Secularizing Islam: The Colonial Encounter and the Making of a British Islamic Criminal Law in Northern Nigeria, 1903–58

RABIAT AKANDE

In spite of its co-option of precolonial Islamic institutions for the colonial enterprise in Northern Nigeria, the colonial state insisted on its secular nature. This was possible because by making a British Colonial Islamic law through an unprecedented expansion of siyasa ("discretionary powers of political rulers"), indirect rule invented an Islamic law that was amenable to the state.

This article narrates the process through which colonial governance invented this British Colonial Islamic law. I focus on criminal law because this was what set Northern Nigeria apart in the British Empire. Save in parts of the Aden Protectorate, Northern Nigeria was the only part of the empire where Islamic law applied not just as personal law but also as


Rabiat Akande is an Academy Scholar at the Harvard Academy for International and Area Studies <oakande@sjd.law.harvard.edu>. The author thanks David Kennedy, Duncan Kennedy, and John Comaroff for several intellectually stimulating discussions that inspired this article. The author is also indebted to Intisar Rabb, Kimberly Wortman, Kristen Stilt, Mitra Sharafi, Noah Feldman, and Priyasha Saksena for their helpful comments and is grateful to the Weatherhead Center for International Affairs, Harvard University and Harvard Law School Program on Law and Society in the Muslim World, for funding the research necessary for writing this article. Finally, the author thanks the anonymous reviewers of this piece for their valuable comments.
criminal law. Because criminal law is considered the paradigmatic public law, the application of “Islamic” criminal law was considered by scholars as well as critics (mostly Christian missionaries) to be the “non-secular” mark of the state and the signifier of the state’s reification of Islamic law. In a departure from this understanding, this article presents a narrative that shows how colonial governance radically transformed Islamic criminal law by appropriating the precolonial doctrine of *siyasa* and expanding it beyond recognition. By converting *siyasa*-as-limited-executive power to *siyasa*-as-expansive-statist-Shari’a-governance, the colonial encounter reconfigured the relationship between political and judicial/juristic authorities and subverted the essence of precolonial Islamic law. In invoking Islamic law as the basis of governance while asserting an ever-expanding executive authority over its content, the colonial state was able to claim fidelity to Islamic law and institutions while transforming its workings.

**Indirect Rule in Northern Nigeria**

Indirect rule as a mode of British colonial governance has its roots in the shift in imperial ideology following the Indian mutiny of 1857. Interpreting the mutiny as a revolt against the imperial civilizing and anglicizing mission, empire turned from direct administration to indirect governance of colonized populations through “traditional” customs and institutions. Just as imperial ideologies were prone to travelling across empire, this new mode of rule would “circulate,” albeit with local variations and contestations across the British Empire, including Northern Nigeria. Indirect


rule in Northern Nigeria, overwhelmingly, took the form of governance through Muslim rulers ("emirs") and Islamic institutions. For the colonial state, this entailed a shift from its nineteenth century alliance with Christian missionaries. Religion was therefore central to indirect rule in Northern Nigeria. Yet, colonial governance was not merely predicated on pre-existing religious formations. Indirect rule was based on defining, deepening, and hierarchizing religious difference. Religious difference, in turn, determined residential formations, legal systems, and political administration. Because this governance design ostensibly privileged Islamic institutions, Muslim rulers, and Muslim populations to the detriment of non-Muslim religious populations, critics of the colonial state, especially European Christian missionaries, labelled it "Muslim sub-imperialism."8

The roots of this Northern Nigerian brand of indirect rule is traceable to the guarantee of noninterference extended to Northern Nigerian Muslim chiefs at the commencement of empire. On March 21, 1903, Sokoto, the Islamic caliphate covering a large swathe of Northern Nigeria and the last emblem of military resistance to colonial expansion, fell to the imperial army. On the following morning, addressing the chiefs who had survived

5. The emirs formed a part of the broader political elite class: Masu Sarauta ("the possessors of governance"), who "were generally, descendants of the founders of the precolonial Sokoto Islamic caliphate." Reynolds, "Good and Bad Muslims," 601. For the administrative and judicial design of the precolonial Islamic caliphate, see Mervyn Hiskett, The Sword of Truth: The Life and Times of the Shehu Usman Dan Fodio (New York: Oxford University Press, 1973); and Ibraheem Sulaiman, The Islamic State and the Challenge of History: Ideals, Policies, and Operation of the Sokoto Caliphate (London: Mansell, 1987).

6. Although formal imperial dominion was declared at the turn of the nineteenth century, imperial presence on the West African coast dates back to 1841 and was the product of an alliance with anti-slave-trade evangelicals. See Emmanuel A. Ayandele, The Missionary Impact on Modern Nigeria, 1842–1914: A Political and Social Analysis (London: Longman, 1966); and Rabiat Akande, "Navigating Entanglements: Contestations over Religion-State Relations in British Colonial Northern Nigeria, c. 1890-1978" (SJD Diss., Harvard Law School, 2019).

7. The colonial state divided natives of Northern Nigeria into three types of residential formations. Type I areas ("emirates") had a predominantly Muslim population and were administered by the state through the emirs. Type II areas were those with "mixed" religious populations and were administered through Muslim chiefs. Type III areas ("pagan areas") had a predominantly pagan population and were administered by the state through "pagan" chiefs. The state applied "Islamic" law and Islamic systems of courts in Type I and II areas. "Pagan" native law and courts operated, subject to several restrictions, in Type III areas. Akande, "Navigating Entanglements." This narrative focuses on the Type I and II areas. Although the terms "native" and "pagan" are now regarded, at best, with ambivalence, I adopt them in this article in the vernacular sense in which they were employed by official colonial discourse and the dramatis personae in this narrative.

8. At the 1910 World Missionary Conference, Northern Nigeria was declared the "worst place to be a missionary."
the conquest, Colonel Frederick Lugard, the head of the imperial army, guaranteed that “Government will in no way interfere with the Mohammedan religion.”9 Lugard’s declaration was reminiscent of Queen Victoria’s declaration of religious and cultural autonomy after the Indian mutiny.10 However, unlike the queen’s guarantee, Lugard addressed his guarantee only to Muslims. As an indication of its commitment to that guarantee, the colonial government scripted emirs’ oath of office to reflect a religious exemption.11 Like the guarantee, this exemption applied solely to emirs. Taken publicly, it was addressed not only to emirs but also to their subjects as an assurance that the state would not encroach on the sphere of religion.

Coupled with administrative convenience, the guarantee would come to be the rationale for the state’s co-option of Islamic institutions for colonial governance. It would be invoked by the state in defense against criticisms of its ostensible preference for Islamic law. In the hands of the authorities among the colonized—emirs and *alkalai* ("judges")12—the guarantee would be a tool for resisting colonial erosion of their authority.

**Governing Shari’a: Law, Secularism, and Colonial Indirect Rule in Northern Nigeria**

In spite of the colonial state’s co-option of Islamic institutions and Muslim chiefs for governance, it constantly affirmed its secular nature by claiming its “neutrality,” “impartiality,” and “religious tolerance.” The ill-defined exceptions to these attributes were considerations of “humanity or good


10. “We declare it our Royal will and pleasure that none be in anywise favored, none molested or disquieted, by reason of their religious faith or observances, but that all shall alike enjoy the equal and impartial protection of the law; and we do strictly charge and enjoin all those who may be in authority under us that they abstain from all interference with the religious belief or worship of any of our subjects on pain of our highest displeasure.” “Proclamation by the Queen in Council to the Princes, Chiefs and people of India published by the Governor-General at Allahabad,” [1858], IOR/L/PS/18/D154 British Library, UK.

11. “I swear in the name of God well and truly to serve His Majesty King George V and his representative, the Governor of Nigeria, to obey the laws of Nigeria and the lawful commands of the Governor . . . provided they are not contrary to my religion . . .” Frederick Lugard, *The Dual Mandate in British Tropical Africa* (Oxon: Frank Cass and Co. Ltd, 1965).

The state also affirmed the distinction between religion and politics by describing emirs as “secular” chiefs. Yet, it, simultaneously, founded the basis of emirs’ legitimacy on their religious authority as the “head of the faith.” Because the state governed much of Northern Nigeria through Muslim chiefs and Islamic courts, it was always caught between admitting the primacy of Islam in native administration and asserting its neutrality and secularity.

Although this double move is inconsistent with conventional notions of secularism, new critiques have shown that “secular” states often “entrench majoritarian religious norms and institutions.” In fact, the colonial state was not merely entrenching Islam, it was also remaking it to render it amenable to colonial governance. As Catherine S. Adcock points out, contrary to the ideal of noninterference claimed by secularism, the enactment of secularism necessarily requires a state to “define, constitute and regulate religion.” Far from not interfering with Islamic law, colonial governance radically altered it.

