

‘NEITHER FISH NOR FOWL’: AREA COURTS IN THE ILORIN EMIRATE IN NORTHERN NIGERIA

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Introduction

Law in Nigeria is a plural complex with the English style common law, Islamic law and the indigenous African law that goes under the name ‘native law and custom’ operating to various extents. This paper investigates the consequences for the Area Courts found in the Ilorin Emirate of northern Nigeria. Area Courts in northern Nigeria are the counterparts of southern Nigeria customary courts. They are the most heavily criticised of courts in Nigeria. They are frequently accused of incompetence, corruption, and arbitrariness (Odinkalu 1992). However, it is argued here that the basic problem with them, arising from the plural complex of laws in the country, is that they suffer from a crisis of identity; they are *de jure* secular courts but they are also historically and *de facto* ‘religious’ being Islamic courts. Though basically Islamic law courts, they partake of the other two laws.

The paper investigates the crisis of identity facing the courts and the ways and manners this has contributed to their problems. While doing this, it also assesses the extent to which the charges of inadequacy levelled generally against Area Courts hold true regarding Area Courts in the Ilorin Emirate. It concludes with suggestions of ways of improving the administration of justice in the Area Courts in the emirate and in Northern Nigeria in general.

The legal pluralism which is a prominent feature of the Nigerian legal system is fully represented in the Ilorin Emirate. The British colonial masters brought common law into Nigeria and into Ilorin following their conquest of the town in

1898. In the common law system, emphasis is on both the procedural and substantive aspects of law. Thus, common law is a very technical law in which lawyers play an important role, the emphasis being on technical or formal justice (Aguda 1986). It is generally expensive and time consuming.

Islamic law is an integral part of Islamic religion (Doi 1990: 2). Islamic law has been administered in northern Nigeria as far back as the 14th century. Of the four orthodox Islamic “schools of law” (Hanafi, Hanbali, Maliki and Shafi), Maliki Law is dominant in northern Nigeria. In Ilorin the consolidation of the Fulani hegemony by Shehu Alimi around 1807, and the incorporation of the town into the Sokoto Caliphate in 1828 assured the dominance of Islamic law in the town (Jimoh 1994: 35-67). However, Islamic law has not completely displaced customary law. There are pockets of traditional communities in the towns surrounding Ilorin. Many inhabitants of these towns still follow Yoruba traditions in their affairs.¹ Even in Ilorin town, customary law exists side by side with Islamic law (Elias 1971). In addition, the urbanisation of many of the towns in the emirate has meant an influx of other Nigerians from different cultural backgrounds.

The judicial process in traditional African communities was simple and speedy. Traditional African communities can be divided into two – the centralised states and the stateless. In the centralised communities, the traditional rulers played an important part in the administration of justice. In the stateless societies, the elders administered the law. In both types of communities, the supernatural – oaths, ordeals, ancestral spirits, and gods - played an important role (Oba 2002b). In civil disputes, reconciliation of the parties was the preferred objective. In more serious cases, punishment of the offender, spiritual cleansing of the community and compensation for the victim or the aggrieved party were the aims of the judicial process (Ayittey 1991: 39 – 69).

History and Structure of Area Courts

Prior to the advent of colonialism, as pointed out above, the Ilorin Emirate formed part of the Sokoto Caliphate established by Usman Dan Fodio. Islamic law was the applicable law of the Caliphate (Anderson 1978: 3). The Sokoto Caliphate itself

¹ These towns include Afon, Laduba, Lasoju, Iloa, Egbejila, Lanwa, Jebba, Bode Saadu, Oke Oyi, Lajiki, Apado, and Maleta (Kwara State Government n.d.).

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inherited a strong Islamic learning tradition in the region of the Sudan (Tsigas and Adamu 1997).

In the Sokoto Caliphate, each emir had his own court. Below the Emir, there were also alkali courts manned by learned jurists who were fluent in Arabic and who referred to Islamic law texts. Many scholars in the area wrote books on Islam generally and on Islamic law in particular (Shagari and Boyd 1978: 28–30. Murray Last 1977: 236–254, has a fairly comprehensive bibliography of these works.) These courts were highly sophisticated (Okonkwo and Naish 1980: 4), and applied Islamic law with the utmost vigour (Anderson 1978: 3). Islamic law is not applicable to non-Muslims (Said 1970: 152–154), to whom the courts apply the applicable customary (Anderson 1978: 172).

