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Native courts of Northern Nigeria: Techniques for Institutional Development

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NATIVE COURTS OF NORTHERN NIGERIA: TECHNIQUES FOR INSTITUTIONAL DEVELOPMENT

DAVID N. SMITH*

I

One of the first acts of Nigeria's new military Government following the coup d'etat that disposed of the previous Government on January 15, 1966, was to announce that its ultimate goal with regard to judicial reform is to integrate the locally administered native courts into the Regional Governmental court structure. As a first step, the more than 750 native courts of Northern Nigeria,[1] previously supervised by the Ministry of Justice, were placed under the supervision of the politically independent Judicial Department.[2] More recently, the native courts have been made independent of the native authorities, the local government units,[3] and the judicial powers of the Emirs' courts have been withdrawn.[4]

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1 The Native Courts (Jurisdiction and Powers) Notice, 1967 (Northern Nigeria Legal Notice [hereinafter N.N.L.N.] 9 of 1967) (2 March 1967), lists the various native courts by province and division. Nigeria, previously divided into four regions, is now composed of twelve states. States (Creation and Transition Provisions) Decree, 1967 (Decree No. 14 of 1967). Six states comprise the former region of Northern Nigeria. The latter term is used here for convenience. Within each state the local government units are called native authorities.

2 Delegation of Powers (Native Courts) Notice, 1966 (N.N.L.N. 15 of 1966) § 2(b) (dated 6 May 1966 with effect from 1 April 1966). This notice was made by the Military Governor of Northern Nigeria in exercise of powers conferred by § 9(4) of the Constitution (Suspension and Modification) Decree, 1966. The unit within the Ministry of Justice, a department within the executive branch, directly responsible for the administration of the native courts was the Commission for Native Courts. This administrative units has now been placed under the control of the High Court (Judicial Department).

The powers originally exercised by the Minister of Justice have been transferred to the Chief Justice of the High Court. Delegation of Powers (Native Courts) Notice, 1966 (N.N.L.N. 15 of 1966).

3 See West Africa, April 15, 1967, at 485; letter from Commissioner for Native Courts, High Court of Justice, Kaduna, to author, Feb. 5, 1968. The first courts to be placed under Government control were those in the regional capital territory. Native Courts Law, 1956 (Amendment) Edict No. 1/67 (Kaduna Capital Territory). "In Northern Nigeria this is a real revolution since . . . it has always been thought, control of [the native] courts was of the highest political importance to Emirs and Chiefs." West Africa, supra.

Effective April 1, 1968, control of native courts will vest in the six states of the former northern region, subject to the continued supervision of the Chief Justice. Each state has enacted governing legislation modeled on the Native Courts Law, 1956 (ch. 78 of the Laws of Northern Nigeria, 1963) [hereinafter as N.C.L.] and has renamed the courts "area courts." See, e.g., North-Western State Edict No. 1 of 1967 (the Area Courts Edict, 1967). The structure of the area courts system will largely imitate the regional system existing under the N.C.L. For ease of citation, reference hereinafter will be made to the structure existing under the law, rather than to the six-fold duplication of that structure.

It is not surprising that the attention of the new Government should have focused immediately on the native courts, for their role has been an important political and social issue in Nigeria for some time. In the period just prior to independence, for example, special legislation was required to allay the fears of non-Moslem minorities who might appear before Moslem courts in the North.[5] In addition, the close association of native court personnel with the executive personnel of the native authorities had long been criticized for its possible political implications.[6]

Much of the criticism of the northern courts, both before and after independence, came from the southern regions and the federal capital which were impatient with the pace at which various institutions of the northern region were becoming integrated into the national governmental structure. Shortly after the coup it was reported that with regard to the future of native courts, "there is already a fairly strong body of opinion in favour of their complete abolition, or at least abolition of their criminal jurisdiction."[7] This sentiment was no doubt reinforced when early in 1966 this latter step was taken in the Western Region.[8]

Without question, much of the southern concern about the native courts of the North was based on a failure to recognize the cultural, historical and geographical differences between the two regions. The legal profession in the southern regions—itself a critic of the northern courts—has been and still is substantially more developed than that of the northern region.[9] In the southern states a relatively limited number of magistrate courts are able to service a small land area. In the North, "[a] drive by a good road from Ilorin, just within the southern boundary . . . to Katsina, near the frontier with the Niger Republic, covers 510

For the present there will be only one Chief Justice who will constitutionally be the Chief Justice of each of the six new states.

[4] West Africa, supra note 3, at 485.

[5] See text accompanying notes 120-24 infra.

[6] Indeed in those native authorities where the Emir is the chief executive officer, some personnel of the Emir's Court have performed both executive and judicial functions. The recent White Paper on the Government's Policy for the Rehabilitation of the Tiv Native Authority 17-18 (Kaduna, 1965) stated that, "It is considered that the Grade B Civil and Criminal Courts have become discredited by some of their Presidents being involved to a greater or lesser degree in politics. . . .

"The principle of separating the judiciary from the executive should be continued in these courts and the members should not have outside executive responsibility."

[7] "Northern Nigeria's Revolution," West Africa, April 2, 1966, at 373.

[8] Customary Courts (Jurisdiction in Statutory Criminal Offences) (Revocation) Order, 1966 (Western Nigeria Legal Notice 15 of 1966) (W.N. Edict No. 2).

[9] In October, 1967, it was reported that there were 122 legal officers and 217 private practitioners in the East, Midwest, West and the Federal Territory. In the North there were 22 legal officers and 13 practitioners for a population more than double that of the southern states. West Africa, October 7, 1967, at 1300. The legal officers figure for the southern regions does not include legal officers in the East, which figure is not given.

miles; and from Birnin Kebbi, near the western frontier, to Mubi, near the eastern, over 1,000 miles."[10] All-weather roads, joined by roads impassible in the rains, "lead to large centres of rural population where a permanent criminal court is essential."[11]

The fact does remain, however, that the native courts of Northern Nigeria have in recent years come under increased pressures generated by a developing society. Where once these courts functioned within primarily rural, non-commercial societies, they are now, for the first time, being called upon to settle disputes involving the growing class of indigenous traders. Where once individual courts dealt almost exclusively with homogeneous populations, expanded commercial activity and improved methods of transportation have brought increased movement of individuals across tribal boundaries.

At the same time, political independence has brought increased concern about judicial independence and basic procedural protections for criminal defendants. The growth of the northern legal profession and the emergence of a local law school have brought with them an increased concern for institutionalized justice and a recognition of "legal" problems that heretofore had been submerged in the administration of social justice. If, in earlier days, the cultural conflict in which the northern courts found themselves was epitomized in the administration of "British justice" by British courts on one side of the street in Zaria and the administration of "native justice" by native courts on the other, the cultural conflict today is epitomized in the contrast between the three-month class for native court judges in one classroom at the Zaria law school and the three-year LL.B. class across the hall.

The various pressures for adapting the native court system to new social and political realities have led to significant legislative response. This response is most dramatically illustrated by the introduction of westernized penal and criminal procedure codes.[12] Yet the basic cultural problem remains and is bound to persist in the foreseeable future: the native court system, administered by lay judges, cannot be abandoned in favor of a western court system administered by trained lawyers. Not only are there significant manpower, financial and geographic problems, but there is also evidence that lawyer-administered courts would not be acceptable to large segments of the population.

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[10] "Northern Nigeria's Revolution," West Africa, April 2, 1966, at 373.

[11] Id.

[12] All courts with criminal jurisdiction, whether native or otherwise, apply the provisions of the Penal Code (1959) (ch. 89 of the Laws of Northern Nigeria, 1963), and the Criminal Procedure Code (1960) (ch. 30 of the Laws of Northern Nigeria, 1963) [hereinafter cited as Criminal Procedure Code (1960)]. Jurisdiction has been given to certain native courts with respect to some civil legislation previously administered only by British-styled courts. See, e.g., The Native Courts (Jurisdiction in Personal Income Tax Cases) Order in Council, 1963 (N.N.L.N. 23 of 1963, as amended by N.N.L.N. 130 of 1963).

These facts were recognized by the pre-coup Government; consequently it adopted a policy—carried forward by the present Government—directed not toward the abolition of native courts but rather toward an up-grading and adjustment of the existing system. Thus, while integration of the native and western-styled court systems is an announced Government policy, it is a long-range one, and one which may ultimately be accomplished through a merging of the two systems rather than through the displacement of the native court system by the district and magistrate court system.

Central to the Government policy of accommodating the native court system to a developing society has been the creation of a number of transitional devices aimed at bridging the gap between the traditional and modern court systems. These transitional devices, the main focus of this article, are of particular significance to lawyers concerned with African legal development, for they represent important examples of how developmental problems can be solved short of simply imposing a western model. The goal of adjusting western legal concepts and methods of legal training to meet local needs is one to which lip service is frequently paid in the African context but one that is not often attained in fact.[13]

The following short history of the native courts in Northern Nigeria will give some sense of the context in which these adjustments in native court administration and judicial review have taken place.

II

Perhaps the most significant fact underlying the present viability of the native court system in Northern Nigeria is that when British administration began in 1900 there existed an effective and well established system of tribunals firmly integrated into the social structure of much of the region. These tribunals were part of the general governmental structure centered around Moslem Emirs who had been installed in power as a result of the 1804-1810 Fulani holy war.[14] Although Islam had been introduced as early as the fifteenth century, the establishment of the Fulani empire was directed at the purification and expansion of Islam. In conformity with Islamic patterns of legal administration, new courts under qualified Moslem scholars were established, jurisdictions were defined and a basic pattern of appeals was created.[15]

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[13] See Gower, Independent Africa, The Challenge to the Legal Profession 90-96 (1967). "The main lack everywhere . . . is real effort toward adapting the received English law and local statute law to local conditions." Id. at 94.

[14] The historical background may be found in Burns, History of Nigeria 49-62 (1929). Developments in one particular emirate are traced in Smith, Government in Zazzau 73-136 (1960).

