

COLONIALISM AND THE TRANSFORMATION OF ISLAMIC LAW

IN THE NORTHERN STATES OF NIGERIA

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INTRODUCTION

The concept of customary law

The term 'customary law' has been variously defined by the judiciary, legislatures and academic lawyers and to it have been attributed equally varying characteristics. In the former Eastern Region of Nigeria, the term has been statutorily defined to mean "a rule or body of rules regulating rights and imposing correlative duties, being a rule or body of rules which obtains in and is fortified by established usage". The Evidence Laws of Nigeria similarly define custom to mean "a rule which, in a particular district, has from long usage obtained the force of law."¹ Allott, the pioneering scholar of African customary law, defined it as "...the rules which trace back to the habits, customs and practices of the people which engender and support the norms expressly formulated from time to time for the decision of disputes."² African Law has

1 See Eastern Region Law, No. 21 of 1956, section 2 and the Evidence Ordinance, Cap. 63, Laws of Nigeria, 1948, section 2. The Privy Council decision in *Eshugbayi Eleko v. Government of Nigeria* [1931] A.C. 662 gave what are generally considered to be the main characteristics of the Native Law and Custom, namely acceptance of the norm by the community, its flexibility and consequent uncertainty, multiplicity and unwritten nature. And in the case of *Owonyin v. Omotosho* [1961] 1 All N.L.R. 307, the Federal Supreme Court endorsed many of these characteristics especially when one of its Justices described custom to be "a mirror of accepted usage" of the community.

2 Allott 1960: 64. This term is used interchangeably with Native Law and Custom. Without supplying any clear definition of the term, the statutory

come to be identified as a term that describes the customary laws of the various peoples and communities who have come under a colonial power.

African law: process vrs description

The study of this branch of law was initially undertaken by curious anthropologists who went far and wide through the colonial possessions of their mother country to discover and describe for the consumption of their academic colleagues the lives of the natives. In their endeavour to understand their subjects better, the colonial administrators often commissioned or otherwise sponsored these researchers, and ultimately put their discoveries to good use in the service of the imperial power. The anthropologists were followed, or more often, as some would argue, preceded by legal and administrative officers in the service of the colonial office. While writing their memoirs or otherwise commenting on their experiences in the service, they occasionally described how the received English law fared in its transplanted soil but hardly took any interest in analyzing its interaction with and impact on the native laws with which it co-existed in the colonial territories. In the 1960s scholars of African Law were mainly concerned with descriptive discourse. It has been only relatively recently that socio-legal and empirical studies about the impact of English and other colonial laws on the indigenous systems of law have been emerging.³

Whereas earlier studies on African Law have been mainly descriptive, conclusions and observations contained in these latter studies have tended, perhaps naturally, to be coloured by the ideological inclinations and the characters of the disciplines of the researchers and commentators. On the one hand, the social scientists, and those lawyers who have strong social science backgrounds, have tended to view, discuss and analyze the interaction between the different systems of law from sociological perspectives, concentrating on the processual nature of the interaction. The socio-political forces which determine the nature and outcome of the interaction are highlighted by this category of

provision on customary law in the Northern Region of Nigeria merely states that the term 'native law and custom' includes Islamic law. As observed by Keay and Richardson (1966: 228), this has resulted in the conspicuous absence of a clear and unambiguous definition of the term in the North such as obtains in and has been quoted from the Eastern Region Law in the text above.

³ For a review of several energetic and lively conferences held and a flurry of scholarly pieces produced on the emerging field of African Law see Allott 1971a, 1971b. Kuper and Kuper 1965: 216 is also a good reference on the study of African Law, as is Roberts 1984: 3-18.

researchers. On the other hand, the formalist lawyers, legal scholars and historians engaged in African law studies have tended merely to describe in doctrinal and formalistic terms the phenomenon of the interaction of colonial laws with their indigenous counterparts. A brief sample of various studies should reveal this difference of approach. The following selection is drawn mainly from the experience of English common law jurisdictions, though one piece gives a refreshing perspective from a Francophone jurisdiction.

I would place the following works in the descriptive category. In Nigeria, we record the work of Ajayi (1960) who first described the impact of English law on the customary law of Western Nigeria. He describes it as exercising a "pruning" effect on the various customary laws obtaining in the region. This he considers to be a necessary process intended to "attune the moral tone of customary law to that of a new age". He further observes the impact of "legislation", which he uses interchangeably with English law, as effecting the extension of the sphere of the operation of English law, the clarification and rendering more certain of the customary laws, and the promotion of trends making for as much uniformity as possible in them and their application throughout the Region (Ajayi 1960: 105, 108). More recently Ubah (1982) has described how what he characterizes as the "westernization process" has impacted on Islamic law in Northern Nigeria in the realms of practice and procedure, and of substantive rules, especially those relating to *hadd* punishments. In assessing the impact of the westernization process, he makes the startling, though unsubstantiated, observation that the coexistence of English courts with their Shari'ah counterparts has resulted in the availability of alternative and liberating judicial forums to Muslims, who would otherwise be obliged automatically to submit to the latter.

Salamone's and two other works provide illustrations of studies which focus on the relation between 'received' laws and the indigenous legal systems from a processual perspective. Using a conflict theory and a network approach, Salamone has attempted to study the interaction between the indigenous, Islamic, colonial and post-colonial laws in Nigeria (Salamone 1983). He shows that by utilizing conflict theory, according to which "...actors are seen to be strategizing, seeking to gain advantages and avoid losses", the changes taking place in and between the indigenous laws of the communities he has studied and between them and Islamic law could be better appreciated. He also discusses the mediating role played by colonial law in the interaction between these other legal systems.

Analytical studies of the impact of both the English Common law and French law on other customary laws have been carried out in respect of other African

countries. The relation of the English common law to customary law in Botswana is viewed by Griffiths (1983) as a symbiotic one "...which involves a process of mutual adaptation". Even though by "duality" independence of and separateness between the two systems of law is implied, the author argues against viewing them as isolated units distinguishable by labelling. They should, she asserts, rather be understood "...in terms of values which relate to mode of life."

Snyder (1981) presents a very interesting analysis of the relation of French judicial attitudes, law and policy towards the customary law of the Banjara Diola community of colonial Senegal. To him, the antiquity which is attached to legal forms described as 'customary law' is a little fictitious. He argues that the term customary law "...in the Casamance, as elsewhere, was a concept and a legal form that originated in specific historical circumstances namely the period in the transformation of pre-capitalist social relations that saw the consolidation of the colonial state." (Snyder 1981: 74) By tracing the evolution of a particular notion of customary law, he contends that although the concept implies historical continuity, as suggested by the definitions of Allott and others quoted in the opening section of this article, its origins are actually relatively recent. He argues further that the form of customary law governing land tenure among the Banjara Diola, as it came to be conceptualized, which makes a very crucial distinction between the legal consequences of the term 'master of the land' and 'users' of land, is determined by specific social forces. It was, to use his own words, given birth by an ideology "that accompanied and formed part of colonial domination". Thus he views the interaction between any notion of customary law and a colonial law or policy as essentially a process whereby the latter is constitutive of the former (Snyder 1981).

In concluding this brief survey of works on the relation of received laws to indigenous systems of laws, I would like to observe that Salamone's conflict theory and Snyder's constitutive approach are very instructive for my purpose. Taking a cue from their method and the insight they have shed on the emerging field of studies of the impact of colonial laws on indigenous legal systems, this article seeks to analyze the impact of colonialism and the imposition of the English common law which accompanied it on Islamic law in the Northern States of Nigeria.

Objectives of this article

It is perhaps appropriate to open our discussion by quoting in extenso the apt and instructive words of Allott since they capture the essence of the British imperial policy towards the pre-colonial systems of law and judicial institutions, and of

the impact this policy has had on them:

These institutions were left in place, and originally were given considerable freedom to function in a traditional way. Reforms were however gradually introduced, which led to the native courts being progressively anglicised in their jurisdiction, their personnel and their procedure. Clerks to keep the records; court records reporting the decisions and their reasons in some instances; the use of written process to summon parties and witnesses; the training of court members; the eventual selection of court members on the basis of their qualifications rather than their customary position - all these changes were gradually introduced in most of the British territories. The end result was that by the closing of the period of British colonial rule, the so-called native courts... bore little resemblance to the traditional institutions which they gradually replaced. (Allott 1984: 58; emphasis supplied)

In this article I intend to probe the following questions: To what extent, if any, have the substance and form of Islamic law changed as a result of the introduction of English Law into Nigeria? What role did British colonial rule in Nigeria play in the transformation process? I will, in conclusion, hazard a few educated guesses as to what to expect next.