The colonial masters applying the system of indirect rule preserved the Alkali courts but gradually assumed control of their administration (Okany 1984: 10–17; Kumo 1988: 42–46). The courts administered both Islamic law and customary law under the direction of the colonial masters (Keay and Richardson 1966; Ubah 1982, 1985: 122–155). The Native Proclamation of 1900 was enacted for “the better regulation and control of native courts”. It took control of the Alkali courts away from the Emirs and placed it in the hands of the Resident (Mahmud 1988: 9–11; Kumo 1988: 7 and 9). In 1933, the Native Courts Ordinance among other things changed their name to Native Courts. This position continued after independence until the Area Courts Edict, 1967 (now called the Area Courts Law, 1967) overhauled the Native Courts system. This Law among other things abolished the Emir’s court and changed the name of Native Courts to Area Courts.

There are two types of Area Courts, Area Courts and Upper Area Courts (Area Courts Law, s. 17). An Area Court may consist of an area judge sitting alone or sitting with members provided that all questions of Islamic personal law are heard and determined by the area judge or any member learned in Islamic law sitting alone (Area Courts Law, s. 4). The appellate courts have insisted on a strict compliance with this provision by the Area Courts (*Kubra v Adeoti*; *Shittu v Shittu*; *Madiu v Baba*). The Area Courts are generally manned by single judges. The Upper Area Courts consisted of a President and two members, but now two members can constitute the court (Area Courts Law, s. 4(1), as amended by the Kwara State Law Revision (Miscellaneous Amendments) Law, 2006).

Area courts combine the administration of the three types of law (the common, Islamic, and customary laws) at the grassroots level. They are the courts of first

instance with jurisdiction in civil cases relating to customary law and Islamic law. They also have criminal jurisdiction. They administer the Penal Code and are guided for this purpose by the Criminal Procedure Code. The Penal Code is ultimately traceable to the English law of crimes (Karibi-Whyte 1993: 232; Owoade 1980: 25). All Islamic and customary law crimes have been abrogated by the Constitution (Constitution 1999, s. 36(12); *Aoko v Fagbemi*). In some States in northern Nigeria, the administration of customary law is separated from that of Islamic law with Area Courts dealing with Islamic Law, and Customary Courts dealing with customary law (e.g. Customary Court of Appeal, 1979 (Plateau State), s. 2; *Usman v Umaru*). The fusion of administration of customary law and Islamic law in one set of courts was based on the colonial definition of ‘native law and custom’ as “including Moslem Law” (High Court Law, s. 2).

Parallel to the Area Courts are the Magistrate and District Courts. The Magistrate Courts deal with criminal cases, while the District Courts entertain only civil cases where the common law applies (Obilade 1979: 202-206). Appeals from Area Courts go to the Sharia Court of Appeal in matters of Islamic personal Law, that is, matters of marriage, inheritance, custody of children and *wakf* (Constitution, 1999, s. 277; Area Courts Law). In all other Islamic law matters, appeals go from the Area Court to the High Court (Area Courts Law, s. 54(2)). From both the Sharia Court of Appeal and the High Court, there are further appeals to the Court of Appeal from where appeal finally goes to the Supreme Court (Obilade 1979: 170-192; Constitution, 1999, ss. 233, 240, 244).

Crisis of Identity of Area Courts

One major reason for the crisis of identity facing Area Courts has to do with the religious nature of these courts. Odinkalu says that “one of the most popular misconceptions about the Area Courts is that they are religious courts” (Odinkalu 1992: 29). He argues that they are creations of statute and not religion. Odinkalu illustrates the ‘misconception’ with the following exchange between an Area Court judge and a legal practitioner:

- Judge: Lawyer, in the name of Allah, are you saying your client (the defendant) is not liable to pay the debt?
Counsel: He is not liable being an agent, Mamman Daura ought to be liable.
Judge: In the name of Allah, are you saying, under Islamic

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Law your client is not bound to pay the debt?

Counsel: Your worship, that seems to be the difference between this Court and I. The Court is thinking of Islamic Law while I have been arguing from the point of view of the ... [English] law of agency.

Judge: *La ila ila lah, Muhammadu Rausuulahi Salalahu alaihi wa salaam.*² You see, a Muslim lawyer saying that we cannot apply Islamic Law in Muslim land.

Court: *Allahu Akbar.*

This exchange between the court and counsel illustrates three fundamental crises of identity facing the court. The first is that the nature of Area Courts is not clear. Are they customary, Islamic or common law courts? Are they a hybrid of these three types of courts? The second is a crisis of identity facing Area Court judges. Are they Qadis in the traditional Islamic law sense or are they public servants? The third is a conflict of law problem, that is, which of the three types of laws apply in particular cases? Another crisis of identity that faced Area Court judges was whether they are civil servants or political appointees. These questions, their answers and consequences are explored hereunder.