[15] Smith, supra note 14, at 94-95.

Impressed by the highly developed and successful methods of government and legal administration in force in the far North—as well as by the problems inherent in the imposition of a foreign legal system[16]—the British administration gave assurances that the Mohammedan system of law would not be interfered with and that the power of native courts to deal with native cases according to the local law and custom would be upheld.[17] At the same time, however, the British were interested in rationalizing and developing the native court system; therefore the need for basic guiding legislation was felt. The first such legislation was the Native Courts Proclamation of 1900.[18] It introduced the first statutory native courts in what became the administrative unit of Northern Nigeria. The Proclamation authorized the Government's representative in each province—the Resident—to issue warrants establishing native courts consisting of at least four persons. The warrants were to be issued after consultation with local chiefs or Emirs, and provision was made that the chief or Emir concerned would appoint the court members.[19]

The main purpose of the 1900 Proclamation was not so much the adjustment of an existing native court system to imported patterns of administration, although a certain balance of power between the local rulers and the British was established, as the identification and recognition of the various tribunals exercising juridical functions throughout the territory. However, as this process of defining centers of judicial power was going forward, problems were being encountered. Leaders of Moslem areas protested that the four-member court was not consistent with the customary constitution of Moslem courts, which were traditionally run by single judges. In non-Moslem areas unofficial tribunals more consistent with local social patterns persisted. The first problem was remedied in 1904 by an amending law which permitted the establishment of courts composed of one or more members.[20] Aspects of the second problem have persisted up to the present.[21]

The 1900 Proclamation was repealed and re-enacted in 1906 by the Native Courts Proclamation No. 1 of 1906 which established the basic legislative pattern for subsequent developments in the native court system until 1933.[22] Four types of native courts were recognized: Emir's courts, to be known as judicial councils; alkali's courts, consisting of single Moslem judges sitting with or without other persons who might

[16] See Lugard, The Dual Mandate in British Tropical Africa 540-41 (5th ed. 1965).
[17] But cruel and inhuman punishments were prohibited.
[18] Native Courts Proclamation No. 5 of 1900 (Northern Nigeria).
[19] The warrants were subject to the approval of the High Commissioner.
[20] Native Courts Proclamation No. 11 of 1904 (Northern Nigeria).
[21] See note 25 infra.
[22] The Native Courts Proclamation No. 1 of 1906 is reproduced in Laws of the Protectorate of Northern Nigeria, 1910, 597-601.

act in conjunction with the alkali as judges or merely act as assessors; chief's courts in non-Moslem areas, also to be known as judicial councils; and multi-member courts of the type provided for in the 1900 legislation. Court members were to be appointed by Residents with the approval of the Governor except that in Moslem areas, consultation with the local Emir was required.

Jurisdiction of native courts was provided in all civil and criminal cases in which "all the parties are natives;" jurisdiction was denied in those cases where a non-native of African descent or a native in government employment was a party, except where the Resident gave consent. Territorial jurisdiction and subject-matter jurisdiction were defined in the court's individual warrant. Both the law to be administered by the court and the procedure to be used were to be in accordance with the native law and custom prevailing in the territory over which the native court had jurisdiction. Courts were given varying powers of punishment and subject-matter jurisdiction, and for this purpose were graded "A," "B," "C," or "D," with "A" courts having the greatest powers. Only nine judicial councils were given the broadest powers, including capital punishment.[23]

It seems fair to state that "after the initial mistake of 1900 [the requirement of four-member courts], the native courts established in Northern Nigeria more or less reproduced the pre-existing traditional native courts,"[24] except with regard to the quasi-judicial, quasi-arbitrational courts which traditionally had existed in many tribal areas but for which no provision was made.[25] The 1906 legislation, however, was significant in that it super-imposed on the existing system two elements of British control. It was provided that Residents would at all times have access to the native courts and could, either on their own motion or on the application of the aggrieved party, (a) suspend, reduce or otherwise modify any sentence or decision of a native court; (b) order a re-hearing before a native court; or (c) transfer any cause or matter, either before trial or at any stage of the proceedings, to the Provincial Court, which was presided over by the Resident. In addition, provision was made for the appointment by the Resident of certain native courts as

[23] Brooke, Report of the Native Courts Commission of Inquiry, Appendix and Summary 69 (1952). Campbell, Law and Practice of Local Government in Northern Nigeria 2 (1963).

[24] Nwabueze, The Machinery of Justice in Nigeria 74 (1963).

[25] See, e.g., Bohannan, Justice and Judgment Among the Tiv 7-8, 160-214 (1957). The author states that there are three types of courts in Tivland: the British-type magistrates' courts, native courts and arbitrational folk "courts" which he refers to as "moots." In this context it is relevant to note that "even where selectivity in the acceptance of cultural elements from outside is recognized, analyses of the contemporary African scene too often fail to grasp the fact that selection is *additive* and not necessarily *substitutive*." Bascom and Herskovits, Continuity and Change in African Cultures 6 (Bascom and Herskovits ed. 1959).

courts of appeal. Any person dissatisfied with a decision of a native court could appeal to the court appointed by the Resident. Thus, in the same way that the pre-British Moslem legal system centered on the Emirs, after 1906 the native court structure centered on the Residents. It was through them that courts were created, membership was appointed and cases reviewed.

The rationale for investing control of native courts in the hands of the Resident rather than in a superior British court was that political officers would be closer to "native motives" and that in the context of a developing political system "occasions may arise when the strictly legal aspect must give way to expediency."[26] The pre-eminent position of the Resident was retained until 1962 when it was considered that more judicial and less administrative control was called for. It will be seen, however, that administrative control still exists and that present patterns of supervision have been influenced in part by the practice of control by Residents.

At the same time that legislation was being developed for the native courts, a parallel system of British courts was being established. These courts were given jurisdiction over persons with whom the native courts could not deal: non-natives, natives in the service of the government and persons living within certain townships. In addition, British courts had concurrent jurisdiction with the native courts over members of the native population, and a separate appellate system was to be administered.[27] What existed was a parallel system of courts which had no contact at any point except in the Resident's ability to transfer a case from a native court to the British Provincial Court, which was presided over by the Resident. There were no appeals from native courts to courts within the other system. Each system was independent and self-contained.

The non-professional and flexible control administered by the Resident was well suited to the Moslem North where, as has been noted, a workable judicial system had functioned before the advent of the British. The degree of interference with the native courts which the Native Courts Proclamation of 1906 and later Ordinances authorized was not

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[26] Lugard, supra note 16, at 539.

[27] The Protectorate Courts Proclamation No. 4 of 1900 authorized three types of British courts: a Supreme Court, Provincial Courts and Cantonment Courts. In 1914, upon the amalgamation of the two separate Governments of Southern and Northern Nigeria, a single Supreme Court was created for the country and Cantonment Courts were replaced by Magistrates' Courts. See Supreme Court Ordinance, 1914; Provincial Courts Ordinance, 1914. Provincial Courts were abolished in 1933 and replaced by a High Court and Magistrates' Courts. See the Protectorate Courts Ordinance No. 45, 1933. Today the British-styled courts in Northern Nigeria consist of a High Court (with original and appellate jurisdiction), Magistrates' Courts (with criminal jurisdiction only), and District Courts (with civil jurisdiction only). High Court Law (1955); Criminal Procedure Code § 6 (1960); District Courts Law (1960) (chs. 49, 30, 33 of the Laws of Northern Nigeria, 1963).

as extensive as might have been provided for. The interference which was permitted was kept within tolerable bounds in Moslem areas through administrative restraint. This loose control, however, was less well suited to the southern provinces and the non-Moslem areas of the North, where, prior to 1900, centers of juridical power were difficult to define. In these areas the Native Courts Ordinance had the effect of imposing artificial native courts in districts which had previously been adequately served by tribunals that had grown out of the local social organization. As a result, in many areas unofficial tribunals continued to function in a twilight zone between arbitration and the application of native law and custom.

This problem and others prompted a general review of the native court system in 1933. The need for deference to traditional modes of settling disputes was recognized as well as the need for a revised system of appeals. Legislation to this effect was adopted in 1933.[28] Provision was made for the inclusion in court membership of those persons who had traditionally exercised judicial power, and native court areas were reorganized. Jurisdiction of native courts was extended over persons who, though not traditionally subject to the jurisdiction of native tribunals, led the same mode of life as the general native community. At the same time a system of appeals from certain native courts to the British courts was instituted as well as a more uniform system of appeals within the native court structure. Different provisions were made for Moslem and non-Moslem courts. Appeals lay from the district Moslem courts to the chief alkali's court, a higher grade native court of first instance, and ultimately to the Emir's court. Appeals from the original jurisdiction of the Emir's court went to the High Court. In non-Moslem areas appeals went either to a magistrate's court or to the High Court. Appeals from the appellate jurisdiction of the High Court lay to the West African Court of Appeal. It is important to note, however, that the magistrate and High Courts were not given supervisory power over the native courts; this was left with the Residents.

The 1933 reorganization is of particular significance in that it incorporated two basic changes in the general philosophy underlying the native court structure. On the one hand the deference paid to the traditional foci of judicial power represented an abandonment of earlier attempts to secure uniformity both within the native court system of the North and that of the whole country.[29] It was recognized that the court of a

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[28] The Native Courts Ordinance No. 44 of 1933, which became effective April 1, 1934.