Broadly speaking, I seek to establish that there exists a causal link between Northern Nigeria's colonial experience and the transformation of Islamic law, and more particularly that:

- the introduction, some would say imposition, of the English common law, its ideas and its institutions into Nigeria has had a tremendous influence in changing the pre-colonial Islamic legal system;
- as a result of the colonial encounter, Islamic law has been transformed in that a) its jurisdiction has been ousted totally in some areas, seriously curtailed in others while being in yet others subdued and rendered subservient to the English-cum-Nigerian statutory laws; b) some institutional and procedural aspects of the Shari'ah such as the method of the training of its personnel and their functions, and its internal and dynamic techniques of self-regeneration, have similarly been transformed; and c) the English common law has now come to shape in very subtle ways discourse about and in the Islamic legal system and is otherwise making inroads by forcing on Islamic law certain

terminologies, processes and concepts which have the capacity to profoundly change the substance and form of the Shari'ah.

Definition of the field

By way of preliminary discussion, I must first define the field. By Islamic law I refer to the totality of the content, method and juristic heritage which Muslims consider to be their distinct law. This is contained in or derivable from four main sources namely the Qur'an, Sunnah (sayings and practices of Prophet Muhammad [SAW]), Ijma' (consensus of the opinion of Muslim jurists) and Qiyas (a method of arriving at new rules by analogical deductions from existing broad principles contained in the Qur'an or Sunnah). These are supplemented by legal manuals and commentaries which explain the primary sources.⁴ In more concrete terms, when I attempt to address the question as to whether or not Islamic law has been transformed in Nigeria as a result of the colonial encounter I will do so against the background proposition that Islamic law did, in this sense, obtain and apply in a fairly unqualified manner throughout the region during the pre-colonial period.

The issue of causation

At this point it may be helpful to mention that there is a polarized debate among students and scholars of African customary law on the question whether the transformation of this law is traceable to the colonial factor. There are some who, believing in economic determinism of some sort, view the transformation as resulting from the introduction and sponsorship of the capitalist mode and relations of production. Although there has been an attempt to make out such a case in respect of the transformation of some precepts of customary law governing the land tenure system in one African community (Snyder 1981), I find it hard to accept economic determinism as being decisive in the

⁴ In modern times the term 'Islamic law' has come to mean the law derived from the totality of these sources and is often used interchangeably with the term 'fiqh'. On the other hand, the term Shari'ah has come to acquire a very restrictive import referring only to those rules of Islamic law which are derived from the twin sources of the Qur'an and Sunnah. The distinction has been made to indicate that the Shari'ah is the pure and unaltered law decreed by Allah and further explained by the Prophet and Fiqh or Islamic law is a body of rules derived from the former but containing as well the human interpretive element in them to the extent that is permissible in Islam.

transformation process of customary law generally, much less of Islamic law, in Nigeria. Surely the genesis and evolution of any system of law cannot be explained by appeal to marxian dogmas solely and exclusively (cf. Roberts 1984, and below). Such an approach to discussing the legal phenomenon generally is very problematic. Moreover, one is inclined to accept the approach of the various definitions of customary law in so far as they all seek to explain this law in terms of its pedigree and characteristics. The argument advanced by Snyder (1981) suggesting that a specific form or concept of customary law is a by-product of the interplay of some social relations within the context of a given community should be understood as true only in a very limited sense, namely that socio-economic conditions may account for the transformation of the concept. However, these do not in and of themselves account for the original 'concept' of customary law which scholars discuss and the judiciary adjudicates upon.⁵ It is all the more problematic if it is applied to explain the pedigree of what Muslims consider to be Islamic law. For where does economic determinism come in to give a plausible rationale for a principle of Islamic law decreed in the holy Qur'an or extracted from it and the other sources of the Shari'ah?

There are others who argue that pre-colonial African society was unsettled and constantly changing to the extent that the concept of African law in that society was either unknown or highly unstable. There are yet others who insist that, in view of the introduction of Indirect Rule to facilitate native administration by the British, any changes which may have occurred in the substance or form of African customary law had no direct causal connection with the colonial policy as such. Consequently "... there are real difficulties in seeing 'customary law' solely in terms of domination." The view that customary law comes into being or has been shaped by an exclusively one-way, top-down view of the colonial encounter must mislead, advocates of this position further contend (Roberts 1984).

The foregoing are no doubt contending positions on the possible cause(s) of the

⁵ If we fail to recognize that there is a distinct notion of a customary law which pre-dates colonialism then we risk falling into the pitfall of a version of the American Realist School of jurisprudence which believes that law is nothing more pretentious than what the courts ultimately do. Certainly the courts do not decide cases in a vacuum. In deciding cases, judges must refer to and interpret some rules and to do so within an institutional setting that permits judicial activism even as it restrains judicial adventurism. Within these constraints judges often engage in legislative activity. But they do not legislate afresh. Rather they refine or extend the application of an existing principle.

transformation of African customary laws. Whatever view one may consider to be persuasive, it must be appreciated that a transformation of the African law of some sort has, as a result of the colonial encounter, indeed taken place. The encounter has also profoundly affected what I shall characterize as 'official' Islamic law - that is to say those aspects of Islamic law which have been the subject of judicial interpretation or legislation. There may well have been several catalysts which have propelled this process.

I will next examine this transformation to the extent that it has affected Islamic law within the concrete Nigerian setting. I should before doing that, however, briefly describe the type(s) of legal systems which had been prevalent in the Northern part of Nigeria before the colonization of the region so as to provide a background against which our discussion will proceed.

THE PRE-COLONIAL LEGAL SYSTEM

Right at the dawn of this century when Lugard brought what is today known as the Northern States of Nigeria under British imperial control, he had to concede that he had found throughout the region, but especially in its principal cities, a complex network of courts in which Islamic law was administered by an Alkali, an Islamic law judge, who, to use his own words, was "a man of great respectability and considerable learning" (Lugard 1906: 168).

Since the inception of the religion of Islam some fourteen centuries ago, a distinct legal system has been evolved to stipulate the laws, institutions and personnel that are necessary for a functioning legal order. The Islamic legal order was brought to the pre-colonial part of Nigeria with the conversion of the people to Islam. This began in the 9th century with the Kanem Borno and spread in the 11th to the rest of the region. However, the widespread application of the Islamic law and the formalization of its judicial structures occurred only during the early part of the 19th century with the establishment of the Sokoto caliphate. This had occurred much earlier on a smaller scale under the Saifawa dynasty of Borno.

It was the Jihad of 1804, a mass religious movement, which transformed the political terrain of Northern Nigeria.

At the turn of the eighteenth century a revolutionary movement, otherwise known as the Jihad of Shehu Usman Dan Fodio, arose in Hausaland that was to have a profound influence on the subsequent history of the area.... (Hiskett 1973:3. For more detail see: Sulaiman 1986, 1987; Last 1967;

El-Masri 1978.)

Among the enduring legacies that this historic revolution bequeathed to this vast area of present-day Nigeria were a highly centralized system of caliphal administration and a distinct legal system. In the field of judicial administration a legal system was evolved which ensured that courts were set up, especially in principal cities and towns, presided over by judges who were appointed by the 'Amirul Mu'mineen' (commander of the faithful), popularly known as 'Sultan', the supreme leader of the Sokoto caliphate, or his regional deputies. The judges were charged with the primary functions of removing injustice, restraining aggressors, and ensuring generally the prevalence of justice throughout the realm in accordance with the Shari'ah. The content of Islamic law to be applied was what had been decreed by the Qur'an, the Sunnah and other subsidiary sources of the Shari'ah. The recognized commentaries and manuals on the sources were to be used as supplementary sources. (Fodio n.d.)

For the purposes of the analyses that will follow, it may be observed that there were no restrictions on the application of any part of this body of law. Indeed the primary reason for undertaking the Jihad was to displace the corrupt and unjust leadership of the rulers of Hausaland and to establish in its stead a leadership that derived its legitimacy from the Shari'ah. The aim was to establish a society whose institutions would be shaped in accordance with the Shari'ah, and to cultivate a cadre of disciples, the flag-bearers, who would submit totally to its dictates. (Fodio 1960)

This is not to say that this legal regime worked perfectly from the establishment of the caliphal system to the commencement of colonial rule in the region. But neither was it completely abandoned or adulterated beyond recognition.

As time passed, the administration diverged in detail from the pattern laid by the Shehu... But the essential Islamic identity, that of an Immamate with ultimate authority residing at the centre, dispensing justice, and legislating though sometimes imperfectly, according to the sharia, was not seriously threatened. (Hiskett 1973: 144)

Thus at the inception of British colonial rule there was in existence in this area a legal order which was distinctly Islamic. This indeed was testified to by Lugard himself (Lugard 1906: 168). I will shortly turn my discussion to address the question as to how this pre-colonial legal regime fared during the six decades that Britain ruled Nigeria as an imperial power.

