

CHAPTER 1

HISTORICAL BACKGROUND

I.

Introduction to Chapter 1:

The Settlement of 1960 and Why It Still Matters Today

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1. The Settlement of 1960.

“The Settlement of 1960” – agreed to by Northern Nigeria’s Muslims and implemented in a spate of legislative enactments in the run-up to Independence – was one of the pivotal events in the history of the application of Islamic law in Nigeria. Before 1960 Islamic law, including Islamic criminal law – although affected in various ways by sixty years of colonial rule¹ – was still “more widely, and in some respects more rigidly, applied in Northern Nigeria than anywhere else outside Arabia”.² In 1960 Islamic criminal law was abrogated and from then the application of Islamic civil law in the North, as in most of the rest of the Muslim world at the time, was increasingly limited to the law of personal status and family relations. Before 1960 the Northern courts in which Islamic law was administered still approximated to the *qadis* courts of classical Islam – in the ways the judges were trained, in the procedures they followed, in the books they turned to to find the law, even in their subservience to the local emirs, who also had judicial functions. After 1960 the courts and their judges became ever less traditionally Muslim and more “Western”, and the judicial powers of the emirs were first curtailed and then eliminated completely. The Settlement of 1960 brought these changes about or set them in motion. The programme of “implementation of Sharia” begun in 1999 in twelve Northern states, which it is the main purpose of this book to document, is in large part a reaction against the Settlement of 1960, and an attempt to restore, as far as possible, the *status quo ante*.

¹ Studies of the effects of colonial rule on the application of Islamic law in Northern Nigeria include C.N. Ubah, “Islamic Legal System and the Westernization Process in the Nigerian Emirates”, *Journal of Legal Pluralism*, 20 (1982), 69-93; J.M. Abun-Nasr, “The Recognition of Islamic Law in Nigeria as Customary Law: Its Justification and Consequences”, in J.M. Abun-Nasr et al., eds., *Law, Society, and National Identity in Africa* (Hamburg: Helmut Buske Verlag, 1990), 31-44; A.H. Yadudu, “Colonialism and the Transformation of Islamic Law in the Northern States of Nigeria”, *Journal of Legal Pluralism*, 32 (1992), 103-139; S. Kumo, “Sharia Under Colonialism – Northern Nigeria”, in N. Alkali et al., eds., *Islam in Africa: Proceedings of the Islam in Africa Conference* (Ibadan: Spectrum Books Ltd., 1993), 1-22; M.S. Umar, *Islam and Colonialism: Intellectual Responses of Muslims of Northern Nigeria to British Colonial Rule* (Leiden and Boston: Brill, 2006), 40-55 and 185-208.

² J.N.D. Anderson, *Islamic Law in Africa* (London: Frank Cass and Co. Ltd., 1955), 219.

2. What this chapter comprises.

The need for reform of the legal and judicial systems in the North seems already to have been recognised, at the highest levels of the Regional Government, by 1957. The process by which the details of the Settlement of 1960 were then worked out, and Northern Muslims were persuaded to accept them, included sending delegations of Northerners to Libya, Pakistan, and Sudan to investigate the legal systems there (early 1958); commissioning an international Panel of Jurists to come to Northern Nigeria to study the legal and judicial systems in place here and to recommend changes (August-September 1958); and then, when the Panel of Jurists' recommendations were accepted by the Northern House of Assembly and House of Chiefs (December 1958), the extended negotiation of the details of the implementing legislation, most particularly the new Penal and Criminal Procedure Codes, with the North's leading *ulama* (1959-60). At the invitation of the Government of Northern Nigeria the Panel of Jurists returned in 1962 to review implementation of their earlier recommendations and to suggest further adjustments. In this chapter we publish, for the first time anywhere:

- the 1958 "Report of the Panel of Jurists";
- the memoranda on progress and problems with implementation of the Panel's 1958 recommendations, written by leading figures in the North's legal establishment, which were submitted to the Panel of Jurists on their return visit in 1962, along with the minutes of the interactive sessions the Panel held with Northern rulers and judges in Sokoto, Kano, Maiduguri, Makurdi and Ilorin; and
- the 1962 "Report of the Panel of Jurists: Second Session", which reviewed progress and made recommendations for further adjustments.

We also include in this chapter two documents that have previously been published but which can now be read again in fuller context:

- the 1958 White Paper on the first report of the Panel of Jurists, "Statement by the Government of the Northern Region of Nigeria on the Reorganisation of the Legal and Judicial Systems of the Northern Region", and
- the 1962 White Paper on the second report of the Panel of Jurists, "Statement made by the Government of Northern Nigeria on Additional Adjustments to the Legal and Judicial Systems of Northern Nigeria".