[29] Uniformity was attempted in the North under the Native Courts Proclamation No. 5 of 1900 which required that all courts be four-member courts. Uniformity was attempted throughout the country following the amalgamation of the Governments of Southern and Northern Nigeria in 1914; the Native Courts Or-

territory must grow out of and be a part of the local social structure to be effective. At the same time, however, the provision for appeal to British courts in certain instances represented a movement toward a more professional approach in the native court system generally. It was a significant, though limited, contact between two previously self-contained systems: "[t]he 1934 judicial reform introduced a system of appeals which blended the previous dual organization of courts and law without giving assistance [to] the point of integration."[30]

Although the reforms of 1933-34 did much to strengthen the native court system in Northern Nigeria and to increase the confidence of the populace in the courts, further problems grew out of the reforms themselves. As noted earlier, the jurisdiction of native courts over persons was extended to include those persons who had adopted the mode of life of the community. This was necessitated largely by the movement of individuals between tribal areas. These persons expected that their own tribal laws (called "personal law" in Nigeria) would regulate the whole range of their family and social relationships. However, because each native court was to apply "the native law and custom prevailing in the territory over which the tribunal has jurisdiction,"[31] the application of any personal law was ruled out in favor of the lex fori. This created a potentially dangerous situation because, "if the system of the lex fori is to be workable at all, it has to be supplemented by rules of jurisdiction that prevent a court ever coming at all to decide a case for which the lex fori would be an unexpected, and thus an unjust, law."[32] Until 1943 the conflict between the individual's expectation that his personal law would be applied and the native court's inability to apply it was generally avoided because most strangers tended to settle in special quarters of the larger towns and these areas were excluded from the territorial jurisdiction of the native courts. At that time these enclaves were relatively small and there was "an attempt to frame a simplified [judicial] system on English lines run by an administrative officer as local authority who was also the magistrate before whom the cases were brought."[33] In 1943, however, it was felt necessary to bring the strangers' quarters under native authorities and consequently within the jurisdiction of the native courts. Special native courts, termed "mixed courts," were created to deal with the problem of mixed populations.[34] The bench was

dinance, 1914, applied to all native courts. Under the 1933 Ordinance the provisions extending jurisdiction over persons (see text accompanying note 28 supra) affected native courts in the northern provinces but not in the southern provinces.

[30] Brooke, supra note 23, at 73.

[31] The Native Courts Ordinance No. 5 of 1918, § 11(1)(a).

[32] Rheinstein, Problems of Law in the New Nations of Africa, in Old Societies and New States 230 (Geertz ed. 1963).

[33] Brooke, supra note 23, at 81.

[34] Id.

comprised of representatives of the major tribal groups in the community. The creation of courts of this type represented a novel approach to native court problems and carried forward the theory that native courts must command the respect of the community served. The problem remained, however, that the court could only apply the lex fori and not personal laws. Fortunately, during this early period, powers of reconciliation, arbitration and pressure on parties to accept what was regarded as an equitable settlement of a dispute prevented serious problems.

Further difficulties were created by the fact that the appeals procedure was relatively complex. Some fourteen different channels of appeal were available in varying situations and the alternatives and categorizations were not readily comprehensible to the average layman. In addition, questions arose as to what law should be applied on appeal. The existence of a dual system of courts did not create serious problems of judicial administration as long as the native courts dealt primarily with cases involving native law and custom and the English courts dealt primarily with cases involving English law. Problems emerged, however, when the two systems were joined at the appellate level and "modern principles were used to test a procedure centuries older."[85] The problem was illustrated most dramatically in the discrepancies that existed between Moslem and English laws of homicide, particularly in the failure of Moslem law to regard provocation as a mitigating circumstance. The conflict resulted in a number of judicial and legislative pronouncements in which various sorts of accommodation were put forth, but none was entirely satisfactory.[86]

By the nineteen fifties, five problems seemed central to the future development of native courts: the law to be applied in civil cases, the law to be applied in criminal cases, the appellate structure, the course of Islamic law and the mode of control and supervision of the courts. These were problems which did not readily lend themselves to ad hoc judicial or legislative pronouncements and it was felt that a general review of the purpose and direction of development of the native courts was needed. This review was undertaken by a Commission of Inquiry in 1951 and resulted in the present basic native court legislation, the Native Courts Law, 1956.[87]

[85] Id. at 67.

[86] In Gubba v. Gwandu Native Authority, 12 W.A.C.A. 141 (1948), it was held that native courts must exercise their criminal jurisdiction in accordance with the Criminal Code. Since native courts could not be expected to administer the Code because of lack of training and an absence of translations into the vernacular, this decision was reversed by legislation. Native Courts Ordinance, 1948 (No. 36 of 1948). In 1951 a Native Courts (Amendment) Ordinance was passed which provided that a native court shall not impose a punishment in excess of the maximum punishment permitted by the Criminal Code.

[87] N.R. No. 6 of 1956. The Commission's findings are reported in Brooke, supra note 23.

Recommendations of an international Panel of Jurists which was invited by the Regional Government in 1958 to review general court organization and the different systems of law in force in the region led to additional basic changes in the law and to the adoption of a Penal Code and Criminal Procedure Code which supplanted all other law in the criminal field.[38] The Panel was invited to reconvene in 1962 and still further reforms resulted from their recommendations.[39]

III

By 1956 the basic framework for the development of the native courts of Northern Nigeria for the foreseeable future was established. The Native Courts Law, 1956, and subsequent amendments clearly reflect the feeling of both the Commission of Inquiry and the Panel of Jurists that the native courts are, and must continue to serve as, the main legal forum of Northern Nigeria and not merely as specialized tribunals supplementing the British-styled High Court, Magistrates' Courts and District Courts.

Through the Native Courts Law, 1956, most of the major problems of appellate structure, court organization and applicable law have been resolved, and it is through this legislation and the (State) Area Courts Edicts of 1967[40] that the sudden impact of the indigenous and imported systems has been and will be tempered. The jurisdiction of native courts to try any cause or matter is limited to the territory defined in each court's warrant[41] and to the persons and subject matter defined in the Native Courts Law. In general terms, native courts have jurisdiction over all parties "who belong to a class of persons who have ordinarily been subject to the jurisdiction of native tribunals" and over those persons "whose general mode of life is that of the general native community."[42] While these terms are seemingly vague, in practice conflicts in jurisdiction over persons seldom arise. If a person does allege that he is

[38] See Statement by the Government of the Northern Region of Nigeria on the Reorganisation of the Legal and Judicial Systems of the Northern Region (Kaduna, 1958).

[39] See Statement Made by the Government of Northern Nigeria on Additional Adjustments to the Legal and Judicial Systems of Northern Nigeria (Kaduna, 1962). Findings resulting from the Panel's second session are discussed in Anderson, Return Visit to Nigeria: Judicial and Legal Developments in the Northern Region, 12 Int'l & Comp. L.Q. 282 (1963).

[40] See note 3 supra. Changes made by the various State Area Courts Edicts are largely ones of terminology. After April 1, 1968, native courts will be graded "area courts grades I, II, and III"; appeals will continue to go to the Provincial Courts which will be called "upper area courts." See, e.g., North-Western State Area Courts Edict, 1967, § 17. The Area Courts discussed infra, at p. 79, are to be merged into each state system.

[41] N.C.L., §§ 3(2), 15(1).

[42] N.C.L., § 15(1)(a)(ii).

not subject to the jurisdiction of native courts, application may be made to the High Court where the issue will be resolved.[43]

Subject-matter jurisdiction is somewhat more complex. Because individual courts are at various stages of development in legal expertise, and as a technique for distributing the litigation work-load, courts are graded "A," "A limited," "B," "C," or "D."[44] Thus, in civil matters, a grade "D" court has jurisdiction over matters relating to succession to property where the value of the property does not exceed fifty pounds. A grade "B" court has jurisdiction in such matters if the value of the property does not exceed five hundred pounds.[45] In criminal matters jurisdiction is limited according to the specific offense; for example, no court below the grade of "A limited" may try an offense of kidnapping.[46] In addition, powers of punishment are also restricted; a grade "D" court may not imprison a person in excess of nine months or impose a fine exceeding fifteen pounds.[47]

To permit courts to hear cases in which persons from other tribal areas are parties, native courts are authorized, under the Native Courts Law, to apply not only the native law and custom prevailing in the area of the jurisdiction of the court, but also the law binding between the parties.[48] In mixed civil causes (*i.e.*, causes in which two or more of the parties are normally subject to different systems of native law and custom) the court may apply a variety of laws: the particular native law and custom which the parties agreed or intended should regulate the transaction; a combination of two or more native laws or customs which the parties agreed or intended to regulate the transaction; or, in the absence of agreement, intention or presumption, the native law and custom—or combination of both—which it appears to the court ought to regulate the transaction. If no law or custom is applicable, the court may apply principles of natural justice, equity and good conscience.[49]

In criminal cases, native courts must administer the provisions of the Penal Code, 1959, and the Criminal Procedure Code, 1960, which, pursuant to recommendations of the Panel of Jurists, displaced all native law and custom in criminal matters in Northern Nigeria, and thus avoided the intolerable situation of having a multiplicity of criminal laws.[50] At the time of introduction of these Codes, it was clear that na-

[43] N.C.L., § 16.
[44] N.C.L., § 17.
[45] N.C.L., First Schedule.
[46] Criminal Procedure Code (1960) (ch. 30 of the Laws of Northern Nigeria, 1963) § 12 and Appendix A.
[47] N.C.L., First Schedule.
[48] N.C.L., § 20.
[49] N.C.L., § 21. In mixed land causes, the court must apply the native law and custom in force in relation to the land in the place where the land is situated. N.C.L., § 21(3).
[50] N.C.L., §§ 22, 26(3).

tive court judges could not be expected "to change overnight, from their existing law and procedure to a perfect application of a new penal code and a new code of criminal procedure."[51] Consequently, it was provided that an interim period of indefinite duration would be allowed during which the native courts would be "guided by" the Criminal Procedure Code and the Evidence Ordinance.[52]

In matters of appeal, the Native Courts Law, 1956, provides for a generally uniform procedure. Appeal from a grade "B," "C," or "D" court goes to the Provincial Court of the Province in which the native court is situated.[53] Provincial Courts are native courts which were established in 1960 in each provincial headquarters on the recommendation of the Panel of Jurists. Unlike previous native courts of appeal, Provincial Courts are not basically courts of original jurisdiction.[54] From Provincial Courts appeals lie to the Sharia Court of Appeal in cases involving questions of Moslem personal law and to the High Court in all other cases.[55] Provincial Courts do not have power to hear appeals from grade "A" or "A limited" courts; appeals from these tribunals lie directly to the Sharia Court of Appeal in cases involving Moslem personal law and to the High Court in all other cases.[56]

The Provincial Courts, the Sharia Court and the High Court are all Regional Government courts, entirely staffed and administered by Government. Thus, channels of appeal are completely outside the influence of native authorities. Previously, the initial steps in the appeal process had been through native authority courts, and delays and unpopular decisions were on occasion attributed to the unwillingness of the appeal courts to interfere with decisions of co-employees. The new appeal process avoids this problem and, in addition, provides a simplified and inexpensive procedure which is easy for the average person to comprehend.

