LAY TRIBUNALS IN THE SUDAN:
AN HISTORICAL AND SOCIO-LEGAL ANALYSIS

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I. THE COLONIAL PERIOD

Introduction

The basis of lay participation: indirect rule. The intriguing concept of the participation of lay people in the administration of justice has reemerged recently as an almost worldwide phenomenon. It has taken different forms and has been implemented in varying degrees, but the basic motivating factor has been largely the same: lay participation is perceived and rationalized as an implementation of a political ideology. This conscious emphasis on the political factor should not, however, overshadow the socio-economic factors that necessitate such participation.

Strangely enough, the political ideologies which lay the theoretical foundations of lay participation are diverse and opposing. They range from authoritarian to democratic,[1] Marxist[2] to capitalist, and colonial to anti-colonial ideologies. Lay participation has been perceived as a revolutionary,[3] as well as a conservative, traditional tool.

Participation of laymen in the judicial decision-making process in most of the British colonies was one feature of the policy of indirect rule, introduced by the British colonial administrators in the last years of the nineteenth and the early years of the twentieth centuries. This type of rule takes different shapes and is used for different reasons, but in British colonial administration everywhere the basic scheme was the same: the recognition, preservation and utilization of the indigenous political and judicial institutions subject to British control and supervision. Lay participation was intensively used. It applied over a wide geographical area, was necessitated by practical considerations, and was experienced for a long time. Accordingly, it had far-reaching effects.

Though the policy of indirect rule is usually attributed to Lord Lugard, the British Governor of Nigeria during the first decade of this century, he revived and implemented rather than invented the concept. His reasons were revealed in one of his reports, where he wrote:

> The situation was not encouraging, money was scarce and administrative staff existed only on paper, housing facilities for the British pioneers were pitiful...means of transportation

were hardly available.[4]

Having deliberated on all the possible administrative forms, their merits, demerits and feasibility, Lord Lugard arrived at his formula of indirect rule under which the limited resources of the colonial administration would suffice for

> ...supervision of tribal or other institutions which regulate the domestic affairs of most African communities, the maintenance of law and order, the assessment and collection of tax, the provision of local government services and the establishment of tribunals for the adjudication of a wide range of disputes to which the natives are parties.[5]

Besides its cheapness and expediency, indirect rule offered the British a unique mechanism of decentralization and local autonomy.

The socio-political setting of the Sudan. In its present geographical boundaries, the Democratic Republic of the Sudan is a relatively recent entrant to modern political history, and like most other new nations, it is a geographical or political rather than a religious, ethnic or linguistic unit. Its area is about one million square miles. The 1973 Census shows a total population of about fifteen millions. The Census Bureau did not use religious, linguistic, racial or tribal categories for the 1973 Census, but according to the 1956 Census more than two-thirds of the population adhere to the Islamic religion, and about five percent are Christians. There are eight major tribal groupings, five of which reside in the northern part of the Sudan and constitute about four-fifths of the entire population. More than half of those four-fifths are Arabs and a large part of the rest are Arab-acculturated. The Arabic language, being spoken by the largest portion of the population in the North, has been confirmed as the official language in all the constitutions in the post-colonial era.

The other one-fifth of the population resides in the South--now referred to as the Southern Region--and consists of the Nilotic, the Nilo-Hamitic and the Sudanic groups. These groups are sub-divided into a large number of heterogeneous tribes with different norms, values, religious beliefs, languages and economic, political and social organization.

Seventy-one percent of the population are listed by the 1973 Census as "rural," dependent on agriculture which is the basis of Sudan's economy. They include the sedentary and semi-sedentary societies of the south. A further 11% are nomadic, moving around the extensive pastoral desert and semi-desert areas of the North. Both the rural and nomadic groups have little contact with the remaining 18% of the population which is concentrated in the quasi-industrial big cities, the population of which has more than doubled in recent years. Emigrants from the rural areas are pouring into Khartoum, the capital, whose population has increased by more than 100% in the last decade. This flow enhances the already existing socio-economic problems and creates new patterns

of conflicts.

Illiteracy is another aspect of disparity and heterogeneity. The 1973 Census did not address this issue but the 1956 Census shows a figure of 88% illiterate; unofficial figures published in 1968 reduce this to 82%. The country's lack of integration has been enhanced by poor transportation which is also a major impediment to social and economic development.

The first central political establishment in the Sudan came into existence in 1821 when the Turks and Egyptians conquered the small scattered Kingdoms into which the country was previously divided, and gradually moved southward. The price of this "modern" state was apparently more than the Sudanese people could tolerate. Exorbitant taxes, corruption and oppression resulted in the outburst of a religious national movement, led by the Mahdi, a religious leader from whom the movement took its name. This movement started in 1881 and culminated in the capture of Khartoum in 1885 and the establishment of the Mahdist state. The primary goal of Mahdism was the proselytization of Islam throughout the world. Accordingly, the new Mahdist state was immediately engaged in wars on all fronts. Little attention was paid to the economic, political and social problems that were present or emerging. Famine, internal struggles for power and the consequences of the multi-faceted war opened the way for the British and Egyptian expedition which succeeded in occupying the Sudan in 1898.

The conquest was followed by the inauguration of the Condominium Agreement of 1898 which was the basic constitutional document of the era. From the start it was clear that the Egyptians were partners only in name and financial burden, whereas the British were the actual rulers. Despite the concessions that the British gave to the Egyptians, they maintained throughout the colonial era the upper hand in the affairs of the Anglo-Egyptian Sudan.

The Anglo-Egyptian rule of the Sudan was not smooth. A number of revolts erupted. In the 1940's a united national movement appeared, including both the Mahdists, who reappeared as a major religious and political force, and their rival, the Khatmiya, the other religious sect. However, as the end of colonial rule came into view, they split. Whereas the Mahdists favoured independence, the Khatmiya and some other political groups favoured unity with Egypt.

The Sudan attained independence on January 1, 1956. In 1953 the Sudanese political parties, the British and the Egyptians had agreed on the right of the Sudanese people to determine their future. The choice between independence and affiliation with Egypt was to be decided by a popularly-elected parliament. A basic enactment termed "The Self-Government Statute, 1953" incorporated this agreement. It was recognized by the Mahdists, the Unionists (those favouring unity with Egypt), the British and the Egyptians as the constitution for an interim period of two years during which the right of self-determination would be exercised. Though the Unionists gained a majority in the parliamentary

elections in 1954, circumstances prevented them from implementing their goal.

With the advent of independence the internal political divisions, that had been held under the surface by the existence of a common colonialist enemy, erupted. In 1955 there was a sudden explosion of civil war in the South. The cultural, racial, linguistic and religious differences between the two parts of the country had been enhanced by the British policy which had originally envisaged the separation of the Southern from the Northern part of the country. The decision to reverse this policy was taken in 1947, following a conference between representatives of the North and the South that opted for unity. However, the rift had become so wide that the civil war continued until 1972, when an agreement was signed at Addis Ababa (the "Addis Accord") granting the South a degree of regional autonomy as a separate Southern Region. This Region included the three Southern provinces (Bahr Al-Ghazal, Equatoria and Upper Nile).

The Western democratic framework transplanted after independence only aggravated the diversity of Sudanese society. In less than three years there were four cabinets. Lack of stability and of consistency in policy was a natural result of the strange and sometimes even grotesque coalitions that dominated the political scene, including a period of coalition between the two main rival parties when neither had an overall majority. No constitution was enacted, and therefore the country continued to be ruled by the Transitional Constitution of 1956 that had been tailored in a hurry from the defunct Self-Government Statute of 1953, a few days before independence.

Realizing that he would shortly be thrown from office by a vote of no confidence, the then Prime Minister handed over power to the army in November, 1958. The army ruled until 1964. These six years were characterized by oppression, corruption, and maladministration, emanating inter alia from the excessive concentration of powers in one body. Though the Transitional Constitution of 1956 was suspended, no permanent constitution was passed. The military rulers were too busy consolidating their power in the face of threatened counter-coups (two of which materialized but were aborted) to introduce positive changes into the legal or judicial systems. The country continued to be governed by decrees. The civil war in the South intensified, mainly because the government perceived the problem as a military one. The economy was collapsing due to the fall in cotton prices and frequent strikes and protests which were dealt with in a brutal manner. The reaction to this was more demonstrations and protests, which eventually culminated in massive disobedience that toppled the military government in October 1964.

A "United Front" representing the political, professional and trade organizations was formed immediately after the overthrow of the military government. Its members agreed, inter alia, on the revival of the Transitional Constitituion and the formation of a transitional civilian non-partisan government. However, within a short period the country was again torn by political unrest. The caretaker government, frustrated with the political atmosphere and the pressure of the major parties,

succumbed and surrendered power to the politicians even before elections. As between 1956 and 1958, periodic cabinet reshuffles became the norm. Clandestine cooperation between one group in the opposition and another in the government was frequent. Between November 1964 and May 1969 five cabinets ruled the country, and at one point two rival governments existed, each claiming legality. The High Court was flooded with constitutional cases, but many of its decisions were disregarded.

Political freedom was abused and strikes and demonstrations were daily phenomena. Those strikes, coupled with the dependence upon cotton as a main source for hard currency, resulted in severe economic problems. "The Round Table Conference" to discuss the Southern problem and in which both Northern and Southern political figures participated, collapsed and the war went on.

The main actors on the political scene ranged from the extreme right to the extreme left, and included Islamic and secular groups, pan-Africanists and pan-Arabists. The tribal leaders who had been institutionalized by the policy of indirect rule emerged as a political power, having become a reliable ally of the army officers during the period of military government, when they had been able to consolidate and expand their judicial and administrative powers. It proved impossible to reach a national consensus of all the political and ideological groups. No constitution was agreed upon, there being no consensus whether the state should be secular or religious; whether the government should be parliamentary or presidential; or whether the assembly should be uni- or bi-cameral. The same dilemmas faced the Law Reform Commission that was established in 1965 to revise the legal and judicial systems. Most of the Commission's time was consumed in debates over fundamental issues such as whether to adopt civil, common, Islamic, or customary law, or whether to draft eclectic codes incorporating elements of all of these.

On May 25, 1969, the army took power again in a bloodless coup. After the experience of the preceding five years, few Sudanese shed tears for the collapse of Western-type democracy. A "Revolutionary Command Council" composed of nine army officers and a civilian assumed exclusive legislative and executive power. The Transitional Constitution was again suspended and the existing political bodies and parties were dissolved. The suppression of political and ideological differences finally made it possible to formulate and adopt a constitution, the Permanent Constitution of 1973. The structure of government prescribed by the Permanent Constitution includes a single monolithic party, the Sudanese Socialist Union headed by the President of the Republic, who is nominated by the Party and confirmed by a plebiscite. He has extensive executive powers and shares legislative powers with the legislature, the People's Assembly.

Some of the issues on which there had been no national consensus have been solved by compromise. The constitutional article dealing with the religion of the state guarantees the place of both Islam and Christianity, and stipulates in regard to each religion that "the state

shall endeavor to express its values."[6] Arabic has been designated the official language of the country, and English the working language in the Southern Region.

However, the post-1969 era has not witnessed the achievement of a final formula for the legal and judicial systems. Major shifts in the political ideology and programs of the establishment have taken place, resulting inevitably in shifts and changes in the legal and judicial systems and perpetuating pluralism and tensions within the legal profession.

The Roots of the Current Legal and Judicial Systems

The Islamic legal and judicial system of the Mahdist state was so centered around the Mahdi and his successor, that the collapse of that state meant the automatic collapse of its judicial organization. Accordingly, the Anglo-Egyptian colonial administration had to start from scratch. The fact, however, that the new establishment succeeded a theocratic state, coupled with the deep degree of religiosity among the population, could not be easily overlooked. The policy to be pursued towards Islam was explicated by Lord Cromer, the British Consul-General in Egypt, in a speech to the Sudanese religious notables shortly before the proclamation of the Condominium Agreement of 1898. He repeatedly asserted that there would be full respect and no interference with the Islamic religion. When asked whether this commitment implied the application of Islamic law, Lord Cromer, strangely enough, gave an affirmative, rather than a diplomatic answer.[7] A few months later, Lord Kitchener, the first Governor General, wrote to the provincial governors, directing them to see to it that "religious feelings are not in any way interfered with and that the Mohammedan religion is respected."[8]

The dissimilarity between the British common law and the Egyptian civil law was a major obstacle to an agreement on the kind of judicial and legal system to be inaugurated. The Condominium Agreement expressly stipulated against the transplantation of Egyptian law because that would have given the Egyptians an upper hand in the legal arena. On the other hand, Egypt considered the Sudan as a province and carried the lion's share of the financial burdens. The austere economic conditions of the Sudan at that time, coupled with its vastness and its poor transportation system, were other factors to be taken into consideration.

It was not until several years after the occupation of the Sudan that the government was able to achieve a formula for the judicial and legal systems accomodating these and other factors. The major problem of the place of religious vis-à-vis secular laws in the judicial and legal systems was solved by establishing a partnership between them. This partnership extended to both the laws to be applied and the machinery to apply them. The judiciary was divided between a civil division[9] and a Sharia (Islamic law) division. The courts of the former division have since been known as civil courts, and of the latter as the Sharia

or Mohammedan courts. Generally the latter had the power to apply Islamic law in cases of personal status[10] involving Moslems. The civil division was headed and manned by British staff, whereas the Sharia division was headed by the "Grand Kadi," an Egyptian, and manned by a group of Egyptian and Sudanese religious notables. Though this partnership may not have satisfied all the groups, it took all of them into consideration.

Shortly afterwards, a third set of courts was recognized and organized by the colonial administration. This set was the lay tribunals which are the topic of this article. Besides tracing the history of those tribunals and analyzing their structural and processual characteristics, I shall be arguing that they are the product of the social, political and economic conditions of the Sudan.

Indirect Rule: The Sudanese Reasons and Experience

In addition to the general reasons that prompted the British colonial administration in Africa to resort to indirect rule, factors peculiar to Sudanese society necessitated a particularly heavy reliance upon this policy.

Firstly, on the political scene the Anglo-Egyptian relationship regarding the Sudan was never smooth or congenial. The Egyptian revolution of 1919 and the assassination in Cairo of Sir Lee Stack, the Governor General of the Sudan and the Chief of Staff of the Egyptian army, prompted the elimination of most of the Egyptian military and administrative staff in the Sudan. In 1924 a pro-Egyptian revolt took place in the Sudan, hastening the elimination of the Egyptians and increasing British suspicion of educated Sudanese. The administration gradually slowed down the training of Sudanese students in the technical schools that it had established, and the appointment to responsible positions of their graduates.

Secondly, the British were facing a more austere economic situation. Until the twenties Egypt had borne most of the financial burdens of the condominium administration. Since the Egyptians were degraded to the status of a nominal partner after 1919, they could hardly be persuaded to pay a large share. This austerity was enhanced by the world-wide economic depression. The government in the Sudan incurred constant budget deficits in the inter-war period (see Table (1)).

Thus the British needed cheap and politically reliable administrative and, if possible, judicial staff.

In the Southern Sudan the difficulties were even more acute. The British policy of separating the South from the North entailed as a first step the elimination of Northerners from the three Southern provinces. All Northerners employed by the colonial administration in the Southern Sudan were transferred. The Passports and Permits Ordinance, 1922, required Northerners to obtain visas to travel to the South, while the Closed District Ordinance, 1922, prohibited Northerners from visiting

or residing in some parts of the South. On the other hand, there were no educated Southerners to replace the Egyptians and Northern Sudanese.

Table (1)

EXPENDITURES AND REVENUE (IN EGYPTIAN POUNDS) OF THE SUDAN'S GOVERNMENT: 1922-1938

Year	Expenditure	Revenue
1922	3,785,321	3,501,426
1925	4,075,203	3,710,103
1929	4,978,506	4,791,302
1930	4,621,009	4,511,224
1931	4,564,500	4,398,618
1936	4,462,309	4,204,917
1938	4,865,406	4,616,902

Source: The Governor General's Reports (1922-1938).

Thirdly, the social structure of most of the Sudanese rural communities posed a problem. The tribal system was complex, and the British administrators were generally ignorant of the social norms, values and customs of most of the tribes. Thus the Governor General wrote:

> I do not suppose that the most ardent advocate, whether of internationalism or of equality or freedom to all creeds and races would seriously contend that it would have been possible in practice to have worked a system under which Kwat Wad Awaibung, a Shilluk, who murdered Ajob Wad Peng because the latter bewitched his son and caused him to be eaten by a crocodile, would have been tried by a procedure closely resembling that followed at Paris or Lyons.[11]

Accordingly, the Milner mission was established to tour parts of the country, study those problems and recommend solutions. Its report suggested inter alia:

> Having regard to its vast extent and the varied character of its inhabitants, the administration of different parts of the Sudan should be left, as far as possible, in the hands of its Native Authorities whenever they exist, under the British supervision...Decentralization and employment whenever possible of native agencies should be undertaken.[12]

In effect the recommendation was for indirect rule.