13. Frederick D. Lugard, Political Memoranda (London: Frank Cass & Co, 1970), 594. The colonial state, for example, justified restrictions on Christian missionary proselytization on the basis that it was a threat to “good order” because it was likely to provoke a violent reaction by Muslims. By invoking “humanity” and “good order” as exceptions to the general policy of neutrality, impartiality, and tolerance, the state was invoking two values commonly deployed in the service of secularism. Agrama, for example, argues that although secular states affirm “equality, neutrality and impartiality,” they, simultaneously, privilege “the sentiments and values of the majority” on the grounds that these are “integral to the cohesion of society.” In essence, by “invoking public order,” the state smuggles in majoritarian values. See Hussein A. Agrama, “Secularism, Sovereignty, Indeterminacy: Is Egypt a Secular or a Religious State?” Comparative Studies in Society and History 52 (2010): 495–523.


The emergence of colonial versions of native law, including Islamic law across the empire, has been the subject of intense scholarly interest. Indeed, that law was central to the colonial governance project is now widely acknowledged. Yet, the Northern Nigerian story remains unique in the application of Islamic law not only as personal law, but also as criminal law. Writing in 1955, J.N.D. Anderson, Professor of Oriental Laws at the University of London observed: “At present, ... Islamic law is more widely, and in some respects, more rigidly applied in Northern Nigeria than anywhere else outside Arabia ... orthodoxy ... has been preserved first by a century of virtual isolation and then by half a century of colonial administration.”

In a study commissioned by the Institute of Colonial Studies in 1950, Joseph Schacht, who was on the faculty at Oxford, went even further than Anderson. In Schacht’s view, the law that empire rigidified in Northern Nigeria was Islamic law “theory,” rather than its “practice.” The core of Schacht’s thesis was that as in other Islamic polities, in the polity that preceded the precolonial Islamic caliphate, Islamic law was a product of a tension between theory and practice. Whereas Islamic Judges were bound by Islamic law theory, political rulers were not so bound. The judicial power of emirs—siyasa—was, therefore, not constrained by theoretical Islamic law. Yet, although rulers often deviated from the Shari’a, they did not overrule it in “principle.”

Schacht argued that like other Islamic revolutionary movements, the precolonial 1804 revolution in Northern Nigeria sought to disrupt this dualism.


19. Joseph Schacht, “Investigation into the Application of Islamic Law in Nigeria” [1951], CO 927/158/6 National Archives, UK.
of Shari’a theory on the one hand and siyasa practice on the other. This revolution, adds Schacht, was not surprising, because Islamic revolutionary movements are a common once-a-century feature of Islamic societies and according to the general trend, siyasa practice would have been ultimately reclaimed. However, before the reinstatement of this duality in Northern Nigeria, the imperial hand intervened. Because “a colonial administration tends to perpetuate the status quo” and empire “tends to favor formal and explicit theory to the disadvantage of ill-defined and changing practice,” the colonial state retained the revolution-generated Islamic law “theory.” This reification of Islamic law, in sum, led to the effacement of siyasa: a triumph of theory over practice. The crux of Schacht’s account was that contrary to the usual balance between theory and practice, empire reified and froze Islamic law theory.

When Anderson would be commissioned a few months later, he, unlike Schacht, would discern traces of siyasa in the colonial state. Yet, like Schacht, Anderson would conclude that the colonial government had reified Islamic law, thereby cohering with the opinions long advanced by Christian missionaries in Northern Nigeria. To both Anderson and Schacht, the path to reform lay in reclaiming siyasa. However, unlike Schacht’s preference for reform through emirs’ siyasa, Anderson’s core recommendation was that the state invoke its siyasa power to adopt a penal code to replace Islamic law. This recommendation prevailed and its outcome—the 1958 replacement of Islamic criminal with a penal code—has come to be considered the moment of secularization in Islamic law.

However, viewed from the vantage point of the series of reform processes that began in 1903, the adoption of the 1958 Penal Code becomes the culmination of the making of a British Islamic law, a process that commenced after the conquest of the Sokoto Caliphate, regardless of Lugard’s guarantee. My aim is, however, not only to challenge the orthodox claim that the colonial government had a protectionist posture toward Islam. After all, heterodox accounts have, partly, reconstructed the history of colonial Northern Nigeria as a tragedy for “Islamic law” and “Islamic legal institutions.”

20 Beyond this, my aim is to show how the colonial encounter, through the expansion of siyasa, produced an Islamic law amenable to governance sometimes by rigidifying Islamic law “in theory” and

sometimes, in dismissal of both “theory” and “practice.” In doing so, I address the central puzzle of colonial governance: How could the colonial state claim to be secular while co-opting Islamic law and institutions? by foregrounding the following questions: Who had (and exercised) the power to decide what Islamic law was? How was the exercise of this power justified? How did the exercise of this power fit with the broader colonial project of governing religious difference? What were the consequences of these processes for Islamic law, institutions, and colonial subjects?

**Siyasa as Shari’a Governance: The Making of British Colonial Islamic Law**

Contrary to Schacht’s assertion that the colonial state’s reification of Islamic law theory led to the effacement of *siyasa*, the making of a colonial Islamic criminal law was through the vehicle of an unprecedented expansion of the *siyasa*.

Defined variously as “statecraft,”21 “discretionary power of the ruler,”22 “shari’a governance,”23 or even “politics,”24 the scope and meaning of *siyasa* in Islamic scholarly discourse has not been free of debate. This debate has centered on the place of *siyasa* in the Shari’a and the relationship between the political ruler and the jurist.25 Positions ranged from considering *siyasa* as “satanic”26 and opposed to fiqh, to that regarding it as being harmonious with the Shari’a and as “serving the Shari’a, alongside fiqh.”27 A strand of the latter position, which regards *siyasa* as *siyasa*

22. Moustafa, “Judging in God’s Name,” 156.
27. Asifa Quraishi-Landes, “Islamic Constitutionalism: Not Secular, Not Theocratic, Not Impossible,” *Rutgers Journal of Law & Religion* 16 (2014): 553, 559. Examples of scholars who hold this view are Ibn al Jawzi, Al Mawardi, and Ibn Taymiyyah. Each had a different answer to the question of the relationship between the ruler and the jurist. To Ibn al Jawzi, the authority of the ruler was subjected to that of the jurists: the authoritative expounders of
shar’iyya, exerts influence on contemporary readings of classical Islamic governance. Describing the classical constitutional structure, Ebrahim Moosa states that “the caliph . . . was merely the steward of the law” and was obliged to “create an environment conducive to the application of Shari’a norms.” Similarly, Wael Hallaq conceives of siyasa as conforming with the Shari’a as opposed to “unfettered power of political governance.” It was constrained to matters of public order and was exercised for the purpose of serving the public good. Hallaq, therefore, argues that restrictions imposed by siyasa shar’iyya meant that the executive ruler “stood apart” from the legislative authority as well as the juristic and judicial powers exercised by judges.

Regardless of whether this Shari’a-constrained siyasa was consistently applied in practice across history, it was held up as an ideal, and the pre-colonial Islamic caliphate in Northern Nigeria was no different. It is true that the founding leaders of the Caliphate did not have a uniform conception of the scope of siyasa within the Shari’a, yet they considered siyasa
to be *siyasa shar‘iyya.* This constrained not only the legislative/regulatory powers of the rulers, but also their judicial powers. To replace the prerevolution un fettered *siyasa,* Uthman Dan Fodio envisaged the exercise of supervisory jurisdiction over *alkalai* by a chief judge appointed by the caliph/sultan. The sultan, therefore, came to have restricted judicial powers. Emirs faced even more restrictions in their exercise of judicial functions and, in many emirates, their judicial power was limited to boundary disputes. Although the caliphate leaders (and much of the population) favored Maliki jurisprudence, *fiqh* diversity was encouraged.

Within the scope of the Shari‘a, the ruler could make a wide range of judicial decisions/legislation/regulations as long as those were for the public good and with the motivation of “piety and support of Islam.” Yet, the ruler’s judicial and legislative power was also constrained by subject matter. For example, within the realm of criminal justice administration, the ruler’s discretion was restricted to *ta’azir:* offenses against public order for which there are no fixed scriptural definitions or prescribed punishments. In practice, *ta’azir* also encompassed offenses for which “conviction could not be secured due to lack of evidence.” Within this realm, the ruler had the power and duty to establish “equitable criminal procedure laws to deter criminals and protect the innocent.” The goal of executive power, here, was, therefore, that of deterrence and protection of the society, rather than punishment.