Islamic law, customary practices, and colonial 'advancement'

The arguments I shall advance in the principal parts of this article contend that the colonial factor has transformed the content and methodology of Islamic law together with its judicial institutions for the worse. There is, I am aware, a counter-argument which asserts that, quite on the contrary, British colonial administration actually helped the advancement of customary laws (including Islamic law) through the formalization of their institutions, legislative support, and introduction of some measure of certainty to the substantive rules and principles of these legal systems, and through other forms of state sponsorship. Salamone (1983), for example, echoes some of these arguments while discussing the relation of Islamic, indigenous, colonial and post-colonial laws in Nigeria. Granted that this may be true of the divergent, unwritten and not-so-sophisticated customary laws of the various communities in Nigeria, and Africa generally, it will be submitted that advocates of this argument have not at all made a plausible case regarding Islamic law, which, arguably, is as certain as the amorphous English common law and had had judicial institutions in place and personnel manning them long before colonial rule. Indeed even on the rules, maxims and precepts of the various customary laws, the effect of colonialism through judicial interpretation and academic manipulation was, it is submitted, either to completely change their character and subsume them under the predominating and well-understood common law concepts or to totally displace them by refusing to enforce them.

I have earlier observed that prior to colonial rule, Islamic law applied in this part of Nigeria with a relative lack of restriction. However in some localities, there were, and still are, noticeable traces of the influence of the customary practices of the various communities on Islamic law principles. Thus Yusuf has observed:

[T]he greatest discrepancy between rules of Islamic law and actual practice is perhaps in the domain of marriage and family where the force and antiquity of local custom appear to have compelled the sharia to allow for some concessions. (Yusuf 1976: 68-69, as quoted by Salamone 1983: 31. See also: Smith 1965; Yahaya n.d.)

Conversely, Islamic law has in turn been decisive in influencing certain of the plural customary practices of converts to Islam. There has always been a reciprocity to this process, with the Shari'ah norms being determinative of the validity of the co-opted customary practices. But on the whole Muslims have lived and been judged according to the dictates of the appropriate principles and precepts of Islamic law. For instance, both in the marriage law applied in courts

as well as that which can be observed from the marriage practices of Muslims, the procedure for contracting marriage by Muslims, its essential validity and rights and obligations of spouses arising from such a marriage have always been governed by Islamic law as enunciated in the recognized legal manuals of the prevailing School of Law in the area. Records of the proceedings of both pre-colonial and colonial Muslim courts which give details of the causes and matters disposed of by the Alkali and the relevant Islamic law rules applied are testimony to this. These include both civil and criminal matters. For instance, they concern matters affecting land disputes, theft, homicide, and economic crimes committed in market-places.

Salamone has asserted that perhaps Islamic law never applied in the region in its pure form:

It is imperative to stress that although Northern Nigeria is a stronghold of Islamic law, that law is there strongly tempered by local custom.... Put more explicitly, 'pure' Islamic law is not and was not in the past practised in Northern Nigeria (nor, perhaps anywhere else in the world).... (Salamone 1983: 29)

Anderson (1970:184) has made a more guarded observation regarding the extent to which Islamic applied in pre-colonial and colonial Northern Nigeria. One assumes that both observers must have formed this opinion as a result of an impression arising from their 'discoveries' that Islamic law was tempered in its observance by the unyielding tenacity of custom and the relative paucity of pre-colonial judicial evidence to the contrary. It is submitted, however, that the assertion is both implausible and unsubstantiated. Indeed there is ample evidence quite to the opposite.⁶ Moreover, it is a grave mistake to seek to determine whether or not Islamic law applied in any jurisdiction in 'pure' or adulterated form by reference solely to court records. This is primarily because, although Islamic law has positive rules which are enforceable in courts, compliance with its norms or relative lack thereof by the believers is largely a matter of conscience. Perhaps these commentators were looking for evidence of the existence or application of an unadulterated 'official', as opposed to 'unofficial' Islamic law which, it is submitted, is rarely a subject of litigation.

⁶ An informant has revealed that some of these records have been preserved and are available, for instance, at the Palace of the Emir of Kano under the custody of his advisers. It seems Salamone must have relied heavily on Greenberg 1946.

TRANSFORMATION OF SUBSTANCE

The introduction of Indirect Rule

It is noteworthy that at the inception of British colonial rule nothing was done to disturb the state of affairs just described. This is perhaps not very surprising. The imperial power needed time to know the peoples and the vast territory constituting the Sokoto caliphate which it had just acquired. The new administration was also courting the good-will of the displaced rulers. Thus Lugard produced the brilliant idea which was later christened the 'Indirect Rule' policy. This administrative contrivance, by which the colonizers found it expedient and most inexpensive to rule the natives through the mediation of the former traditional rulers, was not limited in application to the administrative and political spheres.⁷ It encompassed the judicial system as well. And under its aegis the substance of Islamic law was initially allowed to govern civil and criminal matters without let or hindrance.

Criminal Code displaces Shari'ah

This state of affairs did not, however, last long. Several ingenious devices were soon introduced to interfere with the free application of Islamic law. This marked the beginning of the process of the transformation of the substance of Islamic law by direct intervention. One such device was the provision, which had the full backing of a Proclamation, that although a judge of a native court, then called an Alkali, could try and convict a person under Islamic for any criminal offence, he had no power to impose a sentence which amounted to 'inhuman treatment'. Of course it was not the Islamic law criterion that was the sole determiner of which punishment was inhuman and which was perfectly acceptable, even though the conviction was arrived at by reference to the substantive rules of Islamic law. Another modification was that made between 1948 and 1958 to the Islamic law principles relating to the ingredients of an offence known under the Maliki School as 'qatl 'amd', i.e intentional killing. Under Islamic law, the offence of intentional killing is, once proved or confessed to, punishable with death. However, some instances of what is considered to be intentional killing amount to a lesser offence, manslaughter, under the Nigerian Criminal Code, which essentially replicates the English common law principles.

⁷ See Perham (1937), which is a seminal work on the development of this policy. For its extension to the judicial sphere, refer to Lugard (1965, 1918), in which the administration's policy towards the Native Court system was spelt out in the best spirit of Indirect Rule.

This code was then applicable in the Northern region of Nigeria. There were thus clear divergences between the principles of the two systems of law on this matter. This naturally gave rise to conflicts in the minds of the judges who were called upon to try and convict a suspect under one system of law but sentence him/her in accordance with an entirely different penal system.

This conflict in the terminology and substance of the offence of homicide between Islamic law and the Nigerian Criminal Code had to be resolved somehow as case upon case came up from the then Grade 'A' Emirs' courts of the North, which applied Islamic law, on appeal to the higher courts, which applied statutory laws and the English common law. In the process of resolving the conflict, the substance of Islamic law relating to this matter was transformed. The appellate courts finally decided in effect that the Emirs' courts were free to try and convict accused persons of the offence of 'qatl 'amd' in accordance with the Shari'ah. They were, however, instructed to sentence such convicts in accordance with the Criminal Code. As one commentator has observed, these courts were in effect asked "... to abandon Moslem law and try suspects according to the Criminal Code".⁸ It has been further added that judicial review of the decisions of these lower courts by the Supreme Court which had been charged with the responsibility of bringing them to order "was merely being used so as to obtain by means of its decisions an 'ad hoc' amendment of the Islamic law in each particular case." (Hubbard 1959: 86)

The decisive moment in the transformation of the criminal aspect of Islamic law in Northern Nigeria came in 1959 with the adoption of the Penal Code. With the intensification in the frequency and complexity of cases involving conflict between the Islamic law rules governing crimes and the Criminal Code, and the approach of the promised grant of self-rule status to the region, the colonial administration invented another device that was to lead to the total ouster of the applicability of Shari'ah to criminal matters. The Minorities Commission had earlier recommended that a uniform criminal code be introduced to apply to all persons in the region (Colonial Office 1958). A Panel of Jurists, known as the Abu Rannat Panel, was constituted in 1958 by the Government of the Northern Region to visit the Sudan and investigate how that nation, with a similar religious mix to that of the Northern Region, had just recently handled the issue

8 On the very intricate history of this conflict refer to these two cases: *Idi Wonaka v. Sokoto N.A.* (1957) NRNLR 15; *Maizabo v. Sokoto N.A.* (1957) F.S.C. 13. See Hubbard 1959; also the writings of J.N.D. Anderson who took a special interest in keeping track of developments relating to these recurring conflicts and reports about them: Anderson 1957, 1959, 1970.

