property is punishable by public beating. Children and adolescents are beaten and then reprimanded after the stolen item has been returned to the original owner. Cases of theft are seldom reported to the village authority, unless the thief hails from another community. Stranger thieves are killed instantly.

(viii). Lying before a jury, chief, or council of elders is a serious crime punishable by severe beating. Supernatural justice plays an important role among the Maguzawa, and telling a lie signifies contempt for the basic social values and beliefs of the society. Where a persons is suspected of lying, he is made to undergo a physical ordeal or take an oath by the tsafi, as in the following case:

Case No. 4[21]

Place: Matumbi (near Tsakuwa, Kano)

Date: Ca. 1916

Parties: Lier/Accused: Ma'udu

Complainant: Danladi

Authority: Sarkin Tsafi

Ma'udu was reported to have denied the receipt of his daughter's bride-price from her suitor, Danladi. The village authorities therefore took both Ma'udu and Danladi to the communal shrine where, upon repeating his denial, Ma'udu was asked to skip across a sword three times. Danladi also

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[21] I have relied a great deal on Pospisil's method and conceptions of law (see Chapter One) for the recording and presentation of the rules and cases in this chapter.

jumped over the magical sword thrice. According to my informant, Ma'udu became mad the very instant he took the oath, and died seven[22] days afterwards.

This and many other cases of lying and supernatural justice greatly deter Maguzawa from taking the oath or drinking the gwaska ordeal, a kind of poisonous concoction.

(ix). Trespass is generally unknown, but where an enemy enters a farm or house without approval, exchanges of words or blows frequently ensue. A pursued game which dies in a person's house or land can be claimed by the owner of that piece of ground.

(x). Incest is considered to be a very serious crime among the Maguzawa, and those who commit it are commonly forced into temporary or permanent banishment. Where the male offender insists on remaining within the community he is made to undergo a series of public reprimands and shaming exhibitions. The dread of public dishonor, which frequently lasts throughout one's lifetime, compels persons who commit incest to slip away from their villages for good.

3.3 The Gwari

The Gwari are one of the largest non-Moslem ethnic groups in Northern Nigeria. Totalling about 250,000, they are today scattered throughout the North-Central, Kwara, North-Western, and Benue-Plateau States. They are chiefly a farming

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[22] Seven and three are magical numbers among the Hausa as well.

people concentrated largely in rural areas.[23] Their language, Gwari (Gbari), has many dialects, with at least eight being distinguished in the former Niger Province alone (cf. Temple 1965:121). Hausa is understood by many Gwari, and serves as a lingua franca among a large portion of the population. Myths or stories of origin indicate that the majority of the Gwari claim to have originated from Hausaland or Borno. Others claim to be remnants of Nupe, Jukun, and a few other ethnic groups.

More and more Gwari are becoming Moslems or Christians, but the majority of those living in the rural districts worship spirits and idols. Sacrifices of animals and food form a major element of their religion. Each individual worships a personal god or guardian spirit for whom a sacrificial shrine is set aside. Some communities worship a god called Shekwoi, whereas others, as in Abuja, hold Mama to be the principal deity. An oath is taken in the name of these gods; and when a guilty person dies, or swells up, an ordeal in the name of these supernatural beings is frequently administered. The deities are held to be omnipotent and have the sole prerogative of punishing or rewarding individual Gwari. In times of poor harvest, war, or famine, continuous supplications are made to the supreme deity.

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[23]My data on Gwari law were collected mainly among the Abuja, Kuta, Minna, Gwagwada, Kaduna, and Riga Chikum populations.

Descent is now generally patrilineal, although many villages claim to have formerly practiced matriliny. In the past, a son could only inherit from his maternal uncle. In recent years, however, inheritance rights pass to the eldest son or brother. A mother can hold trust for a minor. Both sons and daughters inherit non-real property. Polygyny is the preferred form of marriage.

Succession to political titles, like village chiefship (Sarki or Etsu), seems to vary from locality to locality. On the whole, however, two models can be identified: (a) a lineal succession from father to son; failing this, to a chosen or younger brother of the deceased chief; and (b) a rotational succession between ruling families. A council of chiefs and elders, headed by a Sarki or Etsu, is responsible for the administration of community affairs. Certain powers are delegated to subordinate titled officials.

Administration of justice varies considerably from community to community. In general, however, it is common for the chief to preside over all disputes in the presence of other titled officials and elders. Fines are imposed, payable in livestock, grains or, more recently, money. Proceeds from fines are shared amongst the jury. Serious civil or criminal offences are sent to the District Head or alkali court.

Oath and ordeals are resorted to only when compromise

fails. Persons suspected of telling a lie are compelled to take the oath. Witnesses play a major role in their systems of evidence and procedure.

3.3.1 Criminal Law of Substance and Procedure

(i). Homicide. The Gwari term for murder is zawu. Premediated murder (zawu zai kpe) is quite uncommon. When it occurs, it usually results from secret poisoning, sooth-saying, or witchcraft. The victim's relatives resort to supernatural means to seek avengement. If detected, the murderer is expelled from the community, and his entire property is confiscated. The victim's relatives are given half the property, while the chief and ward elders divide the other half equally.

Accidental murder is punishable by reprimands. The murderer may also sacrifice and pay some fine in the form of gifts to the village authorities. A married woman who commits murder is sent back to her parents and, in certain places, may be refused entry into her natal village. The murder of a member of a different political unit leads to reciprocal killings, which frequently culminate in wars or feuds (at least in earlier times). Wars, however, are only carried against non-Gwari neighbors such as the Hausa. Boundary disputes and enslavement may, however, occasionally precipitate wars among Gwari communities.

(ii). Battery or body injury is only punishable by fines and/or reprimands. When the crime is committed by a stranger, the punishment ranges from beating to slavery. The village chief administers the punishment.

(iii). Suicide is very rare. Unrequited love, infertility, and failure generally are cited as the principal causes of suicide among the rural Gwari. Suicide victims take their lives by eating a type of yam species called chakara (Gwagwada region).

(iv). Adultery is looked upon as a grave crime, although it is widely practiced. If the act is involuntary on the part of the married woman, the husband personally seeks the head of the male adulterer. Other villages insist on stripping the adulterer naked, and then forcing him to carry a heavy log while the public flogs him around the village. A married woman who submits voluntarily also suffers a similar fate. The majority of headmen and elders, while clearly sanctioning the above punishments, seem to favor fines and sacrifices of food, goats, and dogs to appease the gods and the victim. The fine, if a goat, is sacrificed to the welfare of the community rather than given to the victim's relatives.

(v). Rape is penalized by reprimands, as well as by fines which are usually retained by the judge or by the chief and his council. The rapist is neither beaten nor forced to

marry the girl.

(vi). Assault results in fines being imposed, ranging from money to goats or cows, depending on the community.

(vii). Incest is considered to be abominable. The family is singled out as an outcast for having fouled both the community and the ancestors. Many cases were cited in which the principal partners and families had to sacrifice animals to appease both the community and deceased ancestors.

(viii). Robbery with murder is punishable by death. Robbery without murder, which comes before authorities, is penalized by beating and confiscation of property. Death is the punishment of strangers caught in the act. In such cases, it is the entire community which administers justice. Robbery is considered to be a recent phenomenon among the Gwari. It is seen as an innovation resulting apparently from contact with the Hausa.

(ix). Theft is punishable by death through self-help in many villages of Gwari Yamma. If the thief is spared, and this happens often with non-strangers, he is obliged to make full restitution in addition to paying a court fine. The usual fine is approximately two cows or five goats. In other communities (Kaduna region mainly) the thief is chained in the bush and required to make a sacrifice for the welfare of the village. In parts of Zaria and Abuja, the offender--if a stranger--is fined and then sold into slavery.

3.4 The Igala

The Igala or Igara-speaking peoples inhabit the region adjoining the confluence of the Niger and Benue Rivers. Most Igala therefore are found within the present Kwara State. The principal town, Idah, was once the influential and prosperous capital of a very powerful Igala kingdom.

According to the 1952 Nigerian census, the population of the former Igala kingdom was estimated to be about 370,000. The majority of these live in small, and sometimes shifting, settlements. Larger and less dispersed communities are today found along the banks of the Niger River. Hunting and fishing are highly valued, although more than 90 per cent of the Igala engage in agriculture.

The people speak Igala, a language with strong Yoruba roots. Jukun, Okpoto, and Ibo influences are also evident in Igala language. Culturally, the Igala seem to have closer affiliations with the Yoruba than with their Jukun, Ibo, or Igbirra neighbors. Igala kinship rules and kinship terms, for example, are remarkably similar to those of the Yoruba. Inheritance is patrilineal among both groups, but ties with matrikin among some Idah Igala subgroups indicate a more recent trend towards a bilateral inheritance pattern (Boston 1965:174-211). Inheritance and succession used to run from a deceased man to his elder brother, or secondarily to his eldest living uncle, and failing that to the eldest son of

the uncle. This rule has been replaced by an Igala Native Authority law which makes the child the sole heir to his father's property or title; the same child can also "inherit the wives of his deceased father if the wives have no children, and he can give away any of the wives to the relatives of his father for marriage if he so desires, and if he does not, the widows should be left to go, and if the child wants dowry to be refunded it must be refunded."[24] The enforcement of this rule depends in large measure on the religion of the heirs and the deceased. In some rural areas close to Idah,[25] the traditional deceased-brother rule is still followed; and in the heavier Moslem communities Islamic law of inheritance prevails.

Polygyny is widely practiced, particularly among the wealthy and political elites. The levirate and patrilateral cross-cousin marriage are also common. Divorce is particularly difficult, indeed impossible at times, probably due to the length of farm-labor or the heavy bridewealth that has to be transferred to the wife's party prior to the legalization of marriage.

The Igala worship ancestral spirits and idols. The god of thunder is their principal supernatural being.

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[24] Igala Native Authority Rule No. 159/1951.

[25] My brief fieldwork was confined largely to the Idah region.

Sacrifices and masquerades similar to those of the Yoruba are key features of Igala traditional religion. Nowadays, Islam and Christianity are fast replacing this customary religious structure. Growing Islamic influence can in part be attributed to earlier contacts with the Hausa who settled among the Igala as merchants, clerics, and even rulers.[26]

The King (Attah) was once the most powerful paramount chief of the Igala nation. He was a divine king who owned all the land. He maintained a hierarchy of subordinate chiefs, all deriving titles and authority from him.

The complexity of their judicial system was surpassed in Northern Nigeria only by the Shari'a system. Of all the major non-Moslem ethnic groups in Northern Nigeria, the Igala appear to possess by far the most highly developed judicial system.[27] Very unlike other societies in the North, the Igala seem to have maintained a fairly distinct separation between the judicial and the executive/legislative arms of the State. The Attah heads the legislative and executive hierarchy, while all judicial powers are delegated to the Ogbe, a kind of Chief Justice for the Kingdom. His court at Idah

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[26]During the colonial period, a Hausa was made the administrative chief of an Igala division (cf. Byng-Hall 1907 and Temple 1965:150).

[27]Can this be attributed to Hausa-Islamic influence? Investigations reveal that the elaboration of the Igala judiciary became evident only after the late 1800's.

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serves as an appellate tribunal, as well as a court of first instance with unlimited powers. All major cases have to be referred to him, and he also handles minor cases upon appeal. He has to sanction or review all death sentences. In turn he submits his findings to the Attah. District and municipal chiefs have powers to try cases, sentence offenders, and levy small fines, but the person convicted or punished has a right to appeal to the Ogbe's court. In his capacity as the Supreme Judge, the Ogbe can remit the punishment. The Ogbe is permanently assisted by four judges, who regularly travel around the country sending in any capital causes. Minor chiefs serve roles similar to Justices of the Peace.

All heads of families, lineages, clans, and villages who have titles from the Attah also have the authority to try their members for serious offences. They are expected to submit their decisions to the Ogbe for ratification and confirmation, however. Mixed cause issues, as between litigants from different clans or families, are only handled by the Ogbe or his subordinate judges.

The Ogbe's court is held daily at Idah, except when he is away inspecting district tribunals. The court proceedings are held in an open session, and all adult males who attend it can be asked to form a jury. When evidence from litigants and witnesses is heard, the audience is frequently invited to take sides. Each person present is asked, "Is

this true?" A "yes" or "no" majority determines the verdict. If equal or drawn, the Ogbe has a casting vote. A similar technique is employed by minor chiefs, judges, and lineage heads. At the end of each trial, a report is immediately sent to the Attah before an execution of the judgement.

Judgment costs or fees are always paid by the losing party. The fine or fee is used to pay for the service of the Ogbe and his staff. The Ogbe's court is often described as being corrupt and prone to bribery. In a serious case, the jury can easily be bribed into taking sides. Lesser judges and chiefs who receive bribes frequently arrange the jury in such a way that he who pays the most can win the case.

The common forms of punishment include death, fines, seizing of property, slavery (formerly), and poisoning. Fines are imposed by seizing kinsmen or property until paid; or if not paid, by selling a judgment-debtor into slavery (cf. Byng-Hall 1907), i.e., in earlier times.

3.4.1 Criminal Law of Substance and Procedure

(i). Homicide. When tried and convicted by the Ogbe's court, the murderer is punished by death. The execution is carried out in one of two ways. Around Idah, the murderer is tied to a pole driven firmly into the ground. A rope, which is put around his neck and the stake, is gradually tightened, thus causing slow strangulation. In the Ankpa region, the

head is struck off with a big knife. The execution is carried out in public, with the murderer's family called to witness the scene as well.

The Ogbe's court rarely draws a distinction between "willful" and "non-deliberate" homicide. Those who commit murder under the stroke of insanity are always pardoned, but the Ogbe's court has to gather evidence that the person is insane both before and at the time of the killing.

(ii). Maiming, injury, and battery are punishable by inflicting equal amounts of damage on the aggressor. Strangers can in addition be enslaved (formerly) after the retaliatory "eye for eye." Relatives come together to carry out the vengence.

(iii). Suicide is considered to be an act of God. People rarely take their lives, and those rescued attempting to do so are usually isolated from the community and reprimanded seriously.

(iv). Incest is a very grave offence. An incestuous family is first "shamed" in public, dispossessed of any property, and then "hooted" out of the community. This treatment holds good for chiefs as well as for ordinary citizens. One minor chief of Idah is claimed to have suffered such a fate around 1895.

(v). Adultery with a married woman is widely frowned upon. In general, it is the husband's responsibility to

obtain a remedy, which frequently involves the trapping and enslavement of the adulterer. If the wife returns home, she gets punished severely. If, however, she elopes with her seducer, the latter's relatives are caught and sold (formerly) into slavery until the wife has been returned.

(vi). For raping a girl, a man is forced to pay a high fine to the girl's family. He will in addition work for a number of years on the girl's father's farm, after which the father will allow him to marry the girl.

(vii). Abuse of children, such as beating a child to death, is regarded and treated as a full murder case punishable by death.

(viii). Trespass is not punishable, but if proved the person is driven out of town. Such penalties are imposed more on strangers. The banishment order, however, can be mitigated if the stranger pays a heavy fine.

(ix). For treason or starting a war with another village, a man is either killed or deported.

(x). A thief is made to pay a fine, usually twice the amount stolen, after being disgraced publicly. Chiefs and members of the reigning house of Idah are forced to carry the stolen articles on their heads through towns and villages.

(xi). Fraud and lying are tried by having suspects drink a sasswood concoction. Trial by sasswood[28] is

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[28]For detailed information on sasswood ordeals see Wilson (1856), Price (1939), and Kirk-Greene (1955). Igala sasswood trials closely resemble those of the Yoruba (cf. Byng-Hall 1907).

carried out by the chief of every community, and is not always reported to the Ogbe. Suspects of witchcraft and treachery, and persons accused of seducing unmarried women, are most often subjected to sasswood ordeals.

3.5 Discussion and Conclusions

The establishing of Customary law in Nigeria is specified by the Federal Evidence Act, Cap. 62, Sections 14, 56, and 58. Section 2 of the Northern Nigeria Native Courts Law[29] treats both Customary law and Islamic law as being practically alike, under the single label, "native law and custom." In this chapter, I have attempted to demonstrate that Customary law, however, differs from both the Shari'a and the General law in a number of salient respects. Both the Shari'a and the General legal traditions, for example, originate from outside Nigeria. Even the Maliki law is not a purely indigenous judicial phenomenon although it has now partially supplanted the local legal systems of certain urban Moslem peoples. Furthermore, quite unlike Customary law, both the Shari'a and the General law are not grounded in any specific locality; they operate even in areas where indigenous laws prevail. By contrast, Customary law[30] pertains

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[29] No. 6 of 1956.

[30] It should be noted that the use of the term "Customary law" throughout this thesis does not directly imply that there is one single uniform set of laws and customs

specifically to distinct indigenous ethnic groups who occupy delineated geographical areas. It is enforced mainly through informal tribunals, which are located principally in rural areas.

According to both the Nigerian Federal Evidence Act and the Northern Nigeria Native Courts Law, any aspect of Customary law can only be enforced if it is not incompatible with a written law (e.g. General and Islamic) or contrary to public policy, natural justice, equity, etc. Statutory definitions of Customary law from other African countries[31] have equally tended to accord an inferior status to Customary law vis-à-vis other legal traditions administered within the same territory.

Yet, in both rural and urban districts of Northern Nigeria Customary law is still revered and applied in varying degrees. Indeed, from the point of view of case-load one is tempted to maintain that Customary tribunals seem to handle more local-level disputes than do the Moslem and General lower courts combined. A scrutiny of court registers and observations of rural tribunals in action from four districts in Kano reveals that for every case heard in an alkali court

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prevailing throughout the former Northern Region.

According to most observers, the vast majority of Nigerians conduct their activities in accordance with and subject to Customary law (and Islamic law); besides, far more cases are decided under Customary law than under any other laws in force in Nigeria.

[31] See section 3.1 above.

in 1974, three similar litigations must have been heard in Customary moots within the same period. In the same districts, rural tribunals appear to dispose of more civil cases in a day than do either Moslem or General courts. In Jahun District (Kano), market and village chiefs[32] heard a daily average of 104 civil suits, in contrast to 10 similar cases[33] at the formally constituted alkali court.

In terms of choice, I have also discovered that more than 85 percent of the population of ten animist settlements[34] preferred to resolve a significant proportion of their disputes in accordance with local laws and customs. In another side-investigation, I found that approximately 58 per cent of the population of four Moslem rural settlements in the North-Central State expressed a similar preference.

What has been presented in the preceding sections of this chapter is but a considerably condensed version of the criminal laws of the Maguzawa, Gwari, and Igala. In essence, the basic legal rules and procedures upheld by any one of the three societies are remarkably complex and detailed; and on the whole, rules relating to civil matters tend to be more

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[32] These generally apply Customary, that is, non-Islamic, legal rules and procedures for the bulk of the cases that come before them.

[33] Data for the period June to December, 1973.

[34] These included 2 Angas, 2 Chamba, 2 Gwari, 1 Dakarkari, 1 Tiv, 1 Igbirra, and 1 Warjawa (a Maguzawa sub-group) communities.

extensive and fairly well institutionalized than laws relating to crime. On the other hand, criminal cases seem to be the more easily remembered than civil litigations.

Being largely unwritten and uncodified, Customary law appears to be relatively more adaptive to changing conditions than perhaps either Islamic law or General law. Throughout the decades of Islamic and Western acculturation, it seems that Customary law has been developing and modifying itself in order to accommodate socio-religious changes. This characteristic seems to be identified with Customary laws all over Africa. In the verdict of Lewis v. Bankole, for example, Justice Osborne has correctly observed:

> One of the most striking features of West African native law and custom is its flexibility; it appears to have been always subject to motives of expediency, and it shows unquestionable adaptability to altered circumstances without losing its character.[34]

In the case of Northern Nigeria, the adaptability of Customary law seems to vary with an ethnic group's exposure to Islamic and/or European influences. Urban and semi-urban Customary courts, for example, appear to accommodate such influences much more easily than perhaps rural tribunals. In the case of Bawa Galadimawa v. Kantoma and Another,[35] for

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[34](1909) 1, N.L.R., pp. 100-101. From the point of view of flexibility, Customary law comes quite close to Islamic law, which also manifests similar adaptive characteristics throughout the world (see section 2.5, above).

[35]Unreported Appeal Case No. PCZ/81CU/61 (1961).

example, it took rural Kwasam people about a century to start accommodating to Islamic legal conceptions and practices. As a result of the establishment of a Moslem court in a predominantly animist community, the Kwasam, who traditionally had liberal rules of divorce and remarriage, were forced to draft another rule to the effect that:

> If either a wife or a husband wishes to divorce the other, one of the couple must do so in a formal court where the wife would be issued with a certificate of divorce. The new law further lays down that the divorced woman must observe a three-month iddah [a ritual period before a divorced wife remarries] as laid down in the Shari'a, before she can contract another marriage.[36]

In rural areas, such induced changes can be fairly disruptive. As in the case of the Kwasam, the imposition of a Moslem court did not wholly succeed in ousting pre-existing rules and practices relating to divorce and marriage. Rather, they only served to confound social relations, liabilities, rights, and obligations between husbands, wives, and in-laws.[37]

In urban areas, however, Customary criminal and commercial laws have been more drastically modified by Islamic and other influences. Even then, it has to be stressed that the receptiveness of Customary law does not in any way imply that ethnic laws are being, or will soon be, completely stamped out. Nor does this suggest, in the case of Northern

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[36] First Assessor's statement, in Bawa Galadimawa v. Kantoma and Another, No. PCA/81CU/61 (1961).

[37] For another example of the disruptive influence of Iddah rules upon an animist community, see M. G. Smith (1969a).

Nigeria, that Customary law will ultimately give way to both Islamic and General legal systems. On the contrary, Customary law is bound to persist so long as rural attitudes and behavior patterns continue to be largely supported by native law and custom.

The civil and criminal laws of the three ethnic groups described above noticeably vary from sub-community to sub-community, depending on differential exposure to outside influences. These local variations are at times greater among ethnic groups with widely dispersed or mixed memberships. On the whole, however, a great deal of this local divergence seems to relate more to details rather than to principles. For example, among the Maguzawa, Gwari, and Igala there is the general agreement that a fine or execution is the ultimate punishment for certain homicide and theft cases; but the type of weapon to be used for execution, or the degree and nature of fines to be imposed for specific offences, varies considerably from one group or sub-group to the other. These differences and similarities in attitudes toward criminal offences generally reflect corresponding differences and similarities in social organization. The Maguzawa and the Gwari, for instance, seem to share certain basic socio-cultural features, much as they reveal corresponding differences in other characteristics. But, on the whole, both ethnic groups are essentially loose-knit and semi-independent;

consequently, their judicial organization and laws of procedure and substance tend to be similar too. In particular, techniques of compromise, reconciliation, and open negotiation prevail among both societies.

By contrast, the Igala judicial system is more elaborate and complex, probably because of their history and socio-political development. Quite unlike the Maguzawa or Gwari, Igala traditional society is politically and judicially centralized. As a result, arbitration turns out to be a conspicuous and preferred mode of dispute settlement among Igala judges and chiefs.

Regardless of some basic distinctions between the Gwari and the Maguzawa, on one hand, and the Igala, on the other, it is quite evident that public opinion carries great weight in arriving at judgments in all three social systems. Even among the Igala, straight-forward arbitration is only turned to as a final resort, that is, when all efforts for a meaningful compromise break down completely. From all evidences, it appears that the principal goal of legal agents in these three ethnic groups is the restoration of social equilibrium rather than the declaration of clean-cut winners and losers in specific litigations. Commenting generally on customary judicial processes and the role of traditional legal agents in Africa, Elias (1958:298) has stated:

> Instead of spinning out abstract theories of law their aim is usually the pragmatic one of removing the social causes of social tension, of binding or rebinding the estranged parties in a give-and-take reciprocity, of the re-incorporation of an erring member in the social structure. Only where the activities of a member are anti-social and disintegrative of the social solidarity is there a resort to banishment or death . . . or hanging. But in the generality of cases tried under customary process there is reconciliation of the parties by a fairly just apportionment of blame or desserts.

In the light of my investigation in Northern Nigeria, I am inclined to agree wholly with Elias. His above generalizations significantly hold true for the Maguzawa, Gwari, Igala, Hausa, and Bororo societies, as well as for other ethnic groups which comprise Northern Nigeria today. The widespread practice of compromise techniques and the minimal variations existing both within and between ethnic laws in matters relating to marriage, divorce, inheritance, and aspects of crime may have great significance for the viability of Northern Nigeri'as pluralistic legal system and for conflict resolution in general. The commonality of these features may serve to speed up or facilitate any policy aimed at developing a uniform Customary legal system or a harmonious Common law for Northern Nigeria. At the same time, the commonality of reconciliation strategy may well be the most viable mode of conflict resolution for plural legal systems which lack clearly formulated conflict-of-law rules. In addition, since it is inexpensive, quick, and informal the strategy of reconciliation may well be the best answer for developing areas like Northern

Nigeria.

Finally, in recording the rules and cases presented in this chapter I have closely followed Pospisil's legal theory and method. Using this approach, and presenting data from three ethnic groups with varying degrees of organizational complexity, I have attempted to show that the main attributes of law as defined by Pospisil (1958a, 1971) can be found even in a simple society. My findings among the Maguzawa, Gwari, and Igala therefore serve to reinforce the anthropological view[38] that the codification of law, and the presence of formal courts, lawyers, and law enforcement agencies, are not always preconditions for the existence of law in any one society. Every social organization, regardless of the elaborateness of its social structure, has law. I thus conclude that every ethnic group in Northern Nigeria has evolved a fairly elaborate system of law, nad that, with conscious effort, it will be possible to reconstruct these multiple ethnic laws for the purposes of codification or compilation into monographs, legal

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[38]Upheld by Gluckman, Bohannan, M. G. Smith Pospisil, Nader, and others (see discussion of anthropological definitions of law in Chapter One).

guides and handbooks, or for judicial development generally.[39]

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[39]The flexibility of Customary legal system to changing social, economic, political, and other conditions poses one major question regarding the restatement of law; How far back can one push the recording or ascertainment of the native laws of a given people? For my own investigation I relied on the early 1800's as the critical period marking the political and social consolidation of most ethnic groups in Northern States. Any major judicial changes (and these can be easily detected) must have resulted from subsequent Islamic and European acculturation.

Chapter Four

GENERAL (ENGLISH) LAW AND THE STRATIFIED LEGAL SYSTEM

By the end of the Nineteenth Century, a substantial part of the region known as Northern Nigeria was occupied by the British. On 1st January 1900, it was officially declared a British Protectorate under the Commissionership of Lord Lugard. Using a policy of "Indirect Rule," Lugard sought to retain and effectively utilize the pre-existing indigenous and Islamic institutions of the various peoples. The implementation of this policy (which apparently arose out of necessity and convenience to the British) has helped to preserve some key institutions of traditional administration; these include certain political techniques, a formal code of law, and specialized judicial institutions.

Between 1950 and 1960, the colonial government began to introduce and develop democratically representative institutions of government in Nigeria. Around 1957, both Eastern and Western Nigeria (the other two Regions in the Colony) became self-governing. A Mid-Western Region was carved out of the West in 1963. In the same year, the country became independent, and subsequently assumed the status of a federal republic in 1963. Four years later, virtually a year after

the overthrow of the first military regime, the country was partitioned into twelve states.[1]

Since the beginning of British rule, three judicial structures have been in force within Northern Nigeria: Customary law, Islamic law, and General law. The first two have been examined in the immediately preceding chapters. In this chapter, I shall discuss British legal conceptions, legislative reforms, and the introduction of General law. Next, I shall examine the development of the judiciary and the nature of local statutes initiated by Native Authorities from 1900 up to the present.

4.1 General Law

In the colonial period, the General law[2] was designed chiefly to promote and sustain territorial law and order, particularly on criminal and procedural issues, to regulate the personal and proprietary relationships of non-Africans (British and others), with each other and with Africans, to set up systems for the educational, economic, and political development of the region, and above all to allow intending Africans to opt out of customary law in preference for a

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[1] See Map II, p. xv.

[2] The General law in the Northern States is the primary law for the Magistrates' Courts, District Court, High Courts, and the Supreme Court (Lagos). These same courts are also empowered to administer "native law and custom." Unlike Customary or Alkali courts, the General law courts allow advocates to plead for litigants.

Western legal system, either in general or in respect of specific transactions and relationships (Allott 1970:14).

The current General law in Northern Nigeria essentially consists of (1) the Received (extraneous) British Common law, (2) Enactments by the Colonial Legislature, (3) Enactments by the National and/or Northern Nigeria Legislature; and (4) Enactments, Decrees, and Edicts by the Military Government since 1966. To these may be added those extraneous laws or by-laws promulgated by various local authorities within every province or state in the region. Most of these by-laws are but adaptations and re-enactment of foreign laws. Such borrowings or modifications are particularly common in areas connected with company law, laws of marriage and divorce, tort and contract, health, taxation, forestry, and the adoption, legitimacy, and guardianship of children (Allott 1970:20).

In Northern Nigeria, the statutory provisions for General law are based on (a) the Common Law, (b) the Doctrines of Equity, and (c) the Statutes of general application which were in force in England on 1st January 1900.[3] This triple formula by which English law has been received in Northern Nigeria similarly applies to all British Commonwealth countries in Africa. I will now briefly examine each of the three aspects of the received General law in Northern Nigeria.

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[3]See Northern Region High Court Law 1955, cap. 49 (1963 Revision), s. 28.

4.1.1 Common Law

The term "common law" is broadly defined as the Anglo-American system of jurisprudence. More narrowly, it refers to a principal component unit in the legal system of England. It has its roots in the rules administered by ancient Common law courts, which in their turn derived from the general law and custom of England. As an antithesis to Equity, general law is considered to be a major part of the unenacted judge-made law "common" to the whole of England, as opposed to purely local customs (Allott 1970:28-29). The Common law has been developed almost entirely by judges. Its principles are mainly discovered in precedents or previous cases, and not in a comprehensive code like the French "Code Civil". It is essentially a system of rules extracted from cases.

