

ISLAMIC LEGAL SYSTEM AND THE WESTERNIZATION
PROCESS IN THE NIGERIAN EMIRATES

C. N. Ubah

For many centuries one of the major issues which tended to divide mankind was the conflict between Western cultural values and the accumulated traditions and historical experiences of the Orient. By and large the value system of the West was linked with the Christian way of life while that part of the East with which the West had most contact was grounded on the Islamic religion. Conflict between Christianity and Islam was later replaced by increasing Western cultural penetration and domination of Islamic lands, as a result of which Islamic states were here and there subject to irresistible pressure to modify aspects of their heritage to bring them into conformity with or closer to the canons of Western societies. For in their political, social, economic, and other doctrines Western and Oriental societies were fundamentally divergent. In some Islamic territories, such as Turkey, certain Western values were adopted by the spontaneous acts of the governments, but in others, as in the Nigerian emirates, they were imposed with the coming of colonial rule by an external power.

Sufficient attention has not been paid in current research to the impact of colonial rule on Islamic societies, especially as it affected sub-Saharan Africa. This study attempts to fill part of the existing gap by focusing attention specifically on the judicial sector of the encounter between Western notions and Islamic culture. Our unit of study is the Islamic emirates of Nigeria. Our starting point is 1900 when a protectorate was proclaimed over Northern Nigeria, and a convenient stopping-point is 1930 when the major implications of colonial rule had become clear. Although our illustrations are taken from the emirate of Kano they represent the general trend in all the emirates of Nigeria.

Before the imposition of colonial rule at the beginning of the twentieth century emirates were to be found in the Northern part of Nigeria, in what were known as the Sokoto Caliphate and the Empire of Bornu. The Sokoto Caliphate evolved out of the nineteenth century Islamic revolution led by Usman Dan Fodio, and embodied a large expanse of territory, including almost the whole of Hausaland.¹ The headquarters of the Caliphate were Sokoto and Gwandu (for the eastern and western emirates respectively).

The neighbouring Empire of Bornu, with a much longer history, had its beginnings in the state of Kanem which rose in the Chad region well before the end of the first millennium of the Christian era.² Islam reached Bornu much earlier than the Hausa states: it was adopted by a king of Kanem towards the end of the fourteenth century.³ With Bornu and Hausaland as bases Islam began its penetration of other parts of Northern Nigeria and was vastly extended and consolidated in the course of the last century. The present ten Northern states of Nigeria⁴ were for the most part made up of varying numbers of emirates owing allegiance to Sokoto, Gwandu, or Bornu, depending on their history.

There is at present no comprehensive study of the legal system of the emirates for the period preceding British occupation. But undoubtedly in its several aspects--organisational structure, substantive law, punishments for offences, and judicial procedure--that system was basically Islamic, with variations from place to place according to the degree and depth of Islamization. The following represents a rough picture of the legal system which obtained in the highly Islamised areas such as the capital territories of the major emirates like Sokoto, Bornu, Kano, and Zaria.⁵

Legal administration was in the hands of a qadi (Hausa: alkali), an expert in Islamic law who was appointed by, and held office at the discretion of, the emir who was the chief executive authority. The emir himself had a judicial tribunal over which he presided with the assistance of specialists in Islamic law. Appeals were possible from the court of the alkali to that of the emir, and certain classes of offences such as homicide were reserved for the political authority. The alkali had no special court building: he handled cases either in his house or at such other places as circumstances dictated, and he had no official working hours.

The procedure followed in the hearing of cases and passing of verdicts, as well as the punishments inflicted for various offences, were consistent with the prescriptions of the Maliki schools to which all Nigerian Muslims belonged. The punishments for hadd offences, that is, those statutorily provided for in the Quran, were death for culpable homicide (or blood money or diya in the case of unintentional homicide), flogging for the drinking of intoxicating liquor, loss of limb for theft, and stoning for zina or adultery. For personal injury retaliation was allowed where this was possible, otherwise compensation in cash was awarded. Judgments in all cases were arrived at after competent witnesses had testified or an appropriate number of oaths on the Quran had been administered. As a general rule,

slaves were not competent to give evidence at court, and crimes committed against them were not treated as serious offences.⁶

When the protectorate of Northern Nigeria was proclaimed in 1900 one of the major grounds of opposition among the Muslim population was religion, since there was a general fear that Islam might be proscribed. Lord Lugard, the High Commissioner of the new protectorate, attempted to assure the Muslims that their religion would not be tampered with and that he had no intention even of doing away with their courts. His policy was to incorporate these courts within his own system of administration, and under the Native Courts Proclamation of 1900 his Residents were required to establish native courts by warrant with the consent of the emirs.⁷ But Lugard was under no illusions about the unacceptable nature of certain aspects of Islamic justice. Even before the formal proclamation of the protectorate he had laid down that "by the system of law introduced certain matters became illegal even though sanctioned by native law or religion."⁸ Another proclamation established provincial courts presided over by Residents. The native courts were enjoined to enforce laws sanctioned by custom and tradition so long as these were not contrary to "natural justice and humanity" (as seen through British eyes), and the provincial courts were to deal with cases which sharia or Muslim courts could not or would not handle. It is clear that the existence in the same territory of two types of courts based on two different value systems was likely to give rise to problems.

CONFLICTS BETWEEN ISLAMIC LAW AND COLONIAL POLICY

The impact of British ideas on Islamic law seems to have been most evident in the sphere of hadd punishments. Although Lugard was anxious that the native legal system should be left intact there were certain practices he could not accommodate in a British colony. In particular, some of the statutory punishments were inconsistent with his concept of "natural justice and humanity."

