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# The Express Defenses of the N.Y. Convention on Foreign Arbitral Awards

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# THE NORTHERN NIGERIAN PENAL CODE: A REFLECTION OF DIVERSE VALUES IN PENAL LEGISLATION

VICTOR L.K. ESSIEN\*

The Northern Nigerian Penal Code<sup>1</sup> is an unusual piece of legislation. When it was enacted twenty-four years ago, the Penal Code generated a great deal of discussion.<sup>2</sup> It was simultaneously described as both "retrograde"<sup>3</sup> and "a major advance."<sup>4</sup>

The discussion centered primarily on the procedural aspects of the Penal Code and its twin Criminal Procedure Code,<sup>5</sup> yet the large body of substantive criminal law received no more than perfunctory references. The purpose of this paper is to examine more closely the substantive criminal law provisions. The paper will demonstrate how the Penal Code reflects diverse and sometimes competing values, namely, the African customary criminal law notions,<sup>6</sup> the principles of Islamic criminal law<sup>7</sup> and the principles of English criminal law or the common law of crimes.<sup>8</sup> Significantly, it is interesting to observe how this legislation epitomizes the socio-political matrix of Northern Nigerian society, a society then, and now, in transition from the "traditional" to the Western or "modern."<sup>9</sup>

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1. NIG. PENAL CODE cap. 89 (1959) (Laws of Northern Nigeria).

2. See Price, *Retrograde Legislation in Northern Nigeria?*, 24 MOD. L. REV. 604-11 (1961); Odumosu, *The Northern Nigerian Codes*, 24 MOD. L. REV. 612-25 (1961); Anderson, *A Major Advance*, 24 MOD. L. REV. 616-25 (1961). See also Correspondence from Justin Price to The Editor, 24 MOD. L. REV. 821-24 (1961).

3. See Price, *supra* note 2, at 605.

4. See Anderson, *supra* note 2, at 616.

5. NIG. CRIM. PROC. CODE (1960) (Laws of Northern Nigeria). The Penal Code and the Criminal Procedure Code were brought into operation on the same day in Northern Nigeria for effective implementation of the judicial and legal reforms therein.

6. See Milner, *The Sanctions of Customary Criminal Law: A Study in Social Control*, 1964-65 NIG. L.J. 173.

7. *Id.*

8. Throughout this paper, the terms "English law" and "common law" will be used interchangeably.

9. The terms "transition," "traditional" and "modern" are used in the manner indicated in P. LLOYD, *AFRICA IN SOCIAL CHANGE* 12-13 (1968), in which the author states: "The main concern of this book is thus with the adaptation of traditional West African society to modern conditions—traditional here denoting the far from static pattern of

The Penal Code goes beyond the example set by the English Judicature Acts of 1873-74,<sup>10</sup> which when faced with rival laws in the nature of "common law" and "equity" merely fused the administration of the two systems, with each system essentially maintaining its purity. The solution adopted under the Northern Nigerian Penal Code is more in the spirit of "compromise" and "amalgamation."<sup>11</sup> The Code provides lessons for international legislation, as well as for any attempt at international unification of law.<sup>12</sup> This paper examines the natural history of the Code's birth, the anatomy of the Code, and some challenges posed on account of its unusual nature. The ultimate conclusion is that the Code is particularly well suited to the special characteristics of Northern Nigerian society.

### I. THE NATURAL HISTORY OF THE CODE'S BIRTH

The Penal Code came into force on September 30, 1960, in the Northern Region of Nigeria,<sup>13</sup> a predominantly Moslem area. Islam was introduced into Northern Nigeria during the fourteenth century,<sup>14</sup> and, according to the latest census figures, Northern Nigeria is 73% Moslem, 3% Christian and 24% traditional African religionists.<sup>15</sup>

Before the passage of the Penal Code, Northern Nigeria experienced a plurality of criminal law regimes. The native courts applied customary law which in the Moslem communities was Islamic law. In the non-Islamized communities, criminal law was a reference to those rules of custom generally held to be binding. The magistrate courts and other higher courts applied the provisions of the Nigerian Criminal Code, which was essentially English criminal law.<sup>16</sup> Inevitably conflicts arose as to jurisdiction, as to choice of applicable law and as to whether the punishment to be administered under one system could ever exceed the punishment permitted under the other systems.<sup>17</sup>

institutions deriving from the pre-colonial period and still remarkably persistent." *Id.*

10. For a treatment of the fine points of the development of this aspect of English law, see G. RUDD, *THE ENGLISH LEGAL SYSTEM* 25-30, 37-44 (1962).

11. See Anderson, *supra* note 2, at 618.

12. The term "international unification of law" is borrowed from R. DAVID & J. BRIERLEY, *MAJOR LEGAL SYSTEMS IN THE WORLD TODAY* 10 (2d ed. 1978).

13. NIG. PENAL CODE gen. n.4.

14. See Ijaodola, *The Proper Place of Islamic Law in Nigeria*, 3 NIG. L.J. 129, 130 (1969).

15. O. ODUMOSU, *THE NIGERIAN CONSTITUTION* 4 (1963). Nigeria has not had a reliable census since then. Quantitatively the actual figures have no doubt changed drastically, but there is no reason to suggest that the proportions have also changed. *Id.*

16. For a discussion of the history of Nigerian criminal law, see C. ORWONKWO & M. NAISH, *CRIMINAL LAW IN NIGERIA* 3-19 (1964).