Northern Nigerian Common law has its basic roots from the English law as it was enforced on 1st January 1900, with some modifications and adaptations. It is accepted as part of the law of the court, of which the higher courts must take judicial notice. Section 73 (1) of the Evidence Act, cap. 62 (1958 Revision), as amended by Laws of Nigeria (L.N.) 47 of 1944, clearly states that the court shall take notice of the following facts: "All general customs, rules and principles which have been held to have force of law in or by any of the superior courts of law or equity in England or the Federal Supreme Court or Former Supreme Court of Nigeria or by the

High Court of the Region, and all customs which have been duly certified to and recorded in any such court."

4.1.2 Doctrines of Equity

Equity was introduced into Northern Nigeria as a residual source of legal rules in situations where no express rule was applicable under the following conflict rules: "In cases where no express rule is applicable to any matter in controversy, the court shall be governed by the principles of justice, equity, and good conscience."

The English doctrines of equity (equitable maxims) is a case law system which developed into a distinctly ascertainable body of rules. The same principles and techniques of precedent apply to equity as to common law (Park 1972:9). It is the technical equity, or principles developed by the English court of chancery from mediaeval times, which was imported into Northern Nigeria under the reception formula.

In England, equity was a gloss on the common law, largely superceding it in some areas. Traditionally, "courts of equity" existed as specialized courts in England. In Northern Nigeria and most of British Africa, on the other hand, one witnessed a general fusion of law and equity; and all courts, insofar as they apply the general law, have become courts of common law and equity.

4.1.3 Statutes of General Application

The phrase "statutes of general application" has given rise to much difficulty, being interpreted in many different ways.[4] An act is often interpreted in England as a "statute of general application." The major questions here are: (1) By what courts was the statute applied in England? (2) To which classes of community in England did the Act apply? (Park 1972:26).[5]

In general, Acts which applied only to particular English courts may for some reasons not be in force in Northern Nigeria. It appears, however, that the courts generally regard them as of general application in England. Moreover, an Act can be of general application without applying to every class in the community, as it is the case of the Money-Lenders' Act, which has been regulated since 1939 by Nigerian legislation (Park 1972:27).

An act of general application which was in force in England on 1st January 1900 is automatically in force in the Northern States, provided that it is suitable, and that position can only be changed by a Nigerian or Northern State Statute which regards it for the purposes of Nigerian law. It is worth noting that if after 1900 an Act was repealed in England, this had no effect upon its validity in Nigeria.

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[4]See, for example, Park (1972:24-29) and Daniels (1965: 319-346), for fuller and more useful discussions on this topic.

[5]Also see (1910) 2 N.L.R. 1, decided by Chief Justice Osborne.

As an example, the Land Transfer Act of 1897 was repealed in England in 1925, yet it was held by the West African Court of Appeal[6] to be part of Nigerian law in 1940 (Park 1972:29).

Nigerian judges, legislators, and administrators have contributed a great deal to the enrichment of General law, usually at the expense of both Customary and Islamic traditions. Much of this can be attributed to Nigerian legislative bodies and more recently the Military governments. The legislators in particular have circumscribed the application of English law in the higher courts, namely the Supreme Court, High Courts, Court of Resolution, Magistrates' Courts, and District Courts. Each of these courts, however, also recognizes and enforces native law and custom, or Customary and Islamic law, in the case of Northern Nigeria.

4.2 History of the Judiciary

A brief account of the judicial history of the Northern States will be attempted here, with emphasis on the structure and composition of courts and the different judicial reforms initiated since the colonial period.

As discussed in Chapter Two, Islam and the Shari'a were well-established in the Northern States long before British occupation. Lord Lugard discovered that the courts in the Protectorate were well-served by judges learned in

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[6] Young v. Abina (1940) 6 W.A.C.A. 180.

Moslem law. In certain emirates, the colonial administrations found an elaborate appellate system. In Zaria, for example, the Emir's court acted as final court of appeal for cases from municipal alkali courts. The alkali in turn heard appeals from the court of the salenke, a judicial office established under the Habe. There were in addition market courts in all the major towns (M. G. Smith 1960a:94).

At the time of British occupation, practically every Moslem kingdom had courts in the major towns and cities where Maliki law was being administered by the local judge, called alkali. The latter usually presided alone in the courts. In others he was assisted by learned men (mallamai) and assessors. All grave cases were referred to the Emirs; otherwise the municipal alkalai generally acted as final courts of appeal in their own right. In Ilorin, the Chief Imam (Liman) dealt with all cases and the alkali acted purely as a legal adviser to the Emir (Lugard 1906:80-89).

Final appeal rested with Sokoto, the capital of the Caliphate. The Emir's duties were confined to enforcing the alkali's decisions. At Sokoto, the alkali court was under the close supervision of the Sultan (Sarkin Musulmi), who received daily reports from state agents and a weekly report by the alkali. Head chiefs in the rural areas also held courts.

Until 1900, the northern emirates or Hausaland under

Usman dan Fodio maintained a dual system of courts: the Moslem courts, and the conciliar moots or tribunals of autonomous pagans residing as dhimmi[6] enclaves within the Sokoto Caliphate. With British occupation, a third system of courts was superimposed, thus accentuating the already multiplex and conflictual character of the judicial systems in the region. A March, 1903, speech by Lord Lugard, the High Commissioner for the Protectorate, marked the beginning of this increased judicial conflict. In the speech, Lugard said he clearly wanted to retain the pre-existing legal institutions, yet at the same time, there was a great urgency to impose the British sense of justice over the entire Protectorate:

> The old treaties are dead, you have killed them . . . The Fulani in old times under Dan Fodio conquered this country. They took the right to rule over it . . . They in turn have by defeat lost their rule which has come into the hands of the British.[7]

From that period onward, the appointment of key officials, Moslem or not, in the Protectorate had to be decided by the High Commissioner. He forbade mutilation for theft and the confinement of men in inhumane prisons. The Resident of a Province had to approve any death sentence

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[6]After the jihad of Usman dan Fodio, animists who wished to practice their way of life while still maintaining peaceful relations with the more powerful Moslem neighbors were accorded dhimmi or tributary status. The community granted such a status was expected to pay annual tribute (jizya) to the Moslem ruler in whose kingdom it was located.

[7]Lugard (1903), cited in Brooke (1951:10).

passed by alkali courts, whose powers were thereafter contained in warrants of appointment. Also by virtue of conquest, the entire territory ruled by the Fulani reverted to the British; and if the latter required land anywhere, for any purpose, they took it (Brooke 1951:10).

4.2.1 Organization of the Colonial Judicial System

Because of their policy of Indirect Rule, the British did not explicitly attempt to interfere with the workings of the pre-existing courts. They seemed to be more concerned with increasing their influence and making them effective instruments of justice. They also aimed at reducing certain abuses in the courts as well as teach the alkalai about the "principles of British justice and of the elementary rules of evidence" (Lugard 1906). The British reforms subsequently attempted to increase the number of warranted courts and judges in order that litigants might be able to obtain redress without travelling long distances.

Proclamations Nos. 4 and 5 of 1900 were the earliest legislation on native courts in the North, and they had been enacted before all the Emirates were brought under control. These Proclamations were later amended by Proclamation No. 11 of 1904, under which courts might be established by the Resident (the highest political officer in a province or emirate) at selected towns, with the consent of

the Emir or Head Chief. The High Commissioner[8] of the region had to approve the choice. Each of the native courts was to consist of one or more officials appointed by the Emir with the approval of the Resident. The courts themselves had jurisdiction in civil and criminal offences involving Nigerians only. The jurisdiction could be decreased or enlarged according to the warrant establishing the court.[4] Residents and District Officers had access to the courts, and had powers to order a re-hearing, or to suspend, reduce, or modify a sentence or decision by any of these courts.

According to the provisions of Proclamations 4 and 5 of 1900, three types of British-based courts were to be established in the Northern Protectorate: a Supreme Court, a set of Cantonment Courts, and another set of Provincial Courts. All these were to reflect the system of courts then existing in Britain. Operationally, they were to apply the English Common Law, doctrine of equity, and statutes of general application in England as the fundamental law of the Protectorate (Lugard 1918:38).

The Supreme Court became the highest court of appeal in the protectorate.[9] It was to be presided over by a Chief

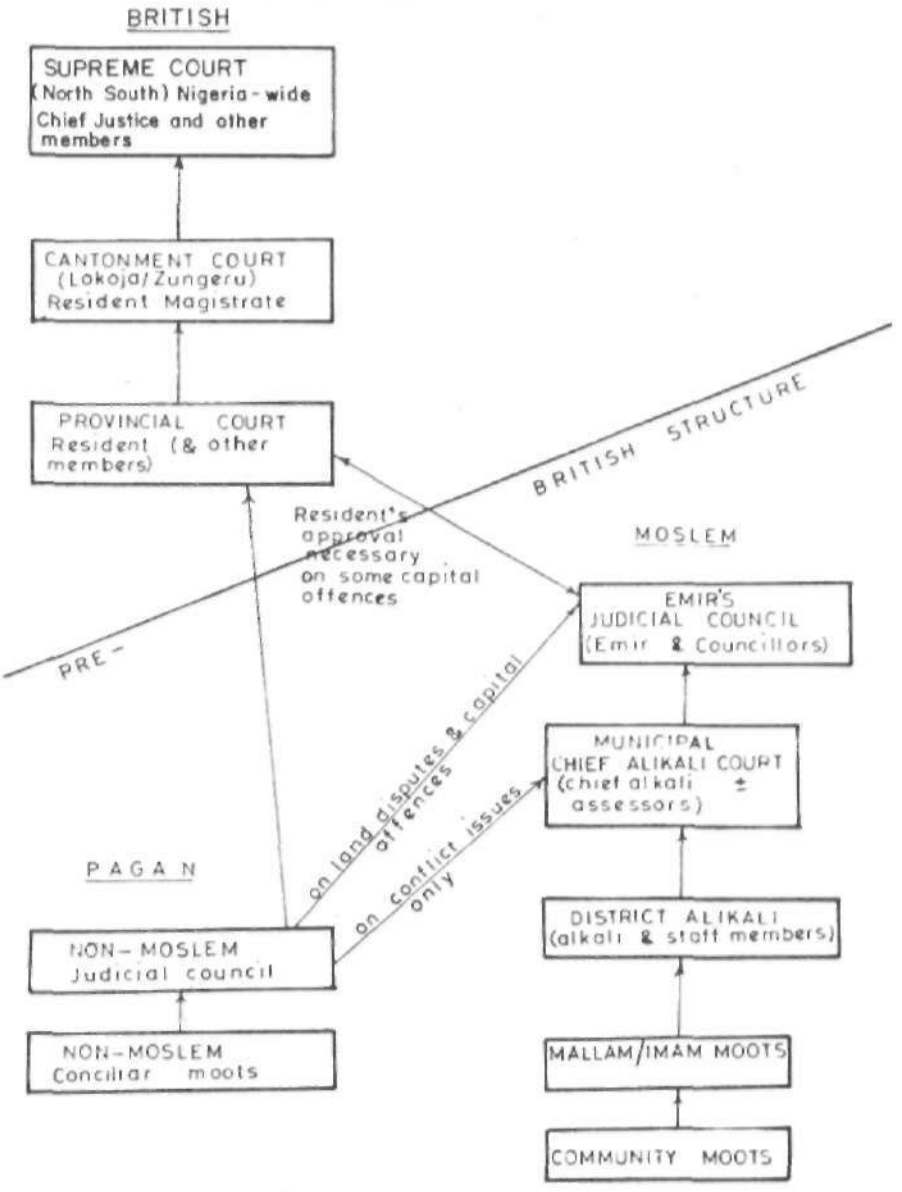
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[8]The High Commissioner of the Protectorate of Northern Nigeria was empowered by the British government to provide, inter alia, for the administration of justice (Elias 1963:113).

[9]See accompanying Charts I, II, and III for the structure of courts in the Northern Protectorate between 1900 and 1933.

CHART I

PARALLEL TIER COURT SYSTEM IN THE NORTHERN PROTECTORATE (1900-1914)*



* There was no provision for appeal and the English and native courts were run on parallel lines.

CHART II

APPEAL SYSTEM IN THE NORTHERN PROTECTORATE (1933)

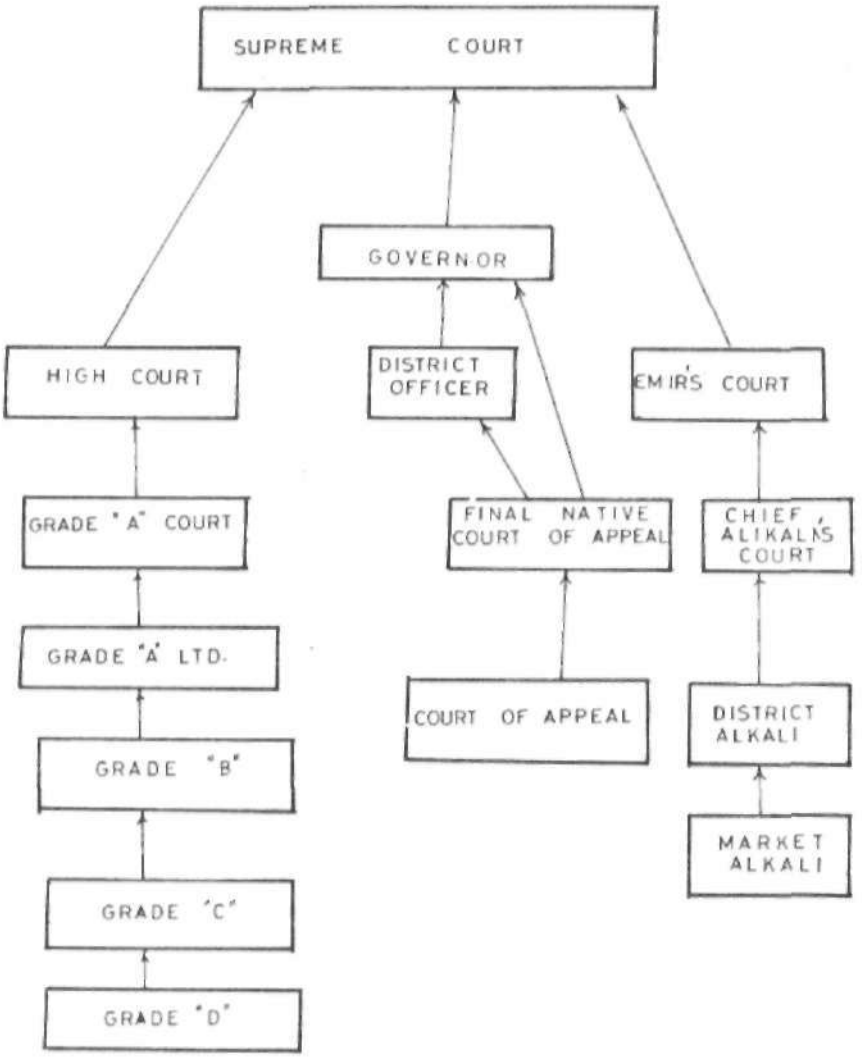
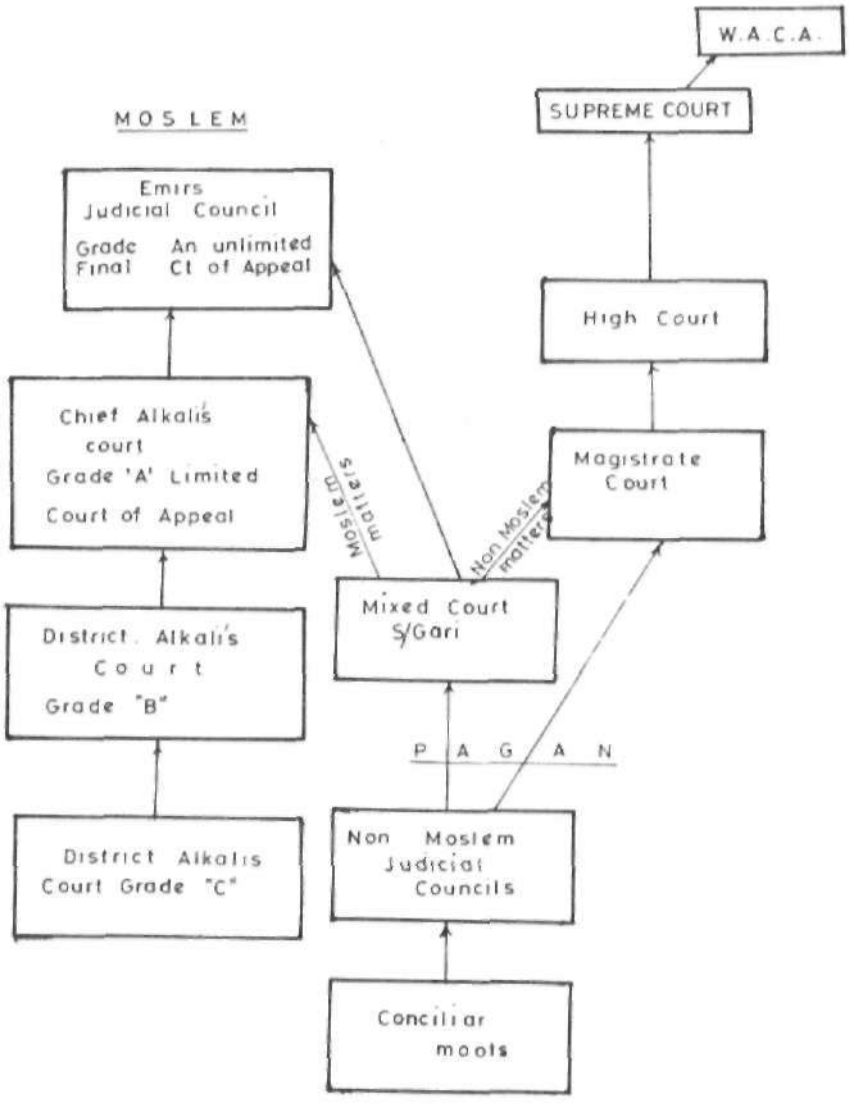


CHART III

BRITISH AND NATIVE COURTS APPEAL SYSTEM
(ACCORDING TO THE 1933-NATIVE COURTS ORDINANCE)



Justice, assisted by a number of judges appointed by the High Commissioner or, later, the Governor. The powers of this court were initially appellate and supervisory rather than original (Elias 1963:114). After the amalgamation of the Northern and Southern Protectorates in 1914, the Supreme Courts of the two regions were replaced by a single Supreme Court of Nigeria.

Below the Supreme Court were the Cantonment Courts, which were to be established at the discretion of the High Commissioner. The cantonments were essentially areas of European and non-indigenous population concentration. Each such court was to be presided over by a cantonment Magistrate appointed by and responsible to the High Commissioner. The Magistrate also served as a Commissioner and member of the Supreme Court. The Chief Justice supervised the functioning of the Cantonment Courts in Lokoja, Zungeru, and other cosmopolitan areas. Monthly lists of cases tried by these courts were sent to him for his scrutiny. The powers of these courts covered (a) all personal suits of £25 or less, (b) all suits between landlord and tenant involving not more than £25 in civil suits, and (c) criminal matters involving not more than three months' imprisonment or a fine not exceeding £25 (Elias 1963:128-9, also Cantonment Proclamation No. 7 of 1902).

The third variety, Provincial Courts, played a greater role than the other two types of courts. Each administrative Province contained one of these, and it was presided over by

the British Resident who was placed in charge of the Province in which the court was created. The major cities were chosen as the seats of these provincial courts. The Residents were occasionally assisted by Assistant Residents and District Officers and any other persons appointed by the High Commissioner (Elias 1963:132). The courts had full powers over all persons, natives and non-natives alike. Any member of the court could adjudicate cases brought before the court. The Provincial courts came under the direct supervision of the High Commissioner or Governor, to whom were submitted all monthly "cause lists." Punishments exceeding six months' imprisonment, twelve strokes of the cane, or a fine of £50 had to be ratified by the Governor or his representatives. The Governor had the authority to modify, reduce, or order a retrial of any case (Elias 1963:135-7). The Resident, being the President of the court, had the power to transfer any case from his court to the Supreme Court, with the consent of the Chief Justice. Lawyers were not allowed to appear during the proceedings of the Provincial Courts. They could, however, plead in the other two types of court.

The Proclamation also allowed for the establishment of "Native Courts," which were to administer "native law and customs" so long as these beliefs and practices were not "repugnant to good conscience, equity, natural justice, and humanity."[10] These courts also could not administer native

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[10]Laws of the Protectorate of Northern Nigeria 1910:598.

law and customs which were considered to be in conflict with any proclamation or ordinance enacted by the colonial government. According to Morris and Read (1972:131), these courts were to operate as the "cornerstone" of the colonial system of "indirect" judicial administration.

Under the native courts system, all alkali courts were lumped together with courts recently established in non-Moslem areas. Islamic law was accepted as the fundamental law in the Moslem areas, despite a slight contradiction to the effect that the English legal system was to be the fundamental law for the Protectorate.

A native court had jurisdiction over all indigenes residing within its area of jurisdiction. Indigenes employed by the colonial government were answerable only to the Provincial Courts, however.

The Native Courts Proclamation No. 5 of 1900 was repealed and replaced by the Native Courts Proclamation No. 1 of 1906. This proclamation established two systems of courts, Native Courts proper and Judicial Councils. The latter had Chiefs or Emirs as presidents. The Emirs worked in close association with mallams or other persons acting as judges or assessors. The Native Courts were essentially alkali courts headed by a Moslem judge sitting "with or without a mallamai (Moslem scholars), almajirai (Moslem scholar-students) or other persons acting either in conjunction with the alkali

as judges or sitting as assessors with such powers as the Resident may determine."[11]

Between 1908 and 1918, the Native Courts were graded according to their powers into four classes: "A," "B," "C," and "D."[12] Of these courts only the "A" class was vested with the authority to pass a sentence of death (subject to the concurrence of the Resident). Under the Native Courts Ordinance of 1918, the grade "A" courts were granted full judicial powers to be exercised in accordance with native law and customs. The grade "B" courts were to exercise judicial powers in all civil cases of up to £50, and in criminal matters punishable by not more than two years' imprisonment, or 24 lashes, or a fine of £50 or equivalent The grade "C" courts were restricted to claims not exceeding £10, and imprisonment of less than 12 months. In criminal offences corporal punishment could not surpass 24 lashes. The grade "D" courts had jurisdiction over all civil matters of £5 or less, and in criminal matters not exceeding a prison term of 3 months, or 12 lashes, or a fine of £5 or equivalent.

In Moslem areas, the Chief Alkali Courts and the Emirs' Judicial Councils were vested with grade "A" powers. Later on, they became appeal courts for cases from the district courts in each of the emirates.

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[11] Laws of the Protectorate of Northern Nigeria, 1910, pp. 597-8.

[12] See Charts II and III, pages 128 and 129.

The Native Courts were effectively used in such matters as the stopping of bush fires, felling of trees, enforcement and collection of taxes, and trying illegal collectors (Brooke 1951:11). More courts were opened, and between 1908 and 1909 they all seemed to be working satisfactorily and showing progress. People developed great confidence in them, and the monthly returns indicated a significant increase in the number of reported cases. In criminal offences, theft and assaults formed the principal charges. In civil cases, debt, matrimonial suits, land disputes, and the administration of estates stood out prominently in the lists. In Kano, the return of cases rose from 15,301 in 1909 to over 20,000 in 1910.

The Northern Nigeria Criminal Code was translated into Arabic and distributed to all native courts in 1909. New prisons were built and provided with well-trained jailers. By 1911 regular salaries were for the first time being paid to the judges. Formerly, the alkalai had no fixed renumeration and depended a great deal on the generosity of the reigning Emir or on the fees collected from their own courts. In such circumstances one could expect inefficiency in the courts due to bribery and corruption. Judgment debts and court fines were paid into the native treasury (Beit-el-Mal). District Heads were responsible for the exectuion of any court order, for the collection of any amount due, and for its

payment into the Beit-el-Mal. By this means a thorough check on both the judiciary and the executive was formalized (Brooke 1951:113).

By 1911 every district had a salaried alkali court. Records of every case tried in these courts were returned monthly to the chief native judges, alkalan alkalai, stationed in the provincial or emirate capitals.

Between 1913 and 1914, and with the amalgamation of the two Protectorates (North and South), the Northern system with some modification was adopted, and Provincial courts which had been in successful operation for over twelve years in the North were now set up in the South. The object was to effect uniformity throughout Nigeria.

In the non-Moslem Emirates recognizing a single head-chief, Native Courts were set up, but without a class of judges administering a written code of native law, as in the Moslem Emirates. Animist communities had courts with few powers and consisting of a combination of members (elders and chief with a president).

Originally, the Judicial Councils were traditionally native courts set up among non-Moslem communities, and they were comprised of elders and chiefs entrusted with limited powers to settle minor causes. The title was subsequently, retained for the court of the head chief, who was at the same time conferred with some executive powers. The jurisdiction

and powers of the Judicial Council were conferred by the warrant under which it was established. In most situations, the Judicial Councils concerned themselves more with "political" offences and quasi-judicial cases such as defaults by native administration, boundary disputes, property or land claims, questions of succession, causes between Moslem and non-Moslem, cases in which the alkali's authority was questioned, and sedition by "fanatical preachers" (Brooke 1951:17; also Native Courts Ordinance No. 5 of 1917). In dealing with non-Moslem litigants the Judicial Councils frequently modified the strict application of Moslem law by recognizing native law and custom. An alkali might sit with non-Moslem assessors when dealing with litigations involving people of diverse ethnic or religious affiliations.

The Emirs, as heads of the Judicial Councils, had at their disposal some discretionary powers to modify the Shari'a. Such powers, which are mainly of a political nature, are referred to as siyasa.[13] It was, for instahce, unknown in some emirates; in others it was known but never applied; in

[13] Schacht (1959) defines siyasa as the discretionary powers of the sovereign, the expression of the full judicial authority retained by the ruler from the beginning of Islam. Siyasa, he emphasizes, means literally "policy," and though often used with regard to criminal law it covers the whole of administrative justice dispensed by the ruler directly or through his political instruments of government, as opposed to the theoretical system of the Shari'a or religious law which is administered by the Qadi. Two systems of jurisdiction, one religious, the other temporal, were thus existing side by side.

still others, it was relied upon for decades and attempts were often made to stretch the concept beyond its local meaning (Brooke 1951:132).

In Katsina, the word was used in two senses: (a) a reduction of price in the market, and (b) mitigation of punishment or clemency. In Kano, the term was stretched to refer to "inherent authority" in connection with the Emir's control over land. The doctrine was also used to effect the arrest of notorious thieves or prostitutes during an epidemic of highway robbery, drought, burglary, or any other natural/unusual disaster. The Emirs of Kano[14] greatly relied on this doctrine for most emergencies requiring the re-establishment of order (Hausa: gyaran mulki). It was particularly used in situations requiring additional punishment, where the penalty was inadequate (e.g., the Alhakin Allah--God's Punishment--which meant one year's imprisonment and one hundred lashes when a serious presumption, but not full proof was established in homicide cases).

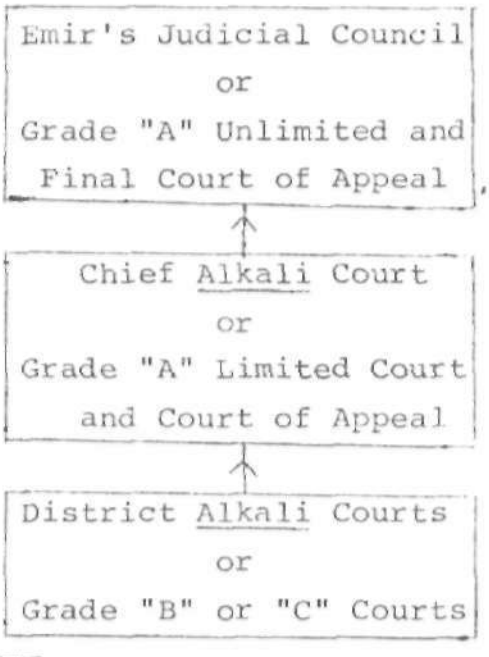
Lord Lugard expressed dissatisfaction with the working of the Provincial Courts. So also did a growing number of lawyers and educated elites who were being denied audience by statute both in the native and provincial courts. Hence,

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[14]The doctrine of siyasa was extensively used by the deposed Emir of Kano, Alhaji Muhammadu Sanusi (1954-1963). See, for example, Northern Nigeria Law Report, 1964, for samples of his decisions which were reversed by the Northern Regional High Court.

The Native Courts Ordinance No. 44 (of 1933) was introduced in 1933. This ordinance effected many improvements in the provisions of the old ordinance, which it repealed. The replacement of the Provincial Court system and the extension of the Native Court appeal system in the 1933 Ordinance can be regarded as definitive steps toward integrating Customary, Islamic, and English (or General) courts.[15]

The Ordinance introduced a provision that for every native court there should be a court of appeal suitable for that particular native court. Thus, for Grade "A" courts the only suitable appeal was the High Court. In non-Moslem areas, the District Officer acted as a final court of appeal. A typical appeal in a Northern emirate, according to the new Ordinance, ran as follows:



[15] See Chart III, page 129.

> Appeal from District Alkali Courts and Grade "B" or "C" courts lay to the Chief Alkali Court or Grade "A" Limited Court at the Emirate (Provincial) Capital. A further appeal from the latter courts to the Emir's Judicial Council or Grade "A" Unlimited Court was considered final in the system. But in certain cases, appeal from the Chief Alkali, sitting at first instance, would lie to the Supreme Court, as would appeal from the Emir's Council. Appeal from the Emir's original jurisdiction lay to the Supreme Court, whereas cases from his appellate jurisdiction were regularly transferred to the District Officer or Resident.

The Provincial Court system was replaced by the High Court of the Protectorate and the Magistrates' Courts. The High Court assumed almost all the limited powers of the Supreme Court. The High Court and the Magistrates' Court had, with the Native Court, concurrent jurisdiction to deal with all matters. They were provided with powers of transfer for any injustice against individuals who were not members of the class for whom the courts were constituted.