For instance, the High Commissioner ordered that no sentence of mutilation (amputation of hands and legs for proved cases of theft) should be carried out in the emirates,⁹ and the Residents were instructed to be on the watch for any infractions. According to oral evidence, British officials began to insist in such cases on terms of imprisonment based on the value of the stolen property.¹⁰ Again, retaliation was no longer allowed for personal injury, and a fine by way of compensation (kudin arashi) was substituted.¹¹ Since wounding was a criminal offence, it means

that the British made some concession in this regard to Islamic law.¹² Apparently it was not until after this period that payment of compensation was replaced by a term of imprisonment. The British also disallowed stoning for zina, substituting a fine or imprisonment, at the option of the complainant.¹³

On the other hand, both cultures accepted the death penalty for a person who willfully killed another, but there were important differences in detail. For instance, a Muslim court could admit evidence and so reach a verdict which a British court could not regard as proper. Hence an accused might be convicted of murder in a Muslim court when in a British court a conviction for manslaughter would have ensued. This was the main reason for the stipulation that a capital sentence passed by a sharia court should not be executed until confirmed by the Resident. In the case of a conviction in a Muslim court of manslaughter the British, again out of respect for Muslim sensibilities, for a long time recognized payment of diya or blood money. And in all cases sentences of imprisonment were passed only by provincial courts where payment of diya was not recognized.

The British insisted that the law was no respecter of persons and that all human beings were equal before the law. Lugard therefore made it clear that a master who wilfully killed his own slave was guilty of murder, and that slaves could testify at court.¹⁴ Moreover, imprisonment was imposed for proved cases of slave trade and all transactions in slaves--actions which in British eyes amounted to offences but which were not contrary to the sharia. These changes were all unpopular. The explanation generally given for the unpopularity is that they were contrary to the sharia and appeared to have put religion itself in grave danger.¹⁵ Yet armed opposition was out of the question because of the military impotence of the Muslim state.¹⁶ In the course of this period a number of the Native Administration (N.A.) officials, both judicial and administrative, were tried and jailed by the provincial court for offences related to slavery.

But there was a deliberate policy of encouraging the emirs to uphold those aspects of their religious culture which were not "repugnant to natural justice and humanity." Thus, Usman, the second Emir of Kano of the British period, was allowed to make rules to curb the drinking, selling, buying, and possession of native brewed beer (fito) within Kano territory. Such rules were designed to enforce the law on Muslims and did not apply to the maguzawa or non-Muslim population, or the township, which was almost completely inhabited by immigrant elements.¹⁷ Again,

the statutory punishment of flogging for drinking intoxicating liquors was maintained. The Native Administration had the responsibility for the execution of its decisions. The argument which Lugard used in defence of this provision was that, since the British were not party to the judgments, they could not be held responsible for their enforcement. Consequently, prisons were set up or expanded both in the cities and in the rural districts to take care of the increasing number of criminals. Caning of convicts was undertaken by an authorised agent who had to hold a cowry shell in his armpit as a check against undue brutality. It was not unusual for a convict to buy off his lashes at an agreed rate in cash per lash.¹⁸

In some other spheres Islamic norms remained unpolluted by alien influences. This was especially true of family law. Important matters like the rules of marriage and divorce laid down by Islamic law remained uncontaminated because they did not disturb the British and were not vital issues in their administration. Where Islamic law coincided with the needs of the colonial regime, as happened with the division of the estates of deceased persons, it was happily upheld. The British were concerned that such estates should be properly administered, for ujera or 10% of the value of the estates was paid into general revenue.¹⁹ In principle Islamic law recognised the bait al-mal or public treasury as one of the beneficiaries from such estates,²⁰ although in this case the proceeds were not entirely at the disposal of the Islamic state. While nineteenth century emirs would seem to have benefitted from the division of inheritance, we do not know precisely what proportion they took. In theory, the state was entitled to what was left after the legitimate heirs of the deceased had claimed their own fractions of the inheritance.²¹ The definite fixing of the government's share at 10% of the total value of the inheritance appears to be a development of the colonial period.

Thus, in spite of the establishment of a British administration and consequent innovations, Islamic law still regulated the lives of the people in very important particulars.

RELATIONS BETWEEN THE SHARIA COURTS AND THE PROVINCIAL COURTS

While the force of the law reached the people mainly through the sharia courts, none the less they had to recognize the provincial court of the Residents as a factor of some importance in the day to day working of the new system of legal administration.

There were one provincial court and a large number of sharia courts in each province. The provincial court was sited at the capital of each province. The sharia courts were made up of the judicial councils or courts of the various emirs in the province²²; the chief alkali's court in the capital city of every emirate; and the district courts under minor alkalai (sing. alkali) who functioned in the rural districts into which each emirate was broken up. The Muslim courts were expected initially to concern themselves more or less with the whole body of the sharia while the provincial court was supposed to deal with matters which had resulted from the establishment of European presence. The two types of court were in a sense antagonistic to each other and represented the dualism of the whole system. The mere fact that the provincial court had nothing to do with Quranic legislation made it suspect to the populace.

Each of the Muslim courts was constituted under a warrant which specified its powers and the territorial unit within which it was competent to operate. The chief alkali's court and the judicial council were courts of "A" grade and had jurisdiction in the whole of each emirate. The district courts were of "B" grade status, with limited powers in civil and criminal cases within their various districts.²³ Each emir was the president of his judicial council, and each of the alkalai was president of his own court. The Native Courts Proclamation, 1906, and the Native Courts Ordinance, 1914, empowered each court to enforce the "native law and custom" prevailing in its area of jurisdiction. The Political Memoranda (1918) added that each court should apply the provisions of any ordinance as might be directed.²⁴ There was no provision in any of these instruments for the enforcement of the sharia as such. Hence "native law and custom" came to be understood in the Muslim courts as if it were absolutely synonymous with Islamic law.²⁵

The commonest cases brought before these courts under the so-called "native law and custom" were those concerning land, marriage and divorce, theft, assault, debt, claims for damages, and administration of estates of deceased persons. Debt and matrimonial cases were usually the most numerous in courts throughout the emirates. In 1912, out of a total of less than 30,000 cases in Kano emirate alone over 16,000 were cases of divorce and nearly 5,000 were cases of debt. The recurring high incidence of divorce suits shows the relative instability of married life among the Muslims. In the court of Kano's Wudil district which in 1918 handled an average of 550 cases a month it was found that 91% of these were matrimonial.²⁶ And everywhere the vast majority of matrimonial cases were divorce suits

by wives against their husbands. Though traditionally women had this right to sue for divorce the incidence considerably increased during this period. It is said that before the establishment of colonial rule women who took their husbands to court would find it difficult to obtain new suitors. The heavy increase during the colonial period was usually attributed by informants to women becoming more "civilized" and hence more conscious of their rights.²⁷ Besides, more money was coming into their hands, directly or indirectly, and with the men getting generally richer it was easy for the women to obtain money from prospective husbands to pay back the sadaqa, the dowry which they had received from their husbands at the time of betrothal.²⁸ Men seldom went to court to secure a divorce since they could get rid of their wives by the simple act of repudiation (talaq), although the fact that they would lose the sadaqa if they resorted to this principle acted as a restraint against an undue exercise of the right.