In matters of supervision and control through review and revision of court decisions, the powers previously exercised by Residents and other administrative officers had been withdrawn and placed in the hands of a specialized corps of inspectors under the Ministry of Justice.[57] In its

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[51] Anderson, Conflict of Laws in Northern Nigeria: A New Start, 8 Int'l & Comp. L.Q. 442, 453 (1959).

[52] Statement by the Government of the Northern Region of Nigeria on the Reorganisation of the Legal and Judicial Systems of the Northern Region 3 (Kaduna, 1958).

[53] N.C.L., § 62.

[54] A Provincial Court may assume original jurisdiction only upon the order of the High Court or an inspector of native courts. In its original jurisdiction a Provincial Court has the powers of a grade "A limited" native court.

[55] N.C.L., § 66.

[56] N.C.L., § 66.

[57] N.C.L., Part VIII. Inspectors now come under the Judicial Department. Delegation of Powers (Native Courts) Notice, 1966, § 2(b).

second meeting, the Panel of Jurists considered that the system of review by administrative officers was, by general consensus of opinion, out of date and that the actual function of amending and revising native court judgments should be performed by a court of appeal. It was recognized, however, that while native courts were adjusting to the new Penal and Criminal Procedure Codes and to new appellate procedures, administrative guidance would still be necessary, and the Inspectorate was established for this purpose.

Although the Native Courts Law, 1956, and its amendments do resolve many of the major problems that have persisted in the development of the native courts, the future of the system really lies in the manner in which the reforms are assimilated. The rate of progress in modernizing the courts will not turn on the mere existence of legislative enactments but on the effectiveness of the transitional techniques developed to bridge the old system and the new. These techniques encompass four basic areas: the "guidance" principle affecting criminal and evidentiary procedure; the supervisory powers of inspectors of native courts; the special role of courts of appeal; and the development of new concepts in native tribunals.

IV

A. *The "Guidance" Concept*

In many ways, the principle of "guidance" serves as the philosophical underpinning of the present course of development of the native court system of Northern Nigeria although it is a legal concept which, strictly speaking, applies only to the application of the Criminal Procedure Code, 1960, and the Evidence Law. It is clear, for example, that the existence of administrative control by an Inspectorate and the somewhat paternalistic approach of courts of appeal to native court cases are in fact a recognition that a flexible approach to native court administration is needed and that native courts are to be "guided" in law and procedure generally.

With regard to the administration of criminal justice specifically, the theory is that "there should be an interim period during which the native courts [are] to be 'guided by,' rather than meticulously held to,"[58] the provisions of the Criminal Procedure Code, 1960, and this is provided for in the Code.[59] The guidance concept does not apply to substantive criminal law; in all cases the court must apply a specific section of the Penal Code and satisfy itself—and a court of appeal, if necessary—

[58] Anderson, supra note 51, at 454.
[59] Criminal Procedure Code (1960) § 386(1).

that each element is supported by evidence before convicting. Courts are never permitted to resort to native criminal law.[60]

In this respect, it is interesting to compare the concept of guidance as it has been applied to the African (local) courts of Uganda. It has been held there that although African courts are to be guided by the Penal Code and Criminal Procedure Code, "any attempt to administer the Penal Code or Criminal Procedure Code must always result in an unlawful exercise of power. . . . [G]uidance by statutes means no more than that the African courts are to be guided by the principles embodied in the legislation rather than by the express provisions themselves."[61] The situation in Northern Nigeria is actually the reverse side to the Uganda guidance coin: native courts must apply the express provisions of the Penal Code and attempt to apply the express provisions of the Criminal Procedure Code although a lenient attitude will be taken toward the latter. Only when a "failure of justice" results will reversal be required.[62]

Of central importance is the fact that it is provided that certain provisions of the Criminal Procedure Code—provisions considered basic to a fair trial—are binding on native courts.[63] The result is that while variation is permitted in general procedural matters, uniformity is required with regard to matters affecting fundamental rights. Appeal courts are thus given a device for dealing with appeals from a large number of courts whose capacities vary widely, and variations in practice and procedure are permitted at the trial court level as long as a case is decided within the limits of accepted notions of justice.

Although there have been several cases in which the High Court has had to determine whether a native court has correctly applied the binding provisions of the Criminal Procedure Code, [64] there has been little litigation in which the High Court has had to define or apply the guid-

[60] "After the commencement of this Law no person shall be liable to punishment under any native law or custom." Penal Code (1959) (ch. 89 of the Laws of Northern Nigeria, 1963) § 3(2). Sections 387 and 388 of the Code provide, however, that a man or woman may be guilty of adultry if he or she commits certain acts and is "subject to any native law or custom in which extra-marital sexual intercourse is recognized as a criminal offence."

[61] Katahikire v. Eishengyero Criminal Appeal No. 107 of 1964, High Court of Uganda; Monthly Bulletin, High Court, No. 62 (1964). See also West Nile District Administration v. Ndesi, reported [1965] Journal of African Law 74. [Journal of African Law hereinafter cited as J.A.L.]

[62] Criminal Procedure Code (1960) § 382. The test to be applied in determining whether a failure of justice was occasioned is defined in Noma v. Zaria Native Authority, 1963 Northern Nigeria Law Reports 97 [Northern Nigeria Law Reports hereinafter cited as N.N.L.R.].

[63] See Criminal Procedure Code (1960) §§ 388-95.

[64] See cases cited in Richardson & Williams, The Criminal Procedure Code of Northern Nigeria 220-32 (1963).

ance principle. The outer limits have been drawn, however. In *Adam Shiwa v. Bornu Native Authority*,[65] the appellant had been convicted in the Court of the Chief Alkali of Bornu of defamation under section 392 of the Penal Code. Under section 141 of the Criminal Procedure Code no court may take cognizance of the offense of defamation except on the complaint of the person aggrieved. In this case a police constable made the complaint. The High Court noted that native courts are only to be guided by section 141 of the Criminal Procedure Code. The Court held, however, that the guidance principle cannot be used "to confer on a native court a jurisdiction which it does not possess, or to confer on a trial court in this case a jurisdiction of which section 141 deprives all courts."[66]

The most significant case on the question of guidance is *Buraima Ajayi and Julande Jos v. Zaria Native Authority*.[67] The appellants had been charged with a criminal offense before the Court of the Chief Alkali of Zaria. The proceedings in the native court were in Hausa, which the appellants neither spoke nor understood. They spoke Yoruba and understood English, but not perfectly. The proceedings were interpreted by five different interpreters at successive stages. Two interpreted into English and one into Yoruba; it did not appear into what language the others interpreted. None of the interpreters was sworn. The High Court observed that on the record the conduct of the trial was "irregular" because of the use of a series of interpreters who were not bound by oath to interpret truly and whose ability to interpret satisfactorily may be questioned. The Court held, however, that the appellants were unable to satisfy the Court that there was in fact a misinterpretation and that a failure of justice was occasioned; therefore the High Court refused to upset the trial court's decision.

The case was further appealed to the Federal Supreme Court where the decision of the native court was set aside. That Court, as a prelininary matter, held that although the interpreters were not sworn as provided in section 242 of the Criminal Procedure Code, native courts are not bound by this section. Under the guidance concept, failure to follow the provisions of section 242 could not itself be grounds for setting aside the judgment. More importantly, however, the Court held that irregularities in the method of interpretation constituted grounds for reversal. While agreeing with the High Court that the burden of showing that an irregularity had led to a failure of justice is on the appellant, the Supreme Court stated that in view of the difficulties in establishing instances of misinterpretation, the burden is satisfied if it is shown that a

[65] 1964 N.N.L.R. 66.
[66] Id. at 68.
[67] 1964 N.N.L.R. 51.

reasonable person who was present at the trial might have supposed that the interpretation was defective to such an extent as to deny the defendant a fair trial. Justice must not only be done in native courts, it must seem to be done.[68] The Court noted that the right to the assistance of an interpreter is guaranteed by the Federal Constitution[69] and the Constitutional provision must be understood to mean the assistance of a competent interpreter.

In procedural matters, it seems clear that the concepts of "guidance" and "failure of justice" will not be stagnant formulations but, like the concept of due process in American constitutional law, will serve as standards "for judgment in the progressive evolution of the institutions of a free society."[70] As greater understanding of the Criminal Procedure Code is shared by the native courts and as legal training of native court staff improves, the guidance principle may be narrowed and native courts held to a higher standard of performance.