Most of the correspondence, reports and writings about native administration emphasized the socio-economic situation of the colonies as the primary reason for recognizing and promoting the roles of the tribal leaders. Few mentioned the possibility of politicizing the tribal leaders so that they would support the British colonial administration. However, from the beginning the British worked for that end through various means. Vast administrative and judicial powers were

granted to those tribal leaders. The succession to the leadership of the tribe continued to be within the chiefs' families. They were awarded a high percentage of the dues and taxes they collected from their tribes. To strengthen the prestige of those tribal leaders and boost them in the eyes of their tribesmen, the provincial governors and district commissioners were reminded that "...we must learn to regard the chiefs as members of the natural aristocracy, the traditional rulers of the country and we must learn to treat them as such."[13]

The tribal leaders reciprocated and gave unconditional support to the British authorities. The ties between the two strengthened when the number of educated Sudanese increased and they began to assume a national leadership role. The tribal leaders viewed the increase in the number of graduates as a challenge to them, since it would tend to enlarge the administrative machinery to their detriment. On the other hand, the British had also perceived the potential dangers of the educated class, and, as we have seen, after the 1924 revolution slowed the educational and training processes. Native Administration proved a conservative, cooperative and elaborate machinery for political control.

Indirect Rule: The Judicial Phase of Native Administration

In discussing the judicial role played by the native authorities, two periods within the colonial era can be identified: that from 1900 to 1922, and that from 1922 to 1956.

De facto existence: 1900-1922. It took the British colonial administration a while to discover the expediency and advantages of native administration and to organize its judicial role. However, long before that, perhaps since time immemorial, the native authorities had had judicial powers over their tribesmen. Though before 1922 the tribal leaders lacked institutionalized powers over their tribesmen, other factors helped to remedy this shortcoming: the moral obligations the tribesmen felt toward a leader, their desire for social cohesion of the tribe, and the fear of social ostracism in case of disobedience of the elders' orders. Those tribal leaders settled a wide range of cases. Their approach was a more reconciliatory than adjudicatory one.

Little has been written about this era. However, the processual and operational characteristics of the lay dispute settlement institutions in the second era are, to a large extent, a perpetuation of this era.

Recognition and Institutionalization: 1922-1956. The Milner Mission Report was approved in 1922. The process of recognition of native administration dealt with the North and South separately.

For the North the Powers of Nomad Sheikhs Ordinance, 1922, was

passed. Its preamble stated: "Whereas it has from time immemorial been customary for Sheikhs [tribal leaders] of Nomad tribes to exercise powers of punishment upon their tribesmen, and of deciding disputes among them, and whereas it is expedient that the exercise of those powers be regularized..." It is noteworthy that the Ordinance did not contend that the tribal authorities were being endowed with judicial powers, but used the word "regularize," implying that those powers already existed. It is also noteworthy that the Ordinance made no mention of the administrative powers of the native authorities.

A major shortcoming of the Ordinance was that it dealt only with nomad tribes, omitting the sedentary, semi-sedentary tribes and inter-tribal settings. However, it goes without saying that the leaders of other tribes continued to exercise their judicial powers. In 1925 the Village Courts Ordinance recognized limited judicial powers of those leaders.

An assessment of this pilot program prompted the British administrators to pass the Powers of the Sheikhs Ordinance, 1928, repealing and replacing the Powers of Nomad Sheikhs Ordinance, 1922. The basic characteristics of the new Ordinance were:

(a) It applied to both the nomad and semi-sedentary tribes.
(b) It endowed the Sheikhs with more extensive officially recognized judicial powers than those granted by the previous Ordinance.
(c) It recognized and regularized the administrative powers of the tribal leaders. Those powers comprised the collection of taxes, administration and policing of government facilities and buildings, and other similar duties assigned to them by other ordinances or by the district commissioners. In short, the native authorities were supposed to act as local government.

In 1930 the Village Courts Amendment Ordinance increased the powers of the village courts, and prescribed new areas where they would be recognized or established. A reorganization of these courts and a consolidation of the three Ordinances was achieved by the Native Courts Ordinance, 1932. The provisions for administrative powers in the Powers of Sheikhs Ordinance, 1928, were deleted, with a view to making separate provision later.

In the South the policy of indirect rule was implemented rather late, partly because of the late success of the British pacification efforts there, and partly because of the uncertain results of indirect rule in the North. The British administrators were aware of the existence of a large number of chiefs' tribunals. However, in 1925 the governors of the three Southern provinces decided that "...the chiefs' courts are still in a very experimental and primitive stage, and as there is a considerable divergence in the way they are operating, due mainly to different local conditions, no law should be passed."[14] The government finally formalized the de facto existence of the chiefs' courts by the Chiefs' Courts Ordinance, 1931. Whether those courts had managed to pass from a "primitive" to a modern stage in six years is certainly doubtful.

Since the native and chiefs' courts were organized on a tribal basis, the British decided in 1944 to extend the application of the Ordinance to the Ngok Dinka.[15] This is a section of the Dinka tribe, a Southern tribe, that resides in the North, namely in southern Kordofan, adjoining the boundary with the South.

The Chiefs' Courts Ordinance, 1931, like the Native Courts Ordinance, 1932, laid down general structural and processual rules. Both enactments stipulated that the details of organization and powers of any chief's or native court should be prescribed by the warrant establishing it. In general these courts were manned by tribal leaders who were illiterate and lacking legal training. They were required to apply certain customary norms and rules, subject to certain qualifications, and some few ordinances. They were under the control of the district commissioners, and hence the executive rather than the Judiciary. The native and the chiefs' courts are jointly referred to as "the local courts".

Despite the similarities in the reasons for the establishment of the two institutions, in their personnel, and generally in their processual and operational characteristics, four significant differences between the native and the chiefs' courts can be identified.

(a) The process of recognizing and organizing the powers of tribal leaders took a different direction in the two parts of the country. In the North, before the promulgation of the Powers of Nomad Sheikhs Ordinance, 1922, the native authorities had exercised more administrative than judicial powers. Accordingly, the British authorities spent much more time and effort trying to expand and promote the judicial powers, particularly criminal, of the tribal leaders. In 1929 one provincial governor complained that he was "...finding it difficult to explain to those tribal leaders that they can try and send convicted persons to prison."[16] The unpreparedness of some native authorities to pass criminal sanctions is explicable by the fact that the native authorities had traditionally relied mainly upon persuasion rather than coercion. Many criminal offenses, as we shall see later, such as adultery, rape, and in some cases even homicide, were viewed and dealt with as civil offenses settled by compensating the victim or his relatives.

Even when the Sheikhs' courts started passing criminal sentences, those sentences were by and large lenient. However, the British administrators by that time had learned some aspects of the social-psychology of native administration and were not disturbed by that leniency. In 1928 the Governor General reported, "I do not consider the comparative lightness of the sentences passed by the Sheikhs' courts necessarily a danger, because the greater possibility of conviction in a trial before the natural leader of the accused acts as a greater deterrent to crime than severity of sentences."[17]

On the other hand, the chiefs in the South had exercised more judicial than administrative functions. After the institutionalization of native administration, the British authorities had to explain to each chief, "...how and why he should collect taxes and conduct similar

administrative functions."[18]

The explanation for this difference is not difficult to find. The North had experienced in recent history a central government which delegated to the native or religious authorities some administrative powers. Until the Anglo-Egyptian conquest, the South had never been under one effective central administration.

(b) The same reason led to another more important difference. That was in the attitudes and perceptions of the tribesmen regarding the newly established linkage between their leaders and the central government. In the North the tribesmen were used to their leaders having such ties with central officials, and continued to pay deference to them despite the fact that the new officials were neither Sudanese nor Moslems.

In the South the reactions were different. In some areas the institutionalization of the chiefs' courts overlooked or ignored the locally established order. Previously some tribes had had more than one chief's court, each of which entertained jurisdiction over a certain category of cases. One governor, realizing his ignorance of such usage and its repercussions, wrote:

> Cattle cases are only heard by the cattle chief, land cases by the land chief, and so on. Unfortunately, when we first started administering this province, this ancient system was not known to us...In our ignorance we assumed that a chief was the dispenser of justice in every case and was generally paramount in the tribe. Through lack of knowledge and inexperience we failed to grasp this point, and jumping over this stage we appointed a chief to whom we looked as the responsible head. This being so, it can readily be understood that many cases of failure of a chief to hear cases, and of the loser to accept the decision was due to the chief knowing that he could not deal with the case, and to the parties to the action not recognizing his authority in the particular class of case. Hence, much trouble arose which, at times, developed into the chief and his people being erroneously regarded as contumacious of government control.[19]

In other areas the new chiefs' courts were not used simply because "...throughout the Southern Sudan the chief's court was regarded by the Africans and admitted by many district officers as fundamentally a European innovation."[20] This conception was promoted by the introduction of the fee system, court work hours, salaried chiefs, court houses in some areas, the formal atmosphere of dispute processing and the system of appeal to the district commissioners. In some areas the chiefs' courts were regarded simply as government courts.

One result of this situation was the concurrent competitive existence of the new official and the old suppressed chiefs' courts. In Equatoria province, "...investigations have elicited the existence of indigenous chiefs' courts generally under the big rain chiefs, assisted by some tribal elders. It also appears that there is a tendency to have two

chiefs: the rain chief and the government chief."[21]

Some empirical studies of the social systems of those tribes[22] and the reports of some governors helped remedy this situation. The government recognized and institutionalized the specialized chiefs' courts, forced the suppression of some unofficial chiefs' courts and lessened the interference of the district commissioners in the affairs of the chiefs' courts. Those steps helped the gradual reconciliation of the average Southerner to the chiefs' courts. Later, when some ordinary courts were established in the South, the Southerners discovered what real European courts looked like.

(c) Another difference was in the roles for which the British authorities thought of preparing each court. The South was relatively underdeveloped. No development plans or projects were established or thought of. The chiefs, assisted by a small bureaucratic machinery, continued to monopolize the conduct of administrative and judicial functions. There was no need to develop an infra-structure since there was no superstructure. Very few schools and training institutions were established. Though the British aimed to separate the South from the North, no class of educated Southerners was created.

During and after the Second World War, nationalist ideas of decolonization and Sudanese unity emerged, initiated by the relatively large Northern elite. The British were taken by surprise. The education of the Northerners had been intended to create a trained body of clerks and technicians. The British never intended, at least in the early years in the Sudan, to educate potential national leaders or policy makers.[23] This is demonstrated by the kinds of institutions established, courses offered and the length of the study period. Nevertheless, the graduates aimed to assume this leadership role, and get organized themselves, initially in one body and later in political parties.

In the South, on the other hand, there was neither an educated class nor an organized group ready to adopt the British ideas of separate development of the South. The chiefs were the only political elite and their courts were the only organized bodies that could play that role. British officials thought of assigning that political role to them by igniting tribal consciousness. This policy was contained in one memorandum suggesting, inter alia,

> When symbols of authority are either deficient or inadequate, and where no tribal institution is capable of modification to that end, the tribal consciousness has to be encouraged by alien means such as a tribal flag or chiefs' police, council courts or court houses. The patriarch sitting under the village fig tree dispensing tribal justice, the chieftain drumming his dependants to council in the shade of the tamarind, the augur fulminating in the shadow of his ancestral arch--in each of these is the seed of development and the embryo of destiny.[24]

The idea of evolving the chiefs' courts was thought of in a wider

perspective. Beside their political role, "...those judicial institutions would be transformed into elementary councils giving advice, and ultimately into an instrument of local government with legislative and executive powers."[25]

However, those ideas proved unrealistic. The problems in the recognition and organization of the chiefs' courts militated again against this policy. The unpreparedness of the chiefs to play such roles, the high rate of illiteracy, and the apathy of the largest portion of the population towards political and administrative matters were some reasons for the failure of the evolutionary process. Besides,

> The evolution of this institution as a means of ever increasing control in local and provincial affairs by the Southern Sudanese was brought to a rude halt during World War II. In those difficult and turbulent years new British administrators appeared and remained only a short time. The experience, knowledge and commitment to develop the courts from a judicial to an executive and legislative function departed with the British officials, and the courts became during World War II what the critics of indirect rule had feared native administration would become in the Depression--preservers of the status quo and an autocratic institution in an age of democracy.[26]

One major political role played by the southern chiefs was their participation, as representatives of the South, in the 1947 conference on the future of the Sudan.[27] The outcome of the conference was a defeat for the British policy of separation of the South from the North. The incident marked the final stage in the British attempts to evolve the chiefs' courts.

(d) A fourth difference between the native and chiefs' courts was in their structural organization. In both cases, there was a wide gap between theory and practice, and the organization laid down by the ordinances was not that which was established and implemented.

According to section 4 of the Chiefs' Courts Ordinance, the chiefs' courts comprised, and still comprise:

(i) A court of a chief sitting alone.
(ii) A court of a chief sitting with members.
(iii) A special court, that is, a court designed to adjudicate cases where members of two tribes, or the chiefs themselves were involved, or the alleged offense was of such gravity that the powers of the other courts appeared to be insufficient. Such a special court would be constituted of diversified chiefs and the district commissioner of that area.

The organization was not hierarchical, and so none of the courts was supposed to exercise appellate or supervisory powers over another. Those powers were to be exercised by the district commissioner whose decisions were final and unappealable.

In practice the situation was quite different. Only two sets of

courts, having hierarchical organization, existed:

> ...the original courts called 'B courts' were given increasing responsibility by being allowed to assign greater penalties--up to two years imprisonment, twenty-five piasters fine [quarter of a pound] and twenty lashes. Below the 'B courts' a large number of 'A courts' were founded which could grant only minor sentences of up to two months imprisonment. Thus, the B courts became courts of appeal.[28]

The "B courts" were manned by the chief himself and the "A courts" by his delegates who would in most cases be the son that would succeed him. This was regarded as a training process for the son under the auspices of his father.

The powers of each court were stipulated in the warrant establishing it. Those powers were increased later. Subsequently, beside their appellate jurisdiction, the "B courts" were empowered to pass a sentence of three years imprisonment, or a fine not exceeding two hundred pounds, and to adjudicate civil cases of which the subject-matter did not exceed five hundred pounds in value. The "A courts" could pass a sentence of imprisonment of up to two years, or a fine of fifty pounds, and adjudicate civil cases of which the subject-matter did not exceed two hundred pounds in value. None of the two other types of courts established by the Chiefs' Courts Ordinance, 1931, was even convened.

Five classes of native courts were set up by section 4 of the Native Courts Ordinance, 1932. Those courts were, and continued to be:

(i) A Sheikh's court, consisting of a Sheikh sitting as president with members.
(ii) A court of a Sheikh sitting in Meglis (council). This was supposed to be a council of elders set to deal with serious and threatening cases.
(iii) A village court, the jurisdiction of which was confined to a village.
(iv) A Court of a Sheikh sitting alone.
(v) A special court, the jurisdiction and constitution of which was similar to the special court under the Chiefs' Courts Ordinance, 1931.

Again, design and operation did not coincide. The statutory pattern proved too complicated. Most of the courts actually recognized and organized were either village courts or courts of a Sheikh sitting alone. The first had limited powers, usually stipulated in the warrant establishing it. It could impose a term of imprisonment not exceeding six months, or a fine of fifty pounds, and adjudicate civil cases whose value did not exceed two hundred pounds. The powers of the Sheikh's court were more extensive. It could pass a sentence of two years imprisonment or a fine of two hundred pounds, and adjudicate civil cases of a value not exceeding five hundred pounds. The special courts were never established.[29]

Unlike the chiefs' courts, the organization of the native courts was co-ordinate. The decisions of the village courts were not appealable to the district commissioners. One possible explanation for this organizational difference could be the structural organization of the tribal system in each part of the country. The tribal system was more deeply rooted in the South, where the powers of each chief extended to many subdivisions of his tribe. In the North each tribal subdivision might have its own tribal Sheikh.

The Aftermath of Recognition: Conflicts and Tensions

The relationship between the civil and Sharia courts in the Sudan during both the colonial and the postcolonial periods has been characterized, despite the provisions that purport to organize it, by jurisdictional and administrative conflicts and tensions. This substantiates the proposition that the existence of two separate sets of courts always results in jurisdictional problems. The rise of the local courts and their relationship with the civil and Sharia courts (which are called ordinary courts of law by the Sudanese enactments) provides another substantiating example, as we shall see.

In the South the conflicts were less discernible because no Sharia courts existed and very few civil courts were established. The recognition of the chiefs' courts halted the establishment of civil courts. Accordingly, there was no pressing need for trained lawyers. In 1935 there was only one trained judge in the South, and no advocates.[30] In 1956 the number of judges was increased to four but there were still no advocates.[31]

The annual meeting of the Governors of the three Southern Provinces of 1946 considered the possibility of establishing some ordinary courts but rejected the plan as "expensive and unnecesary."[32]

In the North the situation was completely different. It was here that the relationship between the Sharia courts and the native courts, especially, was characterized by jurisdictional conflicts and tensions. One of the reasons for recognizing and organizing native administration in the North was to minimize reliance upon the Sudanese educated class. In furtherance of this objective the numbers of students enrolled in schools and of educated Sudanese recruited in government service were reduced, as will be shown below. As a concomitant, judicial and administrative powers were transferred from the Sudanese civil servants and judicial staff to the native authorities.

There was a systematic implementation of this policy with respect to the Sharia courts. Shortly after these had been established, the British colonial administration discovered that they were totally independent of British supervision and control by reason of their personnel (Egyptians and Sudanese), language (Arabic), and the law applicable (Islamic), and that they might eventually threaten the dominance of the civil courts, the English language and the common law. Besides, the new class of educated Sudanese, including those trained in Islamic

law, was increasingly assuming a political role. They were becoming more expensive because of the increase in their number and salaries. On the other hand, the native authorities in the North, besides being cheap and politically reliable, were mostly Moslems, and many of them were viewed by their tribesmen as their religious leaders, so that the task of applying Islamic law could conveniently be assigned to them. Consequently the British sought to suppress the Sharia courts and to transfer their functions to native courts. This policy was carried out gradually and cautiously in three stages.

