THE FUTURE OF CUSTOMARY LAW IN THE SUDAN

I. INTRODUCTION

The important rule played by customary law in the Sudan today raises pertinent questions as to its future in the context of what an observer called cohabitation of laws.[1] The racio-cultural and religious diversities which this cohabitation purports to accommodate results in problems of unity and disunity which require solutions. The gravest of these problems is the cleavage between the Muslim Arab North and the predominantly Pagan Negroid South.[2] This cleavage though recognized by the legal system, poses major problems of transition for which no solutions have so far been attempted. At present, the legal system is a dualism which is unlike the dualism familiar in other African countries in that its components are not customary and general, but Islamic and Civil. The latter term is also used in contrast to the local system within the Civil system. There thus exists a complex situation which is both tripartite in that it comprises Islamic, local and general legal systems, and dual in that it embodies two hierarchies, Islamic and Civil. With the present official commitment to unity, future trends are bound to aim at the integration of the national legal system. Emphasising the position of customary law as administered by both local and civil courts, this paper briefly surveys the Sudan legal system in the hope of high-lighting certain factors which should be acted upon if the envisaged unification is to be achieved with minimum disruption.

1. Farran, Matrimonial Laws of the Sudan vii (1962). [Hereinafter referred to as Farran].

2. Different and isolated from one another until about a century ago when decades of hostility arising out of slave-raiding marked their initial contracts, and administered separately until the dawn of independence in 1956, the two see little in common. The dominant North (both in population and area, the ratio is two to one) looks towards the Arab Middle East; hence, the Sudan is an active member of the Arab League; the South aspires towards Negroid Africa. Even those Sudanese who do not see such broader horizons consider themselves different and opposed. The successors of the British, desiring to foster national unity, reversed the colonial trends of separate development. They adopted Islamization and Arabization as strategies for national integration. The Southerners saw subjugation in this form of unity and opposed it. The present political upheavals were first generated in 1955, a year before independence, when a battalion of the Southern Corps mutinied, this ignited a revolt in the South during which several hundred Northern Sudanese and an equal number of Southerners lost their lives. The insurance continues and the government has been occupied in an attempt to quell it ever since independence. In this internecine warfare, many innocent people fall victims to the "Security forces" which have virtually been running the South since the war began. In consequence, thousands of refugees hnve fled into the neighbouring countries of the Congo, Uganda, Kenya, Ethiopia, and the Central African Republic.

II. ISLAMIC DIVISION

The Islamic division consists of Islamic or Sharia Courts, which were established under the Sudan Mohammedan Law Courts Ordinance, 1902, and which form an independent hierarchy headed by the Grand Kadi. They are empowered to apply "The authoritative doctrines of the Hanafia[3] jurists, except in matters in which the Grand Kadi otherwise directs in a judicial circular or memorandum, in which case the decision shall be in accordance with such other doctrines of the Hanafia or other Mohammedan jurists as are set forth in such circulars or memoranda."[4] Their jurisdiction covers such personal matters as succession, wills, legacies, gifts, marriage, divorce, family relations, or the constitution of *Wakfs*[5] where both parties are Muslims or in the case of mixed or non-Muslim parties where both parties consent to the jurisdiction.[6] Although the majority of the Sudanese are Muslims, Sharia courts function within a relatively small community. The greater portion of the Muslims fall under the jurisdiction of tribal or local courts. Virtually all the Sharia judges are trained only in Islamic law whether in Egyptian Universities or in the branch of Khartoum Law School specialized to Sharia. Consequently, these judges administer Islamic law in solution through amidst a fabric of legal interaction and conflict. Their jurisprudential vision of Islamic Law is that it is God-given and uncompromisingly correct.[7] This is not to imply immutability in Sharia. On the contrary, the provision empowering the Grand Kadi to issue circulars and memoranda can be, and has been used to bring Islamic law in accord with the changing conditions of the modern Muslim world.[8]

III. LOCAL DIVISION

The local division is composed of local courts which are divided into Native and Chiefs' Courts. Native Courts are constituted under the Native Courts Ordinance, 1932, applicable to the six Provisions of the North excepting the Ngok Dink of Kordofan Province. These Courts are empowered to apply "The Native law and custom" prevailing in the area of their jurisdiction, provided it is not repugnant to "justice, morality, or order."[9] Their "native law and custom" is an amalgam

3. One of the four Orthodox Schools of Islamic Jurisprudence.
4. Regulation 53 of the Sudan Mohammedan Law Courts Ordinance promulgated under the Sudan Mohammedan Law Courts Ordinance, 1902, which established the present system of Islamic Courts.
5. Muslim Trusts.
6. Their jurisdiction is similar to that of the Civil Courts under Section 5 of the Civil Justice Ordinance.
7. *Cf.* Anderson, *The Adaptation of Muslim Law in Sub-Sudan Africa* in *African Law, Adaptation and Development,* 149-50 (1965).
8. See, for instance, Anderson, *Modernization of Islamic Law in the Sudan,* Sudan Law Journal and Reporters, 292 (1969) and *Law Reform in Middle East,* 32 International Affairs, 43 (1956).
9. Section 9(1) (a) of The Native Courts Ordinance. See Abu Rannat, Former Chief Justice in *Relationship Between Islamic and Customary Law in the Sudan,* 4 Journal of African Law, 11 (1960).

of Islamic and customary laws.[10] Some of the customary laws are remnants of their pre-Islamic laws and customs.[11] Others might even have evolved subsequently.[12] In any case, the customary laws of these tribal communities have distinct characteristics and are not typically customary.[13] This is why customary law in the Sudan is more identified with the Pagan South.