The most striking transformation that colonial secular governance had on Islamic law sprung from its “legal centralization of political power”

33. Even Muhammed Bello, most liberal in constructing *siyasa,* states in his *Tanbih al-raqid:* “Rulers have dared to oppose the Sharia under the false apprehension that the policy of the Sharia is not capable of dealing with people and the best interest of the community. They overstep the limits of Allah and abandon the Sharia by rebelling in various ways and making innovations in government in a way that is not permitted. The reason for this is ignorance of the Sharia.” Sulaiman, *The Islamic State,* 73. See also B. G. Martin, “A Muslim Political Tract from Northern Nigeria: Muhammad Bello’s *Usul al-Siyasa,*” in *Aspects of West African Islam,* ed. Daniel F. McCall and Norman R. Bennett (Boston: African Studies Center, Boston University, 1971), 63–86.


35. Sulaiman, *The Islamic State,* 68, citing Abdullahi Bello’s *Diya al Hukam.*


37. Sulaiman, *The Islamic State.*
in the state. With this centralization of the state “in the moral and political life of subject peoples,” siyasa governance shifted from its very limited role of enforcing the few laws aimed at maintaining public order to now encompassing the extensive regulation of lives of subjects. That this legal centralization also changed the previous practice of juristic diversity to a “constitutional ordering of legal monism” only heightened Islamic law’s transformation.

This concentration of the power to apply the Shari’a in the hands of the colonial state—“Sharia statism”—was a fundamental legacy of colonial governance in Northern Nigeria. Expanded beyond recognition, siyasa now manifested as state power with the state represented at different points by the rulers, the judges, the colonial administrators, and, ultimately, by the postwar period, by a central legislative council not unconnected to the old power structures. It was this statist arrogation of the power to determine Islamic law and the configurations and reconstructions of authority it produced that secularized Islamic law.

Disaggregating the Colonial State

Colonial governance was a complex amalgam of ideologies and strategies. Two ideas of native administration informed the posture assumed by the colonial state toward Islamic law and institutions and its “secularization” strategies.

The first was the stricter variant of indirect rule formulated by Frederick Lugard who was regarded as its “High Priest.” This variant, set out in his Political Propaganda, was executed during his tenure and applied even

42. Asifa Quraishi-Landes, “Islamic Constitutionalism,” 562, arguing that “state power has become today’s siyasa.” See also Hussin, The Politics of Islamic Law, 177.
43. High Commissioner of the Protectorate of Northern Nigeria, 1900–1906, and Governor General of Nigeria from 1912 to 1914.
more strictly by the “Lugardians”\textsuperscript{45} with the support of the Colonial Office in England. The core of Lugard’s thesis was that “real Africa” was “tribal Africa,” and that Africa ought to be administered through native chiefs, laws, and courts. Lugard considered it the duty of the colonial administration to protect the natives from the “corrupting influence” of European civilization. This glorification and idealization of native institutions in Lugard’s scheme valorized emirs and their place in governance.\textsuperscript{46} Lugardian native administration ideology was the perfect background for the commencement of reform through the expanded \textit{siyasa} of emirs. This expansion reconfigured the roles of political and judicial authorities. There came to be a distinction between what \textit{alkalai} conceived Islamic law to be and what they were ordered to do by the emir who was in turn acting on the “instruction” of colonial administrators. Although \textit{siyasa} was largely rooted in the emir in the Lugardian phase, the colonial administration had begun to arrogate power directly to itself by conferring “supervisory” jurisdiction over Islamic courts on European colonial administrators.

The second idea of native administration was developed by Donald Cameron,\textsuperscript{47} who being hostile to the valorization of native institutions by the Lugardians, ushered in open reforms by creating an appellate bridge from native to English courts.\textsuperscript{48} With Cameron’s reforms, \textit{siyasa} power moved from the emirs to the colonial state. Because Cameron, unlike Lugard, opposed the fusion of executive and judicial powers, he invested the power of reform not in colonial administrators, but in the hands of a judiciary staffed by European judges trained by English law.

Cameron did not completely root out Lugardian ideas. Despite the approval of the Colonial Office, his policy was never fully implemented, because there remained many Lugardians among those entrusted with effecting the reform, namely the residents and district commissioners. As a result, both Cameron’s and Lugard’s ideas on native judicial administration came to exist side by side in the last two decades of colonial rule.

\textsuperscript{45} The administrators who subscribed to Lugard’s thesis.

\textsuperscript{46} So invested were the Lugardians in the idea of the autonomy of the Muslim emirates that Margery Perham, biographer of Lugard and prominent scholar of colonial administration, labeled the Lugardian form “ultra-indirect rule” and noted that they tended to treat these emirates as entities with the status of the princely states of India. Lugard, \textit{The Dual Mandate in British Tropical Africa}, xl.

\textsuperscript{47} Governor of Nigeria, 1931–1935.

The complexity of colonial administration was not limited to the tensions between differing ideas and strategies of colonial administrators. The “tensions of empire”49 extended to the relationship between the colonizers and the colonized, as well as among the colonized. Rather than being a “top-down imposition,” the law and legal institutions were “sites” of contestations in which emirs, alkalai, colonial subjects, and administrators negotiated and renegotiated.50 These contestations did not, however, “make colonialism any less exploitative or coercive.”51

Lugardian Phase (1900–1930)

Lugard viewed Muslims as the “ideal” natives, and Islamic institutions as the “ideal” vehicle of native administration. His fundamental assumption was that although “Islam [was] incapable of the highest development, its limitations suit[ed] the limitations of the people.”52 Lugard noted that Muslims resisted “denationalization tendencies,” especially Christian missionary proselytization, and considered this evidence that Muslims were the “real Africa.” He further argued that Muslims exerted a “civilizational influence” over “lower classes.” Whereas he could discern little more than the “arbitrary will of the chief” or “mob law” in “primitive pagan” communities, he marveled at the sophistication of Islamic courts and the erudition of its judges.

Central to Lugard’s vision of Islamic institutions as a vehicle of colonial indirect rule was a strong executive wielding both legislative and judicial powers. This vision, therefore, called for an unprecedented expansion of the siyasa of emirs. It is true that some of Lugard’s desire to glorify emirs might have stemmed from his orientalist fascination with them and his wish to maintain appearances of upholding his guarantee of noninterference, yet utilizing emirs for the state’s reform project was also dictated by administrative exigencies, foremost among which was the severe manpower shortage in the colonial administration.53 To administer the colony,

49. Frederick Cooper and Ann Laura Stoler, eds., Tensions of Empire: Colonial Cultures in a Bourgeois World (Berkeley: University of California Press, 1997).
50. Moosa, “Colonialism and Islamic Law,” 177. See also Kendhammer, Muslims Talking Politics, 54. For an account mapping out the ways in which the varied responses of colonial subjects to colonialism were justified in the language of the Shari’a, see Muhammad S. Umar, Islam and Colonialism: Intellectual Responses of Muslims of Northern Nigeria to British Colonial Rule, vol. 5 (Leiden: Brill, 2006).
51. Comaroff, “Colonialism,” 312
52. Lugard, Dual Mandate, 78.
53. At the inception of colonial rule, there were 100 British officers for Northern Nigeria, which had a size of 828,796.195 square kilometers and population of 8,700,000. Annual Report, Northern Nigeria, 1901. This manpower shortage would continue because of
the colonial state depended on the Islamic institutions and had to shore up not only their legitimacy, but also their brute power.

Rather than being intended to expand the powers of emirs, the Lugardian vision of a strong executive/administrator found its highest realization in the powers it granted to European colonial administrators, particularly residents. Reform during the Lugardian phase, therefore, primarily took the form of the “instructions” issued by the residents and executed through the extended siyasa of emirs. The other main vehicles of reform—the reorganization of the courts and the conferment of discretionary supervisory jurisdiction on the colonial administrators—closely relied on the logic of the siyasa-expansion tool. The content of the reforms set in motion by the colonial state tended to be triggered, sometimes, by the ideas of the Lugardians about “good order,” and at other times, by the advocacy of local missionaries, their international counterparts, and the Colonial Office.

Expanding Siyasa

Although the emirs denied it in their interviews with Schacht, siyasa was the major tool for reform during the Lugardian phase and this would provide the foundation for the state-siyasa project of the Cameron era. John Cornes,54 a colonial administrator, therefore, rejected Schacht’s assertion that Northern Nigeria represented the “most spectacular instance of the self-effacement of siyasa as represented by the political authority.”55 To Cornes, the emirs’ denial of their exercise of siyasa was “not entirely disingenuous.” Contradicting their claims, Cornes saw evidence of the emirs’ wide exercise of siyasa in their “tight hold over their alkalai” and their exercise of both formal and informal control over judicial outcomes.

Cornes’s opinion was more accurate. In spite of the emirs’ denials, colonial rule saw the expansion of siyasa beyond that exercised during the pre-colonial period. It was this expansion that gave these rulers authority to execute the instructions issued by colonial administrators. In issuing instructions, the residents tended to be strategic. The move of John H Carrow, Resident of Kano Province to modify some rules of evidence in alkalai courts is illustrative.

---

54. John Cornes was the Institute Colonial Studies’ supervisor of colonial services courses when Schacht was commissioned to conduct the Northern Nigerian study. Prior to this, he had served in Northern Nigeria.