17. *Id.*

The differences between the various systems of law were problematic, especially those between Islamic and English law.<sup>18</sup> Islamic law, for example, had a much broader concept of homicide. Homicide included any hostile, unjustified assault ending in death, regardless of the fact that the assault might be unintended or extremely unlikely.<sup>19</sup> Furthermore, the concept of provocation was not recognized under the Maliki School of Islamic law, the preferred Islamic Jurisprudential School of Northern Nigeria.<sup>20</sup> Consequently, this disparity could mean life or death for an accused person depending on which system of law was applied to the case.

Various other conduct was considered not to be criminal under English law, while the same conduct was prohibited under Islamic law. Such conduct included adultery, drinking alcoholic beverages and insulting the modesty of a woman.<sup>21</sup>

Another anomaly which existed in the period before the introduction of the Penal Code was the inequitable designation of certain parties to be incompetent as witnesses. In courts applying Islamic law, women and interested parties were considered incompetent as witnesses. Similarly, a non-Moslem was incompetent to be a witness where the accused was a Moslem.<sup>22</sup>

Jurisdictional conflicts were another source of friction because both English and Islamic law applied in the same geographical area. Thus, both the English Criminal Code and Islamic criminal principles were often applicable to the same incident of alleged criminal conduct.<sup>23</sup> Under the circumstances, no solution could rationally be accepted. In 1947, the West African Court of Appeal, then the highest appellate court in Nigeria, attempted a judicial solution to the problem. The Court held that if an offense was indictable solely under native law and custom, native law applied, but where the offense was indictable under both native law and custom and also under the

18. The rivalry was especially true between English law and Islamic law because unlike African customary law, Islamic law was more developed and more international in its application. For an interesting discussion of some of these conflicts, see Anderson, *Conflict of Laws in Northern Nigeria*, 1 J. AFRICAN L. 87-98 (1957).

19. See C. OKWONKWO & M. NAISH, *supra* note 16, at 6.

20. The adoption of the Maliki School of Islamic Jurisprudence in Northern Nigeria was promulgated in the Sharia Court of Appeal Law cap. 122, sec. 14 (1960) (Laws of Northern Nigeria).

21. See C. OKWONKWO & M. NAISH, *supra* note 16, at 10.

22. See Anderson, *supra* note 2, at 616-17.

23. For a discussion of problems associated with the dual legal systems in Northern Nigeria, see Ijaodola, *A Case for the Unification of Court Systems in Northern Nigeria*, 4 NIG. L.J. 136, 141-45 (1970).

Criminal Code, only the provisions of the Code applied.<sup>24</sup>

This decision by the West African Court of Appeals was honored by the native courts more in its breach than in its observance.<sup>25</sup> Subsequently, the colonial administration arrived at a compromise. Native courts could try offenses under native law and custom, but punishment of an offense under customary law could never exceed the punishment possible under statute for the same action.<sup>26</sup>

These conflicts formed the basis for an ongoing controversy. There was, however, a general consensus that a permanent solution had to be found for the legal chaos. As Nigeria prepared for political independence, the Northern Nigerian Government set up a panel of jurists to make recommendations for the reorganization of the legal and judicial systems of the region. The panel included Sayyed Muhammed Abu Rannat, then Chief Justice of Sudan, as Chairman; Mr. Justice Muhammed Shaaf, a retired Judge of the Supreme Court of Pakistan and Chairman of its Law Reform Committee; and Professor J.N.D. Anderson, Professor of Oriental Laws at the University of London.<sup>27</sup> The panel also included three eminent Northern Nigerians, namely the Waziri of Bornu, Shetima Kashim, Mr. Peter Achimugu and the Chief Alkali of Bida, M. Musa Othman.<sup>28</sup>

The panel recommended that

it was necessary for a Self-governing Northern Nigeria to establish a system of criminal law which would gain international acceptance, which would apply uniformly to all persons living within the Region, which would not discriminate against any section of the community and which would be generally acceptable throughout the Region.<sup>29</sup>

The panel further reasoned that since the majority of the people living in the region were Moslems, the new system should not be in conflict with the injunctions of the Holy Qu'ran and Sunna.<sup>30</sup> This was in consonance with Northern Nigerian political and religious thought at the time, which believed that the existing Criminal Code was too English

24. See *Gubba v. Gwandu Native Authority*, 12 W.A.C.A. 141 (1947) (West African Court of Appeals).

25. See Milner, *Sentencing Patterns in Nigeria*, in *AFRICAN PENAL SYSTEMS* 265 (A. Milner ed. 1969).

26. See Native Courts Law sec. 22 (1956) (Laws of the Northern Region of Nigeria). The Native Courts Law subsequently underwent amendment and renumbering. For a later version, see Native Courts Law cap. 78 (1963) (Laws of Northern Nigeria).