Perhaps the most difficult guidance problems will come in connection with the Evidence Law. At the same time that the Penal Code and Criminal Procedure Code were introduced in the Northern Region and made applicable to cases before the native courts, the Evidence Law was amended to provide that in dealing with evidence in a criminal matter, a native court must be guided by the Law.[71] In 1962 it was recommended by the Panel of Jurists that "some basic provisions of the Evidence Ordinance [now the Evidence Law] should be selected and made binding upon native courts,"[72] but at present native courts are bound only by provisions relating to burden and quantum of proof.[73]

Because trials before native courts are not strictly governed by the Law's rules of evidence or other evidentiary rules but are at the same time subject to judicial review, there is created for courts of appeal the problem of reviewing native court decisions without the relatively definite standards of the common law rules of evidence or those rules in-

[68] It is interesting to compare Mbi v. Numan Native Authority, 1959 Northern Region of Nigeria Law Reports 11 [Northern Region of Nigeria Law Reports hereinafter cited as N.R.N.L.R.], a case decided by the High Court before the Criminal Procedure Code (1960) became effective: the rule that justice should not only be done but also be seen to be done "is one of the fundamental rules of English law . . . . But we are not prepared to say that it is a rule of natural justice, or that its observance is required by good conscience or equity."

[69] Constitution of the Federation (Federal Nigeria Act, No. 20 of 1963) § 22(5)(e). See, however, the Constitution (Suspension and Modification) Decree No. 1 of 1966. A useful summary of legal and constitutional changes as of April 4, 1966, is provided in Keay, Legal and Constitutional Changes in Nigeria under the Military Government [1966] J.A.L. 92.

[70] Malinski v. New York, 324 U.S. 401, 414 (1945).

[71] Evidence Law (ch. 40 of the Laws of Northern Nigeria, 1963) § 1(3). The Evidence Law is derived from the Evidence Ordinance (ch. 63 of the 1948 Laws).

[72] Anderson, supra note 39, at 287.

[73] Evidence Law § 1(4) (added by N.N. No. 15 of 1963).

corporated in the Evidence Law. This situation creates a difficult role for the appeal courts. When the Evidence Law prevails, as it does in the Magistrates' and District Courts, the High Court is aided by prior determinations that certain evidence is unreliable or inadmissible. In the guidance situation, however, it seems the appeal courts will be compelled either to deal directly with the substantive aspect of the evidence in determining what probative weight can be given to it or to go beyond legislative directive and apply principles of the Evidence Law as though they are in fact binding.

It is not surprising that the High Court has chosen this latter course on several occasions.[74] However, while it is clear that certain evidentiary concepts must be regarded as virtually binding—for example, an appeal court could not uphold a conviction where an essential element is based solely on non-expert opinion evidence[75]—in most cases strict reference to the Evidence Law would merely undermine the guidance concept.[76] In circumstances where the appeal court is faced with apparent violations of the Law's rules concerning best evidence, evidence of a co-accused, confession evidence and the like, the court would seem compelled to confront the problem not in terms of common law evidence rules, which are primarily procedural in that they deal with admissibility, but rather the weight that can be given to the evidence. In this regard, the High Court might find assistance in such concepts as the "substantial evidence rule" in appellate review of federal administrative decisions in the United States.[77] Thus, instead of enforcing a strict application of the hearsay rule and its exceptions listed under the Evidence Law—which cannot be understood by most native courts in their present state of development—an appeal court might apply a form of the hearsay rule developed for the administrative process: "hearsay is admissible, and may be used for probative purposes if: (1) it has probative value; (2) it is reliable, as shown either by its source or by corroborating cir-

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[74] See Iyatawa v. Katsina Native Authority, 1961 Northern Nigeria Case Notes 12 (trial court relied on hearsay evidence in a situation not coming within the dying declaration exception and on a Moslem Qasama oath, which is an expression of non-expert opinion); Arab v. Bauchi Native Authority, Criminal Appeal JD/66CA/62, dated 6 August 1963 (admission of evidence of previous conviction held reversible error).

[75] Tittidabale v. Sokoto Native Authority, Criminal Appeal 78CA/61, dated 22 February 1962 (as proof of cause of death, trial court accepted testimony of medical "dispenser" not shown to be skilled in determining causes of death).

[76] Compare the situation where the Supreme Court of Nigeria and the West African Court of Appeal have applied the Judges' Rules (rules laid down for the guidance of police officers in taking confessions) to village heads (who, due to lack of training, cannot be expected to be familiar with the Rules). Nweke v. Queen (1959) 4 F.S.C. 225; Fatumani v. R. (1950) 13 W.A.C.A. 39.

[77] See Patterson, Hearsay and the Substantial Evidence Rule in the Federal Administrative Process, 13 Mercer L. Rev. 294 (1962).

cumstances; and (3) it is of a type which by its nature is capable of refutation."[78]

In determining the extent to which rules under the Evidence Law are to be applied to native courts, the legislature and the judiciary will have to examine the reasons behind the various rules and determine what evidentiary task or public policy is being advanced by the rule. A review of this sort will not only be necessary for creating workable standards for native courts to follow but could serve the additional purpose of reviewing the problem of what rules of evidence are relevant in the context of Nigeria generally. The original Evidence Ordinance, passed in 1943, was based on the 12th edition of *Stephen's Digest of the Law of Evidence* and contains much that is not relevant to the African context and excludes some matters of importance. In addition there are indications that some of the rules of evidence may be based on a misinterpretation of what the governing English law was in 1943.[79] A careful approach to guidance problems could contribute much to a reform of evidence rules generally in making them more suitable for the Nigerian situation.

B. *Inspectors of Native Courts*

The Government White Paper issued after the second meeting of the Panel of Jurists indicated that the function of amending or revising a native court judgment or sentence should now be performed by a court of appeal rather than Residents and other administrative officers. It was further indicated that a newly created corps of inspectors of native courts, acting in supervisory capacities, would have access to court records within the area of their individual jurisdictions; they "would be empowered, whenever they come across a case in which they consider justice to have miscarried, to refer that case to the court to which appeal would have lain."[80]

However, while primary emphasis is given to review by way of the normal appeal process, inspectors are given powers of revision and review similar to those previously held by Residents. The reason for this is that under the present system whereby native courts must apply the Penal and Criminal Procedure Codes and must attempt to update their

[78] Id. at 343.

[79] Section 177(2) of the Evidence Law provides that where accused persons are tried jointly and one gives evidence on his own behalf which incriminates a co-accused, the former shall not be considered an accomplice. This appears to be based on a misunderstanding of R. v. Barnes [1940] 27 Cr. App. R. 154. See the rule stated in R. v. Rudd [1948] 32 Cr. App. R. 224 and Ajaegbu v. Inspector-General 1956 N.R.N.L.R. 104. The Federal Supreme Court follows § 177(2) strictly. Queen v. Asaba, All Nigerian Law Reports 673 (1961).

[80] Statement Made by the Government of Northern Nigeria on Additional Adjustments to the Legal and Judicial Systems of Northern Nigeria, at 4 (Kaduna, 1962).

procedures generally, errors which occur can, in many instances, be dealt with more expeditiously by inspectors than by a formal court of appeal. It was recognized by the Government that during the present phase of adjustment of the native courts to new laws and procedures, instances would arise where review, revision or other action by an inspector would be more practical and efficient than referral of the case to a court of appeal. The exercise of quasi-judicial as well as administrative powers by inspectors was seen to have the advantage of avoiding delay and unnecessary expense to litigants in situations where appellate scrutiny is not essential. Moreover, the review or revision of certain cases by an inspector who is in frequent contact with the court will often have a greater educational impact on the court since the inspector is available to explain to the court where an error was made or how a particular procedure can be improved. Formal reports of appellate decisions cannot often be cast in terms which will be readily comprehended by native court personnel, particularly in light of the continuing language problem.

It is true, of course, that a number of these arguments apply in support of review by Residents. The acceptability of the present system, however, is premised on the existence of several safeguarding factors: emphasis is given to reporting a case on appeal, particularly in other than routine cases; under the guidance of the Commissioner for Native Courts, standards of review and revision are made more uniform; and inspectors, as professionals within the Judicial Department, are more suitable for the role of quasi-judicial officers.

It is important to observe that in calling for a specialized and legally trained body of inspectors to supervise native court activity, the Panel of Jurists not only rejected the principle of control by administrative officers but also impliedly rejected the principle of *judicial* control other than by appellate review of the native courts. At first appearance, the initial exclusion of the native courts from the control of the High Court of the Region might seem to have constituted a retreat from professionalization and from the long range goal of integration of the judicial systems. It may be observed, for example, that the District and Magistrates' Courts of Northern Nigeria have always been under the supervision of the High Court and that the customary courts of several other African states have long been under the supervision of their respective High Courts.[81] There were, however, a number of reasons for not investing the control function in the High Court, not the least of which was the fact that the limited number of High Court judges would not have time adequately to supervise the more than 750 native courts found in Northern Nigeria. Central to the development of the native court

[81] See, e.g., African Courts Ordinance, 1957 (ch. 38 of the Laws of Uganda, 1964) §§ 26, 35.

system is the ability of inspectors to be available immediately to litigants for quick and efficient investigation of complaints. Moreover, the inability of most High Court judges to speak the local languages would be a serious handicap to efficient control in a jurisdiction where the proceedings and records of the majority of courts are not in English.

The Government native courts edict of February, 1966, appears to have recognized these facts. While placing the native courts under the supervision of the Judicial Department, the Government at the same time retained the inspectorate system, headed by the Commissioner for Native Courts, as a unit within that Department. The combined effect of immediate supervision by a corps of inspectors and ultimate control by the High Court marks a significant move toward an increased sense of professionalism and judicial independence within the native court system. The administrative officers in whom powers of review and supervision previously resided were often considered by native courts to be external factors interfering with the normal functions of the court, and in later years the administrative staff had less and less time to devote to the supervision of the native court system due to other departmental demands. Inspectors, on the other hand, as officers within the Judicial Department, can be more readily regarded as an integral component of the native court system. In addition, inspectors are trained in native court law and procedure and several of the present inspectors have themselves had considerable judicial experience in the native courts.

The control exercised by inspectors of native courts is based on a right of access to all native courts within Northern Nigeria and to the records and proceedings of these courts.[82] An inspector may examine court records as a matter of routine or on the application of a litigant. If during the course of such an examination an error in law or procedure is detected, the inspector has a choice of alternatives: if the case is still pending, he may stay proceedings[83] and transfer or report the case to another court with jurisdiction; if the case is completed, he may report the case to an appropriate court of appeal or review the case himself.