Islamic, customary, or English law courts?

In the past the courts were manned by laymen who had basic training in Islamic law or were “versed in the customs of the people”. Legal practitioners did not appear in the courts (Area Courts Law, s. 28(1)). Justice Karibi-Whyte, in justifying the non-applicability of the common law-based Evidence Act to Area Courts, articulated the rationale for barring legal practitioners from customary courts thus:

Area Court judges are not learned in English Common law to enable them appreciate and understand provisions of the Evidence Law. Also in accordance with the section 28(a) of the Area Courts Edict, Legal Practitioners are barred from appearing to act for or assist any party before an Area Court. It is therefore important to insulate them from problems of misunderstanding,

² Translation: “There is no deity but Allah (God). Mohammed is His Messenger (May peace and blessing of Allah be upon him)” (Odinkalu 1992: 31).

misapplication of the law and injustice that will inevitably arise if they, with all the above limitations, are bound to apply the Evidence Act. (*Kunso v Udo*: 55)

What his Lordship said here is *obiter* (by the way), it was not part of the *ratio* (binding parts) of the judgment. The position in Area Courts today differs from the above dictum in three major ways. First, the qualifications for appointments as Area Court judges have changed, legal practitioners are now appointed and more significantly, Area Courts are under the administrative control of the Chief Judge who is a trained legal practitioner. Secondly, legal practitioners now appear before Area Courts. Thirdly, the appearance of legal practitioners has been a mixed blessing. Legal practitioners ‘protect’ the interests of litigants, but they have stultified the customary law practice and procedure in the courts and have brought the technicalities of the common law, its attendant delays and high cost of litigation into the Area Court systems.

(a) Qualification of area court judges and control of area courts

One allegation frequently levelled against Area Courts is that the judges manning the courts are generally not well educated. It is also alleged that the minutes of evidence, the records of proceedings and even judgments are written by court clerks or registrars (Oyewo 1999: 81–82). The rules allow this (Area Courts Law, s. 10(1)(b)). However, in none of the Area Courts visited in Ilorin, was this the case. It was the judges that took the minutes of evidence and records of proceedings.

Although only literate persons are now appointed as Area Court judges, controversies on their qualifications remain. Lawyers complain that the courts are not manned by qualified legal practitioners. However, the position is fast changing. Almost all the judges have one form of legal education or another. Many are qualified legal practitioners and others have Diploma Certificates in Law.

One should point out that for customary law there is no specific academic or professional qualification in the country (Oba 2005: 107-108). Even judges of the Customary Court of Appeal and other superior courts are appointed on the basis of their legal qualifications as legal practitioners plus their having “considerable knowledge of and experience in the practice of Customary law” (Constitution,

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1999, ss. 266(3), 281(3), 288(2)(b)). For Islamic law, although there are diplomas and certificates in Islamic law, and also combined honours degrees in Islamic law, there is no professional body for Islamic law practitioners. The only known legal requirement under the Constitution in Islamic law is the equally nebulous “recognised certificate from an institution approved by the National Judicial Council”, and “considerable experience in the practice of Islamic law” or being “a distinguished scholar of Islamic law” (Constitution, 1999, ss, 261(3), 276(3), 288(2)(a)).

Hitherto, there were no specific qualifications stipulated for Area Court judges, and thus virtually any person could be appointed. Persons with degrees, diplomas and certificates in law have been appointed, and so also have been school certificate holders who had been court registrars for a long time. However, the practice of appointing only legal practitioners who had undergone the common law or the combined common and Islamic law training has taken a firm root in spite of stiff opposition by judges and Kadis who have only Arabic or Islamic studies qualifications (Grand Kadi of Kwara State 2006: xvi). Since 2006, only legal practitioners are appointable as Area Court and Upper Area Court judges (Area Court Law, s. 4A(1)(a), (b), inserted by Kwara State Law Revision (Miscellaneous) (Amendment) Law, 2006). However, judges who are currently serving but are not legal practitioners are allowed to remain until retirement (Area Court Law, s. 4A(2)). It appears that there is now a deliberate policy in the country generally to appoint only legally qualified persons as judges of Area Courts. However, the solving of one problem has intensified the court’s crisis of identity.