The Chiefs' Courts are constituted under the Chiefs' Courts Ordinance of 1931, applicable to the Southern Provinces and the Ngok Dinka of Kordofan in accordance with a Special Order of the Governor-General in Council 1955.[14] The judges are traditional elders and are mostly illiterate. The Ordinance empowers them to try criminal and civil cases involving the natives of the South and according to the customary law prevailing in that territory, provided it is not repugnant to justice. morality and order.[15] In civil cases in which one or more of the parties is a Government official or is a native not domiciled or ordinarily resident in the South, the court can only have jurisdiction with the consent of such a party or parties, and in criminal cases in which the accused is a Government official, the court only has jurisdiction with the consent of the Resident Magistrate. In criminal cases in which the accused person is not domiciled or ordinarily resident in the South, he can apply through the Court before his trial begins to the Resident Magistrate to have his case moved into another court of competent jurisdiction. In

10. Farran observes that —

> Most, if not all, of the tribes involved were converted to Islam long ago. Accordingly, and by a gradual process of charge, it may be argued, their pre-Islamic customs have ceased to prevail and the rules of Mohammedan Law have taken their place .... as the custom of the tribe in question .... What these courts in fact apply is not *pure* Mohammedan law, but Mohammedan law as modified by Custom. Farran, 254.

Referring to the same process of amalgamation in other parts of Africa, Professor Anderson says —

> Islamic law has never fully ousted the indigenous law, but either co-exists with it as a separate and distinct system, each being applied in suitable circumstances, or else has fused with it into an amalgam that may be termed 'Islamic law' or 'native law and custom' according to taste or local practice. Anderson, *op. cit.*, *supra,* note 7, at 153.

11. Dr. Farran wrote "A point which it is easy to overlook is that some tribes of Mohammedan Sudanese, especially in the Western Provinces of Darfur and Kordofan, have customs, obviously dating back to tbe period before their conversion to Islam." Farran, 137.

12. This is made easier by the fact that unless introduced through formal education Islam advanced itself though pre-existing indigenous lines. Rather than obliterate animostic ideas and institutions, it cloaked them with the concepts and outward, but highly ritualized symbols of Islam. This leaves the convert with much room for pursuing his traditional mode of life and evolving customs along traditional lines but under the banner of Islam. See Farran, 227, and Trimingham, *Christian approach to Islam in the Sudan,* 44 (1948).

13. In fact, so fanatically though superficially Muslim are these tribes that they believe their laws to be part of Sharia even when they may in fact be contrary to Sharia. This recalls Professor Anderson's observation that the amalgamated law may be termed "Islamic law" or "nature law and custom according to taste or local practice." See *supra* note 10.

14. The Chief's Courts Ordinance Application No. 1 Order.

15. Section 7 of the Chiefs' Courts Ordinance.

such an event, the Chiefs' Court should stay the proceedings and refer the application to the Resident Magistrate for decision. The Chiefs' Court may make such orders as it thinks fit regarding the detention of the accused, or sending him in custody to the Resident Magistrate, or taking guarantees for his appearance before the Chiefs' Court or the the Resident Magistrate. Section 5 also provides that a Chiefs' Court shall have no jurisdiction in criminal cases over a Government official who is not a native of the Southern Provinces. These provisions are usually applied with modification.

With respect to subject-matter, the warrant of the Court[16] adds some ordinances to the traditional categories of cases, civil and criminal, over which the court has jurisdiction.[17] While certain cases are excluded[18] where it is required under Section 6 of the Ordinance, the consent of the Resident Magistrate or of the parties to the Court's jurisdiction is assumed, and if the Chief's jurisdiction is questioned by the parties, the consent of the Resident Magistrate is usually given. This flexibility in the application of the provisions is necessitated by the cross-cultural intercourse following the abandonment of the policy of ethnic segregation pursued by the British.

For the same reason, however, territorial limitation has often fettered tribal administration. With the migration of people into urban centers, it became a general practice for Chiefs to extend their power outside their own territorial limits. Even cases which had gone to other Chiefs' courts might be revived in the belief that their own Chiefs are the right authorities to settle them. It was not until recently that the provisions of the Chiefs' Court's Ordinance were enforced to stop Chiefs from assuming jurisdiction in such cases.

The Chief in whose area the litigants are resident may assume jurisdiction in consultation with the Chiefs of the parties or the Chief of the other party if one party belongs to his tribe. He may choose to stay the proceedings for a Special Court[19] which has jurisdiction "where the accused is subject to the jurisdiction of one chief and the complainant is subject to the jurisdiction of another chief.[20] Where the accused is himself a chief, a Special Court may also be convened when in the opinion of the Head of State the ends of justice will be served.[21] Simi-

16. Sub-section (b) of section 7 of the Chiefs' Courts Ordinance.

17. Among these are the local Government Ordinance, the. Preservation of Wild Animals Ordinance, the Locust Destruction Ordinance, the Hashish and Opium Ordinance, Disease of Animals Ordinance, and certain cases under the War (Prices Charges) Order.

18. They include murder, offences against the state or relating to the Military Forces, offences relating to slavery or to the harbouring and the screening of offenders with respect to the above offences, and any offences against Government ordinances except where the provisions of any. ordinance form part of native law and custom.

19. Which may be convened under Section 9(1) (a) of the Chiefs' Courts Ordinance.

20. Section 8(1) (a) of the Chiefs' Courts Ordinance.

21. See Section 8(1)(b) of the Chiefs' Courts Ordinance.

larly, where the alleged offence is so grave that the powers[22] of the Chief's Court appear to be insufficient, Section 8(1) (c) provides for the constitution of a Special Court.

An important factor in the limitation of jurisdiction is the law which the Courts apply. A Chief's Court is mainly empowered and inclined to apply its *lex fori*[23] though as we have seen, specific governmental Ordinances may be included in its jurisdiction.[24] The Court is often not informed or is ill-informed about the *lex domicilii* of the parties if it is other than the law of the court.[25] It may be asked whether educated Southerners should be subjected to tribal courts. If so, should they be governed by tribal law? In view of the fact that the Sudanese legal system is largely based on religious adherence, and since the educated Southerners are nearly always Christians or Muslims, the

22. The constitution and powers of the Ngok Chiefs' Court as set out in Schedule 1 of its Warrant are reproduced below for illustration.