of the continued application of Islamic criminal law concurrently with a Criminal Code of English parentage. Not unexpectedly, the Panel recommended the ouster of Islamic law in criminal matters and the wholesale importation of the Sudan Penal Code, a proposal which was reluctantly accepted by the regional legislature.⁹ The Minorities Commission and the Abu Rannat Panel were in effect used as a smokescreen by the departing colonial administration to give local legislative legitimacy to a decision which, surprisingly, had long been canvassed by a member of one of the committees and officially entertained.¹⁰ This Code, which was first used in India, introduced a penal system that calls for uniform territorial application to all citizens in the region. Some of its provisions are passed off as embracing certain norms and principles of Islamic law, such as its proscription of drunkenness - not the mere act of taking intoxicants, which is what Islamic law in fact prohibits - and adultery. Thus a semblance of Islamicity was tagged on to some of its provisions, apparently to cater for the sensibilities of the Muslim populace. The unmistakable objective of introducing the Code was, however, to effect the total ouster of Islamic criminal law or, at best, to render it subservient to the English common law penal system which was the underlying norm that had informed the Indian Penal Code in the

9 In adopting the proposals of the Panel and thereby profoundly affecting the region's legal system, the legislature went through excruciating moments. (See *Northern Region*: 1st September, 1959.) Refer also to the comments of the Sardauna of Sokoto, Ahmadu Bello, who revealed the following reasons for introducing the reforms:

It was borne upon us that these legal and judicial reforms *would have to be carried out if the self-governing region was to fulfill its role in the federation of Nigeria* and command respect amongst the nations of the world... Finally, there are the commercial and industrial interests, mainly financed by capital brought into this country from abroad, which we are doing our best to encourage and foster. (Emphasis added.) (Bello 1962: 217).

10 Commenting on whether or not Islamic law should continue to apply to criminal matters, and especially to the homicide cases in which the most difficulties were encountered, Professor Anderson had in 1955 opined:

On any long view it is clearly intolerable that a homicide committed on one side of a somewhat ill-defined boundary line between Emirates should be tried under one system of law, while one committed a few yards away on the other side of that line is triable under [the Criminal Code], a totally different system... *so eventual unification appears inevitable.* (emphasis added) (Anderson 1970: 221.)

The collection of essays in Anderson (1970) had earlier been published as Colonial Research Publication No. 16, 1954 by H.M.S.O, January, 1955.

first instance.¹¹

From these particulars it should now be clear how the substance of Islamic law has been transformed. I speak of transformation not in the crude and palpable sense of English law or, what amounts to the same thing, Nigerian statutory laws displacing and invalidating in a wholesale manner Islamic law or the principles founded upon the Qur'an or Sunnah. I speak, rather, of a more subtle, less obvious transformation process. Officially, Muslim judges continue to sit and try suspects accused of crimes such as homicide, adultery and perjury. But they are required to judge not in accordance with the normative criteria set out in the Qur'an and Sunnah, even though such provisions have been left intact. They now judge by reference to the Penal Code and other relevant statutes.

Appendage status for Islamic law

The influence of the British colonization of Nigeria on the substance of Islamic law can be viewed from another angle apart from that which sees it as the total ouster or partial displacement of the substantive Islamic rules by the principles of English common law. This other angle involves assessing the role of Islamic law in its relation to the common law-dominated Nigerian legal system to elucidate the changing process undergone by Islamic law and its institutions. As I have observed elsewhere (Yadudu 1988), Islamic law and other customary laws exist side by side with the imposed English common law.¹² But this ostensible

11 Gledhill (1963) has traced the history of the Code. It was first drafted for India in 1837 by Macaulay, a Member of the British Parliament who also served on the Law Commission. It was later borrowed for use in Northern Sudan in 1899. Macaulay, who was an ardent advocate of codification, was guided by certain goals in drafting the Code. The goal of codification, in his view, was to achieve "...uniformity where possible, diversity only when it was inevitable but always certainty." Gledhill also reports that the basis of the Indian Code "...was the law of England stripped of technicality and local peculiarity, shortened, simplified, made intelligible and precise." (Gledhill 1963: 16)

12 Lagos was ceded as a colony to Britain in 1863. By virtue of Ordinance No. 3 of the same year, the application of English law was, subject to certain conditions, extended to the colony. When the Southern and Northern Protectorates were amalgamated in 1914, English law was extended to these territories on similar terms. The basic laws governing the 'reception' of English law vary from one region to another. The High Court Law, Northern Region of Nigeria (No. 8 of 1955) contains the language of the 'reception' in this Region.

co-existence of the plural legal systems, particularly of Islamic law and the common law, should not deceive us. For it does not permit Islamic law to exist as an all-embracing legal system nor as an independent and autonomous partner of the English common law. It exists as an appendage of and a tolerated nuisance in relation to the pre-eminent 'received' English law. In this respect, therefore, the transformation amounts to the taming and subjugation of Islamic law by the 'Nigerian' legal system, which was in the first place introduced by the colonial state and is now nurtured and maintained by remote control through entrenched institutions which survive as a colonial legacy.

The superimposed English legal system, its ideas and institutions have tamed Islamic law in several ways. They have not only ousted the application of certain substantive rules of the Shari'ah. They have also condemned those retained to a life as appendages. The appendage status has caused the substantive and procedural rules and precepts of Islamic law to be judged and analyzed in academic circles and by the judiciary not on their own terms but through the lenses of the Englishman. This viewpoint is derived from the English common law which has now been repackaged as 'Nigerian law' and legitimated.

The Nigerian courts and legislators have on several occasions been called upon

To date this Law remains valid for all the states comprising the former Region.

Section 28 provides that, subject to certain qualifications:

Subject to the provisions of any written law... -

- (a) the common law;
- (b) the doctrines of equity; and
- (c) the statutes of general application which were in force in England on the 1st day of January, 1900, shall...be in force within the jurisdiction of the [High] court.

Section 34 (1) of the same Law provides further:

The High Court shall observe, and enforce the observance of, every native law and custom *which is not repugnant to natural justice, equity, and good conscience, nor incompatible either directly or by implication with any law for the time being in force*, and nothing in this law shall deprive any person of the benefit of any such native law or custom.

[Emphasis added.]

This Law dictates the terms of the co-existence and the extent of the applicability of both English and Islamic laws in the region. (It may be mentioned that Section 28A also provides that "[a]ll imperial [sic] laws...shall...be in force so far only as the limits of the local jurisdiction and local circumstances permit...." We shall see shortly how much use the Supreme Court has made of this section.)

to determine this appendage status of the indigenous systems of law in relation to the 'received' English law. One instance may suffice to illustrate the nature of the dependency relationship. The judiciary has, especially in the fifties and more recently in the late sixties, been asked to interpret the full import of the section of the High Court Law, quoted in footnote 12 above, by virtue of which English law had been received in the region. In *Adesubokan v. Yinusa*,¹³ a question arose before the High Court of North-Central State as to whether a person who had lived and died a Muslim could disinherit his lawful heirs by disposing of his entire property by a will executed under the English Wills Act 1837. A deceased Muslim had executed such a will by which he bequeathed virtually all of his property to a 'beloved' son, thereby depriving other surviving heirs of the right to share the property left behind in accordance with the prescribed rules of the Shari'ah. The courts had earlier decided that this English statute had been received in the country. But according to Islamic law, which was the personal law of the deceased person, he was disallowed from perpetrating what Muslims consider to be a despicable act of disinheriting a lawful heir. Holding that the Islamic law rule governing the matter was incompatible with a 'written law', that is the English Wills Act 1837, the Supreme Court of Nigeria overturned the decision of the state court. The latter had held, following the terms of the High Court Law, that 'local circumstances' precluded the deceased from availing himself of the English Act. Preferring to apply Islamic law, which deals more justly with the heirs in such cases and maintains equilibrium in family relations, the state court had interpreted the 'reception' clause more pragmatically. But the Supreme Court thought otherwise and rendered Islamic law subservient to the Wills Act 1837, a statute which when passed into law in Britain, obviously did not have Nigerian Muslims in its contemplation.

One must, however, note some recent developments concerning the dual co-existence of the pre-eminent English laws with the other indigenous systems of law. In October, 1986 the Nigerian Law Reform Commission organized a National Workshop entitled 'The Review of Pre-1900 English Statutes in Force in Nigeria'. In recent years, there has been persistent public outcry over the retention of certain English Statutes on the Nigerian statute books as 'received' laws even they may long have been repealed in England itself.¹⁴ Responding to

13 (1971) NNLR 77 and [1972] JAL 82.