55. Schacht, “Investigation into the Application of Islamic Law in Nigeria,” 5.
First, Carrow met with the emir’s senior officials and spoke to them of “the necessity” of “adjusting ... to modern conditions.” To protect the emir from being “accused of failing in his faith,” Carrow suggested that the governor issue an order mandating reform. Subsequently, Carrow met with the emir who suggested that rather than issuing an order, the governor should write a personal letter “requesting” the changes. Upon receipt, the emir guaranteed that he would direct alkalai to comply. Such a strategy would ensure that “the whole matter is dealt with as discreetly and quietly as possible to avoid gossip and intrigue in Kano city.” Carrow agreed and did as the emir proposed.

When Lugard instituted reforms to eliminate the classical alternatives of compensation or forgiveness to criminal punishment, it was left to emirs to secure alkalai compliance. Therefore, in Katsina NA v. Yakudi of Hababa and Dankoko of Renage in which the chief alkal discharged a defendant convicted of homicide in response to the request of the victim’s family, the emir overturned the decision and sentenced the convict to death, citing “the instruction of the government” mandating punishment for criminal convictions.

Alkalai sometimes contested this exercise of siyasa. In a case in Sokoto Province, the alkal refused to comply with the emir’s directive on the basis that he “could not enforce a law made by an emir that is not in the Quran.” Arguing that “Islamic law strictly commands obedience to those in authority,” the emir overruled him. The emir was, therefore, asserting that he was exercising siyasa shar’iyya. For emirs, retaining their authority in the face of their obligations to implement the wishes of their colonial overlords required clothing their commands in the language of the Shari’a. Because the state sought to preserve the authority of emirs in the eyes of natives, administrators cooperated with emirs in justifying reform as siyasa Shar’iyya.

Beyond alkalai resistance, emirs sometimes resisted this reform through siyasa project. In 1930, the Advisory Council of Emirs passed a resolution that “they were unable to suggest any departure from the strict letter of Mohammedan law” on the basis that if they did so, “all their subjects ...
would feel that they had abandoned their religion.” Thanking them for “their clear and unequivocal statement of their point of view,” the lieutenant-governor pointed out that their position was “entirely logical.” The lieutenant-governor’s response was, of course, entirely consistent with the Lugardian strategy of apparent deference to the emir. Neither the emirs’ resistance nor the ostensible deference of colonial administrators halted reform. In these cases, Lugardians utilized the vehicle of supervisory jurisdiction over Islamic courts.

Reorganizing the Judiciary

Lugardian reorganization of the judiciary was designed to expand the powers of emirs by setting up grades of courts and instituting a system of appeal. There were four grades of Islamic courts with the emirs’ court at the apex. The emir’s court had exclusive jurisdiction over homicide cases and pronouncing the death penalty, the execution of which was subject to the approval of the resident. Both residents and district officers had a right of access to the courts and could “review, modify or suspend a judgment” or “order re-hearing before the same court.”

Obviously, the expansion of the emir’s jurisdiction had already increased the avenues through which the emir could exercise siyasa in the service of the colonial state. Yet, the colonial administrators’ supervisory jurisdiction offered an alternative in situations in which emirs resisted colonial directives. In the Hassana of Fura case, a defendant convicted of murder was forgiven by the parents of the victim and the emir discharged the defendant in line with Islamic law. The resident insisted that a punishment of death ought to be imposed and complained to the governor who, in spite of his expressed desire not to offend the emir, imposed a judgment of 5 years imprisonment.

By exercising supervisory jurisdiction over emirs’ courts, political officers exercised judicial control without formal appellate jurisdiction. This design was informed by Lugard’s conviction that it was “[un]desirable that there should be any formal right of appeal” but “essential that the duty of supervision and revision by the administrative staff be rigorously carried out.”

61. Native Courts (Amendment) Proclamation (No. 10, 1908) (N.Nig.), 1911 and Native Courts Ordinance (No. 5, 1918) (Ng.).
64. Lugard, Political Memoranda, memorandum no. 3
Operating parallel to the native courts were the Protectorate Courts. The Lugardian design, therefore, produced two systems of courts. On the one hand, there existed the native courts appeal system under the control of the administrators: the district officer, resident, high commissioner, and governor, in that order. On the other hand, the English-style protectorate courts were under the control of the chief justice and applied local legislation, “English Common Law, doctrines of equity and Statutes of General Application that were in force in England on 1 January 1900.” The relationship between the protectorate courts and Islamic courts was unclear. This lack of clarity increased the discretion of colonial administrators. The question of jurisdiction could make a radical difference to the fate of a defendant. For example, a homicide might call for capital punishment under the Criminal Code applicable in protectorate courts, but the accused person could avoid the death penalty by paying *diya* (“compensation”) in Islamic courts. Also, a homicide might constitute manslaughter under the Criminal Code but be punishable by death in the Islamic courts.

In the Lugardian phase, the administrators did not transfer cases from the Islamic courts to the Protectorate courts although they had the power to do so. This attitude stemmed from the Lugardian impulse to preserve the appearance of strengthening the authority of emirs. The refusal to transfer cases left the vast majority of judicial work in hands of emirs and *alkalai*, under the supervision of the European administrators. Resident of Sokoto, Edward J. Arnett explains this disposition: “... [the Islamic court’s] judge may be less clever than an English one at analyzing a mass of evidence but ... To take away this power ... would seriously impair the authority of the emirs and the whole native administration.”

65. One of these was the 1916 English Criminal Code. The Protectorate Courts were of two categories: (1) the Supreme Court and (2) the Provincial Courts comprising Provincial Courts and Cantonment Courts. See Protectorate Courts Proclamation of 1900 and Cantonment Courts Proclamation of 1902. Colonial administrators wielded immense power over both courts. The Supreme Court was the highest in the hierarchy with both supervisory and appellate jurisdiction: appellate jurisdiction over the provincial courts and supervisory jurisdiction over cantonment courts and native courts if political officers transferred cases to it.

66. Jurisdiction was determined by: (i) whether the accused person was a native/non-native; (2) whether the alleged offense was committed within the boundary of an emirate and whether the case was investigated by the Nigerian police or the Native Authority Police; and (3) whether the resident or other officer *saw fit* to transfer the case from the native courts.

This did not prevent the exercise of judicial powers of supervision by the administrators when necessary. On the one hand, therefore, the Lugardian reforms increased the judicial powers of emirs as a vehicle for *siyasa*. On the other hand, the power of supervision provided a channel through which the state could directly determine judicial outcomes.

**Judicial Reorganization: Jurisdiction over Non-Muslims**

Consistently with Lugardian design, non-Muslims in both the Muslim emirates and areas with mixed-religious populations\(^68\) were subject to Islamic criminal law and the jurisdiction of Islamic courts.\(^69\) In addition to the pervasive Christian missionary criticism that this arrangement violated “freedom of conscience,”\(^70\) the status of non-Islamic customary law was highly contentious in disputes between Muslims and non-Muslims. In one case, a Muslim defendant charged with murder argued that he had shot and killed the victim (a “pagan”) in an attempt to prevent him from stealing his ram. When summoned to testify, the victim’s family members insisted that custom forbade entering into the presence of the defendant (including in court) unless he “held a sheep in front of himself” and the victim’s next of kin was blindfolded and stabbed the sheep, until the animal’s blood ran over the defendant. The defendant declined to submit to the ritual and consequently, the victim’s family members refused to testify. The *alkali* held that the capital penalty could not be imposed in the absence of witnesses refuting the defendant’s account. He then ordered the defendant to pay *diya* as required in cases of unintentional killing.

\(^{68}\) This was in spite of the Native Court Proclamation of 1900’s provision that the law applicable by a native court was native customary law prevailing in its area of jurisdiction.

\(^{69}\) Although Islamic courts had exercised a degree of jurisdiction over some non-Muslims in the precolonial era, this was restricted. Colonial rule expanded the territory over which Islamic institutions exercised governance powers. Further, the precolonial ad hoc systems of trial of non-Muslims residing in emirates by persons of the ethnoreligious persuasion of the parties, ceased to operate. In *Reg v. Ilorin*, the Supreme Court upheld this colonial era subjection of non-Muslims to the jurisdiction of Islamic criminal law on the basis of the argument that criminal law is territorial. The court further pointed out that in Northern Nigeria, there is no personal law in the sense in which the concept exists in India. Anderson, “A Survey of Islamic Law in Nigeria,” 83.