President or Vice-President	Composition	Jurisdictional Limits	To Whom Appeals Lie
Head Chief	President with one Vice-President and five members	Sentence of 3 years imprisonment; 100 head of cattle or Money equivalent; 25 lashes; and may hear civil suits worth up to Ls. 100 or 50 cattle.	Resident Magistrate [formally District Commissioner] DAR Missiriya — Kordafan province
Head Chief	With 3 members	Sentence of 2 years imprisonment; 25 head of cattle or Ls. 50 fine; 21 lashes and may try civil suits up to Ls. 50 or 21 head of cattle.	Same
Either of two Sub-Chiefs	Vice-President with 3 Members	Sentence of 1 year imprisonment; 15 head of cattle or Ls. 30 fine; 10 lashes; and may try civil suits up to Ls. 30 or 15 head of cattle.	Court under the Presidency of Chief Deng Majok

In practice, the traditional composition of the court is followed and membership is open to all elders, although only official court members stamp their seals onto the judgment.

23. In accordance with the provisions of Section 7 sub-section (a) of the Chiefs' Courts Ordinance.

24. By the operation of sub-section (b) of Section 7 of the Chiefs' Courts Ordinance.

25. For that reason, an Arab representative sits in the Ngok Dinka court as an assessor to inform the court of Arab law, and the same is true of Arab areas in Kordofan; a Dinka assessor informs Arab courts on Dinka law.

issue is of contemporary significance. Nothing in the Chiefs' Courts Ordinance or in any other enactment restricts or expressly extends the jurisdiction of the Chiefs' court over Christians and Muslims, nor is there any judicial pronouncement on the point On specific issues such as monogamous and especially Christian marriages, there is a difference of opinion among some writers. Major Wyld, for example, writing on Zande law, argues for the jurisdiction of the Chiefs' Courts over such marriages.[26] Dr. Farran, on the other hand, interprets applicable statutes and cases as denying such jurisdiction. His argument rests *inter alia* on the fact that the Chiefs' Courts, being composed of tribal leaders totally lacking in any legal training, are unfitted to adjudicate on Christian and monogamous marriages, which can only be dissolved for certain matrimonial offences which must be proved by civil-law, not customary law standards of evidence, and that Chiefs' Courts have no authority to apply the civil law, which is the law applicable on these issues.[27]

With respect to Muslims, Section 38 of the Civil Justice Ordinance says that in personal matters "civil courts,[28] shall not be competent to decide in a suit to which all parties are Mohammedans, except with the consent of all the parties." Instead, by section 6 of the Mohammedan Law Courts Ordinance, they fall under the jurisdiction of Sharia Courts, and are governed by Sharia law.

In practice, in the case of both Christian and Muslim converts, the Chiefs' Courts assume jurisdiction and sometimes give regard to the Christian or Muslim rules applicable to the converts. In one case, for instance, a Dinka Chiefs' Court permitted a *post mortem* divorce in modification of customary law. A Christian Dinka woman, whose husband had died, and who by tribal law would have lived with his pagan next-of-kin, applied for divorce from her dead husband. The court agreed, provided that the dead man's bride-wealth was returned. This having been done, she was emancipated from the levirate union.[29]

In another case, the pagan father of a Catholic Dinka girl had arranged for her marriage to a young pagan. On being informed of the project, the girl stated that she did not object to the husband on personal grounds, but insisted that the formalities required by canon law be observed. When her relatives persisted in their arrangement, she took refuge with the Mission, and the father of the bridegroom sued in the Chiefs' Court for her return. The Chief, himself a pagan with a large number of wives, ruled that she could not be compelled to marry in a way which would displease her God as that would endanger the success of her marriage. He therefore ordered the return of the bride-

26. Farran, pp. 258-73.

27. *Ibid.*

28. Among which local courts are included. See *supra* p. 1.

29. Farran, 25.

wealth if the bridegroom was unwilling to perform the necessary forms for a monogamous unions.[30] In most cases, however, they apply tribal law. As Dr. Farran put it:

> In reality, [these issues are] part of a wider [problem] of great contemporary importance: to what extent, if at all, should the urbanized member of an African tribe be regarded as being still governed by the customary law of his tribe? — with its equally important corollary, if he is not so governed, by what system of rules should he be governed?[30]

One might add that the problem is not restricted to the urbanized, for the process of acculturation which the educated class have been undergoing is a fact which transcends considerations of unbanization. Indeed, the obvious question is what constitutes "urbanization" or, to use another term used by Dr. Farran, "detribalization". The definition that "By 'detribalized' we mean here those Southerners who have left the tribal area without an *animus revertendi"* is probably adequate as far as it goes, but fails to account for problems raised by the fact that not only do many modernized Southerners intend to return, but they in fact do return to their tribal areas. With the rapidity of change, most Southerners in urban communities still have first degree relatives in their tribes. Most of them, moreover, desire to help develop their areas and this commitment necessitates their return. According to Dr. Farran, "Those who intend to return .... must observe the tribal ceremonies if necessary by proxy."[31] The more fundamental question, then, is whether a man whose return is largely prompted by the desire to operate from within to facilitate the progress of his people should be subjected to the very processes he plans to change, merely because of the intention or even the fact of return.

This is undoubtedly a factor in the indignation often felt by the educated class when subjected to the Chiefs' Courts. The problem in particularly striking in criminal cases where the Chiefs' motivation to retaliate against what they consider to be a general opposition and threat to them by the educated class may lead to miscarriage of justice, often with no redress on the national level. The problem is aggravated by the fact that the Chiefs who constitute these Courts are also administrators and executives. This convergence of powers is an essential aspect of traditional jurisprudence. An authority who cannot pass orders, judge on their basis, and execute his judgments is insignificant. The relative powerfulness of the Chiefs and their abuse of power against the educated class sometimes with the connivance and even the encouragemnent of national authorities tends to widen the gulf between the traditionals and the moderns. The challenges and the threats these moderns pose to the Chiefs in turn intensify the Chiefs' abuse of power and the circle reinforces itself.[32]

30. *Ibid*., at 184.

31. *Ibid.*

32. For an extreme example see the case of *Sayed Elia Kuze* which the Commission of Enquiry into the 1955 disturbances called "a farce and a usurpation of the machinery of justice," *S.G. Southern Sudan Disturbances,* 91-97 (1956).