The first stage started shortly after the first enactment recognizing the judicial role of native authorities. Native courts were given concurrent jurisdiction with Sharia courts over personal status matters involving Moslems. The ultimate intention behind this was expressed in a memorandum to district commissioners stating that:

> ...Sheikhs can be given powers to decide upon Sharia issues... and thus we can gradually eliminate the Sharia courts.[33]

It was not clear from the memorandum whether the provision was considered to be an "endowment" of new powers or a recognition of powers which the Sheikhs already had. It is probable that the Sheikhs had already been dealing with such cases, perhaps because of ignorance of their jurisdiction and the cultural and physical accessibility of the Sheikhs' courts to native litigants.

The second stage started when the Sheikhs' courts were given exclusive jurisdiction over personal status cases of Moslems "...unless both parties want, and make it clear that they want to have their suit decided by the Sharia court."[34] So the concurrent jurisdiction of the Sharia courts became conditional upon the consent of both parties to a suit. A few months later, the Legal Secretary stated:

> My conclusion may be summed as follows:...
>
> (c) When jurisdiction of Sheikhs' courts is recognized, the concurrent jurisdiction of Sharia courts will be barred.
>
> (d) Sharia courts should have jurisdiction if both parties elect to go before them. The necessary corollary being that, if one party goes to the Sheikhs' courts, the Sharia court jurisdiction is ousted.[35]

Stipulation (d) was a milestone in the suppression of the Sharia courts, because it made clear what was only implied in the earlier memorandum. Hereafter, a decision by one party to have his case adjudicated by the Sheikhs' court would be final and binding on the other.

Caution characterized this stage for fear of the reaction of Sharia judges, especially the influential Grand Kadi. Addressing him, the Legal Secretary bluntly insisted that there was no plan to abolish the Sharia courts, and continued disingenuously:

> ...I trust therefore, that your honor will be satisfied that the religious jurisdiction of the Sharia courts has been fully se-

> cured...In that case [parties choosing to submit to the jurisdiction of the Sheikh's court] the Mahkemeh [Sharia Court] will not be able to deal with the case, not because the case is excluded from its jurisdiction, but because the parties have elected to go before the other tribunal. This I am sure you will agree, is a universal principle of all jurisprudence, and does not in any way curtail the jurisdiction of Mehakim Sharia [Sharia Courts] or interfere with the essential rights of every Moslem to go to the official religious court.[36]

However, those were not the kind of arguments to convince the Grand Kadi. Being an Egyptian official in the Sudan in the late twenties, he had witnessed the elimination of the Egyptians' presence and influence in most fields. The growing alliance between the British administration and the native authorities would inevitably jeopardize the presence of the rest of the Egyptian staff. It would also affect the Sudanese educated class who were regarded by the Egyptians as an important means of channeling their influence in the Sudan. Besides, in the view of the Grand Kadi and the Sharia judges, Islamic law would be undermined if it were to be administered by native authorities without proper training. Moreover, the assurances of the Legal Secretary were contradicted by what the Sharia judges were witnessing. In a long reply the Grand Kadi voiced many of his worries and argued, inter alia:

> (1) What the Sheikh's court is doing is arbitration. In Islam such arbitration should hold good until a judgment is given. If before a judgment is issued the arbitration is protested against, the arbiter should desist from giving a judgment. This has not been catered for.
>
> (2) Section 11 of the Powers of Sheikhs Ordinance provides that the Governor or District Commissioner has the right to quash or revise the findings or sentence of the native court over civil or criminal cases even if no party has appealed. This being the case, it is justifiable that the Sharia Kadi, concerned with the matters of personal law, should be given the right to review the judgment if either party raised an objection.
>
> (3) As regards the question of ascertainment by the Mohammedan court of whether or not the dispute is being, or has been dealt with by the Sheikh's court, this makes the Sharia Kadi to have [sic] no free hand in matters which come within his jurisdiction.[37]

The Grand Kadi also raised the issue of the lack of proper training and knowledge of Islamic law by the Sheikhs. Moreover, he argued that the submission of the parties to the jurisdiction of the Sheikhs' courts in personal status cases was not the result of their free choice but was obtained by the influence of the Sheikhs over their tribesmen.

The Legal Secretary, realizing the weakness of his position in the face of these arguments, sought the assistance of the Civil Secretary. He wrote to the latter:

> I believe you have had a copy of my letter addressed to the Grand Kadi explaining the future relations of Sharia courts with the Sheikhs' courts. I have now received from him a moderate and very intelligent reply which I thought at first, it would be difficult to answer.
>
> I think, however, that I can do so, and of course I will let you see my reply before I send it, but I must first be sure of my grounds and therefore I shall be glad if you will consider with me the following points...[38]

The points he raised concerned the law to be applied by the native courts in personal status cases, the problem of concurrent jurisdiction, and the question of the official response to the "wild rumours" of the government's intention to abolish Sharia courts.

Many letters were also exchanged among the Legal Secretary, the Civil Secretary, the Intelligence Department and some of the provincial Governors. Some of those letters revealed approval of the policy to abolish Sharia courts, others voiced some reservations, and a third group asked for clarification. This last included the Chief Justice himself, who wrote:

> Is it the ultimate aim that in other areas the official Kadis shall disappear and be replaced by some other class of men or not be replaced at all?
>
> I do not myself know what is the considered intention, and hope that you will agree with me that it is most important that this Department [of Justice] know.[39]

The official reply to those different views showed a change in approach rather than in policy. It also manifested the administration's fear of making the policy known publicly. The Civil Secretary wrote to the Department of Justice:

> I think you would be safe in conveying to the Sharia authorities that there is no intention of abolishing any Sharia court which is doing good work on a scale which justifies its existence...<u>At the same time I look forward myself to the day when, under the system of native administration it may have proved possible to do away with the Sharia Courts in several outdistricts, when they will have ceased to justify their existence</u>.[40]

It is clear that the later part of this stage was characterized by lack of clarity as to the policy towards Sharia courts, about how to convey it to other officials, and about how to justify and publicise it without generating unmanageable opposition and tensions. However, despite this, and the external opposition and some internal misgivings, the process of suppressing the Sharia Courts accelerated. Thus the itinerary of Sharia judges to areas where Sheikh's courts were recognized and organized

was stopped, thus leaving the Sheikhs' Court unfettered in dealing with personal status cases.[41] In December 1927 the Civil Secretary wrote to the Legal Secretary:

> I trust you will agree with me in thinking that it would be undesirable that there should be any circuits of Mahkemah in Districts in which it is proposed to set up courts under the Powers of Sheikhs' Ordinance, 1927.[42]

The Legal Secretary was certainly agreeable, and in the same month he issued a circular to all Kadis to stop the circuits touring.[43]

The third stage in the process of evolution of native courts at the expense of the Sharia Courts was conducted more boldly. It started with the reply of the Legal Secretary to the Grand Kadi's earlier letter. Beside parrying many of the points raised by the Grand Kadi, the Legal Secretary showed the determination of the government to proceed with its policy. The reply, which was long, was sent almost a year after the receipt of the letter. Unlike the first letter, which was mild in tone, this contained disguised threats when it suggested:

> The giving of legal sanctions to the authority exercised by the tribal and local leaders over their people is conceived as a step in the direction of entrusting to the natives of the country greater authority in managing their own affairs...which is a matter of highest importance, and I am responsible just as you and every high official for seeing that this policy is implemented in the spirit as well as in the letter.[44]

The reply sought to show that the process was a response to the demands of the natives themselves, and so should not only be allowed but protected, and that the Grand Kadi was among those who should protect it.

> Since this choice was exercised by them, it will be your duty to see that there is no interference when the parties consent...

Concerning the institutions to which appeals should lie, and the law to be applied, the reply argued:

> It would defeat the whole object of the Government's policy of entrusting to the native authorities the management of their affairs if an appeal was allowed from the Sheikhs' court either to the Civil court or to the Sharia court...The government is equally determined that when the native Moslems prefer to have the personal law interpreted by their own trusted leaders, they shall be allowed to do so.

This letter put the Grand Kadi on the defensive. Not only was he expected to agree with the policy, but he was also expected to participate in its implementation. Given those implied threats, it was not

surprising that the reply of the Grand Kadi was short and submissive, seeking face-saving solutions. It did not attempt to address any of the points raised by the Legal Secretary; nor did it reiterate the earlier parried demands. Instead, it showed an implicit, if not express approval, stating:

> Now that your last letter shows that the Government is determined to have this policy carried out, any responsible official has no alternative but to find the best way for carrying it out.[45]

Realizing that it would not be possible to reverse the government's policy regarding the endowment of the Sheikhs' courts with jurisdiction over personal status cases, the Grand Kadi, in the same reply, suggested that:

> ...should appeal against [Sheikhs' courts'] decisions in personal matters does not [sic] coincide with the policy for which the Sheikhs' courts have been established, I suggest, subject to your, and His Excellency the Governor General's concurrence, that the Grand Kadi be made umpire for the decisions relating to personal [status] matters which have been issued by these courts...As during these first years, these Sheikhs will be in the course of training, the Grand Kadi's decisions will prove useful to them, and will enable them to make just decisions.

However, even those mild requests were rejected. The government proceeded with the suppression of Sharia courts. By April 1929, more than eighteen had been abolished, and more than thirty-eight Sheikhs' courts, with clear jurisdiction over personal status matters, had been established.[46] The judges were retired under section 32(b) of the Pension Ordinance, 1919, which empowered the Governor General to pension off any employee "...in the interest of public service." However, as the number of pensioned Sharia judges increased, the government began to fear the political consequences. The Civil Secretary wrote:

> It will be politically undesirable in the highest degree to pension off the Kadis whose courts are abolished...To cause individual Kadis to suffer in this way would increase the opposition of the educated classes to our native policy and would give it reasonable grounds...Kadis whose posts are suppressed should be absorbed elsewhere.[47]

A few days later it was decided that "elsewhere" did not include the Sheikhs' courts.[48]

In the latter part of this stage the Legal Secretary felt confident enough to state clearly the official reason for the abolition of Sharia courts:

> The proposal for abolishing them is made frankly on the ground that they are too busy, and consequently derogate from the complete functioning of the native administration.

> Their decisions cannot, like those of the Sheikhs' courts, be varied or quashed by the administrative authorities. They are 'out of the picture' as impinging on the jurisdiction of the Sheikhs', and thereby a limitation on the complete control of the District Commissioner.[49]

This daring step was followed immediately by others to strengthen the status of native courts. The registration of births and deaths was transferred from the Sharia courts to the Sheikhs' courts,[50] which were also empowered to issue illam (a document for proof of heirship) and tawkeel (mandate). Sharia courts were directed to accept as valid such illams and tawkeels, "...as if they were issued by any competent authorities."[51]

For the first time, too, a reference to the policy of suppression was contained in the Governor General's annual report, which was widely circulated and accessible for perusal in all departments. The 1928 Report stated: "The administrative reorganization consequent on the development of native administration has made it possible to dispense with several religious courts and to effect some reduction of staff and students in 1929."[52]

A concomitant process was the diminution of the Kadi's College. This College was established in 1902 to train Sharia judges. The enrollment was annual for a two-year course of study. However, during the suppression of the Sharia courts, there was a conspicuous decrease in admissions. Admission came to be held every five years only, and it is reported that in one meeting held in 1929 "the Legal Secretary raised the question of the continuance of the Kadi's College...A new class was due in 1930 and it seemed possible that it ought to be discontinued. The Civil Secretary felt on political grounds that it would be most undesirable at the present juncture, which was agreed upon."[53]

Goals, Aims and Results of the Policy of Suppression and Evolution

Table (2) shows the results of suppression in 1929. Almost one-third of Sharia judges were pensioned off. Out of 42 Sharia courts 20 were abolished. The aims of the policy may, in my opinion, be summarized as follows.

(i) The checking of the many challenges posed by the Sharia courts to the British administration in the Sudan. Those courts were not only independent of British control but were under the overwhelming control of the Egyptians and educated Sudanese. A similar challenge was posed by the Islamic pedagogic institutions. The continuation of study courses in Islamic law would have been a potential threat to the common law and civil courts.

(ii) The strengthening of the prestige of the native authorities and the enhancement of their reliance upon the administration in the face of the educated Sudanese class which was the common enemy of both.

(iii) The alleviation of some of the financial burdens of the British colonial administration. It is true that the government issued a directive for re-employing those Sharia judges who were pensioned off. However, none of the records reveal the extent, if any, of its implementation, nor of the kind of jobs assigned to those re-employed.

Table (2)

NUMBER OF SHARIA JUDGES PENSIONED
OUT OF 1929 TOTAL

	Number of Sudanese	Sudanese Pensioned Off	Number of Egyptians	Egyptians Pensioned Off
Court Inspector	4	--	6	--
Kadi	45	14	13	7
Legal Assistant	31	12	--	--
TOTAL:	80	26	19	7

Source: A Note by the Legal Secretary[54]

(iv) The suppression of the spread of nationalist ideas. After the 1924 revolt in the Sudan, the British authorities realized that the educated class was trying to play a national leadership role. Halting the spread of intellectuals over the country was, from the British point of view, one important way of halting the spread of nationalist ideas. This contention could be substantiated by one government memorandum which suggested, among other things, that,

> ...by entrusting power and authority to the natural leaders of the people whom we must support and influence as occasion requires...the country will be parcelled out into nicely balanced compartments, protective glands against the septic germs which will inevitably be passed on from the Khartoum of the future... Only then will the Sudan be made safe for autocracy.[55]

(v) The establishment of supervisory control over cases of personal status of Moslems. The British executive staff now achieved this for the first time since the establishment of Sharia courts in 1902. Previously it had been thought impossible because of the religious and language barriers.

However, the ultimate aim of abolishing all Sharia courts was never achieved. The process of devolution stopped at the third stage, with the figures shown in Table (2). The relationship between the Sharia and native courts continued to be characterized by strains, tensions and jurisdictional conflicts. When between 1965 and 1969 the Islamists gained legal and political predominance, many of the powers that the native courts had gained were pruned and circumscribed.

The policy came to a sudden halt in the mid-thirties. The archival

records reveal no reason for this, but the following reasons could be suggested.

The British may have found that the policy was expensive. It had increased their alienation from the Sudanese educated class. Members of the class who had not been directly affected feared that their turn would come. The British needed political stability in the face of the deterioration in the international scene. The military build-up of the Italians in Eritrea, near the Sudanese eastern border, and their subsequent conquest of Ethiopia was one example. One way of attaining this stability could be by discontinuing the policy. Appraising the policy of devolution and suppression, one British administrator in the Sudan concluded that, "From the political point of view, to abolish a Mohammedan law court without providing an adequate alternative is gratuitously to provide the intelligentsia of the country with a weapon with which to attack our policy of Native Administration."[56] Besides, antagonizing the Sudanese intellectuals could drive them into the arms of the Egyptians, thus enhancing the Egyptian influence. The establishment of the Khartoum Law School in 1935 for teaching common law, was thought of as one means of avoiding that result. Abolishing the Sharia courts and closing the Kadi's College when opening the Law School would have been difficult to justify.

Another reason could be that the British received empirical confirmation that the Sharia courts were really innocuous, and that it would make no difference whether their jurisdiction was exercised by them, by native courts, or by district commissioners. Later the Legal Secretary wrote:

> No doubt the District Commissioner receives complaints from time to time about decisions of Native Courts in Sharia cases. When this occurs, and a point of Sharia law is involved, it seems to me that the obvious and proper course is for the District Commissioner to discuss the matter with the Government Kadi. The adoption of this course, in addition to assisting the District Commissioner in coming to a right decision would, I think, be a step towards enlisting the sympathy and cooperation of the Sharia courts with the Native courts.[57]

In summary, the relationship between the Sharia and Native Courts was left unresolved. Both continued to have concurrent jurisdiction over personal status matters of Moslems. As a result, the jurisdictional conflicts and tensions continued. Clearly a political change was needed before the relationship could be clarified. That did not take place until 1965.

II. THE POST-COLONIAL PERIOD

For the present purpose three distinct eras can be identified: from 1956 to 1964; from 1964 to 1969; and thereafter.

Native Administration and the Paradoxes of Independence: 1956-1964

Given that native administration flourished during the colonial period, and proved an effective machinery for British political control, it may appear strange that independence was not followed by any step to suppress, curtail or reorganize the powers of native authorities, and that they survived the post-colonial period. Yet, they did. During the period of self-determination that preceded independence, the tribal leaders, fearing the retaliation of the new political elites and hoping to maintain and strengthen their powers, organized themselves into a political party. Strangely enough they called it the "Socialist Republican Party." This party "...was composed mainly of the tribal notables of the Northern Sudan whose influence had grown during the period of native administration...and for no deeper ideological reasons they denominated themselves Socialist Republicans. This party was viewed benevolently by the Britih administration which saw in it a counter-weight, not only to the Unionists, but also to the Mahdists."[58]

However, the political influence of the tribal leaders proved insignificant. The main reason was that the allegiance of most Sudanese passed to one of the two religious sects. The contemporary political history of the Sudan turned on the axis of these sects because the two major political parties affiliated with them. The Socialist Republican Party was viewed benevolently by the British while the independence struggle was at its apex. As a result the party disappeared shortly after its formation, and the tribal leaders affiliated to the two major traditional parties. Competition between the two parties for their allegiance helped the tribal leaders to maintain their administrative and judicial powers.