The provincial courts were established with the Residents as presidents and their European officers as commissioners. (Residents were, incidentally, advised to be interested observers of the proceedings of all the sharia courts.) Provincial courts were expected to try all cases involving "non-natives," government employees, and "natives" not subject to the emirs' authority. In addition they were required to enforce the laws of the protectorate, as expressed in various proclamations, over all classes.²⁹ In comparison with the work done by the Muslim courts, the activities of the provincial courts were limited. In 1912 only 111 cases were heard by the court of Kano province, although these gradually increased with the arrival of the railway and the subsequent influx of Europeans and non-Muslims from other parts of Nigeria. The nature of cases handled was not exactly the same as those which engaged the attention of the sharia courts: abuse of office, contempt of court, cruelty to animals, drunkenness, fraud, false pretences, extortion, gambling, debt, vagrancy, slave dealing, offences against revenue and fire-arms proclamations, murder, and robbery with violence.³⁰ In the traditional society such matters as dealings in slaves and possession of fire-arms were no offences at all, and during the early years of British rule it shocked people that they were regarded as such. (The ban on the bearing of fire-arms was a security measure taken by the British in their own interest.)

The exact place of the provincial court in judicial administration had to do with the overall policy of Indirect Rule. It was laid down that matters of customary law should not engage its time except when it was feared that justice, as understood by the British, could not or would not be done in the sharia courts. In

such circumstances, the Resident could transfer any cases from any Muslim tribunal to his own even after a sentence had been passed.³¹ In practice, however, during the early years British officials dealt with some cases involving native law and custom. One of the early Residents at Kano, Major Festing, frankly stated that "precisely the same sorts of cases" were tried in the provincial courts as those heard by the sharia courts "and undoubtedly it is a lottery before which a malefactor may be brought."³² Lugard expected that in the course of time the Muslim courts would be able to apply protectorate laws, so it is clear that the role of the provincial courts was seen as bound to diminish with time. However, the courts at no stage played a major role in judicial administration because of the apathy and contempt with which they were generally viewed by the Muslim inhabitants. And when the sharia courts assumed increased responsibilities by enforcing the protectorate government's laws, the provincial courts withdrew more and more to the townships which were then outside the control of the various Native Administrations. They were never entirely pushed out of the judicial process and they frequently reviewed sentences of capital punishment passed by emirs' councils, confirming some and reducing others to manslaughter according to their own way of looking at the issues involved.

But the existence of British courts and the presence of British officials must have had some significance to the people. For the first time the common people had immediately at their disposal judicial tribunals other than the sharia courts to which they could take their cases in the first instance, or to which they could lodge complaints against the decisions given by the sharia courts. Inevitably, there were peasants who tried to make use of these facilities. That this was not exactly Lugard's policy made no difference at all. To the British themselves, this must have presented a dilemma. How could they entertain this kind of litigation without undermining the prestige of the authorities whom they claimed it was their intention to preserve and support? Lugard had warned British officials against "unnecessary interference" that might deny the sharia courts "a sense of independent responsibility."³³ On the other hand many of his Residents were concerned at first that the people should be made to feel that the British were interested in seeing that their own notion of justice was done. However, as the Residents got used to power it became easier for them to appreciate that if too many cases were heard by political officers the prestige of the sharia courts, and in particular of the emirs, would be impaired. As opinions hardened against provincial courts entertaining many suits, those complainants who went to them with a view to profiting from the more liberal

British notions of offence and punishment suffered double frustration. In the first place this alien type of justice was not always made available to them, and in the second place they alienated many fellow Muslims who thought it wrong for believers to seek justice in non-Muslim courts.

Lugard did not recognize a formal right of appeal from any of the sharia courts to a provincial court, although he conceded to anybody who considered himself a victim of injustice an appeal to the Resident in his capacity as an administrative officer.³⁴ Thus, on the one hand the Resident should not interfere, on the other he should. What difference it made in practice that he could pursue the two contradictory lines of policy in different capacities it is impossible to see. But as regards whether he should hear cases in the first instance, and with regard to the question of whether he should entertain appeals and in what manner, each Resident exercised a personal discretion. There is enough evidence in the administrative records to substantiate the view that in the course of the development of the administration British officials in general showed little enthusiasm for entertaining appeals and even less interest in acting as courts of first instance. As one of the pioneers in the field of colonial administration rightly stated: "Part of the price to be paid for the advanced system of Indirect Rule is that it does not encourage complaints."³⁵

As early as 1914 there were instances of common people who, on experiencing the unsympathetic attitude of local British officials, went straight to lodge their complaints with the Lieutenant-Governor at Kaduna; such complaints included those against the emirs. Perhaps some of them had legitimate grievances. There were others, no doubt, who thought that ignorance in Kaduna of local conditions might facilitate decisions in their favour. Officials at Kaduna invariably listened to litigants with patience, for a considerable distance separated the headquarters from the provincial administrations. But the usual question put to the complainant was whether he had seen the Resident of the province, and where this was not the case a note was sent to the Resident with a request that the case be looked into. Predictably, many such appeals were unsuccessful, although in a few cases complainants obtained redress.³⁶