The issue is much deeper than merely one of jurisdiction over the educated class. To what extent are the presently constituted Chiefs' Courts equipped to handle the complex problems of acculturation now facing traditional but developing societies of the country? Provisions qualifying the application of customary law where it is contrary to justice, morality, or order, could be so construed as to make for development in the law and cover novel situations. At present, however, such creativity hardly exists.

It must, however, be stressed that religious conversion or acculturation does not *ipso facto* disentangle a person from the pre-conditioning factors of his cultural background, even though he may be substantially changed and may aim at changing important aspects of his native culture. The problem thus lies in the fact that the system does not provide for intermediate stages.[33]

IV. CIVIL DIVISION

The civil division consists of Civil Courts as opposed to Islamic and local courts. These are the common courts and are the least limited in terms of people and the territory they govern as well as the laws they apply. In criminal jurisdiction, they apply the Sudan Penal Code and the Code of Criminal Procedure together with other criminal statutes and regulations. In civil jurisdiction, Section 5 of the Civil Justice Ordinance of 1900 as re-enacted in 1929 provides:

> Where in any suit or other proceeding in a civil court any question arises regarding succession, wills, legacies, gifts, marriage, divorce, family relations, or the constitution of Wakfs, the rule of decision shall be:—
>
> (a) Any custom applicable to the parties concerned which is not contrary to justice, equity or good conscience, and has not been by this or any other enactment altered or abolished and had not been declared void by the decision of any competent court.
>
> (b) The Mohammedan law in cases where the parties are Mohammedan, except insofar as that law has been modified by such custom as is above referred to.

Sub-section (b) was a device to cover tribal communities in the North who though Muslims still retained indigenous laws administered by native courts.[34] The provision gives customary law priority over Islamic law. "Except insofar as that law has been modified by such

33. There is nothing in Sudanese law, for instance, resembling the Christian Marriage and Divorce Ordinance of Kenya which states *inter alia* that:

> Any African woman married in accordance with the provisions of this Ordinance or of the Marriage Ordinance or of the Native Christian Marriage Ordinance (now repealed), whether before or after the commencement of this Ordinance, shall be deemed to have attained her majority of widowhood and shall not be bound to cohabit with the brother or any other relative of her deceased husband or any other person or to be at the disposal of such brother or other relative or other person, but she shall have the same right to support for herself and her children of such marriage from such brother or other relative as she would have had if she had not been married as aforesaid.

34. See Farran, 137.

custom as is above referred to" means either that pure Islamic law will not apply to these people to whom customary law is applicable, or that Islamic law as modified by their customs will apply to them. Virtually all the judges being Muslims, this interpretation is not likely to withstand the post-colonial Muslim nationalism.[35] Indeed, it is generally contended that such repugnancy clauses as are applicable to other laws cannot be applied to Islamic law, since it is God's prescription.[36]

A report[37] on native law in Darfur Province illustrates this unconditional commitment to Islam. A custom provided that a tribal leader might marry more than four wives,[38] which is the limit imposed by Islam. Thus custom was recognized in a number of tribes. In criticism of the British judge who had upheld the custom, the reporters wrote that "the conflict was not between state-made legislation and custom, but between faith and custom .... It is legitimate to wonder whether it was wise of the British Administrators to uphold and enforce a custom that violated the basic principles of the people's religion."[39] This argument, though religiously understandable, destroys itself on its own terms, for courts do not enforce faith unless it is supportable by law. The critics would have been better off with the argument they discarded, namely, that the dispute was between state-made legislation and custom, for it could be argued in favour of Islam that since Section 5(a) provides for the application of "custom" if among other reasons it "has not been by this or any other enactment altered or abolished" and sub-section (b) provides for the application of Islamic law to Muslims, sub-section (b) could be construed as part of "this enactment" covering succession, wills, marriage and the like, abolishing customs which are anti-Islamic law. This is presumably what the Chief Justice meant when he wrote of the Homr of Kordofan that "Many of [their] customs, such as those relating to land, trespassing, cattle and so on, fall outside the scope of the Sharia. But some of their customs relating to personal status differ from the relevant rules of Sharia."[40] Sharia in its broad sense would have a greater scope, but, in this particular sense, the Chief Justice must have meant only that part of Sharia recognized by state legislation. Even then, one is still faced with the phrase "except insofar as that law has been modified by such custom as is above referred to."[41] Whether one construes the phrase as an exclusion of Islamic law where there is an applicable customary law, or as applying to situations where Islamic law had been adapted to local conditions (in which case the adapted form applies) it is difficult to see what would legally justify Islamic law

35. *Ibid.*

36. See *supra* note 7.

37. By Khartoum law students, who had gone on a tour of tribal areas, visiting local courts, and acquainting themselves with customary laws.

38. A custom which prevails in most parts of Africa.

39. The Report cited *supra* note 37 at p. 7.

40. Abu Rannat *op. cit. supra* note 10 at p. 11.

41. Section 5(b) of the Civil Justice Ordinance.

to prevail over customary law. The issue is more academic than real because civil courts do not apply Islamic law often, since, as we have seen, according to Section 38 of the Civil Justice Ordinance, "Civil Courts shall not be competent to decide in a suit to which all parties are Mohammedans except with the consent of the parties." [42]