So the political situation, coupled with economic and social problems and the absence of any program for dealing with those problems, facilitated, and indeed necessitated, the continuation, during the first two years after independence, of the roles played by the native authorities. The military regime that took power in 1958 was desperately in need of popular support. The political parties, which were all declared dissolved, and many of the profession and trade organizations revealed their determination to resist the military regime and to restore democracy. The regime found that it was left only with the native authorities whom it flattered and whose endorsement and support it subsequently gained. History repeated itself, and soon the military establishment and the native authorities were allies against the expanding educated class. Thus the first period ended with the native authorities comfortably maintaining both judicial and administrative powers.

No significant changes were introduced in the local courts system in this period. The declaration of independence was accompanied by a declaration of adherence to Westminster democracy. One effect of democratic rule was a call for separation of the powers of the executive and the judiciary as one step for guaranteeing the independence of the judiciary. This, coupled with the departure of the district commissioners, prompted the government to amend the Native and the Chiefs' Courts Ordi-

nances, transferring appellate jurisdiction over those courts away from the district commissioners to the resident magistrates (district judges of the first grade and magistrates of first class).[59] This meant the theoretical subordination of the local courts to the ordinary courts, and hence their integration into the judicial system.

This change may appear to be of landmark importance. However, it should be viewed in the context of the social milieu within which the local courts operated. District commissioners had supposedly exercised appellate and supervisory authority over the local courts previously. There are no records or empirical studies, but I am inclined to think that in practice district commissioners exercised very little, if any, appellate control, although this should not obscure their elaborate administrative control. Many reasons contributed, in my view, to the fact that an insignificant number of appeals were taken to the district commissioners. One was the nature of the local courts' role. They were in general reconciliatory rather than adjudicatory bodies. They sought primarily to maintain the social cohesion of the tribe through persuasion rather than coercion. This role was facilitated by the statutory provision that they were to apply "...native law and custom prevailing in the area over which the court exercises jurisdiction, provided that such native law and custom is not contrary to justice, morality or order,"[60] in addition to some ordinances and regulations prescribed by the central government.

In most of the local court sessions which I attended I observed that in each case the plaintiff would make a clear, unequivocal claim, and the defendant would make what he thought was a complete defense. Then the court, applying the precepts of fireside equity, would often settle the case by means of a compromise. Social pressure, fear of social ostracism, and the influence of the tribal leaders would propel the plaintiff/complainant to forego part of his claim and the defendant the other part. As has been correctly noted by one researcher, "In such small communities people must go on living together, and it is more important to work out an agreement that would allow for future harmony than to punish an offender for an act committed in the past."[61] Besides, people often feel compelled to accept the justice of a decision reached by their own people. Consequently there was general acceptance of the decisions rendered, and a low rate of appeal. Moreover, the district commissioners were not always available. They were few, and followed circuits covering large geographical areas. They were also regarded as complete aliens.

These facts should lead us to question the assumptions that the legislative amendment subordinated the local courts to the ordinary courts, and that the court system thereby became integrated. Integration of a court system requires, in my view, more than a legislative provision declaring an appellate link between courts. All the reasons that inhibited appeals from local courts' decisions to district commissioners again operated to inhibit appeals to resident magistrates, whose courts were likewise alien bodies to the average tribesman.[62] Moreover, the court of the resident magistrate was even more physically inaccessible, since it did not tour, and the appellant had to go to it. It was thus

even more expensive, inconvenient and time-consuming. Finally, the outcome of any appeal was generally uncertain.

Added to the failure to integrate the courts judicially was the fact that the local courts continued under the administrative control of the Ministry of Local Government throughout this period. The Ministry paid the salaries of the tribal authorities and received the revenues from fees and fines. The courts' records and financial statements were part of the Ministry of Local Government records. The courts' administrative staff, where they existed, were the Ministry's employees, not judiciary auxiliary staff. No separation of the administrative and judicial powers of the native authorities was adopted or envisaged. Though the Ordinances as amended conferred on the Chief Justice the power to establish the courts, it is clear that the power was controlled by the Ministry of Local Government and was subject to its financial capacity and priorities.

In spite of all this, the Chief Justice, delivering the Sudan's statement on local courts at the "African Conference on Local Courts and Customary Law," held in Dar es Salaam, Tanganyika, in September 1963, declared that, "...the local courts of the Sudan have been successfully integrated into the Judiciary."[63] He continued: "Powers of selection, appointment, promotion, training and dismissal are in the Judiciary, and ultimately in the Chief Justice." This statement was incorrect in all aspects.

Regarding selection, neither the Chief Justice nor the Ministry of Local Government had any say in the selection of the head of a tribe or other traditional office-holder. Yet such functionaries were necessarily appointed to local courts. As one British administrator put it, "The Chief is always there. Our business is to recognize him, to afford him official recognition, that is, in the diplomatic sense of the word. If we arbitrarily replace him, we create a dual command--the Government Chief and the real Chief."[64] When the tribal leader died, succession to the leadership by his eldest son was generally automatic. This was, and still is a primary, unalterable characteristic of the Sudanese tribal system.

The Chief Justice spoke about promotion without indicating the ranks involved, or whether it was by merit or seniority. Since the Sheikh or the chief was invariably the tribal leader and the paramount judicial officer, it is difficult to see to what post he could have been promoted.

Whatever meaning might be assigned to the word training, it was misleading to suggest that there was any kind of training for the personnel of local courts. Never in the history of local courts had a training program existed or been envisaged. Indeed, the Chief Justice himself said in the same statement: "There are no special schools or courses for local court judges other than those of the regular school system of the country. No education is required; where judges are illiterate they have literate clerks."[65]

Finally, none of the Ordinances provided for the suspension or dismissal of tribal leaders. However, it is almost axiomatic that he who lacks the power to appoint, lacks the power to dismiss. If such powers had existed, it might have been expected that they would be vested in the Ministry of Local Government, since that is the body with financial and administrative control over the tribal authorities.

Not only did the statement of the Chief Justice misrepresent the legal status of the local courts, it also lacked empirical support. For example, it averred that there were "...more than one thousand local courts in the Sudan..."[66] Table (3) shows the exact figures and distribution of the local courts throughout this period.

In conclusion, the first era of the post-colonial period was by and large a perpetuation of the colonial period in both the structural and operational characteristics of local courts.

Struggle for Survival: 1964-1969

At the time of the popular revolution of 1964 one of the loudly chanted slogans demanded dissolution of native administration. The proponents of dissolution were motivated by the fact that the tribal leaders had given unconditional support to the overthrown military government. They regarded native administration as a remnant of the overthrown regime, that needed also to be swept away.

It became clear to the tribal leaders shortly after the success of the revolution that they were passing through a critical historical stage in which their very survival was in issue. Their defence had to be conducted on three fronts. The political front involved the survival

Table (3)

LOCAL COURTS IN THE SUDAN: 1956-1964

Province	Number of Local Courts
Khartoum	16
Blue Nile	207
Northern	126
Kassala	69
Kordofan	110
Dar Fur	102
Bahr al Ghazal	101
Equatoria	127
Upper Nile	92
TOTAL	950

Source: Files of the Local Courts, Inspector of Local Courts Office,[67] the Judiciary.

of native administration as a concept. Here they had to struggle against both antagonistic street demonstrations, demanding immediate dissolution, and a caretaker government with a strong leftist tendency and ideology. The leftist forces regarded the native administration as a machinery that would certainly oppose and obstruct the envisaged revolutionary social, economic and political changes they hoped to introduce. Beside the leftist intellectuals who dominated the caretaker government, and the mobilized masses, opponents of native administration included young members of the tribes who had recently gained political consciousness and who felt oppressed and exploited by the tribal leaders.

On two further fronts the tribal leaders faced judicial attacks, although these were less crucial. One, led by the civil judges, aimed to separate native courts from native administration and to effectuate their integration into the judiciary. These demands were propelled by the democratic spirit of the post-revolutionary era and by concepts such as the independence of the judiciary (embodied in the National Charter agreed upon by the political and professional groups immediately after the revolution), separation of judicial and administrative powers, the rule of law, and the principles of legality. The other attack, led by the Sharia judges, aimed to curtail the jurisdiction of native courts over matters of personal status involving Moslems--a jurisdiction which native courts had acquired, as we have seen, in the second period of the colonial era.

The challenges to native administration crystallized concurrently on both the political and judicial fronts. On the one hand, the senior members of the judiciary, in a landmark resolution passed in December 1964, demanded the immediate separation of native courts from native administration and the transfer of all the affairs of native courts from the Ministry of Local Government to the Judiciary. On the other hand, leftist elements in the caretaker government, despite, or perhaps because of their failure to include their policy of abolition in the National Charter, acted promptly. The Minister representing the labour movement submitted a note to the Council of Ministers in December 1964, demanding the dissolution of native administration. He described native administration as a backward system, created by the imperialist colonial powers to weaken the national movement, and contended that it had obstructed rural development and exploited the masses by its corvée system. The note demanded, among other things, the suspension of native administration in the Northern Sudan and the distribution of its functions among various agencies, and the repeal of the Chiefs' and Native Courts Ordinances. The note went on to suggest, as a demonstration of the government's seriousness about the problem, the immediate dissolution of native administration in certain areas in the North, and the formation of a committee to study the feasibility and manner of dissolution in the rest of the country, including the South.

In my view, this was simplistic, and not based on thorough study of native administration and the social systems within which it functioned. It did not propose an alternative to perform the judicial functions, it did not consider the expenses of the new agencies to carry out the func-

tions of native administration, nor were those agencies defined or their constitution and duties detailed. Nonetheless, given the revolutionary spirit of that era (that was, ironically, coupled with the prevalence of Western democratic jurisprudential thought), the council of Ministers agreed with the note in principle. The Council passed Resolution No. 206, which ordered the separation of native courts from native administration. A committee was formed to study native administration in general and to propose ways and means for dealing with it. Thus the proposals of the judiciary were accomodated in Resolution 206, thereby strengthening its legal and political basis.

However, a system which had had a major judicial and administrative role for more than half a century would not stand by and watch the digging of its grave. Shortly after the passage of Resolution 206, some of the native authorities from the North arrived in Khartoum for an exchange of views on the current situation. Inspired by the fear that the current was flowing rapidly against them, they decided that it was advisable for them to organize so as to exercise group pressure. They established the Tribal Leaders' Association, and secured the endorsement of most tribal leaders in the Sudan. To appreciate the significance of this we have to look at the number of native authorities in the Sudan in this period, as shown in Table (4). A decision to obstruct the implementation of Resolution 206 and any attempts to dissolve native administration in any area was passed unanimously. As we shall see, the tribal leaders were determined to fight for survival in both the judicial and administrative arenas.

Table (4)

1965 DISTRIBUTION OF NATIVE AUTHORITIES

Province	Number of Native Authorities	Population of each Province
Khartoum	44	584,472
Blue Nile	281	2,397,528
Northern	138	1,013,880
Kassala	175	1,097,376
Kordofan	444	2,051,616
Dar Fur	345	1,528,712
Bahr al Ghazal	554	1,157,016
Equatoria	358	1,049,614
Upper Nile	430	1,037,736
TOTAL	2,769	11,917,950

Source: Central Archives Files, Native Administration 1/1/4.[68]

The native authorities were not alone. Most of the official administrators were opposed to dissolution. Ironically, the British colonial administration had developed native administration to offset the influence of these very people. However, their old enemy had now become their intermediary tool in the administrative and judicial processes.

It was the native administration that collected taxes on behalf of the commissioners and local officials, that kept law and order in the name of the government, and that implemented decisions of the local municipalities. As one author noted:

> It is easy to understand why administrators in the rural areas of the Sudan were alarmed by the call to liquidate Native Administration, the means by which Government authority is communicated to the mass of sedentary people and nomads, for it meant that government authority emanating from them would not be communicated to the masses. Unpreserved, that authority would evaporate at the doorsteps of old districts and new councils. With this the probability of a fragile state of public security and empty chests were too harsh facts for their professional conscience to bear.[69]

It is ironic also that the secret notes, with which officials flooded the Council of Ministers and the Ministry of Local Government, contained the very same arguments which the British colonial authorities had used to pave the way for recognizing and evolving native administration, and to offset the influence of the Sudanese educated class, including some of these officials.

The local officials opposed not only dissolution but also the separation of native courts and native administration, arguing that "...without judicial powers the native authorities can hardly effectuate their administrative powers...the judicial powers boost the native authorities in the eyes of their tribesmen and facilitate the conducting of their administrative roles..."[70] Other officials argued that approval by the Ministry of Local Government of Resolution 206 was tantamount to the signature of the death warrant of native administration.[71]

Similar arguments were contained in memoranda submitted by the Tribal Leaders' Association. These memoranda were initially defensive. However, sometimes they were critical, and even ironical when they repeatedly argued that "We believe that the Native Courts Ordinance is the only Sudanese law...the Civil Justice Ordinance and the Penal Code are imported colonial laws that neither coincide with our traditions, nor meet our national needs."[72]

The opposition of the educated class to native administration in the colonial era had been motivated by political reasons enhanced by the timing of the evolution of native administration. It was also motivated by personal grievances arising from the displacement by the native authorities of members of the educated class. In that opposition, the educated class was unified, especially in the early years of the evolution of native administration. In contrast, in the post-colonial era the educated class became sharply divided. The argument that native administration was a reactionary tool created by the colonial powers with the object of political control became of secondary importance in the post-colonial period and was advanced only by the leftist elements. The major arguments for and against native administration in this era were administrative and legalistic. For the judiciary, it was argued that judicial independence could be complete only if the native courts

were separated from native administration. The leftists allied themselves with this position, though it did not coincide with theirs, for tactical reasons. On the other hand, the official administrators regarded the preservation of native administration as a necessity dictated by expediency, economy and the social structure of the Sudan's rural areas. For them, an effective native administration needed judicial powers, and separation of judicial powers meant the collapse of administrative powers.

The tactics resorted to in obstructing Resolution 206 varied in importance and effect. Beside flooding the Council of Ministers and the Ministry of Local Government with memoranda, they gathered in Khartoum to enhance the group pressure, and, more importantly, to offer empirical proof that local officials could not function without them. This, in turn, propelled the local officials to intensify their pressures on the Ministry of Local Government to campaign for rescission of Resolution 206. Those pressures were channelled systematically to the Council of Ministers. Another major tactic of the native authorities was to revive their co-operation with the traditional political parties. Both parties had vested interests in the removal of the leftist caretaker government. Accession to power of the traditional parties would certainly delay the implementation of the Resolution and offer a chance for reconsideration of the whole matter.

The Ministry of Local Government that was supposed to monitor and, with the judiciary, supervise the policy was in a dilemma. On the one hand, the Council of Ministers and the judiciary were pressing to implement the policy; on the other hand, their local officials were conveying a gloomy picture of the collapse of law, order and administration in the rural areas because of the non-cooperation of native authorities.

The Sudanese judiciary prided itself on having struggled effectively during the era of the military government to maintain the independence of the judiciary--an independence subsequently guaranteed by the National Charter. So, irritated by the reluctance of the Ministry of Local Government to strengthen the independence of the judiciary by implementing the policy of separation, the judiciary decided to act alone. They sent forms to all the tribal leaders in the North asking them to indicate which powers they preferred to maintain, the judicial or administrative, and giving them a fixed period within which to exercise the option.[73]

Realizing that the judiciary was determined to proceed with separation, the Ministry of Local Government resorted to delaying tactics in the hope that the passage of time would bring about a change of policy towards native administration that would do away with Resolution 206. The Minister of Local Government wrote to the Inspector of Local Courts and the Chief Registrar of the Judiciary:

> Resolution 206 does not include a stipulation as to an immediate implementation, and in my view it should await the recommendations of the committee formed by the Council of Ministers to conduct a thorough study of native administration.[74]

The Chief Registrar did not agree with that interpretation. In his reply, he raised the aforementioned constitutional arguments in favour of separation and emphasized the authority of the judiciary to implement that resolution:

> The policy of separation is not only the correct policy, but it is long overdue. It lies exclusively within the jurisidiction of the judiciary, and the judiciary is determined to implement it.[75]

While the judiciary may have had the legal authority to implement the policy, it is less certain that it had the executive power needed. It was soon struggling against both the native authorities, who regarded separation as a step towards their own dissolution, and officials of the Ministry of Local Government, who opposed separation because they wished to maintain the administrative powers of the native authorities.

Relatively few tribal leaders cooperated to the extent of having the forms completed and submitted to the resident magistrates. Of those who expressed an option, the number who opted for judicial powers was far greater than of those who opted for administration. In the Northern province with the largest return, for example, 90% of the native authorities opted for judicial powers.[76] The reasons were obviously the social prestige of judgeship, its powers, and the relative ease of its duties.