27. See Anderson, *supra* note 2, at 617.

28. See S. RICHARDSON, *NOTES ON THE PENAL CODE LAW 1* (4th ed. 1976).

29. *Id.*

30. *Id.*; see also Anderson, *supra* note 2, at 617-18.

and, in part, anti-Islamic.<sup>31</sup> The panel consequently resolved to fashion the new Code after the Sudan Penal Code, a derivative of the Indian Penal Code. Both the Sudan and Indian penal codes were enacted for societies sharing characteristics similar to that of Northern Nigeria.<sup>32</sup>

The panel, nonetheless, had to remember that the new Penal Code could not be too dissimilar to the preexisting English-type Criminal Code, which was, and still is, applied in the rest of the country. For the sake of continuity, the panel aimed to not unduly decriminalize hitherto criminal offenses.<sup>33</sup>

The situation called for compromise. Conceived in a spirit of compromise, the Penal Code that was delivered contained principles of English, Islamic and African customary law. This is clearly borne out by the anatomy of the Code.

## II. THE ANATOMY OF THE PENAL CODE

The discussion of the Code's anatomy herein will be accomplished by selective references to particular provisions of the Code which are relevant to the three legal cultures under discussion, namely, common law, Islamic law and customary law.

### A. *Principles of English Criminal Law*

On the whole, the Code reveals a basic partiality to English criminal law. The Code is based primarily on common law principles, although in some cases the approach is oversimplified.<sup>34</sup> The presumption may have been that if Northern Nigeria were to modernize, it should fashion its laws in accordance with modern principles of law. Consequently, in addition to other common law notions of crime, the

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31. Anderson, *supra* note 2, at 618. Anderson explains that the preexisting Nigerian Criminal Code, based, as it was, on English criminal law, had "such a bad name in the North (however undeserved this might be) that Muslim opinion would never have accepted it." *Id.* Anderson gives us an inside view of the panel of jurists when he states that the two Muslim jurists from overseas had to assure the local Muslims that the Sudanese and Indian Codes, the proposed model codes, "were in no way contrary to Muslim principles." *Id.*

32. *Id.* at 618.

33. *See generally id.*

34. This is hardly surprising since the Code derives much of its strength from the Sudan Penal Code. The Sudan Penal Code was modeled after the Indian Penal Code of 1843, which was drafted by Lord McCaulay. There are important aspects of the Penal Code, however, which answer the basic and peculiar needs of Northern Nigeria. *See J. ANDERSON, LAW REFORM IN THE MUSLIM WORLD 87-88 (1976)* (these differences are minimized in the author's desire to generalize). For a more detailed comparison, see A. GLEDHILL, *THE PENAL CODES OF NORTHERN NIGERIA AND THE SUDAN (1963)*.

Code accepts the principle of legality by abolishing all customary law criminal offenses.<sup>35</sup> The Code also accepts the territoriality principle, stating that all offenses committed wholly or substantially within the territory of the Northern Region are punishable under the Code.<sup>36</sup> The Code sets forth the common law distinction between mistake of fact and mistake of law by treating the former as exculpatory and punishing the latter.<sup>37</sup> The provisions on insanity are merely a restatement of the M'Naghten rule.<sup>38</sup> The Code also contains two provisions on provocation. These provisions state that "grave and sudden provocation" may reduce an offense of "culpable homicide punishable with death," to one "not punishable with death."<sup>39</sup> The insertion of this partial defense of provocation may be seen as a major concession to the adherents of English criminal law values; such legal defenses are unknown to the Maliki School of Islamic Jurisprudence.

In a similar vein, there are several miscellaneous provisions on public health,<sup>40</sup> environmental protection,<sup>41</sup> obscenity,<sup>42</sup> forgery,<sup>43</sup> false

35. See NIG. PENAL CODE §§ 5, 3(2) ("After the commencement of this Law no person shall be liable to punishment under any native law or custom").

36. *Id.* § 4 ("Where by the provisions of any law of Northern Nigeria the doing of any act or the making of any omission is made an offence, those provisions shall apply to every person who is in Northern Nigeria at the time of his doing the act or making the omission").

37. *Id.* § 45 ("Nothing is an offence which is done by any person who is justified by law, or who by reason of a mistake of fact and not by reason of a mistake of law, in good faith believes himself to be justified by law in doing it").

38. *Id.* § 51. "Nothing is an offence which is done by a person who, at the time of doing it, by reason of unsoundness of mind, is incapable of knowing the nature of the act, or that he is doing what is either wrong or contrary to law." *Id.* See also BLACK'S LAW DICTIONARY 904 (5th ed. 1979) (referring to *M'Naghten's Case*, 8 Eng. Rep. 718 (1843)).

39. *Id.* § 38 (definition of provocation); *id.* § 222(1) (reduces murder by provocation to manslaughter).

40. *Id.* §§ 184-190 See, e.g., § 184, which states:

Whoever adulterates any article of food or drink or abstracts from any article of food or drink any part thereof so as to affect injuriously the quality, substance or nature, intending to sell such article as food or drink without notice to the purchaser or knowing that it is likely that the same will be sold as food or drink without notice to the purchaser, shall be punished with imprisonment for a term which may extend to one year or with fine not exceeding one hundred pounds.