If an inspector stays a case, it affords him sufficient time to examine the records. A stay of this sort would be used, for example, where the inspector has reason to suspect that the court may be without jurisdiction over the person or subject matter. This power is particularly significant since, as was noted earlier, the Native Courts Law, 1956, sets specific monetary limits on the amounts which may be involved in particular civil cases before particular grades of courts,[84] and the Criminal

[82] N.C.L., § 55. Powers of inspectors must be specially conferred by the Chief Justice, Delegation of Powers (Native Courts) Notice, 1966. See note 92 infra.
[83] N.C.L., § 56(1).
[84] See text accompanying note 45 supra.

Procedure Code of Northern Nigeria prohibits certain grades of courts from dealing with certain categories of offenses.[85] Moreover, the power to administer most civil legislation and miscellaneous criminal legislation must be specifically conferred.[86] A native court may erroneously accept a case either through ignorance or through difficulty in correctly classifying the case. In like manner, the Native Courts Law, 1956, imposes certain limitations concerning the persons who may be subject to native court jurisdiction. In addition to native courts not generally having jurisdiction over persons who do not come within the category of persons "whose general mode of life is that of the general native community," they have no jurisdiction over companies.[87] In instances where the "company" concept is not clearly understood or where the source of a debt is not clearly defined, a court may inadvertently accept a case where one party to the action is a corporation.

If an inspector determines that the court should not continue with the case for lack of jurisdiction or other reason, he may transfer the case to another native court, a District Court or a Magistrate's Court, depending on which court has jurisdiction, or he may report the case to the High Court.[88] The High Court may either hear the case itself or direct that some other court hear the case.

Upon the completion of a case by a native court, if an inspector is of the opinion that there has been a miscarriage of justice in the case he may, either on his own motion or in his discretion on the application of any person concerned, report the case to the court to which an appeal in such case would lie.[89] The normal procedure, of course, is for a litigant to pursue his own appeal without recourse to an inspector. In some instances, however, the litigant may be ignorant of, or misunderstand, his right of appeal or may be unaware that any grounds for appeal exist. Since legal practitioners may not appear to act for or assist any party before a native court,[90] errors of law committed in the trial court may not be apparent to a litigant. Without special grounds, however, an inspector would not normally exercise these powers on the application of a party if the purpose were merely to circumvent routine appeal procedure. And, in any case, an inspector is prohibited from exercising his powers where an appeal has already been instituted.[91]

As has been previously noted an inspector on whom the power of review has been conferred may review any case in any court to which

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[85] See text accompanying note 46 supra.
[86] N.C.L. § 24.
[87] Northern Region Legal Notice [hereinafter cited as N.R.L.N.] 320 of 1957.
[88] N.C.L., § 56(2).
[89] N.C.L., § 58.
[90] N.C.L., § 28.
[91] N.C.L., § 59.

he has access, either on his own motion or on the application of a person concerned. Since the introduction of the inspectorate system in 1963, the right of review for inspectors assigned to the provinces has been limited to courts of grades B, C and D. Recently, however,—shortly after the transfer of the Commission for Native Courts to the Judicial Department—the power of review has been withdrawn altogether from seventeen inspectors and the Commissioner of Native Courts, reflecting the High Court's reluctance to have administrative officers exercise judicial power.[92] As noted earlier, the power of review was to be used by an inspector when appellate review did not appear necessary, as in the case of a clear lack of jurisdiction or a clear error of law. Errors in relatively routine matters are not uncommon in a court system where tribunals must master much new law and procedure quickly, and review by an inspector provides a quick and efficient method of correcting errors without causing undue expense to the litigant or the state. Moreover, review by inspectors relieves appellate courts of a considerable burden and allows courts of appeal to devote more time to the more difficult problems which a developing legal system presents. In spite of this it is unclear whether the power of review will be restored by the Chief Justice.[93]

When a power of review is conferred, an inspector has four alternatives in disposing of the case: he may reverse, vary or confirm the decision; he may make such order or pass such sentence as the lower court could have made or passed; he may make some further order, such as an order that a person imprisoned be released on bail; or he may set aside a conviction, sentence or judgment or other order. If, after setting aside a judgment, the inspector considers it desirable, he may order that the case be retried either by the same court or some other court with jurisdiction; or he may report the case to the High Court. In reaching his decision the inspector may take any additional evidence that he considers necessary. In making any further order in a case, or in varying a decision, the inspector may not increase a fine or sentence of imprisonment or give an order in a civil case to the prejudice of any party without giving the convicted person or such party an opportunity to be heard.[94]

Despite the fact that the displacement of Residents by a corps of inspectors as the center of native court control means greater professionalization in native court supervision, there still remains the danger

[92] N.N. Notice No. 341 of 1967 (27 April 1967); N.N. Notice No. 224 of 1967 (16 March 1967).

[93] The power of review is not granted in the new Area Courts Edict, 1967. See North-Western State Edict No. 1 of 1967 (The Area Courts Edict, 1967) part VIII.

[94] N.C.L., § 58(3)(a)(iii).

that injection of administrative control into the judicial process may undermine the influence and prestige of the courts. This danger is significantly minimized by the fact that inspectors exercise restraint in interfering in cases and attempt to make their presence as unobtrusive as possible. Also, because the inspectorate is organized to perform an educative and guiding function as well as to see that justice is done, there is a continuing process of building up the competence of courts at the same time that errors are being corrected. This educative function represents an important change in the theory of judicial supervision and is the basis on which the position of native courts will be strengthened.

One reason why questions relating to the definition of "guidance" and general guidance problems do not appear more often in appellate decisions is that many of these problems are in fact resolved by inspectors without recourse to appeal. Although the phrase "guided by" was designed to ensure that appellate courts would take a "lenient and paternalistic attitude towards imperfect attempts to apply a wholly strange system,"[95] it may be that the real impact of the guidance concept will be through the corrective and guiding influence of the inspectors of native courts.[96]

C. *The Role of Courts of Appeal*

In addition to the withdrawal of appellate jurisdiction from native authority courts[97] and the existence of a separate court of appeal for matters of Moslem personal law,[98] perhaps the most significant feature of the native court appellate system is the governing law's conception of the role of appeal courts. While in the United States the appellate system is considered to be something quite distinct in the judicial process, in Northen Nigeria appellate review of native court decisions tends to be much more an extension of the trial. The High Court, the Sharia Court of Appeal or a Provincial Court may, for example, hear additional evidence,[99] review questions of fact as well as law[100] and review the

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[95] Anderson, supra note 51, at 454.

[96] Education of native court staff is also pursued through training courses at the Institute of Administration, Zaria, and in the Provinces under the sponsorship of the Commission for Native Courts. In addition, the Commission issues periodic circulars on points of law of interest to native courts and edits High Court and Sharia Court of Appeal decisions for native court use. See, e.g., the Hausa editions, Labarin Wasu Shari'u A Jihar Nijeriya Ta Arewa, 1961 et seq. (Case Notes of Northern Nigeria).

[97] See text accompanying notes 53-56.

[98] See text accompanying notes 55 and 56 supra. "Moslem personal law" is defined in the Sharia Court of Appeal Law, 1960 (N.R. No. 16 of 1960) §§ 2, 12.

[99] N.C.L., §§ 70(2), 70A(2). See Kumbin v. Bauchi Native Authority, 1963 N.N.L.R. 49 (evidence of doctor who examined deceased heard on appeal though not at trial).

[100] N.C.L., §§ 70(1)(b)(iii), 70(1)(A)(b)(ii), 70A(1)(a). See Kumbin v. Bauchi Native Authority, 1963 N.N.L.R. 49 (High Court examined stick with

propriety as well as the legality of a sentence.[101] In criminal cases an appeal court may, "after hearing the whole case or not and whether in whole or in part," substitute any other decision which the court of first instance could have made.[102]

In the United States, appeal courts "usually need not concern themselves directly with litigants, or even with questions of fact, but may concentrate on questions of law and policy."[103] In Northern Nigeria, however, in the Sharia Court of Appeal and the Provincial Courts, litigants appear on their own behalf[104] and the scope of review in all appeals from native courts can be virtually as broad as the scope of the original trial.

Section 9 of the Rules governing appeals to the High Court from native courts[105] provides, for example:

> At the hearing of the appeal the Appeal Court may allow, or require, witnesses to be called whether or not they gave evidence at the trial . . . and may do or order to be done anything which it would have power to do or order had the case been before the High Court in the exercise of its original jurisdiction.

Section 11 (2) of the Sharia Court of Appeal Law provides that the Court for all purposes of hearing an appeal "shall have all the powers . . . of every native court of which the judgment, order or decision is the subject of an appeal . . . ."

In addition, there is less finality in the appeal process than, for example, in England where "appeals terminate litigation, subject only to the possibility of further review in a higher court or retrial (in civil but not criminal cases) in the court below."[106] In appeals from native courts, appellate tribunals in Northern Nigeria may order retrial in criminal as well as civil cases and rehearings are not uncommon.[107]

A third aspect of the role of appeal courts is the guidance given native courts when retrial is ordered. The High Court will, on occasion, set

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which blow was struck to determine whether death of person in sound state of health could be caused).

[101] N.C.L., §§ 70(1)(b)(iii), 70(1)(A)(b)(ii). But see Bassa v. Jos Native Authority, 1964 N.N.L.R. 49. (court cannot substitute a conviction merely as a way to increase a sentence).

[102] N.C.L., §§ 70(1)(b)(iii), 70(1)(A)(b)(ii). See Ihom v. Tiv Native Authority, 1965 Nigerian Monthly Law Reports 472, 475 (High Court): "The English Appeal Courts do not have the wide powers which are given to us by section 70 Native Courts Law 1956."

[103] Karlen, Appellate Courts in the United States and England 157 (1963).