The High Court and Magistrates' Courts could try any case involving natives, non-natives, or persons subject to the jurisdiction of a Native Court. The High Court was readily accessible to individuals wishing to appeal from Native Courts. The Magistrates' Courts were also designated as appellate courts for Native Courts with a wide power to transfer cases. The Ordinance further stipulated that counsel should not appear in appeals from Native Courts, except in land issues where the value of the property in dispute was £200 or more.

The 1933 West African Court of Appeal Ordinance (No.

47 of 1933; cap. 229, Laws of Nigeria, 1948) provided a further channel of appeal from the High Court and Supreme Court. The court's decision in the classical case of Tsofo Gubba v. Gwandu Native Authority, which caused so much consternation in the Moslem North in 1947, was given in a capital case heard on appeal under this Ordinance.

The judicial reforms of 1945 did not directly affect the Native Courts. The reforms mainly repealed the Protectorate Courts Ordinance, and the High Court became merged with the Supreme Court. Separate Magistrates' Courts were also established throughout Nigeria.

Following the 1947 decision, in the celebrated case of Tsofo Gubba v. Gwandu Native Authority,[16] given on appeal in the West African Court of Appeal, a commission of inquiry headed by Justice J. N. Brooke was instituted in 1951. Among other things, the Commission recommended the use of the term

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[16] In this case (1947, W.A.C.A. 141) the accused had been convicted of deliberate homicide by the Emir of Gwandu's Judicial Council in full accordance with Moslem law, and sentenced to death. Upon appeal, the Supreme Court upheld the lower court's decision, but maintained that had the case been tried under the Criminal Code (of the Protectorate, 1916) on the same facts and offence, the accused would have only been convicted of manslaughter. Statutorily, the Emir's court had the power to administer Islamic law and custom and to award whatever punishment was laid down thereby, although subject to the usual repugnancy clause.

Upon further appeal, the West African Court of Appeal ruled that the Emir's court ought to have applied the Criminal Code. The W.A.C.A. held that the conviction was wrong in law since, from the facts of the case, the offence amounted to no more than manslaughter. The conviction was therefore quashed and the sentence set aside.

"customary" courts and "customary" law to replace "native." This was accepted in the Eastern and Western Regions of Nigeria, but not in the Northern Region. The Commission also recommended that the law to be administered in a particular case should be that which is applicable and appropriate to a particular cause as an alternative to that prevailing in the area of jurisdiction. They also suggested the simplification and modification of persons subject to native courts based upon their styles of life. It was further suggested that colonial administrative officers should cease to constitute courts of appeal, and that the High Court should no longer claim supervisory powers over customary courts (Brooke 1951:182-190).

As a result of Brooke's report, the Executive Council of Northern Nigeria enacted the Native Courts Law and the Moslem Court of Appeal Law in 1956. The Native Courts Law, of 1956[17] defined persons subject to the jurisdiction of the native courts, set out gradings and powers, venues, law to be administered, and the powers of review, inspection, and appeals (Keay and Richardson 1966:54-56).

The establishment of a Moslem Court of Appeal as a bridge court was recommended by Justice Brooke, and the proposal found great support from Moslem chiefs and judges as a means of shielding the Shari'a from the encroachment of the English legal systems. The Native Courts Law 1956 provided

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[17]Northern Region, No. 6 of 1956.

that appeals from Grade "A" Unlimited and "A" Limited courts, and from any other court for which no native court of appeal was provided, lay to the Moslem Court of Appeal in cases governed by Moslem personal law. According to the Moslem Court of Appeal Law, 1956,[18] the court had powers to hear appeals as defined above. It had no standing memberships. The Governor had powers to appoint a panel of alkalai and assessors, upon consultation with Moslem chiefs and jurists. At the end of a session, the alkalai and assessors became functus officio. Appeal from the decision of the Moslem Court of Appeal lay to the High Court; but the latter had no supervisory jurisdiction over the Moslem Court of Appeal. The Moslem Court of Appeal did not function satisfactorily, however, because it lacked a standing membership. Besides, since it continued to be subject to further appeal to the High Court, it could not wholly allay Moslem suspicions,[19]

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[18] Northern Region, No. 10 of 1956.

[19] Such suspicions were greatly reinforced in the example of Dominic Ogoja v. Adamawa Native Authority (1959 N.R.L.N.R. 35). In this case, a Christian was presented in a Moslem court for fornication (zinna) with a Moslem lady. Moslem Law should have strictly applied. But Moslem law itself exempted a non-Moslem from trial in a Moslem court for such offence without his explicit consent. The accused was tried and convicted. He appealed to the Moslem Court of Appeal, which upheld the conviction. On further appeal to High Court, the latter held that the Moslem Court of Appeal wrongly accepted jurisdiction in that Moslem Law by its own provisions withdrew itself from application in this case (Keay and Richardson 1966:58; also see Okolie v. Ibo 1958, N.R.N.L.R. 89).

particularly as High Court decisions were binding upon it (Keay and Richardson 1966:57-58).

The Brooke Commission Report thus gave rise to some significant changes within the Northern judicial system. However, far-reaching legal and judicial reforms had to await further changes in 1959 and later. Particularly important were a number of changes which followed the report of a Panel of Jurists, which was established in 1958. It was given the task of "modernizing" the Region's judicial system through the reconciliation of Moslem law and other legal systems. The Panel recommended certain key judicial changes, which were accepted and implemented virtually in toto by the then Northern Regional government. Among these was the suggestion that the personal and family law of every community should remain intact. Contract and tort cases were to continue to be governed by the law chosen as binding between litigant parties. The Panel also recommended the introduction of an opting out clause whereby non-Moslems could have, for the first time, the option of being tried in Moslem or non-Moslem courts.

The commission further recommended a system of training[20] for teaching the new Codes to Native Court Staff. In order to standardize the renumeration of the lower court staff, the Panel also recommended a minimum of N378.00 (ca.

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[20]For details on the training of native court personnel, see Richardson (1961).

$570) per annum for a trained alkali. Also, as a result of the Panel's work, a Judicial Service Commission was established for the Region. This body had the task of approving appointments to the higher-grade native courts, and delegating the supervision of native courts to a specialized body under the Ministry of Justice and controlled by the Commissioner of Native Courts (Keay and Richardson 1966:75-80).

In order to resolve some of the complications in the organization of appeals from Native Courts, the Panel recommended the establishment of a Provincial Court in each province. Such a court was to consist of either an alkali or a president and two members. The Panel further recommended the abolishing of the Moslem Court of Appeal and replacing it with the Shari'a Court of Appeal.[21] This was to be an appellate court with a standing membership and was to consist of a Grand Kadi, a Deputy Grand Kadi, and two judges. The court was to hear and terminate appeals only in cases connected with Moslem civil personal law. In homicide cases, there was to be an automatic appeal from a Grade "A" court to the High Court, and in some cases to the Court of Resolution[22] at Kaduna. The latter was initially designed to have jurisdiction

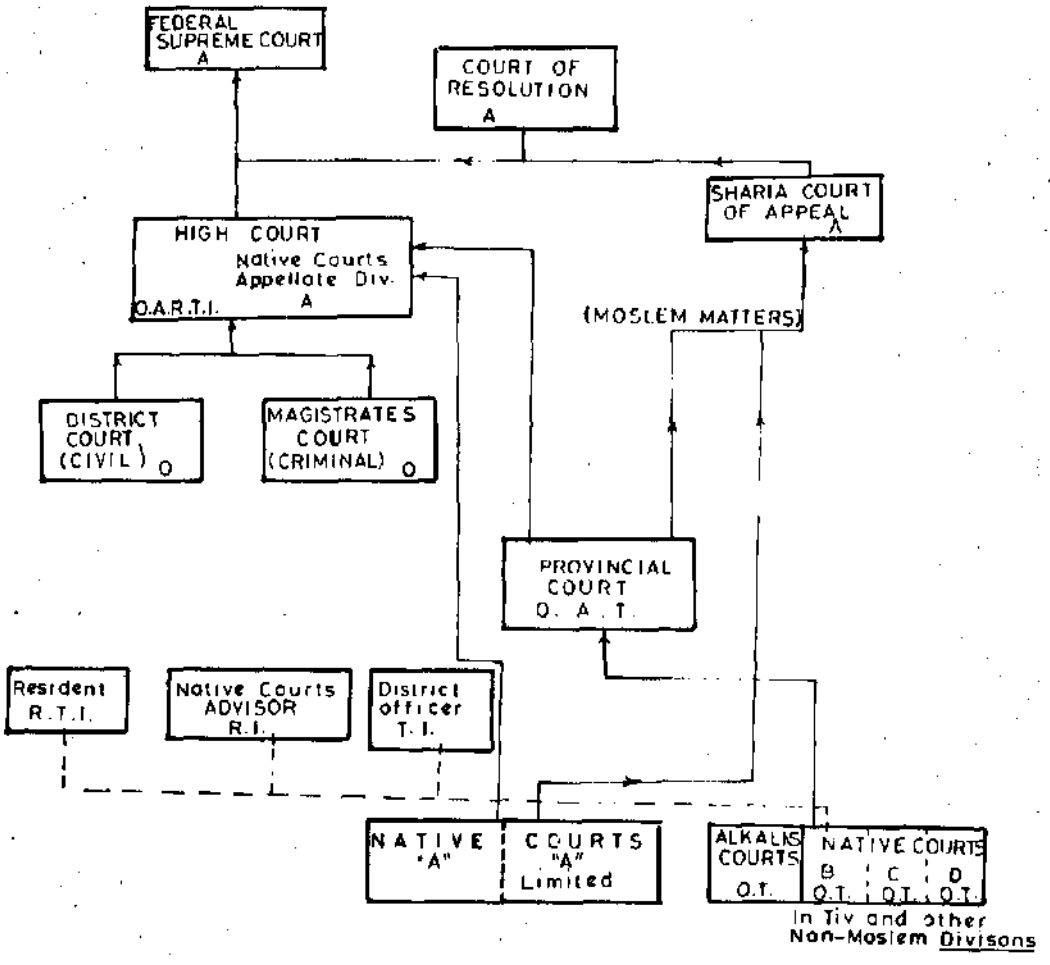
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[21]See Charts IV, V, and VI for the structure of Courts in Northern Nigeria from 1960 to the present, on pgs.145, 146, 147.

[22]Despite its establishment in 1960, the Court of Resolution for the Northern States has yet to hear any cases. See Charts IV, V, and VI, on pgs. 145, 146, and 147.

CHART IV

JUDICIAL HIERARCHY IN NORTHERN NIGERIA
1960–1967*



* Adoped from Allott (1962: 213)

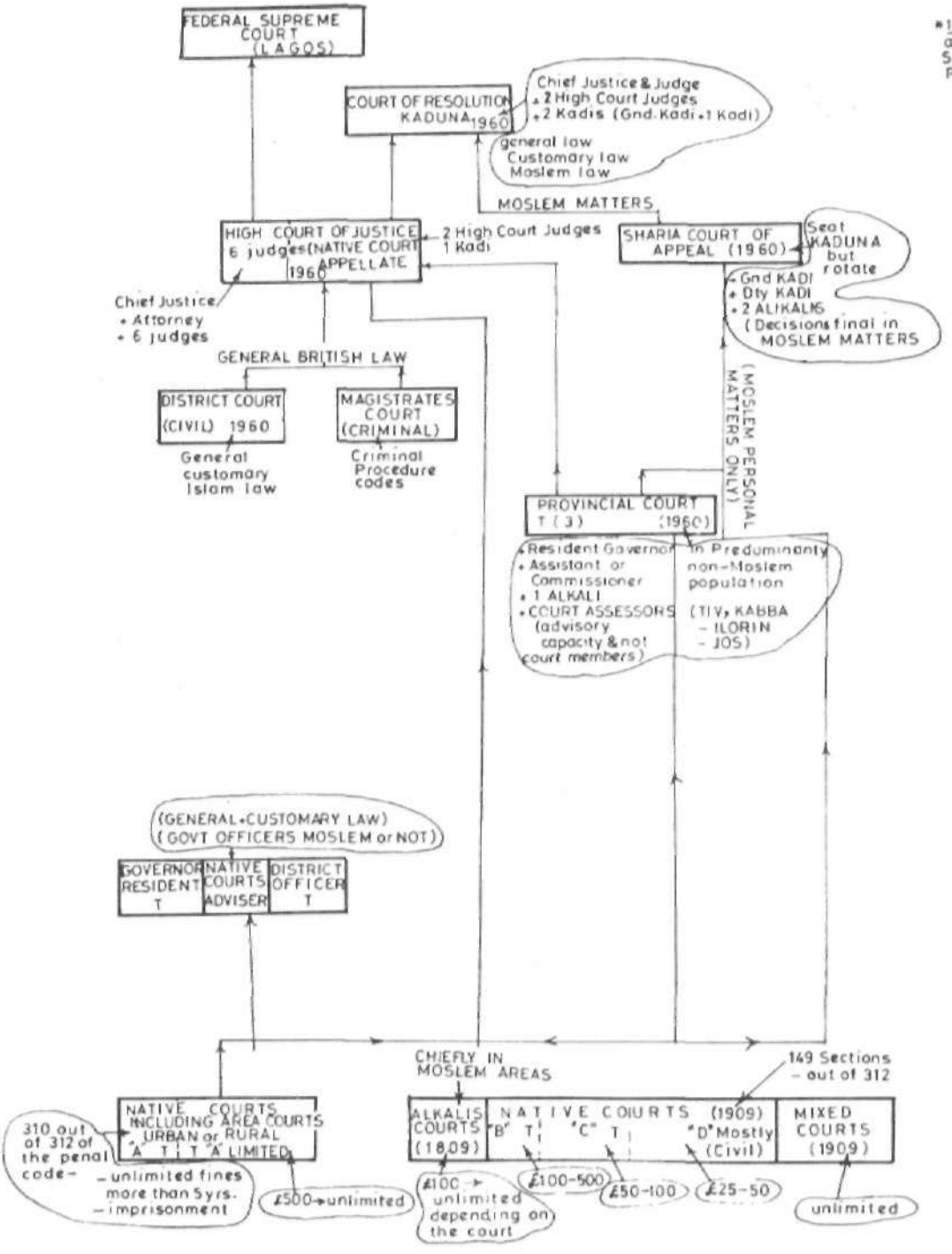
LEGEND

O = Original Jurisdiction
A = Appellate "
R = Revisory Jurisdiction
T = Power of Transfer
I = Power of Inspection
C = Power of Confirmation

——— Channel of Appeal
Channel of revisory
– – – – jurisdiction
——→ direction of appeal

CHART V

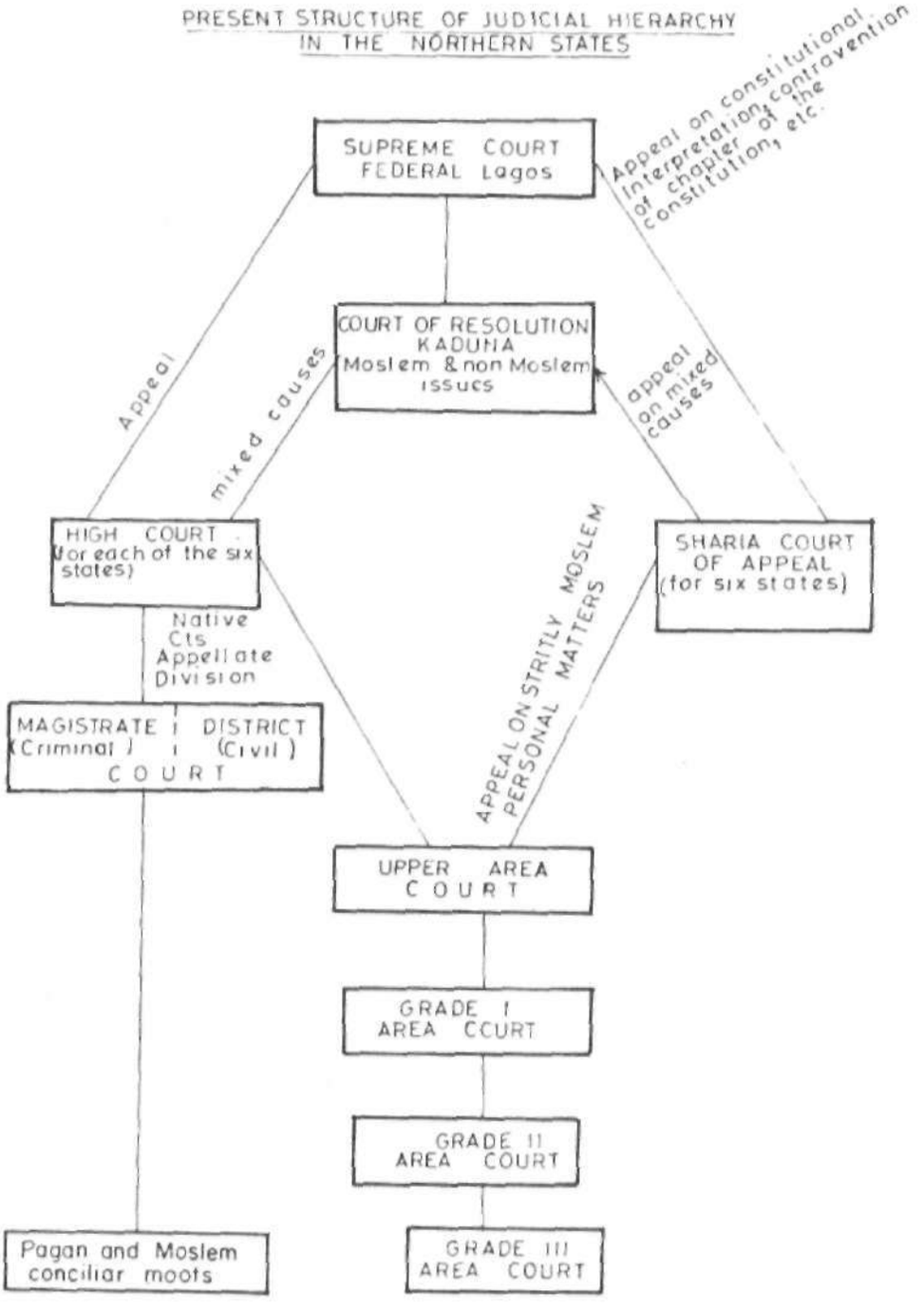
COURT SYSTEM IN NORTHERN STATES OF NIGERIA
1804 – 1969



*1960 – adoption from the Sudanese, Libyan & Pakistani system

CHART VI

PRESENT STRUCTURE OF JUDICIAL HIERARCHY IN THE NORTHERN STATES



over disputes arising between the High Court and the Shari'a Court of Appeal, that is, between Moslem and non-Moslem litigants. Other appeals from Grade "A" and "A" Limited courts were to be channeled to a Native Courts Appellate Division of the High court, comprising two High Court judges and one Shari'a court judge.[23] All three were to have an equal voice.

For the heterogeneous urban areas, the Panel recommended the establishment of Grade "A" Limited courts in Kano, Kaduna, Makurdi, Jos, and Zaria, to replace the existing Mixed courts.[24]

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[23]See Charts IV, V, and VI, pp. 145, 146, and 147.

[24]The pluralistic character of some township or suburban settlements (Sabongari) and the multiplicity of conflicting laws among these stranger communities necessitated the establishment of Mixed courts. The first courts were constituted in Kano and Kaduna in 1932. These courts adjudicated without any statutory authority; and in order to avoid partiality, the president of each court was always a non-Nigerian, who was assisted by Hausa, Ibo, and Yoruba assessors or translators with respect to local laws and customs.

The Mixed courts administered the traditional laws of the litigants, as ascertained as a matter of evidence (Elias 1954:134-135). Islamic Law was also regularly applied when one of the parties happened to be a Moslem. The court had the powers of a Grade "B" court in civil cases and Grade "C" court in criminal matters. As a special court, the Mixed court employed simple procedures and a speedy method of enforcing judgments. Compromise was the most frequent device for resolving conflicts. The law regularly applied was unwritten and uncoded. Yet the court proved a great success in handling inter-ethnic litigations in a very practical manner. Above all, the court successfully relieved the Alkali courts and the Magistrates' courts of several cases, despite the discrediting remark that the Mixed court operated on "no customary law and no known principles" (Brooke 1941:69).

To return to the problem of homicide, it may be noted that this was a major area of conflict between the Shari'a and General law ever since British control was established. Between 1934 and 1957, there were about sixteen Grade "A" Unlimited courts in the Region, and each could issue death sentences. So long as there was a dual system of Native and Protectorate courts, no problems of conflict arose;[25] but with the statutory establishment of an appeal channel from Grade "A" Court to the High (or after 1943, Supreme) Court, High Court judges--who were essentially trained in English legal principles--could hear appeals in cases decided under Moslem law. As a result, there were several cases in which the High Court, acting on the advice of assessors, applied the rules of Shari'a and ordered retrial or reference back for completion of the necessary procedure on the grounds of repugnancy. In Babayi Wandie v. Bornu Native Authority,[26] for example, a retrial was ordered because of the failure of the lower court to take oaths from the relatives of the deceased.

The main conflict area was in determining the appellate court's duty in a situation where a person was sentenced

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[25]Before 1933, the only check on Native court homicide jurisdiction had been the administrative officer's powers of transfer and reviews, and the Governor's prerogative of mercy (cf. Lugard 1918:281).

[26](1936) 13 N.L.R. 18. Also see Katsina Native Authority v. Abdullahi Kogo, (1930) 14 N.L.R. 49; and Guri and Birniwa v. Hadejia Native Authority, (1959) 4 F.S.C. 44.

to death for culpable homicide, in full compliance with the Shari'a, whereas the Criminal Code (sanctioned by the High Court) could only allow for a sentence of manslaughter. Such conflicts generally arose when there was an element of provocation, and Islamic law does not recognize provocation as a mitigating circumstance.

The conflict between the two legal systems regarding homicide thus needed resolution, for the situation allowed a murderer to be tried according to whether or not he committed the offence in the area of jurisdiction of a Grade "A" court. The report from the Panel of Judges in 1958 recommended corrective measures. As a result a new Penal Code[27] was enacted in 1959 which provided a single homicide law for all persons, and it was one which could be administered by all courts having jurisdiction over homicide cases.

Both the Penal Code and a companion enactment, the Criminal Procedure Code,[28] presented several ambiguities and difficulties at the start (cf. Oloyede 1972:183-186, and Richardson and William 1963). On the whole, however, the

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[27]The Penal Code Law (Northern Region), 1959, No. 18 of 1959; and the Criminal Procedure Code Law (Northern Region) No. 11 of 1960. (Also see N.R. No. 18 of 1959, now cap. 89 of the Laws of Northern Nigeria, 1963, which has been translated into Hausa.)

[28]This new code originated from the Criminal Code which first applied throughout the two (Southern and Northern) Protectorates of Nigeria in 1916. The Criminal Code was first introduced in 1904 and was based on the Queensland Criminal Code of 1899. Its provisions, however, have their origin in the English Common Law.

reform measures had the advantage of forcing underground the administration of criminal law in Moslem and Customary courts. They also minimized part of the conflicts stemming from the multiplicity of laws and judicial systems.

It is worth noting that the Criminal Procedure Code differs significantly from the Criminal Procedure Act of Nigeria.[29] Of great interest is that it was to apply specifically to all High Courts and Magistrates' Courts in the Northern States. Only some sections of it were to "bind" Native Courts, which on the whole were to be "guided" only by the remaining sections of the Code.

The substantive accommodation, in significant respects, of the Penal Code to the conceptions of the Shari'a convinced some scholars (e.g., Price 1961) that the net effect of the new reforms was particularly one-sided and retrograde.[30] Along with the indiscriminate use of a ruler's discretionary powers (siyasa), many legal experts felt that a meaningful integration could hardly be achieved between the Moslem and Customary courts and the newly introduced English-based system of law. The reforms never once broached the issue of the integration of executive, legislative, and judicial functions embodied in the status of the Emir or Native Authority. The

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[29]Cap. 43 of 1958, Laws of the Federation of Nigeria and Lagos.

[30]On the other hand, Anderson (1959) and others viewed the reform measures as a "new start" and a "major advance."

Regional Government plainly indicated that it would not allow any judicial reforms to interfere with the key traditional influence and control of the Native Authorities. The Native Courts were to continue as part of the local administration, with the alkalai as its employees, serving the people of the Native Authority.[31]

These reform measures and to some extent the earlier ones clearly seem to have enhanced the status of the Shari'a. Apparently in an attempt to effect a balance, the new military government of Nigeria introduced in 1967 an Edict with the aim of integrating the various legal systems within the region. In the next section, I shall briefly examine these reform measures and assess their contribution to the overall harmonization of the multiple legal systems in the six Northern States.

4.2.2 Post-Independence Changes

In order to correct the flaws of the previous legal and judicial reforms some major enactments were made in the Northern States between 1967 and 1968. The promulgation of an Area Courts Edict[32] by each of the military governments

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[31] See Nigeria, Northern. House of Assembly. Debates (1960a), and Whitaker (1970:229-230).

[32] See The Area Courts Edict, 1967 (Kwara State), No. 2 of 1967; The Area Courts Edict, 1967 (Kano State), No. 2 of 1967; The Area Courts Edict, 1967 (North-Central State), No. 1 of 1968; The Area Courts Edict, 1967 (North-Western State), No. 4 of 1968; The Area Courts Edict, 1968 (North-Eastern State), No. 38 of 1968; and The Area Courts Edict of 1968 (Benue-Plateau State), No. 29 of 1968.

of the six Northern States sought to restructure the Customary Courts.[33] Each Edict, which came into full operation in April, 1968, instantly repealed the Native Courts Law of 1956 and abolished all Native Courts, including Provincial, Alkali, and Area Courts. In their stead, the Edict provided for the establishment of customary courts styled as Area Courts.[34] The judges, including the alkalai and other members of such courts, have henceforth been recognized as part of the Public Service structure of each State.

The authority for establishing an Area Court is vested in the person of the Chief Justice rather than the Provincial Commissioner. The Emirs' Judicial Councils and Chiefs' Courts have also been abolished under the 1967 Edict. Matters related to Moslem personal law can be heard by any member of an Area Court, trained in Islamic law, and sitting alone. An Area Court may sit with or without assessors. The area judge,[35] sitting alone or sitting with one or more members, consitutes an Area Court. All Area Court judges and other court members are to be appointed, dismissed, or suspended by the State Public Service Commissions.

Under the present reform any person, Nigerian or not,

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[33]Customary Courts are here used to refer to courts established under Native Courts Law or Area Courts Edicts.

[34]See Chart VI, p. 147.

[35]An Area Court judge can either be an alkali or another individual learned in the Shari'a or the traditional law of the area of jurisdiction of that court (see Obilade 1969:31).

may consent to be heard in an Area Court. At the same time, such a person may at any point in the proceedings, before final verdict, decline to be tried by a given Area Court.[36] Such an individual must then apply to the High Court and notify the Area Court accordingly.

The new reforms established four grades of Area Courts: Upper Area Courts, and Area Courts Grade I, II, and III.[37] The criminal and civil jurisdiction of each court corresponds in general to its grade. All the Area Courts have unrestricted jurisdiction in matrimonial causes under traditional law and custom. Upper Area Courts, just like the abolished Native Courts Grade "A" and "A" Limited, have unlimited jurisdiction in civil causes involving debt or damages, inheritance, and land cases. In criminal matters, an Area Court has jurisdiction over any offence under the Penal Code mentioned in the seventh column of Appendix A of the Criminal Procedure Code.[38] Authority over criminal jurisdiction is more restricted in the Area Courts than among the former Native Courts. An Upper Area Court, quite unlike the former Emir's Judicial Council or Grade "A" Court, does not have jurisdiction in homicide cases, however.

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[36]The opting out clause has been greatly liberalized under these Military Court Reforms.

[37]See Chart VI, p. 147.

[38]Schedule to cap. 30, Laws of Northern Nigeria, 1963. Some of these offences include theft, burglary, and homicide.

Appeals from Area Court Grade I, II, or III lie to the Upper Area Court having jurisdiction in the locality in which the Area Court is situated. From an Upper Area Court, appeals lie either to the Shari'a Court of Appeal, in Moslem personal matters, or to the High Court in all causes.[39]

Trained Inspectors are to supervise the operations of Area Courts. The powers of an Inspector are basically similar to those of an Inspector under the repealed Native Courts Law, except that an Inspector now has virtually no more power for reviewing cases.[40]

Just as in the Native Courts Law 1956, legal practitioners are prohibited from pleading before any Area Court. Magistrates' Courts have jurisdiction mainly on criminal causes, and District Courts on civil issues involving non-Moslems or persons with mixed causes. Appeals from both courts lie to the High Court.[41]

The post-1967 military reforms also introduced new rules governing the choice of law as between different ethnic laws in the Northern States. Furthermore, all land causes, whether mixed[42] or not, are now to be governed by the native

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[39]Area Courts Edict, 1968 (Benue-Plateau State), No. 4 of 1968, s. 54.

[40]On the powers of Inspectors, see Keay and Richardson (1966:283).

[41]See Chart VI, p. 147.

[42]"Mixed Causes" refers to a cause where two or more of the parties are ordinarily subject to different systems of native law and custom.

law and custom in force in relation to land where the land is situated, that is, the lex situs.[43] Under the former Native Courts Law, mixed land causes were governed by lex situs, whereas, unmixed land causes were governed by the native law and custom prevailing in the area of jurisdiction of the court or the law binding between parties.[44]

4.3 Native Authority Statutes

Since 1940, Native Administrations in the North have been empowered to initiate local statutes or declarations. Such declarations have the force of law within a Native Authority's area of jurisdiction. In addition, they can override any other local code, Islamic or Customary, but they cannot override a law or decree initiated by a Nigerian legislative body, military authority, or General law court.[45]

Native Authority statutes specifically govern civil matters such as marriage, divorce, bridewealth, sanitation, forestry, and public works. Based on the powers vested in them by the Native Authority Law of 1954,[46] several local

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[43] See Obilade (1969:39-40).

[44] See Native Courts Law 1956, s. 20 (1).