*Id.*

41. *Id.* §§ 191-192, which state:

191. Whoever voluntarily corrupts or fouls the water of any public well or reservoir or other public water supply so as to render it less fit for the purpose for which it is ordinarily used, shall be punished with imprisonment for a term which may extend to two years or with fine or with both.

192. Whoever voluntarily vitiates the atmosphere in any place so as to make it noxious to the health of persons in general dwelling or carrying on business in

42. Footnote 42 appears on page 93.

43. Footnote 43 appears on page 93.

accounting,<sup>44</sup> bigamy,<sup>45</sup> sedition,<sup>46</sup> copyright,<sup>47</sup> revenue stamps,<sup>48</sup> and

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the neighbourhood or passing along a public way, shall be punished with imprisonment for a term which may extend to six months or with fine or with both.

*Id.*

42. *Id.* §§ 200, 202, 203. *See, e.g.*, § 200 ("Whoever to the annoyance of others does any obscene or indecent act in a public place, shall be punished with imprisonment for a term which may extend to two years or with fine or with both").

43. *Id.* §§ 363-368. *See, e.g.*, § 363, which states:

Whoever makes any false document or part of a document, with intent to cause damage or injury to the public or to any person or to support any claim or title or to cause any person to part with property or to enter into any express or implied contract or with intent to commit fraud or that fraud may be committed, commits forgery; and a false document made wholly or in part by forgery is called a forged document.

*Id.*

44. *Id.* § 371, which states:

Whoever, being a clerk, officer or servant or employed or acting in the capacity of a clerk, officer or servant, wilfully and with intent to defraud, destroys, alters, mutilates or falsifies, any book, paper, writing, document of title or account, which belongs to or is in the possession of his employer or has been received by him for or on behalf of his employer, or wilfully and with intent to defraud makes or abets the making of any false entry in or omits or alters or abets the omission or alteration of any material particular from or in any such book, paper, writing, document of title or account, shall be punished with imprisonment for a term which may extend to seven years or with fine or with both.

*Id.*

45. *Id.* § 384, which states in part:

(1) Whoever having a husband or wife living marries in any case in which such marriage is void by reason of its taking place during the life of such husband or wife, shall be punished with imprisonment for a term which may extend to seven years and shall also be liable to fine.

*Id.*

46. *Id.* §§ 416-419. *See, e.g.*, § 416, which states:

Whoever by words, either spoken or reproduced by mechanical means or intended to be read, or by signs or by visible representation or otherwise excites or attempts to excite feelings of disaffection against the person of Her Majesty, her heirs or successors or the person of the Governor-General or the Governor of a Region, or the Government or constitution of the United Kingdom or of Nigeria or any Region thereof or against the administration of justice in Nigeria or any Region thereof, shall be punished with imprisonment for a term which may extend to seven years or with fine or with both.

*Id.*

47. *Id.* §§ 426, 427. *See, e.g.*, § 426, which states:

Whoever intentionally—

- (a) makes for sale or hire any copy of a work which infringes a copyright; or
- (b) sells or lets for hire any copy of any such work; or
- (c) distributes copies of any such work for the purposes of trade or to such an extent as to affect prejudicially the owner of the copyright; or

48. Footnote 48 appears on page 94.



posts and telegraphs.<sup>49</sup> These are a function of the developing political economy of Northern Nigeria and are patterned after English criminal jurisprudence.

### B. Islamic Criminal Jurisprudence

Although the drafters of the Penal Code were interested in drawing up a modern Penal Code, they were especially interested in having a Penal Code that is not unduly offensive to Islamic law. They achieved this goal by grafting Islamic principles to otherwise English criminal law principles and by including specific Islamic crimes in the Code.

The criminalization of adultery and fornication under sections 387 and 388 of the Code represents an example of specific Islamic crimes included in the Code. Section 387 states:

Whoever, being a man subject to any native law or custom in which extra-marital sexual intercourse is recognised as a criminal offence,<sup>50</sup> has sexual intercourse with a person who is not and whom he knows or has reason to believe is not his wife, such sexual intercourse not amounting to the offence of rape, is guilty of the offence of adultery and shall be punished with imprisonment for a term which may extend to two years or with fine or with both.<sup>51</sup>

Another concession to Islamic legal ideas was the criminalization of seduction and enticement under the Code.<sup>52</sup> Seduction and entice-

(d) by way of trade exhibits in public any copy of any such work, shall be punished with imprisonment for a term which may extend to two months or with fine which may extend to fifty pounds or with both.

*Id.*

48. *Id.* §§ 440-448. *See, e.g.*, § 441 ("Whoever counterfeits or knowingly performs any part of the process of counterfeiting any revenue stamp, shall be punished with imprisonment for a term which may extend to seven years and shall also be liable to fine").

49. *Id.* §§ 453-468. *See, e.g.*, § 456 ("Whoever stops a mail with intent to carry out an unlawful search or to commit theft of postal matter shall be punished with imprisonment or life or any less term or with fine or with both").