\(^{70}\) Christian Missionary Society General Committee III’s January 26 1916 Memorandum in which it urged the colonial government to conduct judicial and civil administration was according to custom rather than Islamic law. Resolution by Subcommittee on Difficulties with the Nigerian Government, January 26, 1916. CMS/B/OMS/A3/CL/1916, University of Birmingham Cadbury Research Library Special Collections.
However, the family of the victim declined the *diya* because their custom forbade it.\(^71\)

Although the complexities introduced by non-Islamic customary law posed challenges, the most criticized disability of non-Muslims in the Islamic courts was in the area of evidence. Oaths not sworn to on the Quran, although admissible, had an inferior evidentiary value. This meant that the testimony of non-Muslims had lesser weight before the court. In Kano Province, reforms introduced had enabled Christians to swear on the Bible in English and permitted “pagans” to swear using a knife. However, evidentiary restrictions against non-Muslims continued to exist in many provinces. In reaction, it was not uncommon for non-Muslim parties to agree settle disputes informally outside of the legal system when a matter had not come to the attention of the authorities.\(^72\)

**Substantive Reforms**

In keeping with the Lugardian valorization of Islam, the creation of the Lugardian idea of a colonial Islamic law largely relied on the procedural reforms described. Overt substantive reform was rare. The most significant was the state’s confinement of Islamic law to the jurisprudence of the Maliki school.\(^73\) Although Maliki jurisprudence had been predominant in the precolonial Islamic state, judges had been free to apply the jurisprudence of other schools.\(^74\)

Further confining jurisprudence was the narrow conception of Maliki law. In keeping with Lugard’s prescription in *Political Memoranda*, many colonial administrators conceived of Maliki law “as a settled code which you look up in Ruxton.”\(^75\) Commenting on this, a colonial administrator admitted that he, like other colonial administrators, had “little idea

\(^71\) J.N.D. Anderson, The Reform of Criminal Law Introduced by the British, File 365205 PPMS 60/1/12-17, SOAS Library Special Collections, London.

\(^72\) Some Muslims labeled “skin-deep Muslims” also engaged in this practice of settling disputes outside of the legal system. Schacht, “Investigation into the Application of Islamic Law in Nigeria.”

\(^73\) Native Courts Proclamation (No. 2/1900) (N.Ng.).


of the number of points on which two or more orthodox Maliki views were possible.”

This narrow conception of Islamic law was most significant in the Lugardian policy on hadd penalties. In spite of the colonial policy that penalties must not involve “mutilation, torture or grievous bodily harm,” the Lugardians largely upheld the univocal conception of Islamic law as contained in Ruxton. Hence, the restriction hardly meant anything in practice. For example, Lugard expressly acceded to beheading and drowning as permissible penalties dictated by Maliki law. Yet, by the turn of the nineteenth century, such punishments had become rare in Northern Nigeria. If Schacht’s thesis that the colonial state upheld “theory” rather than “practice” was true, it was with regard to this confinement of Islamic law to a narrow conception of Maliki jurisprudence. Yet, Lugardian policy did not fully validate Schacht’s thesis even in this regard. Irrespective of both theoretical prescriptions as contained in Ruxton’s Maliki law and the practice of the courts, Lugard abolished restitution as a principle of criminal jurisprudence: As a penalty for crimes, it did not, in his view, conform with “good order.”

In spite of these reforms, official rhetoric continued to valorize Islamic law. For example, the stated purpose of the Native Courts Proclamation (No. 5) of 1900 was the “better regulation and control” rather than creation “of native courts.” In Lugard’s 1914 Amalgamation Report, he asserted that “the courts were served by judges erudite in Moslem law and fearless in its impartial application.”

**Cameron Phase (1931–58)**

Hugh Clifford, Governor of Northern Nigeria from 1919 to 1925, first articulated the ideas that would form the basis of the native (and judicial) administration ideology of the Cameron era. Unlike Lugard, Cameron...

---

76. Letter from official (name illegible) to Anderson. Anderson Collection, PPMS 60/01/16, SOAS Library Special Collections, London.
77. Native Courts Proclamation (No. 2/1900) (N.Ng.).
79. Section 13 of the Native Courts Ordinance. See the Hassane of Fura case and *Katsina NA v. Yakudi of Hababa and Dankoko of Renage*.
82. Clifford’s ideas did not receive the support of the Colonial Office the way Cameron’s did.
(and Clifford) sought to model native administration in Northern Nigeria after that of Southern Nigeria because of his admiration for Southern Nigerian administration and the natives it had produced. Setting his ideas in motion was not easy, as many in the rank and file of the colonial administration remained resolute Lugardians. Yet, Cameron’s reforms eventually became so far reaching that he is regarded as the “architect of Nigeria’s postcolonial legal system.”

At the core of Cameron’s opposition to Lugardian design were the extensive powers granted to emirs, in particular and to the executive/administrators (native chiefs and political officers), in general. Cameron’s attack, therefore, centered on the fusion of executive and judicial powers, the increased siyasa of emirs, and the absence of an appellate channel from the native courts to the superior courts.

Regarded by Christian missionaries as “the Master of indirect rule, and not its servant,” Cameron was no Lugardian adulator of indirect rule or its “reverence” for emirs. As he once informed the British Parliament, “to be a good chief depended ... upon the man becoming a Christian.”

Cameron did not favor a complete departure from Islamic law and institutions; indeed, he was cautious about reform save in situations in which Islamic law was “so flagrantly and dreadfully barbarous, so contrary to accepted standards of modern civilization or detrimental to the interest of others.”

Because Cameron neither valorized emirs nor made a show of idealizing Islamic law as Lugard did, he was willing to pursue reform openly, mostly through the courts. Yet, because he, like Lugard, continued to utilize native institutions for colonial enterprise, he had to engage in a balancing act between the need to maintain the efficacy of native institutions and the thirst for reform.

In spite of their differences, Cameron and Lugardian ideas on native administration both concentrated power over Islamic law in the hands of the state. If for Lugard, Shari’a governance was largely through a state-directed expansive Emir’s siyasa, for Cameron, it took the form of direct intervention of the colonial state through the judiciary. Both converted the hitherto siyasa shariyyah into an extensive statist siyasa.

83. Prior to being governor, Cameron had accumulated experience in many phases of colonial administration in Southern Nigeria and Tanganyika, neither of which featured the Lugardian brand of indirect rule.
85. H.D. Hooper to WRS Miller, June 9 1931. IMC-CBMS/01, SOAS Special Collections, United Kingdom.
Judicial Reorganization: Siyasa Recalibration

Cameron’s judicial reorganization was designed to reduce the siyasa of emirs and administrative officers and shift it to a new locus: judges of the English courts. He set about doing this by curtailing the judicial powers of emirs through two channels: the creation of an appellate bridge to high courts and the reduction of the jurisdiction of emirs’ courts. Yet, Cameron’s plan to depart from the Lugardian practice of curtailing emirs’ siyasa could not go too far, because the entrenchment of the Lugardian practice hindered radical transformation.

If the colonial state no longer relied on emirs’ siyasa in service of its reform project, the emirs and Masu Sarauta continued to find use for siyasa, with or without the state’s consent. Indeed, siyasa would come to be an infamous tool utilized by the emirs and Masu Sarauta for repressing political opponents, particularly with the inception of party politics during the postwar period. For example, in the infamous Basa case in Yobe Province, the accused person was charged with slandering the emir (of Fika) and some other political elites. Both the Native Authority Police who proffered the charge and the chief alkali before whom he was tried acted under the direction of the emir. Basa was subsequently sentenced to eighty lashes of flogging, a sentence reviewed and confirmed by the emir himself. This sentence was executed by a “giant” who beat Basa so severely that he became disabled. On appeal, Basa’s conviction was overturned on the grounds that the offense was unknown to Islamic law; the sentence was improperly administered; and the emir of Fika had given judgment in his own case. The court awarded Basa compensation and recommended that the chief alkali be disciplined. Embarrassed by the publicity generated by the case, the government wrote to the emir, reprimanding him, and expressing its intention to dismiss the chief alkali.