To say that appeals or complaints were absolutely not entertained would be wrong. In 1924, for instance, there were thirty-six appeals to the District Officer at Kano against sentences passed by the judicial council. Of these thirteen were dismissed, seven were upheld, and in the rest the cases were either transferred to other emirates or the sentences were reduced. Of the

eleven appeals against the chief alkali's decisions, ten were dismissed and only one was upheld. During the same period there were as many as fifteen appeals to Kaduna three of which seem to have been upheld.³⁷

British officials also saw it as part of their duties to supervise the activities of the sharia courts. To the extent that this was done it involved subjecting the decisions of the various courts to scrutiny. Attempts to find out what kind of cases were brought to the courts and how these were handled were facilitated by the insistence from the beginning of British rule on the innovation that all courts should keep written records of their proceedings. Part of the work of touring officers was to see how far this order had been complied with. A number of alkalai were ruined by unfavourable reports made after the inspection of their courts. The principle of inspection was significant because it shows how deeply the British were committed to the view that without their occasional intervention in the districts nothing could be done properly in their own sense of the word. But by the end of our period the British wished to involve the emirs and their people more closely in the work of supervision.

CHIEF ALKALI'S COURT AND THE JUDICIAL COUNCIL: THE QUESTION OF SUPREME JUDICIAL POWER

The debate concerning the relative powers of the chief alkalai's courts and the judicial councils of the emirs took its bitterest form in Kano. It is worth following it there in some detail to elucidate the principal issues at stake.

It must be stressed that this matter, which was such a bone of contention among the colonial administrators, was about the way Indirect Rule should develop in the sphere of judicial administration. It should equally be emphasized that the question was entirely the product of the colonial environment and that it existed only in the reasoning of the British since both the emir and the alkalai knew what their powers were under the Islamic legal system.

Four principal issues were involved. The first was the Western notion of separation of powers as between the executive, legislative, and judicial arms of government. In Islamic law there was no such principle: the Imam or the head of the Islamic community combined in his person all executive and judicial powers, while the legislative function as such did not exist since God had issued his laws for the good governance of

the world in the form of Quranic legislation. The emir was free to delegate part of his powers to the alkali, but he did not thereby repudiate his ultimate responsibility for the proper administration of the law. The British did in fact recognize him as an executive and judicial official but they were sometimes unable to accept the full implications of this recognition. Thus in 1907 Festing reported that the emir frequently "interfered" with the alkali's court and even transferred cases from there to his own.³⁸ But the idea of executive interference with the judiciary was absurd in Islam which accorded the executive a place in the judicial system. Sir Percy Girouard, Lugard's successor as head of the Northern Nigerian Administration, later gave a ruling on situations of this sort:

Great care should be taken not to impair or lessen the prestige of the emir; the integrity of the bench may be a very high ideal, but where it treads on the toes of our native executive, I fear we must support the executive for the present.³⁹

In other words, such a situation should be accepted not as intrinsically good in itself but as a temporary expedient at any rate. This instruction must have been followed by the Residents of Kano after 1908 but the problem was destined to come to the fore once more.

The second issue was concurrent jurisdiction itself, which the British had granted to the emir and the alkali especially with regard to capital sentences. Between 1907 and 1908 there was a serious political crisis at Kano and this gave the British cause to abolish the emir's judicial council. This left the chief alkali's court with a virtual monopoly of legal power, which was terminated when C. L. Temple, posted to Kano early in 1909 as resident, made peace with the emir. On Lugard's return as the Governor-General of Nigeria the question of the respective powers of the emir and the alkali was again raised.

In 1915 Lugard, on the advice of his attorney-general, informed Temple, now lieutenant-governor, Northern Provinces, that it was impossible for the emir and the alkali to exercise concurrent jurisdiction over the same class of offence within the same area.⁴⁰ The attorney-general had expressed a fear that "if there were two courts with the same jurisdiction over the same area, the result would be confusion."⁴¹ But such a state of confusion had never existed and Temple told them that he was not in favour of making any alteration in a system which he believed had worked very satisfactorily.⁴² Although the attorney-general gave up the struggle at this stage the governor pursued

the matter further and called for a list of the classes of offences over which the judicial councils had exercised jurisdiction. In the list submitted by the Resident of Kano, the following categories of cases were stated: (1) debt, where the amount involved exceeded £100; (2) ownership of property, house, and farm disputes; (3) taxation; (4) slavery; (5) deprivation of office; (6) murder and manslaughter; (7) extortion; (8) highway robbery; (9) burglary; (10) grievous assault; (11) sedition.⁴³

Lugard now thought that the emirs of northern Nigeria were wielding more legal powers than they ought to be entrusted with. He pointed out that the alkalai's courts should deal with all matters in which the law books provided a guide--including murder cases--while the judicial councils should handle executive matters.⁴⁴ He then tabulated the cases he considered the judicial councils should be left with as follows: (1) defaults by officers of N.A.'s; (2) boundary disputes; (3) claims to land; (4) offences against British laws; (5) offences against N.A.'s; (6) succession; (7) questions between Muslims and "pagans"; (8) cases in which the alkali's authority was in question; (9) sedition. This list is long but the exclusion of the emirs from certain types of cases represented a determination to Westernize further the judicial system.

The District Officer of Kano observed that the question of murder cases being left to the courts of the alkalai would depend on individual circumstances. He argued that though as an "A" grade court the tribunal of the alkalin Kano was capable of handling murder cases yet it should be remembered that the Waziri of Kano, who was a member of the judicial council, was the greatest authority on Muslim law in Kano. Secondly, he stressed that it was of the utmost importance that the prestige of the emir should be strongly upheld. He recommended that as a compromise it would be necessary to adopt the Katsina practice where the members of the judicial council, including the emir, were present in murder trials, the actual proceedings being conducted by the alkali and the legal members, while the emir's role was limited to pronouncing the sentence arrived at.⁴⁵

The Resident, Palmer, was inclined towards this view, and claimed that it did not really matter to the emir who tried the cases provided that his right to preside over the trial and pronounce the verdict was not challenged. Therefore, if what the governor wanted was that the most competent hand should try such cases, then that objective was already being attained in Kano where the emir was guided by the opinions of his legal experts the greatest of whom, the Waziri, was far more learned

than the alkali of Kano.⁴⁶ He then suggested that in a situation where the alkali was a man of incomparable ability he should be co-opted as an ex-officio member of the judicial council and made to sit in cases of homicide. He stated that the emir would not oppose the plan and that it had the advantage that it would not cause the friction which would otherwise ensue if the alkali's court were given more powers than that of the emir or if it were to be understood that he was enjoying greater confidence of the government than the emir himself.