50. This is a reference to those persons whose personal laws are either Islamic or African customary law. The draftsmen were probably not aware of the fact that in some parts of the common law world, unlike in England, illicit sexual relations may be regarded as criminal. For a discussion of the United States position on this topic, see G. MUELLER, *SEXUAL CONDUCT AND THE LAW* (1980).

51. NIG. PENAL CODE § 387; *see also id.* § 388 (treatment of women as offenders).

52. *Id.* § 389, which states:

Whoever takes or entices away any woman, who is and whom he knows or has reason to believe to be the wife of any other man, from that man or from any person having the care of her on behalf of that man with intent that she may have illicit intercourse with any person or conceals or detains with that intent

ment were traditionally common law torts rather than crimes.

The provisions on drinking and the intoxication defense further represent interesting departures from traditional common law positions.<sup>53</sup> The consumption of alcohol by any Moslem for any non-therapeutic purpose is punishable by a month's imprisonment.<sup>54</sup> Furthermore, while involuntary intoxication may exculpate an accused person from liability, the fact that voluntary intoxication makes it impossible for the accused to form the intent in a crime requiring specific intent is of no legal consequence.<sup>55</sup> As a general rule, section 44 of the Code provides: "A person who does an act in a state of intoxication is presumed to have the same knowledge as he would have had if he had not been intoxicated."<sup>56</sup> This appears to be a restatement of the Islamic injunction, "[l]et him who sins in drink be punished when sober."<sup>57</sup>

Another traditional Moslem crime which is preserved under the Code is the use of words, gestures or acts to insult the modesty of a woman or the intrusion upon the privacy of a woman.<sup>58</sup> This offense is

any such woman, shall be punished with imprisonment for a term which may extend to two years or with fine or with both.

*Id.*

53. *See, e.g.*, NIG. PENAL CODE §§ 39(b), 44, 52, 401, 402. § 39(b) states:

A consent is not such a consent as is intended by any section of this Penal Code, if the consent is given—

(b) by a person who, from unsoundness of mind or intoxication, is unable to understand the nature and consequence of that to which he gives his consent; . . .

*Id.*

54. *Id.* § 403, which states:

Whoever being of the Moslem faith drinks anything containing alcohol other than for a medicinal purpose shall be punished with imprisonment for a term which may extend to one month or with fine which may extend to five pounds or with both.

*Id.*

55. *Id.* § 44. This provision must be quite offensive to English criminal jurisprudence nurtured on the libertarian ideas of John Stuart Mill. *See* J.S. MILL, *ON LIBERTY* (1859). *See also* COMMITTEE ON HOMOSEXUAL OFFENSES & PROSTITUTION, *THE WOLFENDEN REPORT* (1963) (Great Britain—the sections on homosexuality emphasize that law is not concerned with private morals or with ethical sanctions). In *THE ENFORCEMENT OF MORALS* Devlin argues that "society cannot ignore the morality of the individual any more than it can his loyalty; it flourishes on both and without either it dies." P. DEVLIN, *THE ENFORCEMENT OF MORALS* (1965), *quoted in* S. KADISH & M. PAULSEN, *CRIMINAL LAW AND ITS PROCESSES* 6-15 (2d ed. 1969).

56. NIG. PENAL CODE § 44.

57. S. RICHARDSON, *supra* note 28, at 24.

58. NIG. PENAL CODE § 400 states:

Whoever intending to insult the modesty of any woman utters any word, makes any sound or gesture or exhibits any object, intending that such word or sound shall be heard or that such gesture or object shall be seen by such woman or

given meaning within the Moslem context in which women are generally placed in "purdah" or seclusion to preserve them from the temptations of the world.

In addition to enacting specific Moslem crimes, Islamic principles are grafted to otherwise English law principles. This is especially obvious from the provisions on punishment.<sup>59</sup> Section 68(2) of the Code provides that "[o]ffenders who are of the Moslem faith may in addition to the punishments specified in subsection (1) be liable to the punishment of Haddi lashing as prescribed by Moslem law . . ."<sup>60</sup> This punishment is intended to be purely symbolic and is carried out in a public place. Presumably it still remains an effective mode of punishing offenders.<sup>61</sup>

The procedure regarding capital punishment for murderers<sup>62</sup> provides another example of the commingling of Islamic and English jurisprudence. Under the Criminal Procedure Code, a native court judge is required to invite the blood relatives of the deceased person to express their wishes as to whether a death sentence should be carried out, and the judge will record the wishes in the record of proceedings.<sup>63</sup> This procedure enables a governor to take the wishes of the deceased's relatives into consideration when exercising his power under the Code to reduce a capital sentence to a life sentence. This is a variation of the Moslem courts' practice of allowing the relatives of the deceased person the option of compounding the murder. The principle of compounding criminal offenses is in keeping with traditional Islamic law; it began as an element of the Islamic concept of collective responsibility.<sup>64</sup>

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intrudes upon the privacy of such woman, shall be punished with imprisonment for a term which may extend to one year or with fine or with both.

*Id.*

59. *Id.* ch. III.

60. *Id.* § 68(2).