The local officials were alarmed. They increased the pressure on their Ministry to halt the process of separation by whatever means might be available. The only remaining means was financial, and it was effective. The judiciary received a warning from the Ministry of Local Government that, if separation was ever effectuated, the Ministry would be absolved from all financial responsibilities towards native courts and their personnel.[77] The judiciary had always been financially constrained, and the salaries of new judges, their clerks, native police, and the courts' other needs could hardly be allocated from within the current budget of the judiciary. The central government was in no better financial position.

Meanwhile, the current was flowing rapidly against the caretaker government. Political, economic, social and administrative problems built up, and the government was forced to resign. This opened the door for the traditional parties, and elections in the middle of 1965 resulted in their comfortable seating in power. Subsequently, the process of separation was halted, and the new Council of Ministers established another committee to study native administration and propose recommendations. This marked a great victory for the Tribal Leaders' Association. Not only had they won the struggle for survival, but they had emerged as an organized body capable of exercising successful group pressure. On the other hand, the judiciary, faced with the new changes, the financial problems of implementing the separation policy and the government's disregard of some of its decisions in constitutional cases, was no longer enthusiastic in pursuing the policy. Moreover, the ideological split in the educated class was inevitably reflected in the ju-

diciary. This deprived the judiciary of its ability to exert pressure as it had done earlier.

Having won the struggle for survival, the tribal leaders went onto the offensive. In 1966 the Tribal Leaders' Association submitted a long memorandum to the Council of Ministers. It stated the reasons for the Association's opposition to the earlier resolutions, and then attacked the policy of separation, suggesting that it would result in complete chaos and disorder. In victorious tone it stated: "The government judges are ill-prepared to deal with problems of customary law, norms and values of the Sudanese tribes by virtue of their Western education."[78] It detailed the roles played by the native authorities, their efficiency and their low cost. For the first time the tribal leaders now spoke of the problems which, in their opinion, the native authorities faced. Those problems, the memorandum suggested, could only be solved by an immediate acceptance of the following demands:

(a) an increase in the salaries and amenities of tribal leaders,
(b) representation of the tribal leaders in Local Government Councils,
(c) an increase in the clerical staff and native police,
(d) an increase in the judicial powers of native courts.

In another memorandum they warned that they would not co-operate with or meet members of any committee that was studying native administration with the possibility of dissolution under consideration.[79] The worries and reservations of the tribal leaders were, however, at that stage excessive. By 1966 the word "dissolution" had almost disappeared from the vocabulary of officials, committees and the Council of Ministers, and had been replaced by such words as "modernization", "ameliorization" and "organization". A reshuffling in the cabinet resulted in the elimination of the committee which had been established to study native administration and present a policy-oriented report, and the formation of one whose terms of reference referred to betterment of native administration and the conditions of the native authorities. This may have been a result of another threat by the tribal leaders. They had stated that they would oppose any political party or candidate who would not openly voice his support of the native administration. In the fever of parliamentary elections and with the possibility of a presidential election to follow, it was clear that the Association had potentially great political power. By mid-1966 the current against native authorities had been halted, and they had gained the initiative.

However, the Tribal Leaders' Association had fallen short of full victory. Beside the challenges of dissolution and of separation of judicial powers, native administration faced a challenge concerning their relationship to Sharia courts. The second era in the colonial period had witnessed, as we have seen, the evolution of native courts at the expense of Sharia courts. The seating of the traditional parties in power after the 1965 election marked, in addition to the factors already mentioned, the commencement of active participation of the Islamists, both inside and outside the government, in the political decision-making process.

The Sharia Courts Act, 1967, and the implementing regulations, stripped native courts of the power to consider, in whatever manner, any of the matters falling within the jurisdiction of the Sharia courts, that is, principally personal status issues concerning Moslems. One circular included a warning to the members of the native courts that harsh measures would be applied against any breaches.[80] However, it can be argued that the directive was not likely to be entirely effective. There was difficulty in determining which issues were matters of personal status. The Sharia courts were physically inaccessible in many areas. In contrast, native courts were culturally and physically accessible, they were convenient and cheap, and tribesmen were conditioned to take such matters to their tribal leaders.

So this era, that started with attempts to dissolve native administration and separate native courts from native administration, came to an end with the tribal authorities in almost full control of the current of events. The attempts not only failed, but culminated in the opposite result. A number of factors contributed to this. The main reason was the absence of consensus on a policy towards native administration, and the lack of political stability. Five cabinets ruled the country during this period. Each had its own conceptions and views about native administration. Each of the three committees formed to study native administration was a miniature of the government itself, and reflected the degree of commitment of that government to the tribal leaders.

Secondly, the note that initiated Resolution 206 was simplistic. It was not based on an empirical study of the complex tribal social systems and the persistent economic problems that had impelled the preservation of native administration. Resolution 206 itself demonstrated a conspicuous failure to grasp and recognize those problems or the need to introduce social change in tolerable doses. Furthermore, the austere economic situation silenced the judicial attempts to integrate and control native courts.

Thirdly, there was the sudden rise of an organized body of tribal leaders, a development unique to the Sudan. The Sudanese Tribal Leaders' Association played on both the lack of a studied program for dealing with native administration, and the political differences and the scramble for political power. The Association became a power that the political parties had to, and did, take into account.

Finally it should be mentioned that the struggle was between the government and the native authorities in the North only. The chiefs in the South were not a target of the dissolution or separation policies, and none of the three committees dealt with native administration in the South. One reason for this was, in my view, the conviction of all the political elites that it was neither feasible nor advisable to attempt to tamper with native administration in the South because of the complexity of the tribal system there, the absence in many areas of a bureaucratized judicial and administrative apparatus, the precarious security situation at the time, and the austere economic condition of the entire country. Another reason which has been advanced by Southern

intellectuals turns on the fact that, before the agreement with the North was signed,[81] the Southern chiefs allied with and rallied support to whoever was in power in Khartoum, against the Southern intellectuals, most of whom were engaged in the North-South conflict. Consequently, it is argued, any central government would strive to strengthen the administrative and judicial powers of the chiefs. Whatever the explanation, the fact is clear that there was heavy reliance on native administration in the South: as seen in Table (4), the number of the chiefs in the South during this period was enormous. Almost every two thousand Southerners had a chief, and the number of chiefs was almost equal to that of the Sheikhs in the North, despite the disparity in population and geographic size.

Processual and Operational Characteristics of Local Courts

Before an examination of the latest period, it may be helpful to consider certain problems, which still arise today, in the operation of local courts. Both the Native Courts Ordinance and the Chiefs' Courts Ordinance laid down, as we have seen, a general structural framework for the local courts. The details were to be prescribed by the warrants establishing each court. This scheme was dictated by the fact that each locale had its own values, norms of behavior, and degrees of development. The literacy, knowledge and reliability of the prospective members of each local court were also relevant to a decision on its jurisdiction and powers. However, despite the differences, general common theoretical and practical problems regarding the operation of local courts can be discerned.

Though it took the legislature more than thirty sections to specify the procedure for the establishment, and the jurisdiction of local courts, it specified the law to be applied by those courts in one section of each Ordinance. Every court was to apply the native law and custom prevailing in the area over which the court exercised jurisdiction, provided that such native law and custom was not contrary to justice, morality or order.

The most obvious problem arising from this section is posed by its proviso: whose justice, morality and order is to be followed? The Sheikh or chief deciding this matter is a member--in fact, the leader--of the community where the custom is prevailing. Moreover, he is not normally familiar with any other law or custom. Thus it would seem unreasonable to expect him to refuse to enforce a custom on the ground that it is repugnant to justice, morality or order. Rejection of one custom presupposes knowledge of an alternative custom. Consequently the "repugnancy clause" (which the British introduced in various forms in all their colonies) proved to be, as far as the local courts were concerned, a redundancy.

It might be contended that this proviso was directed to the appellate authorities, who would quash any decision of a local court applying a custom repugnant to justice, morality or order. This contention widens the issue to one concerning the relationship between local and appellate

courts. It has already been seen that there were reasons militating against appeals to district commissioners. Moreover, in the unlikely event of an appeal it would have been difficult for a district commissioner to reverse the decision of the local court on the ground that the custom applied was contrary to justice or morality. The district commissioner would be wary of giving a decision which might degrade the tribal leaders in the eyes of their tribesmen, given the British policy regarding native administration. Another reason for such reluctance could have been the ignorance of district commissioners of the degree to which any particular custom prevailed in a locality.

This leads to another observation, namely, that the statute gave no indication of the standard of justice, morality or order to be applied. Was it to be that of the community where the custom prevailed, or one envisaged by the district commissioner, or should there be a resort to an objective standard? In a similar situation an opinion of the Judicial Committee of the Privy Council held: "I have no doubts that the only standard of justice and morality which a British court in Africa can apply is its own British standard."[82]

This strict adherence to Western standards has led Western lawyers and social scientists to consider any system that did not coincide with their standards as a non-system. This exclusivist approach can be discerned in some of the earlier writings of Evans-Pritchard on the Nuer tribe of Southern Sudan. He wrote:

> In the strict sense of the word, the Nuer have no law. There is no one with legislative or judicial functions. There are conventional payments considered due to a man who has suffered certain injuries--adultery with his wife, fornication with his daughter, theft, broken limbs...etc., but those do not make a legal system.[83]

Resident magistrates are generally in no better position than the district commissioners or British judges in considering appeals from local courts. Two problems arise.

Firstly, in most cases the resident magistrate to whom an appeal is taken has no knowledge of the custom that has been applied, nor the extent to which it prevails within that area. Confirming the decision of one local court, and thus ratifying the validity of a certain custom vis-à-vis the justice, morality or order proviso, one resident magistrate commented:

> One need not read too much in the term morality, otherwise the whole object of the Chiefs' Courts Ordinance will be defeated. Many are the customs which go deep down to the root of the village life here in the South, with which not many of us, if indeed any at all, would agree. For this reason I am of opinion that this custom is a valid one.[84]

Secondly, it is frequently difficult for a resident magistrate to determine the grounds for the decision appealed against. Since many local courts have no clerks, and such clerks as they have are at best semi-

literate, records of cases hardly exist, and when they do, they contain only basic information concerning the names of the parties, their witnesses, their ages and a general statement of the subject matter of the dispute. The procedure of local courts is simple and informal. Evidence is usually full of hearsay and opinion. The personal knowledge of the tribal leaders about the parties and the case itself, consciously or unconsciously, form part of the grounds and can be decisive. Accused persons are not usually afforded the rights their counterparts enjoy in the ordinary courts, such as the right to confront one's opponent. Witnesses are not usually asked to leave the courtroom while other witnesses are testifying. If those issues were dealt with seriously, every appeal would inescapably be converted into a de novo hearing.

As yet no general, binding rules regarding procedure in local courts have been prescribed. One resident magistrate, feeling this lacuna after reviewing a certain appeal ruled: "Although matters of criminal procedure in the chiefs' courts are left up to the individual courts, certain fundamental requirements must be met:

(i) accused must be tried in open court in the courthouse or regular location of court;

(ii) accused must be offered the right to appeal under the Chiefs' Courts Ordinance, 1931, section 9."[85]

However, there is no indication that those requirements were conveyed to the local courts through a memorandum or any other means. Even if they had been, the sufficiency of, and possibility of compliance with, the ruling are both doubtful.

One last observation about the proviso is that it did not go as far as other similar provisos introduced in some other African countries. In many of those countries, the applicable custom must not be "in conflict with the provisions of any national law for the time being in force."[86] Presently most African countries sanction and apply those customs only in so far as they are not repugnant to their penal codes. Customary criminal law that is repugnant to the written penal laws has been declared invalid in most of Anglophone Africa. This development is attributable to the prevalence of Western jurisprudential thought, which values the rules of natural justice, the principles of legality and the rule of law. These rules and principles exclude the punishment of any person for breach of an unwritten, inaccessible law.

For Sudanese law, the Chief Justice declared in his paper already quoted that "...the local courts are guided but not bound by the Penal Code."[87] However, it would seem that in practice local courts do apply customary law which is contrary to the written penal laws. The chiefs and Sheikhs receive no legal training or guidance, and regard their norms and customs as the law without regard to their compatibility with the Penal Code. The resident magistrates themselves have recognized this and ratified the application of custom repugnant to the penal law. In one case, for example, the accused had had sexual intercourse with the daughter of the complainant, who conceived thereby.[88] When he was approached to marry her, he refused. According to the Sudanese Penal

Code, he had committed no offense: neither rape, since the woman was a consenting adult, nor adultery, because neither of them was married. Nevertheless, the chief's court convicted him and sentenced him to one year's imprisonment by virtue of a custom of the Bari tribe of the Southern Sudan, whereby a man is punishable for pre-marital intercourse with a virgin whom he is not willing to marry. The resident magistrate confirmed both the conviction and sentence and concluded: "...a pure girl is regarded so absolutely her father's property that no man should copulate with her unless he is prepared to marry her, thereby compensating her father for payment of dowry."

The Anticlimax: 1969-1975

The political changes of May 1969 had far-reaching effects in many aspects of Sudanese life.

The political protagonists who monopolized the decision-making process in the early years (1969-71) included most of the leftist elements of the caretaker government of 1964. The primary obstacle that had then thwarted the implementation of their political, social and economic programs--namely, Western-type democracy--was no longer the norm of political life. They were no longer a caretaker government inhibited from implementing long-term plans. The Tribal Leaders' Association had been dissolved, along with other political and trade organizations. Hence, a month after it took power, the government passed a resolution dissolving native administration. There was no overt political opposition to that resolution.

Unlike the earlier resolution prescribing the dissolution of native administration all over the Sudan, this one was, at least in principle, more realistic and better considered. It stipulated immediate dissolution only in selected areas, comprising Khartoum and the Northern provinces, and the irrigated area that currently coincided with the Gezira area, that is, the area which lies immediately south of Khartoum. Those areas had achieved a certain degree of development that had shaken the hold of tribal institutions. They are the most detribalized, urbanized centers of the country by virtue of the educational and transportational facilities and agricultural and industrial schemes.

The Ministry of Local Government, which was entrusted with the effectuation of the resolution, issued orders prescribing the transfer of the administrative powers of native authorities to newly elected rural councils to be called "People's Councils." These were to operate under the auspices and supervision of the towns and rural municipalities. We may observe the irony in the dutiful obedience with which the local and central officials of the Ministry of Local Government conducted the dissolution. Only four years earlier those same officials had blocked the judiciary's attempts to separate the judicial and administrative powers of the native authorities. However, in 1969 the absence of organized opposition from the tribal leaders and the

speed with which the resolution was passed and handed down for implementation left no opportunity for complaint. Moreover, the officials were part not only of the state hierarchical bureaucracy, but also of a political hierarchy governed by central democracy. Furthermore, in the areas where the dissolution was to be effectuated the degree of political consciousness had noticeably increased, and many of the youth supported the resolution, alarming not only the tribal leaders, but also the government officials.

It was important also that the dissolution initially affected administrative powers only. The newly created councils were to be units for local administration, but have no judicial functions. Given the judiciary's attempts to integrate native courts in the preceding period, this may appear incomprehensible. While the Ministry of Local Government was busily conducting the establishment of the People's Councils, the judiciary was out of the picture. The dissolution was announced by the Minister of Local Government and was initially carried out by his Ministry.

The unpreparedness of the judiciary and its confused response was manifested in three memoranda and supplements issued by the Chief Justice.

The first memorandum was a response to the inquiries of some resident magistrates as to the position and future of native courts in the areas where native administration was being dissolved. The Chief Justice asserted that dissolution of native administration in those areas meant the forfeiture of their administrative powers only, and hence, "the separation of native courts from native administration and their automatic integration within the judiciary."[89] The memorandum directed the native authorities to continue their judicial duties in the understanding that they were now part of the judiciary.

This memorandum raises a host of questions. The use of the word separation was, in my view, incorrect. When the government passed its resolution its only concern was the administrative powers of the native authorities. It was not troubled by the combination of administrative and judicial powers in single bodies, because at no place was there any mention of the continuation of the judicial powers. The result could have been the continuation of the judicial powers until they were forfeited. However, neither the intent nor the result can be termed separation. Nor was it correct, in my view, that dissolution meant "automatic integration." Integration would have required a positive step, such as the enactment of a further law, and could not, in the circumstances of this case, have been automatic.

Two days later the Chief Justice issued a second memorandum. This confirmed the continuation of the judicial duties of the native authorities, and continued: "...but we are now in the process of evaluating

the characters and competence of the native authorities who are manning those courts."[90] It directed the resident magistrates to establish ad hoc committees to tour these areas and recommend where native courts should be abolished. In such areas they were to be replaced by benches of magistrates.

The idea of benches of magistrates had been introduced by the British long before they formalized the de facto existing native and chiefs' courts. Those benches were to be manned by notable laymen and to deal with petty criminal cases. The British administrators had in mind the justices of the peace that form the lower level of the judicial hierarchy in Britain. As in Britain they were to have police powers, deal with petty criminal cases and be manned by notables of the community. Section 10(A) of the Code of Criminal Procedure, 1925, re-enacting a similar section of the 1899 Criminal Procedure Code, gave the Chief Justice power to constitute such benches.[91]

The members of those benches also served as members of the major and minor courts. Those were collegially-manned criminal courts, presided over by first and second class magistrates respectively, and dealing with serious offences. Though resulting primarily from the shortage of judges, the participation of those laymen was also regarded as one way of ensuring that decisions would be consonant with native ideas and customs.[92]

However, the institutionalization of local courts to perform the same functions resulted in the abandonment of the scheme for benches of magistrates. The native authorities were more influential, and the recognition of their judicial powers facilitated, as we have seen, the extension of their administrative powers. In subsequent years few benches of magistrates were established and Section 10(A) almost died of non-use. In 1969 there existed only four benches of magistrates, in the manner the British planned.