87. The 1933 Native Courts Ordinance.
88. For example, although Cameron’s initial plan was to strip all emirs’ courts of jurisdiction over capital matters, he acknowledged that “it is quite impossible to withdraw this power over which they have exercised the full consent of the Government for over thirty years” and opted to reduce the number of emirs’ courts with jurisdiction over capital cases from twenty-three to sixteen. Brooke Commission Report, 186.
89. The stage for this dichotomy between the “establishment” and the opposition was set by the design of colonial indirect rule. For an account of how colonial rule created a dichotomy between “good Muslims” and “bad Muslims,” on the basis of alignment with the Masu Sarauta, see Reynolds, “Good and Bad Muslims.” For an account of the Masu Sarauta’s utilization of siyasa to repress opponents in the postwar period, see Jonathan Reynolds, The Time of Politics (Zamanin Siyasa): Islam and the Politics of Legitimacy in Northern Nigeria, 1950–1966 (San Francisco: International Scholar Publications, 1999), 1.
his part, the chief alkali insisted that his judgment was justifiable because it had been directed by the Emir.91

Judicial Reorganization: Jurisdiction over Non-Muslims

Cameron moved to curtail the jurisdiction of emirs and alkalai courts over non-Muslims. Although this might have been partly the result of Cameron’s sympathy for Christian missionaries who vocally criticized the subjection of Christians to Islamic courts,92 the immediate catalyst was the Eluaka case. Victor Eluaka, a Christian in Plateau Province, had been whipped in execution of the judgment of an alkali court for refusal to pay land tax.93 The case generated furor in missionary circles.94 At the urging of the Church of England’s Church Missionary Society, the Colonial Office waded into the matter. In response to Secretary of State Sir Phillip Cunliffe-Lister’s, request for information, Cameron stressed that the flogging had been carried out without his knowledge or permission, and assured the secretary that such would not happen again.95

91. Colonial administrators could not always decisively reprimand the over-reach tendency of emirs. For example, when the emir of Kano convicted five political opponents of “holding a political meeting without a permit” the Resident, Richard E. Gresswell criticized the emir, pointing out that he had no power, save with regard to offenses that had fixed penalties, to award more than twelve strokes on a single person at a trial. He also informed him that he was at a risk of being ordered to pay damages if the defendants appealed the decision. In response, the emir insisted that he had acted within his authority citing Tafsirat al-Hukam, a Maliki text. KSHCB, “Native Courts Policy and Instructions,” June 29, 1956, in Reynolds, The Time of Politics, 93.

92. For a comparison of Cameron and Lugard’s relationship with Christian missionaries, see Akande, “Navigating Entanglements.”

93. According to Hugh Middleton, the resident, Eluaka had failed to pay a tax levied on his ownership of two plots of land in Bukuru, Plateau Province, a Type II area. Eluaka informed the native chief that he could not afford to pay the tax. Alongside three Muslim natives, he was charged to an alkali court. During the proceedings, the four defendants did not “seem to take the alkali’s warnings seriously,” so the alkali issued a final warning: “If the four of them did not pay their taxes in six hours, he would have them arrested and publicly flogged.” When they did not comply with the order, they were arrested, hauled to a public square, and flogged. Within a few hours, they paid their taxes in full. Public Record Office File, CO 583/190/1130 (1933), 2 in Gloster, The Evolution of Maliki Law.


95. Not all administrators blamed the alkali. For example, the Acting Secretary of the Northern Provinces, Herbert B. James, observed that the alkali had considered the sentence justifiable according to al-Mukhtasar, a Maliki text. Further, the alkali believed that Eluaka and his codefendants had considered the fine to be “a laughing matter.” Confidential Memorandum signed by H. B. James, Acting Secretary of Northern Provinces, No. 19062/26, April 4, 1933, Public Record Office File, CO 583/190/1130 (1933), 13.
Cameron responded to the criticism generated by the Eluaka case as well as the broader criticism of the situation of non-Muslims in *alkalai* courts by the creation of mixed courts, which applied the customary law of the parties to the dispute. They were presided over by appointees of emirs. Because mixed courts did not exist in every province and even where they did, the Native Authority Police could still charge non-Muslims before Islamic courts, many non-Muslims continued to be subject to the jurisdiction of emirs and *alkalai* courts.96

**Appellate Process in a System of Multiple Courts**

The legislation that embodied Cameron’s reform of the judiciary was the 1933 Native Courts Ordinance, which unified the appellate system for all of Nigeria. As in the Lugardian phase, two sets of courts existed, the Islamic courts97 and the “superior” English-style courts. However, in a departure from the Lugardian design, there now existed a unified system of appeals: matters from the Islamic courts were appealable to the superior courts: the High Court, the Supreme Court, and, ultimately, the West African Court of Appeal (WACA).

Although Islamic courts were now mandated to comply with the provisions of the Criminal Code, they continued to decide criminal matters according to Maliki jurisprudence and the demands of the emir’s *siyasa*. Initially, the practice of the superior courts was to apply Maliki law (as interpreted by the Islamic courts) in determining appeals, although this contravened section 4 of the Criminal Code, which declared the code supreme in cases of discrepancies with native law.

This deferential attitude to the Islamic courts would not last. Cameron’s reforms had not only empowered the judiciary, they also coincided with a change in its composition. The judges of the Lugard era, although usually barristers-at-law, had typically started their careers in administrative positions and were therefore more acquainted with native institutions. The judges of the Cameron years were different. As a prominent Lugardian

---

96. See *Effiong Ekpo v. Kano Native Authority* (1957) N.R.N.L.R. 129 in which the High Court of Northern Nigeria, held that contrary to the appellant’s assertion that the Emirs’ Court had no jurisdiction over non-Muslims, the Emir’s Court had jurisdiction to apply Islamic law “over all persons who are within the Native authority’s jurisdiction and whose general mode of life while there is that of the general native community.” 130.

97. These courts’ application of Islamic law was, as previously, limited by the repugnancy test (measured by “natural justice, equity and good conscience”). They were also required to apply certain ordinances. Native Courts Ordinance of 1938.
administrator noted, these Cameron era judges not only lacked administrative experience in Northern Nigeria, they also “felt themselves out of sympathy with the people and their surroundings. They missed the company of fellow members of their own profession in this predominantly Muslim world and they disliked the relative austerity of living conditions.”

By the end of the postwar period, the new judges had abandoned the earlier posture of deference. The earliest sign of this shift was Justice Ames’s dissent in *Magudama v. Bornu NA* in which he stated: “Can it be the law of this large British protectorate that in any part of it, a man can be sentenced to death for what is shown by the evidence to be at most manslaughter and not murder? Mohammedan law has no privileged position. It prevails where it does prevail because it is the local law and custom.”

Ames’s critique went beyond the refusal by the *alkali* court to comply with the 1933 ordinance. It was a critique of what the superior court judges perceived to be an undue preference for Islamic law over other indigenous legal systems.

One year later, in *Tsofo Gubba v. Gwandu N.A.*, the entire court adopted Ames’s position. Chief Justice Verity declared: “where a native court exercises its jurisdiction to [sic] an act which constitutes an offence against the Criminal Code, it is required to exercise that jurisdiction in a manner . . . in accordance with the provisions of the code.”

Gubba had discovered the victim having intercourse with his wife and killed the victim in the ensuing fight. The *Alkali* court convicted Gubba of homicide and sentenced him to death. In overturning the conviction, WACA held that the facts of the case established the statutory defence of provocation, a defence unrecognized under Islamic law.

**The Emirs and Alkalai Respond**

Emirs, *alkalai*, and scholars received the Gubba decision with shock. Although Cameron’s departure from Lugardian practice had put them on notice, the initial deferential attitude of the superior court judges did not prepare them for the Gubba reversal. With the decision, the emirs concluded that the colonial government had reneged on the 1903 guarantee of noninterference. Peter H.G. Scott records the story of the emir of Katsina Province who refused to try homicide cases out of fear that the
Supreme Court would overturn his decisions. Instead, he transferred those cases to the High Court. Many other emirs and alkali had a similar inclination. This stance was authorized by a pronouncement of three eminent jurists of the Kano Law School: “The Shari’a is all sufficient and unchangeable . . . where the Quran prescribes a judgment, no other may be given . . . Nevertheless, where for one cause or another, the whole government is not to be bounded by the Scriptures, it is better that those judges whose authority is founded upon the Shari’a should touch nothing in which the Shari’a may not be fulfilled . . .”

The outrage was not merely a reaction to colonial interference in native courts. It was also rooted in the perception of the Northern Nigerian political and judicial elites that English judges and Southern Nigerian lawyers were colluding to erode Islamic law and undermine their institutions. Even before the Gubba decision, emirs and alkali with their Lugardian sympathizers already viewed the new class of judges with distrust. Not only did these judges openly disdain the ways of the North, they were also fastidious churchgoers. To make matters worse, they identified as professional peers of the mission educated and Christian barristers of Southern Nigerian origin. At this time, Northern Nigeria had not yet produced any native trained in English law. The emirs and alkali were therefore deeply suspicious that the English Judges and the Christian Southern Nigerian barristers were colluding to erode the British government’s guarantee of non-interference.

After Gubba

Legislative Reforms

The first legislative response to the protests that greeted the Gubba decision was the Native Courts Ordinance, No. 36 of 1948, which empowered the Islamic courts to try offenses in accordance with Islamic law, even when

102. Some emirs and alkali interviewed by Schacht in his 1950 study stated that because the government had chosen to contravene the guarantee of noninterference by interfering with the courts, it was preferable to abstain from exercising jurisdiction rather than to apply “non-Islamic” law or be overturned on appeal. Stripping themselves of jurisdiction would take the matter “out of their conscience.” Schacht, “Investigation into the Application of Islamic Law in Nigeria,” 15.
such also constituted an offense under a statute. However, an appellate court was granted the discretion to choose any course available, even if the original decision was correct under Islamic law. Further, decisions in homicide cases were subject to review by a High Court judge. Because the emirs and *alkalai* were not appeased by the 1948 Ordinance, the 1951 Ordinance sought to reassure them by abolishing the power of review of the High Court. However, this ordinance also limited the punishment that native courts could impose. In practice, *alkalai* did not comply with the limits set by the 1951 amendment.