61. One does not feel tempted to join in the debate on the aims of criminal punishment. The nature of the prison system in Nigeria would, however, suggest that retribution rather than utilitarianism is the underlying but inarticulate aim. For a brief discussion on the aims of Islamic criminal punishment, see A. QADRI, *ISLAMIC JURISPRUDENCE IN THE MODERN WORLD* 285-300 (1973).

62. See generally NIG. CRIM. PROC. CODE §§ 270-273, 393-394.

63. *Id.* § 393. This section is taken from chapter 33 of the Criminal Procedure Code. Chapter 33, entitled *Trials in Native Courts*, exemplifies the mixture of Islamic and English law. Sections 270-273, *supra* note 62, relate to chapter 22, *The Judgment*, which deals with, *inter alia*, capital crimes generally.

64. See M. KHADDURI & H. LIEBESNY, *LAW IN THE MIDDLE EAST* 224 (1955).

### C. African Customary Law Principles of Crime

At the time of the Penal Code's enactment, it was thought that a considerable portion of the northern region's population did not arrange their lives in either the Islamic mode or in the Western/Christian mode. The personal laws of these people were the African customary law principles, administered by native tribunals.

In some Moslem communities, the many years of Islamization had not completely obliterated the traditional customary law notions.<sup>65</sup> Some of these notions necessarily found expression in the Code.<sup>66</sup> For instance, it was considered appropriate to include as criminal offenses cannibalism,<sup>67</sup> trial by ordeal,<sup>68</sup> witchcraft,<sup>69</sup> and juju worship or invo-

65. See Ijaodola, *supra* note 14, at 131.

66. See *infra* notes 67-70.

67. NIG. PENAL CODE § 218 ("Whoever knowingly eats or receives for the purpose of eating any part of a human corpse shall be punished with imprisonment for a term which may extend to two years or with fine or with both").

68. *Id.* § 214, which states:

Whoever presides or is present at any unlawful trial by ordeal shall be punished—

- (a) with imprisonment which may extend to ten years or with fine or with both; and
- (b) if such trial results in the death of any party to the proceeding shall be punished with death.

*Id.*

69. *Id.* § 216, which states:

Whoever—

- (a) by his statements or actions represents himself to be a witch or to have the power of witchcraft; or
- (b) accuses or threatens to accuse any person with being a witch or with having the power of witchcraft; or
- (c) makes or sells or uses, or has in his possession or represents himself to be in possession of any juju, drug or charm which is intended to be used or reported to possess the power to prevent or delay any person from doing an act which such person has a legal right to do, or to compel any person to do an act which such person has a legal right to refrain from doing, or which is alleged or reported to possess the power of causing any natural phenomenon or any disease or epidemic; or
- (d) presides at or is present at or takes part in the worship or invocation of any juju which has been declared unlawful under the provisions of section 215; or
- (e) is in possession of or has control over any human remains which are used or are intended to be used in connection with the worship or invocation of any juju; or
- (f) makes or uses or assists in making or using, or has in his possession anything whatsoever the making, use or possession of which has been declared unlawful under the provisions of section 215, shall be punished with imprisonment which may extend to two years or with fine or with both.

*Id.*

cation.<sup>70</sup> Such provisions would appear ludicrous in Western penal legislation, but are very meaningful within the context of Northern Nigeria.

Customary law concepts also led to the criminalization of "insulting or abusive language" used in a manner likely to provoke another.<sup>71</sup> Under common law, insults and "mere vituperation" are generally not considered actionable.<sup>72</sup> Traditional African notions, however, deem such conduct reprehensible and punishable because of its tendency, in smaller communities, to result in breaches of the peace or disturbances of the societal equilibrium.

Section 381 of the Code states that it is criminal to "breach a contract of service during voyage or journey."<sup>73</sup> The tenor of this section is unduly feudalistic and is symptomatic of the traditional customary society.<sup>74</sup> In English law, a breach of a personal contract of whatever kind will never be grounds for a criminal law action.<sup>75</sup>

The criminal legislation which best reflects the customary notions of justice while also emphasizing the transitional nature of the society from "traditional" to "modern" is the Criminal Procedure Code.<sup>76</sup> The Code reflects the concern with achieving "harmony" and "repairing the disturbed equilibrium in society," as well as the informality that is characteristic of the traditional African administration of justice.<sup>77</sup> This is in contrast to the highly formal, adversarial system of English jurisprudence. The provisions of the Criminal Procedure Code allow the magistrate to frame the charge that the accused before him is re-

70. *Id.* § 215 ("The Governor in Council may by order declare the worship or invocation of any juju to be unlawful").

71. *Id.* § 399.

72. *See, e.g.*, W.P. KEATON, PROSSER AND KEETON ON THE LAW OF TORTS 56-57 (1984).

73. NIG. PENAL CODE § 381 states:

Whoever, being bound by a lawful contract to render his personal service in conveying or conducting any person or any property from one place to another place or to act as servant to any person during a voyage or journey or to guard any person or property during the voyage or journey, voluntarily omits so to do, except in the case of illness or ill treatment, shall be punished with imprisonment for a term which may extend to one month or with fine which may extend to five pounds or with both.

*Id.*

74. *See id.*

75. *See, e.g.*, E.A. FARNSWORTH, CONTRACTS 812 (1982).