In the second memorandum of the Chief Justice the criteria for abolishing native courts included corruption of native authorities, misuse of power, incompetence and lack of popular support. A recommendation to establish a bench of magistrates should rest on the degree of modernity and development of that community. The memorandum went on to emphasize that, "...the abolition of native courts and their replacement by benches of magistrates should be conducted carefully and only in areas where it is feasible and advisable."

Less than two weeks later this policy was reversed. The Chief Justice issued a third memorandum stating, inter alia, that,

> ...after a reconsideration of the matter, I have decided to reverse the earlier understanding. Instead of having the preservation of native courts the rule and the establishment of the benches of magistrates the exception, the establishment of those benches should be our primary objective. This policy has to be carried out immediately.[93]

The memorandum then laid down general rules regarding the composition of those benches, the selection procedure of their magistrates, and other rules which will be detailed in the next parts.

This memorandum should be considered a landmark in the chronicle of lay tribunals in the Sudan. It endeavored to shake the foundation of the native courts, suppress a large number of them, and revive the old concept of benches of magistrates, with notables rather than tribal leaders, applying mainly the State's codes rather than customary law.[94]

Free of political and bureaucratic shackles, the government rapidly accomplished the dissolution of native administration in the stated areas. At the same time the judiciary grappled successfully with the Ministry of Local Government, and later decided to extend the establishment of benches to the rest of the North. Many provincial committees were formed to study the existing native courts and identify those which it would be appropriate to replace. Remarkable results were achieved in less than two years, as Table (5) shows. It is to be noted that this Table does not include the three Southern provinces, since no benches of magistrates were established there during the period.

Table (5)

NUMBER OF THE DISSOLVED AND REMAINING NATIVE COURTS, AND THE NEWLY ESTABLISHED BENCHES OF MAGISTRATES IN THE SUDAN AS IN 1971

Province	Number of Native Courts Before Dissolution	Number of Dissolved Native Courts	Remaining Native Courts	Newly Established Benches of Magistrates
Khartoum	16	12	4	34
Blue Nile	237	237	--	106
Northern	126	116	10	53
Kassala	69	60	9	54
Kordofan	160	110	50	104
Dar Fur	102	69	33	71
TOTAL	710	604	106	422

Source: Files of the Local Courts, Inspector of Local Courts Office, the Judiciary.

By 1975 three kinds of dispute settlement institutions, manned exclusively by laymen, were operating: the native courts, the benches of magistrates and the chiefs' courts. While warrants were being issued for the suppression of native courts and the establishment of benches of magistrates, others were being issued for the establishment of native

courts in other areas of the North, and of chiefs' courts in the South. Table (6) shows the situation in August 1975.

Table (6)

NUMBER AND DISTRIBUTION OF LAY TRIBUNALS, 1975

Province	Number of Native Courts	Number of Benches of Magistrates	Number of Chief's Courts	Total Number of Lay Tribunals
Khartoum	4	26	--	30
Blue Nile	--	106	--	106
Northern	10	53	--	63
Kassala	17	54	--	71
Kordofan	55	104	--	159
Dar Fur	43	71	--	114
Bahr al Ghazal	--	1	101	102
Equatoria	--	1	127	128
Upper Nile	--	1	92	93
TOTAL	129	417	320	866

Source: Files of the Local Courts, Inspector of Local Courts Office, the Judiciary.

This Table shows that there were more native courts in 1975 than in 1971. This was due, as we shall see later, to a retraditionalization process into which the judiciary was forced. There were also 320 chiefs' courts in the South, this being the same number as in the year 1956-1964, shown in Table (3).[95]

Structural and Processual Characteristics of the Benches of Magistrates: A Comparative Perspective

The sixties witnessed intensive programs of local court reform in most of Anglophone Africa. A comparative analysis of the changes will help us to identify some of the problems of the Sudanese reform movement.

The importance of the topic may be seen in the fact that the local courts, and particularly the benches of magistrates, settle a high number of civil and criminal cases in the Sudan, even when compared with the civil and Sharia courts. Table (7) indicates the number of cases settled by the civil courts, Sharia courts and benches of magistrates in 1973.[96] It shows that the caseload of the benches of magistrates in each of the Northern provinces far exceeds that of the other two types of courts. It might be argued that the magistrates deal with petty claims that are relatively easy to dispose of. However, that is the kind of litigation which the average citizen is involved in, and which those dispute settlement institutions are established to deal with.

Table (7)

NUMBER OF CASES DECIDED BY EACH OF THE THREE SETS OF COURTS IN THE SUDAN (EXCLUDING THE COURTS OF APPEALS AND THE SUPREME COURT) AS IN 1973

Province	Civil Courts			Sharia Courts	Benches of Magistrates
	Criminal Cases	Civil Cases	Total		
Khartoum	10,952	2,100	13,052	6,637	39,194
Blue Nile	10,204	3,476	13,680	9,101	63,397
Northern	3,676	1,628	5,304	3,907	15,413
Kassala	7,592	2,352	9,944	6,197	30,066
Kordofan	5,860	2,152	8,012	7,277	26,695
Dar Fur	4,776	1,152	5,928	7,314	13,436
Bahr al Ghazal	508	492	1,000	248	No Statistics
Equatoria	1,388	356	1,744	63	"
Upper Nile	1,356	380	1,636	192	"

Source: The Quarterly Statistics and the Files of the Local Courts and Benches of Magistrates.

There is a dearth of information and a complete absence of statistics about the judicial activity of the local courts in the Sudan. However, given the number of cases annually settled by the magistrates, as shown in Table (8), we can develop an idea of the number settled by the native and chiefs' courts.

Two characteristics distinguish the Sudanese reform from other African countries' reform. The first is the absence of a separate statute laying down the framework of the newly established benches of magistrates, and explaining the envisioned socio-legal changes. The second is the confinement of the reform to certain selected areas, resulting in the existence of three different sets of dispute settlement institutions, each with its own structural and processual characteristics.

Compared with most African countries, the Sudan started its reform movement late. Other countries initiated reforms a few years after independence. Nigeria started its reform with the Native Courts (Amendment) Law, 1963. The 1967 legislation in Nigeria established as one of its aims the eventual professionalization of native courts there. Ghana started reorganizing its local court structure by the Local Courts Act, 1958. A more meticulous statement was passed in 1960 and was followed by a series of enactments aiming also at a gradual professionalization of those courts. In Tanzania, "...structural integration of the courts has been in effect since July 1964, when a single judicial hierarchy of three levels of courts was created...The crucial legislation which introduced those changes is the Magistrates'

Table (8)

NUMBER OF CASES DECIDED BY BENCHES OF MAGISTRATES IN THE SUDAN IN 1972-73

Province	1972 Decisions	1973 Decisions
Khartoum	35,490	39,194
Blue Nile	115,839	63,397
Northern	10,153	15,413
Kassala	27,553	30,066
Kordofan	17,085	26,695
Dar Fur	7,638	13,436
(No Statistics from the Southern Region)		
TOTAL	213,758	188,201

Source: Files of the Local Courts, Inspector of Local Courts Office, the Judiciary.

Courts Act, 1963...The set of local courts established is called the Primary Courts."[97] Uganda followed the same line by the 1967 Magistrates' Courts Act. In Kenya, the Magistrates' Courts Act, 1967, resulted in the "...abolition of African courts and the creation of a fully integrated three tier system of courts."[98] In the Sudan, by contrast, the first bench of magistrates was established in 1970.

Again, in contrast to most African countries, the establishment of the benches of magistrates was not predicated upon or followed by empirical studies of native courts by legal experts or social scientists.[99] Many committees were formed and their members visited many rural areas. However, because of the lack of expertise of most members, the brevity of their stay in those areas, and the kind of data they were directed to gather, their reports were short, general, not comprehensive, and not empirical studies. The reform movement seems indeed to have been primarily a reaction to the changes that the Ministry of Local Government was introducing in native administration. The unpreparedness of the judiciary was discernible in the changes and shifts in the policies set by the Chief Justice.

The third memorandum of the Chief Justice stipulated that each bench was to consist of no less than five nor more than ten members. A few months later, a fourth memorandum raised the number to twelve, three of whom would man the bench each month, with a rotating presidency.[100] Thus, each member would participate in the bench three months a year, being president of the bench in his third month. The grounds of eligibility for appointment included residence in the locality, ownership of certain property, minimum and maximum age limits, good character and morals, and political commitment.[101] This last requirement will be discussed later.

In most other African countries, "...the criterion focused on in

selection leads to the appointment of men employed in government administration. The most common prior position for magistrates is court clerk."[102] Another favoured prior position is that of policeman. In both cases the rationale is that the candidate is familiar with the law and the procedure and formalities of courts. In the Sudan, on the other hand, the newly appointed members are largely farmers and local merchants. Native policemen and clerks of native courts, where they exist, continue in those capacities. The initial appointment is made by the province judge after interviewing the nominees. The approval of the Chief Justice, which is a legal prerequisite for finalizing the appointment, is usually automatic.

The lack of permanence in both membership and presidency, which has no parallel in any other African country, has resulted in another difference. In the Sudan, the part-time magistrates are paid only nominal fees for each session.[103] Conscious of the deleterious effects for morale which could ensue, the government is striving to induce the feeling that the rewards are psychic rather than material--meaning the social prestige attached to the office of magistrate. The government also represents membership of the benches as a social and political duty, rather than a paid job.

The appointment of permanent stipendary magistrates for local courts in other African countries has been facilitated by the relatively small number of local courts in those countries, and the fact that each court is manned by one magistrate. In some countries, such as Tanzania, he is assisted by unpaid assessors. Table (9) shows those striking differences.

Table (9)

POPULATION, NUMBER OF LAY COURTS, LAY MAGISTRATES AND THEIR SALARIES IN EAST AFRICA, 1973

Country	Population (millions)	Number of Lay Courts	Number of Lay Magistrates	Monthly Salary in Dollars
Tanzania	12.5	800	500	80
Kenya	10.5	150	150	200
Uganda	9.5	222	233	90
Sudan	14.9	866	5,014	30[104]

Source: These figures are collected from a number of sources.[105]

The impermanence in membership of the benches in the Sudan means that members have little prospect of advancement. African countries which established local courts with grades, such as Kenya, developed a system of promotion. In Tanzania there is even the glimpse of a possible promotion to the professional level.[106]

A more serious shortcoming of the Sudanese reform is the total lack of training for the newly appointed magistrates. The seriousness

of this is increased by the duty of the benches to apply the state's codes. The attitude of the other African countries towards training runs in two directions.

Nigeria and Ghana reformed their local courts system with the expectation of eventual professionalization. Most of their local courts are now manned by professional judges. This development is consistent with the recommendations of the Dar es Salaam Conference, which called for the adoption of a fully professional magistracy as an ultimate objective.[107] The process has been facilitated by the large number of lawyers in those countries.

In East Africa the shortage of lawyers and relatively limited extent of financial resources led to second thoughts about the professionalization recommendation.[108] The three East African countries instead followed a paraprofessionalization process by adopting a training program for the local courts' magistrates. The length of the training period ranges between six months to one year spent in Law Faculties, after which trainees receive law diplomas. One difference among those countries is that Tanzania and Kenya recruit as magistrates the successful trainees only, whereas Uganda recruits all the trainees regardless of the standard they attain. In the Sudan no training program has been either adopted or envisaged. The lack of a permanent magistracy, the large number of magistrates, and their distribution over a million square miles, militate against such a program.

No statute prescribed the law to be applied by the benches of magistrates. Nor did the third memorandum of the Chief Justice deal with this issue. However, there is a general belief among the members of benches and the judiciary that those benches ought to, and do apply, like any other ordinary court, the state codes. This belief stems in part from a reference to the general powers of benches in the Civil and Criminal Procedure Acts, 1974. It is further substantiated by the fact that the powers vested in those magistrates vary between those of first, second and third class magistrate in criminal cases, and that in civil cases, they are, by and large, those of a judge of the second grade.[109] Moreover, most magistrates are endowed separately with powers of justices of the peace, such as to issue arrest and search warrants, to release accused persons on bail, and to take dying declarations.

It is difficult to state with precision what law is in practice applied by magistrates. From my observations and interviews I would conclude that they apply an amalgam of the state's codes, customary law, and general principles of equity. The extent to which each is applied depends upon factors such as the accessibility and intelligibility of the codes to the magistrates, the number of literate magistrates on each bench, the degree of development of the locality, the physical proximity of a civil court whose judge can give guidance, and the kinds of cases presented to each bench.

The recommendation of the Dar es Salaam Conference for the codifi-

cation of customary law has been widely followed.[110] Application of customary law in most African countries is now confined to civil cases.[111] So, whereas professional magistrates in Ghana and Nigeria and paraprofessionals in East Africa apply customary law, lay magistrates in the Sudan, some of whom are illiterate, are required to apply the non-customary state codes.

There is no consensus among African countries regarding the appearance of professional advocates before their lay tribunals. Tanzania, arguing that the appearance of professional advocates would judicialize lay tribunals, and cause delay and expense, barred them. Kenya, Uganda, Nigeria and Ghana[112] allow professional advocates to appear before the local courts, arguing that this will facilitate the legal training of magistrates. Prosecutions are generally conducted by policemen.

In the Sudan, section 9 of the Advocates Ordinance, 1935, precluded the appearance of advocates before native and chiefs' courts. This section was not re-enacted in the 1970 Ordinance which repealed and replaced the 1935 Ordinance. The question, whether professional advocates should appear before any of the three lay tribunals, has not been fully answered. The Civil Courts Circular No. 26, 1970, issued a few months after the promulgation of the Advocates Ordinance, 1970, stipulates that "The question of whether an advocate should be allowed to appear before a bench of magistrates should be decided on a case-by-case method." This gives the resident magistrates unfettered discretion to determine whether to permit appearance upon an application made by the advocate. General criteria for the decision include the complexity of the legal issues involved and the ability of members of the bench to apprehend and appreciate an advocate's submissions. Regarding the appearance of professional advocates before native and chiefs' courts, the Circular states: "...a decision on such issues is a moot one, as those courts are in the process of withering away and will soon be replaced by benches of magistrates." The paradox is that, five years later, the number of native and chiefs' courts that were supposedly withering away was still greater than the number of benches of magistrates.

A further comparison is possible respecting the role envisaged for newly established benches of magistrates. The dissolution of native administration in the Sudan was initiated, as we have seen, by the leftist elements dominant in the first two years of this era. The notion of law as an effective agent for bringing about social, political and economic changes requires institutions committed to producing such changes. It is not surprising that the leftist elements pressed not only for the dissolution of native administration, but also for the representation of workers and peasants in benches of magistrates and People's Councils.

The promulgation of the Permanent Constitution, 1973, in the Sudan has been followed by a comprehensive program for building institutions and organizations that would form parts of the political structure of the state. In selecting persons to serve as members of those institutions, political adherence to the establishment is an influential fac-

tor. There has been a systematic policy of isolating those viewed as politically unreliable. The benches of magistrates are considered as one of the possible agencies for effecting social, political and economic change. Other bodies include the People's Local Councils, the Village Development Committees and the local branches of the Sudanese Socialist Union. All these bodies are expected to work interdependently. Members of the benches are urged to abandon their political disengagement, join the party's branch and participate actively in the political process.

Proponents of the changes, especially those of the post-constitutional arrangement stage, perhaps have in mind the Tanzanian experience since the mid-sixties. There the members and assessors of the primary courts are chosen by the party branch. "One intent of the Tanzanian parliament in granting new powers to the assessors was to increase the courts' responsiveness to the political and development goals."[113] These courts are regarded as institutions analogous to Village Development Committees and party branches. The theoretically systematized manner in which those institutions are supposed to function in the Sudan is analogous to the interdependent functioning in Tanzania. So the political ideologies of both countries have resulted in the union in the same persons of judicial and political responsibilities. Despite the relatively long period of experience, the repercussions of this interdependence in Tanzania are not yet certain. However, it has been stated:

> The independence of the primary courts and their ability to remain citizen-oriented may, to a significant extent, depend on the continuing attempts of Tanzania to the slower non-coercive route to social change. If the frustrations which are inevitable with planned social change build up, the advocates of putting the muscle of the law behind social change efforts may gain more support. If this happens, the present situation of the courts could change dramatically.[114]

Implementational Setbacks

The replacement of native courts, manned by native authorities and applying customary law, by benches of magistrates, manned by politically committed notables and supposedly applying state codes, was soon extended to the rest of the North. As we have seen, the Civil Courts Circular No. 26 evidenced a plan to extend the process throughout the country, including the South.

Political and economic conditions facilitated the suppression of native administration. The Ministry, assured of the government's political protection against any opposition by the tribal leaders, proceeded to replace native administration with People's Councils. The judiciary followed suit, replaced native courts with benches of magistrates. The alternative in each case was viewed as cheaper and more politically reliable.

However, a third important variable has been overlooked. That is the social conditions of the communities where native courts are operating. Certainly the whole process involves social change. But has the country as a whole been prepared for the kind of change which purports to uproot the social organization of many communities within a short time?