Just as Islamic law is favoured, customary law is disfavoured. A number of factors account for this. The obvious one is that customary law is seen in opposition to Islamic law and is accordingly resented. Besides, as we said earlier, since customary law in the North has assimilated Islamic principles, customary law as commonly understood is identified with the South and to encourage it would be to impede national integration.[43] Furthermore, modernization in the Sudan focuses on the already relatively modern section, mainly the three Towns, Khartoum, Khartoum North and Omdurman. Such areas as are governed by customary law are too remote to those who govern the country from Khartoum.[44] There is also the general feeling that customary law is inferior and therefore something to be ashamed of or at least not to be encouraged by any means including the mere knowledge of it.[45] This view seems to be shared by the educated class in the South. Of course, customary law plays an important role in the problems of identity marking the South-North relations and this works in its favour among the educated Southerners. On the other hand, they consider it "primitive" and it is sometimes used against them by their traditional opponents who wield tribal power. They therefore do not want to identify with it. When the present writer was conducting an investigation into Ngok Dinka customary law he was often warned by this class and the more progressive among the traditionals that he should not record such customs as would embarrass the Dinka in front of others. A combination of these and other factors has subordinated customary law to Islamic law. While the latter is taught not only in the Sharia division but also in the general division of the law school, customary law is not. An expatriate who shows interest in the study and the teaching of customary law is likely to be suspected of "imperialist" motivation. To the majority of Sudanese its disappearance is only a matter of time and, the shorter the time the better. Yet, over 80% [46] of the populace is still governed by customary law, and through original jurisdiction, revision, and appeals, civil courts are continuously confronted with customary law. The result is often a miscarriage of justice. "One of the many difficulties of the administration of justice in the Sudan today is that the Northern Sudanese magistrates have no knowledge, judicial or private, of the customary law of the pagan."[47]

42. See *Nurel Huda Abdel Ghani v.* Omar Hassan (1953) Digest No. 24.

43. See *e.g.* Farran 29-31, 66-67 and Thompson, *Sources in the New Nations of Africa: A Case Study from the Republic of the Sudan* Wis. L. Rev. Fall, pp. 1146., 1162 (1966).

44. *Ibid.*

45. While this was the case throughout Africa, it has been reversed by post-colonial policies in most countries.

46. Estimates vary from over 80% to over 90%.

47. Farran, 282 note 11.

This ignorance is aggravated by the fact that the scanty law reporting that exists does not cover cases decided by local courts.

One judge told the present writer during the latter's field work that he could attend his court of appeal but should not expect to learn from it since he, the appellate authority, knew nothing about Dinka law. Asked how he could decide on appeals in ignorance of the law the judge replied that as they did not want to embarrass the Chiefs, they would usually allow their judgments to prevail. It is true that the influence of the Chief depends, among other things, on the extent to which his judgments are respected by higher authorities. On the other hand, the concept of appeal would be meaningless if this concession is carried to an extreme. A happy medium cannot be reached in ignorance of the law. In sharp contrast with the automatic endorsement of Chiefs' decisions is the dismantling application of repugnancy clauses to customary law. Whether it is "justice, morality, or order" or "justice, equity, and good conscience," these clauses are potential tools for the development of customary law, but cultural bias coupled with ignorance of the law may render them destructive to the administration of justice. When the writer asked a Province Judge what standard was used in applying repugnancy clauses he said, "Of course, the standard of decent and civilized society, not that of a primitive tribe."[48] In one case, a young judge with Khartoum legal training was shocked by the Ngok Dinka custom of compensating the husband for an adulterous wife. He argued that it was an equitable maxim that a wrongdoer cannot benefit from his own wrong, and according to him, the interests of husband and wife were so identical that for the husband to recover for his wife's wrong was to benefit wrongfully. He therefore asked the writer to advise the Chief on his behalf to abolish the custom. His argument was evidently based on one side of the case, and an exaggerated one at that. He did not know the point of view of the society in which the custom prevailed. The custom is found in almost all African traditional societies and is rooted deep in their cultures. Even in Western law in which he was trained, it is a tort in some jurisdictions. In any case, one may wonder whether it could be established that the interests of the wife and her husband in violation of sexual rights are joint. The

48. A judge once told the writer of an incident which will illustrate the point. A Ngok Dinka man and a woman came to his court. The man complained that the woman was refusing to live with him as her husband and asked the court's order to compel her to do so. The woman, probably sophisticated by town influence, told the judge that she was not the complainant's wife but his brother's widow. On proving the facts, the judge ordered the woman free and held the levirate contrary to Section 7 of the Chief's Courts' Ordinance. He told the writer that he was going to instruct the Chief of the tribe to abolish the custom throughout the tribe. When the writer explained the significance of the levirate in Winna society and produced a book to illustrate its existence in other Southern tribes, so sympathetic was the judge that he stopped talking about ordering a sudden abolition of the custom and asked his secretary to type the relevant pages of the book.

We do not necessarily question the justice of the particular decision; but the suggestion that the custom be outlawed throughout the tribe was a hazardous step, which as the judge himself admitted, could only be explained by cultural conditioning and ignorance of customary law. Citing this incident, Dr. Farran remarked, "It is by no means easy for anyone — even a judge — to put aside certain fundamental bases of thought; moral standards we may call them." Farran, 16.

outcome of a case of adultery may be to their common economic advantage, but in Dinka society, it is most unlikely that the wife benefits. Even the husband must abstain from the dairy products of cattle given as adultery compensation, or any other food acquired through such cattle. Usually they are disposed of in settling debts or in marriage. But whether there is a common material advantage or not, the wrong cannot be common. How can a husband be a party to a wrong which violates his sexual rights and why should he be hampered from a remedy simply because one of the parties injuring him incidentally benefits from the compensation due to him? The situation would, of course, be different if the husband traded on his wife or in any way consented to the commission of the wrong. As it was, the writer explained the importance of the custom among the Dinka and the judge was persuaded not to prescribe its abolition.

The problem cannot be approached as a series of isolated facts, nor should we be understood to oppose the application of the repugnancy clauses to reform the law in a desirable manner. In one case for instance the judge skilfully induced self-scrutiny among the Dinkas by pointing out to them the negative implications of a custom in present day Dinka society :[49] His success illustrated a creative use of the repugnancy clauses to develop customary laws with the least possible disruption and with as much support from public sentiment as possible. What is desirable, therefore, is not a rejection of the qualifying provisions, but their skilled application.