76. NIG. CRIM. PROC. CODE (1960).

77. For a discussion of the nature of the African customary judicial process, see T. ELIAS, THE NATURE OF AFRICAN CUSTOMARY LAW 238-242, 267-272 (1956). The author concludes that "the African judge is in a sense an arbitrator." *Id.* at 272.

quired to defend.<sup>78</sup> The magistrate may direct the investigating police officer to look for further evidence,<sup>79</sup> and generally enjoys broad discretion and power in relation to pre-trial and trial procedures.<sup>80</sup>

These and other features of the Codes have been the subject of severe criticism. One critic charged that the Penal Code and the Criminal Procedure Code were bound to be another instrument of oppression in the hands of a judiciary manipulated by the executive, and that certain provisions of the Codes were offensive to the "golden thread" of British criminal law, namely, the presumption of innocence.<sup>81</sup> In a rejoinder to this criticism, Professor Anderson, one of the panelists who drafted the Penal Code, explained that the Code was peculiarly suited to the needs and resources of Northern Nigeria, where the majority of police officers would not know the correct charge to bring against an accused.<sup>82</sup>

### III. CHALLENGES TO THE NATURE OF THE PENAL CODE

The preceding criticism did not mark the outer limits of the comments on the basic nature of the twin Codes. In *Ibeziako v. Commissioner of Police*, the defendant was charged with the offense of offering gratification to a public servant.<sup>83</sup> Counsel for the accused argued that section 160(1) of the Criminal Procedure Code, which deals with the powers of a court to frame charges when a *prima facie* case against the accused has been made, violated section 21(4) of the prevailing Nigerian Constitution which regarded the presumption of innocence as a guaranteed right. The Nigerian Supreme Court rejected counsel's arguments on the point and stated, *per obiter*, that "the fact that a procedure was foreign to English ideas does not mean that it is contrary to natural justice."<sup>84</sup>

Another commentator has questioned the constitutionality and fairness of using the Penal Code to enforce religious beliefs.<sup>85</sup> Dr. Agbede's position rests on section 28 of the then-existing Nigerian Constitution, which stated that no Nigerian shall be accorded a "privi-

78. NIG. CRIM. PROC. CODE § 160(1).

79. *Id.* § 148.

80. For a criticism of the courts' discretionary powers under the Criminal Procedure Code Law, see Price, *supra* note 2, at 604-11.

81. *Id.* at 610.

82. Anderson, *supra* note 2, at 624.

83. *Ibeziako v. Commissioner of Police*, 1 All N.L.R. 61 (1963) (Nigerian Law Reports).

84. *Id.* at 68.

85. See Agbede, *Application of Islamic Law in Nigeria: A Reflection*, 5 NIG. L.J. 119 (1971).

lege or advantage" or be subject to "disability or restrictions" by operation of any law.<sup>86</sup> The provision further stated that any law which runs counter to this part of the Constitution shall be rendered invalid "unless it is reasonably justifiable in a democratic society."<sup>87</sup> Dr. Agbede also charged that "it can hardly be democratic that a secular society should employ its machinery for law enforcement to make a person a good Moslem while blissfully disregarding the plight of other religions."<sup>88</sup> Dr. Agbede's remarks are largely misconceived. There is nothing intrinsically undemocratic about a penal code reflecting a religious value, provided that it is a value shared by the greater majority of the subjects of the code.<sup>89</sup> In addition, secular values and religious values are not necessarily antithetical, and, on the contrary, often overlap.

Another interesting criticism of the Penal Code has come from Professor Anderson.<sup>90</sup> He observes that under Islamic law, very stringent rules of evidence were applied to offenses such as illicit sexual relations and alcohol consumption. He questions why, under the Penal Code, these offenses should be proved "in all the ordinary ways" permitted by common law rules of evidence.<sup>91</sup> Presumably, Professor Anderson expected the retention of what he himself describes as an "almost impossible standard of evidence."<sup>92</sup> But what use is a proscription if it is almost impossible to prove its commission? The standard of evidence under Islamic law is not a part of the definition of the offense, and its exclusion under the Penal Code should not affect the statutory provisions in any way.

Professor Anderson further questions why the "haddi punishment"<sup>93</sup> should apply as a discretionary, alternative punishment only for Moslem offenders. He writes that "the combination of a prescribed

86. NIG. PENAL CODE § 28.

87. *Id.*

88. See Agbede, *supra* note 85, at 128.

89. This is an argument that Devlin would willingly defend. See P. DEVLIN, *supra* note 55.

90. See CHANGING LAW IN DEVELOPING COUNTRIES 170 (J. Anderson ed. 1963).

91. *Id.*

92. *Id.*

93. See NIG. PENAL CODE § 68(2). Hadd or haddi punishments are mandatory, fixed penalties specified by the Koran for such crimes as illicit sexual relations, theft, alcohol consumption and slanderous allegations of unchastity. D. PEARL, A TEXTBOOK ON MUSLIM LAW 310 (1979). The punishments, depending on the crime, include death, limb amputation or flogging. A. RAHIM, THE PRINCIPLES OF MUHAMMADAN JURISPRUDENCE 362 (1982). Hadd penalties are to be distinguished from ta'zir penalties, which are imposed purely at the discretion of the court. Ta'zir penalties may range from mere warnings to imprisonment, but in any event may not exceed the legal hadd. *Id.* at 363; Maydani, *Uqubat: Penal Law*, in 1 LAW IN THE MIDDLE EAST 227 (1955).