An answer to this question might today be premature. However, there appear to be four factors thwarting the process of dissolution of native courts and establishment of benches of magistrates.

First, the gap between the existing institutions and those envisaged has proved wide, and frequently unbridgeable. The influence of the tribal leaders over their tribesmen has often been underestimated. Tribesmen have been conditioned to their tribal leaders, as the only leaders they know. Novelty is resented and feared. A choice of new leaders could, it is thought, produce unforeseen results, and its success is besieged by doubts. Consequently, in many areas the tribesmen simply selected their tribal leaders to man the benches and the rural councils.

Moreover, the tribal leaders themselves did not stand by passively for the execution of the death sentence. While they lacked their former organization and capacity for exerting group pressure, they had not been stripped of their influence over their tribesmen. So in many areas the tribal leaders re-emerged in a different shape, encroaching on many of the benches of magistrates and the People's Local Councils.

Secondly, the use of law, by means of this institutional change, to effectuate a comprehensive program of social, economic and political change, was not accompanied by other changes that might have facilitated and reinforced it. The pace of the introduction of schools, eradication of illiteracy, and improvement of communications, transport and other facilities has been very slow in comparison to that of the abolition of native courts and the establishment of benches of magistrates. Without waiting for political, social and economic developments to occur, the government attempted to transform those institutions, in order to use them to bring about other envisioned changes.

I do not wish to revive the Savigny-Bentham controversy about whether law has to follow the existing social, political and economic norms, as Savigny argued, or can be used as an instrument for producing new norms in those areas as Bentham theorized. Most social scientists today, suggesting that neither Savigny nor Bentham is entirely wrong, agree that

> The effectiveness of law to produce particular change would seem to require that attention be given to the social context in which change is to operate, especially the kinds and extent of social, political and economic supportive conditions required to implement these laws. Attention is drawn

> to the personnel involved in the implementation procedures, and finally a concern with assessing implementation effectiveness in terms of penetrating the lives of the involved community.[115]

Another social scientist, analyzing some of the cases of aborted reforms of dispute settlement institutions, concluded: "If dispute institutions are reformed without commensurate change in society, they may serve to perpetuate or even aggravate existing social conditions."[116] He went on to suggest one way in which this perpetuation might be carried out, "If new or reformed institutions are merely added to the established institutional structure, the former are more likely to come to resemble the latter. Established institutions continue to symbolize the way disputes ought to be handled." As we have seen, many benches of magistrates continued to be, except in name, the same old native courts.

Thirdly, instead of one, national committee laying down standards, variables and criteria for abolishing native courts and establishing benches of magistrates, many provincial committees were formed. Although broad guidelines were conveyed to them, each committee had its own composition, standards and criteria. The attitudes of the committees towards a native administration varied. Those differences were inevitably reflected in the implementation process. The results are ironic. The committee which dealt with native courts in Khartoum province, the most detribalized and urbanized province in the Sudan, recommended the preservation of four native courts. The committee that dealt with the Blue Nile province, containing some of the most rural and underdeveloped tribes in the Sudan, recommended the abolition of all native courts there. Both recommendations were accepted and implemented.[117]

Fourthly, the newly established benches were directed by the resident magistrates to apply certain common law rules of procedure and evidence. Many of those new rules differed from the customary rules of the native courts. One example was the practice of native courts to order accused persons to take an oath. Under the principles of common law which the benches were directed to apply, accused persons could not be required to take an oath. This was a shocking innovation for many tribal communities. Again, in the abolished native courts, the native tracker's evidence was always conclusive, whereas the common law rules required both proof of the tracker's expertise and corroboration of his evidence. The rules regarding the inadmissibility of hearsay and opinion evidence were incomprehensible and unacceptable to many rural communities. In general, the common law adversary procedure, which the benches of magistrates were directed to follow, was incompatible with many of the locally established values and norms.[118]

One result was that many of the new judges were unable to secure that their decisions were effective, despite the government's backing. Streams of letters flooded the judiciary, complaining of the collapse of law and order and the failure of the new benches to enforce their

decisions. Many complaints addressed the incompatibility of the law applied by those benches with the local customs and values. This time the complaints were not from government officials, but from tribesmen.

These factors impelled the judiciary to reconsider the whole process. Three steps were taken.

First, the process of suppressing native courts and establishing benches of magistrates was halted. This was despite the expectation of the Chief Justice that all the chiefs' and native courts would soon wither away. Secondly, some of the abolished native courts were resurrected in areas where it seemed particularly unlikely that new benches would succeed. When the fieldwork was completed many applications requesting, and official reports and letters suggesting resurrection of native courts were under consideration. Thirdly, in some areas when benches of magistrates were established, the chiefs' courts continued in existence. This occurred in the provincial capitals of three Southern Provinces.

A Post-Script

The field research upon which this article is based was completed in the early months of 1976. However, since that time a number of developments in the lay tribunals in the Sudan have taken place. I am currently involved in a study that aims at updating this article, Though the study has not yet been completed, some mention should be made of recent developments, and particularly of two further Acts.

The People's Local Courts Act, 1976. It is not necessary to discuss at length the provisions of this Act as it was repealed by the later Act. It replaced both the Chiefs' Courts Ordinance, 1931, and the Native Courts Ordinance, 1932. However, it contained a saving clause to the effect that any court established under either of those Ordinances would continue to decide cases until the warrant of establishment of a people's local court was issued.

The power to establish a people's local court was vested in the Chief Justice, who was to act after consultation with the Minister of the People's Local Government. Five types of court were set up by this Act:

(a) A people's local court. This was to be a court of general jurisdiction, its powers to be stipulated in the warrant of establishment.

(b) A people's local court with jurisdiction confined to trying contraventions of local orders issued by the People's Local Councils. Such orders cover a wide range of issues such as price control and prohibition of alcohol.

(c) A joint people's local court, to deal with cases where

the jurisdiction of two or more local courts conflicted.

(d) An intermediate court of appeal with appellate jurisdiction over decisions of the people's local court. The Act provided for further appeals to the Resident Magistrate, to the Province Court, and to the Court of Appeal.

(e) A special people's local court to deal with cases which were beyond the maximum jurisdiction of the people's local court.

The Act excluded a number of cases from the jurisdiction of people's local courts, such as civil cases in which one or both parties were not subject to the jurisdiction of the court, cases concerning ownership of land, murder cases, cases against the government or a government employee or army officer, and any cases excepted by the warrant of establishment. The courts were to administer both the custom prevailing within the local limits of the jurisdiction of the court, provided that it was not contrary to justice, morals or public order, and any other law the administration of which was authorized by the establishing warrant.

Though expressly abolished, the chiefs' and native courts continued to exercise their functions through the saving clause. No warrants for establishing people's local courts were issued. The reasons for the freezing of this Act are under research.

The People's Local Courts Act, 1978. This repealed the 1976 Act, and repeated the repeal of the Chiefs and Native Courts Ordinances. Again there was a saving clause, keeping the chiefs' and native courts functioning until warrants establishing people's local courts to replace them were issued.

The main feature of this Act is that it deals with the Northern part of the Sudan and the Southern Region separately, establishing different types of courts in each part with a number of differences in the mode of establishment, hierarchical organization and jurisdiction.

In the North the power to establish people's local courts is vested in the Chief Justice after consultation with the commissioner of the province concerned. Five types of courts, closely similar to those prescribed by the People's Local Courts Act, 1976, may be established. The appeals system is also similar to that stipulated in the 1976 Act.

In the South the power to establish people's local courts is vested in the Chief Justice after consultation with the Minister of Regional Administration, Police and Prisons. Besides the people's local courts with general jurisdiction, and those with jurisdiction to try contraventions of local orders, two other kinds can be established.

(a) A regional people's local court with both original and appellate jurisdiction. The original jurisdiction of this court is similar to that of the special people's local court. It hears appeals against decisions of the people's local courts.

(b) A main people's local court, also with both original and appellate jurisdiction. Its original jurisdiction is in cases which are beyond the jurisdiction of the people's local courts. It hears appeals against the decisions of the regional people's local courts.

All those courts, in both the North and the South, are collegially organized, consisting of twelve lay judges, three of whom are to man the court each month, with one as president. Though local courts are established by the Chief Justice after the required consultation, the selection of the members of those courts is largely politicized. The Act stipulates that the president and members shall be selected pursuant to the recommendation of the Resident Magistrate in consultation with the administration officer, the President of the people's local council, the Security officer, and the Secretary of the Sudanese Socialist Union of the area in which the jurisdiction of the court extends; provided that such recommendation must be confirmed by the Province Judge concerned.

A number of differences between the local courts in the North and in the South can be identified. The first lies in the role played by the Minister of Administration, Police and Prisons in the South. This Minister is the equivalent of the Attorney General in the North, and he has not hitherto been involved with local courts.

The second difference lies in the hierarchical organization of the courts. Whereas the court system in the North consists of a number of courts with original jurisdiction and one appellate court, that in the South has a two-tier appellate system.

The third difference lies in the courts' jurisdiction. The people's local courts in the North have jurisdiction over civil suits, the subject-matter of which does not exceed 200 Sudanese pounds in value, and in criminal cases can impose a penalty not exceeding imprisonment for a term of five years, a fine of 500 pounds or both. The people's local courts in the South have jurisdiction over civil suits to the value of 100 pounds, and in criminal cases can impose a penalty not exceeding one year, a fine of 100 pounds, or both.

The law to be administered by each set of courts is the same, that is, custom which is not repugnant to justice, morals or public order, and any other law the administration of which is authorized by the establishing warrant. Both sets of courts are precluded from entertaining jurisdiction over the cases enumerated for the same purposes in the 1976 Act.

It was only in the late months of 1978 that the establishment of

people's local courts started; and it started in the North only. Even there, the process has been very slow. Through the saving clause all the chiefs' courts and a large number of the native courts still exist,[119] together with the benches of magistrates and the newly established people's local courts.

Though it may be too early to appraise the 1978 Act, nevertheless some shortcomings are apparent. It has done little more than endorse and legalize the existing system of part-time lay magistracy, with no training and meager pay. In some areas of the North there was a mere change of name, the benches of magistrates becoming people's local courts. The criterion for the selection of the members of those courts is largely politicized and is shared, as we have seen, by a large number of persons. This could result in the exclusion of some people on political grounds, and in disagreement within the large selecting body.

III. CONCLUSION

Some Policy Recommendations

The number of lay tribunals in the Sudan and the volume of litigation handled by them indicate the importance of their role. Those institutions have not, in my view, received sufficient attention.

All the chiefs' and native courts currently existing are operating under the conditions of the colonial, or even of the pre-colonial period. They need to be reformed to function appropriately within the new and continual processes of socio-economic and legal change, and to promote those changes.

In the light of the experience of the African countries mentioned, and the idiosyncracies of the Sudan, I believe that the objective regarding lay tribunals should be a full-time stipendiary paraprofessional magistracy. This should be achieved gradually. Standardization of the organization, structure, procedure or powers is neither possible nor advisable, especially in the early stages. The social organization of each locale and its degree of development should be taken into account in deciding the time for the replacement of the existing local court, and in prescribing the powers and jurisdiction of the new bench.

The first step towards this objective should be to reduce the current membership of the lay tribunal from twelve to three, who would then man each tribunal permanently.

A training course should be conducted in the provincial capitals and should deal with the general principles of criminal and civil law, procedure and evidence. This should be followed by annual or periodic refresher courses. The need for this follows from the need to establish a refined paraprofessional magistracy capable of dealing with a

certain variety of legal matters at a low cost. It follows also from the need to integrate those lay tribunals into the court system. Despite the paraprofessional status of those tribunals, I would not recommend allowing advocates to appear before them. Such appearances would divest tribunals of their ability to conduct speedy inexpensive trials, and might confuse their members.

The working conditions of the tribunals should be improved by providing them with clerks, police and clerical facilities. They should be located within the ordinary court buildings where the latter exist, if that is possible; otherwise in decent buildings that would enhance respect for them.

A project should be established for the codification of customary law. This would entail deciding which customary norms and values could be incorporated in national or local legislation, and which should be suppressed by reason of their repugnancy to justice, equity or morality.

Since the tribunals will be dealing with petty civil and criminal cases, they should be constituted of one level. One appeal to the first grade court should be permitted, and the parties should be told of it. The availability of such appeals, the training and refresher courses, and full control by the judiciary over those institutions, will facilitate their integration into the judiciary.

The principal objection to this proposal is its expense. In my view, this is mistaken. Under the present system the government pays the fees of a large army of magistrates and tribal authorities. The number of magistrates would be reduced to one-fourth of the present number. Filing fees and fines, which should be more systematized, would cover a good part of the expenses. The training and refresher courses could be conducted by the province and first grade judges and the staff and senior students of the Faculty of Law. Moreover, the financial burden of modernizing lay tribunals and establishing more refined dispute settlement institutions is outweighed by the benefits. Under the recommended tribunals, the cost of litigation will be minimized, practice and procedure simplified, and speedy trials guaranteed.

Those benefits have induced many countries to establish similar institutions at the bottom of the judicial hierarchy to deal with petty cases. Many communist countries have established non-professionally manned institutions to deal with those cases, though a different rationalization is offered there. Many states in the United States of America have established the so-called "Small Claims Courts" or "Courts of Conciliation." Though these courts are manned by career judges, they follow informal procedure, in many states attorneys are not allowed to appear before them, and "Hearing is not governed by statutory rules of practice, procedure, pleadings or evidence except in the area of priviledged communication...It is informal with the sole objective of dispensing speedy trial between the parties."[120]

In the Sudan it is neither feasible, advisable nor even possible to abolish or professionalize the lay tribunals. The best we can do is to reform them, and the best reform we can achieve is one that takes into account the social and economic conditions of the country.

NOTES

[1] See generally Justice Vanderbilt's writings on judicial administration, and particularly his analysis of the Jacksonian democracy in The Challenge of Law Reform 19 (1955), and "Impasses in Justice," Washington University Law Quarterly 370 (1956).

[2] Much literature has appeared recently about lay tribunals in the socialist countries. See e.g. H. Berman and J. Spindler, "Soviet Comrades' Courts," 38 Washington Law Review 842 (1963); Adam Podgorecki, "Attitudes to the Workers' Courts," in V. Aubert (ed.), Sociology of Law 149 (1969).

[3] This view has been voiced by many of those who have written about lay tribunals in the socialist countries. See Berman and Podgorecki, id. See also the writings on Tanzania referred to later in this article.

[4] Lugard, Political Memorandum 124 (1970).

[5] S. Egbnonu, Indirect Rule and South East Nigeria 88 (1964), (emphasis added).

[6] The Permanent Constitution, 1973, Article 16.

[7] Speech by Viscount Cromer to the Sheikhs and Notables of the Sudan at Omdurman, January 8, 1899, Central Archives Files, civ. sec. 42/1/1.

[8] Memorandum from Lord Kitchener to the Governors of the Provinces, January 19, 1899, excerpted in MacMichael, The Sudan 76 (1955).

[9] The word civil has many, sometimes confusing, connotations in the Sudanese legal and judicial systems. Civil law here is contrasted with Sharia. It may be contrasted with criminal or common law. The civil and Sharia courts are collectively referred to as "ordinary courts of law" to distinguish them from the so-called local courts that comprise the native and chiefs' courts.

[10] By personal status cases I mean cases that are, as a general rule, adjudicated by the Sharia courts only. Those cases concern marriage, divorce, guardianship of minors, wakf (mortmain), gift, succession, inheritance, wills, legacies and interdiction.

[11] Governor General's Report 138 (1903).

[12] Milner Mission Report, 1920, civ. sec. 39/1/6.

[13] Memorandum on Native Administration, civ. sec. 39/1/13.

[14] Minutes of the Annual Meeting of the Three Governors of the Southern Provinces, 1925, civ. sec. 1/13/42.

[15] The Chiefs' Courts Ordinance Application (No.1) Order, 1944.

[16] Letter from the Governor of Kordofan to the Legal Secretary, November 1929, civ. sec. 42/A/1.

[17] Governor General's Report 82 (1928).

[18] Letter from the Governor of Equatoria to the Civil Secretary, May 31, 1931, civ. sec. 42/A/1.

[19] Letter from the Governor of Bahr al Ghazal to the Civil Secretary, March 31, 1927, civ. sec. 1/10/34.

[20] R. Collins, "Autocracy and Democracy in the Southern Sudan: The Rise and Fall of the Chiefs' Courts," in A. Rivkin (ed.), Nations by Design 169 (1968).

[21] Intelligence Department Report, April 1931, civ. sec. 1/39/104.

[22] Most of those studies were published in Sudan Notes and Records, an annual periodical started by the British colonial administration in 1918. Some of those studies appeared later as books, such as Evans-Pritchard's and Howell's writings about the Nuer, and Seligman's about the Nilotics.

[23] This view is shared by many intellectuals. Michael Reisman writes, "Colonial law schools, where they were established, were designed to prepare junior judicial and administrative officers for whom obedience and fidelity to textual directives were most important. Creativity and policy-making were reserved for superiors from the metropolitan." M. Reisman, "Legal Education and National Development: Suggestions for Curriculum Reform at the Faculty of Law of the University of Khartoum," (May 1976), (Report submitted to the Minister of Education, Democratic Republic of the Sudan.)

[24] "A Note on Administration in Southern Sudan," J.H. Driberg, May 25, 1924, civ. sec. 1/9/31.