[45] As an exception, the Matrimonial Causes Decree 1970 (No. 10 of 1970), does not affect Customary or Islamic laws of marriage and divorce, as outlined in some local statutes.

[46] N.R. No. 4 of 1954. The then Governor of the Region had to confirm every declaration by a Native Authority to ensure that no provision was repugnant to natural justice, etc.

administrations[47] have sought, for example, to define and standardize marriage payments by the bridegroom, the minimum age for girls, parental rights over a girl's consent, divorce procedure, and leviritic marriage (Keay and Richardson 1966: 268). In matrimonial matters, local statutes generally reflect the guiding values and practices of the dominant ethnic group within a Native Authority's jurisdiction.

4.4 Discussion and Concluding Remarks

The General law, as applied in Northern Nigeria, derives largely from English Common law. Although it has been modified by Nigerian enactments and legislations, the General law is still clearly distinct from both Islamic and Customary legal traditions. Being administered mainly in the higher courts, it differs from both Moslem and ethnic laws in a number of salient characteristics. Initially, it was designed for litigations involving distinct classes of people, notably foreigners and indigenes in the service of the colonial administration. Gradually however, it has become the "national" law, towering over the other two forms of legal levels.

Successive conquests of Hausaland and what later became the Northern States undoubtedly promoted and sustained

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[47] See, for example, Native Authority (Declaration of Tiv Native Marriage Law and Custom) Order, 1955 (N.R.L.N. 149 of 1955), Native Authority (Declaration of Idoma Native Marriage Law and Custom) Order, 1959 (N.A.L.N. 63 of 1959), and Native Authority (Declaration of Biu Native Marriage Law and Custom) Order, 1964 (N.A.L.N. 9 of 1964).

legal pluralism and internal conflict of laws in the region. In succession, new conquering groups, first Moslems and then the British, have attempted to supplant pre-existing victors as the main source of legislative and judicial authority, and thereby impose their own laws and scales of values. The complete transformation of an entire socio-legal system, however, has always been impossible to achieve anywhere. The task is bound to be even harder where a vast territory like Northern Nigeria, containing so many ethnic groups with fairly different political and judicial institutions is involved. Consequently, the Moslem jihad leaders of the 19th century, with their strict policy of rule according to the Shari'a, had to recognize the legal traditions of several non-Moslem communities living as dhimmis among them. Similarly, the British could not entirely supplant the Islamic and Customary legal traditions of the peoples they conquered. Although the British sought to operate under a policy of Indirect Rule, it is quite obvious that they also made some bold attempts to suppress both Moslem and non-Moslem beliefs and practices which appeared to contradict the English sense of justice and morality. It is, for example, clear that between 1903 and 1959, the colonial administration significantly altered native fiscal and constitutional laws, reversed rules of succession in certain emirates, whittled the powers of native judges, revoked appointments of court judges, and

in 1920 alone dismissed more than 80 alkalai and chiefs all over Hausaland. The colonial administration also abrogated Moslem hadd punishments like mutilation for theft and death for fornication, introduced legislations against juju, witchcraft, and trials by ordeal, and commuted numerous sentences passed by the Moslem courts.

The type of "social law" recounted by Nadel in the case of the Nupe seems to hold true generally for the political and judicial conditions in pre-colonial and post-colonial Northern Nigeria. Using the Nupe as an example, Nadel (1942) maintained that the judicial problems among these people were created as a result of the imposition of the British legal system upon a system that was already pluralistic and internally contradictory. He observed that although the General law had gradually gained supremacy over the other legal traditions in the area, it had not completely eliminated the problems which commonly stem from the co-existence of multiple legal levels:

> We may formulate it almost as a social law that an expanding system of jurisdiction, once it begins to supersede another weaker system of jurisdiction, is bound to expand further . . . . But inevitable as is this development so are the conflicts inherent in it (Nadel 1942:168).

In other words, if the pre-existing legal systems had been completely suppressed, especially during the British occupation, there would probably be no legal pluralism and conflict, or at least, the conflictual situations would not have been

as acute as they now are.

As it happened, some of the colonial legislations aimed at eliminating certain inconsistencies in the plural legal system only served to magnify them. For example, the judicial reforms beginning with the Brooke Commission and terminating with the 1959-1960 enactments appeared to favor the Shari'a, while still making substantial concessions to both Customary and General legal systems. The introduction of the Shari'a Court of Appeal, the restitution of certain hadd punishments, and the inclusion of uniform rules of criminal procedure for all classes of persons have certainly enhanced the positions of both Moslem and Customary laws. Even the inconsistencies in criminal matters, which were expected to disappear with the promulgation of the Penal Code and the Criminal Procedure Code, are still apparent. The Codes have succeeded only in forcing underground some criminal law determinations, since many lower tribunals continue to decide criminal offences just as they had been doing before the introduction of the new Codes. It is important, however, to note that English legal conceptions have made significant inroads into Moslem and non-Moslem societies, just as the legal ideology and practices of many non-Moslems have become contaminated by Islamic law.

The post-1967 enactments under the military regime can therefore be seen as more radical attempts to cure some

of the major defects of the judiciary in the Northern States. These new reforms clearly erode the privileged status of the Shari'a in order to achieve wider uniformity and centralization of laws and courts. Yet, despite these efforts to centralize and secularize the judicial and legal systems, conflicts of interest between the differing realms of law still persist within the Northern States. In the next chapter I shall examine the nature and direction of the conflict-of-law situations that have arisen as a result of the plurality of these legal institutions.

Chapter Five

CONFLICTUAL INTERACTION OF DIFFERING REALMS OF LAW

Using a variety of decided cases, I shall now illustrate the degree of conflictual interaction between the three judicial systems that are being enforced concurrently within the Northern States of Nigeria. A majority of the cases cited in this chapter are of a mixed-cause nature, and have all been conveniently classified under specific clusters or situations of conflict.

Every plural legal system usually exhibits multiple realms of internal conflict of interests involving its autonomous or semi-autonomous juridical units. In Northern Nigeria about eight principal conflict-of-law situations can be isolated analytically:

1. Customary law v. Customary law (Inter-Customary Conflict);
2. Customary law v. Islamic law;
3. Customary law v. General law;
4. Islamic law v. General law;
5. State law v. Federal law;
6. State law v. State law;
7. Islamic law v. Native Authority Statute; and

8. Customary law v. Native Authority Statute.

For the purpose of this essay, I shall confine my discussion to the first four of these realms of conflict.

5.1 Inter-Customary Conflict of Laws

The ethnically heterogeneous composition of the Northern States immediately suggests that there will be friction and incompatibility between the legal systems of their differing social constituents. A large proportion of conflict cases involving different bodies of customary law have been civil in nature, notably personal matters relating to land, inheritance, contract, and marriage. Inter-customary legal conflict essentially holds between native litigants claiming primary loyalty to two or more ethnic groups.

The question of friction between different ethnic laws has resulted largely from the disappearance of rigid geographical barriers between contiguous social units and the "corresponding growth of mobility among the population" (Park 1972:116). Where all those who reside in a particular locality belong to the same ethnic group, a large proportion of the litigations arising in the area will ultimately be resolved according to ethnic law and custom. Today, such situations are no longer typical. Members of other ethnic societies have become dispersed and relatively more concentrated in various urban and semi-urban centers of the North.

When a member of one ethnic group becomes involved in a legal action in his native community, assuming that Islamic law, General law, or local statute does not apply, the case has to be decided under the local law of the area (what Park [1972:116] calls the "personal law" of the man involved). Where members of the same ethnic group become involved in a legal action, the nature of transaction and the express consent of either party as to the law which should govern the case greatly count. The case of Okolie v. Ibo,[1] for example, is a suit between two Ibos residing in Jos. A breach of contract was involved in the supply of petrol to the filling station of one by the other, who was a transporter. On further appeal, the High Court held that the Jos Moslem Court, which tried the case in the first instance, wrongly accepted jurisdiction in that the Shari'a by its own provisions withdrew itself from application in this case. Upon considering "their respective occupations and the nature of the transaction between them and the commodity in which they dealt," the High Court concluded that the principles of General law[2] should govern the case to the exclusion of either Ibo law or Islamic law.

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[1] (1958) N.R.N.L.R. 89. Also see Dominic Ogoja v. Adamawa Native Authority, (1959) N.R.L.N.R. 35.

[2] A prior agreement to be bound by General law will often have been made between the parties to a litigation; but that need not always be the case, as in the famous decision of Justice Graham in the suit Green v. Owo, (1936) 13 N.L.R. 43.

In the Northern States, the provisions for "mixed" causes or actions involving non-Moslems of differing ethnic groups are contained in sections 20 and 21 of the Native Courts Law, 1956. For such conflict cases, section 20 provides that a native court should administer either the native law and custom prevailing in the area of the court or the law binding between the parties.[3]

In principle, the effective jurisdiction of customary tribunals stops dead with litigations involving local native residents. In practice, however, some customary tribunals have been handling actions between natives and non-natives--persons who are ideally subject to their respective customary laws. For example, many litigations involving an animist versus an Ibo, Yoruba, or Lebanese have been recorded in the minute books of a number of judicial councils of non-Moslem areas. Where this happens, it is generally assumed that a person who settles in another community with laws different from those of his natal community may reject his primary customary law and integrate himself into the new locality. But if he continues to regard himself still subject to his primary law, this will be his own law; such has at least been the case with the Yoruba and Ibo who have resided for several decades in Northern urban centers.

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[3]My observation of court behavior and perusal of court records indicate that most Area or Moslem Courts and Judicial Councils simply applied the first option, without seeking the consent of the parties to the action.

In the former Mixed Courts, the tendency was to apply the law binding between parties in a mixed litigation. In cases of marriage, the law of the member of the more powerful ethnic group was usually accepted as binding when a compromise could not be reached. A similar principle is being adopted in many rural tribunals, as judged from the following unreported case of witchcraft accusation.

In this litigation, an animist was accused of witchcraft in the North-Eastern State village of Balassa. A Hausa curer, maidodo (or maiduba), was consulted. The latter insisted on using an ordeal method of trial despite the pleadings of the accused for trial according to his native law. In the end the accused was given a poisonous concoction (gwaska) to drink. He vomited this instantly, and was therefore found guilty and burnt alive.[4]

5.2 Customary Law v. Islamic Law

Conflict between Islamic law and one body of customary law is here interpreted as a religious-legal clash. Internal conflicts arising between Islamic law and a body of ethnic law are most common in areas where Islam has been established either as the dominant religion or as the religion of a significant section of the local population. Since 1804, Moslem

[4] NAK/SNP 9/2/45/1915.

judges have been attempting to impose Islamic law in the native courts often contrary to the practice of the people; the result has been the creation of tension between official and popular judicial behavior.

In conflicts involving points of Islamic legal principles and traditional practice reaching any Moslem court, Islamic law almost always prevailed. This is illustrated in the verdict given in respect of Liman Usman Madagali v. Risku and Ardo Disa.[5] In this case, Liman Usman had appealed against the Chief of Madagali for giving away his (Liman Usman's) farm, as a gift, to Ardo Disa and one Iguda in the absence of Liman Usman, the complainant. In actual fact, Liman Usman was away for only two years.

The Shari'a Court of Appeal reversed the decision of the Provinvial Court, which was that the District Head had the right to give away the land of an absentee.[6] The Provincial Court's decision was claimed to have been based on custom and tradition but the Shari'a Court of Appeal entertained the appeal, inter alia, on the grounds of Islamic law.

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[5] In Liman Usman Madagali v. Risku and Ardo Disa (NNCN, 27, 1963) it was held that where there is a conflict between Islamic law and customary practice, Islamic law should prevail.

[6] In this case the absentee was only away for two years, whereas most local customs (e.g., Hausa) stipulate ten years before a person's land can be transferred statutorily to another.

The case of Alhaji Ishaku v. Hadejia Native Authority,[7] where the facts of the case run similar to those in the above case, equally illustrates the determination of the Moslem courts to replace customary laws by Islamic law.

In practically all mixed civil causes involving an animist and a Moslem, for instance, Islamic law has been enforced by the Shari'a courts. Islamic law, being the primary law of the alkali courts, is supposed to prevail in litigations between Moslem and non-Moslem parties. Unless the law applied is specifically a compound of both Customary and Moslem laws,[8] the former are always held to be incompatible with the principles and practice of Maliki law administered by the alkalai and Emirs' Judicial Councils.[9]

Ideally, Emirs' Courts and later Magistrates' Courts should have been hearing most "mixed cases" (cf. 1933 Native Courts Ordinance, Section 25). In practice however, the alkali courts have also been hearing several major and minor cases involving Moslems and non-Moslems.

Moslem courts on the whole discountenance marriages between Moslems and animists. According to some Moslem jurists, a Moslem male can marry an animist woman, in which

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[7] NNCN (Case Notes of Northern Nigeria) No. 25 of 1962:65.

[8] Such instances have been very rare indeed.

[9] Since 1901, Moslem court cases were subject to confirmation, transfer, review, or dismissal by other legal bodies; and since 1959, not only animist and Christians but also Moslems have been free to opt out of any court or law (in criminal matters).

case inheritance and other legal rights related to the union should be settled according to Islamic law. Moslem women, on the other hand, are generally prohibited by the courts from marrying men from societies which are patrilineally organized.

In two instances, the Northern Shari'a courts have ruled such unions repugnant to Islamic legal conceptions. For example, in a 1933 case,[10] Alkali Bakura of Lokoja refused to allow an animist clerk to get married to a Hausa Moslem girl. In 1935, another case[11] was reported from Sumaila where two Maguzawa were once married according to their custom. The wife subsequently converted to Islam. At the trial Alkali court, the husband was informed that his marriage would become invalid unless he accepted Islam. The animist declined to do so and claimed the return of his brideprice. The court decided that, as according to Islam the marriage had become null and void, the husband's claim could not be upheld.[12] In such instances, some courts would not even regard the marriage claim as a debt. The support for such rulings can be found in Ruxton's Maliki Law: "The

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[10] NAK/SNP 17/21235 pp. 1-2.

[11] NAK/SNP 17/21235 p. 15.

[12] A majority of the alkalai with whom I discussed this case fully appreciated the unfairness of the dicision from a humane point of view. However, most of them felt that since Islam does not recognize such unions, the letter of the Shari'a must be observed. A few recommended a compromise.

general rule is that a Mohammedan shall neither cohabit with nor marry an unbeliever" (Ruxton 1916:103).

Several Moslem jurists in the North, however, were prepared to countenance a marriage between a male Moslem and a female Christian or Jew (i.e., people of the Scripture, Kitabiyyah); they were also inclined to recognize the debt claims of either party to such unions.

A situation where a Moslem woman deserts her Moslem husband and contracts another marriage is regarded as a case of polyandry or bigamy, and this is illegal under Islamic law. For example, in the legal action against Zainab Idrisu,[13] who deserted her husband, Bagobiri, and contracted a wa-joko (Yoruba: "come and sit-down or live with me") marriage with another man, Gide, the alkali ruled the second union to be illegal. Zainab was sentenced to one year's imprisonment but continued to be Bagobiri's wife during her prison term, until the marriage was legally dissolved.

In matters of succession and inheritance, animists are not allowed by Moslem courts to succeed to the estates or titles of their deceased Moslem relatives. Moslem courts do not in general recognize the claims of non-believers to the estate of a deceased Moslem, as illustrated in the case of Aguda, a Yagba Yoruba who died in Kaduna in 1924 after having

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[13] Bagobiri v. Zainab Idrisu and Gide Abubakar. (An unreported case tried by Alkali M. Salihu Mikailu, Kaduna Criminal Court, 31/8/72). Also see New Nigerian 2 Sept. 1972.

been converted to Islam. His brother, Ikpindumia, an animist, petitioned to claim the property, but the alkali of Kangiwa dismissed the application and instead claimed the property for the Beit-el-Mal, as provided by the Maliki law.[14]

Cases of crime involving Moslems and animists coming before alkalai courts have been few in recent years, noticeably due to the transfer of such cases to the Magistrates' and District Courts. The former Mixed Courts of the major urban centers have also heard several such actions. Before 1960--that is, prior to the introduction of the two written codes--most Moslem courts were loath to admit the testimony of an unbeliever against a Moslem; and in homicide cases, animist heirs were being paid about half of the compensation ordinarily due to their Moslem counterparts.

Whereas courts in Hausaland have tended to enforce Islamic law in most mixed causes, Moslem Yoruba cases (mixed or not) in the Offa area have been tried primarily in accordance with Yoruba customary rules and procedure (cf. Ijaodola 1969:130-131).

Where an action between members of the same ethnic group comes before a Moslem court, the tendency is to apply Islamic law. In such instances, the Shari'a can be seen as a territorial law. But before the Shari'a is applied, one of the parties (usually the plaintiff) to the suit has to

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[14] Ikpindumia v. Alkalin Kangiwa. (An unreported case; Kangiwa, Kaduna 1924, MIA 2/42/R41f.)

make a formal application of consent to be tried there. Islamic law also governs intercustomary cases where court assessors are not available, as in the case of Osuagwu v. Soldier.[15] This action between two Ibos concerned a claim for the value of clothing allegedly entrusted to the defendant. The Kaduna Alkali Court, which tried the case at first instance, applied Islamic law and awarded damages to the plaintiff. Upon appeal, the Regional High Court reversed the judgment of the alkali on the ground that the consent of the defendant on the law governing the case was not asked by the trial alkali.

In general, the law applied depends a great deal on the nature of litigation. In homicide cases involving animists, Moslem courts almost always apply Islamic law. For example, in the trial of Dan Jatau,[16] a Bamaguje from Doda village of Katsina, the Alkali Court thought it expedient to apply Islamic law to settle the dispute:

> On 31/3/1922, Dan Jatau was found guilty and sentenced to death by the Katsina Judicial Council for the murder of Sarki (Headman) of Mufata. The crime was committed at a drinking party, and both the accused and witnesses were Maguzawa animists.
>
> In the course of a dispute over bridewealth, the accused was reviled and slapped by the bridegroom's brother (the actual deceased). Dan Jatau replied with a pestle, which led to the death of the Sarki of Mufata.
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> Upon hearing all evidence, the Emir agreed on behalf of

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[15] 1959 N.R.N.L.R. 39.

[16] Rex v. Dan Jatau of Doka, NAK/SNP 1315/22 (unreported). Also see Liman Usman Madagali v. District Head Risku & Ardo Risku, (1963) N.N.C.N. 27.

> his Council that this was a case of killing with deliberate intent, for which Islamic law prescribes "life for life," that is, the death of Dan Jatau.
>
> The deceased's relatives were at first asked whether they wanted blood money or the death of Dan Jatau, as was the practice in Islamic homicide trials. The heirs told the Emir that they preferred the death of Dan Jatau. The latter was therefore sentenced to die in accordance with Moslem law.

In matters of inheritance other than land, the personal law of the deceased is held to be the law binding between disputing parties. In inheritance issues relating to moveable property, Islamic courts have been respecting the customary laws of litigants; the same applies to matrimonial suits regarding divorce, maintenance of children, or refund of bridewealth.

In land causes, however, Islamic courts quite frequently overlook the customary laws of the litigants and seek to apply what they consider to be Maliki law of succession, as in the Maguzawa case of Audu Dan Gado v. Shekarau and 5 Others.[17]

This legal action concerned the inheritance of farms which a deceased woman left to her husband. According to the traditional land tenure law of the rural Maguzawa communities around Kano, gandu farms are considered to be communal property. Only personally-acquired smaller farms, gayauna, can be alienated. When a woman inherits a piece of gandu

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[17] Shari'a Court of Appeal No. SCA/CV/KN/22/71 of 18/6/71. Also see Mosugu (1974:109-116). I am grateful to M. Sanusi Chiroma for a first-hand information on this case (August, 1975).

land, the right of occupancy lasts only during her lifetime. Upon her death, the property commonly reverts to the family. In this suit then, the family of the deceased was claiming back a family property which had been transferred to the husband by the deceased woman.

The case was originally heard before the Gwarzo Alkali (now Area) Court. Not satisfied with the verdict, the plaintiff successively appealed to the Kano Urban Area Court and the High Court. The latter court ordered a retrial at Gwarzo, where the case was heard at first instance. From there, the appeals proceeded again, ending up at the Shari'a Court of Appeal, which finally dismissed the appeal and affirmed the decisions of the lower Moslem courts on 18th June 1971.

Before the final decision was reached the plaintiff, apparently frustrated by the delays in the proceedings, trekked virtually all the way to Lagos (some seven hundred miles away) to state his case before the former Nigerian Head of State and Commander-in-Chief of the Armed Forces, General Yakubu Gowon. After a brief parley with soldiers at the Dodon Barracks, Yakubu Gowon's residence, the poor peasant managed to make some impression on the military authorities, who eventually helped to speed up the trial (cf. Mosugu 1974:109).

All along, this case was tried according to Maliki

law rather than Maguzawa customary law--the primary law of the litigants. The important question here is whether Islamic law at all applied in this land tenure case. Gwarzo district of Kano is predominantly Moslem, and the litigants claimed before the courts to be Moslem Maguzawa. Therefore the Shari'a courts felt it expedient to apply Islamic law, being the legal system "prevailing" in the entire Kano State.

Now, the law governing land tenure in the Northern States is the Land Tenure Law of 1962,[18] which states that in causes between natives, the existing indigenous law or custom of the locality in which the land is situated (lex situs) should apply. Dealing with jurisdiction on succession to land, the Northern States Area Courts Edict, 1962, also outlines:

> In land causes and matters the native law and custom to be applied by an area court shall be the native law and custom in force in relation to land in the place where the land is situated.[19]

If one were to follow these provisions of Land Tenure Law, 1962, and the Northern States Edict, 1967, then lex loci domicilii or local territorial law of the Maguzawa should have governed the case. As it were, the trial courts simply applied Islamic law as a personal law because the parties confessed to be Moslems.

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[18] No. 25 of 1962, S. 30.

[19] For example, No. 2 of 1967 of North Central State. This provision applies throughout the other five states within the region.

Granting that they were Moslems, it is still openly questionable as to whether the Maliki code or any other law other than that of the Maguzawa of the area strictly governed the case. Several writers have repeatedly emphasized that of all areas of customary legal institutions among the Moslem Hausa and Fulani, succession to land is the least untouched by Islamic legal influence (cf. Anderson 1954:184-190, A. Smith 1961:174-175, McDowell 1969:266-277, 1966:23, and Mosugu 1974:109-116). Moslem Hausa and Fulani inheritance is particularly noted for its extreme variability and, at times, contradiction (M. G. Smith 1965a:277).

It therefore seems as Mosugu and others have held, that Maguzawa local law, lex loci domicilii, should have governed this case to the exclusion of Moslem or any other legal provision, since the laws "existing" or "in force" had reference to territory and not to persons (Mosugu 1974:115).

5.3 Customary Law v. General Law

This area of conflict is typified by legal actions involving animists on the one hand and Christians on the other. In other words, the conflict situation here has a primary religious undertone, although it also suggests a clash between native law and customs and English law.

Such litigations have always been referred to the Provincial Courts, Magistrates' Courts, Mixed Courts, and

the High Court in Northern Nigeria. The British-styled courts that heard mixed causes between animists and Christians have tended to manifest some element of bias against those animist practices which either contradicted the written law or appeared to be repugnant to "natural justice," humanity, etc.

Instances of divorce, maintenance of children, and inheritance are much more common in this category of conflict of law situation. I shall first cite a few cases tried during 1907-1930, a period in which there were widespread Christian conversions in Nigeria. Conflict between Native law and Christian (or European) principles at the time was inevitable as Christianity began to spread.

In most of the earlier cases of conflict between customary and Christian codes, colonial administrators seemed to favor either a compromise or the use of native law, mainly because (1) they were then highly conscious of the danger of undermining the influence of native authorities, and (2) a serious rift between animists and Christians would greatly distract Nigerians from converting to Christianity. The colonial administrators and judges therefore thought it prudent to interfere as little as possible with traditional customs, but rather to take what was good in native life and give it a Christian significance, to make Christianity indigenous, and not to introduce it as something altogether

foreign. The administrators, however, actually introduced legislation to suppress criminal customs which they considered incompatible with the British sense of judicial justice. Some firm Christian administrators during the 1935 Resident's Conference in Kaduna,[20] for example, felt that where Christian interests conflicted native law and custom should be overridden in the interest of uniform justice. It was also felt that the enforcement of Christian-oriented legislations would ultimately change the local customs.[21]

Between 1920 and 1940, a number of cases raised three main points in connection with the conflict between Christian and animist legal conceptions and practices:

(i). The return of children of converted Christian parents to the animist relatives of the husband upon the latter's death and the mother's remarriage;

(ii). The claim by the deceased's husband's brother of a Christian woman as wife on the death of her Christian husband; and

(iii). The succession to property, in the case of converts.

These three issues relate to the question of guardianship, leviritic marriage, and inheritance respectively.

(i). Guardianship. The first problem is illustrated

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[20] NAK/SNP 17/11161, p. 23-26.

[21] The anthropologists who attended the same conference similarly expressed their concern for humanity and justice. They, however, felt that they would like to see some native customs preserved.

in the following cases. In the first civil action:

> Joshua Fasipe (male, aged 15) and Comfort Ayo (female, aged 8) were the children of the late Nicodemus Mabayoje by his married wife, Ruth Oyeleye. After the father's death, the woman married again in church, and the second husband paid the dowry to the first husband's people (animists). The relations of the deceased husband then applied for custody of the children.

In this case,[22] the Magistrate's Court, presided over by a District Officer, ruled that the children must be returned to the animist relatives of the first husband, although they (the children) and their mother desired that they should continue to reside with the mother and to attend church and school.

In a second case:[23]

> A yagba[24] Native Treasurer, Paul Akure, met another Yagba girl, Oni, in Lagos when he was completing his education there. Oni was already married, according to Yagba custom, to a man to whom her parents had betrothed her when she was a child. But as she did not like the husband, she ran away from him to Lagos.
>
> Paul and Oni lived together as man and wife. In due course, a daughter was born to them and the birth was officially registered at Lagos.
>
> When Paul returned to Yagba District, Oni's first husband, Laniru, claimed the return of the bride-money, which Paul accordingly paid.
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> Laniru now also claimed the six-year old daughter, and according to Yagba law and custom the child must be handed over to him, as the child was born before the bride-money was refunded.

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[22]Heard near Offa 25th February 1925; NAK/SNP 17/11161 para. 2. (unreported).

[23]June 1935 (unreported). NAK/SNP 17/11161 pp. 11-12.

[24]A subsection of the Kabba Yoruba living in Kwara State, Nigeria.

The Yagba Native Court, which tried the case at first instance, followed Yagba native law and custom and gave the custody of the child to Laniru. Upon appeal to the Provincial Court, the Resident upheld the judgment of the Native Court. However, he observed that the Yagba law governing this case was "repugnant to natural justice and humanity," taking into consideration that "one of the parties was a Christian and had absorbed ideas regarding family relationships which were in advance of the somewhat crude customs of the tribe of which he is a member."[25] The Resident then suggested a compromise, that Laniru accept some compensation from the appellants and give up his claims to the child. But Laniru would not agree, and the issue remained unresolved.

The facts of a third case[26] concerning guardianship run thus:

> A Longuda convert of the Sudan United Mission married by native custom a Longuda woman, who was not at the time a convert but had subsequently become one. The couple had two children.
>
> Without consulting the girl's mother's uncle, who by custom was the guardian of the child until her marriage and who was entitled to her dowry, the father sent the daughter to the mission school. Whereupon the great uncle applied to the Shellen Native Court, claiming the customary custody of the child.

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[25] NAK/SNP 17/11161, p. 12.

[26] Unreported. From Numan, Adamawa Province. NAK/SNP 17/11161, pp. 20-23.

The Native Court and the District Officer's Court recognized the uncle's customary rights over the girl. Normally, his permission ought to have been sought before the girl was sent to school. However, following consultation with the District Officer, the Native Court later arranged that the father of the girl pay in advance the amount of the customary dowry, upon which the uncle relinquished further claims to guardianship of the girl. The compromise was actually imposed on the Native Court by the District Officer. The local court obviously favored the uncle's rights to dispose of the girl.

It is interesting to note that Moslem law, in such cases, does not recognize the customs of the community to which the individual belonged prior to his conversion to Islam. One of the drawbacks to such an attitude is exemplified by a fascinating incident which occurred in Zaria Province during the 1920's. The inhabitants of Kurama village[27] had all become converted to Islam. But after the death of one member of the community they all renounced the faith, as the direct consequence of a ruling by the local Alkali Court to the effect that the estate of the deceased would have been administered according to the Shari'a instead of Kurama law and custom.[28] In the case of children, they would never be

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[27]The people of this village claimed to have emigrated from the Dalla-Kurmi area of Kano City.

[28]NAK/SNP 17/11161 p. 36; 1925.

returned to their animist relatives.

(ii). Marriage (Leviritic). Out of many instances of matrimonial problems created by conversion to Christianity may be cited the following legal action reported from an animist ethnic group in the present North-Eastern State. Briefly, a Christian woman, Alice, was on the death of her Christian husband claimed as a wife by the non-Christian brother (Kirim) of the husband, who by native law would inherit her.[29]

The Native Court, in consultation with the colonial administrator directly in charge of the area, admitted that they had never come across a widow who could refuse such a marriage. Nonetheless, the Court ruled that since the woman was protected by the Church, the non-Christian brother-in-law could come in as a "guardian" but never force the widow to marry him. In this way, he was entitled to give her away in marriage and to claim the bride-price. This compromise was actually imposed by the District Officer. The Native Court initially ruled that the widow should go and live as a wife to the brother-in-law. In sharp contrast, had the parties been Moslem-animist, the animist brother-in-law would have had no claim at all under Islam.

The cited case of leviritic marriage recalls among many others the more recent legal action, In the Estate of

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[29]NAK/SNP 17/11161 p. 10; 1932.

Agboruja,[30] in which the Supreme Court ruled that the Public Trustee should pay the brother an allowance from the deceased brother's estate for the children's maintenance. The Native Court had earlier made the brother the heir of his brother's estate, the husband of the widow, and the father of the children. On upholding this judgment, the Supreme Court originally argues, that the children would clearly be taken good care of by their new father, and that the leviritic practice was quite prevalent among many other societies in Nigeria (Keay and Richardson 1966:234).

