

IMPACT OF CUSTOMARY LAW ON THE PRACTICE OF THE
ISLAMIC LAW OF SUCCESSION: A CASE STUDY OF
THE ADIGO OF SOUTHERN COAST OF KENYA. 4

BY

HASSAN ABDULRAHMAN MWAKIMAKO

In the Name of Allah,
the Most Gracious, the Most Merciful,
Praise be to Allah, Lord of the Universe,
and Peace and Prayers be upon
His Final Prophet and Messenger.

A thesis submitted in partial fulfilment
for the Degree of Masters of Arts in the
University of Nairobi.

SEPTEMBER 1992


DECLARATION


This thesis is my original work and has not been presented for a degree in any other University.

بِسْمِ اللَّهِ الرَّحْمَنِ الرَّحِيمِ
لِلَّهِ الْحَمْدُ وَالصَّلَاةُ وَالسَّلَامُ عَلَى خَاتَمِ الْأَنْبِيَاءِ وَالرَّسُلِ

This thesis has been submitted for examination with our approval as University

*In the Name of Allah,
the Compassionate, the Merciful,
Praise be to Allah, Lord of the Universe,
and Peace and Prayers be upon
His Final Prophet and Messenger.*


Dr. J. K. O. Mupfema


Professor Richard Mubvumba

DECLARATION

This thesis is my original work and has not been presented for a degree in any other University.

Mwansa

HASSAN ABDUL RAHMAN MWAKIMAKO

"My Lord! bestow on them
Thy Mercy even as they
cherished me in childhood"
Quran 17: 23

This thesis has been submitted for examination with our approval as University Supervisors.

J.M.O. Mtupah
Dr J.M.O. Mtupah

Mohamed Bakari
Professor Mohamed Bakari

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n A. Mwakimako

ABSTRACT

This work has been as a result of two perplexing views expressed in other works on the subjects, shariah and Islam against the Adigo people. On the Shariah, attention was drawn on attitudes of orientalist scholarship on the Shariah. Specifically this has been an attempt to counter the doubts and criticism expressed in other works on the validity and authenticity of the Shariah as a system of law and doubts on its sources as viable for a system of law.

This survey therefore is an attempt to explain the Shariah and to clarify the doubts about the sources of Shariah. While other works have termed the sources of Shariah as 'alleged' our study attempts to explain what the Shariah is, what are its sources and what is the scope of these sources in the formulation of the Shariah. On the sources of Shariah, this study defines the meaning of each one of them and proceeds to articulate how that particular source can be used to formulate the Shariah.

Collaborative evidence on all sources of Shariah is sought to clarify the authenticity of the sources. It is found herein evidence from the Quran that explains why the Quran can be used as a source of Shariah. Thus on the authenticity and validity of the Shariah, this work contributes to knowledge and explication

the sources of shariah and their limitations in the corpus of Islamic jurisprudence.

work has been done on the Adigo people. Basing our findings on

On the Adigo, concern has been on the fact that Adigo people

indigenous and Islam as a religion has been alien. This has

the basis of some scholars to contend that the traditional

practice of inheritance of the Adigo is in conflict with Islamic

principles and practice of the law of succession. Basically the

argued 'matrilineal practice of the Adigo has been argued as the

reason that has shown the conflict between Islamic and traditional

practice. A real society becomes rather inconsistent when reference is

made to their practice of inheritance. Further Adigo people

An attempt has been made to discuss the emergence and spread

of Islam amongst the Adigo. The spread of Islam was not

simultaneous. The gradual acceptance of Islam may have led to cases

of parallelism. However the trend did change and strict Islamic

practice has been observed.

Since the law of succession has been explained as the born of

conflict between Islam and traditional Adigo practice, this

study has specifically dealt with the principles of the two

systems of law in order to compare them and discover the conflicts

and possible accommodations. Our intention here has been to

analyse the problem and look for possible solution.

The Islamic Law of Succession is thus investigated in its

development during the Jahilliya period. The reforms introduced by

uran and the general exposition of the Shariah and its rules
plication give the corpus of the Islamic law of succession.
ame has been done on the Adigo people. Basing our findings on
ethos and principles which are the guidelines on the
istration of the law of succession, we find that the Adigo
tional practice is minimal, naturally its towards extinction.

ding relationship with the larger world of Islam, making it
However the study did reveal that, the Adigo traditional
ice of 'Kuhala Ufwaa' which is synonymous with inheritance has
patrilineally based. The notion that Adigo are traditionally
rilineal society becomes rather inconsistent when reference is
to their practice of inheritance. Further, Adigo people
temporarily recognise and trace descent both patrilineally and
lineally. This makes it similar to the Islamic practice of
ning family relationships. However amongst the Adigo the
ent group has been found to have certain advantages over
ner in the life of an individual.