14 In 1986 I had occasion to collate the following public lamentations over the inadequacy of the Nigerian Legal system. A Military Governor in Nigeria urges the development of a "new set of laws that will deal with our endless political problems". Another enjoins the members of the Nigerian Bar Association to "avoid too much technicalities [in the law]" by eliminating unnecessary

these criticisms, and with a view to saving the nation from “the embarrassment and inconvenience of administering these [pre-1900 English] laws as part of our legal system”, the Commission, at the instance of the Attorney-General of the Federation, organized the workshop with a view either to repealing them altogether or otherwise to Nigerianizing them (Nigerian Law Reform Commission 1986).

The Law Reform Commission had, prior to the Conference, compiled what it considered to be an exhaustive list of English statutes that had been ‘received’ in Nigeria. These were subsequently ‘purged’ of features which were considered to be unsuitable to local conditions. Then draft edicts were prepared embodying all the modifications. They were then circulated to participants prior to the commencement of the conference for comments and to make for speedier and more meaningful deliberations. At the conclusion of the workshop, one of its most notable achievements was the inclusion in all draft edicts, where appropriate, of an explicit proviso stating that the English statutes which had just been clothed with a Nigerian garb of legitimacy would not oust or in any way take away anything from the substance of other indigenous laws, which would continue to co-exist with them. In effect, the legislation would, when enacted, specifically over-rule the notorious Supreme Court judgment in *Adesubokan v. Yinusa* discussed above.

The Attorney-General of the Federation was reported to have remarked on receiving the reports of the workshop compiled by the Law Reform Commission, that Nigeria had begun taking giant strides towards removing all the remaining colonial vestiges from our laws and judicial institutions. Posterity will judge whether the achievements of the workshop amount to the proclaimed feat.

preliminaries in court proceedings. And no less a distinguished personality than the Chief Judge of a State is worried over the non-availability of cheap, affordable and otherwise accessible justice to the poor, and hence calls for the control of fees charged by attorneys. Yet another law-enforcement officer is of the view that existing laws are too alien such that no amount of translation would make them relevant. Again, characterizing the Nigerian legal system as “absolutely irrelevant to the yearnings and aspirations of our society”, a group of social scientists decry the quality of our judicial personnel and indict judgments handed down by the Nigerian Bench as tending to be too technical and not based on fundamental social issues. These views were culled from the *New Nigerian* newspaper, editions of November 21st and 23rd, 1985, January 31st, and February 19th, 1986. See also Yadudu 1988.

TRANSFORMATION OF FORM

Substance vrs form

The impact colonialism has had in transforming the substance of Islamic law appears to be glaring and incontrovertible. It has however not had so conspicuous an impact on the form and methodology of this law. The changing process in this area is more subtle and not easily discernible. As such it seems to have eluded the public gaze. We next turn our discussion to the type of changes that have occurred to the form and methodology of Islamic law. The dichotomy between form and substance in philosophical and legal discourse is, I am aware, problematic.¹⁵ It would appear to be especially problematic in respect of Islamic legal phenomena, for the substance (the shape or essence) of Islamic law is not much different from its form (or what one may term its texture or colour). I will nonetheless utilize the dichotomy for the purpose of distinguishing the fundamental from the not-so-radical changes which the incidence of colonialism brought to the Islamic legal system in Nigeria. To illustrate and analyze the modifications to the form of Islamic law, I will refer to changes in its method of personnel training and its internally dynamic process of regeneration, self-adjustment and development.

Initial Colonial policy

The process of the taming and subjugation of the Islamic legal method by the 'received' English law and ideas had a long history and began in a subtle manner. The Sokoto caliphate was finally conquered in 1903. In an address to the Sultan and the Sokoto elders in that year, Lugard took pains to justify the British conquest and the terms of co-existence between the Sokoto rulers and the British to whom suzerainty had passed by virtue of the conquest. Among several other demands and undertakings made, Lugard announced:

The Alkalis and the Emirs will hold the law courts as of old, bribes are forbidden, and mutilation and confinement of men in inhuman prisons are not lawful. The powers of each court will be contained in a warrant appointing it. Sentences of

¹⁵ 'Substance' has been defined to mean "the material or essential part of a thing, as distinguished from 'form'". And 'form' has been defined as "the legal or technical manner or order to be observed in legal instruments or juridical proceedings..." (Black 1979).

death will not be carried out without the consent of the Resident.... Government will in no way interfere with the Mohammedan religion. (Quoted Brooke 1952: 10.)

Clearly implicit in this part of the address are both a promise not to interfere with Islam (and so with Shari'ah which Muslims consider to be an integral part of the Islamic belief system) and a signal that Islamic law and its judicial institutions may be modified and interfered with as and when the new rulers deemed it right.

The Islamic judiciary

Under the Shari'ah legal system, the qualifications of a judge are clearly spelt out. He must be a person of considerable learning. For instance, this minimum is required of him: a thorough knowledge of the Qur'an which is the fundamental basis of the Shari'ah system; a mastery of the authentic and primary books of Sunnah (the sayings and practice of Prophet Muhammad); proficiency in the Arabic language; a thorough grounding in Fiqh (Islamic jurisprudence); and an acquaintance with logic. To this list must be added: religious piety; the appropriate emotional temperament; an acute sense of judgment; and an interactional disposition with other members of his community; all these and more are considered requisite qualifications of a person who is to be entrusted with the onerous task of judging the affairs of Muslims and adjudicating over disputes between them in accordance with the divinely-ordained Shari'ah. The academic training occurs within the formal traditional system of Islamic education, which differs considerably from one place to another. The other qualities are acquired in life, and can be recognized when they are present in an individual.

Thus the Shari'ah does not envisage situations where the burdensome and serious matter of adjudication will be entrusted to persons of frail or unsound mind or questionable character. This perhaps explains why throughout the chequered history of Islam we have had few outstanding judges and indeed few who offered themselves for or were willing to accept judicial appointments.¹⁶ It should,

¹⁶ There may well be several other reasons for this. There is a 'Hadeeth' of Prophet Muhammad which categorizes types of judges and which has been variously interpreted either as discouraging persons from taking the office or as inviting believers to engage in good deeds through the office of the judge. Al-Khalil (1916: 273) states the law according to the Maliki School on the office of a judge.

however, be conceded that the times and circumstances of the Muslim *Ummah* (community) throughout the world have changed. With these changes there has been a corresponding relaxation of these qualifications. There is an Islamic law maxim to the effect that a people are judged in accordance with their condition. This maxim has been relied upon to relax many an Islamic law requirement.¹⁷ Notwithstanding this, however, even Lugard could not fail to observe that the judges (alkalai) he found presiding over the Shari'ah courts at the inception of colonial rule were "men of great respectability and considerable learning." (Lugard 1906: 168) This is corroborated in Nadel (1951), an anthropological study of the Nupe. The training was mainly through private tuition within the traditional Islamic method. A person would learn in stages to memorize the Qur'an, and study varieties of its exegeses, the science of *Hadeeth*, and other books of *fiqh* (Islamic jurisprudence) under one or several scholars. (Last (1967) and El-Masri (1978) have given a good historical account of the state of scholarship in the Sokoto caliphate.)

Now the pertinent question to ask next is: what has the colonial encounter done to this, or what remains of the method of training and the functions of Islamic law judges in Nigeria? At the initial stages, the imperial power did very little to interfere in these matters. But with his promulgation of the various Native Courts Ordinances and Proclamations, Lugard positively sought, and with success, to influence the appointment and regulate the functions of the alkalai. For instance, various regulatory powers were given to the Resident, the District Commissioner and the Chief Justice to be exercised over the newly-introduced grades of Native courts in the Northern Protectorate. There was introduced a requirement that the Resident's or District Commissioner's consent or approval had to be sought in the appointment of judges by the Emir or the Native Authority. They were also empowered to inspect the courts' records, supervise the judges and review or transfer cases.¹⁸

17 For example, the character of a witness in an Islamic law trial may be impeached on the ground that he lacks '*adalah*', a comprehensive term which goes to the moral probity and trustworthiness of an individual. The yardstick used to measure this in early times was relatively stringent. Such a person must not be known to be a liar or deceitful or recalcitrant in saying his prayers on time. Over the years, getting such types of witnesses became impossible and the requirement had to be relaxed somewhat. See Al-Khalil 1916: 293.

18 See the Native Courts Proclamations of 1900 and 1906; the Native and Protectorate Courts Ordinances of 1914 and 1933 (*Laws of Nigeria*, 1910, 1923 and 1933).