Area Courts are under the administrative control of legal practitioners. The Kwara State Judicial Service Commission is responsible for the appointment and discipline of Area Court judges in the State (Constitution, 1999, s. 197 and Part II, Third Schedule). The Commission is dominated by legal practitioners with the Grand Kadi as the only representative of Islamic law in the seven-man panel. Islamic law is generally marginalised in the controlling organs of the judiciary in the country (Oba 2004b: 60-62). The Area Courts are under the general supervision of the High Court under the Chief Judge of the State (Area Courts Law, s. 43). This has been a thorny issue. The Kadis argue that the Area Courts should be under the general supervision of the Grand Kadi of the Sharia Court of Appeal (Oba 2004b: 62).

(b) Legal practitioners as counsel in area courts

In 1982, the High Court decided in *Uzodinma v Police* that legal practitioners have a constitutional right of audience in all criminal cases in all courts including Area Courts. In 1984, the Court of Appeal in *Karimatu Yakubu and Anor v Alhaji Yakubu Paiko and Anor* extended this to civil cases. Even though this decision was heavily criticised by scholars such as Tabi'u (1985-1987), Ladan (1993) and Oba (2000a: 127-128), legal practitioners now appear freely in Area Courts and are frequently seen in them. They appear in ordinary business suits without the barrister's wig and gown, which are worn only before superior courts. The Area Courts are not superior courts, being created under section 6(5)(k) of the 1999 Constitution. The judges too appear in flowing traditional robes (*Agbada*) or in simpler long dress (*kaftan*). A few customary judges are seen wearing western suits.

(c) The impact of legal practitioners on proceedings in area courts

As pointed out earlier, Area Courts have jurisdiction in both customary law and Islamic law matters as well as in English-style statutory criminal law. By their education, legal practitioners are only familiar with English-style common law. They are generally totally ignorant of the rudiments of customary law and Islamic law (Oba 2004a). Yet, these form the overwhelming majority of cases before them. Justice Belgore aptly summarised the pathetic situation of customary courts resulting from the activities of legal practitioners in Area Courts as follows:

In preparation for the beginning of our constitutional doom, some parts of the country started "renovating" the native courts by putting British trained lawyers as the judges. Instead of quick and just decisions, these customary court judges were only "customary judges" because the law says so, they are not even a cross of customary and common law judges. The courts got worse in matter of delays and ignominious adherence to precedents. In many cases the judges never know the custom of the area they adjudicate upon. The net result is that they employ their personal moral standards on issues of succession, legitimacy, matrimonial causes, custody of children, contracts and other personal laws. (Belgore 1999/2000: 45)

Now, with legal practitioners taking over the customary courts as counsel and

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judges, the system in the Area Courts is becoming increasingly anglicised. Legal practitioners still complain that non-lawyer Area Court judges do not “appreciate” legal points (Odinkalu 1992: 29-32, 87-90). Of course, the judges who are lawyers do. If the system is not overhauled, the common law will sooner or later overwhelm customary law and Islamic law procedures in the Area Courts. They will turn from the distributive justice of customary law to the formal justice of the common law.

(i) Abridgment of customary law evidence and procedure

The tendency is to apply common law rules of evidence and procedure in cases governed by customary law or Islamic law, whereas the law exempts customary and Islamic courts from the ambit of the Evidence Act which codified the rules of the English law of evidence (Evidence Act, s 1(2)(c). See further Oba, 2003: 462-464).

The oath is a prominent means of proof under Customary and Islamic Laws (Oba 2002a). While customary law oaths continue to suffer increasing threats to their recognition in the English style courts or the general courts (Oba 2008a) and their use has declined significantly even in customary courts across the country, the Islamic law oaths are enjoying an increasing relevance and use in the Area and Sharia Courts. The appellate courts, particularly the Sharia Court of Appeal have insisted that the Islamic procedure (which includes Islamic oaths) must be followed strictly in Islamic cases in the Area Courts (Ambali 2003: 95-127; Oba 2005: 162-164). In customary law proceedings, traditional oaths are rarely used, the preferred oath being the common law oath embodied in the Oaths and Affirmations Law. This may be because the Area Courts (Civil Procedure) Rules, 1971 which regulates the Area Courts in civil matters and the Criminal Procedure Code which governs criminal procedure in these courts are patterned closely after the common law civil and criminal procedures respectively. Common law oaths constitute a radical departure from the Islamic and customary law use of oaths (Oba 2002b).

The Area Courts have generally followed Islamic law procedure in Islamic cases³ but in customary law matters, the English civil law procedure adopted for customary cases by the Area Court (Civil Procedure) Rules 1971 has been

³ This is consistent with order 11, Area Court (Civil Procedure) Rules, 1971, which stipulates that Islamic law procedure must be followed in Islamic law matters; see also *Aremu v Akanni* at 13.

followed (Order 11, rules 1-11, Area Court (Civil Procedure) Rules, 1971; Eri 2000: 110-118). Judges and counsel keep making references to these rules and the Criminal Procedure Code. The arguments advanced by counsel generally are also similar to those advanced in the English style courts.