Islam as known perhaps more than any other religion, provides
In practice of the law of inheritance, there has been minor
licts contemporarily. This has been as a result of the Islamic
ening observed amongst muslim youth who aspire to be governed
the Shariah than the traditional practice. How Islamic
ation has managed to achieve this, and what challenges it might
faced may be of interest to other researchers

ives under the
in to which every member has to submit, with sovereignty
nging to Allah alone.

Muslim people, however, have different ethnic and cultural
ns, geographical situ INTRODUCTION cal backgrounds and present
conditions. The 'Muslim world' is likewise undergoing
transformation. The changes occurring
at many Muslim societies, differ in scope, intensity, and
Characteristic of an Islamic society may be identified as one
ding relationship with the larger world of Islam, making it
of a wider Islamic community (Umma). It is furthermore a
ty that traditionally considers itself Islamic in both a
ral and a religious sense, and is so considered by other
s adjacent to it or otherwise in contact with it whether these
r groups be Islamic or not. Such a society, within the
xt of Islam, is one that exhibits the structure and
ization of societies that are not only acephalous and
tarian, but also one that is both in its professed religion
culture. occupied with those features of traditional cultures,
n affect the direction and content of change and the
Islam as known perhaps more than any other religion, provides
its practitioner a corpus of a near total social order. The
nic state, like the whole of what one might call Islamic
nology, views the Dar al-Islam (Abode of Islam) as one vast
geneous common-wealth of people who have a common goal and
iny and who are guided by a common ideology in all matters,
spiritual and temporal. The entire Muslim Umma lives under the
iah to which every member has to submit, with sovereignty
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MENT OF THE PROBLEM

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Muslim people, however, have different ethnic and cultural
ns, geographical situations historical backgrounds and present
conditions. The 'Muslim world' is likewise undergoing
oportionate but rapid transformation. The changes occurring
st many Muslim societies, differ in scope, intensity, and
ity. Traditional cultural patterns, are in process of
olution. There are cleavages in almost every sector of life,
eas, institutions, between generations, and among classes and
unities.

In places where ethnic societies embraced Islam, the Shariah
xpected to dominate their lives. These ethnic societies,
ver, have been seen to have their own customary laws and
tices. It is likely these societies practiced customs in
lled with Shariah, even at times at variance. Analysts have
been pre-occupied with those features of traditional cultures,
h affect the direction and content of change and the
ptivity of a society to innovations. Such conditions of flux
be unmistakable signs of internal changes in the value system
a society to innovations. This change may be unavoidably
owed to some degree of secularization and a shift from
riptive to principal value orientation. The acceptance of a
lar orientation on religious, social and cultural matters could
niversal in many Muslim societies, but attitudes towards the
lems created by it differ in every case. With all this, there
a likelihood of a steady trend towards secularization in

ditional institutions amongst ethnic communities that embraced
lineal and Bilineal. Heritage rights are in accordance to the
ure of an individual family. Inheritance amongst the Adigo
The Adigo are an Islamized Bantu Society, who have their
nctive culture, and uphold their traditional values according
eir own weltanshaugen (world view). After embracing Islam
was an encounter between their traditional values and the
iples of Islam. Most traditional Adigo values in conflict
Islamic ideology had to change. This is so because Islam
res all aspects of life of its adherents to be regulated by
Shariah which is Divine and therefore perfect; perfect and
efore complete; complete and therefore final; final and
efore unalterable. In this sense, Islam had a great impact
the traditional institutions of the Adigo.
ritance¹ is one of the social institutions greatly influenced
both Islamic Shariah and Customary law and practice
gst the Adigo². To Islam vis-a-vis Adigo custom, inheritance,
cially its ideology and laws, are the most important. The
mic law of inheritance is central in the Islamic and religious
. Accordingly "... the laws of inheritance form a vital
gral part of the family laws of Islam..." in a sense may be
to constitute its focal point³.
The importance of inheritance, and its ideology may however
between the Adigo customary law and the Shariah. The family
he most sacred social institution in Islam, as well as amongst
Adigo, but the Islamic family structure may not be the same as

Adigo family structure. The Adigo family can be matrilineal, patrilineal and Bilineal. Heritage rights are in accordance to the structure of an individual family. Inheritance amongst the Adigo has also followed one's clan. With the adoption of Islam, the Adigo abandoned (or they had to) those traditional practices which were in conflict with the Shariah, a factor noted as causing trouble amongst the Adigo⁴. The nature of the trouble and its causes are, however, not explained in detail, though a clue is given in the text "... a few Digo have adopted the patrilineal system and this system probably causes disputes since their (Adigo) claim to inheritance would hold if carried to a Shariah court"⁵. We have tried to show that the patrilineal system practiced by the Adigo was not the result of Islam alone. Infact it might be that, it was the traditional practice amongst the Adigo.