Ostensibly this intervention was in furtherance of the administration's declared intention to check corruption in the system and to prevent the perpetration of 'miscarriages of justice'. The primary, though undisclosed, objective was, unmistakably, gradually to transform the pre-existing regime. Perhaps an influential factor which lent support to this was the recurring criticism of colonial policy towards the indigenous legal systems. The administration had over the years come to be openly criticized for not taking a bolder and more interventionist approach to the transformation process. It was viewed as offering a purer version of British justice to the southern Nigerians, with the full-fledged institutionalization of the Supreme Court applying pure common law, and, conversely, a corruption of justice to the North, by retaining and propping up the Islamic legal system and even empowering Residents, purely administrative officers, to exercise judicial authority. (See Crocker 1936: 229 ff. Morris and Read 1972 offer similar criticisms as to East Africa.)

With the enthronement of these and similar regulatory procedures, a wholly new regime was externally imposed on the Shari'ah judicial system to govern the functions of its officers, the *alkalai*, who essentially remained judges dispensing Islamic justice. From then on the office of this category of judges was governed not by reference to the relevant internal Shari'ah rules but to the superimposed regulatory regime. Thus a person would be appointed to a judgeship not so much because he was the most learned or pious Muslim but because the Resident was agreeable to his candidacy and he had the proforma endorsement of the Emir. Since then one measure after another has been taken to improve and perfect this external and incongruous method of regulating the functions of persons called upon to dispense justice in accordance with the Shari'ah in Nigeria. These include the Native Courts reform of 1956 and the Area Courts reform of 1967. In 1975 the Customary Courts Reform Commission made several recommendations for the re-organization of the Customary and Area Courts in the country. Finally, the Constitution of the Federal Republic of Nigeria, 1979, came to embody some of this latter Commission's recommendations by entrenching, for instance, provisions relating to the Judicial Service Commission.¹⁹

As part of the intervention process, the administration focussed its attention on finding ways to restrict the jurisdiction of Islamic law courts to matters of personal status. The Moslem Court of Appeal was introduced in 1956 to exercise exclusive jurisdiction on appeals over suits involving the personal status of

¹⁹ See the following: Brooke 1952; Area Courts Edict, 1968, *Kano State Laws*, 1968; Government of Nigeria 1978; *Constitution of the Federal Republic of Nigeria 1979*: Part D of the Third Schedule.

Muslims decided by the lower Native Courts. Subsequent Constitutions and Laws of the country have retained this court while varying its nomenclature as a regional and now a state court.²⁰

Operating within such a regime, a person called upon to apply Islamic law today has to do so with all these fetters around him - fetters which are unknown to the system of law he has been asked to apply. Tied to such a leash, he is naturally constrained to harbour dual and conflicting loyalties: to Islamic law which he probably knows best, and to the superimposed regulatory regimes which he is not very familiar with and which do not exercise the same restraining effect on him, but could, nonetheless, ensure as well as mar his livelihood.

Perhaps it is not unfair to observe that an Area Court judge, or for that matter a Qadi of the Sharia Court of Appeal, does not today consider his assumption of office and exercise of functions to be first and foremost a definite religious duty as Caliph Umar, in his letter to Abu Musa Al-ash'ari, envisaged.²¹ Neither does he view his function as being primarily to remove injustice, redress wrongs and restrain aggressors in accordance with the Shari'ah as Abdullahi Bin Fodio enunciated (Yamusa 1976). Rather such judges, being subject to the code of conduct of public officers contained in the Constitution and other administrative regulations, are led to view themselves as mere civil servants or judicial officers. As such, they receive conflicting signals: they are asked to apply Islamic law, but to do so only within the confines of a judicial bureaucracy that is alien to, and often contradicts, the regime envisaged by the Shari'ah legal order.

Colonial influence on judicial personnel training

Added to these institutional developments is the fact that the quality and depth of the training of Islamic judicial personnel has witnessed a very sharp deterioration. I shall argue that, although this did not start with nor was solely caused by the colonial encounter, that encounter has heightened the decline and introduced a wholly new dimension.

20 See the Northern Region of Nigeria Moslem Court of Appeal Law, No. 10 of 1956; and the 1979 and 1989 Constitutions of the Federal Republic of Nigeria, sections 240 and 259 respectively.

21 This is one of the many instructions which Caliph Umar gave Abu Musa when he appointed him to the office of a Governor and it has served as the most important document to refer to in discussing the office of a judge under the Shari'ah.

It must be conceded that long before the period of colonial rule, the state of scholarship had declined in the Muslim world generally. The abandonment of 'Ijtihad' as a regenerative mechanism of the Shari'ah system, the accompanying sudden cessation of lively jurisprudential discourse and innovation in the form of commentaries, compilations and the issuance of 'fatwa' (legal opinions given by juris-consults), and the official adoption by each ruler of one School of Law, all combined to bring about the ossification of the Shari'ah in its substance and form, and a stagnation in thought.²² Notwithstanding this, the amount of knowledge one had to acquire to become a judge or even an ordinary learned citizen, was still astounding. They were perhaps representatives of this class of learned judges that Lugard met and admired.

How then did the colonial factor introduce or intensify a deterioration in the method of training judicial personnel in Nigeria? In its gradually unfolding scheme to introduce more English law into the North and reshape the judicial institutions to conform to certain British notions of respectability, the colonial administration adopted many ways and devices. The basic 'reception' statute had ensured the bulk introduction of substantive English laws. What remained to be done was the purposeful training of a cadre of Northerners who would be imbued with English common law ideas combined with a smattering of Islamic law, as recommended by Brooke (1952) and Anderson (1970). The administration adopted a gradual approach to accomplish this. Teams were selected, given local training first and later sent to the United Kingdom for a more thorough initiation into the common law system. A school to serve as a local training ground was built.

I would submit that the establishment of the Law School, now the School for Arabic Studies, Kano in 1934 was the starting point. It should be viewed as such because the colonial administration set up the school with a view to providing a formal legal training to persons who would, in addition to performing other functions within the emerging colonial bureaucracy, replace the aging native court judges as well as manning newly-established judicial positions. In

²² 'Ijtihad' is a process by which a judge fills the voids of the explicit principles of the Qur'an and Sunnah by engaging in analogical deduction through interpretation to arrive at a new decision which is not otherwise covered by the Qur'anic precepts. This dynamic process helped the cause of the rapid development of Islamic law tremendously. Muslims however abandoned this method with the alleged closure of the door of 'Ijtihad'. This decision was taken late in the third century after Hijra (A.D. 900 circa). For a more detailed discussion of this period and how it affected the development of the Shari'ah see: Dasuqi 1969; Pasha 1969.

attempting to appreciate the role played by the Law School in leading to the decline of legal scholarship one must balance the merits of the type of formal legal education offered at the school with the informal, traditional type which obtained in town. Without doubt, the Law School curriculum was broader in outlook as it sought to introduce students to the multiple disciplines into which Islamic scholarship has been categorized. It exposed them to a more scientific method of learning the Arabic language, which in turn helped to widen their horizons. And it opened their minds to a less inhibited study of the Shari'ah through a comprehensive study of Fiqh from the perspectives of all Schools of Law. However, in all these studies depth was lacking as compared with what students would have received informally. In those days, and even more so today, many a student who had received instruction at home would, upon registering at the school, come to feel that what he got out of the formal instruction from the school fell far short of what he had already acquired at home. Today, as then, he stays and suffers it all only because he needs the certificate which the school offers, and which will earn him success in the emerging judicial bureaucracy where his informal education, though more thorough, may not.

The trend for Islamic legal training to become more and more formalized but lacking depth of approach continues unabated. Indeed it appears to be assuming a menacing dimension. Prior to the sixties, the training of personnel for the Sharia and Area Courts system was entirely different from that for the English-type courts. Each prospective judicial officer was exposed exclusively to the system of law within which he would operate. However, in anticipation of the introduction of the Penal Code in 1959, and with the jurisdiction of the Sharia Court of Appeal confined to the Islamic law of personal status, leaving the de-Islamized Area Court to dispose of other causes and matters governed by Islamic law, the need was felt to give some judicial personnel an acquaintance with both systems of law. A number of persons were selected to study comparative law at the School of Oriental and African Studies, London. Here at home efforts were made to retrain the native court judges by giving them some knowledge of the rudiments of substantive English law and procedure. Comparative legal study was introduced at para-legal and undergraduate levels at the Ahmadu Bello University, Zaria, in 1975, and later elsewhere.²³

23 This writer is a beneficiary of this type of degree programme. I obtained the LL.B. (specialization in Islamic law) degree of the ABU in 1978. Other Law Faculties in the North, such as those at Bayero, Maiduguri and Usman Dan Fodio Universities, have recently copied this programme with major improvements which have enriched it even more.