(ii) Technicalities

Customary law in indigenous African communities was simple and its administration speedy. The proceedings in Area Courts are supposed to reflect these characteristics. Karibi-Whyte JSC explained the role of Area Courts thus:

Our new judicial system having accommodated our indigenous system of administration of justice has recognized its informality, malleability to the particular area in which the court exercises jurisdiction, has made provision within the limits of statutory provision enabling them to administer justice as understood by the people and to do substantial justice between the parties before them. Thus what the enabling statutory provisions aim at achieving is the doing of substantial justice in accordance with the native law and custom of the parties before them, any technicality which will stultify the realisation of this objective will be rejected by the court. (See s. 62, Area Courts Edict, 1968). Area Courts are therefore given a wide latitude to enable them do substantial justice. (*Kunso v Udo*, 54)

This is consonant with section 61 of the Area Courts Law which provides:

No proceeding in an Area Court and no summons, warrant, process, order or decree issued or made thereby shall be varied solely by the reason of want of form but every court or authority established in and for the State and exercising powers of appeal or revision under this Edict shall decide all matters according to substantial justice without undue technicalities.

Karibi-Whyte, JSC, commenting on this provision said:

It is important to appreciate the fundamental factor that Area Courts created under the Area Courts Edict, 1986 [Benue State]

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which are the successors of the former native Courts, which in turn were the courts which replaced the pristine traditional methods of the administration of justice are designed to maintain and adhere to our indigenous methods of administering justice. (*Kunso v Udo*, 54)

(iii) Delay of cases

Delays in the litigation processes are routine in Nigerian courts. It is not unusual for a case to last several years (Aguda 1986: 13). From the trial court to the Supreme Court, cases have been known to take up to 22 years (as *Ariori v Elemo* did). There are several reasons for this. There are too many cases before the courts. Up to 30 cases are listed before the court daily (Odinkalu 1992: 84). The pattern is still more or less the same in Area Courts in the Ilorin Emirate with as many as 35 cases on the court's docket in some instances. It is simply beyond human capacity to take all the cases listed. Invariably, many are simply adjourned. Legal practitioners too are responsible for some of the delays. They ask for too many adjournments. Again, the common law places a great premium on procedural niceties, rather than on the substantive matter before the court. Hence, there are too many arguments on technicalities that have little or no bearing on the substantive issues in the cases (Oba 1999). The system permits appeals on technical points even when the substantive case is still on. Thus, there can be several interlocutory appeals before a case is eventually concluded by the trial court. These appeals when fortified by orders for stay of proceedings, are responsible for the worst delays within the system. Until the appellate process, which may consist of several steps (to the High Court then to the Court of Appeal and finally to the Supreme Court) determines an interlocutory appeal, a case cannot be brought to a conclusion. There are also the volumes of records of proceedings to be prepared in tens of copies for each appellate stage. The arguments of counsel do much to multiply the records of proceedings.

Secular or Religious Courts?

Area Court judges administering Islamic law generally think of themselves as Qadis in the traditional Islamic sense rather than as the civil servants they are under the law. Although they are not religious courts *de jure*, they are so *de facto*. At least, that is how the judges perceive themselves and that is how the populace

perceive them. Since the law they administer, the procedure they follow, and the manner of proof in their courts are based on Islamic law, it is inevitable that they think of themselves as Qadis. The judges frequently cite and rely on Islamic injunctions on judicial ethics. The Sharia Court of Appeal in admonishing an Area Court judge repeated this hadith (a saying of the Prophet Mohammed (SAW)):

Judges are of three categories: two categories will surely go to hell fire while only one will enter paradise. The judge who knows the law and decides in accordance with the law will surely enter paradise. The second is the judge who knows the law but refuses to judge in accordance with the law due to subterranean motive he will enter hell fire. The third judge is one who is not learned in the applicable law but arrogated the power to himself he will surely end up in the hell fire. (Quoted in *Ibrahim v Ibrahim*, 61-62. This hadith is reported in al-Asqalani 1994: 289.)

This is an oft-cited hadith in connection with Muslim judges generally and with Area Court judges in particular. Odinkalu's arguments as to the status of Area Courts though superficially correct, overlook the religious antecedents of the Area Courts (Odinkalu 1992). Their religious flavour remains up to today.