The nature of relations between the Islamic law of succession and the Adigo customary law of inheritance clearly indicates the conflict between 'traditional' ethnic, and the 'modern' Islamic. There is thus a disparity amongst the Adigo between the new and the old. Inevitably the Adigo underwent change, thus what the morphosis of society may have forced such a dramatic rethinking of established values within the contemporary Adigo in its customary law of inheritance and the various relationships between the Adigo customary law of inheritance and its impact upon the practice of the Islamic law of succession is the subject of this study.

RESEARCH METHODOLOGY

The study was primarily based on qualitative field and library research, participant observation, open and closed ended interviews. Two categories of informants were interviewed. These were Muslim scholars, mainly Madrassah Teachers, Mosque Imams and Adigo sages, the second group comprised of Adigo sages. For the first category, the Islamic philosophy of inheritance was investigated. The second group discussed the alleged ideology of Adigo matrilineal inheritance and the development of the Adigo rules of inheritance. Islam is the religion of an overwhelming majority of Adigo. Islam is therefore expected to be the focal point of Adigo culture. Oral interviews were conducted with as many informants as possible and from various areas where the Adigo lived in order to obtain a cross section of the population. Caution was also taken to interview a considerable number of informants and avoid possible individual biases of the informants, especially in the areas of the clans of some clans. This seemed to raise eyebrows because some informants originated from slavery and a number of informants needed the confidence of the researcher in order to reveal facts. Only men were interviewed because the women approached for information directed the researcher to male relatives. The researcher found out that questions of law were mainly discussed by men who only became members of the Ngambi council. This also shows some inconsistency with the alleged matrilineal practice of Adigo. rules of inheritance, and the Islamic law of succession.

The unstructured open and closed ended interview schedules (Appendix I & II) were used for the purpose of guiding the researcher on the appropriate questions to be posed to the informants. These were not distributed as such. Tapes were used to record these interviews. Some informants however did not like the idea of being taped due to reasons best known to themselves, in such cases the researcher took notes on the discussions.

OBJECTIVES OF THE STUDY

Today, Islam is the religion of an overwhelming majority of Nigerians. Islam is therefore expected to be the focal point in the society, though somewhere else it is noted that the majority still subscribe to traditional customary practice, most of which are at variance with the basic teaching of Islam.

This study aims to provide a critical analysis of the Adigo society's understanding, interpretation and practice of its primary laws of succession, at the same time being Muslims, their practice of the Islamic law of succession. The study however bears witness that the Adigo are Muslims, thus culturally and spiritually part of the Muslim world hence bound to the Shariah. It is within the scope of this survey to understand contemporary Islam amongst the Adigo society along with its initial potentiality for its evolution, with particular emphasis on the Adigo traditional primary laws of inheritance, and the Islamic law of succession.

The inquiry investigates and attempts to analyze what inbuilt, cultural mechanism helps to perpetuate traditional values in the practice of inheritance, and what values enhance the Islamic practice of inheritance. This study shall also investigate the traditional and Islamic norms and mores that motivated the Adigo to resist and inhibit change and those which hindered change. Further this study will attempt to investigate the relationship between Adigo ethnic ideology and the Islamic philosophy on matters concerning inheritance. Additional objectives are:

To add to the available, historical, anthropological, philosophical and sociological works on the Adigo, a socio-religious analysis of the aspects on inheritance, touched but not elaborated by previous works.

To attempt to show the Shariah law of inheritance when interpreted, can accommodate many aspects of the customary laws of inheritance that may be currently seen as innovations.

To analyze and explain arguments, both for and against the concerned laws for the benefit of the Adigo people and other interested parties.

THESES

Aspects of the Adigo customary law of inheritance cannot co-exist with Islamic law of inheritance.

The matriliney of the Adigo is the sole factor responsible for the conflict between the Adigo customary law of inheritance and the Islamic law of succession.

PROBLEMS ENCOUNTERED

Major problems encountered during the field work included unreliable means of transport. Kwale District where the Adigo live a vast area. Covering the entire district proved difficult in the short time allowed for field research. The researcher depended on public transport which was unreliable on many occasions this explains why the researcher concentrated on areas that were easily accessible from the main Mombasa - Lungalunga Road.

It was also found that a lot of time was needed to arrange for interviews with some principal informants. Though the Researcher tried at a point to have the interviews done spontaneously, whenever informants were available, it certainly became clear that other informants had more information, and there was need for more interviews. Arranging for more interviews was a bit difficult because many respondents also had other things to do. Reconciling this was a challenge to the researcher. Many times respondents did not keep time and often interviews had to be rescheduled.