and discretionary punishment, for one and the same offense, is totally contrary to principle."<sup>94</sup> Again, one fails to understand Professor Anderson's call to principle. Criminal sentencing, while it must not be arbitrary, is a very discretionary exercise.<sup>95</sup> The primary concern is the judge's ability to prescribe whatever combination of available punishment is necessary to aid the offender on his road to rehabilitation. If by the peculiar beliefs of an offender a public lashing is deemed an effective correctional measure, there is no reason why the judge should not use such methods.

#### IV. CONCLUSION

The preceding criticisms notwithstanding, it is generally considered that the Code has, over time, engendered wide acceptance and proved quite workable.<sup>96</sup> One cannot help noting that attempts at unification of law have traditionally met with a great deal of resistance.<sup>97</sup> It is worthwhile to point out also that while the work of international unification movements, notably the International Institute for the Unification of Private Law (UNIDROIT), has not been spectacular, it has achieved a good measure of success.<sup>98</sup> UNIDROIT has worked with many United Nations agencies, such as the Inter-Governmental Maritime Consultative Organization and the United Nations Commission on International Trade Law, to draw up various conventions. Among these conventions are the United Nations Convention on the International Multimodal Transport of Goods<sup>99</sup> and the United Nations Convention on Contracts for the International Sale of Goods.<sup>100</sup>

Admittedly, the process of unification has had a greater impact on

94. See J. Anderson, *supra* note 90.

95. The vast Western literature on punishment agrees on one thing, that there are several criteria for sentencing. What they do not agree on is which criterion ought to be emphasized. See A. QADRI, *supra* note 61.

96. The problems of law enforcement in Northern Nigeria are not a function of the Penal Code. In fact, reports and representations made to me by senior police officers on staff at the Nigeria Police Staff College, Jos, Nigeria, where I was a visiting lecturer from 1979 to 1981, indicate that the Penal Code has greatly improved the quality of law enforcement since its enactment.

97. See R. DAVID & J. BRIERLEY, *supra* note 12, referring to the unification of law: "There are those who, rooted in nineteenth-century thinking, decry such an ambition as pure fantasy." *Id.* at 10.

98. For a review of the steady developments taking place in this Institute, see generally REVUE DE DROIT UNIFORME (UNIDROIT, 1926-present).

99. United Nations Convention on International Multimodal Transport of Goods, opened for signature May 24, 1980, II REVUE DE DROIT UNIFORME 157.

100. United Nations Convention on Contracts for the International Sale of Goods, opened for signature Mar. 10, 1980, I REVUE DE DROIT UNIFORME 61.



new areas of concern such as the legal regulation of space and television.<sup>101</sup> In such areas, there is an absence of deeply rooted traditions, while there are well-settled competing legal precepts already present. The feeling remains, however, that unification of law will become more necessary rather than less necessary in the future. The practical lessons to be learned from experiments like this one in Northern Nigeria and the more recent experiment in the former British Colony, Seychelles,<sup>102</sup> must be taken seriously in the larger effort at international unification of law.

The Penal Code was designed to answer definite societal concerns. It was aimed at reconciling the various conflicts posed by the multiplicity of legal regimes in Northern Nigeria through the process of unification. The Government wanted a penal code that would be "modern" and "respected internationally" while, at the same time, inoffensive to the Islamic and African customary values of the large majority of the Northern Nigerian peoples. The Code that was eventually produced, as observed in the above discussion, has sought to accommodate these values. It exemplifies the cultural and religious mix of the particular society and also the transitional nature of the society. More importantly, it emphasizes the concern of lawmakers to integrate the society.

These are legitimate ideals for a code to attempt to achieve, and in this sense, the experiment is a worthy one. Whether the Code, in practice, has achieved these ideals remains outside the scope of this paper. For the purpose of the discussion herein, it will suffice to conclude that the Penal Code has proved that "law is nation and culture specific, historically wrought, and drenched in the specific political, economic and cultural experience of a people."<sup>103</sup>

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101. See R. DAVID & J. BRIERLEY, *supra* note 12, at 10.

102. A. CHLOROS, CODIFICATION IN A MIXED JURISDICTION ix (1977). In the Seychelles, the new Civil Code led the way for a unification of law. This has been said to be "one method of bringing together the traditions of the common law and the civil law in the context of the future development of a unified European law." Chloros, *The Projected Reform of the Civil Law of the Seychelles: An Experiment in Franco/British Codification*, 48 TUL. L. REV. 815, 845 (1973-74). The particular circumstances of the Seychelles emphasize that international unification is a realistic alternative and that there are workable techniques for balancing divergent values. The Northern Nigerian Penal Code is an example of this balancing method of lawmaking.

103. Delaney, *Liberation Law: Towards a Human Rights Jurisprudence* 38 (1984) (New York University dissertation—work in progress).