In practice, however, the alkali did not become a member of the judicial council. Even as late as 1930 the incumbent emir, Abdullahi Bayero, told the meeting of northern chiefs at Kaduna that he did not need the services of his chief judge because his council had members trained in the law.⁴⁷ Before this date the practice in Kano had been to exclude the alkali entirely from all murder and homicide cases.⁴⁸ Jurisdiction over matters of life and death, limited now by the presence of British officials, thus remained one of the principal manifestations of the emir's powers.

The third issue on which final decision had to be taken as regards the respective powers of the emir and the alkali was control over land disputes. The establishment of British administration gradually stepped up the process of land alienation and sub-division of farms at Kano.⁴⁹ Traditionally, land was held by the head of the family on behalf of its members, but the removal of warfare and the pressure of taxation on the individual members of the family led to a breakdown of this system and to the gradual emergence of individual holdings.⁵⁰ Lands began to be mortgaged, transferred, and sold. Sales of land continued to be regarded by the emir's council, contrary to the realities of life, as illegal transactions.⁵¹ Disputes over lands and taxes had been handled by the judicial council and the alkalai, but it would seem that by 1913 or so they were being reserved for the council alone. In 1920, the D.O. urged that individual ownership of property in land should be recognized and that any disputes arising therefrom be dealt with, like any other case involving ownership of property, by the alkali's court.⁵² But at various times the senior Residents held the view that no change in the procedure by which the council handled all questions pertaining to land should be entertained.⁵³ Such cases were recorded as dealt with by the council, although in theory they were regarded as the prerogative of the emir.

However, all this had to reckon with other realities of the time. In 1930, there was a complaint that farm disputes were taking a great deal of the emir's time.⁵⁴ In 1929 alone

there was a total of 515 land cases and in 1930 the number was as high as 629. Lindsell, appointed Resident of Kano that year, then proposed to hold discussions with the emir to see if he could delegate part of this power, for it was certain that so long as the traditional system of land tenure continued to be eroded litigation was likely to increase. In due course this delegation of power was effected and some of the district heads were authorised to arbitrate in farm disputes and transfer to the emir more difficult cases with full reports on the preliminary investigation carried out by them.⁵⁵

And fourthly, the position with regard to appellate jurisdiction had to be determined. Lugard had laid down that an appeal lay from the district court to the chief alkali's court or the judicial council.⁵⁶ Thus his idea was that since both courts were of "A" status it did not matter where the appeal was lodged. However, after the abolition of the council at the beginning of 1908 the court of the alkalin Kano became the sole and supreme court of appeal for the whole emirate.⁵⁷ When the council was restored a year later there was a return to the old arrangement. This seems to have functioned more or less as required by the British until early in 1927 when the British staff accused the new emir, Abdullahi Bayero, of "interfering" with the decisions of the alkali. The judicial council had in effect been acting as if it were a court of appeal for cases in which the chief judge had already given a ruling.⁵⁸ Granting that this was so the emir was acting within the bounds of Islamic legal tradition. Under that law a litigant dissatisfied with the judgement of the alkali could appeal to the court of the executive authority,⁵⁹ and this had been the tradition in pre-colonial Kano. However, this brought him into conflict with the British, whose system recognized no such procedure. How far apart the two systems were from each other is reflected in this letter from Lindsell, the Acting Resident, to the emir:

Since the Emir is not a cadi it is necessary to place the law in the hands of the alkali. The alkali, however, if he takes bribes, or is dishonest, is subject to the Emir's jurisdiction, like any other. But in respect of the law, since he is the supreme alkali if he has given judgment, judgment is given and the matter is with God. It is not right to mix the legal work of the alkali and the sharia of the sarki.⁶⁰

At a subsequent meeting between the Resident and the council Lindsell told the emir face to face that it was no business of the council to meddle with the alkali's decisions.

At the same time an attempt was also made to redefine the jurisdiction of the council as being over homicide cases, land disputes, taxation matters, cases involving N.A. officials, political offences, and the like.⁶¹ In other words, the administration of the main body of the sharia was the alkali's responsibility. Nothing was said of the judicial council being an appeal court, but on the other hand this was not explicitly denied. In 1933 the council became, under the new Native Courts Ordinance, the final court of appeal in the emirate and was authorized to hear appeals from the chief alkali's court.⁶² This more or less restored the traditional position of the emir vis-à-vis the alkali and did not represent a new accretion of power.

Before the promulgation of this ordinance the executive authorities in some other emirates had sustained greater loss of power and prestige as a result of monopolies which the Residents had allowed the chief judges to acquire. For instance, in the course of the development of colonial rule at Zaria and Sokoto, it became the practice that only the chief alkalai could hear appeals against the decisions of the district courts.⁶³ The total exclusion of the emirs from this vital sector of the judicial administration, though consistent with the Western principle of independence of the judiciary, would have been unimaginable in these emirates in the pre-conquest period. The chief judges did not hesitate to exercise their powers to the detriment of the executive authorities. One objective of the 1933 Ordinance was to rehabilitate the powers of those emirs who were being menaced by their judiciary.

PRACTICE AND PROCEDURE

It is pertinent here to examine how the work of the courts was conducted. Our emphasis will be on the courts of the chief alkalai. Since these courts were most easily inspected by British officials, being located in the capitals of the emirates, they were under the greatest pressure to accept change. The practice and procedure adopted here were therefore an example for the district courts.