Although civil courts are expressly empowered to apply Islamic law and customary law, the main source of the law they apply is contained in section 9 of the Civil Justice Ordinance which states that "In cases not provided for by this enactment or any other enactment for the time being in force the court shall act according to justice, equity and good conscience." Theoretically, this provision is a further ground for applying any law, including such principles of Islamic law or customary law as are conducive to "justice, equity, and good conscience." Practically, it has become a tool for the importation and adaptation of Anglo-American law, which provides now the bases for the general law of the country. Since personal matters under Section 5 were left to local law, Section 9 provided for a partial reception of what is often referred to as "lawyers' law"[50] torts, commercial law, evidence, civil

49. The custom concerned gift-withdrawal. There is a special type of contractual friendship among the Dinka according to which gifts of cattle are exchanged usually in co-operation over the payment of each other's bridewealth or any bridewealth in which each is interested. The friendship may be broken should a serious conflict warrant it. Under certain circumstances, such a severance calls for the restoration of the *status quo ante i.e.* the return of the objects exchanged. In *Matet Ayom* v. *Deng Majok;* Abyei, Ngok Dinka (1955), this law was invalidated. In dismissing the plaintiffs claim Sayed Mohammed Ibrahim said to the assembled Dinka Chiefs and ordinary people that if the custom were upheld he for one "would be reluctant to accept even a cup of tea from a Dinka." This case was followed by the Chief's Court in *Nyuong* v. *Wor*, Abyei, Ngok Dinka (1959).

50. See generally, Twining: *Some aspects of Reception,* Sudan Law Journal & Reports, p. 229, pp. 232-33 (1957); Thompson, *op. cit supra* note 43 at p. 1148.

and criminal procedure, conflict of laws and public law, as opposed to "people's law" in which tradition is so deep-rooted that it should be be left to customary law.[51] This distinction is so blurred that it can mislead. Studies of African customary laws have shown that they cover all aspects of law. Although certain problems covering modern exigencies are not answerable by customary law, general classes of law such as contracts, torts, evidence, property and criminal law are covered in a form reflecting the conditions they serve. Partial reception brought the modern expression of these categories. In its mode of reception, the Sudan, among all British administered territories, was unique in that there was no statute expressly providing for the importation of English law and in using such terms as "justice, morality, and good conscience," to modify the legal system of a conquering power.[52] This explains the fact that the delegates at the London Conference of 1959-1960 on the Future of Law in Africa smiled when this Sudanese qualification was mentioned.[53]

In adapting Anglo-American law to the circumstances of the country, the importance of customary law or custom again comes to mind. In illustration of local limitation as applied to individual cases is provided in *Sudanese Government* v. *El Balcila Balla Baleila*,[54] where a nomadic Arab killed an engineer whose train had run over his cattle. Many factors combine to make cattle immensely important to the nomadic Arab, so that to kill them in a manner he must have thought brutal was held to be sufficient provocation to reduce murder to simple culpable homicide. The concept of the "reasonable man" was held not to be uniform throughout the country, but to be varied according to the local conditions of the community of which the accused is a member. Abu Rannat, C.J., in reviewing the decision of the lower court and holding in favour of the accused, said:

> The "reasonable man" referred to in the textbooks is the man who normally leads such life in the locality, and is of the same standards as others, . . . The accused in this case is an unsophisticated nomadic Arab who knows little about the world. . . . The real test is whether an ordinary Arab of the standard of [the accused] would be provoked or not.[55]

Another case[56] concerned contributory negligence. The plaintiff was crossing the road when he was injured by the defendant's car. It was argued that the plaintiff could have crossed without the defendant slowing down if he had walked at a reasonable speed. The court held that a reasonable Sudanese walks already as a native of dignity and that the plaintiff had not been unreasonable in maintaining his speed.

51. *Ibid.*

52. For an example of what existed elsewhere in British Africa see Allott, p. 18.

53. See 4 Journal of African Law, 77 (1960).

54. S.L.J.R., 12 (1958).

55. *Ibid.*

56. S.L.J.R. (1958).

In yet another case,[57] a major court considered as circumstantial evidence, in accordance with the local custom of Kakwa tribe in the South, the fact that for a person to slaughter a sheep and bang his own head against the wall of a house of the deceased's relatives was evidence of having killed that person.

This is the essence of Section 9 as expressed in the celebrated *dictum* of Owen, C.J. that we are guided but not bound by English Common and Statute Law. This *dictum,* as one writer observes, "has been repeated often enough to become a judicial cliche."[58]

Actual creativity in the application of Section 9 should not be exaggerated. We have already seen how ignorance of traditional laws impedes such creativity. Since national legal training is in Anglo-American and Islamic law, the sources of law utilized under Section 9 are limited. Even the appreciation and consequently the application of Anglo-American law is usually faulty because of the scarcity of Anglo-American reports and other legal literature, particularly in the more isolated areas. Furthermore, lack of adequate reports and other publications on Sudanese law leaves the judges unaware of their own laws, whether statutory or judge-made.[59] Inconsistent and erroneous application of the law is the consequence. In *Khartoum Municipal Council* v. *Michael Cotran*,[60] the court rejected the Road Traffic Ordinance, 1945, and applied the English Constitutory Negligence Act, 1945, which came about a month after the Sudan legislation providing for apportionment in contributory negligence. The court reasoned that "The English Act of 1945 relating to Contributory Negligence would be applicable in equity, justice and good conscience." In an earlier case,[61] the Court of Appeal recognized the injustice of the English last opportunity rule and yet upheld it under the misconception that they were bound by prior authorities on the point, though the views of these authorities were merely *obiter dicta.* Marrogordaba J., as he then was,

57. *Sudan Government* v. *Yoek Lowiya S.L.J.R.*, 69 (1959).

58. Thompson *op. cit. supra* note 43 at p. 1152. In *Nicola Episcopoulo* v. *The Superior of the African Catholic Mission* the plaintiff and defendant were registered owners of adjoining plots of land In constructing certain buildings on his own land the defendant mistakenly allowed his buildings to encroach on the plaintiff's land. The plaintiff brought action claiming that the defendant be ordered to remove the buildings on the plaintiff's land, or. in the alternative, that the defendant be ordered to pay plaintiff compensation for the loss of enjoyment of the land built on. The Court of Appeal held *inter alia* that the English law or. the point, which allowed a trespasser who has built in good faith on another's land to be turned off by that other, who may keep the buildings without compensating the builder, or even sue the builder for damages if the buildings had damaged the land, had gone too far in its protection of landowners against trespassers, since it might produce great injustice in certain cases. Although the Court did not follow Egyptian and Ottoman laws on the point, it considered them and found them also inapplicable. 1 Sudan Law Reports (Civil), 31 (1964).