The introduction of the study of comparative law is not a bad development in itself. Its conception was, however, not entirely in good faith. The colonial administration no doubt saw in it another expedient contrivance for the transformation of the traditional Islamic legal scholarship. Judging by the rather disjointed and shallow content of Islamic law taught to potential Sharia or Area Court judges in most law faculties in the North, there has been an abysmal decline in the quality of training for potential Shari'ah judges, legal practitioners and other judicial personnel. It would seem to me that the various programmes of study offered by law faculties cannot even qualify as a poor substitute for the academic programme which the Law School previously offered. This is mainly because these current programmes do not even pretend to give the students a thorough grounding in the fundamental matters which a potential 'qadi' or area court judge ought to know. Instead, in what I would consider as a frivolous over-straining, we unduly categorize and compare Islamic law with English law in each topic we teach our students. It would seem that we succeed only in perpetuating the dependent status of Islamic law as a subservient partner of English law within the Nigerian legal system.²⁴

It can thus be seen that the colonial encounter has played quite a tremendous role in re-shaping the form and substance of Islamic law. For we now conceive of the office of an Alkali, his functions and the method of training judicial personnel not in terms of the Shari'ah precepts and ethos which had been the practice prior to colonization of the country but by reference to and in compliance with the superimposed colonial and post-colonial regulatory regimes which live with us even today. Indeed they are entrenched in a more pervasive way now.

TRANSFORMATION OF METHODOLOGY

Nigeria's colonial encounter has also transformed the methodology of the Islamic legal system by the infusion of new legal terminologies, doctrines and processes.²⁵ I turn to a discussion of these changes in this part of the article.

24 My comment will not, I hope, be misunderstood to amount to a gratuitous public condemnation of a type of programme of study of which I am a beneficiary and in the evolution and implementation of which I am a participant. I only see it for what it has become: an integral part of the colonial scheme to transform both the substance and form of Islamic law in Nigeria for the worse. I happen also to believe that, stripped of their pretensions, the programmes could be overhauled, enriched and put to better use.

25 The common law has also wreaked havoc on other bodies of customary law

Imposition of the advocacy system

The delivery of justice under the traditional Islamic legal system is cheap and accessible to all. A court is required to sit at the most public of places such as the mosque. The procedures for the disposition of disputes are known to be simple and understandable to average muslims who have had no more than the most basic Islamic education. Strictly speaking, no fees may be charged to litigants for the processing of their cases. The method of prosecuting a criminal case or establishing a civil right by a claimant is inquisitorial. The judge sits not as a mere umpire who regulates legal battles and moderates the exaggerated claims of either party, but to establish guilt or liability, or absolve the innocent party. He does this with the aid of the religio-moral system which ideally impels parties to tell the truth or, at least, discourages them from lying. Such a system operates speedily, and is cheap and easily accessible to all. Finally, the Shari'ah legal system knows nothing of the arcane and incomprehensible legal terminologies whose ambiguity, technical intricacies and indeterminacy under the common law provide lawyers with bones of contention and confusion in the law out of which to make a living. It was this kind of judicial system which was prevalent in the North prior to colonial rule. But since its contact with the English common law system much of this simplicity, accessibility and speedy delivery of justice, which had been the hallmarks of Islamic law, has been transformed and is in danger of being submerged.

Although still relatively simple compared with the processes in the English type of courts, processes in Area Courts and the Sharia Court of Appeal have now been rendered more complex, less comprehensible and more expensive to litigants. Court fees are charged. Even though the Evidence Act and, except in special cases, the Criminal Procedure Code do not govern proceedings in these courts,²⁶ practices peculiarly known to common law courts such as incessant

in Africa, especially by introducing new terminologies and concepts to govern land tenure. These have come to displace completely or submerge the terms and categories known to these systems. See Snyder (1981). In Nigeria, as elsewhere throughout former British African colonies, customary law concepts governing communal land holding have virtually been transformed into common law freehold tenure through judicial interpretation and application. For instance, see James 1973: 13-31; Nwabueze 1972: 106-137.

26 The Evidence Act, 1945 (*Laws of Nigeria*, Cap. 62), section 1 (4) (c) provides that the "...Act shall apply to all judicial proceedings in or before any court established in the Federation of Nigeria but it shall not apply ...to judicial

adjournments, formalities and technicalities associated with the filing of appeals and the serving of court process, have been injected into the Islamic judicial system. The imposition of procedures that are peculiar to common law trials also threatens to render the delivery of justice in Area Courts just as expensive, inaccessible and dilatory as in non-Shari'ah courts.

Prior to 1979, legal practitioners²⁷ were statutorily barred from appearing before Area Courts and the Sharia Court of Appeal. This ban had been introduced by section 10 (a) of the Provincial Courts Ordinance, 1914, and subsequent Native Court Laws and Edicts had retained it. The 1979 Constitution has, however, been interpreted as having altered the situation.²⁸ As a result, legal practitioners are now, regardless of the type of their professional training, entitled to appear before these courts. Needless to observe, a legal practitioner in Nigeria has been trained in the art of the adversary system of advocacy known to the common law. According to this system, losing or winning depends not so much on the merit of a client's case or the veracity of his story as on the eloquence and skill of the attorney. At common law, observes one commentator, "...law suits are turned into legal warfare...in which the victory was commonly enough that of the strongest and acutest lawyer rather than that of the most righteous cause" (Inderwick 1891: 219-20, quoted Veal 1970: 32).

Legal practitioners now appear before these courts. A few of them possess a smattering of fragmented knowledge of Islamic law. An overwhelming majority, however, lacks any expertise in Islamic law, as they have not been taught it. By allowing lawyers to appear before an Area Court and the Sharia Court of Appeal, the bench and the legal establishment have not only pandered to the greedy wishes of the legal profession. By a stroke of the pen, the adversarial

proceedings in or before any native court (unless otherwise directed)".

27 According to the Legal Practitioners Act, 1962, a person called to the Nigerian Bar and enrolled as a Solicitor and Advocate of the Supreme Court of Nigeria is called a Legal Practitioner. In Nigeria the distinction between barristers and solicitors has been done away with. A legal practitioner combines the roles and provides the services of both officers of the court.

28 See the judgment of the Federal Court of Appeal in the unreported case of *Karimatu Yakubu & Another v. Yakubu Paiko & Another*, CA/K/805/85, in which this interpretation was offered by Justice A.B. Wali. The proper import of section 33 (2) of the Constitution of 1979 was in question. It is not suggested that the Shari'ah does not recognize a concept which permits parties to be represented in legal proceedings. It does so, but within its unique judicial tradition. Indeed the Appellate court had to consider and distinguish the Islamic concept of legal representation from its common law counterpart.

legal procedure, which is essentially of common law origin and has been known to encourage dilatory litigation, work injustice, and favour the well-to-do, has suddenly been superimposed upon the simpler, better known and more accessible inquisitorial procedure which is employed in Shari'ah courts.

Introduction of the doctrine of judicial precedent

I conclude this part by noting how the common law doctrine of judicial precedent is similarly being smuggled rather surreptitiously into the Islamic judicial system. This common law doctrine, by which the previous decisions of superior courts bind them and the lower courts within the hierarchical order of all Courts of Record, holds that a certain part of the decision of a court, the *ratio decidendi*, is clothed with authority to govern similar fact situations in the future. It is based on the principle that judges should treat like cases alike.²⁹

This doctrine is totally unknown to the Islamic legal system. Two Islamic law concepts are often referred to as doctrines which are similar to that of judicial precedent under the common law. There are indeed certain processes known to Islamic law which may resemble the doctrine. These are the 'Qiyas' process of developing new rules from existing principles through analogical deductions, and the 'Taqlid' procedure which imposes an obligation on certain categories of persons to follow the juristic views of earlier juris-consults. However, it is submitted that these are entirely different. Caliph Umar has once more clarified the issues and has made the distinction between the two concepts quite clear. He counselled Abu Musa in the following words:

If you gave judgment yesterday, and today upon reconsideration, come to the correct opinion, you should not feel prevented by your first judgment from retracting; for justice is primeval, and it is better to retract than to persist in error. (Ghanem 1975: 88.)