[104] No legal practitioner may appear for or assist any party before these courts. Sharia Court of Appeal Law, 1960, § 19; N.C.L., §§ 60(2), 28.

[105] The Northern Region High Court (Appeals from Native Courts) Rules, 1960 (N.R.L.N. 112 of 1960).

[106] Karlen, supra note 103, at 158.

[107] N.C.L., §§ 70(1)(b)(ii), 70(1)(A)(b)(i) (retrial in criminal cases); § 70A(1)(b) (retrial in civil cases); §§ 70(1)(b)(iii), 70(1)(A)(b)(ii) (rehearing in criminal cases); § 70A(1)(a) (rehearing in civil cases).

forth in detail the procedure to be followed by the trial court, particularly when the retrial involves a matter of a technical nature, for example the taking of medical evidence and the establishment of a witness' expert qualifications. Thus, in the recent case of *Zaria Native Authority v. Aishatu Yar Dauda Bakori*,[108] where the accused was deaf and dumb and her capacity to stand trial was in question, the court indicated in precise terms the type of evidence which it was advisable for the trial court to hear and the procedure to be followed in taking the evidence.

Although the appellate process is constructed to provide maximum flexibility in the review of cases and to ensure that all matters are decided "according to substantial justice without undue regard to technicalities,"[109] the appeal courts function within the framework of traditional procedural safeguards. A substituted decision may be made only if the appellant was accused of the substituted offense in the lower court or if the appellate court is satisfied that the defense of the appellant before the court of first instance would not have been substantially affected if he had been so accused.[110] In addition, the High Court has held that the intention of section 70(1)(b)(iii) of the Native Courts Law, 1956, is to allow an appeal court to substitute a conviction for another offense where the original conviction was wrong and not to allow it to do so merely because it thinks that the offense deserves a more serious punishment.[111] Appeals cannot be entertained unless the appeal is entered in the strict manner specified by law.[112]

It is to be expected that some strains will be experienced in an appeal system which attempts to maintain the type of flexibility contemplated by the Native Courts Law, 1956, while at the same time incorporating traditional appellate restraints. The appeal courts of Northern Nigeria are confronted with the problem of utilizing certain trial court techniques without becoming mere trial courts themselves. The problem has presented itself in a number of cases in which the High Court has drawn a distinction between "retrial" and "rehearing." In *Igboke Oroke v. Chuku Ede*,[113] a civil case appealed from a native court to a Provincial Court, the unsuccessful plaintiff alleged that a vital witness in his favor, who had been in court during the trial, did not give evidence. The Provincial Court heard that witness and another of the plaintiff's wit-

[108] 1964 N.N.L.R. 25.

[109] N.C.L., § 70C.

[110] N.C.L., §§ 70(1)(b)(iii), 70(1)(A)(b)(ii). See Basharu v. Bornu Native Authority, 1962 N.R.N.L.R. 50 (Federal Supreme Court).

[111] Bassa v. Jos Native Authority, 1964 N.N.L.R. 49.

[112] Audu v. Jos Native Authority, 1962 N.N.L.R. 46 (failure to file copies of notice to appeal with lower court and make requisite deposit); Bauchi v. Bauchi Native Authority, 1963 N.R.N.L.R. 45 (erroneous assumption of appellate jurisdiction by Provincial Court).

[113] Appeal No. MD/9A/1962, dated January 10, 1964. See also Atswaga v. Agena, Appeal No. MD/34A/1963, dated January 10, 1964.

nesses and also admitted a sketch plan which had been prepared for the use of the Provincial Court. The Provincial Court reversed the trial court judgment.

The case was further appealed to the High Court which held that the Provincial Court erred in hearing additional evidence and in reversing judgment on the basis of that evidence. The High Court declared that an appeal court should not allow additional evidence to be adduced unless the evidence could not by the exercise of reasonable diligence have been obtained for use at the trial. Secondly, the High Court observed that while section 70A(1)(a) of the Native Courts Law, 1956, authorizes an appeal court to rehear a civil case and to reverse or vary a decision on the basis of the rehearing, the rehearing must be confined to the original case but no more. If additional witnesses are to be heard or different evidence is to be adduced, the normal procedure is for the court to order a retrial. Only if the new evidence were of a decisive nature would reversal or variance of a decision be permissible. New evidence "cannot as a rule do more than show that the trial court might have come to a different decision if it had itself heard the additional evidence. In such a case, the appeal court should order a retrial but is not justified in reversing the trial judgment."[114]

The High Court's interpretation of section 70A of the Native Courts Law is not compelled by a fair reading of the section. It provides:

> (1) Any court exercising appellate jurisdiction in civil matters under the provisions of this law may in the exercise of that jurisdiction—
>
> (a) After hearing the whole case or not, reverse, vary or confirm the decision of the court from which the appeal is brought . . .
>
> (b) quash any proceedings and thereupon where it is considered desirable, order any such cause or matter to be heard *de novo*. . . .
>
> (2) In the exercise of its powers under this section a court may hear such additional evidence that it considers necessary for the just disposal of the case.

Subsection (2) refers to the exercise of the court's powers "under this section" and would appear to apply to paragraph (a) as well as (b). Nor is there any explicit restriction that the additional evidence has to be evidence not available at the trial. In the past it seems to have been a common practice in African courts, when hearing appeals, to call any additional evidence that might be available.[115] In the present stage of development, however, the Court seems justified in enforcing a dis-

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[114] Oroke v. Ede, Appeal No. MD/9A/1962, dated January 10, 1964.
[115] [1965] J.A.L. 74.

tinction between trial and appeal processes. As the Court stated in *Oroke*:

> Once a case has been decided, the dispute should not be reopened by trying the case again. . . . Since a dispute is to be decided by the trial court and not in the appeal court, each party must make the whole of his case in the trial court . . . . [H]e should not be allowed to improve on his case in the appeal court.[116]

In the Provincial Courts particularly, where litigants appear on their own behalf as in the lower courts, an emphasis on retrial in the court below rather than on an expanded concept of rehearing seems desirable. If the Provincial Court were able to have any additional evidence adduced and were able to conduct a rehearing that is virtually a retrial, the role of trial courts would be seriously undermined, particularly in the minds of uneducated litigants. This argument is less forceful with regard to proceedings in the High Court where the presence of lawyers and English-trained judges gives the appellate procedure a formality which sets it apart from the trial court procedure. But even in the High Court it is questionable whether the Court should assume too many trial techniques. Particularly in the context of a developing legal system the High Court should perhaps place greater stress on its lawmaking functions and concern itself as much with setting down guidelines for the future as in seeing that justice is done in the particular case.

The *Oroke* case in which the rehearing-retrial distinction is developed indicates the type of balance that will have to be maintained if the native courts are to be effectively guided and litigants are to find justice without at the same time undermining basic standards of appellate procedure.

D. *Forum Reform*

One principle that has been basic in the development of the native courts of Northern Nigeria is that the courts should be acceptable to the society which they serve. Deference to the needs and traditions of the community is a central factor in the enduring effectiveness of the courts today. As was noted earlier, when statutory native courts were first created, the traditional composition of Moslem courts was not respected and in many instances those persons who had traditionally exercised judicial power were excluded from court membership. Both of these shortcomings had to be eventually overcome through legislation.

More recently, the problem has been one of finding courts acceptable to a mobile, mixed and commercial population. The creation of mixed courts in the pre-war period served as an initial response to the problem of mixed litigation[117] and, in many respects, as the Attorney-General of

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[116] Oroke v. Ede, Appeal No. MD/9A/1962, dated January 10, 1964. See also Zaria v. Maituwo, 1966 Nigeria Monthly Law Reports 59.
[117] See text accompanying note 34 supra.

the northern region commented in 1956, "they have done very good work and have been essential to the life of urban communities. Where not created they have arisen spontaneously and have received subsequent official recognition."[118] It might be said, however, that the value of these courts lay less in their ability to solve legal conflicts according to strict legal precepts than in their ability to merely provide solutions to problems that came before them. The strength of these courts has lain in the fact that they have been composed of representatives of the major tribal groupings in the community and thus have been acceptable forums for persons from these tribes. Their weakness has lain in the fact that in many instances the tribal representatives, as the oldest and most respected members of their tribal communities, were cut off from the main stream of development of their tribal laws and customs. In addition, the various representatives have frequently failed to agree on decisions and have frequently quarreled. This has been due not only to sectional pressures and partisanships but to the difficulty in applying principles when there is a conflict of personal law. It is clear that in recent years the mixed courts "have lost some of the favour with which they were regarded and reform is required . . . ."[119] The mixed courts have served as a transitional technique of dispute-settling which now needs revision.