56. Thompson, *op. cit. supra* note 43 at pp. 1154-50. See also Guttman, *Law Reporting in the Sudan* 6 I.C.L.Q. pp. 685-89 (1957) and Twining, *Law Reporting in the Sudan* 3 J.A.L. pp. 176-78 (1959).

60. S.L.J.R. (1958).

61. *Abu Gabal* v. *Sudan Government* A/C. App. 3/194.

said, "I concur, though not without regret. . . . This rule, though never in my opinion consonant with justice, equity and good conscience .. . . was always recognized by this court.

V. TOWARDS INTEGRATION

The foregoing has shown the complexities of Sudan legal problems, lack of articulation in policies, and the inadequate equipment of the decision-makers to handle the task of law reform. Customary law still commands the allegiances of the majority and is interwoven into the various sources of Sudanese law, religious and secular. Nonetheless, it receives the least attention. There is much talk about law reform in the Sudan, but the reforms envisaged centre around Islamization and Arabization in the sense of making the law reflect Islamic-Arabic culture more than it does now.[62] A significant faction of the legal profession advocates a shift to the civil law system with the view to codification and translation into Arabic, probably after the model of Egyptian law.[63] There is also a call for the abolition of local courts, leaving customary law to be applied by the civil courts. Alternatively, it is sometimes suggested that local courts be constituted of legally trained personnel instead of tribal chiefs. These and others are still the rattlings of empty vessels. Nothing constructive has been suggested and no action is in sight. Informed and responsible men realize that the system cannot dispense with courts which handle a heavy load of litigation in a country which, though better in this respect than most countries in Africa,[64] has an insufficient number of trained lawyers, especially when the trained few are completely ignorant of customary law.

Of course, the system cannot remain forever divided. As the Ranat, the former Chief Justice said to the London Conference on the Future of Native Law in Africa, "In the future, it is likely that a Sudan Common Law will develop as all integral part of the society now emerging in the Sudan; it will not be based on religious adherence, but upon the social custom and ethics of the Sudan as a whole."[65] At the moment social ideals should not be confused with social realities. The existence of difference is a fact which perhaps with wisdom can be turned into an asset. To ignore diversity and pretend that there is at present any fundamental unit is to deceive oneself and to act upon this deception is to invite disastrous consequences. In the words of a notable judge, "If we fail to appreciate this fact, we will be in the position of a man

62. For practical difficulties associated with the idea generally Twining, *Some Aspects of Reception, op. cit. supra* note 50.

63. The fact that most of the professional lawyers are trained in Egypt or in the Khartoum branch of Cairo University is a factor in this appeal.

64. Legal education was introduced into the Sudan in the thirties. For the situation in East Africa see Twining, *Legal Education Within East Africa,* in *East African Law Today* 115 (1965). Referring to the important role played by local courts today the Commission of Enquiry into the Southern Disturbances of 1955 reports "We find that even if judicial personnel were available, the work of the local Courts for years to come will still have to be maintained." The Report, op. *cit. supra* note 32 at p. 10.

65. Abu Rennat op. *cit. supra* note 10 at p. 6.

.... closing his eyes, and putting his hands on his ears, neither hearing nor seeing the civic, economic, or social realities of Sudanese life." [66] In the first and the only textbook on problems of the Sudan legal system, Dr. Farran gives the same advice in unequivocal terms when he says that "to establish a uniform code of law for the present position, is as impossible as it is undesirable. As well might one attempt to replace the lush abundance of a tropical garden with the staid formalities of an English public park." [67] It is the author's suggestion that a process of transitional integration by which the competing interests of tradition and modernity as well as of the various participating ethnic, racial, or religious groups are balanced, is the only means of developing the national legal system without destructively shaking each of its component parts.[68]

This will raise issues relating to the unification of the courts and the law they apply as well as whether this law should or should not be codified. In many African countries, the integration of law has reached the level of codification. The School of Oriental and African Studies has embarked on a project which aims at codifying the law of torts, and the code is meant to be a re-statement in a way which would integrate customary law with received Western law.[69]

In a conference held at Ibadan in 1964, Professor Allott said:

> Any new law must, in my submission, therefore try — so far as possible — to build on what is already there. That means, in the common law African countries, the Western type common and statutory law, as well as the indigenous customary and religious laws. To make a new law of civil wrongs, which replaces but at the same time incorporates and synthesizes the existing multiple legal system, is much more of a challenge than to bring in a quite different law from outside. To try to do as Ataturk did, and introduce a novel law having no previous connection with the country, would be an exercise doomed to failure in the modern African context.[70]

The Sudan, having been dormant, must begin with the preliminary issues. First, the courts should be unified by creating one hierarchy. Local courts, though subordinate, form part of the national judicial system. Since virtually all judges are Muslims and receive some training in Islamic law there is even less reason why Islamic law should remain in isolation and in the hands of absolutists. Even though the civil judges be biased as Muslims, chances of fusion and compromises between the various laws would be greater if Islamic law was administered by the same courts that administer the rest of the law.

66. Mr. Justice Mudhawi in *Khartoum Municipal Council* v. *Cotran* S.L.J.R. p. 85 (1158).

67. Farran, p. 31.

68. Allott and Cotran, A Background Paper on Restatement of Laws in Africa, August 1964 (Unpublished paper prepared for the conference on Integration of Customary and Modern Legal System).

69. Allott, The Codification of the law of Civil Wrongs in Common Law African Countries, August 1964. (Unpublished paper prepared for the conference on Integration of Customary and Modern Legal System).

70. *Ibid*., at p. 6.

Elsewhere,[71] we have argued that the institution of Chieftainship is far too deeply rooted to be suddenly eliminated if at all. On the other hand, it is crucial that Chiefs be equipped for their role in contemporary society. One obvious qualification should be a certain amount of education. While allowance should be made for the present generation of illiterate Chiefs, some sort of training for them should be introduced. For long-range purposes, education should be a precondition to Chieftainship.