(iii). Inheritance. The problem of inheritance can be illustrated by the case of a Yergham[31] Christian convert who died intestate, leaving some property. His animist relatives wanted the estate to be divided according to native law, whereas the Church held that the wife of the deceased, a convert also, should inherit the property according to Christian ethics and principles of English law. Presiding over the case, the colonial officer in hcarge of the area ruled in favor of native law as governing the deceased's real and personal property.

In his support of the above verdict, the District Officer argued that English law itself is not in any way based on the tenets of Christian faith. The English law of

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[30](1949) 19 N.L.R. 38.

[31]In Muri Division, unreported case, 1930. (Cf. NAK/SNP 17/11161).

inheritance was never part of the Canon law; indeed, it originated from non-Christian sources, and even in Britian the laws of inheritance have been frequently modified in favor of local custom (NAK/SNP 17/11161).

As regards individual status, conversion would not necessarily bring about a change in the mentality of a person brought up under animist customs. Indeed, most converts, Christian or Moslems, usually continue to believe in and practice a substantial part of their local traditions. Therefore, in animist-Christian conflicts it will often be more equitable to respect the native point of view.

5.4 Islamic Law v. General Law

Evidence from case material indicates that criminal matters, at least up to 1960, have been the key areas of conflict between the two legal systems. In more recent years, however, the emphasis has been on disagreements relating to the law of evidence, wills, inheritance, marriage guardianship, divorce, and contract. The evidence from case material further suggests that where the two legal systems collided, the General law almost always prevailed over the Islamic: the latter was generally held to be either repugnant to or incompatible with the former.

5.4.1 Criminal Jurisdiction and Procedure

In criminal matters, legal tension was particularly acute throughout the colonial period. Between 1902 and 1904 alone, British officials commuted or dismissed approximately 200 out of 230 cases of rape and homicide which were originally heard by various Moslem courts within the North.[32] The bulk of these cases involved Moslems.

Finding the penalties imposed by the Maliki courts relatively excessive, the British introduced the Criminal Code[33] to be applied concurrently with Islamic hadd or criminal law. The results from this joint existence of two criminal laws proved to be quite unsatisfactory, however. For, under this conflicting situation, the extent of punishment given for specific crimes depended largely on whether they were tried in Moslem or Magistrates' courts, or whether the cases were investigated by the Nigeria Police or by the Native Authority Police.

So in the late 1940's it was enacted that native courts (Moslem or not) could no longer impose for any customary offence a penalty more serious than that which could have been inflicted for the same conduct under the Code.

This legislation arose mainly from the decisions in Bornu Native Authority v. Abatcha Magudama[34] and Tsofo Gubba

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[32] NAK/SNP 7/3-14/4/1902-1914. For similar cases of commutation or dismissal during the colonial period see Chapter Six below.

[33] See Chapter Four above.

[34] (1946) Unreported. Cited by Anderson (1957:88).

v. Gwandu Native Authority.[35] Both these actions concerned homicide. The original trial Moslem courts had imposed death penalties, but upon review the English courts found the punishments too excessive, repugnant to natural justice, and inconsistent with the Criminal Code. The death sentences were subsequently substituted with manslaughter convictions in accordance with the Criminal Code.

The necessary legislative changes resulting from the decisions in these cases have been updated in the Northern Region Native Court's Law, 1956. Under this enactment it was stressed that no native court should inflict a punishment in excess of that prescribed by the Criminal Code of any other enactment; and that where native law and the Code conflict, the Code or any other governmental enactment should prevail.

In practice, however, the new arrangement has not been satisfactory. A glance at the pre-1959 Northern Nigeria Law Report will immediately convince one that Moslem courts had not been abiding strictly by the directions in the Code. Rather, they had continued to administer the Maliki law as they had always done. A case decided in the early 1950's clearly indicates that provocation was still being discountenanced by the Shari'a courts; the same case

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[35] (1947) 12 W.A.C.A. 141. For details of this and similar cases see Chapter Four, section 2, above.

also shows that the testimony of women, particularly in criminal litigation, was still being rejected by the Moslem courts. To the British, these two practices were quite "repugnant" and incompatible with the Code.

In an illustrative case,[36] a Moslem who was on a journey with his two wives had left one of them to lodge with her mother, while he himself lodged elsewhere, as was the rule among the Hausa. Shortly after, he paid a visit to the wife who was staying with her mother, but found she was not in the house. So he called on a friend of his, who had once stayed with him in his own village. The friend was at home, but his behavior was so suspect that the husband concluded his wife must have been hiding with this friend. After checking once again at the mother's house to see if she had returned, he reported back to the friend's house only to see him emerging from a room with the wife in circumstances which looked compromising. Highly enraged, the husband insulted his friend, who replied with a blow. At this stage, the husband pulled out a knife and stabbed the friend, as a result of which the latter died.

At the trial, the wife confessed to committing adultery with the friend, but her testimony was rejected on the ground that a woman is not a competent witness in a

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[36]Unreported (1959). Cited by Anderson (1959:444). The source, name of litigants, and place of trial were not cited by the author.

criminal litigation. Her testimony was also considered "irrelevant on the ground that no degree of provocation would alter the fact that the blow was 'deliberate,' hostile, and was not struck in the course of legitimate self-defence" (Anderson 1959:444). The lower court passes a sentence of diyya (blood money payment) for the crime, but this was subsequently ruled as inadequate and hence intolerable from British point of view.

By 1948, many colonial officers were recommending that where manslaughter was detected rather than murder, the Emirs' Judicial Councils should impose a penalty of no more than one year and one hundred lashes.[37] But, then, in Daura Native Authority v. Hamidu[38] the colonial administration turned around to recommend that for certain manslaughter and deliberate murder suits the death penalty should be imposed in lieu of the diyya claim or one hundred lashes and a one-year term.

Decisions in three other homicide cases[39] in 1957

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[37] MIA 2/42/R1577, pp. 254-295.

[38] Also see Rex v. Goto of Yanduna, and Katsina Native Authority v. Abdullahi Kogo and Others (MIA 2/42/R1577, 295-306).

[39] These are: Jalo Tsamiya v. The Queen (1957) N.R.N. L.R. 73; Ayuba Dan Rufa'i Fagoji v. Kano Native Authority 1957) N.R.N.L.R. 57; and Mamman Maizabo v. Sokoto Native Authority (1957) 2 F.S.C. 13. For details on these cases see also Anderson (1957, 1959).

marked the climax of this conflict in criminal jurisdiction. By 1959, the British had decided to abolish all customary and Islamic criminal laws. Henceforth, all Native Courts were to be guided, if not bound, by the Northern Nigeria Penal Code and, soon after, the Criminal Procedure Code.[40]

Under Maliki law, the ruler is the proper person to hear and determine religious disputes within his territory. The ruler therefore has the authority to try cases in which he is personally involved. In the later 1950's, however, the British ruled this as being contrary to the principles of natural justice, i.e., that no person could be a judge in his own cause.

In the case of Modibbo v. Adamawa Native Authority,[41] the Lamido (Chief) of Adamawa's Judicial Council claimed jurisdiction to preside over a litigation which allegedly involved a personal attack upon his person. The accused was given a severe penalty by the Lamido's Court. Upon review of the case, the High Court totally rejected the procedure, argument, and penalty as being quite repugnant to a basic principle of natural justice in view of the personal nature of the attack upon the Moslem ruler (Keay and Richardson 1966:204). Henceforth, all native courts have been guided by the Criminal Procedure Code.

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[41](1956) N.R.N.L.R. 101.

5.4.2 Civil Matters

Some measure of uniformity has thus been realized in the criminal aspect of law in the Northern States following the imposition of the two British-styled codes. However, in matters relating to estate, inheritance, contract, tort, marriage, divorce, and pregnancy the British did not introduce any uniform legislation for the region. Yet they had all along ruled that many civil actions by the Moslem courts were repugnant to or incompatible with the English sense of justice. I shall proceed to examine a few cases concerning estates, divorce and child claim, and inheritance.

(i). Estate Distribution and Dormant Pregnancy. In the case of Sambo of Gwarzo,[42] we are presented with a very involved situation which turns upon a point of Islamic law that obviously clashes with English behavior, knowledge, and sense of justice, namely the belief in deferred pregnancy (Hausa: Kwantaccen ciki). The history of this case is as follows:

> About October 1919, Sulaimanu of Gwarzo died and the alkali of Gwarzo delivered his entire estate to Sulaimanu's brother, Sambo.
>
> Asama'u, a former wife of the deceased, complained to the Emir of Kano and claimed the estate on behalf of herself and Sulaiman's son born two months before Sulaiman's death. The Emir reversed Alkalin Gwarzo's action and gave the estate to Asama'u for her son as heir of deceased.
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> Sambo appealed to the British District Officer on the ground that it was 13 years since Asama'u left her husband, Sulaimanu, and that there had been several intervening (indeed ten different) husbands.

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[42] NAK/SNP 2130/1922; Sambo v. Asama'u, unreported.

Asama'u admitted living separately for at least ten years and having gotten one new husband.

The District Officer questioned the Emir's judgment and referred the case back to the Moslem courts for further enquiry. The case dragged on for several years before the Chief Alkali of Kano gave his verdict, which in essence upheld the Emir's judgment on the paternity of the child as Sulaimanu's heir.

The alkali's decision was based on the belief, still firmly held by courts and the majority of elderly Hausa-Fulani Moslems,[43] that a woman may become pregnant, but the pregnancy may subside or become dormant. When this occurs it is held that the first child born thereafter, or any miscarriage that occurs, is due to the original pregnancy, no matter how many years have elapsed or how many marriages have intervened.

In support of the Chief Alkali, the Waziri of Kano quoted three main sources: (a) The Quran, which states that the period of gestation for a pregnancy lasts until she has delivered or miscarried; (b) the Mukhtasar, which holds that if a woman imagines herself pregnant she must wait four or five years; and (c) the Risalat, which rules that in case of divorce or husband's death, the period of gestation lasts until the woman delivers. From these three sources, it is clear that the period of gestation is quite unlimited under Islamic law. From the point of view of the colonial officers, though, the evidence upon which the alkali based his decision

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[43] Interviews, February-March, 1975.

was "farcical" and "totally inadmissible."

Several more cases of this nature came to the notice of the British administrators in the 1920's and 1930's, but no definite effort was made to override the Moslem courts' stand on the issue. In a few cases, allegedly pregnant women were examined by medical doctors who invariably reported that the women were neither pregnant nor had ever been so. Nevertheless, Moslem courts staunchly refused to change their judgments. In some instances, however, the Residents succeeded after applying strong pressure, in reaching compromises with the alkalai, as in the case[44] of a woman whose divorced husband have prevented her from remarrying by making an allegation of dormant pregnancy.[45]

(ii). Divorce and Child Claim. In more recent civil actions, the common law courts have succeeded in overriding some decisions of the Moslem courts. For instance, in Mariyama v. Sadiku Ejo,[46] which involved two Igbirra Moslems

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[44] NAK/SNP 2130/1922, Part II & III.

[45] Some Hausa believe that this is a plan adopted by khul'-divorced husbands for preventing their late wives from remarrying. After divorce, they may allege that the women are pregnant, and bring witnesses to prove this before the alkali courts.

[46] (1961) N.R.N.L.R. 81. See also Re Alayo (1946) 18 N.L.R. 88. A more recent case is that of R. v. Bartholomew Princewell (1963 N.N.L.R. 54), in which the regional High Court ruled that a Christian who, being previously married monogamously under the Marriage Ordinance, was converted to Islam, cannot thereafter claim the prerogative of a Moslem to take additional wives. A second Moslem marriage for such a person was considered bigamous and void.

who had married according to Islamic rites, the Regional High Court ruled that they were not bound by Islamic law in their matrimonial affairs, because their general social and linguistic behavior suggested that they considered themselves bound by Igbirra law and custom to the exclusion of Moslem law. In this case the divorced husband had claimed custody of his wife's child. In the trial, the Alkali court gave its decision on the basis of Islamic principles because both parties had professed to be Moslems.

Overruling this decision, the Regional High Court argued that it was clear from the general conduct and statements of the parties that they thought of themselves as bound only by Igbirra law. Indeed, Islamic law requires a divorced wife to observe the iddah (ninety days' chastity), but the defendant had remarried well within that period. As a result, the High Court ruled that Igbirra, and not Islamic law was applicable. The alkali's decision was thus nullified on the grounds of repugnancy to natural justice, etc.

But in an earlier matrimonial suit[47] involving a Moslem woman and a Christian man, the Resident's Magistrate court (while obviously questioning the humaneness of the decision) had supported the Alkali court, which ruled that the husband, who once professed Islam and defected soon after getting married to a Moslem woman, was not entitled to

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[47] NAK/SNP 17/21236.

any claim over the three children resulting from the union.[48]

(iii). Inheritance. Inheritance disputes, whether of a mixed or non-mixed nature and testate or intestate, have been a major source of civil conflict between Islamic law and the General law in Northern Nigeria. Case-law or precedents have yet to provide reliable conflict-of-law rules for resolving testate or intestate litigations originating from Moslem courts and finding their way ultimately to the Common law courts. In a few cases, however, Moslem court decisions have been overruled by Common law courts, mostly on the grounds of repugnancy, incompatibility, or wrongful jurisdiction.

Although it is generally understood that where English law or any local statutes were unavailable, the "personal law" of the deceased (in matters of succession) should apply, as in the case of Tapa v. Kuka.[49] The later decision in Mariyama v. Ejo[50] seems to confound any rules that may have been derived from such court decisions. In Tapa v. Kuka, for instance, it was held that the law applicable to the estate of a deceased Nupe Moslem dying in Lagos was "that of a Nupe

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[48] My view on this issue is that mixed marriages involving, in particular, property claims should be solely treated as a "contract," and leave out any question of marriage and religion.

[49] Decided by Justice Brooke (1945), 18 N.L.R. 5.

[50] 1961. See details of this case above, section 4.2(ii).

Muhammedan in Bida," that is, Islamic law being the law of his birthplace, Bida. Yet in the 1961 case of Mariyama v. Ejo, the conduct and speech behavior of the Moslem litigants convinced the Common law courts that Igbirra law was intended to apply in the case to the exclusion of Islamic law.

In situations where Moslem courts were less prepared to surrender on grounds of repugnancy, a compromise was frequently reached, as in the following three mixed inheritance suits decided between 1930 and 1950.

In the intestate succession case of Gladys v. Zaria Alkali,[51] the alkali of Tudun Wada, Zaria, who was administering the estate of Halima, ruled that Gladys, being a Christian, could not inherit the estate of a Moslem. Gladys had earlier filed an application for a share of the estate of her mother, Halima. The latter died a Moslem after having given birth to an only daughter, Gladys, from her first marriage with a Christian named Ephraim.

The alkali's judgment and the manner in which he handled the distribution of the estate strictly conformed with Maliki law.[52] The then Acting Resident for Zaria who reviewed the case doubted if such a ruling could not be said

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[51] NAK/MIA 2/42/R964, p. 8, 1932 (unreported).

[52] The alkali's decision clearly agrees with Ruxton (1916:395(e), 326, footnote 4).

to be repugnant to natural justice, etc. He argued that in English law, a change of religion would not debar one from inheritance. In the end, after consultation with the Emir of Zaria, it was decided to make a concessionary ex-gratia payment to Gladys from the proceeds, but the amount given to her was considerably less than the portion of the estate she would have normally inherited had she been a Moslem.

In a second case[53] of intestate inheritance involving Moslems and non-Moslems, Mr. Salami Fagbo had died as a Moslem in Zaria, leaving behind Mr. J. O. Fagbo (a Christian and eldest son of Salami Fagbo by a previous marriage), one wife (a Nupe Moslem), and her three children. J. O. Fagbo was the son of a Yoruba pagan woman, and at the time of his birth, his father--the deceased--was also an animist. Salami Fagbo later came to settle in Zaria, where he subsequently converted to Islam and married a Nupe Moslem woman, with whom he had three children. Under strict Moslem law, J. O. Fagbo, being a Christian, had no claim to any portion of the estate, but an agreement was reached whereby he came to inherit a fair proportion of the proceeds from his father's estate.

The third legal action concerned the Estate of Habiba Abigail,[54] who died as an apostate Moslem in Zaria on

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[53]NAK/MIA 2/42/R964, p. 52-62; (1940) J. O. Fagbo v. Nana and children.

[54]NAK/SNP 2/42/R964, pp. 71-74; (1944) Heirs of Abigail v. Zaria Native Authority.

6 February 1943. She was Nupe married to a Moslem husband. After the latter's death she became a Christian and died in that faith. Her estate was substantial and her heirs were all Moslems. At the alkali court it was ruled that since the woman was a Moslem apostate and her heirs were all Moslems, the estate automatically reversed to the Native Treasury (Beit-el-Mal). It was argued that no individual Moslem could benefit from the estate of an apostate Moslem. This is a strict interpretation of the Maliki code, which states that "no Moslem can inherit from an apostate Moslem" (Ruxton 1916:395[d]).

A compromise was at first reached whereby the Beit-el-Mal inherited half the estate and the heirs the other half. But the administrative officer in charge of Zaria found the decision repugnant to natural justice although it was fully consistent with native law and custom. The case was therefore taken out of the jurisdiction of the Moslem court. In doing so, the colonial administration argued that the estate in question was a Christian's, and therefore the alkali court had no powers to administer it despite the fact that the heirs were all Moslems. Being a Christian's estate, it had to be administered by English law,[55] which takes no cognizance

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[55] In this and a few other mixed cases of inheritance, it was generally held that a Moslem's estate descends according to Moslem law and a convert's estate according to the intention of the deceased.

The leading case on this issue in Nigerian law is Smith v. Smith (1924, 5 N.L.R. 105).

of the religious beliefs of legal heirs.

In testate inheritance, the situation has been radically different. When a Nigerian Moslem makes a will[56] regarding the distribution of his estate the general presumption, as can be deduced from Nigerian case law, is that the General law should govern the action to the exclusion of Islamic principles. In some cases, Islamic rulings have been held to be totally incompatible with the English Wills Act, 1837. To illustrate this, I shall here examine in great detail two cases of testate inheritance which seem to me to highlight the current trend in conflictual interaction between General law and Islamic law.

In the Estate of Saratu Abuja,[57] we are presented with a situation where, for the first time in the North, a Moslem made a will[58] which was held to be in conformity with the English Wills Act of 1837. On 18th April 1947 Saratu Abuja, an illiterate Moslem woman, revoked all previous wills, codicils, and testamentary documents and made a written will. When she died, Saratu left behind four relatives: Her husband

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[56] In the cases that have so far come before the courts, the wills were mostly drawn up in English. Islamic law recognizes wills or testaments, but apparently not those drafted in English or any other language than Arabic (Interviews, July-August, 1974).

[57] Mijinyawa and Others v. Lawani Ojo and Others (1947). NAK/MIA 2/42/R417 (unreported).

[58] The will was actually drawn up in Hausa, and not in English, a fact which I think reduces the will's effective conformity to the English Wills Act, 1837.

(Mohammadu Mandara), her nephew (Mijinyawa), and her two nieces, Lami[59] and Tani, both sisters of Mijinyawa.

In the will, Saratu appointed Messrs. Lawani Ojo and A.D.B. Williams as her sole executors, giving each of them some money out of the estate. On her death, the executors were to see to the necessities of her funeral and pay Moslem estate dues to the Zaria Native Authority. The buildings on her plot within Sabon Gari, Zaria, were to be transferred for good to one of her two nieces, Lami. Of her remaining personal effects, the proceeds were to be shared among her nephew, two nieces, and one Hajo, who was Saratu's ward. Her husband was totally excluded. The will was read and translated in Hausa to Saratu, who seemed perfectly to understand same and put her right thumb impression thereto. Three witnesses and also an interpreter signed.

Under the Moslem law, in the absence of a will only the husband and nephew would inherit, both nieces being barred, even though they were both Moslems. If the will were proved and the estate administered under Moslem law, the nieces, although not qualified to be heirs of the estate, would be entitled to a share of the amount to be distributed under the will. The fact that Lami had apostasized from Islam would not debar her from receiving her share under the will.[60]

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[59]Lami had already converted to Christianity before the will was drawn up.

[60]Some Moslem jurists in the North have expressed a contrary view on this point, that a Moslem's estate descends to Moslems only, or failing, to the Beit-el-Mal (Interviews, November, 1974).

The husband, nephew, and the other niece suspected some foul play, and raised some serious objections to the validity of Saratu's will. In particular, they suspected an element of connivance, in the making of the will, between Lami and the two Sole Executors, who were alleged to be good friends of Lami.

Therefore, acting on behalf of himself, his sister, and the husband of the deceased, Mijinyawa filed a caveat in the Supreme Court against the applicants for the grant of Probate. Under the English Wills Act of 1837 enforced in Nigeria, Mijinyawa, although a Moslem, could in all probability challenge the validity of Saratu's will, which in this case purportedly disposed of a larger part of the estate than allowed by the Shari'a. This was probably supported by the following passage made in the judgment of the Privy Council in Bartlett v. Bartlett:[61]

> There is nothing here [i.e. in the Wills Act, 1837] to enable a person who, by the law which binds him in his lifetime, holds his property with a strictly limited right of testamentary disposition, to dispense himself from that restriction and to dispose of his property by will without any limit at all, simply by making his will in the form prescribed by the Wills Act and by purporting to make dispositions in it, contrary to and in excess of those which the law thus applicable permits him.

Advised on the strength of this passage, Mijinyawa therefore entered a caveat in the Nigerian Supreme Court to restrain the two Sole Executors from administering Saratu's will until

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[61] (1925) Privy Council, Appeal Case No. 377.

the extent of its validity was determined by that Court, since it alone had jurisdiction in the matter of disputed wills made in accordance with the English Wills Act of 1837.

Action in this case, which was at first removed from the jurisdiction of the alkali of Zaria, actually dragged on for more than three years (1947-1950). According to one source, the case was never resolved. The Nigerian Administrator-General, in his capacity as Probate Registrar, eventually declined the administration of Saratu's estate, which was already deteriorating under the care of the Chief Alkali of Zaria. From another source, I learned that the Beit-el-Mal eventually inherited the bulk of the estate, after distributing a portion of the proceeds to the heirs under Islam. Lami also received a share of the proceeds as ex-gratia payments from the Beit-el-Mal.

When I discussed this case with a number of Moslem jurists, it was strongly felt that under the Shari'a no Moslem has a right to contract out of Moslem law. The possibility that Moslem estates can be dealt with in any other fashion other than according to Islamic law was viewed with considerable alarm. It was maintained that a Moslem cannot make a "good will" contrary to the Shari'a.[62]

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[62] Some lawyer friends of mine have argued that the law to be applied in the interpretation of Saratu's will depends largely on the intention of the testator, as shown by the wording of the will. There is, however, no direct case-law authority on the point whether a Moslem can dispose of his property by will in a way contrary to Moslem law. But in the case of Apatira v. Akanke (1944, 17 N.L.R. 149), Justice Ames was clearly prepared to hold that he could; (for a contrary view see Bartlett v. Bartlett, above).

Saratu's case was viewed as an attempt by a Moslem to defeat Moslem law.

Perhaps a more controversial testate inheritance suit in recent years is that of T. T. Adesubokan v. Rasaki Yinusa, decided by the Federal Supreme Court of Nigeria on 17th June 1970. The case initiated in the North-Central State High Court, and its facts are amply set out in the report of the decision delivered by Justice Bello, who presided over the suit at first instance.[63]

In brief, a Moslem, who was simultaneously subject to Customary and Islamic laws and who died leaving property in Zaria and Lagos, had purported to draw up a will which was held to conform to the English Wills Act of 1837, a statute of general application in the Northern States of Nigeria. The Moslem testator was a Yoruba born at Omu-Aran in Ilorin, Kwara State, but he was educated and brought up in Lagos where his parents had settled. He moved later to Zaria, where he died after making a will which obviously offended Islamic law in certain respects, notably in depriving one of his Moslem heirs of the share to which he would normally be

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[63] Zaria, Civil Suit No. Z23/67, judgment delivered on 30th October 1968: R. Yinusa v. Adesubokan. This is a very leading decision in Nigeria for the application of Customary law, Islamic law, and the English Wills Act in a conflict-of-law situation. No wonder the case has continued to stir a great deal of controversy among lawyers and law teachers within Nigeria and abroad (cf., for example, Khalil 1975:9-11, Ijaodola 1970:1-12, and Anonymous, J.A.L. 1970:56-64, 1972a:82-88, and 1972b:169-171, 173-175).

entitled under Maliki law. In his will, the testator bequeathed to the plaintiff, Rasaki Yinusa, the sum of only ten naira (about $15.00). To his two other sons, who incidentally descended from the same mother, he left a house in Lagos and the rest of his estate jointly and in equal shares.

The Probate Registrar granted probate of the will to the defendant. In an action against the defendant (Adesubokan), being the executor of the will, the plaintiff (who was the eldest son of Yinusa Atanda Saibu, deceased) requested that the probate be set aside on the grounds that the testator, being a Moslem, was not entitled to make a will under the Wills Act of 1837. The plaintiff further argued that the testator was not entitled to dispose of his properties under the will in a manner which obviously contradicted the principles of the Shari'a.[64]

In his verdict, the judge held that the will was thereby invalid, and thus he set aside the probate of the will on the grounds that (1) while a Northern Moslem, resident in the North, is entitled to make a will conforming to the English Wills Act he cannot deprive by that action his Moslem heirs their entitled shares of the estate under Maliki law; (2) in the case of a will of movables, the testator must comply with his personal law, i.e., the lex domicilii or the

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[64]Under Islamic law the three brothers should inherit equal shares.

native law and custom of his particular locality, so long as this personal law is not repugnant to natural justice, etc., and (3) where the testator is a "native" as defined by the Land Tenure Law (Section 30) and the will concerns land, house, or other immovable property situated in the Northern States, the testator must comply with the native law and custom relating to the devolution of the place where the land is situated, i.e., lex situs.

The defendant brother, T. T. Adesubokan, as sole executor of the will, appealed to the Federal Supreme Court against this judgment. In its verdict,[65] the Court allowed the appeal by setting aside the earlier judgment of Justice Bello. In its submission, the Supreme Court argued that the learned judge's decision clearly violated the provisions of the Wills Act of 1837 under which a testator, regardless of his religious conviction, can dispose of his estate (real and personal) in any way he pleases. They observed that the Provisions of the Maliki law, which Justice Bello held to apply in this case, was "undoubtedly incompatible with section 3 of the Wills Act, 1937."

In his judgment, Justice Bello had argued that for movable property the Maliki personal law (lex domicilii) applied, and for immovables the Moslem lex situs applied, to

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[65]Delivered on 17th June 1971, Lagos, Supreme Court 25/70: T. T. Adesubokan v. Rasaki Yinusa (Ademola, C.J.N. Coker, Lewis, Madarikan, and Udoma, J.J., Supreme Court).

all Moslems in the North. It was held that because the deceased died a Moslem, his personal law should be Islamic; and that his lex situs should be the Moslem law of Omu-Aran because throughout his life he had continued to identify himself as a native of Omu-Aran, a Moslem Yoruba community. Thus, according to Justice Bello, the deceased was altogether bound by the rules of Islamic law, from which he could not escape.

The man's house, however, the only immovable property in dispute, was situated in Lagos. In such a case the applicable law is neither strictly Islamic law nor the lex situs, as provided in section 30 of the Land Tenure Law. Furthermore, even if the house were situated in Omu-Aran it is doubtful whether Islamic law specifically applied in this case. Preliminary research on land tenure law has indicated that not all Moslems in Northern Nigeria consider themselves bound by the Shari'a as a personal law. Elsewhere, we are told that the Yoruba courts in Offa have "been applying the [Yoruba] customary law in all matters even if they concern Moslems, since the Moslems in that area who form over 60 per cent of the population do not consider Islamic law as their law and they organize their lives according to usages of custom" (Ijaodola 1969:130). The Yoruba Moslems of the Western State also consider themselves to be governed primarily by Yoruba customary law; and since Omu-Aran is a

Moslem Yoruba community, it could be argued as well that Yoruba customary law should have applied in this case to the exclusion of either Islamic or English Common law. The inheritance principle which is likely to govern the suit is the Yoruba idi-igi, under which each wife and her children receive an equal share of the estate left by the deceased husband. In the case under discussion, each of the two disputants descends from a different mother.

In the commercial sector, conflicts between General law and Islamic law are also evident, as in the case of Gambo v. Kyariram.[66] In this legal action, a rich lady who was unlicensed under the Money-Lender's Ordinance had loaned money to another Moslem. The latter, in turn, loaned it to his clients on a trust (amana) basis and with interest (ribah). The rich woman sued her debtor in an Alkali Court, which ruled that she could recover the principal but not the interest because the latter was ribah, a practice prohibited under Moslem law; but the ribah did not as a matter of fact, render the entire transaction void.

The debtor appealed to the High Court of Northern Nigeria on the grounds that the entire contract was null and void, because the rich lady was not licensed under the Money-Lender's Ordinance, and that the Shari'a prohibits money-lending. The appeal was dismissed by the High Court on the

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[66] Kaduna High Court Case, No. JD-39A/1962 (unreported). See also Carroll (1967:76).

basis that the lower Alkali Court ruling was in no way incompatible with the General law. This at once suggests that the trial Moslem court had been closely bound by the provisions of the Money-Lender's Ordinance while still rejecting some elements of the ordinance which contradicted Islamic law.

5.5 Summary and Concluding Remarks

In Chapters Two, Three, and Four I have outlined the substantive differences and adaptive adjustments between Islamic, Customary, and General legal traditions. In this chapter, I have attempted to illustrate the thesis that, judging at least from case evidence, the interaction of these three judicial systems has been chiefly characterized by internal inconsistency. It is also clear that courts, have played a substantial role in promoting the internal conflict.