Finally, in order to give some further context to the documents published here, we have put together

- a brief "Who was Who" in the Settlement of 1960,

which immediately follows this introduction.

3. Why include these materials in this book?

The reader may justifiably wonder why, in a book documenting events of 1999-2005, we have included documents from 1958-62. Let us try to explain.

a. Early opinion about the Settlement of 1960. Today, Muslim opinion is largely against the Settlement of 1960, while Christian opinion is all for it. But this was not always the position. In the run-up to independence it was among Nigeria's Christians

that opposition to the Settlement of 1960 was most vocal. The North's Muslims, by contrast, seem to have been, let us say, reluctantly acquiescent and cautiously hopeful.

Their leader, Ahmadu Bello, the *Sardauna* of Sokoto and Premier of the Northern Region, persuaded Muslims that the concessions they would make – including the abrogation of Islamic criminal law – were necessary to the progress of the North in the dawning era of Northern self-government (effective 15 March, 1959) and Nigerian independence (1 October, 1960).³ For what they conceded, the Muslims gained important perquisites in return: these included a prestigious new Sharia Court of Appeal for the Northern Region, formally on a par with the Regional High Court, whose judgments on matters within its jurisdiction were final and unappealable to any other court; and a seat for the judges of the Sharia Court of Appeal on the Native Courts Appellate Division of the High Court, giving them a voice in the development of all aspects of the law of the Northern Region.⁴ Perhaps most importantly, as has already been noted, at every stage of the discussions the North's *ulama* were closely consulted, “in order that they might be satisfied that there was nothing in the [new legislation, particularly the new Penal and Criminal Procedure Codes] which was contrary to the Moslem religion and therefore unacceptable to the people of that faith.”⁵ A huge effort – detailed in Part V of this chapter – then went into making the new arrangements work properly; and for a time, it seems, they actually did.

Christian opposition was not widespread. The *Sardauna's* party, the Northern People's Congress (NPC), included Christians, one of whom was on the Panel of Jurists;⁶ judging from the records of the 1958-60 debates the NPC members of the Northern legislative houses seem all to have supported the Settlement of 1960. But Christian opposition existed and had its effects. Mr. J.S. Olawoyin, the leader in the Northern House of Assembly of the opposition Action Group, speaking on the occasion of the second reading of the bill for the new Penal Code Law, said the bill, and the consultations with Northern *ulama* that had led to it, showed “that serious attempts

³ See e.g. the *Sardauna's* speech to the Northern House of Assembly moving that “this House accepts the Government's proposals contained in the Sessional Paper on the Reorganisation of the Legal and Judicial Systems of the Northern Region”, Debates of the House of Assembly (Second Legislature) Second Session, Third Meeting, 10th to 13th December, 1958, columns 937-941. This speech is reprinted in S.I. Nchi and S.A. Mohammed, eds., *Alhaji Sir Ahmadu Bello, Sardauna of Sokoto: His Thoughts and Vision in His Own Words* (Makurdi: Oracle Pub. Co. Ltd. 1999), 188-192. The Sessional or White Paper in question is reprinted as Part IV of this chapter.

⁴ The perquisites gained by the Muslims in the Settlement of 1960 are discussed in greater detail in P. Ostien, “An Opportunity Missed by Nigeria's Christians: the Sharia Debate of 1976-78 Revisited”, in B.F. Soares, ed., *Muslim-Christian Encounters in Africa* (Leiden and Boston: Brill, 2006), 221-55 at 229-31.

⁵ The Attorney-General, speaking to the Northern House of Assembly on the second reading of the Bill for the Penal Code Law, Debates of the House of Assembly (Second Legislature) Third Session, 12th to 19th August, 1959, column 484.

⁶ Peter Achimugu, who was also a member of the delegations of Northerners sent to investigate the legal systems of Sudan, Libya and Pakistan in early 1958. J.N.D. Anderson, one of the foreign members of the Panel of Jurists, was also a Christian.