Odinkalu also complained that there was no female judge in the areas covered by his research. This he thinks may be a possible violation of the constitutionally guaranteed rights against discrimination on grounds of sex (Odinkalu 1992: 50). While there are many women among the Magistrates and High Court judges in the Emirate, there is no female judge in any of the Area Courts in the emirate. Nobody can remember if one was ever appointed. This is not strange. Islamic law requires that only males be appointed as judges (Yusuf 1982: 29).

Again, under Islamic law, a non-Muslim cannot be a judge in a court applying Islamic law to Muslims (Ambali 2003: 81). Such a person can however be a judge applying customary law or other religious laws to his own people even within an Islamic State. This is the pattern adopted in Ilorin. All the Area Court judges applying Islamic law are Muslims. There are non-Muslim judges in the Area Courts that administer customary law. Contrary to Odinkalu's assertion, Area Courts when they administer Islamic law have an Islamic flavour. Yet, Area Courts are not really fully fledged Islamic courts. As we have indicated earlier, their judges are public servants whose control and discipline are not in the hands

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of religious authorities but in the hands of secular public officials. They also deal with criminal laws which are not based on Islamic law. Thus, in many cases, the religious judicial and ethical imperatives are not really relevant in these courts. The circumstances of the court and its judges indicate a serious crisis of identity, not surprisingly, with some very adverse consequences.

Apart from the legal and other procedural consequences, the court's identity crises have aided highhandedness, arbitrariness and corruption in the court. These have given the court a bad reputation among legal practitioners, litigants and the general public.

(a) Highhandedness and arbitrariness

In the past, another serious crisis of identity faced Area Court judges when they were under the direct control of political appointees and they became more or less extensions of politicians.

When the colonial administration took over the running of the alkali courts, the resident was in charge of them. The Native Administration (NA), as the local government was called, succeeded the resident. Between this period and the Area Courts reform of 1967, Area Courts (or the native courts as they were known then), were under local government. During this period, local government officials were elected through partisan politics. Local government officials used the Area Courts to victimise and harass their political opponents (Yahaya 1980: 10-12, 100-101; Mahmud 1988: 29-30). Illegal arrests and undeserved jail sentences were imposed. Judges that refused to cooperate were summarily removed from office. This perverted use of the courts opened them to all sorts of corruption and highhandedness. The Area Courts reform of 1967 removed the Area Courts from the control of politicians, but the high-handedness of the old sometimes surfaces again. A relatively recent example is the case of *Ndache v Nda Yaru* where the Sharia Court of Appeal reprimanded the Area Court for issuing a bench warrant against a party who was absent from court on the day fixed for the hearing of a paternity/custody of child case filed against her.

(b) Corruption

The incidence of corruption was unknown or very low in the pre-colonial alkali era

(Ubah 1977: 121). Unfortunately, today corruption is a well-known contemporary problem in Nigeria. Courts generally and Area Courts in particular are not immune. Area Court judges are also frequently accused of trying cases in their houses or in chambers rather than in the open court (Odinkalu 1992: 104-106). It is difficult to get concrete facts but allegations of corruption are common.

Judges in the Ilorin Emirate no longer hold ‘court sessions’ at home. However, it appears that cases still sometimes proceed informally in the judges’ chambers rather than in open court, particularly where there are no legal practitioners in the case. So many persons - litigants, personal visitors, legal practitioners and touts - routinely consult the judges in chambers that one cannot say with complete certainty that none of the visits are made with dubious motives. Some unscrupulous touts, and even legal practitioners, collect money ostensibly for bribing the judge. Such a person then proceeds to the judge’s chambers to discuss other things without offering or giving the bribe. He will then upon his return confirm that he had delivered the bribe! It is too easy to have an audience with an Area Court judge in Chambers. It appears that legal practitioners do not observe with rigour the practice whereby the legal practitioner on the other side must be informed and his presence requested before a legal practitioner in the case can discuss any aspect of that case with the judge.⁴ It may be that the courts are meant to be informal in the traditional sense, but such solitary visits raise legitimate suspicions.