Apart from re-orienting the Chiefs, the membership of their courts as we have suggested elsewhere[72] for tribal decision-making bodies in general, should be integrated primarily along the lines of traditionals and "moderns". This way, a fusion of tradition and modernity may be expected as an articulated or a natural outcome of tribal judicial process. Such an integrated court would also be more competent to deal with the complex diversities now extending into the tribes, This would justify granting them more substantial powers and such increase in their powers would in turn make them more effective as instruments for integrated transition.

With respect to the demand for separation of powers, in view of the strong expectations for their concurrence,[73] the disadvantages of change would seem to outweigh the advantages. In any case, the present abuse of power could be adequately checked by stringent supervision by national decision-makers. Such supervision could easily be expected with a reformed national system.

The primary step along the lines of reform on the national level is to remedy ignorance. The maxim should be "study now, reform later" or at best do both concurrently. Outlining reasons for the study of Africa customary law, Professor Allott wrote:

> If the uniform legal system is to evolve in a satisfactory manner, one which expresses the characteristic ethics and way of life of the people, it is essential that immediate attention be paid to the present customary law, which reflects *par excellence,* the people's own choice of legal system. So far as possible one wants to avoid revolution in the legal sphere and abrupt discontinuity with the past and present. What one seeks is a smooth evolution of legal institutions, so that the new law is based on and is in harmony with the old. To do this, knowledge of the present law is essential.[74]

Customary law, its sociological framework, and its interaction with other systems should be introduced into the law school curriculum, to be studied not as a static system but as a part and an agent of social mobility. A portion of the present law report system should be devoted to customary law in transition. Those whose profession concerns itself with the administration of the law — judges, advocates, and admi-

71. Deng: Law and the Challenge of Modernization in Dinka Society, Thesis submitted for the Degree of the Doctor of the Science of Law (Yale University) 1968.

72. *Ibid.*

73. See *supra* p. 8.

74. Allott, *The Study of African Law,* Sudan Law Journal and Reports 258 (1958).

nistrators — should receive additional training in these problems. If the judges are well equipped to meet the challenge and guide modernization through customary law, the fact that they are outsiders can be an asset because conformity to archaic customs is more often expected from an insider than from an outsider.[75]

While the role of an outside judge is important, judges should also be appointed among the local population both because they would have a deeper insight and concern and because this would satisfy the demand of their groups for greater share in power. The problems of their co-operation with the traditionals would be minimised by the integration of tribal decision-making bodies.

Once the court is integrated and the judges well trained in handling the complex problems of legal synthesis, evolutionary integration should lay stress on case-law rather than on legislation. Although legislation is vital in defining goals and laying standards, the courts are continually confronted with the particular problems of social change, and it is necessary that the law be left flexible.[76] This stands against the idea of adopting the doctrine of *stare decises*,[77] at present[78] even if the law reporting should be improved. Similarly, in the interest of unity in diversity as well as flexibility it is desirable that the law not be codified during such a transitional period.[79] Adoption and adaptation necessitate fluidity to allow progess to take the harmonious though perhaps long way towards a genuine fusion. But whilst codification is not advisable, recording should be encouraged as part of the study of customary law. It would be useful to group customs into those which are uniform, *i.e.,* those found in all the tribes, and local customs, those existing in some tribes only.

75. When a group of Northern Sudanese university students visited Abyei Chief's Court and pointed out the injustice of punishing only men for sexual offences, the court members laughed in appreciation and although they argued that men were often instigators they admitted the unreasonableness of the law and speculated on changing it. A young judge stationed in El Fashir, a remote area in Western Sudan, told the writer how surprised he was at the willingness of the Chiefs, provided they were approached with deference, to learn from the judges.

76. See Twining, *Some Aspects of Reception, op. cit. supra* note 50.

77. The inadequacy of reports is sufficient argument against the doctrine. See Guttman, *Survey of Sudan Legal System,* Sudan Law Journal and Reports, 7-10 (1956). Cliff Thompson suggests that the balance of confidence in the Court of Appeal and certainly of the law on the one hand and conformity to changing conditions on the other might be achieved by "the ability and willingness of the legislative power to act quickly to remedy weaknesses in the law, for this would mitigate the political danger of the Court of Appeal being bound by unwanted rules." *Op. cit. supra* note 43 at 1169. This by implication favours the doctrine of *stare decisis.* But as we have argued, the individualization of judicial problems would not be adequately substituted for by legislative power.

76. Authorities are in conflict on the matter. For example in the case cited *supra* note 61, the court considered itself bound by its previous decision. Generally, the matter is not even raised.

79. See Farran, 31.

Where sufficient material has been gathered, a form of restatement comparable to the one undertaken by the Restatement of African law Project of the London School of Oriental and African Studies should be prepared to guide the submission.[80] Each of the systems interacting could be restated, focusing on itself but also integrating suitable principle from the other systems. The problem of multiplicity of tribes could be minimized by their division into such major sub-cultural groups as the Nilotic and the Sudanic peoples.[81] These restatements would then need to be revised as often as possible, incorporating much of the development the courts will have made and the degree to which their innovations are universally effected, thereby adding ultimate fusion.[82]

The Sudan legal system as it now stands has the foundation of an ingenious architect who carefully designed it for the amicable cohabitation of Islamic law, customary law, and the imported general law as well as their development toward a harmonious fusion. How far the system achieves these goals depends on the people who run it. "The major legal systems of the world mainly gain their character, not from the content of their specific legal rules or doctrines, but from the men who did and do dominate the legal system and the administration of justice in their society".[83] The future of customary law in the Sudan thus far depends on the quality of the decision-makers, their articulation of the equitable policies of transitional integration, their proper understanding of the whole context and its diversities, their prediction of what various alternative trends might be, their objective evalution of such predicted trends, and their selection of alternatives conducive to balanced and harmonious integration and development.

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80. See *supra* note 68.

81. As this might foster a spirit of wider factionalism it should be carefully conducted.

82. An adversary body might be set up to inform the decision-makers of the progress and assess new measures at the various stages of development toward this fusion.

83. Max Weber, quoted in Twining, *Scone Aspects of Reception* at p. 234.

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