In some of the cited mixed-cause litigations compromise strategies were adopted, particularly during the colonial period. In the majority of the cases, however, it is evident that one system of law almost always prevailed over the other(s). In urban inter-Customary conflicts, for example, the law of the dominant ethnic group in a given locality was most frequently applied to resolve disputes in which one party came from a dominant group and the other from a minority community. Such a situation prevailed especially

in the former Mixed Courts of the North. In mixed litigations heard by Moslem courts, Islamic law has largely prevailed over, for example, Customary legal principles. Although the alkali courts also recognize and enforce certain points of native law and custom Moslem judges are, in the main, only familiar with the Shari'a and have therefore tended to impose this law in practically all kinds of litigations brought before them. Similarly, in the more recent cases heard by the higher Nigerian courts, there is an indication that the General law is being progressively preferred over both Customary and Islamic legal principles and practice. In other words, one discovers a gradually accepted assumption that when Islamic law and General law collide, the interests of the latter should prevail over those of the former.

With the introduction of the Criminal Procedure Code and the Penal Code about fifteen years ago, there has been a recognizable decrease in criminal mixed-cause litigations in urban Moslem and secular courts. For good or for worse, the determination of criminal offences requiring critical choices between two or more legal codes have been forced underground. As a result, conflict-of-law today is largely emphasized in civil jurisdiction; under this category, controversial issues have generally involved inheritance, wills and estate, marriage, divorce, guardianship, and contract.

In the following chapter, I shall tabulate and

summarize several more conflict-of-law cases. I shall then discuss the kind of socio-legal processes or problems that can result from mixed litigations in a plural setting like Northern Nigeria. Finally, I shall examine the significance of the case material for my thesis.

Chapter Six

MIXED-CAUSE LITIGATION: TRENDS IN THE CHOICE OF LAW

The Moslem conquest of the 19th century brought some major socio-legal changes in Northern Nigeria. As noted above, certain of these changes have begun to penetrate non-Moslem communities as well.[1] In this century, more far-reaching changes actually came with British occupation.

During the first few decades of British rule, most Northern towns and cities, old and new, became linked by rail or paved road, or both. The development of transportation, along with the ending of inter-ethnic warfare and slavery, the opening of secular schools and the spread of literacy, the introduction of cash-cropping and money-economy, and the setting up of industries and commercial houses have significantly harmonized inter-ethnic relations, intensified internal migrations, and accelerated the concentration of population into towns. The attractions of new entrepreneurial openings and employment opportunities offered by the new administration led to the settlement of many southern Nigerians, Ghanaians, Lebanese, and other foreigners in the

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[1] See concluding observations in Chapter Three, above.

Northern urban centers. By 1930, the ethnic composition of these urban areas had become sufficiently heterogeneous to warrant the establishment of Mixed and Provincial Courts.[2] These courts, along with the reconstituted Judicial Councils, served as the primary venues for handling inter-ethnic litigations as well as those disputes between parties of differing religious or ethnic backgrounds.

British influence, particularly the impact of new modes of commerce, new styles of politics, and the rewards of Western education, no doubt helped to speed up the process of individual and group mobility, the restructuring of norms of status achievement, the reorganization of patron-client relationships, and the parcelling of communal property. At the same time, the impact of Christianity and new legislations on marriage[3] have radically affected traditional attitudes toward divorce and polygynous unions among both educated Christians and non-Christians.

Since law is held to be an integral part of society,[4] one may predict that socio-cultural changes in inter-ethnic relations are likely to have a significant impact upon traditional theories and practices of inheritance, marriage,

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[2]See Chapter Four above.

[3]E.g. The Nigerian Marriage Ordinance which preceded the Matrimonial Causes Decree of 1970.

[4]See discussion in Chapter One, Section 1, above.

divorce, guardianship, credit terms, and land transactions. The use of wills and written documents, the growing rate of inter-ethnic marriages and urban mixed litigations,[5] for example, may be linked to these socio-cultural changes. Socio-economic innovations and urban dispute settlement machineries, both during and after colonial rule, may also be partly responsible for the growing use of cash in land transactions, the sale of land to non-indigenes, the increasing use of writing in commercial transactions, the development of judicial execution for debt, and the growth of other forms of obligation and the means of enforcing them. The acceptance and increased activity of money-lenders or credit agents even within Moslem communities may also be attributed to colonial legislation, the establishment of secular courts, and the introduction of new rules of commerce. Also, as outlined above, the establishment of General law courts and the introduction of new Codes have been partly responsible for both the reduction in mixed litigations and several legal inconsistencies relating to crime.

In the previous chapter, I have used cases to illustrate the nature of legal conflict in Northern Nigeria. In this chapter, I shall summarize a few areas of socio-legal

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[5]Discussed in Chapter Five above.

change, notably those trends that can be directly related to mixed-cause litigations. Next, I shall discuss the impact of socio-cultural changes--judicial innovations in particular--upon both Customary and Islamic judicial systems. Above all, I shall examine the question of choice of law, a crucial juridical phenomenon commonly identified with every multi-legal and conflict-of-law environment.

6.1 Mixed-Cause Material

The cases presented earlier in this essay form part of some 450 suits[6] collected by the author throughout the six Northern States. As far as practicable, the cases were gathered from diverse urban and rural courts. A minimum of 70 decided legal actions were selected from each State. The majority of the cases concern civil matters, notably inheritance, divorce, guardianship, contract, debt claim, and tort. More than three-quarters of the suits are of a mixed-cause nature, and were largely decided between 1920 and 1959.[7]

Being mixed, the cases presented here and in the previous chapter primarily involve parties who ordinarily

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[6] In Table II, p. 215, only 410 cases have been tabulated. The remainder, either civil or criminal, have been discussed or alluded to in Chapter Five and other parts of this thesis.

[7] As shown in preceding chapters, several of these cases were decided in the 19th century and between 1960 and 1973.

are subject to two or more distinct bodies of law or court. In the collection of cases, I have therefore focussed mainly on inter-ethnic and inter-religious litigations in both rural and urban districts. The collection also includes those problematic legal actions where judges have experienced difficulty in determining which law to apply.

There may appear to be some bias in the selection of these cases. Given the scope of my study, I have tried to limit the collection of the cases to a few selected rural and urban areas. The ultimate aim, however, is to present a preliminary analysis of the different forms of mixed litigations, along with their probable causes and the types of socio-legal processes or problems they may have generated. A further limitation of the case material is that I have relied heavily on court records. Experience all over Africa (cf. Gluckman 1969a) has shown that even the fullest court proceedings are relatively brief. At best they merely give abstracts of testimonies of witnesses and verdicts of presiding judges. As a result, I am particularly concerned with outcomes rather than with either the actual processes of conflict resolution or detailed investigations of individual cases and litigants.

Table II below reveals that civil litigations tend to be more frequent in urban than in rural districts, with 68.5 per cent of those I collected being in the former. This

Table II

FREQUENCY OF SURVEYED MIXED CIVIL SUITS IN THE NORTHERN STATES (1920-1959)

Type of Cases	Customary v. Customary		Customary v. Islamic		Customary v. General		Islamic v. General		Total	
	Urban	Rural	Urban	Rural	Urban	Rural	Urban	Rural	No.	%
Divorce (Mixed)	3	1	17	4	8	6	8	4	51	12.4
Child Maintenance/Inheritance	1	2	14	11	8	3	2	-	41	10.0
Succession to Land and Other Property	-	4	7	15	4	2	2	1	35	8.5
Contract/Debt Claims	19	9	13	11	38	15	47	18	170	41.5
Tort	12	4	5	4	30	7	43	8	113	27.6
TOTAL	35	20	56	45	88	33	102	31	410	100.0
	55		101		121		133			
Percentage	13.4%		24.6%		29.5%		32.4%		Urban 68.5 Rural 31.5	

is hardly surprising, since all over the world inter-ethnic and inter-religious transactions are, on the whole, denser in urban than in rural areas, and Northern Nigeria is no exception. However, the trend in this part of the world is evidently a 20th century phenomenon.

Inter-Customary conflicts seem to be fairly evenly distributed between rural and urban centers, whereas other categories of conflict-of-law situations occur more frequently in urban areas, with the greatest proportional differences being conflicts between Islamic and General legal systems. This suggests that ethnic heterogeneity is more of an urban phenomenon. Inter-Customary disputes relating to child maintenance and inheritance are generally very few. This may be attributed to the fact that the majority of persons living permanently in Northern urban centers are professed Moslems or Christians. Animists are present in the cities mainly as migrant workers. Moreover, inter-marriages between persons of different animist groups in a given town have been remarkably low; and where this obtains, the parties usually come from rural groups that are linguistically and culturally related.

Litigations between animists and Moslems seem to be more evenly distributed between rural and urban localities. The reason may be that Northern Nigeria is predominantly Moslem, and that even among the more Islamized communities

the Shari'a has not completely supplanted certain indigenous legal attitudes and behaviors.[8] Among the Hausa, for instance, unilateral divorce by a woman (khul') through the Moslem courts is very frequent, and yet this is a practice which clearly clashes with Islamic legal principles.[8]

Table III presents the number of Hausa women who sued their husbands for various divorce and lesser matrimonial causes in three alkali courts in Kano State between 1951 and 1960. The record indicates that the number of female complainants considerably outnumbered their male counterparts, the ratio being approximately 3:1; in an extreme case recorded in one of the courts, the ratio approximated 12:1. These figures further confirm the flexibility or accommodative nature of the Islamic legal system in Northern Nigeria. The high frequency of divorce and female complaints may be partly attributed to recent economic changes, rapid migration, and inter-ethnic or inter-community marriages.

Mixed marriages are commonest in urban centers, the most frequent occurrence being between Moslem women[9] and

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[8] See conclusions to Chapter Two, above.

[9] Among the Hausa, the majority of such women are the "free, sophisticated" types. In recent years, educated Moslem men have been marrying Christian women in considerable numbers. The key questions here are: Who should get legal custody of the children upon divorce, and are the contracts recognized by alkali courts? Discussions with some leading Moslem jurists indicate that there is no consensus over these questions.

Table III

KHUL' DIVORCE RATES IN THREE ALKALI DISTRICT COURTS, KANO STATE (1951-1960)

A. Female-Male Distribution

Complaints	1951	1952	1953	1954	1955	1956	1957	1958	1959	1960	10-Year Total Number	10-Year Total %
Female	303	273	260	422	321	315	209	372	392	290	3,157	73.1
Male	115	138	172	38	123	82	155	120	128	92	1,163	26.9
TOTAL	418	411	432	460	444	397	364	492	520	382	4,320	100.0

B. Number Appealed, Divorced, or Compromised

Appealed	72	86	25	20	42	87	23	77	81	21	534	12.4
Divorced	186	114	214	325	161	188	158	130	272	184	1,932	44.7
Compromised	160	211	193	115	241	122	183	285	167	177	1,854	42.9

Christian men. The cases generally reveal a preponderance of female complainants in the alkali courts. In some urban courts, like those of Jos and Kaduna, some 98 per cent of mixed-marriage complaints were filed by women. The complaints against the non-Moslem husbands generally ranged from ill-treatment to questions of certificates,[10] child maintenance, and property inheritance.

Contract, debt claims, and tort are substantially high in both rural and urban areas, with figures being slightly higher in urban centers where inter-personal interactions are densest. This should be expected, since commerce or market exchange usually involves greater and more regular interpersonal contact than perhaps any other activity. Conflict between Customary or Islamic law and General law in matters relating to contract, debt claims, and tort is noticeably high.[11] This may be partly attributed

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[10] In many Alkali or Area courts a certificate is issued after each successful divorce, usually at the insistence of the wife. Such a practice clearly indicates the receptiveness or adaptive nature of Native courts to changing conditions. Under Islam, a verbal pronouncement of the repudiation formula before witnesses suffices; the issue of certificate appears therefore to be a contradiction of Islamic principles because, as in this case, it directly suggests that the iddah requirement may no longer be necessary for the divorced Moslem woman, and that once issued with a certificate, such a woman is free to remarry straight away.

[11] In some instances 75 percent of Court Register cases from urban areas deal specifically with contract, debt claims, and tort in the form of (a) claims for a vehicle, (b) sale of a house, (c) rent arrears, (d) infringement of credit sales, (e) breach of contract (f) commission agent claims, and (g) claims for bodily injury and related damages.

to the introduction of certain modes of commercial transactions such as modern contract, transportation, dealership, and installment sales. By contrast, clashes between Islamic and Customary law over contract, tort, or debt claims are comparatively low, probably because both Customary law (as practiced by the Hausa, for example) and the Shari'a have basically similar operational principles with regard to commercial transactions. For example, contracts based on trust (Hausa: amana) are regularly enforced by both Customary and Moslem tribunals within areas like Kano, Zaria, Katsina, and Sokoto. The General law courts, on the other hand, recognize contracts or claims only when substantiated by written documents.[12]

From the cases discussed in Chapter Five, and the fact that courts are generally specialized in Northern Nigeria, it appears that each court has tended to enforce its primary law in most conflict-of-law situations. For example, Moslem judges, who are in the main familiar only with Maliki law, have been administering this type of law in the majority of disputes involving Moslem and non-Moslem, or even Christian and animist, litigants.[13] The General[14]

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[12]Some General law courts, which can also enforce native law and custom, have been recognizing the validity of contracts backed by oath or reliable witnesses (cf. Kano Mixed Court Book 2, 1960).

[13]See Chapter Five, Section 2, above.

[14]See Chapter Five, sections 3 and 4, above.

law courts, which are also empowered to enforce native law and custom with the aid of assessors, most frequently place the General law or local statutes above both the Shari'a and the Customary law.

The decided cases further reveal that both the General and Islamic courts are suspicious about the efficacy and certainty of Customary laws, which are basically unwritten and uncodified. On the whole, however, Moslem law appears to be more sympathetic than General law towards Customary legal decisions and practices.[15] This is certainly true in criminal matters where Islamic hadd punishments, rules, and procedures seem to correspond closely to the criminal rules and procedures of a large number of the ethnic groups.

Compromise solutions have been quite common in mixed-cause litigations. Such compromise strategies were more commonly employed in circumstances of civil conflicts between Islamic law and General law during the colonial days (cf. Table IV). However, in criminal matters like homicide, theft, and robbery trials, the General law has been mani-

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[15]The recognition given to certain Hausa, Fulani, and Kanuri customary behavior in the alkali courts directly suggests that Islamic law has been quite tolerant of non-Islamic practices. If we are to draw a scale of differential accommodation for the three judicial systems, accommodation appears to have been greater, longer, and more sustained between Islamic law and Customary law than has been the case between the latter and the General law (cf. Table IV).

Table IV

BREAK-UP OF THE 110[16] CIVIL CASES APPEALED (1920-1959)

	Lower Court Decision Reversed	Compromise Reached	Lower Court Decision Upheld	Total
From Customary Courts to Islamic Courts	8	20	16	44
From Customary Courts to General Law Courts	16	7	6	29
From Islamic Courts To General Law Courts	10	19	8	37
TOTAL	34	46	30	110

[16]Out of the 410 cases in Table II, (see p. 215).

festly uncompromising towards the Shari'a courts, particularly during the early part of British administration in Nigeria. For example, of some 212 homicide cases decided by the Kano Judicial Council between 1906 and 1932, more than 80 per cent of the lower court sentences were overruled or commuted by the General courts presided over by colonial officers (cf. Table V).

Table V

212 HOMICIDE CASES: APPEAL FROM KANO URBAN MOSLEM COURT TO GENERAL COURTS (MAGISTRATE'S AND HIGH COURT), 1906-1932[17]

	Lower Court Decision Reversed	Lower Court Sentence Commuted	Lower Court Decision Upheld or Appeal Dismissed	Total
Number of Cases	20	157	35	212
Percentage	9.4	74.1	16.5	100

In recent years, Nigerian General law courts[18] seem to have been particularly concerned with bringing Nigerian law

[17] Sources: National Archives Kaduna, KANOPROF, and High Court and W.A.C.A. decisions. Manslaughter was usually advised for murder charges from Moslem courts.

[18] Staffed mainly by Nigerians trained in British jurisprudence.

and courts into line with contemporary socio-legal trends. Consequently, certain principles of Islamic law are held by these courts to be incompatible with similar provisions prescribed by General law.[19]

A major challenge to the native courts is posed by the judicial innovations, introduced principally by the British, in the form of local statutes and commercial laws. The differential enforcement of these new rules in the native courts reveals at once the inherent frustration on the part of these courts, as well as their receptivity to changing socio-legal conditions. Islamic legal ideas have been filtering into the Customary legal system, just as General legal innovations have recently been penetrating both the Islamic and the Customary.

It has been argued that written law is more rigid and unwritten customary law, as in Africa, more supple and responsive to social change (D'Arboussier 1965:165-183). Contrary to this view, my findings reveal that the Maliki law as applied in Northern Nigeria has been quite flexible and receptive to change, as has Customary law.[20] The immutability of its being written or divine does not seem to be a major barrier to the adaptiveness of Moslem law to unfamiliar socio-legal conditions.

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[19] See, for example, the Supreme Court judgment in T. T. Adesubokan v. Rasaki Yinusa, S.C. 25/70 of 6/17/1971. Also see Chapter Five, section 4, above.

[20] See for example, the concluding observations in Chapters Two and Three, above.

In general, adaptation appears to be easier in some judicial fields than in others. For example, the widespread adoption of European commercial techniques, marriage patterns, and land tenure has both encouraged legal conflict and significantly influenced the gradual application of contract and tort laws in many of the Customary and Islamic courts.

The introduction of the Money-Lender's Ordinance and the Hire-Purchase Law in the 1950's and 1960's respectively, furnish clear examples of the receptivity of the Shari'a and Customary structures to alien and conflicting judicial changes. A great proportion of the commercial litigation coming before the Customary and Maliki Courts in recent years has involved actions for money-lending and non-repayment, goods sold, services rendered, and unpaid rents on real and personal property. A noticeable increase in sales on credit (as in television and radio sets, cars, and motorcycles) has resulted in many suits coming before both categories of lower courts. Yet, sales on credit are, in principle, incompatible with the Shari'a, and totally alien to Customary legal behavior.

The courts are also handling more and more cases of money-lending and other categories of loans with interest. Money-lending, particularly the extortion of excessive interest (ribah), is no doubt repugnant to Moslem legal principles. Nonetheless, since the introduction of the Money-Lender's

Ordinance, the Shari'a courts have been constrained to enforce it; and in the exercise, they are becoming adjusted to the new rules about money-lending. The enforcement of this ordinance in the Islamic courts has not always been easy, however. Conflicts between General law and Islamic legal principles frequently arise, as in the case of Gambo v. Kyariram.[21]

The adaptation of Islamic and Customary laws to changing conditions within Nigeria is also evident in land tenure and land contract disputes. In the majority of urban land litigations (mixed or not), there is a clear indication that the traditional land tenure system is fast breaking up in many parts of Northern Nigeria. The traditional primogeniture succession rule is no longer strictly observed among the urban and semi-urban Hausa, for example. Houses, farms, and other properties are being fragmented in accordance with Islamic and, to some extent, General legal principles. Such a trend has been generating a great deal of generational and sibling hostility in many Moslem and non-Moslem communities. Among the sedentary Fulani and the Manga, the conflict is on a sex basis, with women clamoring for equal shares of property. In some rare cases, wills are written in Hausa in order to defeat both Customary and Shari'a courts.

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[21]Kaduna High Court Case, No. JD-39A/1962, (unreported). The facts of this case have been discussed in Chapter Five, section 2 above.

It is obvious that Islamic and British acculturation has contributed to the changing patterns of contract and land tenure laws in Northern Nigeria (cf. McDowell 1969:267-277). However, I am inclined to maintain that the factors influencing this trend from "status to contract" are largely related to urban growth, ethnic heterogeneity, cash economy, and to some extent individual sophistication. New economic conditions are apparently the prime factors resulting in the mass adoption of the Islamic law of inheritance and the British-based laws of contract.

The new changes brought successively by Moslem jihad leaders and British conquerors have profoundly affected the lives of many ethnic groups in Northern Nigeria. In a number of circumstances, they have given rise to considerable individual and group frustration, and constituted a prime source of grave social disequilibrium within ethnic groups. The introduction of the alkali courts and the subsequent enforcement of iddah rules in several communities have, for example, generated serious conflicts between traditional socio-legal structures and Islamic law. This ideological clash has in turn affected the structural relationships between individuals, as between husbands, wives, and in-laws, among the Kwasam and Kadara peoples.

Secondary marriage, as practised by the Kadara, the

Kwasam,[22] and similar animist communities within Kano, North-Central, and North-Eastern States traditionally grants the second husband exclusive uxorial and genetrical rights so long as cohabitation with a woman continues. In these societies, a woman is free to have as many "husbands" as she can practically afford, but she can only co-reside with a single one at any given moment. The departure of the woman, voluntarily or by dint of elopement, kidnapping or capture, instantly terminates the cohabitation, but never the marriage.

Now the introduction of Islamic iddah rules, which stipulate among other things that a woman has to wait three consecutive months after a legal divorce before remarrying, has brought with it a considerable degree of ambiguity, conflict, and frustration over the status and validity of individual husband-wife rights. The responsibilities of husbands, wives, fathers, and in-laws have thus become more confounded than ever before. Among the Kadara people, for instance, it has been observed that:

> The traditional structure and distribution of individual liability and right have been disturbed by the introduction of an alien structure[23] with very different presumptions and implications. The two systems of law, tribal and alien, co-exist in conflict, although each has absorbed the other in itself, by dislocating some of its rival's institutional connections (M. G. Smith 1965b: 221).

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[22] See, for example, Bawa Galadimawa v. Kantoma and Another, (1961), reported in Chapter Three, section 5, above.

[23] Namely, alkali courts and iddah rules.

In the same vein, the issue of divorce certificates and approval of written divorce as substitutes for, or supplements to, verbal divorce in alkali courts has been causing a great deal of strain and anxiety in husband-wife-child relationship within many non-Moslem (and also Moslem) communities.

Above all there is the recent infiltration of Common law judicial procedure into the Moslem courts, which are supposed to be guided primarily by the Shari'a rules of substance and procedure. In many urban courts Moslem judges, who are largely trained in Islamic law, insist on applying the "are-you-guilty-or-not" procedural rule[24] to all categories of minor criminal offences. The introduction of this rule has been a source of frustration for judges, policemen, and litigants alike. Today, many consider the rule as a principal source of court delay and congestion in minor criminal offences. The same rule is also criticized on the ground that it is a non-Customary and non-Islamic procedural element which significantly impedes rather than adds anything worthy of a fair and speedy administration of justice.

6.2 Problem of Choice of Law

The parallel existence of stratified legal systems in Northern Nigeria has led to the development of the problem of

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[24] This is prescribed by the Criminal Procedure Code (1960), which is intended as a guide to all "native" courts in the Northern Region.

choice of law or court. Urban court judges, in particular, are increasingly confronted with the question of determining which law should govern a mixed or conflict-of-law situation. The dilemma is equally obvious for the litigant, who has to make a choice among two or three possibilities of courts.

The selection of a particular court basically implies a choice of a specific type of law to govern a given legal action. For, as I outlined above, each court in the North is guided by a primary law. This means that in default of any special reason a court of a given type will specifically apply its primary law. The courts are therefore specialized. The judges themselves, by virtue of their specialized training, tend to be more knowledgeable of the primary law used in their particular type of court than they do about the principal laws enforced in the other two court systems.

Thus, by convention, customary court judges directly apply ethnic law to all non-Moslem and non-Christian persons who claim membership of a given ethnic group; Shari'a court judges mainly apply Islamic law to Moslems; while judges in the General courts principally enforce the English common law to Christians and non-Africans.

Nowadays, however, these dichotomies no longer operate in such rigid terms. Many of these primary or first-instance courts are increasingly exercising jurisdiction over all persons. This pressure is particularly acute for

municipal judges, who are handling more mixed-cases as a result of rapid urban growth, economic diversification, and individual mobility.

The heterogeneous nature of persons and cases the courts are handling today implies that the concept of primary -law may gradually disappear. Already, the alkalai have begun to enforce the General law of contract between non-Moslems, and between Moslems and non-Moslems. Many have also been enforcing Customary laws, local statutes, the doctrine of equity, and a compound of any of these laws, along with the Maliki code. When thus faced with several parallel possibilities of laws to govern a particular case, the choice-making by the judge is bound to beomce harder, slower, and more acute.

Similarly, since British occupation and the introduction of the "opting out" clause, litigants have been constantly facing a choice-difficulty with regard to the type of court which should govern their cases. The introduction of the General law has, in particular, multiplied the legal options in the six States. The provision that a litigant may, by express agreement, choose a particular law to govern a specific relationship or transaction has also increased the occasion whereby persons can freely opt out[25] of their primary

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[25]The opting out clause is contained in the Penal Code of 1959, and applies strictly to criminal offenses. But in civil as well as criminal cases, a judge is today expected to request litigants whether or not they wish to be governed by the law of his court.

law courts in preference for another one.

In urban areas, litigants have been freely exercising this right to contract out of a given court of law. Some "sophisticated" Moslems, for example, have been expressly opting out of alkali courts in preference for another system. The same applies to non-Moslems, who often refer their cases either to Islamic or General law courts.

The major factors that seem to determine individual choice of law or court[26] in Northern Nigeria are religion, ethnicity, nature of transaction, type of relationship, nature of claim, convenience of distance to the nearest court, litigation costs, "sophistication," prestige, income level, and pursuit of fairness. For the majority of non-Nigerians and non-Africans residing in the region, the preferred court in civil actions has been the General. Although a considerable number of mixed-causes involving Lebanese, Indians, and Pakistanis have been heard by Moslem courts, the majority of non-Nigerians and non-Africans living in urban and semi-urban centers have been opting for the Magistrate, District, or High Courts. Choice here is partly determined by precedent. During colonial rule it was promulgated that all non-Africans and non-Nigerians were not bound by the native law and custom prevailing in any part of the region. For those who expressly opted for the Moslem courts, religion, length of stay, and

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[26]For an extended discussion on the determinants of choice of law in Africa generally, see Allott (1970:182-253).

familiarity with the people were generally the key factors behind their choices. For example, a large percentage of the Lebanese, Syrians, and Arabs who appeared before the Shari'a courts in Kano between 1950 and 1965 were Moslems who had been resident in the area for an average of twenty years.[27] As such, many of them considered themselves to be one with Kano people.

For the West Africans, Europeans, and other Pakistanis, Indians, and Middle Easterners who largely prefer the General courts above either the Islamic or the Customary, one can argue that the choice is primarily based on religion, ethnicity, and to a great extent on the nature of the claim or transaction. The majority of these persons are Christians; and ethnically, they are non-Nigerians who operate as either merchants or governmental employees. Thus where non-Nigerians or non-Africans are involved in a mixed litigation with another Nigerian, the nature of the claim (which may involve large sums of money, in the case of contract) or the type of transaction (e.g., transportation, dealership, or shipping) is likely to be outside the powers and jurisdiction of either the alkali or the Customary courts.

In the case of Nigerians who happen to be non-indigenous to Northern Nigeria, the preferred law has also been the General. A large proportion of these people are

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[27] Waje (Township) and Chief Alkali Court Records, Kano. 1942-1968.

non-Moslems, but even the Moslem Yoruba among them do not consider themselves bound by Customary or Maliki law. This can partly be explained by an earlier colonial ruling that all stranger communities[28] should resolve their legal disputes according to native law and custom or refer them either to (former) Mixed Courts or to General law courts.

Several non-Northerners,[29] either as plaintiffs or defendants, or both, have actually been tried in Moslem Courts. In general, the majority of such persons seem to avoid the Customary and Moslem courts, not necessarily on religious or ethnic grounds but more because they largely deal in commercial transactions and claims which in principle come directly under the jurisdiction of the General law courts.

In the case of Northerners, choice seems to be determined primarily by the religious and/or ethnic identity of the individual. Of the 105 urban Moslems[30] I questioned on choice of law in conflict situations, 70 per cent favored alkali courts and 30 per cent General. The choice here has

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[28] I.e., the Yoruba, Ibo, and other non-Northerners living in the new township areas (Sabon-Gari) of urban centers like Kano and Zaria.

[29] I interviewed 92 Ibo, Yoruba, and Bini individuals in Jos, Kano, Zaria, and Kaduna (June and July, 1974).

[30] Interviews carried out in Jos, Zaria, Kaduna, and Kano. In Jos, as high as 46 per cent of the Moslems favored the General courts. The interviewees were both private and public employees.

been determined chiefly by religious considerations. Even then, the unusually high preference for the General courts is quite unexpected among Moslems, who ordinarily should consider themselves subject only to Islamic courts. Most of those who contract for the General courts are widely-travelled or educated merchants with high incomes, and can thus easily afford the high cost of litigation. Some of them consider it prestigious to sue in the General courts, as having legal counsel enables them to attend to their daily business activities.

Out of some 85 animists[31] I questioned in various rural and urban centers within Kano, North-Central, and Benue-Plateau States about 51 per cent would opt for Customary courts, 30 per cent for Islamic courts, and 19 per cent for General courts. The preference for the Customary or Islamic court is largely based on ethnic and economic reasons. Many, particularly those from the rural districts, consider the General courts to be too expensive (and also fewer in number), compated with the other two types. The majority of those who opt for Moslem law usually do so because, according to them, it is the only inexpensive system nearby for mixed litigations.

Of the 97 Christians I interrogated in Kano, Zaria, Kaduna, and Jos, 40 per cent favored Customary courts, 28 per cent Islamic courts, and 32 per cent General courts. The selection of a Customary or Islamic court is based mainly on

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[31]Also see data in Chapter Three, section 5, above.

ethnic sentiment, expense, and accessibility. Esteem for the General courts is highest among wealthy urban Christians.