Moreover, the Shari'ah court structure has not been built on any defined hierarchical order. Although practices may differ from one place to another, Muslim countries or communities have not, in the past or today, been known to operate their court systems in any particular hierarchical scheme. Thus the

²⁹ Both the colonial Federal Supreme Court and the contemporary Supreme Court of Nigeria have held this common law doctrine to have been received in Nigeria: see *Ojosipe v. Ikabala* [1972] 1 All N.L.R. 128 and *Johnson v. Lawanson* [1971] N.M.L.R. 380.

system institutionalizing several grades of Native or Area Courts is a colonial innovation which was unknown to the pre-colonial judicial system. It is true that in pre-colonial times the Emir's palace served as a quasi-judicial forum which was superior to the ordinary courts in respect of certain categories of disputes such as land and other political cases. However, this was effected by the exercise of the 'Siyasa' doctrine. This doctrine permits a Muslim ruler to establish new institutions or to legislate against conduct which is harmful to the community, both of which activities may have been unknown in the classical period of Islam, to meet the exigencies of time. The Shari'ah court applied this doctrine to oust the jurisdiction of the other courts in respect of these matters, not to preside over them in an appellate capacity. The decision of such a court lacked, and was not viewed as possessing, any precedential value. Neither did judges presiding over district courts located outside the principal city consider the judgment of the city Alkali to have any such value.³⁰

This doctrine has now crept into the Islamic law judicial process. One does not know the extent to which such a development will find favour with the Sharia Court bench. However, the celebrated case of *Karimatu Yakubu v. Yakubu Paiko*³¹ may provide an indication. This judgment of the Federal Court of Appeal on an appeal from the Niger State Sharia Court of Appeal illustrates how the common law doctrine of judicial precedent has met with judicial approval by a higher bench. One of the issues which the appellate court was called upon to decide was whether a father could lose his power of 'ijbar' (the right to marry off his virgin daughter to whomsoever he wishes with or without her consent) by releasing her. The court held that the father could indeed forfeit this right by putting the daughter to a choice between options. Justice Uthman Mohammed opined thus: "...where a father has given his virgin daughter the right to choose between her two or more suitors, he has lost his power of ijbar." He cited with approval the decision of the then North-Western State Sharia Court of Appeal, curiously a lower court within the judicial hierarchy, in the unreported case of *Alhaji Isa Bida v. Baiwa*. In essence, Justice Mohammed considered the earlier judgment of a Sharia Court of Appeal to have precedential value, with the consequence that the Niger State Sharia Court of Appeal should have either

30 In the Maliki School, writes the author of *Mukhtasar al-Khalil*, a judge is obliged to consult the text of the Law on each fresh question arising for the court's decision. The Kadi will look up the precise intention and the just application of the Law, with respect to the matter under consideration for a judgment is always a special, isolated, decision on detail, never a general one embracing several cases. (Al-Khalil 1916: 288)

31 See note 28.

followed or reconsidered it in deciding the *Karimatu Yakubu* case.

Perhaps the following observation is pertinent here. There is something curious about the Federal Court Appeal's resort to the decision of a lower court to arrive at its own, and through such a route to superimpose an alien doctrine which neither the lower court in this case, nor any other Sharia Court of Appeal in the quarter of a century since their establishment, had ever referred to. Furthermore, we may ask why, if there is a textual authority derivable directly from a primary source of Islamic law such as a 'hadeeth' (sayings and practices of Prophet Muhammad) or a juristic opinion within a recognized and applicable school of law in the region, as there may well be, the court chose to rely on the doctrine of judicial precedent which is unknown to Islamic law? Was the Hon. Justice consciously co-opting this doctrine to govern Islamic judicial proceedings? Did the court appreciate what a radical and novel departure from the conventional Shari'ah practice its action amounted to?

There is something ominous about the wholesale and uncritical co-option of the common law doctrine of judicial precedent into the judicial process of Islamic law so as to form part of its terminologies. Surely a judge who ignores or refuses to base his decision on the authority of the Qur'an or Sunnah or other subsidiary sources of Islamic law, but bases himself solely on the authority of some earlier decision, whether of his own court or of another, and whether of coordinate or superior jurisdiction, poses grave dangers of far-reaching consequences for the Islamic legal system. It is a matter of common knowledge that under Islamic law injunctions contained in the Qur'an or Sunnah, and the juristic opinions of earlier juris-consults have normative value, whereas a mere decision of a judge does not possess such a quality.

The co-option of this common law doctrine into the Islamic legal system, is likely, I fear, to do in Nigeria what it has done to this law in the Indo-Pakistani sub-continent. It will turn Islamic law upside down. In that region, Islamic law is not only referred to as Anglo-Mohammedan law. It is mainly discussed, taught at schools and judicially interpreted and applied as a judge-made law very much like the received English common law.³² In the light of the developments discussed above, it would appear that the Islamic legal system faces similar

32 See the following works on Islamic law in the sub-continent, in which much of what passes for Muslim law is no more than a collection of judicial pronouncements, based primarily on the *Hedaya*, a Hanafi legal manual which had earlier been translated into English by Sir Charles Hamilton (1870): Rashid 1979; Fyzee 1964; Hodkinson 1984.

consequences in Nigeria. If our judges should similarly rely on past decisions of courts to decide disputes between Muslims to which Islamic law is applicable, we will very soon render redundant the wealth of juristic heritage which the Qur'an, the books of 'Hadeeth' and our well-known legal manuals embody. We will thereby dispense with the treasure of knowledge which our traditional Islamic law scholars have acquired in preference for case-law.³³

WHAT NEXT?

The question now is: what do we expect next? A lull or a cessation or an intensification of the onslaught? In other words, are we about to witness the triumph of an expensive, inaccessible and demonstrably unsuitable English common law judicial system over the more popular, culturally-rooted and morally acceptable Islamic legal system in the North? I cannot hazard a categorical answer one way or the other. I would, however, like to draw attention to the following trends and currents.

I. While this transformation is taking place, no one seems to notice, much less appreciate, its consequences. Where a glimpse of it is caught, little is attempted to deal with it. The politicians, the Bar and Bench in the country are content to adopt a flip-flop attitude towards indigenous law. When it suits them, they praise it. In another breath, they condemn it. One thing is however very clear: the fact that both Islamic and customary laws are under siege and are threatened with virtual extinction by co-option and merger through official action, is not an issue which elicits from them concern or any action by way of a rescue operation.

II. Contrary to the assertion of the Attorney-General of the Federation that Nigeria is, with the recently concluded review of the pre-1900 English statutes, taking giant strides towards purging the nation's legal system of all colonial vestiges, all one sees is the entrenchment of the discredited statutes by other means. With the possible exception of a few of the statutes reviewed, all we have done to reform them is cosmetic. If and when the draft edicts are enacted,

33 Given the choice, I would very much prefer that judges, possessing all the necessary qualifications and exercising all due deference to the Islamic tradition, would re-open the allegedly closed door of 'Ijtihad'. An internally-generated method of reinvigorating judicial discourse is far preferable to striking out on an uncertain and, eventually, dangerous voyage of wholesale borrowing of terminologies and doctrines, and, even then, operating within a system which Muslims have little respect for in consequence of religious scruples, qualms of conscience, and disdain for the colonial legacy.

all that the review exercise will have succeeded in doing is to substitute for English street names others that are more homely and have a Nigerian flavour. What is worse, many of the English statutes which hitherto had been considered suspect and manifestly unsuitable have suddenly acquired a Nigerian garb and thereby become legitimated.

III. With the higher Shari'ah bench, notably at the Federal Court of Appeal, toying with the idea of espousing and superimposing the common law doctrine of judicial precedent on the Islamic legal system, we seem to be heading towards dangerous currents. We are in peril of witnessing the sudden abandonment of the sacred sources of the Shari'ah and their replacement with case-law to adjudicate disputes between Muslims. We would then be on our way to the official elevation of lawyers and the redundancy of traditional Muslim scholars. The decision taken by some states in the North such as Gongola to start appointing only legal practitioners, who may have no more than a smattering of knowledge of Islamic law, to preside over certain grades of Area Courts, goes a long way to heighten and confirm such fears.

IV. It may be well to remember, though, that when we talk about Islamic law within the Nigerian legal system, and especially in relation to the transformational process, there are both the official and unofficial Islamic law. The official is that aspect of it which judges, lawyers, legislators and governmental agencies apply. It is this aspect which has been the subject of the transformation. Its opposite, the unofficial Islamic law, is that which Muslims learn, imbibe and apply to themselves on a daily basis - at home, in the market-place etc. This latter aspect remains in the books, committed to the hearts and pricking the conscience of muslims. It is certain that the unofficial Islamic law is unaffected by the transformation process. Nay, it may, in my submission, be strengthened and reinvigorated by the hue and cry which accompanies the transformational impact. Attachment to, understanding of and commitment to the Shari'ah continue to prevail in muslim folkways. It remains to be seen which will prevail in the end.

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