Another minus for the Area Courts is the presence of touts. Touts are the most oft-complained about features of lower courts in the country. Area Courts are particularly infested with them. There are two types of touts in the Area Courts. There is the ‘charge and bail’, and there is the *Baba Kekere* (literally in Yoruba ‘small father’). The ‘charge and bail’ basically furnishes bail bond for persons arraigned before Area Courts on criminal charges. Often they act as go-betweens negotiating bribes between accused persons on the one hand and the judge and the police prosecutor on the other hand. *Baba Kekeres* are an exclusive feature of Area Courts throughout northern Nigeria (Yusuf 1982: 42-43). They are not found in superior courts and English-style Courts. They are frequently seen going in and

⁴ It is against the rules for a legal practitioner to discuss a case with a judge in the absence of the legal practitioner on the other side or behave in any way as to create the appearance of gaining special personal consideration or favour from a judge: Rules of Professional Conduct for Legal Practitioners, 2007, rules 30(4),(5), 34. See further Orojo 1979: 57-58.

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coming out of judges' chambers, and talking with court registrars and clerks. They do not appear in cases except as witnesses. Many believe they specialize in giving false evidence (Yusuf 1982: 42-43). All these show that the ethical tone of the Area Courts has declined remarkably compared to its pre-colonial purely religious-oriented precursors. Touts give the judges a bad image. Attention was drawn to this at a workshop for Area Court judges (Oba 2000). The submission there was that any judge within the vicinity of whose court touts particularly *Baba Kekeres* are present is automatically guilty of corruption. For, if he (the judge) does not tolerate, entertain and welcome their attention, the touts will disappear within a few days, because they would no longer have any reason for hanging around. If the judge keeps his door open to them then they will flourish and collect bribes purportedly or actually on the judge's authority.

Corruption is a general problem in the judiciary. The Justice Eso Panel established in 1983⁵ which looked at the problem of corruption in superior courts, that is the High Courts and above, charged over forty judges with corruption. The report was not allowed to see the light of day. There is no Government White Paper on it yet. It is doubtful if there will ever be one. However, the anti-corruption crusade launched by President Obasanjo upon assuming power in 1999 has been a major step in checking corruption in the public service. The Independent Corrupt Practices Commission (ICPC, established by the Corrupt Practices and Related Offences Act, 2000; see Ali 2003) and the Economic and Financial Crimes Commission (EFCC, established by the Economic and Financial Crimes Commission Act, 2002; see Kolawole 2004) established by the administration are putting public officers on their toes. If the momentum is maintained there is no doubt that corruption in all sectors of public life in general and the judiciary in particular, will be greatly reduced if not completely eradicated. Unfortunately, the anti-corruption drive has suffered set backs in recent times under the current Nigerian leadership (Human Rights Watch 2009).

Conflict of law problems: Which law is applicable in particular cases?

Since the 'native law and custom' of Ilorin and the 'prevailing law' in the area is Islamic law, most Area Courts are constituted by single judges learned in Islamic law. The Area Courts in only a few places in the Emirate where customary law is dominant are manned by judges who are experts in customary law. In the

⁵ Terms of reference of the Panel, *The Guardian* newspaper, January 10, 1994.

remainder of the Emirate, this creates problems for the tiny minority of ‘strangers’ whose customary law is Yoruba and not Islamic law. No doubt, the volume of work resulting from customary law in these areas does not warrant the establishment of exclusive Area Courts for customary law. Regarding this problem of choice of forum the compromise reached is that such cases are filed at the Upper Area Courts where there are judges learned in customary law. A similar problem arises for Muslims in the areas where customary law dominates and there are no judges learned in Islamic law in their Area Courts. The usual solution is that such cases are transferred to another Area Court manned by a judge learned in Islamic law.

There is also a problem of conflict of substantive laws between Islamic and customary laws. Personal law matters relating to family law, such as divorce, custody of children and inheritance are the commonest cases in Area Courts. Most of the litigants in the Area Courts are both Muslims and indigenes of the Iorin Emirate. Yet, conflict of law problems do occur in Area Courts in relation to Muslims. Sometimes, a legal practitioner representing a Muslim litigant would argue that customary law should apply in the case even though all the parties are Muslims and the matter in question relates to personal law (see e.g. *Adisa v Adisa* and comments in Ijaodola 2004). Mostly, however, the problems arise because Muslim litigants complain of the imposition of customary law on them. This is a frequent problem in southern Nigeria where only customary courts and magistrates courts exist (Okunola 1991: 153-156; Olaniyan 2005; Oba 2009). In northern Nigeria, the problem often occurs in places where customary law dominates and the Area Courts are manned by customary law experts. The Sharia Court of Appeal has always firmly resisted this. According to the court:

The point needs to be made that a Muslim and as long as he or she professes Islam, has no option or choice regarding the application of Islamic law – personal or otherwise onto his person. Having voluntarily assumed the status of a Muslim, he or she is disentitled from accepting or rejecting according to his whims and caprices. He cannot back out therefrom and he must not allow anybody to either encourage or discourage him therefrom. There cannot be a superimposition or juxtaposition of customary law over Islamic law. It cannot be done. It is never done. (*Shittu v Shittu*, 98. See also *Jacob v Suleiman*.)