Both at the capitals and in the districts, consolidation of British rule brought one important change in the functioning of the legal system. Previously the alkali, having no official court building, did his work mainly in his own house, and invariably at his own convenience. Lugard required him to "sit in a specified building as a court house" and at a specified time; if he or any member of his court contravened this rule he

would be subject to fine or dismissal.⁶⁴ It was anticipated that this innovation would meet with some opposition at Kano.⁶⁵ In the neighbouring emirate of Katsina the new system was given a trial and proved a success.⁶⁶ However, as often happened in those early years, developments at Kano lagged behind those at Katsina and by the end of 1909 the alkali of Kano with his assistants was still conducting legal administration in his own house.⁶⁷ Eventually, however, not only the alkalin Kano but also the district alkalai came to conduct their business in buildings specially reserved for this purpose and at specific times.

Except where otherwise stated the following description of practice and procedure at the chief alkali's court is taken from an official report made at the instance of the chief commissioner⁶⁸ about June 1934,⁶⁹ but which represented the practice and procedure from the time British administration was consolidated. The court had a fairly large staff.⁷⁰ Before proceedings began one mufti recorded the names of complainants; these were then passed to the alkali who called in litigants in that order. After stating his case the complainant paid his fee for summoning the defendant, although this could be waived if he was a pauper. Another mufti recorded the names of the parties concerned: the complainant, the defendant, the name of the dan ijara (plural yan ijara) who was to deliver the summons, and so forth.⁷¹ All proceedings were conducted in Hausa but recorded in Arabic.

Summonses were served orally. In the case of a defendant in the district a letter would be addressed to the village head concerned. A defendant was expected to appear before the court within a day or two and if resident in the city he could present himself immediately should he be required to do so. A second summons might be served at no additional cost to the plaintiff, and only if this was not honoured would the political authority be requested to compel attendance.⁷² According to oral evidence, there were no changes in the methods by which the alkali processed the evidence of witnesses or arrived at the verdict. As soon as judgment was given in any particular case the appropriate machinery was set in motion to execute the sentence. In the case of debt, the alkali could persuade the plaintiff to allow enough time for his claims to be met, if the suit was successful and the defendant pleaded that he had no money. Payment by instalments could be agreed upon if the defendant was in paid employment.⁷³ Should it happen that he was entirely without means and there was no hope of his being capable of paying, he would be required to make a sworn declaration on the Quran to that effect. This oath did not invalidate the claims since the plaintiff could again proceed with action if he noticed any change in the circumstances of the debtor. A defendant who failed to discharge his obligations

within the period agreed was detained in the debtor's prison. Unless he was willing to enter into satisfactory arrangements he was liable to be detained for a period of three months. Such detention was a kind of punishment and in no way cancelled his debt.⁷⁴

An innovation associated with the colonial era was the payment of court fees. For instance, if through court action a man was able to recover a debt owed him he was made to pay ten percent of it to the bait al-māl. 'Ushiri,' as this payment was called, was condemned by the 'ulama' (the Muslim intelligentsia) as contrary to the sharia.⁷⁵ In the same way, ten percent was also taken from any payment to an individual in compensation for an injury. Rules were also formulated for the administration of estates of dead persons. The procedure adopted was as follows: if a man died it was the duty of the district head to inform the district alkali who would make an inventory of the estate and report the same to the chief alkali. The latter would then authorize the district alkali to divide the estate among the heirs according to their recognized shares. The ujera (not to be confused with the ushiri), or the ten percent claimed by the bait al-māl, was then handed over to the district head for transmission to the Ma'aji, the officer in charge of the treasury.⁷⁶ Some alkalai lost their positions either for administering an estate without a specific instruction from Kano or for not administering it properly when given that authorization. It hardly needs to be pointed out that it was physically impossible for one alkali to attend to the details of estate administration in respect of the several persons who died daily in each district. The result was that often estate administration passed into unauthorized hands. Sometimes the laws seemed perfect in theory but they could not be enforced in practice.

Homicide cases at first, in deference to customary practice, continued to be treated as matters in which the state as such had no interest but which the deceased's next-of-kin might pursue or abandon. Thus, for example, in 1908 a certain Abubakar struck his wife who collapsed and died. The only witness was the woman's three-year-old son and next-of-kin. The alkali of Kano decided not to hear the case until the child had grown up and was prepared to prosecute.⁷⁷ In later days, the state became the prosecutor, but this did not change the procedure or rules of evidence. It meant only that government did not have to wait until somebody decided to take up a homicide case before it could be brought to court. State prosecution was without prejudice to the rights of the next-of-kin to demand death or diya in the event of conviction.

An interesting case, R. v. Wagani, illustrates several points

in Islamic criminal procedure. Serikiyo of Jauga in Ringim district, going to the field to get corn, passed by the farm of one Wagani, who alleged that his own crops had been damaged by Serikiyo's horse. A fight followed during which Wagani threw Serikiyo on the ground and beat him. Two other men, Mallam and Bello, rushed to the scene and separated them. After the fight Serikiyo went to one of his blood heirs called Mama and told him in the presence of witnesses: "If I die, Wagani has killed me, and no one else."⁷⁸ Serikiyo died fifteen days later. The alkali of Dabi (Ringim) summoned Wagani and Mama before the emir and reported the matter. Before the council Mama repeated Serikiyo's statement that Wagani was responsible for his death; but Wagani denied that Serikiyo ever said anything of the kind. Three men, Gari, Gagil, and Bello bore witness to the alleged statement.

Wagani contested the evidence of the three men: Bello's on the ground that Bello was seeking the hand of Tagani, Serikiyo's daughter, in marriage; that of Gagil, on the ground that he had married Dabi, Serikiyo's daughter; and that of Gari, on the ground that the mother of Serikiyo was the daughter of the mother of Gari's daughter. The council upheld these objections.⁷⁹ Mama then called in three other witnesses: Alhassan, Lafiya, and Muhammadu who, not being disqualified by any interest in the case, testified that they heard Serikiyo declare that Wagani was the cause of his death. Then the two sons of the deceased, Buba and Tura, each swore fifty times in the presence of the accused to the effect that the injury inflicted by him was the cause of their father's death and so asked for the blood of Wagani.⁸⁰ The emir and council, satisfied that the claim had been proved, returned a verdict of "guilty": "The judgment is in accordance with the precepts of the Kuran and the Sunna."⁸¹ The sentence was later confirmed by the Lieutenant-Governor Temple.