An additional problem in finding a suitable forum arose in the situation where non-Moslems found themselves parties to actions before Moslem courts and Moslems found themselves parties in actions before non-Moslem courts. In rural areas the administration could not afford a double system of native courts. Thus, a non-Moslem living in a predominately Moslem area was likely to find himself, in criminal cases and in civil cases where he was a defendant, before a Moslem court. Even in areas where mixed courts existed, there was nothing to compel a Moslem court to transfer to the mixed court a case in which one or both parties were non-Moslems.[120] In response to this problem in the period just before national independence, it was proposed that non-Moslem defendants before Moslem courts and Moslem defendants brought before non-Moslem courts should be given the opportunity of "opting out" of that court in favor of a more suitable tribunal.[121] The proposal resulted in an amendment to the Native Courts Law, 1956, which provided that in all cases before native courts the defendant must be asked his religion. If the defendant were a Moslem in a non-Moslem court or a non-Moslem in a Moslem court, the alkali or president of the

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[118] Northern House of Assembly Debates (March 8, 1956).
[119] Brooke, supra note 23, at 83.
[120] See Osuagwu v. Soldier, 1959 N.R.N.L. 39.
[121] See Richardson, "Opting Out": An Experiment with Jurisdiction in Northern Nigeria, [1964] J.A.L. 20.

court was required to ask the defendant if he consented to having his case tried before that court or if he desired to have the case tried in another court. If the defendant elected to opt out, the Resident was to be informed and he would direct in what court the case would be tried.[122]

The mere passage of this amendment in the period immediately preceding independence probably played a role in dispelling some of the fears of non-Moslem minorities in the North and in easing the movement toward self-government, but the device created a number of problems.[123] More importantly, there was in the very concept of a choice of forums the underlying implication that there was special merit in being tried in one court rather than another. It was recognized that the opting out provision would, in the long run, only serve to undermine public confidence in native courts generally and to deepen existing divisions. Thus in 1961, after the adoption of the new Penal and Criminal Procedure Codes and the establishment of an independent appellate system, the opting out experiment was repealed.[124]

Although the judicial reforms in criminal law and appellate procedure did much to alleviate the problems that had given rise to the opting out device, it was seen that instances would undoubtedly arise in which access to a native court disassociated from local loyalties would be desirable. Consequently, in 1963 when the native court inspectorate system was established, it was provided in the Native Courts Law that if it should appear to an inspector or to the High Court that "it is necessary for the purpose of securing, as far as possible, a fair and impartial trial" or "it is expedient in the interests of justice generally," that a particular matter should not be tried at first instance by the native court having jurisdiction to do so, an inspector or the High Court may order the matter to be tried at first instance by the Provincial Court of the particular province.[125] This technique provided the opportunity of access to a native court divorced from local loyalties but placed the option in the hands of the inspector or High Court, who can exercise

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122 N.C.L., § 15A (added by the Native Courts (Amendment) Law, 1958).

123 The section was used to obtain postponements in cases and inspired cases of apostasy before Moslem courts. The wording of the section as originally written implied that there was not only a right to opt out but also a right to choose the court of trial. The Native Courts (Amendment) Law, 1960, remedied some of the procedural problems.

124 The Native Courts (Amendment) Law, 1961. Compare the following statement in Cotran, African Conference on Local Courts and Customary Law, IV J. of Local Ad. Overseas 128, 132 (1965): In most countries there are provisions "whereby a party could apply for a transfer from the local courts to a court where legal representation [is] allowed either as of right or at the discretion of the court, and the Conference commended these provisions . . . ."

125 N.C.L., § 63. Original jurisdiction of Provincial Courts is no longer dependent on the prior order of the High Court or an inspector. The Native Courts Law (1956) (Amendment No. 2) Edict, 1967 (Edict No. 4 of 1967).

independent judgment. Inspectors can also make transfers to other courts, and since this power is exercised in the inspector's discretion, the problems inherent in the former opting out procedure are not present.[126]

Experience with original jurisdiction in the Provincial Courts has indicated the usefulness of access to a Government native court in certain cases and has led to the recent creation of a new type of tribunal which represents an important departure in the concept of native courts in Northern Nigeria. These new courts, termed "Area Courts," are Government courts of original jurisdiction and are uniquely qualified to meet the legal needs of the communities in which they exist.[127] As Government courts, they possess independence from local associations and loyalties. As Government courts staffed by sole judges of high caliber, they are able to deal effectively with problems of mixed law and to avoid many of the problems inherent in the mixed court situation.[128] In addition, because the Area Courts are presided over by traditional native judges of high qualifications, the courts are able to deal with important commercial litigation involving indigenous traders in commercial and industrial centers. Indigenous traders generally prefer to have their problems dealt with in such courts where procedures are less expensive and are simpler and speedier than in the British-modeled District Courts or High Court. Area Courts have a further advantage over the District and High Courts in that Area Court judges are able to speak at least one of the native languages and are familiar with local laws and customs. The Area Courts, in short, provide many of the advantages of both the native courts and the non-native courts without their respective limitations and represent an important development in adjusting the native court system to modern problems and procedures.

The recent Government decrees withdrawing all native courts from the control of the Ministry of Justice and the native authorities represents a logical next step in divorcing the courts from political control.[129] The effect of the decree, however, will probably not be felt immediately as was the creation of Government Provincial and Area Court. Presumably, it will still be necessary for the Chief Justice to appoint court

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[126] N.C.L. § 56(2).

[127] N.C.L., Part IX(A). Area Court judges and all staff of Area Courts are public officers in the public service of the Government. N.C.L., § 70E(2). The "Area Courts" referred to in the text are not to be confused with "area courts," the new terminology for all native courts as of April 1, 1968. See notes 3 and 40 supra. On that date the Area Courts referred to in the text will be merged into the general governmental court system of each state and will also be called area courts.

[128] Area Courts, however, have not replaced mixed courts.

[129] Delegation of Powers (Native Courts) Notice, 1966.

personnel from groups of nominees put forth by the native authorities. Moreover, the isolation of many of the courts from the center of government will continue to enforce a close working relationship between the native authorities and court personnel. But undoubtedly the degree of local government control will be lessened.

V

The philosophy underlying the institutional development of native courts in Northern Nigeria has been one of building upon the basic indigenous court structure. Governing legislation has been directed toward improvement and adjustment rather than displacement of the indigenous system.

In certain respects, there has been little practical alternative to this course of action. Any significant substitution of Magistrate's and District Court jurisdiction for native court jurisdiction is impossible at this stage because of the extremely small number of professionally trained lawyers in the North. Lawyers from outside the North would encounter immediate problems of language and unfamiliarity with local social systems and would of course face difficulties in gaining the confidence of local populations. Equally important is the fact that as long as recognition is given to native law and custom in civil matters and as long as different laws continue to apply to different classes of persons, it is necessary to retain court personnel familiar with these laws.

Moreover, from the point of view of the long range development of an effective system of legal institutions and norms, the present government policy of strengthening and upgrading native courts, as opposed to a displacement of these courts in favor of institutions received from non-indigenous sources, seems essential. The various native laws and customs governing civil affairs must eventually give way to codification, unification and modernization. Yet, unless native law and custom is to be merely abandoned in favor of imported laws, it is important to have on the legal scene men who understand these tribal laws and who can participate in their rationalization and unification. These men can play a significant role not only in seeing that certain indigenous social values are maintained when codifications are made but also in facilitating acceptance of new laws in their communities.

And, indeed, even with regard to criminal matters where modern Penal and Criminal Procedure Codes prevail, it is important at this stage to have the law administered by judges who are intimately familiar with local social and cultural conditions and who can, as their training progresses, perceive ways in which the Codes can be "Nigerianized" to meet local needs. While a certain amount of deference to local values is

shown in the Northern Nigerian Penal Code,[130] the Code is still largely an "imported" one.

In the long run, of course, the goal must be one of bringing together the best aspects of native and professional courts. The Area and Provincial Courts represent important steps in this direction. By attracting men of high caliber who combine extensive legal training with knowledge of local laws and customs, these courts are able to deal with a broad range of cases. The Area Courts have already shown a competence to deal with rather complex commercial and non-commercial litigation and appear to have attracted the confidence of the growing body of indigenous traders as well as the general population. It is through such courts, as well as through upgrading of more traditional forums, that the goals of modernization, unification and Africanization of legal institutions and norms can be realized.

Central to this whole scheme of development is the problem of education, not only for native court judges and staff but also for inspectors of native courts, High Court judges and practicing lawyers. Central also is improved communication between the High Court (and to a lesser extent the District and Magistrate Courts) on the one hand and the native courts on the other.

The effective functioning of the inspectorate system depends largely on the recruitment of men knowledgeable in native law and custom, modern criminal law and local languages. Such men are difficult to come by and heretofore some of the best work by inspectors has been done by two-man teams of western-trained lawyers and indigenous personnel trained in native court matters.[131]

In the past the High Court, staffed by expatriate, British-trained lawyers, has been markedly isolated from native court matters. Clearly, if the High Court is to set sound native court policy, either judicially or administratively, its members must become more familiar with these courts. The transfer of the Commission for Native Courts to the Judicial Department, while primarily aimed at divorcing the Commission from

[130] See, for example, note 60 supra (deference to native law and custom in adultery cases). The Penal Code (1959) § 403 punishes consumption of alcohol by a Moslem and is, in effect, a codification of Moslem law. Offenders who are of the Moslem faith may be liable to the punishment of the traditional haddi lashing "as prescribed by Moslem law" for offences contrary to certain sections of the Penal Code (1959) relating to adultery, defamation and the drinking of alcohol. Penal Code (1959) § 68. See also Criminal Procedure (Haddi Lashing) Order in Council, 1960 (N.R.L.N. 85 of 1960) which codifies the traditional method of carrying out the haddi punishment.

[131] The two-year diploma course at the Institute of Government, Zaria is directed toward the training of inspectors of native courts and area court judges. See Milner, Legal Education and Training in Nigeria, Nigerian Law—Some Recent Developments 131 Int'l & Comp. L.Q. (Supp. No. 10, 1965).

political influence, may have the additional and unanticipated benefit of making the High Court more aware of native court problems and of improving communications between the two judicial systems.

Generally overlooked is the role of the practicing lawyer. As noted earlier, lawyers are not permitted to appear before native courts. This does not mean, however, that lawyers cannot advise persons within the jurisdiction of native courts. In recent years this counseling function has been clearly increasing among the lawyers in Kaduna and Kano, yet practicing lawyers have frequently sought out the guidance of the Commission for Native Courts, frankly professing ignorance of all law relating to native courts. Moreover, as lawyers trained for the English bar, they have been unfamiliar with the client-counseling aspects of law practice.[132] Much depends on the education of lawyers trained in Nigerian law schools in the fields of native court law and native law and custom, as well as the common law.[133] The emergence of such lawyers equipped to counsel clients who will appear before native courts may help to lay the foundation for eventual acceptance of trained lawyers as judges and advocates in native courts.

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[132] For the background to this state of affairs see Gower, Independent Africa, the Challenge to the Legal Profession 104-17 (1967).

[133] See Milner, supra note 131, at 115.