Future of Area Courts: Concluding Observations and Suggestions

Any discussion of the future of Area Courts will necessarily involve a discussion of the future of law in Nigeria. Upon a consideration of the arguments for and against the continued existence of customary law generally (Okany 1984: 223–233) and Area Courts in particular (Mahmud 1988: 28–33), there is no doubt that lower courts at the level of Area Courts will always be needed. The only question is what form they should take. It is doubtful whether the same court, given the current state and content of the lawyer's academic and professional training, can administer concurrently the three types of laws in the country. The Area Courts have tried to do this but they have ended up being 'neither fish nor fowl'.⁶ Islamic law proponents see them as common law courts masquerading as Islamic law courts; adherents of the customary law see nothing of their cherished African judicial procedure in the courts; while legal practitioners see them as being largely arbitrary (Odinkalu 1992).

There is a need to clarify the identity and character of Area Courts in the Ilorin Emirate. They are in reality two distinct courts - Islamic and customary courts. They should become separate Islamic and customary law courts respectively while Magistrate courts administer English-style law. This will eliminate the distortions introduced into the administration of these three laws by the present arrangement. It will also meet the yearnings and aspirations of the people who actually want Islamic, customary or English-style laws to govern their affairs respectively. In the case of Islamic law, it also has the added advantage of strengthening the religious flavour of the courts which will be useful in the fight against judicial corruption.

It has been suggested that English-style laws should be administered exclusively by the Magistrate courts, customary law by Customary courts and Islamic law by Sharia courts (Tabi'u 1986; Oba, 2000, 2004a). This is the form pioneered by Plateau State which established Area Courts, Customary Courts and Magistrate Courts to administer the three types of laws respectively. However, the control of these three courts is put in the hands of the Chief Judge of the High Court. At appellate level, the tripartite arrangement continues with appeals from customary law courts going to the Court of Appeal, and those from the Area Courts in matters of Islamic personal law going to the Sharia Court of Appeal while those from the Magistrate courts go to the High Court. This arrangement was adopted with some variations by Zamfara State in 1999. The State abolished Area Courts, created Sharia Courts with exclusive

⁶ I am indebted for the phrase 'neither fish nor fowl' to Kumo 1988: 14.

jurisdiction in all Islamic law matters and transferred the customary law jurisdiction of the defunct Area Courts to the Magistrate courts. Under this arrangement, the general supervision of the Area Courts was given to the Grand Kadi as head of the Sharia Court of Appeal, the court to which appeals from Sharia Courts lie, while the Chief Judge supervises the Magistrate courts, appeals from which lie to the High Court. This in our view is the preferred option in places where customary law is not prominent. For the Ilorin Emirate, a tripartite courts system is preferable with the control of the Sharia Courts placed under the Grand Kadi. It is suggested here that in furtherance of this option and its variants, legal education should be fashioned academically and professionally towards separate degrees in common law, Islamic law and customary law respectively. A legal practitioner will then appear in and man only the courts within his area of specialisation.

Others are advocating a fusion of all the courts in the country under an English-style courts system (Agbede 1989: 240–241; Dinakin 1991: 65-68). This is clearly unrealistic because the legal practitioners envisaged as the judges of the unified courts are deficient in learning in customary and Islamic laws. Proponents of this option argue that this could be remedied by reforming legal education so as to accommodate substantial learning in both Islamic law and customary law to the extent that all legal practitioners would be experts in all those laws (Aguda 1988, 1989: 264; Tilley-Gyado 2000: 276-278). This approach is fraught with problems as I have highlighted elsewhere (Oba 2004a: 146). However, it is clear from the arguments of supporters of both parallel and unitary court systems respectively that there is a clear need for a radical review of the curricula at the university and Law School levels in such manner that it should be possible to produce practitioners with standardised academic and professional qualifications in Islamic and customary laws. The options in this regard have been examined in detail elsewhere (Oba 2008b).

Corruption is another problem that must be addressed. As we have seen, corruption is a cankerworm within the Nigerian judicial system. Although the availability of appeals and the firmness of the superior courts have helped check many of the excesses of Area Courts, it is necessary that there is effective machinery for weeding out corrupt judges. However, it is apt to point out that corruption in Nigeria goes far beyond the judiciary, it is a national malaise. It is therefore also necessary that the country undergoes an ethical revolution which will purge the country and its judiciary from corruption.

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