Observing generally on the choice of law made by native Northern Nigerian litigants, ex-litigants, internees, ex-prisoners, and individuals who have never been arraigned before any court, I think that the choice of law and court system is largely determined by religious and ethnic factors. The preference for the General law in urban centers appears to be on the increase; and the choice of this type of law by Moslems and animists clearly indicates that urban growth, "modernization," high income, prestige, and the nature of transactions and claims between parties will progressively determine jointly and severally the course of individual selection of the type of law to apply in a given conflict-of-law situation. This fact suggests further that the General law may gradually come to be favored above both Islamic and Customary[32] law in urban environments. In the rural districts,

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[32]The present choice-ranking based on my interviews in urban Northern Nigeria places Islamic law ahead with approximately 43 per cent, Customary with 30 per cent and General 27 per cent. The percentages obviously vary from one urban locality to another.

Moreover, choice-making on the part of litigants, prisoners, and other categories of persons appears to be "linear" or ascending. In other words, people freely contract for either Islamic or General law in ascending order, but never "backwards" from General to Islamic and then to Customary. I have indeed come across no case in which a litigant from either the Islamic or General court expressly selected to be tried in a Customary one. Occasions arise, however, whereby a case is referred by a Shari'a or General court judge back to a Customary court for retrial.

Islamic and Customary law are likely to remain preferred above General law for quite some time. Choice here will still be determined largely by religious and ethnic loyalties, and to some extent by income level and proximity to the nearest court.

6.3 Summary and Concluding Remarks

The cases examined in this chapter and the preceding one suggest a number of socio-legal problems or issues. They also reveal certain trends, particularly from the beginning of British rule.

In the first place, the case material has revealed a growing preference for General law over both Customary and Islamic. Legislations and particularly court decisions have been crucial in fashioning the direction of this evolutionary trend. However, this does not suggest that justice is greater in General than in either Customary or Shari'a courts. The trend is in fact largely dictated and encouraged by changing political, economic, educational, and social conditions within the country at large.

Secondly, mixed marriages which are clearly urban seem to be on the increase between both Moslems and non-Moslems. The trend is no doubt a twentieth century phenomenon, which appears to have received a dramatic boost with the commencement

of the Nigerian Civil War (1967-1970).[33] This increase in mixed marriages is in turn affecting traditional attitudes toward divorce and polygynous unions.[34]

Thirdly, compromise solutions seem to be more easily reached in civil than in criminal matters. Consequently, in civil more than in criminal cases, mediation has been employed as a basic mechanism of dispute settlement. Islamic courts have been resorting to compromise mainly in divorce, marriage, and related causes. General courts tolerated or reached some conciliatory solutions mostly during the early periods of colonial rule. In recent years, the majority of mixed litigation reaching the General courts have generally been resolved with winner-loser verdicts. Customary courts, on the other hand, have been functioning largely on the basis of reconciliation or public opinion.

Fourthly, with the introduction of the new Codes, traditional trials of criminal offences in both Islamic and Customary tribunals have been forced underground. Nonetheless, the restitution of hadd punishments and certain traditional

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[33]Records of civil litigations in a Kaduna District Court indicate an increase of more than 35 per cent in mixed marriage complaints during the first four months of 1971, that is, soon after the termination of the Civil War.

[34]For example, a large percentage of the educated Moslems married to non-Moslems within Zaria area practice monogamy, with minimal frequency of divorce (Personl observations, 1974).

rules and procedures by the new Codes implies that conflict in criminal matters still persists--although at a low-key level--with both Moslem and Customary courts passing judgements more or less as they did prior to the imposition of the new Codes.[35]

Of particular interest, however, is that conflict itself is now significantly confined to civil litigations within urban communities. Inheritance, estate, wills, divorce, marriage, guardianship, and quite recently general contracts, debts, and claims appear to have been the principal areas of recorded mixed-cause litigations in civil jurisdiction. The trend here can be partly attributed to the growing heterogeneity of urban areas and perhaps also to the break up of traditional modes of social organization relating to family and marriage. Moreover, the growing mixed litigation in modern contracts, debts, and torts no doubt points to the impact of a Western style of commerce, and the role of both Customary and Islamic tribuanls, in enforcing these commercial innovations.

Fifthly, in all the mixed causes discussed in this chapter and the preceding one, conflicts have tended to be

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[35]It is worth noting that most criminal offences and land cases originating in rural districts seldom reach urban courts or local administrations. Several factors constrain rural peoples from taking disputes (relating to land or inheritance, in particular) to formal courts. (See, discussion in Chapter Two, section 5, above).

inter-ethnic or inter-religious, or simply to involve persons with differing social, educational, economic, occupational, or environmental backgrounds. The cases themselves no doubt reflect a bias in my data collection. However, their high frequency in the urban areas clearly reflects the multiplex and changing nature of Northern Nigerian society in general.

Sixthly, the case evidence and personal interviews presented above suggest that religion and ethnicity have been very crucial in determining the choice of law or court. Among the Hausa, Kanuri, and other Moslem peoples, however, religion is virtually synonymous with ethnicity. This leads me to conclude that ethnic loyalty, rather than the quest for justice or equity, may well be the chief factor in fashioning choices of law in multi-legal settings. In time, however, the nature of transactions between litigant parties, the types of claim involved, the degree of individual sophistication, and considerations of fairness, cost, and proximity to nearest court may situationally and temporally mitigate against the pre-eminence of the ethnic factor. Such a trend is already evident even in the more Islamized parts of the North. This shift is no doubt related to general changes in individual life-styles, which are in turn influenced by concomitant economic, social, political, legal, and educational changes within Nigeria as a whole.

Seventhly, there has been a greater degree of mutual

compatibility between Islamic law and Customary law than between either of these two systems and General law. This may be partly attributed to the fact that both Islamic and Customary legal traditions have been interacting with one another long before British occupation. It is therefore reasonable to assume that the longer and denser the interaction between two seemingly similar legal units, the greater will be the compatibility between them, at least with respect to certain branches of law. At the same time, the evidence from cases and reform measures indicate a growing disagreement between General law and the Shari'a within the last few decades. Such confrontations, which decidedly began with Lugard's government and culminating in the recent military reforms, have been gradually eroding the whole fabric of the Shari'a, as well as, Moslem administration and social organization. Judicial innovations since Lugard's period have indeed been posing serious implications for the whole ethos of Moslem Northern Nigeria, and for socio-legal change in general.

Such a confrontation directly suggests that whatever socio-legal change is taking place now is likely to be in the direction of British or Western conceptions of justice, and government. The trend may similarly reflect the changing nature of the Nigerian judicial system. At present, even Moslem judges are being obliged to study, if not enforce,

some aspects of the General law, while the majority of legislators, lawyers, and judges in Nigeria today have been largely trained in Western legal traditions. Judgments in more recent mixed litigations[36] indeed depict the latter personnel as being particularly committed to "modernizing" or "internationaliizing" the Nigerian judicial and legal structure. This leads me to hypothesize that a religious law, like the Shari'a, may have less and less appeal in a progressively Westernizing and secularizing society like Nigeria.

Eighthly, Moslem law courts have been receptive to changing conditions, just as Customary law courts have been. The degree of receptivity, however, has varied with the branch of law and whether changes have been imposed or not on these courts. Induced legislative reforms, such as the criminal codes are being enforced with less zeal and less efficiency than innovations dealing with commercial law, for example. An explanation for this may be tied to the idea that criminal law has always constituted the backbone of both Customary and Islamic legal traditions. On the other hand, innovations relating to land matters, contracts, and commerce are more readily accommodated because they cover those domains of social activity that are fairly novel to the corpus of rules and procedures provided in both systems. The Customary structure for example, does not originally cover rules and practices

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[36] See, for example, the case of T. T. Adesubokan v. Rasaki Yinusa (1971), discussed in Chapter Five, section 4, above.

relating to the use of documents in commercial transactions or to the sale, pledging, and individual ownership of land. Therefore, the fact that these traditional courts have been recognizing and enforcing these innovations indicates not only the growing flexibility of these courts, but also a general movement from "status to contract" within the wider Northern Nigerian society.

Finally, certain legal innovations appear to have created more problems than they have furnished solutions. For example, the guilty plea prescribed by the new Codes has come to be regarded as a primary source of court delays and choice-of-law dilemma in criminal litigations; and in some animist communities, the imposition of the Shari'a seems to have confounded individual and group relationships, rights, duties, and liabilities.

In Chapter Three, it has been shown that cases can be utilized to illustrate and validate legal rules, procedures, and dispute settlement mechanisms in any society. In this and the preceding chapter, however, cases have been presented primarily to help reveal crucial areas of conflict and adaptation resulting from the interaction of multiple legal systems in Northern Nigeria. The case material has also helped bring details of social, and particularly ethnic, interaction, thereby revealing certain general processes within Northern Nigeria at large. The study of cases has also helped reveal

not only certain of the problems generated by the inadequacy of the plural legal system, but also to indicate a few of the areas where viable rules and procedures can be worked out of conflict-of-law situations. Furthermore, the case material, as supported by a summary of legislative reforms in historical perspective,[37] has served to reveal the nature and direction of judicial conflicts, as well as how these conflicts reflect and influence socio-cultural change within the region in general. For example, it has been shown that some court decisions during the 1940's were crucial in directing legal trends, effecting uniformity in certain branches of law, and bringing about socio-cultural change.[38] An examination of more recent cases has enabled me to detect not only the direction of judicial conflict and change, but also those legal domains requiring restructuring for the benefit of the entire society.

The analysis of cases in these two chapters has thus brought me to agree with the anthropological view that law is an integral part of social life, and that both law and society reflect and direct one another.[39]

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[37] See Chapter Four, above.

[38] See the consequences of the decisions in Tsofo Gubba v. Gwandu Native Authority and related criminal cases discussed in Chapter Four, section 2, and Chapter Five, section 4, above.

[39] See discussion in Chapter One, above.

In conclusion, this chapter and the one immediately before have raised a number of genuine issues regarding both the viability of (Northern) Nigeria as a plural legal system and the significance of my findings for the anthropological study of law. In my concluding chapter, I shall summarize some of these problems further and then suggest possible solutions for them. In addition, I shall summarize the main thrust of my study and advance some generalizations or theoretical observations based upon these findings.

Chapter Seven

SUMMARY AND CONCLUDING OBSERVATIONS

In this study I have shown that Northern Nigeria is characterized by a multiplicity of judicial organizations:

(1). Customary law, a blanket term for the vast array of relatively distinctive but interrelated ethnic systems of law. These are administered through local tribunals of the people, three-quarters of whom reside in the rural districts;

(2). Shari'a, which is largely enforced by the alkali (now turned into Area) courts and the former Emirs' Judicial Councils of the predominantly Moslem urban and semi-urban areas; and

(3). General law, which was introduced by the British at the beginning of this century. This system is regarded as the "Formal National Law" for Nigeria as a whole. It looms over the other two systems, even though it has recurrently been modified by internal Nigerian enactments, legislations, and court decisions. It is presently administered mainly through the District, Magistrate, High, and Supreme courts. Advocates are permitted to practice in most of these courts, unlike in Customary and Shari'a courts.

I have argued that the co-existence of these legal structures may be attributed to two major sources:

Firstly, ethnic heterogeneity: The region is populated by approximately 250 ethnic groups, each characterized by relative linguistic, legal, political, economic, and social distinctiveness. The northern part of Nigeria was ethnically and institutionally complex long before the imposition of Islamic ideals and British rule. The Savannah zone has for centuries supported various populations of migrant or sedentary farmers, herders, craftsmen, clerics, traders, and rulers or conquerors interacting frequently through various forms of symbiotic relationships. This therefore resulted in multiple adaptations and the growth of differentiated social and ethnic units.

Secondly, successive conquest of the region by the Moslem Hausa-Fulani and by the British in the 19th and 20th centuries, respectively. Both the Moslem practice of incorporating non-believer communities as dhimmis or tributaries to the Islamic States, and the British policy of indirect rule, considerably served to promote and sustain a plural number of legal and social systems. The retention of the pre-existing judicial organizations of the indigenous ethnic groups vis-à-vis the extraneous Islamic and English laws has undoubtedly added to the complexity of socio-legal systems in the Northern States today. If a successful unification, suppression, or elimination of the ethnically distinct judicial structures had followed the introduction of either of the extraneous

laws, the issue of legal pluralism may not have perhaps arisen, or at least it would have brought substantially different consequences.

The interaction of these different systems of law has subsequently given rise to processes of both mutual legal adaptation and internal conflict. Admittedly, each powerful, new politico-legal system attempted to suppress if not eliminate the pre-existing ones; but this, as I have shown, has not been wholly successful. Rather, the interaction has resulted in an exchange of jural elements among the three different bodies of law. It has been shown, for example, that Islamic law has been adjusting itself to the pre-existing ethnic legal environment by tolerating, and at times enforcing, certain traditional practices which overtly conflict with the principles of the Shari'a. Customary law has also been adapting itself to the Shari'a, which is presently the most fundamental law in the more Islamized parts of the six States. Legal adjustments have been greater between Islamic and Customary law than between General law and either of the other two systems.

In the same vein, General law has slowly been permeating both Customary and Islamic judicial strata, just as General courts are being brought to recognize and administer certain Customary and Islamic practices.

On the whole, however, the interaction between the

three judicial hierarchies has been characterized more by contradiction and inconsistency than by legal supplementation or adaptation. I have for example shown that the judicial organization and rules of substance and procedure vary remarkably from one body of law to another. Moslem values imply that most animist and British (Christian) legal institutions are repugnant to the basic principles of the Shari'a, and must therefore be rejected. Similarly, the British and their Western-trained successors consider a great proportion of Customary and Moslem judicial institutions to be inferior, and thereby incompatible, with English concepts of justice. This struggle persists today with each jural system, symbolized by courts and judges, vying to displace the laws and customs of the other systems. Such competition has frequently resulted in the General courts' complete reversal or alteration of definitive decisions delivered by either the Customary or Shari'a courts.

Up to the 1960s, the area which has generated the greatest legal conflict, and perhaps more court cases, has been criminal law.[1] With their occupation of Hausaland, both Moslem and British rulers tampered little with the traditional values and practices relating to marriage, divorce, or family. Rather, they concerned themselves more with the

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[1]This view has been alluded to in Chapters Four and Five, but is not much reflected in the sample of cases summarized in Chapters Five and Six.

suppression of public or criminal offences which contradicted the ethics of their administrations. Indeed, for the establishment of law and order, in other words an effective government, these conquerors had to busy themselves more with public offences such as treason, theft, and robbery rather than with the way compound heads regulated marriage or divorce issues. It is therefore no suprise that criminal matters in Northern Nigeria became the central focus of conflict, particularly between these two administrations.

This clash was inevitable in that both the Moslems and the British initially sought to govern their new territory using their own conceptions of justice, equity, and effective administration. The Moslems for one, sought to rule Hausaland strictly according to the Shari'a, and therefore imposed maiming and death penalties for offences like theft, robbery, fornication, and murder. The British, on the other hand, considered these punishments excessive and repugnant. Thus, with the promulgation of the earliest British proclamations for the Northern Protectorate practices like slavery, slave trading, and slave-raiding were defined as criminal offences and subsequently abolished.[2] By contrast, to the Moslem and non-Moslem populace of the period these practices were both legal and economically lucrative. For the judges who had to enforce these new rules, the emancipation of slaves became

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[2]See Lugard (1901, 1906).

problematic, since slavery was positively sanctioned by both Moslem and Customary laws. Subsequent colonial legislations either abolished or drastically altered the application of hadd punishments, practices of juju, witchcraft accusations, and trials by ordeal. Light imprisonment or fines were imposed for offences such as theft, murder, and robbery which were formerly punished by death sentences under both Customary and Moslem laws.

These new regulations were naturally held to be repulsive to the majority of the people inhabiting Hausaland just as slavery, maiming, stoning, and execution were to the British. As would be expected, many Nigerians of the time, refused to give up dealing in slaves in particular. Indeed, slave-trading flourished, covertly, with the knowledge of chiefs, mallamai, and judges; and even today some scholars believe that all those freed by the former colonial courts still remain slaves.

The conflict turned out to be very serious for the Moslem population. In the course of administering the new ordinances several Moslem leaders found themselves at open odds with the colonial government. Many judges became genuinely frustrated. Others who openly defied the new regulations had to be dismissed or imprisoned for non-compliance.[4]

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[3]See NAK/SNP 7/11/5541/1910, and Stanley (1908).

[4]NAK/SNP 120P/1921. Also see Fika (1973:300-307).

The judicial innovations (on criminal matters) began by Lugard not only stripped Moslem and non-Moslem administrations of a substantial part of their traditional legal power and jurisdiction but also greatly undermined the whole fabric of the native system of government and administration of justice. The new provisions, culminating in the 1967 reforms, admittedly went beyond the notion of conflict of laws. According to Anderson (1959:446), they had "invalidated, at one stroke, the overwhelmingly greater part of the criminal justice administered by [and acceptable to] all Moslem and Customary courts." And in Northern Nigeria, as we have seen, it is mainly these courts which have been disposing of more than 95 per cent of all recorded litigations, In other words, the conflict in criminal jurisdiction has posed some serious implications for the whole ethos of both Moslems and non-Moslems and for socio-legal change in Northern Nigeria generally.

The introduction of the Penal Code and the Criminal Procedure Code in 1959 and 1960, respectively, brought some measure of uniformity, at least in the domain of criminal law. The new Codes also appear to make up for the eroded privileges of native criminal law by reinstituting a mild form of hadd punishments, by introducing a higher Moslem court of appeal, and by standardizing certain rules and procedures for the benefit of non-Moslem minorities.

With the standardization of the application of criminal law, one can say that a stage has been reached whereby each court in Northern Nigeria can deliver judgments which will more or less conform to the regulations stipulated in the new codes. In practice, however, these uniformity measures are far from being adhered to. Witchcraft accusations and ordeal trials, both considered severe felonies under the Penal Code, are still observed in Customary and Shari'a courts. Besides, these two sets of courts continue more or less to enforce heavy penalties for theft, robbery, burglary, homicide, and adultery as they did in the past. Thus, more than anything else, the new Codes have served to force underground the administration of much criminal law in these tribunals.

Quite recently, many administrators, judges and ordinary citizens have been expressing great alarm over the mounting incidence of theft and burglary in various parts of Nigeria. In the case of the Northern States, the increase in theft cases can be partly attributed to general poverty, rising unemployment, and greater migration to the cities, but more so to the milder forms of punishment prescribed in the Code for this type of crime. Indeed, increases in theft were first recognized barely a few years after colonial enactments against excessive punishments for stealing and

related crimes.[5] Thus, in an effort to combat such a trend and also resolve part of the growing anxiety from judges and the public, the North-Eastern State in 1974 introduced a decree on theft which directly contradicted the Penal Code law. Under the new decree, the North-Eastern Government prescribes a minimum of 21 years for stealing live property, ranging from a chicken to a cow. This new law conforms closely to Islamic and Customary rules about theft, and thereby directly clashes with the 1959 Code.

Thus, conflict in criminal matters still persists. However, in more recent years confrontation between the three bodies of law is being emphasized in civil causes. Mixed-cause litigation in urban areas today is largely concerned with contract, claims, tort, marriage, divorce, inheritance, and land matters. This trend is bound to increase, at least for the next few decades, mainly because of the transitional stage of Nigerian society. However, the trend may be partly halted when clearly defined conflict-of-law rules have been devised for all key areas of civil law.

In my analysis, I have also shown that legal conflicts within the Northern States have given rise to some major social and jural problems, one of which is the question of choice of law on the part of judges and litigants. Although

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[5]Palmer (1908b) is known to have said: "It is lamentably impossible to deny that in Hausaland the incident of theft has grown worse rather than better since British occupation."

courts in the region are specialized, that is, every court is theoretically bound by one primary law, such dichotomies no longer strictly apply. Practically all systems of courts today, with the exception of the remote Customary tribunals, are required to administer some elements of General law, for instance. As a result, many urban court judges have been experiencing difficulty in choosing the appropriate law for specific mixed-cause litigations. Similarly, with increasing changes in style of living, educational standards, and economic opportunities, litigants are beginning to face the dilemma of choice between alternative courts or laws. Although choices so far have been determined largely by ethnic (and religious) factors, urbanites are gradually weighing the relative advantages of being tried in one system of law rather than another.

One of the obvious advantages of the hierarchical legal system in the Northern States is that litigants can savor the best of the three alternatives. The introduction of the opting out clause, beginning with the 1959 reforms, has greatly multiplied these choice rights, notably within urban communities. If a party is dissatisfied, for instance, with the decision of a Customary or Islamic court, the channels of appeal and the opting privilege now permit access to the higher (General) courts, in which full rights of legal representation are guaranteed. Few litigants, however, can afford

the costly proceedings at this level. Besides, the choice-making, as I argued earlier, is necessarily restrictive, linear, and always at the expense of the Customary legal system. Precedents and investigations have jointly revealed that a litigant can only contract out of either Customary or Islamic law, or both, but never out of General law. Once an application or appeal is made to the General system, there is no turning back to either of the other two systems. In all appeal cases today the General courts, symbolized by the High Courts and the Supreme Court, are held to be the ultimate authority. The Shari'a Court of Appeal in Kaduna has a final say only in civil matters which involve Moslem personal law.

Such a situation tends to accord General law a privileged status over Islamic and Customary law. The same situation also directly implies that the General law is superior to the other two systems, and that once a plaintiff or an appellant selects the General to govern a given case, he can no longer have recourse to any other system. The only exception is when a judge of a General court specifically orders a case to be tried in a court other than a General one.

7.1. Possible Remedies

As possible remedies for this anomalous situation, I am here proposing two alternatives: (1) equal recognition of the three types of legal traditions, or (2) unification

(or integration) of the three systems into one body of law, which might then be called the Northern States or Nigerian Common Law.

Had a successful suppression of the pre-existing laws followed the British introduction of General law, the present problems of legal pluralism and internal conflict may not have arisen. The same problems also may not have arisen if the different bodies of law had been accorded equal status and subsequently encouraged to co-exist in parallel compartments.

7.1.1. Equal Recognition

One basic remedy to the inadequacy of the legal system in the Northern States might come by extending equal treatment and unrestricted internal autonomy to each of the three legal traditions. Such an exercise would entail, among other things, the elevation of the Customary and Islamic systems to the same status currently enjoyed by General law throughout the Federation. This also calls for the maintenance of three separate final courts of appeal, and three sets of lower courts having autonomous jurisdiction, power, composition, and set of rules and procedures to govern specific cases. Customary law, for example, could be used in cases involving non-Moslem and non-Christian persons residing primarily in rural areas, Islamic law to apply only to professed Moslems, while General

law to have jurisdiction over non-Nigerians and professed Christians. Each of these systems would thus become a personal law applicable only to a specific category of persons.

In exceptional circumstances one could recommend the use of General law or some compound of elements from the three systems. For example, where the nature of transaction or claim between parties appeared to be alien to both Islamic and Customary systems, as in contract and tort, relevant features from the General law could be recommended as the more equitable alternative. In mixed litigations involving persons of mixed descent or religion, the application of compromise or compound law between the parties could be recommended. In either of these conflict-of-law situations, the explicit consent of parties would be necessary. It may also be suggested that such type of cases could be referred to "courts of resolution," styled after the present Court of Resolution in Kaduna. Such courts could act mainly as channels of mediation for first-instance and appeal cases.

One of the advantages of such a watertight system is that it would retain the diversity of laws, which may be desirable for plural societies like Nigeria. Furthermore, the compartmentalization and internal autonomy would minimize the usual frustration of choice on the part of judges and litigants. The problem of conflict might also be reduced considerably. Furthermore, equal status would for the first time be accorded

to indigenous legal systems. Such a recognition might significantly enhance the general status of ethnic laws, and thereby remove some of the historic discrimination which they have experienced.

A basic requirement for achieving equal treatment for each of the three bodies of law would be the total erasure of the "repugnancy clause" and "incompatibility rules" introduced by the British. Once equal recognition was extended, these concepts would then become obsolete and redundant. For, the whole question of what is repugnant to natural justice, morality, etc., is problematic within Northern Nigeria, just as in Britain it has been difficult at times to formulate what is or is not specifically repugnant. Opinion grounded in experience constantly changes on many legal issues; and the fact that certain matters have moved one way in Britain does not preclude the possibility of its moving independantly in Nigeria. The fact that witchcraft, ordeals, and severe punishments for certain offenses are not tolerated in Britain does not mean that such conducts should be totally abrogated and characterized as barbaric or repugnant.

On another plane, it is difficult to demonstrate that the rule which excludes non-Moslems from succession to the estate of Moslems is repugnant to natural justice and morality. Natural justice itself is a product of bias,[6] and therefore

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[6]U.S. Justice Oliver Wendell Holmes (1961) dismisses natural law as "a mystic overlaw and the product of highly prejudiced wishful thinking" which tends to "denigrade other systems to the lowest."

a relative phenomenon; and to this day it has not been settled whether it should be conceived as something so fundamental the simplest societies recognize it, or whether it is mainly the current opinion and evaluations found only in the most industrialized societies.

7.1.2. Integration of Contradictory Laws and Courts

Another practicable alternative solution to the problem of legal pluralism in Northern Nigeria might be to integrate or unify the three legal systems into a single, harmonious body, which could be termed Common Law. Certainly, with effective integration, much of the current ideological and structural tension between the three legal hierarchies could be significantly minimized.

Judicial unification or integration generally implies uniformity, a process of unity which seeks to include as many distinct legal levels as possible within a single judicial framework. In recent years, one of the principal advocates for legal unification or integration, especially in developing plural societies, has been Professor Anthony Allott. He and a number of legal theoreticians have developed and refined concepts like "organic unification" and "structural unification" of courts and jural rules. The former concept suggests that uniformity or identity can be achieved in a legal system by eliminating one set of laws and replacing them with another.

"Organic unification" also calls for the "rationalization" of certain jural rules and procedures, as against others, within the whole society. It further involves the process of "assimilation," whereby different legal systems become absorbed into the corpus of a common unitary law by means of clearly-defined methods. With some modifications, all these strategies might prove to be quite workable in Northern Nigeria.

"Structural unification," on the other hand, does not imply total uniformity. It merely "seeks to achieve a purely national unity by being inclusive of as many distinct systems of . . . law as possible within a single legal framework" (Rubin and Cotran, 1970: Introduction). Structural unification can therefore be achieved by having uniform procedures, rules, and machinery of enforcement, but leaving the substantive laws of different ethnic or other legal bodies virtually intact. This was the strategem adopted by both the Moslem and British conquerors, although as we have seen this has not been entirely successful. Conflict still persists despite the successive super-imposition of Islamic and General laws, courts, and law-enforcement machineries within the six Northern States.

Another strategem in "structural unification" is to make the different juridicial units mutually intelligible by codifying differing laws and publishing proceedings in a single language, one which normally is shared by all the groups.

Such a technique, it is susggested, will provide a useful way of resolving disputes between persons who hold different ethnic or religious loyalties. It may also help to "create" harmony in judicial procedure and application, as well as to create greater scope for the development of a coherent set of rules on inter-personal conflict of laws (Rubin and Cotran 1970: Introduction). In Northern Nigeria this method would be most suitable during the preliminary stages involving, for example, the unification of various ethnic laws. At such a stage, Hausa could be utilized as the basic language of recording, codification, and proceedings.

"Integration," as the third strategem under "structural unification," is concerned with making a single enactment for each branch of law (e.g., divorce, succession, inheritance, guardianship, and homicide) on a national or sub-national basis. Matters which cannot be unified under uniform rules would then be left to the personal law of the parties concerned. Such a strategem does not, however, aim at total legal unification.

Clearly, a combination of modified forms of organic and structural unification techniques will be required to achieve a meaningful, if not total, uniformity of law in Northern Nigeria. At all levels, some measure of rationalization and absorption of identical branches of law or legal systems will become necessary. It is then, and then only,

that the incorporation of many legal systems into a single judicial framework will become possible.

Essentially, a start must first be made by coalescing the distinctive laws of the various ethnic groups into a workable and integrated system. Such a scheme necessarily calls for intensive, diachronic research, and the cautious restatement of distinctive and interrelated ethnic laws. Contiguous localities could, for example, be grouped together into a single "legal zone" for purposes of recording. Where variations become quite significant, unification could be effected by means of carefully interpreted consensus among informants or "panels of judges." A similar procedure could then be carried over to the inter-ethnic juridical level, where a controlled comparison between the different customary laws in the region might establish the existence of underlying principles upon which uniformity could be realized. Identical customary laws could thus be merged together, and compromises made about differing jural rules and procedures, until an acceptable uniform Customary law for the entire region was drafted. This aggregate of ethnic laws could then be integrated with Islamic law and the General law.

At this higher level, a more rigorous degree of rationalization would become imperative. For purposes of overall uniformity it may become quite expedient to retain only the best, in other words the most equitable and least reproach-

able, jural elements of each system. The finest qualities from each of the three legal codes could subsequently be ascertained before moving on to decide about the ultimate rules of substance, procedure, and organization for the entire region.

In the selection and final integration process, it would probably be necessary to include those features of Customary and Islamic laws which would likely appeal to the bulk of the region's population. Some of these qualities include:

(a). Low Cost. In the absence of advocates and cumbersome representation, proceedings in both the alkali and Customary courts have always been remarkably inexpensive. Parties are seldom overburdened with the cost of professional assistance. Given the generally low income level in Nigeria, it may well be to the advantage of the judiciary to retain and extend this diacritical feature. Such a move would probably imply the value of making drastic cuts in the training and activities of trial lawyers.

(b). Simplicity. The decision-making process and constitution of both Islamic and Customary legal systems are relatively simple and fast. Both avoid the use of irksome and inappropriate legal machinery in the disposition of cases. Consequently, justice is generally administered more quickly than is presently the case in the General courts, where

professional assistance often contributes to congestion and delay.

(c). Flexibility. The decisional process in both Customary and Islamic courts indicates an ability to apply legal principles based upon current social, economic, and political values to the facts of given cases. Such a characteristic, like the preceding ones, might well become a basic feature for the entire Nigerian, if not African, judicial system (Carroll 1967:99-100).

(d). Conciliation. Both Customary and Islamic courts are conventionally supervised and presided over by "laymen" who have the power to administer prescribed laws. The Shari'a court judges, however, are more formally trained than those presiding over Customary tribunals. But even among the latter, the "laymen" who regularly sit in informal councils or panels are generally familiar with their respective societal rules and practices. The judges here, just as in the alkali courts, are concerned not only with the integration and welfare of specific rival parties or litigants, but also quite frequently with that of the entire community. Through the use of compromise or mediation techniques, they generally seek to satisfy all the parties involved in a given dispute. Their ultimate goal, moreover, seems to be the restoration of community equilibirum.