On their part, the judges of the Superior Courts were not induced by the post-Gubba legislations to turn back from their activist course. In *Fagoji v. Kano NA*,105 the Supreme Court overturned the decision of the Emir’s Court, holding that superior courts were still bound by the Criminal Code when considering appeals from Islamic courts even though the latter courts had been relieved from the obligation to adhere to the Code by the 1948 Ordinance. Therefore, although the Supreme court admitted that the Emir’s Court’s conviction of the appellant and pronouncement of the capital penalty was consistent with Maliki law, it overturned that court’s decision because the facts of the case amounted to manslaughter rather than murder under the Criminal Code. In *Maizabo v. NA*,106 the Supreme Court went further by not only asserting appellate supremacy and the duty of appellate courts to comply with the Code, but also by holding that the Islamic courts were obliged to comply with the code.

**The Legal Experts**

Faced with the new activism of the superior courts and the measured resistance of emirs and *alkalai*, the colonial government assumed a mediating posture. Within three years of the Gubba decision, the administration commissioned three legal experts to conduct surveys on Islamic law. The first, Neville John Brooke, the Chief Justice of Nigeria, was to chair a commission charged with inquiring into native courts and making recommendations for reform. Although the Brooke Commission pointed out that Lugard’s 1903 guarantee was not “a guarantee of immutability in the law” and predicted that Islamic criminal law in Northern Nigeria was bound to give way to codes of modern criminal law as “found elsewhere in Moslem countries,” it recommended the retention of “Islamic criminal law” and Islamic courts.107

106. *Maizabo v. NA* (1957) NRNLR. 133 (S.C)
107. Brooke Commission Report, 185. The commission recommended that future *alkalai* be trained in customary law and apply it in matters involving non-Muslims. It also proposed
The other two experts, Joseph Schacht and J.N.D. Anderson, were mandated to situate their findings and recommendations within their own scholarly knowledge of Islamic law and societies. On his part, Schacht concluded that *siyasa* had been curtailed and that this had frozen Islamic law “theory.” His core recommendation was that the colonial state revive *siyasa* as a tool of reform while curtailing the jurisdiction of Islamic courts over non-Muslims and homicide matters.

Although Anderson’s mandate was in the context of a wider survey of Islamic law throughout British African territories, his report would have the most far-reaching impact. Commissioned by a Colonial Office that had grown increasingly hostile to indirect rule, Anderson was particularly drawn to Northern Nigeria, regarded as the “ultra-indirect rule” territory in Africa.

Influenced by Sir Henry Maine, (a key thinker on the legal and administrative design of indirect rule), Anderson considered Islamic criminal law through the lens of the “evolutionary-progressive” paradigm. Although he considered its evolution salutary, he opined that Islamic criminal law had not evolved sufficiently to be adequate for twentieth-century Northern Nigeria. In his view, this inadequacy was marked by the inequality of treatment based among others, on religious difference. These features made it unsuitable for a “contemporary state with a mixed-religious population such as the future Nigeria.” He therefore called for immediate reform. As a “conservative evangelical” himself, Anderson was not immune from the advocacy of Christian missionaries for reform of the colonial Islamic legal system in Northern Nigeria.

Citing the experience of other Muslim countries and arguing that “no realist would maintain that the Shari’a provides any adequate basis for criminal law in a modern state of mixed religious loyalties and progressive
intentions,” Anderson recommended stripping Islamic courts of jurisdiction and replacing Islamic criminal law with a code of English criminal law. He suggested two related vehicles through which this reform could be actualized. The first was an expanded emirs’ siyasa, the beginnings of which he already discerned in the workings of the colonial state. The second, which he favored, was to convene a “conference of leading jurists to study the points concerning which uniformity or reform was desirable and to agree as to the rule which in each case is preferable, and then for instruction to be issued by appropriate authority that these decisions should be applied by the courts.” Whereas the first vehicle was rooted in the Lugardian idea of siyasa, the second involved the direct exercise of siyasa by the state. In Northern Nigeria, the “appropriate authority” intended by Anderson was the Legislative Council that was composed of not only colonial administrators but also the natives appointed/elected under the new postwar party politics system but still closely linked to the Masu Sarauta. As Anderson and certain officers in the Colonial Office’s Africa Department would note in a 1957 dispatch, “the difference therefore between the way in which criminal justice is administered in Northern Nigeria and other Muslim countries is not so much a matter of fundamental principle as of the way in which the siyasa jurisdiction of the state is exercised.” Anderson proposed that Northern Nigeria toe the path of these Muslim states. His proposal would form the basis of the 1958 reforms.

The 1958 Reforms

By 1958, it was clear that decolonization was imminent. Although Lugardians continued to try to thwart the Cameron trajectory, they could not continue to stave off pressures from the Colonial Office, pressures heightened by missionary influence in a postwar climate. In September 1957, for example, the Colonial Office responded to the agitations of non-Muslims


115. Beyond the discretionary power of the ruler, Anderson argues that siyasa ought to encompass “a wider application of the principle that the Ruler may prescribe, in any point on which Muslim jurists have differed, which of the variant views is to be applied by the Courts.” In his view, this had been the basis of reform in Shari’a in Egypt and Middle Eastern countries. J.N.D. Anderson, “Islamic Law in African Colonies,” Corona, The Journal of His Majesty’s Colonial Service 3 (1951): 265.

116. Ibid.


by setting up a commission “to inquire into the fears of minorities and the means of allaying them.” The position of non-Muslims in the legal system was one of issues that dominated the commission’s proceedings.\(^\text{119}\)

Although the commission avoided making recommendations on Islamic law, the tenor of its proceedings made it clear that an overhaul was imminent.

Describing the moment, Sharwood-Smith points out that besides the advocacy of non-Muslim minorities and their European missionary-advocates, “opinion abroad” had also become “critical.” Further, “all other Muslim states that valued world opinion had long since resorted to a Penal Code ... for the sake of reputation alone, the time had come for the North to undertake a thorough modernization of its entire legal system.”

Already referenced by Brooke, Schacht, and Anderson (in spite of their varied prescriptions), Sharwood-Smith’s invocation of the experience of other Muslim states was not new. He cautioned the Colonial Office, which was enthused with Anderson’s recommendations against the overt appearance of the dominance of European scholars in the reform process. Worried that Anderson’s plan though “theoretically fully justified” was “unconscious of the hard facts,”\(^\text{120}\) he suggested an alternative plan. This plan was for the Masu Sarauta to send a delegation to Sudan, Libya, and Pakistan to observe their experience. So invested was Sir James Robertson, Governor-General of Nigeria, in Sharwood-Smith’s plan that he not only got the Colonial Office’s approval, he also proposed that his friend, Sayyed Mohammed Abu Rannat, the Chief Justice of the Sudan, chair the panel to be set up after the delegations submitted their reports.\(^\text{121}\)

**The Panel’s Findings**

The Panel found that Northern Nigeria’s legal system featured “anomalies that seem contrary to natural justice and ... fundamental rights.” Aligning with Anderson (and Schacht’s) views on the reification of Islamic law, the panel found that these “unsatisfactory features ... can only be explained as a perpetuation, long beyond their time, of the traditional concepts and procedures for the application of Maliki law.”\(^\text{122}\) Failing to acknowledge

\(^{119}\) See Willink Commission Report.

\(^{120}\) Sharwood-Smith to Macpherson, April 18 1957 NA/CO 554/1941 in Thompson, Norman Anderson, 179.

\(^{121}\) Besides Justice Abu Rannat, the members of the panel included Anderson; Justice Mohammed Sharif, the Chairman of the Pakistan Law Commission; Shettima Kashim the Waziri (Vizier) of Borno Province, Peter Achimugu, a prominent Christian politician in the ruling Northern People’s Congress and Mallam Musa, the Chief Alkali of Bida.

\(^{122}\) Report of the Panel of Jurists, September 10, 1958, PPMS 60/01/01, John Anderson Collection, SOAS, London.
Colonial reforms, the panel faulted the colonial administration for the “stagnation” of Islamic law, stemming from “a meticulous if exaggerated loyalty” to Lugard’s 1903 guarantee.

If the roots of stagnation lay in Lugard’s guarantee, its continuity lay in Northern Nigeria’s “disconnection from the ‘currents of thought . . . elsewhere in the Moslem world.’ Nigeria’s impending independence necessitated reforms because independence called for “additional contacts with the outside world and . . . need to attract foreign capital.” Also, the panel emphasized that without reforms, the United Nations would “ask some awkward questions.”