are being made to Islamise the whole of the Northern Region”⁷ – a refrain heard from Nigeria’s Christians on many subsequent occasions as well. Mr. Olawoyin, represented by Chief Rotimi Williams of Nigeria’s Western Region, was later the lead applicant in a lawsuit that temporarily derailed the Native Courts Appellate Division of the Northern High Court, by ousting the judges of the Sharia Court of Appeal from it.⁸ Nigerian opponents of the Settlement of 1960 found a British ally in Mr. Justin Price, a judicial magistrate in the North, who

published an article in the *Nigerian Citizen* attacking the Penal Code Bill as a vehicle for the imposition of Muslim law upon Northern Nigerians by the back door. He went on to assert that the Criminal Procedure Code Bill was an instrument designed to introduce trial by inquisition. Price’s intervention was seen [in the North] as instigated by lawyers in the Eastern and Western Regions. The [southern] Nigerian press covered the story with the inflammatory headline, ‘Where Justin is, then Justice shall be done’!⁹

Price’s attacks, also published in *Modern Law Review*,¹⁰ came just at a time when the North needed support in the National Assembly from MPs from the Eastern and Western Regions, to repair legislatively the damage done by Olawoyin’s lawsuit; Price’s contentions were viewed as potentially damaging enough to call for responses both by the *Sardauna* himself, in the Lagos press, and by J.N.D. Anderson in *Modern Law Review*.¹¹ These efforts, and some political horse-trading, were eventually successful: by mid-1962 the damage had been repaired, the controversy had died down, the judges of the Sharia Court of Appeal had resumed sitting with the Native Courts Appellate Division of the Northern High Court; and the Settlement of 1960 then continued in effect until 1979.¹²

b. Christian fears quickly dispelled. Readers of this chapter will see for themselves that the fears of some Christians about the new Penal and Criminal Procedure Codes, and perhaps about other elements of the Settlement of 1960 as well, were quickly

⁷ Debates of the House of Assembly (Second Legislature) Third Session, 12th to 19th August, 1959, column 501.

⁸ *J.S. Olawoyin & Six Others. v. Commissioner of Police* (1961) (Supreme Court of Nigeria) 1 All N.L.R. (Part 2) 203.

⁹ S.S. Richardson, *No Weariness: The Memoir of a Generalist in Public Service in Four Continents 1919 – 2000* (Wyllye, Wiltshire: Malt House Publishing, 2001), 223.

¹⁰ J. Price, “Retrograde Legislation in Northern Nigeria?”, *Modern Law Review*, 24 (1961), 604-11.

¹¹ A. Bello, “Reply to Mr Justin Price’s Attack on the Legal Reforms in Northern Nigeria”, *Lagos Magazine*, 28 October 1961, reprinted in Nchi and Mohammed, *Alhaji Sir Ahmadu Bello*, 193-99; J.N.D. Anderson, “A Major Advance”, *Modern Law Review* 24 (1961), 616-25. The same issue of *Modern Law Review* also contains a response to Price by O. Odumosu, “The Northern Nigerian Codes”, pp. 612-615, and Price’s reply to Odumosu and Anderson, pp. 821-24.

¹² Price’s articles, Olawoyin’s lawsuit, and the Northern efforts to overcome the problems they caused, are discussed in the Memorandum of the Attorney-General reprinted in Part V of this chapter, ¶¶ 8 and 28. See also J.P. Mackintosh, “Federalism in Nigeria”, *Political Studies*, 10 (1962), 223-47 at 228 n. 1: “A Bill to remedy [the problem created by Olawoyin’s lawsuit] was defeated in the [federal] Senate [in December 1961]... It was, however, passed in the next session after Northern Senators had made some concessions on Bills which interested other Regions.” Our thanks to R.T. Suberu for bringing this passage to our attention.

dispelled. The documents printed in Parts V and VI below show that already by mid-1962 the new arrangements had found wide acceptance all over the North by all elements of the population, Muslim and non-Muslim alike. In 1966 a British judge of the Northern High Court, after surveying developments related to the Criminal Procedure Code, concluded that:

Mr. Price and others who shared his doubts, will be glad to know, that this Code does not furnish “a most efficient instrument of oppression,” but is rather a Code, which, in spite of or perhaps even because of its not being an exact copy of English criminal procedure, is looked upon as their own by Northern Nigerians and which on the whole is administered with some pride and with increasing impartiality and efficiency.¹³

c. Muslim opinion changes. It took much longer for Muslim opinion, at first acquiescent, to swing against the Settlement of 1960. How long it took may be debated, but certainly by the mid-1970s it had fairly started; by the mid-1980s the idea that Muslim consent to the Settlement of 1960 had been a terrible mistake which ought if possible to be corrected was wide-spread and firmly entrenched in the North.