[25] R. Collins, supra note 20, at 174.

[26] Id., at 176.

[27] For the records of that Conference see "The Juba Conference," civ. sec. 3/1/1948.

[28] R. Collins, supra note 20, at 173.

[29] Governor General's Report 20 (1946).

[30] Minutes of the Annual Meeting of the Three Governors of the Southern Provinces, September 30, 1935 civ. sec. 1/9/32.

[31] Number of Judges Act, 1956.

[32] Minutes of the Annual Meeting of the Three Governors of the Southern Provinces, September 20, 1946 civ. sec. 1/9/37.

[33] Memorandum from the Legal Secretary to all District Commissioners, February 1, 1925 civ. sec. 42/A/1.

[34] Memorandum from the Civil Secretary to all District Commissioners, February 20, 1925, civ. sec. 42/A/1.

[35] Memorandum from the Legal Secretary to the Civil Secretary, June 15, 1927, No. LS/SC/8/27, civ. sec. 42/A/1 (emphasis added).

[36] Letter from the Legal Secretary to the Grand Kadi, October 21, 1927, LS/SC/8/29, civ. sec. 42/A/1.

[37] Letter from the Grand Kadi to the Legal Secretary, dated November 11, 1927, civ. sec, 42/A/1.

[38] Letter from the Legal Secretary to the Civil Secretary, November 16, 1927, LS/SC/8-29(2), civ. sec. 42/A/1.

[39] Letter from the Chief Justice to the Legal Secretary, November 16, 1927, civ. sec. 42/A/1.

[40] Letter from the Civil Secretary to the Department of Justice, November 17, 1927, civ. sec. 42/A/2 (emphasis added).

[41] Circular to all Sharia judges, No. LS/SC/7-29, November 27, 1927, civ. sec. 42/A/2.

[42] Letter from the Civil Secretary to the Legal Secretary, December 17, 1927, civ. sec. 42/A/2.

[43] Circular to all Sharia and Sheikhs' Courts, No. LS/SC/8-29, December 28, 1927, civ. sec. 42/A/2.

[44] Letter from the Legal Secretary to the Grand Kadi, August 2, 1928, civ. sec. 42/A/2.

[45] Letter from the Grand Kadi to the Legal Secretary, February 14, 1928, civ. sec. 42/A/2.

[46] Note from the Chief Justice to the Legal Secretary, September 2, 1929, civ. sec. 42/A/2.

[47] Letter from the Civil Secretary to the Legal Secretary, September 11, 1929, civ. sec. 42/A/2.

[48] Note from the Legal Secretary to the Civil Secretary, September 11, 1929, civ. sec. 42/A/2.

[49] Letter from the Legal Secretary to the Civil Secretary, November 6, 1929, civ. sec. 42/A/2.

[50] Id.

[51] Id.

[52] Governor General's Report 32 (1928).

[53] Minutes of a Meeting Held at the Palace on November 10, 1929, civ. sec. 42/A/2. (Attended by the Civil, Legal and Financial Secretaries, the Chief Justice and the Assistant Civil Secretary.)

[54] Note on Devolution of Sharia Courts by the Legal Secretary, No. LS/SC/8, August 20, 1929; civ. sec. 42/A/2.

[55] Minutes by Sir John Maffey, the Governor General, January 1, 1927, civ. sec. 1/9/33.

[56] Memorandum from the Legal Secretary to all the Northern Governors, October 22, 1932, civ. sec. 42/A/2.

[57] Id.

[58] P.M. Holt, A Modern History of the Sudan, 161-62 (1961).

[59] Mustafa set out the rules for appeals against decisions of the native courts thus: "Appeal: This is set out in the warrant, but the procedure has become generally standardized. Appeals from a Sheikh sitting in Meglis go to the Branch Court and from the Branch Court to the Regional Court where such a court exists, otherwise to the Main Court. From a Regional or Main Court appeals go to the Resident Magistrate within whose local Jurisdiction the court is situated, and thence to the judge of the High Court or Provincial Judge." Z. Mustafa, "Sudan," in A. Allott (ed.), Judicial and Legal Systems in Africa 284 (1970). None of the records I went through reveals the use of such an elaborate hierarchical system. Many interviewees stated that the system was proposed but never fully implemented, and that, while some of the courts mentioned existed, they were so few that no general rule could be found.

[60] Section 7, Chiefs' Courts Ordinance, 1931, and Section 9, Native Courts Ordinance, 1932.

[61] J. Collier, Law and Social Change in Zinacantan 10 (1973).

[62] In perusing the available decisions of the local courts, I noticed that in the very few cases where there was an appeal to the resident magistrate, the dissatisfied party was not a member of that tribe, but an outsider residing with that tribe. Many interviewees and most of the observational sessions substantiated

this finding.

[63] African Conference on Local Courts and Customary Law, Record of Proceedings of the Conference held in Dar es Salaam, Tanganyika (now Tanzania) 82 (1963) (hereinafter cited as Proceedings).

The first conferences dealing with the customary law and local courts in Africa were the Judicial Advisers' Conferences held in Uganda in 1953, and in Nigeria in 1957. Those Conferences should be distinguished from that of Dar es Salaam. In the earlier conferences the participants were mainly British colonial administrators in what was known then as British Africa, and their primary objective was to study and evaluate the judicial phase of indirect rule.

On the other hand, "...most of the participants in the Dar es Salaam Conference were African lawyers who were convened to serve the function of providing expert advice and recommendations which could be considered by the new governments with respect to the kinds of changes in their legal systems that would be required to accomodate the social, economic and political modernization which would be a major priority of the new African governments." S. Castelnuovo, Legal and Judicial Integration in Tanzania--A Case Study of Law and Political and Social Changes 66 (1969) (unpublished Ph.D. thesis in political science submitted to the University of California, Los Angeles).

[64] Memorandum on Native Policy, Sudan Notes and Records 42 (1941).

[65] Proceedings, supra, note 63, at 84.

[66] Id., at 82.

[67] This office was established in 1944, and the first Inspector was appointed in that year. "The purpose behind this appointment is to ameliorate the standard of local courts," Governor General's Report 28 (1944). By convention rather than legislation, the Inspector is required to be a trained lawyer.

[68] I have some misgivings regarding the correctness of the figures on the distribution of the population in this Table. Two observations should be made.

(i) There was no census during the sixties. The only census before 1973 was that of 1956. The archival record that shows those figures does not indicate the sources, and they are probably estimates.

(ii) There is a discrepancy between the figures given and those offered by either of the two official sources. One example is the population of the South. According to the 1956 census, it was 2,784,000, according to the 1973 census it was 2,950,914. Table (11) shows a population of about 3,244,366, which seems

unduly high.

[69] G.M.A. Bakheit, "Native Administration in the Sudan and its significance to Africa," in Y.F. Hassan (ed.), Sudan in Africa 270 (1968).

[70] Letter from the Commissioner of Dar Fur to the Ministry of Local Government, No. Md/100/J/1. March 1, 1956 civ. sec. 1/1/4.

All the archival records, letters and memoranda referred to hereafter in this part are in Arabic. The excerpts quoted are translated by me.

[71] Letter from the Commissioner of Kordofan to the Ministry of Local Government, No. K/P/103, March 12, 1965, civ. sec. 1/1/4.

[72] Letter from the Tribal Leaders' Association to the Council of Ministers and the Chief Justice, February 24, 1965, civ. sec. 1/1/4.

[73] Form No. Judiciary A/B/2, March 19, 1965.

[74] Letter from the Minister of Local Government to the Inspector of Local Courts and the Chief Registrar of the Judiciary, No. M/L-G41/2/A, March 24, 1965.

[75] Letter from the Chief Registrar to the Ministry of Local Government, no number, April 6, 1965.

[76] Native Administration Files, N.A. 1/1/4. Inspector of Local Courts, the Judiciary.

[77] Letter from the Ministry of Local Government to the Chief Registrar M/L-G41/2/A, April 26, 1965.

[78] Memorandum from the Tribal Leaders' Association to the Council of Ministers, N.A. 1/1/3, May 4, 1966.

[79] Memorandum from the Tribal Leaders' Association to the Council of Ministers, N.A. 1/1/3, May 12, 1966.

[80] Circular from the President of the Supreme Sharia Court to the native courts, August 27, 1968, No. M/SH/Gen/7.

[81] See part I, p. 4.

[82] Gwa Bin v. Kisunder, 1938 Times Law Reports 403 (Tanganyika).

[83] E. Evans-Pritchard, "The Nuer of Southern Sudan," in M. Fortes et al. (eds.), African Political Systems 272 at 293 (1970).

[84] Sudan Government v. Rainado Legge, 1963 S.L.J.R. 54 (emphasis added).

[85] Sudan Government v. Albino Marines Joto, 1963 S.L.J.R. 55.

[86] Section 11, Uganda Native Courts Ordinance, 1941.

[87] See Proceedings, supra, note 63.

[88] Supra, note 84.

[89] Memorandum on Native Courts, No. A/10-B 2-2; June 30, 1969.

[90] Memorandum on Members of Native Courts, No. A/10-B 2-3, July 2, 1969.

[91] This section read:
The Chief Justice may constitute Benches of Three Third Class Magistrates who shall have the powers of:
(a) A Court of Magistrates of First class; or
(b) A Court of Magistrates of Second class; or
(c) A Court of Magistrates of First class trying an offence summarily; or
(d) A Court of Magistrates of Second class trying an offence summarily;
as the Chief Justice shall direct, subject in any case to any limitations specified by the Chief Justice; and the provisions of the Penal Code and the Code of Criminal Procedure relating to the Courts of Magistrates of the First or Second Class trying offences summarily as the case may be, shall apply to the Bench so constituted and subject to any limitation of powers as aforesaid.
A summary proceeding is:
"...any proceeding by which a controversy is settled, case disposed of or trial conducted in a prompt and simple manner, without the aid of a jury, without presentment or indictment, or in other respects out of the regular course of common law. In procedure, proceedings are said to be summary when they are short and simple in comparison with regular proceedings." Black's Law Dictionary, 1369 (1968).

[92] Governor General's Report 72 (1927).

[93] Memorandum on the establishment of Benches of Magistrates, No. A/10-B 2-4, July 15, 1969.

[94] For a detailed discussion of the provisions upon which the Chief Justice had relied and the legal and constitutional problems involved in this process, see Salman, Judicial Administration and Organization in the Sudan: Impact of Political and Socio-Economic Factors 291 (1976), unpublished JSD thesis submitted to Yale Law School.

[95] Some of the interviewees suggested that a number of unrecognized chiefs' courts still existed without the knowledge of officials. Their number and the ways in which they operate are difficult to

determine.

[96] It took me a long time and much effort to prepare Tables (7) and (8) because there are no available annual statistics. To determine the caseload of the ordinary courts--both civil and Sharia--I went through the "Quarterly Statistics" of cases of each province. This deals with the cases settled by and cases pending before each court every three months. A shortcoming of the Quarterly Statistics is that it does not indicate the type of cases dealt with by each court. The figures concerning the ordinary courts include both the cases decided originally and those decided by way of appeal.

[97] M. Nicholson, Legal Change in Tanzania as Seen Among the Sukuma, 124-25 (1968), (unpublished Ph.D. thesis in anthropology, submitted to the University of Minnesota).

[98] E. Cotran, "Kenya," in A.N. Allott (ed.), Judicial and Legal Systems in Africa 132 (1970).

[99] Some of the studies worth mentioning include:
(i) Peter Russell, "The Administration of Justice in Uganda: Some Problems and Proposals," A Report Submitted to the Ugandan Government (1971).
(ii) Arthur Phillip, "Report on Native Tribunals in Kenya," Submitted to the Kenyan Government (1945).
(iii) H.E. Lambert, "The Use of Indigenous Authorities in Tribal Administration in Kenya," Submitted to the Kenyan Government (1947).
(iv) Francis Spalding et al., "The Lower Courts of Zambia," 2 Zambia Law Journal 1 (1970).
(v) Nigeria, Report of Native Courts' Commission of Inquiry (1953).
The number of reports and theses written about local courts in Tanzania is tremendous. Sufficient to mention three:
(vi) F. DuBow, Justice for the People: Law and Politics in the Lower Courts of Tanzania (1973) (unpublished Ph.D. thesis in sociology submitted to the University of California, Berkeley).
(vii) S. Castelnuovo, supra note 63.
(viii) M. Nicholson, supra note 97.

[100] Memorandum on the Benches of Magistrates, No. A/1/D-5, March 16, 1970.

[101] There is no stipulation as to the ineligibility of women for the membership of the Benches. However, among the more than five thousand lay magistrates (infra Table (9)), there is only one woman; she is a member of the Juba Bench of Magistrates.

[102] F. DuBow, supra note 99(vi), at 132.

[103] A member gets 3/4 of a Sudanese pound per session. A session may last from 9 a.m. to 2 p.m. The president gets one pound.

[104] This is an approximate figure based on the assumption that each bench holds an average of three sessions a week.

[105] This information is scattered through the reports enumerated in note 99 supra.

[106] Supra note 97, at 192.

[107] Proceedings, supra, note 63 at 46.

[108] I could not trace exact current figures of lawyers in any of those countries. The numbers shown here give a general idea of the number of lawyers.

In Tanzania, "By the end of 1975 there were 81 advocates registered in the Roll of Advocates." M.R.K. Rwelamira, "Report on Research on the Legal Profession in Tanzania," 3 (1976), (unpublished paper submitted to the Conference on the Legal Profession, International Legal Center, New York, October 1976).

In Uganda after the expulsion and departure of the Asians in 1972-73, the country was left with fewer than forty practitioners; see Russell, supra, note 99(i) at 56; see also P. Iya, "Providing Legal Aid to the Poor in Uganda--A Research for New Dimensions in the Law," (unpublished paper submitted to the Comparative Law Course, Yale Law School, 1974).

On the other hand, the list of advocates in Ghana, "...eliminating those known to be abroad or dead, contained 588 lawyers as of December 1969..." R. Luckham, "The Ghana Legal Profession: The Natural History of a Research Project," 13 African Law Studies 121 (1976).

I could not obtain exact figures for advocates in Nigeria. However, many Nigerian lawyers asserted that the number there far exceeded one thousand.

[109] For the details of those powers see the Civil Procedure Act, 1974, and the Criminal Procedure Act, 1974.

[110] One example is E. Cotran, The Restatement of African Law Series 1967-1969.

[111] Kenya has taken an extreme position on this issue. Section 3(2) of the Kenyan Judicature Act, 1967, states, "The High Court and all subordinate courts shall be guided by African customary law in civil cases in which one or more of the parties is subject to it or affected by it, so far as is applicable and is not repugnant to justice and morality or inconsistent with any written law..." (emphasis added). Given such conditions one wonders what is left of customary law.

[112] Russell states that professional advocates are not allowed to

appear before local courts in Ghana, see Russell, supra note 99(i), at 55. This statement is contradicted by many empirical researches done on local courts in Ghana--which are, of course, more reliable. One of those researchers states, "Lawyers appeared in 30.13 percent of civil and 30.73 percent of criminal cases in Grade II Courts (local courts)."

M. Lowry, The Ethnography of Law in a Changing Ghanaian Town 147 (1971) (unpublished Ph.D. thesis in anthropology submitted to the University of California, Berkeley).

113 Supra, note 97, at 190.

114 DuBow, supra note 99(vi), at 251.

115 S. Castelnuovo, supra note 63, at 3.

116 R. Abel, "A Comparative Theory of Dispute Institutions in Society," 8 Law and Society Review 217 at 298-99 (1973).

117 One result of the abolition of all native courts in the Blue Nile Province, and the establishment instead of Benches of Magistrates, has been the steady decrease in cases adjudicated before, and decided by the newly established Benches. Table (8) supra, shows that the total sum of cases decided in 1973 is less than half the cases decided in 1972.

118 It is interesting to note that those same complaints about the adversary system prompted a crucial change in the local courts system in Malawi. After it attained its independence in 1964, Malawi, like other former British colonies, passed the Local Courts Act, 1964. This required those courts to apply the state substantive and procedural law codes, which are a codification of common law. The Judiciary was soon flooded with complaints, directed mainly against the adversary procedure. This resulted in abolition of the new system and the reinstatement of the local traditional courts, which were to apply their customary substantive and procedural laws. To the surprise of all the Africanists the traditional courts, as they are called now, are endowed with unlimited civil and criminal powers, including the power to pass death sentences. Appeal against their decisions is not a matter of right, and when it exists, it goes to a traditional appellate court. Dr. Banda, President of Malawi, defending this retraditionalization policy, stated:

> Under our judicial system no one was allowed to hide anyone, to defend anyone that he knew himself had committed a crime. Under their judicial system (referring to the British common law), a father cannot incriminate his son, a wife cannot incriminate her husband, even if they know that they have killed, stolen, they won't tell...Under our system it is a moral sanction--if a man's son or nephew commits a crime, it is the father, the uncle who takes the

son or nephew to court. No question of harbouring, defending a criminal you know to have committed a crime, and playing tricks and technicalities.

Hansard, Debates of the Seventh Session, First Meeting of the Parliament, Malawi, November 21, 1969. See also Local Courts (Amendment) Bill, 1969.

[119] This was still true at least as recently as December 1980.

[120] Note, "Small Claims Courts Revisited," 5 Col. J. L. & Soc. Problems 47 (1969).