This case illustrates how the sharia courts were free to try cases and pass judgment according to their own law and how the British were often prepared to support the native authorities even in cases of questionable convictions. No British court could have found the defendant guilty of murder on the basis of the evidence presented. But the British sometimes sacrificed the interests of the individual to the overriding necessity of maintaining stability and harmonious relations with the native authorities.

CONCLUSION

We have attempted to call attention to the various stresses and strains to which the Islamic legal system in the Nigerian emirates was subject as a result of British colonial rule. Muslims in

Nigeria as everywhere believed that their legal system was divinely ordained and backed by centuries of historical experience. Hence one may appreciate the degree of bitterness and frustration which colonial innovations generated. Not only did the British abolish certain laws and practices even though these were sanctioned by religion and tradition but they also attempted to restructure the legal machinery in the light of their own cultural development. The ulama, the custodians of Islamic culture, associated the Westernization process with Christianity and were apprehensive that this was only part of a wider imperial scheme to undermine their religion.

Some of the innovations like the abolition of the punishments in respect of hadd offences were quite revolutionary. There were also significant innovations such as the erection of court buildings, the documentation of proceedings at the sharia tribunals, and the requirement that law officers should be available for duty at specific times. But some basic Western concepts like the principle of separation of powers could not be enforced in the emirates without weakening the executive to a greater extent than the British, for reasons of political expediency, were prepared to allow. Though the Islamic legal system was not destroyed by Westernization, it was significantly affected in the process.

NOTES

¹For a story of the Caliphate see D. M. Last, The Sokoto Caliphate (London, 1967); H. A. S. Johnston, The Fulani Empire of Sokoto (London, 1967); S. J. Hogben and A. H. M. Kirk-Greene, The Emirates of Northern Nigeria (London, 1966).

²Vide, H. R. Palmer, Bornu, Sahara and Sudan (London, 1936); Y. Urvoy, Histoire de l'Empire du Bornou (Paris, 1949); L. Brenner, The Shehus of Kukawa (London, 1973).

³The first Muslim king of Kanem/Bornu was Umme Jilme who adopted the religion about 1086; in the case of Hausaland, a king of Kano called Yaji (1349-65) was converted with the arrival of a group of Muslim businessmen from Mali.

⁴These northern states are Bauchi, Benue, Borno, Gongola, Kaduna, Kano, Kwara, Niger, Plateau, and Sokoto.

⁵The information is based on the author's field notes.

⁶For instance, compensation and not the death penalty ensued when a free Muslim killed a slave. A master was free to take the life of his own slave and could not be called into question.

⁷C. O. 581/1. Northern Nigeria Proclamations 1900-1904, No. 1 of 1 Jan. 1900.

⁸Mss. Brit. Emp. S.65, Lugard Papers, Rhodes House Library, Oxford.

⁹F. D. Lugard, Political Memoranda, 1906, p. 175.

¹⁰Among the informants were Alhaji Sani Kafinga, interviewed at Kano, 18 June 1972; Alhaji Ahmadu Boppa, interviewed at Kano, 30 June 1972; and Alhaji Harisu, interviewed at Danbatta, 10 Aug. 1972. All oral data referred to in this paper are preserved in the author's field notes.

¹¹Alhaji Ahmadu Boppa, 30 June 1972 (Kano); Mallam Ma'azu, Liman of Dawakin Tofa, 9 Aug. 1972 (Dawakin Tofa); Muhammadu Lawal, 10 Aug. 1972 (Danbatta).

¹²As we have already noted, customary practice allowed award of compensation where retaliation was not possible.

¹³Mallam Hamza, interviewed at Kano, 21 June 1972.

- ¹⁴ Lugard, op. cit., pp. 174-75.
- ¹⁵ Babban Mallamai, Mallam Ibrahim, 16 June 1972 (Kano). Mallam Ibrahim was at the time of the interview head of the Kano ulama or Muslim intelligentsia.
- ¹⁶ Babban Mallamai, 16 June 1972; Liman Yola, 22 June 1972 (Kano).
- ¹⁷ S.N.P. 10/7, No. 4/3p/1920, 'Native Beer, Rules made by Emir.'
- ¹⁸ S.N.P. 15/3, A 12, Report No. 35, Kano Province.
- ¹⁹ S.N.P. 17/2, No. 12004 Vol. 1, Annual Report, 1929.
- ²⁰ See F. H. Ruxton, Maliki Law (London, 1916), p. 389; J. Schacht, An Introduction to Islamic Law (Oxford, 1964), p. 170.
- ²¹ Usman dan Fodio, 'Kitab al-Farq,' translated and annotated by M. Hiskett, Bulletin of the School of Oriental and African Studies, Vol. 23, part 3, 1960, p. 571.
- ²² Each province was made up of several emirates. For instance, initially Kano Province was made up of the following emirates: Kano, Katsina, Daura, Hadejia, and Katagum.
- ²³ The powers of these courts were defined and re-defined from time to time.
- ²⁴ Lugard, Political Memoranda, 1918 (London, 1919), p. 265.
- ²⁵ The Political Memoranda, 1918 equated Muslim law with native law and custom, see p. 265.
- ²⁶ N.A.K. Kano Prof. 5/1, No. 244, Report on the alkali and prison of Wudil district.
- ²⁷ Mallam Umaru, 19 July 1972 (Kura); Mallam Bello, 24 July 1972 (Dal); Abba Wambai, 9 Aug. 1972 (Dawakin Tofa).
- ²⁸ Abba Wambai, 9 Aug. 1972 (Dawakin Tofa); Hamza, 27 Aug. 1972 (Kano).
- ²⁹ Lugard, Political Memoranda, 1906, p. 9.
- ³⁰ S.N.P. 10/2, No. 98P/1914, Annual Report, Kano Province, 1913. See also S.N.P. 10/1, No. 134P/1913, Annual Report, 1912,

for Kano Province.

³¹Lugard, Political Memoranda, 1906, p. 61.