The core reform proposed was the replacement of Islamic criminal law and procedure with a penal code and a criminal procedure code, which would bring Nigeria into alignment with Sudan and other Muslim countries where “Muslims and non-Muslims live side by side.” The penal code (like the criminal procedure code) was derived from the Sudan Penal Code of 1899, which was in turn based on the Indian Penal Code of 1860, a colonial legislation.\(^{123}\)

Ignoring its distant origins, the panel stated that it proposed the code because of the “psychological reason to meet the Moslem sentiment,” because Sudan-type codes had “proved acceptable to millions of Moslems in sister countries.” In spite of the panel’s efforts, emirs and alkalai resisted this overt abolition of Islamic criminal law. One of the most terse negotiations concerned diya. Although diya had been informally abolished during the colonial era, the emirs and alkalai opposed its preclusion from the new code. A long negotiation ensued during which the panel invited the mufti of Sudan, who sought to convince the northern elites that the preclusion of diya was permissible in Islamic law.\(^{124}\) The outcome was that diya was retained in circumstances in which the prerogative of mercy was contemplated.

The panel recommended the curtailment (and eventual abolition) of the judicial authority of the emirs, including their powers of siyasa and their power to appoint alkalai. Hence, as the 1957 dispatch had envisioned, the new vision of siyasa for the independent state would be a siyasa exercised by the central state apparatus, acting through its legislature and executive rather than the old emir-driven siyasa model.

\(^{123}\) The Indian Penal Code’s provisions were inspired by the Common Law as well as statutes in England and North America including the Louisiana Civil Code and the New York Code. Mawani and Hussin, “The Travels of Law,” 741.

Defending the code, Anderson argued that its primary achievement was its shift of the supreme lawgiver from a “divine” source to the legislature. The code de-Islamicized the law and secularized it. In his words, “legislative authority became the basis of law without further seeking to root it in the sharia.” With this, alkalai could no longer refuse to apply the law based on conscience. Neither could emirs invoke the Lugardian guarantee to oppose reform. Further, the abolition of emirs’ “siyasa,” which “caused great uncertainty in the law and apprehension among minorities” meant that the “position of minorities” was now greatly improved.125

Yet, some critics of the “colonial Islamic legal system” remained unconvinced of the code’s merits. In an article that became emblematic of the critique of the code, Justin Price, a British Magistrate in Nigeria, argued that the Penal Code was a “retrograde legislation” designed to “entrench the powers of the emirs and therefore, the hold of Britain after independence.” Further, the formal abolition of emirs’ siyasa did not diminish their powers over the judiciary, because they would continue to have control over alkalai who Price described as being of “poor quality.”126

What Price alluded to was that the party politics system that produced the self-governing legislature that emerged in the 1950s was based on the old power system. As such, the Masu Sarauta continued to exercise both direct power (through membership of the legislative and executive councils) and indirect control (through patronage of political parties) over the pseudo-self-governing structure that would be the foundation of the impending independent state.127 Under such a circumstance, the transfer of siyasa to the state did not make much of a difference.

Yet, this criticism that the reforms lacked teeth did not obviate the need for the panel to convince the Northern Nigerian population of the new code’s compatibility with Islamic law. Pre-empting protests, the panel asserted that “there is nothing in this Penal code, which is contrary to the principles of Islam when it is properly understood.” Following the panel’s lead, the political elites presented the reforms as being compatible with

Islamic law. Stating that “there is nothing in the [code] . . . that is in any way contrary to the tenets of our religion,”128 Ahmadu Bello, the premier, cited its similarity with the Sudan and Pakistan codes, “which have proved perfectly acceptable to the millions of Muslims among the populations of those countries.” According to Bello, the goal was to “preserve the fundamentals of Islam for the Muslim majority” and to “allay the fears of the minorities.” The reform, in his view, had not only succeeded in doing this this, it had also done so to the admiration of the Colonial Office and business interests.129

This effort did not eliminate all opposition. For one, the Masu Sarauta was not united in its support; certain emirs with less influence in the postwar political system considered the reform as a move designed to reduce their influence.130 The Northern Elements Progressive Union (NEPU), the postwar political opposition to the Masu Sarauta, oscillated between attacking the code and embracing its reforms. On the one hand, NEPU castigated the modernization narrative promoted by the Masu Sarauta as a tacit acceptance of colonial claims of the Sharia’s barbarity. Yet, it welcomed and even advocated for some of the reforms ushered in by the code, especially the abolition of the emirs’ siyasa.131

### Conclusion

Critical accounts of secularism have challenged the sacred–secular binary in mainstream narratives on the basis that secularism is enacted through a contradiction: while asserting its separation or distance from religion, the state simultaneously regulates religion.132 It is under these circumstances that the secular state maintains its hold over religion: continuously defining

what counts as “secular” and “sacred,” while also regulating the content of both.

Instead of viewing the colonial state’s insistence on being “secular” while it adopted Islam as mistaken, taking it seriously allows us to see the ways in which the colonial state enacted secularism to govern Islam. In co-opting “Islam” for the colonial enterprise, the colonial state was not merely living up to the tendency of secular states to entrench majoritarian norms and institutions. Beyond this, the colonial state was remaking Islam in order to make it amenable to the colonial enterprise by “defining, confining and regulating” it.133 This process of remaking Islam took the form of the unprecedented expansion of the siyasa, first, of the emirs, and eventually, its direct appropriation by the central colonial state apparatus. From “serving the sharia alongside fiqh,” siyasa as Shari’a governance came to dominate the field, casting a shadow over fiqh. This process not only altered the content of Islamic law, it also altered the relationship between Islamic law and the state and reconfigured the roles of the emirs, alkalai, and English courts’ judges. It was in this way that the colonial state’s secularization of Islamic law subverted its core essence.

That the colonial state insisted on its neutrality, impartiality, and noninterference in the midst of these processes not only obscured the ways in which Islamic law had begun to be remade since the inception of empire, it also masked the forms of domination that the state perpetuated and enabled. For the missionaries attacking the subordination of non-Muslims, particularly Christians, in the colonial state (and perhaps, oblivious to the struggles over Islamic law and institutions), securing “religious toleration” meant attacking the secular state.134 Because the state cast “Islam” as the “secular,” attacks against the state’s secular vision therefore called for attacking the state’s “Islam.” For those emirs (and alkalai) opposed to the colonial reform project, resistance meant challenging the state’s interference with Islamic law and institutions while also benefitting from the expanded authority that the state had conferred on them. Nostalgic about the precolonial past but now steeped in colonial privileges and mired in colonial statist consciousness,

133. Adcock, The Limits of Tolerance, 25.
134. In Samuel Moyn’s account, this was true of Europe. Contrary to the association of Christianity with secularism by the new wave of secularism critiques, Moyn argues that Christianity’s “religious freedom” project “was most often intended . . . to marginalize secularism.” This was especially the case in the transwar and postwar periods when the religious freedom project (that culminated in the adoption of Article 18 of the Universal Declaration of Human Rights) set out to protect Christianity against the onslaught of secularism. Samuel Moyn, Christian Human Rights (Philadelphia: University of Pennsylvania Press, 2015), 139–67.
they were left with attacking the state’s secular project while, simultaneously, affirming its fundamental state-centered premises.

The colonial legacy of the struggles over religion–state relations, never dead, has reawakened since the introduction of Shari’a Penal Codes in Northern Nigeria in 1999. These struggles are now being framed as a binary between a secular conception of a state on the one hand, and a non-secular, Shari’a-permissive idea of the state on another. On the one hand, Shari’a Code proponents (most prominently Muslim political elites and intellectuals), argue that theirs is an antisecular vision, which seeks to remedy the subjugation of Islamic law in 1958 and bring Islamic law, and therefore Islam, back to its rightful place. On the other hand, the opponents of the code, the self-branded secularists (most visibly Christian ecumenical groups), argue that the introduction of the code is merely a continuation of the long history of Muslim imperialism set in process by the colonial state.

In their memory of the colonial state and their conception and articulation of their respective positions, both groups are united in their opposition to each other. In the view of the secular coalition, the state’s secularism is inconsistent with the recognition of religion or incursion of religion into the public sphere. Secularism, in this conception, therefore, means the exclusion of religion from the public sphere, which is the exclusive domain of the secular. The secular, in this formulation, is the opposite of the religious, here, the “Shari’a.” The Shari’a position is similar. In the conception of this coalition, its vision of a state that would recognize and institutionalize the Shari’a for willing persons is inconsistent with the secular vision. The Shari’a, according to this view, cannot coexist with the secular.

Not just an assertion about present-day Nigeria, but, deeply rooted in the disputants’ memory of the colonial past, this framing obscures the ways in which the colonial state’s secularism project was deeply imbricated with religion. With this concealment of the religion governance that is integral to statist secularism, this framing makes it difficult, if not impossible, to unearth and challenge the (surviving) forms of domination that the colonial state’s enactment of secularism perpetuated and enabled.