In all the ethnic groups I have studied, mediation

appears to be the dominant technique for determining justice. The alkali courts and the former Emirs' Judicial Councils are similarly noted for their conciliatory tendencies. The alkalai, for instance, almost always recommend reconciliation before they agree to adjudicate divorce or guardianship issues. Islamic law as administered in Northern Nigeria clearly recognizes and enforces, in almost all civil and criminal matters, the principles of compromise (sulkh) and equity (tahdusal hukkum). The more sublime form of compromise, siyasa, is left as the prerogative of the rulers or emirs. The doctrine of conciliation can be easily adjusted to contemporary transactions in urban areas. In amana transactions involving small claims of money, for example, creditors and debtors can be counselled to settle differences outside the court (Yusuf 1975c).

Compromise moots have already become popular and more serviceable than formal trial courts in countries like Norway and the United States. It may therefore be advisable for (Northern) Nigeria to institutionalize more mediation panels in both rural and urban areas. The urban tribunals, which might be termed "courts of resolution," could be multi-ethnic in composition in order to make them congruent with the cosmopolitan towns and cities. The members of the court could be given some basic training in Customary law administration.

Once a network of such tribunals was established all

over the region, traditional mediation would probably become technically more acceptable to the majority of Northern Nigerians than the fairly costly and overawing pleaders and judges who are largely trained in another system of law, and who may well be ignorant of the law of the community in which they practice.

The joining of mediation or collective bargaining techniques to the integration of Customary and Islamic law may well be the most profitable step toward the development of a uniform legal system. The current conflictual tendencies between the three levels of law are likely disappear; and in the face of probable future increases in litigations, congestion of courts, delays in trials, and overflow of expensive lawyers, it may be worth giving serious thought to the expansion of quasi-judicial associations or traditional moots whose main concern will be the prevention of conlficts and the reconciliation of litigant parties. When this method of resolving disputes becomes inexpensive, simple, fast, and informal--as is minimally the case now in the North-Central State Bureau of Public Complaints, and in various Social Welfare bureaus all over the Northern States--people may rediscover an excellent means for avoiding damaging publicity.

(e). Severe Penalties for Specific Cases. Both Islamic and Customary tribunals are, by tradition, famous for awarding severe penalties for such criminal offences as adultery,

theft, and murder. Since the imposition of the Penal Code, this severity has been relaxed, in compliance with the new rules. In recent years, for example, theft has become a major problem in all Nigeria. As a deterrent to this widespread practice, it is here suggested that a uniform severe penalty, based upon an aggregate of the punishments stipulated in both Islamic and Customary law, be adopted.

From what has been discussed so far, it is evident that in terms of organization, rules of substance and procedure, and adaptive tendencies both the Shari'a and Customary law seem to share much in common, often to the exclusion of the General law. When it comes to evolving a single common legal system, the majority of the inhabitants of the six Northern States are most likely to approve of the merger of the best elements from both or all systems.

People are also likely to approve the adoption of Western or English-based laws of commerce and tort in the projected Common law. Commercial transactions in present-day Nigeria are largely non-traditional. In particular, most contracts, loans, credit sales, rentals, real-estate dealerships, and other modes of commercial activity are Western in origin. Such a Common law, however, ought to incorporate also certain pervasive principles of commerce which are indigenous to the majority of the population. For example, the doctrine of trust (amana), as a traditional

substitute for written negotiations, is bound to persist as a key factor in a large proportion of face-to-face transactions among the Hausa, Kanuri, Nupe, and other ethnic groups.

7.2. Government Policy and Hurdles to Legal Integration

Any policy aimed at effecting a uniform legal system for the Northern States has to consider at least two major obstacles, the co-existence of compulsory institutions, and the contempt and indifference for Customary law.

7.2.1. Co-existence of Compulsory Institutions

The integration of laws of family, marriage, inheritance, and other compulsory institutions is bound to be difficult in a multi-ethnic society. In particular, the parallel enforcement of monogamous and polygynous unions is likely to create a serious problem. Native Christians are, for instance, enjoined to practice monogamy. For such persons and those who marry according to the Marriage Ordinance, taking another wife is considered to be bigamy,[7] a crime under the current Matrimonial Causes Decree, 1970.

From a glance at Nigerian daily newspapers, a considerable proportion of Western-educated Nigerians seem to favor monogamous unions. However, the bulk of the population appears

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[7] See, for example, Rex v. Bartholomew Princewell (1963), N.N.L.R. 54; and (1964) J.A.L. 36.

to sanction the retention of polygyny. To resolve such marital complications, it would be advisable to provide for a uniform marriage law. In this regard, the pioneering integration policies began by such African nations as Tanzania, Uganda, Kenya, and Ghana may be worth copying. In these countries, the proposed solutions all aim at establishing a national uniform system of "registration of marriage, whatever its form, and all, whilst not outlawing polygamy, recognize that encouragement should be given to monogamy" (Phillips and Morris 1971:41). In Tanzania all marriages, whether polygynous or monogamous, have equal status.[8] The same nation has also given considerable attention to the practice of polygyny; for example, if a man decides to take a second wife he can do so only after consulting and subsequently obtaining the consent of his first wife.[9]

7.2.2. Contempt for Customary Law

In Nigeria, the present-day attitude among government officials and modern elites toward Customary law has not been particularly encouraging. Harrell-Bond and others (1975: 107) discovered similar attitudes in Sierra Leone, where

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[8]Tanzanian Government Paper No. 1, 1969, Mainland Tanzania. Also see Harrell-Bond, et al. (1975:137-144).

[9]Before such legislation was passed, a Tanzanian Christian who wanted to marry a second wife had to divorce the first one. Furthermore, if such a Christian were married to a second after being legally wedded to the first, the second wife and her children were not recognized by law. Such a situation prevails now in Nigeria.

administrators, judges, and lawyers tend to play down Customary law in favor of Statutory or Received English law. Indeed, all over Africa there exists a parallel lack of interest in traditional law, under the assumption that with time and education family, marriage, inheritance, claims, damages, and tort will evolve toward a more Westernized form.[10]

In the Northern States, the official policy now seems to be that ethnic laws should be left alone, to wither away as outmoded, residual institutions. Moslems, in particular, are least prepared to acknowledge the fact that the Hausa, Fulani, and Kanuri peoples still retain a significant proportion of non-Islamic laws and customs, and that in each of these societies there has evolved what we can today call Customary law, uncontaminated by Islamic judicial practice.

Such a policy is hardly surprising, however. In the Northern States the majority of chiefs, judges, lawyers, and administrators have been trained either in English or Islamic politico-legal conceptions. Contempt for Customary law is particularly high among lawyers and judges practicing in the General courts.[11] This should be expected, since a fair

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[10]See Cotran (1966). Colonial contact, the impact of Islam and Christianity, and styles of living all tend to mitigate against a favorable recognition of Customary law.

[11]For an attack on the attitude of the Nigerian higher judiciary, see Cottrell (1973) and Khahlil (1975).

proportion of such officials have been partly trained abroad, an atmosphere which tends to favor Islamic and Western legal conceptions and thereby denigrade Customary ones.

7.3. Ethnic Differences, Legal Unification, and National Unity

Ethnic differences relating to laws of marriage, family, and inheritance may be major obstacles to achieving national unity through legal integration in multi-ethnic countries. But these differences, as I noted earlier, are not so insurmountable as to pose any significant hurdle to a policy of legal integration in Northern Nigeria, or in Nigeria as a whole. Both rural and urban courts have been finding ways and rules for coping with such differences. The Customary law of the dominant ethnic group is, for instance, almost always accepted as the applicable law in mixed-cases. In most other situations, compromise strategies are being enforced. Such acceptance and mediation tendencies support my contention that the time for the integration of the courts and laws in Northern Nigeria has already come. As I indicated in Chapters Five and Six, the differences that now exist between one ethnic law and another, or between Customary and Islamic laws, are more ceremonial than legal in nature. Penalties or compensation for such offences as adultery, theft, murder, and witchcraft seem to vary from one body of law to the other, but

the general attitudes and rules applied for such crimes are basically the same.

The question of the reality or nature of an ethnic group has been a highly controversial issue among anthropologists, sociologists, and political scientists. All efforts to define an ethnic collectivity, using different criteria, have so far proved to be inadequate. The idea that each of the 250 ethnic groups in Northern Nigeria possesses a significantly distinctive body of law cannot be supported by my findings. Rather, contiguous ethnic units, or those with similar and interrelated politico-social institutions, tend to evolve relatively uniform judicial structures, such as found between the Maguzawa and the Gwari described in Chapter Three.

The question of the persistence or structural importance of ethnic groups and ethnic distinctiveness, however, has significant political implications in Africa today. As Colson (1968) has observed:

> Contemporary African tribes are either new forms of political organization created for administrative purposes . . . or they represent the emergence of self-conscious nationalistic movements.

Colson then goes on to point out how ethnic loyalties have often been exploited by political leaders.

In Nigeria, political rivalry has generally been expressed in ethnic, and to some extent, religious terms; and since the January coup of 1966 the military governments in the

country have been attacking these ethnic cleavages in favor of national development and national unity. In 1967 a major judicial reform was initiated to unify the courts within the federal system. In support of this policy, it is here further suggested that the integration of the parallel laws in Northern Nigeria would go a long way to foster national unity. Furthermore, such a judicial development might bring Nigerian traditions in line with legal trends elsewhere.

Finally, an ideology of unity in the legal sphere, beginning with the ethnic sectors, might significantly assist in removing the disruptive influences which, so far, have been promoting various forms of social cleavage. Most importantly, such an ideology might help eliminate discrimination against persons on the basis of ethnic, religious, or territorial affiliation, or on the basis of the obsolete colonial distinction between "native" and "non-native."

A positive step towards judicial integration at the primary level has been started in the Western State of Nigeria. There, a Division of Law Development was recently instituted to look into customary cases and complaints for purposes of developing uniform case-laws and customary rules for the entire State (New Nigerian, June and December, 1974). By means of analogy, inference, critical analysis, and reference to judicial precedents, the Federal Republic of Nigeria has also been working gradually towards integrating its multiple

legal systems, and thus making them mutually intelligible within the broader context of a Common Law.[12] The centralization of the court systems, the provision of uniform salaries for judges, and the introduction of nationwide decrees and codes on matrimonial, land tenure, constitutional and criminal matters can all be regarded as positive moves towards effecting judicial unification within the nation. Above all, it has been reported that about two-thirds of the laws of Nigeria inherited from the colonial authorities have now been superseded by local regulations. The remaining one-third are also being amended to suit the existing Nigerian legal environment (New Nigerian 1975c).

The bulk of these reforms and uniformity measures are far from being satisfactory, however. For example, the Matrimonial Causes Decree (the General law of Nigeria in regard to the annulment and dissolution of marriage and other matrimonial issues) has been largely based on corresponding changes in the British legal system; yet the Decree has made no attempt to deal with Moslem or Customary marriages, which still constitute the vast majority of marital unions in many parts of Nigeria.

7.4. Relevance of the Study

The question of legal pluralism and internal conflict of laws involves much more than an examination of court

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[12] See Elias (1972:254-271).

decisions and legislations. It also requires more than the efforts of lawyers, judges, administrators, and historians. In essence, it calls as well for contributions from anthropologists and other social scientists who are concerned with the relationship of jural rules and behavior to society at large. The study of conflicting judicial organizations especially requires an examination of a specific socio-legal environment, its development, its component units, and how these identifiable units interact with one another and thereby influence, or are influenced by, the wider social system. For this kind of investigation, a multi-disciplinary approach will therefore become necessary. This is the task I attempted to accomplish here, for, in order to identify and evaluate the structure, interaction, and impact of the distinctive legal units in the Northern States, I have had to resort to historical, juridical, and anthropological techniques of data collection and interpretation.

Anthropologists have been making considerable contributions to the understanding of law and its relationship to other aspects of social life. Such studies have covered both industrial and non-industrial societies, although the emphasis formerly was on the latter. On the whole, most of these studies have been concerned more with the structure and function of law within specific ethnic groups. My study has however gone beyond this approach and focussed on a large

region characterized by remarkable ethnic heterogeneity, historical change, and conflicting judicial values and practices. Despite this difference of approach, my findings partly confirm some of the generalizations derived from holistic studies, i.e., law is an integral part of social life, and that to understand legal phenomenon one has to probe the non-legal aspects of life as well (cf. Gluckman 1955, Turner 1957, and Llewellyn and Hoebel 1954). Thus, in my examination of Customary laws,[13] I have shown that even a brief reference to the political, social, and economic systems of the Maguzawa, Gwari, and Igala may contribute a great deal to understanding the nature and inter-relations of law within these societies. It is thus permissible to infer, for example, that the slight differences in the dispute settlement techniques found in these three societies partly reflect corresponding differences in the complexity of their social and political organizations.

Nonetheless, I am tempted to disagree with Moore (1969) and others who have asserted that to fully understand the whole legal system of a given society one may need to also master the entire institutional system of that society. As pointed out in many anthropological works, it is literally impossible to grasp the structure and function of an entire social system. The task is therefore all the more difficult when one's area of study involves a large heterogeneous region.

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[13] See Chapter Three.

In his classification of legal systems, Gluckman (1955, 1965b, 1965c) has argued that the distinctions between the legal systems of "tribal" societies (ethnic groups) and those of differentiated societies have procedural consequences and are also characterized by certain differences in basic -legal concepts. Admittedly, my study neither focussed on dispute settlement nor on the life-histories of individual cases and litigants. I did not, therefore, adequately describe how law or litigation was immersed into the daily life of the Maguzawa, Gwari, and Igala. Nevertheless, from the data presented on these three societies I am tempted to disagree with Gluckman by maintaining that ethnic groups such as the Igala may manifest as much procedural (and probably conceptual) complexity as any other differentiated society. The Igala do indeed possess local terms as direct equivalents for some Western legal concepts. Besides, they also have ready equivalents of "civil" and "criminal" offences, as these are generally understood in English Common law.[14] In addition, they also have an elaborate court and appellate system.

In my investigation of the laws of the Maguzawa, Gwari, and Igala, I have closely followed Pospisil's definition and substantive rule approach (1958a, 1971). Carefully formulated legal rules, often substantiated by specific accounts of disputes and their outcomes, were collected from informants.

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[14] See, for example, Boston (1965).

In his study of the Kapauku, Pospisil has tended to emphasize the authority aspect of rules and decisions. In my own research, I have discovered that too much emphasis on authority aspect of rules, cases, and decisions will undoubtedly create some basic problems in the analysis of legal relationships between social units lacking strong systems of authority. Among the Maguzawa and Gwari (both have comparatively weak authority structure) conflict resolution has usually been in the form of feasible compromise rather than the enforcement of more or less clearly stated rules of conduct which are validated by the decisions of authorities.

Pospisil's approach restricts the field of law to legal decisions and such principles as can be abstracted from them, thus excluding stated rules not confirmed by authority decisions. In my investigation, this authority factor was de-emphasized by collecting verifiable rules and cases from a wide spectrum of informants. Furthermore, because of the inherent shortcomings of oral testimony, I did not rigorously follow each rule with a brief report of actual disputes and their resolution. Rather, I chose to verify certain rules by referring to written materials and court records where available. I also invited rule-oriented responses to hypothetical cases from local panels of jurists.

In this respect then, I have also utilized Allott's (1968) Restatement technique, which I consider to be comple-

mentary to that of Pospisil's (1958a). Both are specifically searching for "ideal" legal rules and principles in social life. Of the two approaches, though, only Pospisil's makes a detailed reference to the social context of the society under study. Nonetheless, it is clear that both techniques seldom account fully for the social matrix of the rules collected. Only in extended case-method studies (cf. Llewellyn and Hoebel 1954; Turner 1957, Epstein 1967) can one hope to adequately account for the social context of the cases and rules that are being investigated. No doubt, real-life disputes so often present a much more complex set of issues than can be covered by a single rule, for instance. This suggests that, even when the focus of dispute involves the subject matter of such a rule, circumstantial factors (not covered by the rule) play a role in the decision-making process. They may also lead to an outcome which is not strictly in conformity with the rules (Holleman 1973:589-591).

Such processes and inter-connections therefore cannot be fully accounted for in the kind of approaches advocated by either Pospisil and Allott. Nonetheless, the study of legal rules and principles of specific ethnic groups, no matter how far removed from social context, may make some considerable contribution to jurisprudence, legal anthropology, and anthropological philosophy.

From a comparative standpoint, I have also attempted

to go beyond the conventional work of jurists and legal historians, most of whom have tended to neglect African Customary law as a viable unit of analysis and comparison. My appraisal of the basic differences and similarities between Islamic, Customary, and General judicial organizations has been designed primarily to demonstrate that Customary law can be adequately and usefully compared with other legal systems.

As an ethnic law, Customary law displays the major attributes of law advocated by Pospisil (1971:30-96). It also serves basically the same purposes and functions as does law in any other society. Although largely unwritten and uncodified, and frequently accalimed as inferior, (African) Customary law has been serving the same major purposes as Roman, Napoleonic, British, American, or Islamic law. Therefore, I am of the view that, within the context of Northern Nigeria, both Moslem and General legal systems are in no way superior to ethnic laws, from the point of view of dispensing justice and controlling the behavior of individuals and groups. But in order to substantially enhance the prestige of Customary law, and thus earn it the universal respect and recognition it has for long been deprived of, there remains the urgent need to research, record, and codify the laws of the different communities in Northern Nigeria and other parts of Africa. The product of this systematic effort can then be converted

into monographs, law handbooks and guides, codes, and textbooks for students, scholars, judges, legal practitioners, and the public. For the anthropologists, such works or restatements may serve not only as a study of the anthropological context of law, but they may also contribute to the general theory of jurisprudence and policy-making.

By jointly utilizing "pluralism," "internal conflict," and "case-method" approaches, I have also sought to add a new dimension to theory and method in legal anthropology. Hoebel (1949, 1954), Bohannan (1967, 1969), Pospisil (1971), and Tanner (1966), who were among the first anthropologists to direct attention to the issue of legal pluralism, have not fully explored the type of processes or problems that can often be generated by co-existence of differing levels of law. My study, which involves an examination of the interaction of multiple legal systems and their impact on an ethnically complex environment, can therefore be seen as an attempt to fill such a vacuum in the anthropological study of law.

Among legal anthropologists, apparently only Nader (1963:584) seems to appreciate the fact that interacting legal systems, even in the most homogeneous society, may simultaneously complement, supplement, and conflict with one another. It is therefore surprising that Pospisil, the chief advocate of "multiplicity of legal systems and legal levels" in recent years should have totally overlooked this phenomenon in his

study of Kapauku plural legal system. In the illustration of his theoretical standpoint on "multiplicity of laws," Pospisil (1958a:274, 1971:107-111) has classified different legal domains among the Kapauku Pauans: family, household, lineage, clan, confederacy, and so forth. According to him, these form a hierarchy of jural levels according to the inclusiveness of their respective subsocial categories.

Judging from what I presented in this thesis, it appears that my conception of "pluralism," which I equate with "multiplicity of laws," differs considerably from Pospisil's formulations. In Northern Nigeria, the three legal traditions I examined do not strictly form a "hierarchy" of levels of "inclusiveness" as typified by the Papuan model. It is true that the Northern appellate system usually terminates with Islamic law (in Moslem personal matters) or General law. But, in essence, none of these systems necessarily encapsulates the other(s). Each legal tradition exists as a distinctive unit with clearly distinguishable origin and characteristics. In the case of the Kapauku system, it appears that the legal organization of a particular clan may have been derived directly from the household, family, and lineage it encapsulates.

It is therefore reasonable to conclude that there may be significant differences in the structural arrangements of plural legal systems in homogeneous and heterogeneous societies;

those in a complex or heterogeneous society (like Northern Nigeria) may not necessarily be as hierarchical and inclusive as those that can be identified among the Kapauku or the Maguzawa.

Moreover, by overlooking the adaptational and conflictual aspects of the Kapauku legal levels, Pospisil merely reduces his whole approach to a "classificatory" or structuralist-functionalist model. Being essentially static, Pospisil's model of pluralism fails to take note of the dynamic aspects of the judicial levels he analyses. On the other hand, my model, with its emphasis on mixed cases, legislations, conflict, and adaptation can perhaps be conceived as an interactional or dynamic model of pluralism.

Despite its weaknesses, the concept of pluralism[15] seems to have considerable analytic value. It has enabled me to provide a relatively objective analysis of particular systems of relations, organization, rules, and behavior in a multi-legal environment. The use of a framework of "pluralism" presupposes a thorough examination of specific social or institutional contexts. It seeks to identify the essential components of some given common values and to determine how these respective valuations order individuals' social relations (M. G. Smith 1971:418-420). Anthropologists interested in the study of law, particularly in heterogeneous

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[15] See Chapter One.

societies, urgently need a conceptual framework appropriate for the comparative investigation of the different legal levels within those societies. They also urgently require an analytical tool for studying the legal systems of those historical and contemporary social systems whose political and legal composition and organization hinder their functional or normative integration, and hence jeopardize their internal cohesion. The concept or technique of "legal pluralism" has provided me with such an analytic and methodological framework, at least for the purpose of my present study in Northern Nigeria.

Similarly, the concept of "internal conflict of law," initiated by lawyers, appears to be a very useful idea or analytic tool for the legal anthropologist interested in the enforcement or interaction of parallel legal institutions within a specific political framework. The concept is indeed directly related to the theory of pluralism. It suggests a multi-cultural situation where all the analytically distinct legal institutions are in conflict with one another. However, as in the case of "pluralism," an analytic stress on conflict does not mean one should ignore the unity and links that may have existed, or are being realized, between internally conflicting legal institutions in the wider social system.

My study of the inconsistencies between the three judicial structures in Northern Nigeria does not amount to

neglecting or underrating either the fundamental commonalities between the different legal systems or the adjustments through complementation (or supplementation) that have been taking place between the parallel legal institutions. Indeed, I have clearly shown that legal adaptation has been taking place between, for instance, Islamic law and Customary law, thus probably helping to speed up the process of judicial integration or uniformity. Indeed, (Northern) Nigeria as a whole can hardly achieve unity if all its legal, political, and other institutions have been in perpetual conflict with one another.

In Chapter Three, I have cited a few cases[16] as a way of validating or illustrating points of substantive law, procedure, and dispute settlement. Chapters Five and Six, by contrast, demonstrate that case material can be effectively utilized in studies of legal pluralism and conflict of laws. The study of court decisions, particularly those based on mixed causes, can reveal not only underlying values, norms, basic premises, but also some of the actual relationships between individuals or groups of differing backgrounds. Equally significant, mixed litigations, as supported by historical documentation of legislative reforms, can illustrate certain processes in social life. They can bring details of social interaction into focus and thereby reveal certain

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[16]See Chapter One for a discussion of my research methods.

general processes. Some of the cases I cited, for example, demonstrate the heterogeneity of urban contacts and institutions in Northern Nigeria. They also show how judge-made decisions from mixed-causes can affect socio-legal change, direct social trends, and bring about some uniformity in a certain branch of law.

The case material has indeed helped reveal the nature and direction of social, legal, and political conflicts in Northern Nigeria, as well as how these conflicts reflect and influence socio-cultural change within the system as a whole. Through individual decisions, the courts can therefore suggest or actually direct choice of law, indicate which legal system should supersede the other(s), nationally, and in conflict situations,[17] and indicate which type of legal rules should govern specific conflict of interests.[18]

I have therefore come to agree with the anthropological assertion that law both reflects and directs social life. Just as socio-economic changes, resulting from Western influences, can be seen as key factors in bringing about changes in commercial, land transactions, and perhaps marriage laws (e.g., bride-price), it can equally be argued that court cases and legislative alterations of legal rules also resulted

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[17] See to the consequences of the decision in Tsofo Gubba v. Gwandu N.A. (1947) 12 W.A.C.A. 141, reported in Chapters Four and Five.

[18] See Adesubokean T. T. v. Rasaki Yinusa 1971, 25/70 of 17/6/71, reported in Chapter Five.

in dramatic socio-economic change[19] in Northern Nigeria. Both courts and legislative reforms are now encouraging the proliferation of money-lenders, complex credit transactions, and the break-up of communal estates.

Just as with extended case studies, good rules may be derived from conflict-of-law situations, workable rules that would endure and be useful in other cases. In this essay, no attempt has been made to pin-point workable rules from specific mixed litigations. Nonetheless, from a study of some of the cases, compromise rules can be meaningfully adopted in complex inheritance issues involving, for example, persons of differing religious identity. In other situations, one system of law may be allowed to prevail over the others. However, as I indicated earlier such a guiding principle can be both dangerous and far from being satisfactory.

The joint utilization of the case-method and pluralism approaches seems also to suggest that where alternative rules and methods of conflict resolution are maintained side by side the choice of the appropriate law becomes very crucial--not only to practical anthropologists, lawyers, and historians, but to judges, administrators, and litigants as well. Furthermore, in multi-cultural environments like Northern Nigeria, group and category memberships are always major legal problems. Therefore, decisions in mixed litigations are essentially

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[19] See Caplan (1967) for similar changes in Nepal.

judicial as well as policy decisions.

Using the above theories and methods of data collection and interpretation, I shall now advance the following generalizations based largely upon my findings from the Northern States of Nigeria:

(1) "Legal pluralism" and "internal conflict of law" can both be the direct consequences of ethnic heterogeneity, or foreign rule and values, or both.

(2) Foreign occupation, whether direct or indirect, can accentuate legal pluralism and internal conflict, so long as pre-existing or weaker legal institution(s) have not been successfully suppressed or eliminated.

(3) Once one system of law begins to supersede the other(s), it is likely to continue to expand further. Thus, in Northern Nigeria, the combined interaction of governmental legislations, court decisions, secularization, migration, and educational and commercial developments seems to have enhanced the status of General law, which is currently expanding at the expense of the other two systems.

(4) Predominance of one legal system notwithstanding, conflict of law is likely to persist so long as there has not evolved, through legislation or otherwise, unambiguous conflict-of-law rules, and so long as other parallel judicial organization(s) continue to be enforced alongside the dominant one.

(5) The suppression of one legal unit by a more

powerful one may not usually culminate in the total elimination of the weaker one, but it may breed or generate genuine contempt for the latter. Thus, Customary law, which has for long been systematically constrained by Islamic and General laws, continues to survive--although as the most "inferior" of the three.

(6) The co-existence or interaction of different levels of law can be both adaptational (integrational) and conflictual. In a multi-legal or ethnically plural environment, the conflict factor is likely to prevail over integrational tendencies as long as the competing legal units continue to exhibit marked differences, and as long as there is lacking some institutionalized conflict-of-law rules.

(7) The longer and denser the interaction between two or more contradicting judicial units, the greater and more sustained will be the movement toward integration or uniformity. In some parts of Northern Nigeria for example, Islamic and Customary laws have been more compatible than either has been with General law, which was introduced more recently into the region.

(8) The rigid codification of a legal system (such as Islamic law) is no inherent barrier to its flexibility or receptivity to changing economic, social, political, or legal conditions. Therefore, the recording (restatement) and subsequent codification of Customary law in Nigeria can hardly

prevent its adaptation to change.

(9) In multi-cultural societies, group definition and membership are always major legal problems having policy considerations (Moore 1969). Therefore, where certain groups are singled out for preferential legal treatment, as in the case of expatriates and General law, and of Moslems and Shari'a, it becomes imperative not only to set aside conflict-of-law rules and procedures, but also to define what constitutes membership in any one group and which law is most applicable. A rigorous classification of who is subject to which laws may provide solutions to such problems.

(10) A compromise strategy is perhaps the more practicable technique for dispute settlement in developing multi-ethnic societies. In Northern Nigeria, the fabric of procedural techniques used in Customary and to some extent Islamic (marriage, divorce, and inheritance especially) courts have been largely conciliatory. During the colonial period, compromise (more in civil than in criminal) has been extensively used to resolve mixed litigations. Therefore, being inexpensive, informal, and simple, compromise may well be the best technical answer for civil mixed litigations prevailing in urban areas.

(11) The choice of law in multi-cultural societies may be largely defined by ethnic (and/or religious) considerations. With increasing secularization, urban growth, migration, and

educational and economic expansion, however, such factors as the nature of transactions, the nature of claims, costs, pursuit of justice, and proximity to nearest court may erode the salience of ethnicity in choice-making. Where the ethnic variable prevails, as in Northern Nigeria at present, it is reasonable to conclude that individual litigants are simply not "shopping around" for the most equitable of the alternative possibilities of courts or decisions available; rather, they are heavily restricted in their choice-making by the dictates of their ethnic (or religious) loyalty. Where such a situation obtains, one may further deduce that national unity may become a major issue.

(12) Finally, within multi-institutional systems, inter-ethnic (and/or inter-religious) litigations tend to be more frequent in urban than in rural districts.

Very little has so far been written about legal systems in the Northern States of Nigeria. In particular, the literature on the laws of the region's different ethnic groups is very scanty indeed (cf. Salacuse 1965). My study, therefore, may contribute to the opening up of new vistas for extensive and specialized research, both on indigenous judicial organizations and on extraneous laws as well. My study may also benefit many of the region's practising lawyers, law teachers, judges, legislators, and administrators, many of whom lack a basic knowledge or appreciation of the

socio-legal systems in which they are involved.

I further hope that the various governments within Nigeria can discover from this study the key areas in which judicial integration (or diversity) and change may be of some practical benefit either to the entire nation or to segments of the population which will be so directly affected. In the interests of Nigerian unity, I am of the strong opinion that the development of plural societies can benefit more by evolving uniform or carefully integrated judicial systems than by maintaining multiple legal structures, as is presently the case. Finally, I hope that my study has illuminated not only the variety of consequences which can result from the introduction of alien legal institutions, but also those consequences that may follow the implementation of a new, consciously developed legal system.

Appendix A

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Appendix B

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