³²S.N.P. 15/3, A 12, Report No. 35.

³³Lugard, Political Memoranda, 1918, p. 265.

³⁴Lugard, Political Memoranda, 1906, p. 176.

³⁵M. Perham, Native Administration in Nigeria (Oxford, 1937), p. 92.

³⁶S.N.P. 10/2, No. 52P/1914. For some of these complaints see 'Kano Province--Complaints.'

³⁷S.N.P. 9/12, No. 635/1925, Annual Report, 1924.

³⁸S.N.P. 15/3, A12, Report No. 35.

³⁹S.N.P. 6/4, No. 16/4, No. 116/1908, Note by Girouard, 23 Aug. 1908. This was of immediate relevance to Zaria where the Resident, E. J. Arnett, had upheld the decision of the alkali against its alleged distortion by the emir. See Arnett to Governor, 29 July 1908 (telegram).

⁴⁰S.N.P. 8/2, No. 41/1915, Lugard to Temple, 1 Feb. 1915.

⁴¹Ibid. R. M. Combe (Attorney-General) to Lugard, 6 March 1915.

⁴²Ibid. Temple to Lugard, 8 Feb. 1915.

⁴³Ibid. Resident Kano to Lieutenant-Governor, 13 April 1915.

⁴⁴Ibid. Lugard to Temple, 30 May 1915.

⁴⁵Ibid. District Officer, Kano Division, to Resident, Kano Province.

⁴⁶Ibid. Palmer to Temple, 16 July 1915.

⁴⁷Nigeria, Northern Province Advisory Council: Records of Proceedings at Full Meetings with Native Rulers (Lagos, 1931), p. 23.

⁴⁸N.A.K. Kano Prof. 5/1, No. 693, Resident to Lieutenant-

Governor, 19 July 1927. It is not certain when the exclusion of the alkali from homicide cases was effected, but probably it was at the end of the debate.

⁴⁹This view is common in various reports. By 1908 land alienation was already causing some concern to the British in northern Nigeria.

⁵⁰C. W. Rowling, Report on Land Tenure Kano Province (Kano, 1952), p. 2.

⁵¹S.N.P. 10/9, No. 120P/1921, Report Jan. 1920 - Mar. 1921.

⁵²S.N.P. 10/9, No. 316P/1920, Gower's 'Handing over note' to Arnett.

⁵³S.N.P. 10/9, No. 120P/1921, Report No. 59, Jan. 1920 - Mar. 1921.

⁵⁴S.N.P. 17/2, No. 14686 Vol. 1, Annual Report, 1930.

⁵⁵S.N.P. 19/2, No. 16687 Vols. 1 and 2, Annual Report, 1931. The number of cases handled by the emir fell from 629 in 1930 to 411 in 1932 and 270 in 1933.

⁵⁶Lugard, Political Memoranda, 1906, p. 176.

⁵⁷S.N.P. 7/9, No. 2949/1908, Mid-Year Report, 1908.

⁵⁸N.A.K. Kano Prof. 5/1, No. 693, Note by Lindsell.

⁵⁹See E. Tyan, "Judicial Organization," in Law in Middle East, eds. Majid Khadduri and H. J. Liebesny (Washington, 1955), pp. 238, 241-42; N. J. Coulson, A History of Islamic Law (Edinburgh, 1964), p. 163.

⁶⁰N.A.K. Kano Prof. 5/1, No. 693, Lindsell to Bayero (undated).

⁶¹Ibid.

⁶²S.N.P. 17/2, No. 20208, the correspondence re Native Courts Ordinance.

⁶³See M. G. Smith, Government in Zazzau (London: Oxford University Press, 1960), p. 214; P. K. Tibenderana, "The Administration of Sokoto, Gwandu, and Argugu Emirates under British Rule, 1900-1946" (unpublished Ph.D. thesis, University of Ibadan, 1974),

p. 326.

⁶⁴Lugard, Political Memoranda, 1906, p. 178.

⁶⁵S.N.P. 15/3, A 12, Report No. 35.

⁶⁶Ibid. It was precisely for this reason that Festing wanted the experiment to be tried at Kano.

⁶⁷Mss. Afr. 952, 6/1, Arnett Papers, Rhodes House Library, Oxford: inspection report by Arnett, then a second-class Resident.

⁶⁸The designation of the officer administering the Northern Provinces changed to 'Chief Commissioner' late in 1932.

⁶⁹S.N.P. 17/3, No. 21516, 'Native Courts--Reports on Practice and Procedure.'

⁷⁰This was made up of the chief alkali, 5 muftai, 2 scribes, 5 appraisers, 1 court usher, 15 yan ijara (to execute summons), 1 dogari (member of emir's police), and an emir's messenger.

⁷¹The yan ijara were on a fixed salary of fl per month, and the summons fee was credited to revenue.

⁷²This would involve sending a dogari to effect arrest.

⁷³S.N.P. 17/3, No. 21516, 'Native Courts....'

⁷⁴Ibid.

⁷⁵Liman of Dambazawa Mosque, Mallam Shehu, interviewed at Kano, 22 June 1972.

⁷⁶S.N.P. 6/5, No. 44/1909, 'Emir of Kano's order re manner in which gado is to be collected.'

⁷⁷S.N.P. 7/9, No. 2949/1908, Mid-Year Report, 1908.

⁷⁸In Islamic law, such a statement duly testified is admissible in evidence. See J. N. Anderson, The Maliki Law of Homicide (Zaria, 1952), pp. 6-7.

⁷⁹In Islamic law, any evidence by a witness may be objected to on the ground that he is biased against the defendant. Vide Ruxton, p. 296. In the case under consideration it must have been held that the three men had connexions which made it impossible for them to render unprejudiced evidence.

⁸⁰This seems to be a peculiar procedure, if Anderson, p. 8, is correct in saying that the fifty oaths must be divided among a minimum of two agnates of the deceased in accordance with their rights of inheritance.

⁸¹N.A. 1, C.S.O. 1/26/3, Emir of Kano Abbas to the Resident, Tomlinson, enclosure in Lugard to Harcourt, 30 June 1913.