No doubt many factors contributed to this. Part of it was the reaction among Muslims throughout the world against “liberalism”, corrupt capitalism, and Western imperialism or “world arrogance”. In Nigeria, as elsewhere,

widespread enthusiasm [grew up] for reviving Islamic law to replace the laws and legal institutions borrowed from the West since the onset of its powerful influence in the nineteenth century. Many Muslims see this revival as a form of political resistance to imperialism. Demands for the Islamisation of law dovetail with the currents of cultural nationalism that have condemned the Western influences on dress, music, education, the family, and other aspects of life. Campaigns have been launched in the Muslim world to effectuate an “Islamisation of modernity,” which entails subjecting institutions borrowed from the West to Islamic critiques and reforming them along Islamic lines.¹⁴

The actual realisation of these ideas in Iran and to a lesser extent in Pakistan and Sudan inspired many Nigerian Muslims. But two specifically Nigerian factors also had powerful effects. One was the wreck made of the Settlement of 1960 in the constitution-making process of 1976-78, in which Nigeria’s Muslims not only suffered a humiliating defeat at the hands of Christians in the battle over the Federal Sharia Court of Appeal, but also, in the resulting 1979 Constitution, lost every one of the perquisites that had made the Settlement of 1960 palatable to them in the first place.¹⁵ The other was the progressively

¹³ T.H. Williams, “The Criminal Procedure Code of Northern Nigeria: The First Five Years”, *Modern Law Review*, 29 (1966), 258-272 at 272.

¹⁴ A.E. Mayer, “Current Muslim Thinking on Human Rights”, in A.A. An-Na’im and F.M. Deng, eds., *Human Rights in Africa: Cross-Cultural Perspectives* (Washington, D.C.: Brookings Institution, 1990), 133-56 at 133. See also J. Hunwick, “An African Case Study of Political Islam: Nigeria”, in C.E. Butterworth and I.W. Zartman, eds., *Political Islam (Annals of the American Academy of Political and Social Science*, 524 (1992)), 143-55.

¹⁵ This “debacle of 1979” is discussed in detail in Ostien, “An Opportunity Missed”, 238-43.

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worsening failure of the Nigerian state: what had begun in hope for the new nation in 1960 had quickly deteriorated into political turmoil, the imposition of military rule, and civil war, and was ending in collapsing institutions and infrastructure, high levels of poverty and personal insecurity everywhere, and pervasive official corruption. Disappointment and resentment fed into the reinterpretation of Northern colonial history, by a new generation of Muslim scholars, as one long campaign by the British to “weaken”, “paralyse”, and finally to abrogate Islamic law.¹⁶ The new Penal and Criminal Procedure Codes, with other elements of the Settlement of 1960, came to be seen as ill-motivated and unjustified impositions forced on an unwilling or deluded *Sardauna* by the undue influence of the British.¹⁷ The failure of the Nigerian state was interpreted directly as a failure of the inferior and obviously defective laws and legal institutions left in place by the British.

In Nigeria the abrogation of Islamic criminal law and the mischief of ‘Repugnancy Clause’ have played havoc with the law and order situation.¹⁸

The Nigerian society now suffers from the application of a law and social and economic order that have failed in their homeland. The ascendancy of crime in Nigeria, the injustice, the economic exploitation and the corruption that now eats deep into the fabric of our society are the result of our slavish application of English law and English social and political and economic system. It is only the ignorant that will fail to realise this simple fact.¹⁹

Obvious reasons make it necessary to turn to the Shari’ah as an effective means of reforming society, creating a disciplined people and combating the rising tide of crimes in the country. The first reason is that the secular Western means so far used in preference to the Shari’ah have undoubtedly failed.²⁰

[B]ecause certain Muslim leaders in the past had inflicted damage on the Shari’ah, [is no reason why] other Muslims should never attempt to rectify that

¹⁶ E.g. A.B. Mahmud, *A Brief History of Shari’ah in the Defunct Northern Nigeria* (Jos: Jos University Press, 1988), *passim*.

¹⁷ To quote one prominent scholar: the British used “ingenious devices” and “smokescreens” to oust the application of Islamic criminal law and “smuggled” new doctrines “rather surreptitiously” into its civil side; their “ostensible” purposes covered up an “undisclosed” objective to transform the pre-existing regime; what they did “was not entirely in good faith”; up to today they still tame and subjugate Islamic law “by remote control” through the entrenched legal institutions they set up before they left. Yadudu, “Colonialism and the Transformation of Islamic Law”, 114-16, 131, 124, 128, 118. See also M.A. Ajetunmobi, “Reorganisation of Legal System in Northern Nigeria – Appraisal of 1958 Recommendations”, *Islamic and Comparative Law Quarterly*, 10 (1990), 96. Continuing discussion of these themes is illustrated by D. Ahmed, “The Sardauna Was Deceived”, *Weekly Trust* for 15-21 September 2001.

¹⁸ S.K. Rashid, “On the Teaching of Islamic Law in Nigeria”, in S.K. Rashid, ed., *Islamic Law in Nigeria: Application and Teaching* (Sokoto: University of Sokoto Press, 1988), 88-104 at 90.

¹⁹ I.K.R. Sulaiman, “The Sharia and the 1979 Constitution”, in Rashid, ed., *Islamic Law in Nigeria*, 52-74 at 68.

²⁰ M. Tabi’u, “Controlling the Crime Rate in Nigeria: The Relevance of Shari’ah”, in S.K. Rashid, ed., *Shari’a, Social Change & Indiscipline in Nigeria* (Sokoto: University of Sokoto Press, 1987), 183-91 at 187.

damage. The proposition is itself absurd and lacking in any sense whatever. For the most sensible course of action available to Muslims in a situation like this is to try and correct the damage caused by their brothers...and not to let it continue.²¹

These ideas, still very much alive today, contributed directly, in 1999-2000, to the abrogation of the Settlement of 1960 in twelve Northern states and to the programme of re-implementation of Sharia which it is the main purpose of book to document.

d. Why this chapter? Let us return, then, to the question why, in a book documenting events of 1999-2005, we have included in this chapter documents from 1958-1962.

The rejectionist Muslim view of the Settlement of 1960 rests on a cluster of claims about matters of historical and causal fact – about things that did or did not happen at definite times in the past, and about how and why they did or did not happen. How accurate are these claims? Or, for that matter, how accurate are their contraries?

Answer: nobody really knows. To speak just of the Settlement of 1960: No one has ever documented and studied the development of the *Sardauna's* thinking on the cluster of problems it addressed; the thinking of the members of his inner circle; the options available to them; the various pressures put on them; or their calculations of the gains and losses to the Northern Region, to its Muslims, or to Islam, that would result from the pursuit of one option or another. The ideas and actions of the British colonial officials who were involved, and of the leaders of the then-Eastern and Western Regions, all equally important to understanding the Settlement of 1960, are equally obscure. The reports of the delegations sent to Libya, Pakistan, and Sudan, although circulated at the time in the North, have never been published and are essentially unavailable to researchers today. The same – up to now – is true of the reports and recommendations of the Panel of Jurists and of the records of their interactions with Northern leaders. The same is true of the records relating to the drafting of the new Penal and Criminal Procedure Codes, including the details of the negotiations between the drafters and the *ulama*. Whatever information still exists about the attitudes and opinions of the wider Muslim community of the time is scattered far and wide in documents written in at least three languages, now resting in dusty archives, private collections, the crumbling pages of old newspapers, the memoirs of public officials and private persons, published or unpublished, hardly known to us today.

In short, today all of us are almost totally in the dark about this vital and controversial event in Nigeria's history – about what actually happened and how and why – because almost all the information needed to form well-founded opinions is missing. Result: all present opinions necessarily derive primarily from ideological presuppositions, not from knowledge of the facts. All therefore are equally simplistic and unsupported; debates about them go nowhere; nothing is ever resolved; and conflict continues.

²¹ I. Sulaiman, "Victor Takes All: The Shari'ah in Secular Nigeria", in Rashid, ed., *Shari'a, Social Change & Indiscipline in Nigeria*, 55-64 at 56.

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And so this chapter, whose purpose is to begin to remedy our ignorance about the Settlement of 1960, just as the wider purpose of the book is to begin to remedy ignorance about the programme of Sharia implementation begun in 1999-2000. The documents published in this chapter, most of them for the first time, add materially to our knowledge of the circumstances surrounding the Settlement of 1960; they will also, therefore, help to inform the debate about the current Sharia implementation programme, intimately related as it is to the Settlement of 1960. Beyond such immediate concerns, the documents will also be found to be of much wider and more permanent interest, touching as they do on many aspects of the past that scholars and historians will find significant in ways impossible now to predict.

But of course the beginning made in this chapter is a small one, so let us end this introduction with a plea for more scholars and more scholarship in this fascinating field of Nigerian legal history. This and every other chapter of this work throw up questions to which we do not have answers; there are topics here for a thousand PG theses. Only patient investigation and analysis, using all the tools of historical and legal scholarship, can produce the deeper and more nuanced understanding of the Nigerian past so essential to resolution of contentious issues in the present. The fields are ready for harvest, but the labourers are few.