The researcher also experienced some financial constraints, especially when covering distances which were far apart using public transport. Though the University offers research grants, this is usually inadequate to cover all the research expenses.

Thus out of a period where Muslim Pakistan had recently abolished slavery, Maududi offers a translation of the Islamic ideology and how it can be put into practice to enable

LITERATURE REVIEW

The primary sources upon which we have had to rely on the Islamic Shariah are works done by prominent Muslim scholars. Abul A'la Maududi in Islamic Law and Constitution (1960), Ibrahim Rahman Doi's Shariah: The Islamic Law, (1984), Fazlur Rahman's Islam (1966) and A.A.A. Fyzee's A Modern Approach to Islam (1964) and Outline of Muhammedan Law (1964). Secondary sources are done by the Orientalists which includes Ignaz Goldziher, Heinrich Schacht, N.J. Coulson and J.N.D. Anderson.

Maududi's work, Islamic Law and Constitution (1960) stems from the time of the formation of Pakistan as an Islamic state, thus arising from the need of the Pakistan polity to be based on Islamic conditions and principles of Islam, as explained in the Shariah. In this text Maududi explains how the Shariah can be implemented in modern states. The set up of the book is important in that it was written at a time when Islam was passing through one of its most difficult periods, where the chains of political servitude were rampant in many Muslim states, where intellectual and cultural

ents aiming at Islamic renaissance were emerging throughout Muslim world. It was a time where everywhere Muslims were on march. rather, that maslaha has to conform with the spirit of revealed law. Thus being the Divine law, the Shariah cannot be Thus out of a period where Muslim Pakistan had recently freed from political slavery, Maududi offers a translation of the Islamic ideology and how it can be put into practice to enable living Muslim societies reconstruct their socio-political life in accordance with the Islamic ideology which is not just a mere collection of dogmas and rituals but a complete way of life; an embodiment of Divine guidance for all fields of life. These may be private or public, political or economic, social or cultural, moral legal and judicial. Maududi gives an explicit methodology on application of the shariah amongst Muslims despite the many moral and political interferences that Muslims may find themselves in.

Muhammad Muslehuddin's Philosophy of Islamic Law and the Orientalists, is yet another treatise by a Muslim scholar on the Shariah. It is a direct answer, and an Islamic view of the 'chief' done to the Shariah by the orientalist. Critical points raised by Muslehuddin are the distortions done by the orientalist on the question of rational interpretation of the Quran and vis-a-vis the Shariah. The notion that the intellect of man and whatever has been decided by the use of that intellect must be good in the eyes of God' is critically analysed and an Islamic alternative is

in the fact that it is not that Islamic Law has been revealed for the benefit of man hence maslaha or public interest is all that is important, rather, that maslaha has to conform with the spirit of the revealed law. Thus being the Divine law, the Shariah cannot be subjected to the vagaries and whims of human reason, and has to be preserved in its ideal.

The definition of Shariah is given (p. xii) which enables the reader to embrace and appreciate the caution that needs to be taken in trying to comprehend the Shariah. Analogy as is used in the Shariah is said to have been preferred to reason because, reason is subject to change and also liable to err, hence, 'reason' is subordinate to analogy. Though analogy came to be seen as a source of law because it was used to decide on the caliphate, Muslehuddin is of the opinion that, in reality, analogy is only a derivative, a concept proved by the fact that whatever it extracts from the texts (Qur'an and Sunnah) is not law as such but has to be authenticated by the Umma to attain the status of Law.

Still to preserve the law in its ideal form and to protect it against the encroachment of the fallible reason, Ijma has to be subordinate to the original sources. The idea that jurists can give their opinion on matters concerning the Shariah and their opinion be binding upon the Umma has been taken by orientalist, that the opinions of the jurists is law. Muslehuddin takes issue with this and equips that their views (scholars), as such, are mere

ons and not the law. Thus the divergence of opinion among the
cs should not be seen as tensions and conflicts in the Shariah
f. ed. Doi's work however is more of a Sunnite interpretation
Shariah. Nevertheless it has been resourceful to our study,
In order to explain the Shariah in the contest of other
ns of Law, Muslehuddin has compared the philosophy of the
ah with aspects of law in general thus gives a discussion of
s law!; an exposition on Bentham's philosophy of Law and the
as explained by Greek philosophers. For our study
uddin's intellectual discourse has been relevant because it
s the Shariah in a clear view to both Muslims and non-Muslims.
Islamic ideas on the principles of Ijtihad, Qiyas and Analogy,
san and al-Masalih al-Mursalah have been relevant especially
se it was the only work written in English language that
cally analyses the orientalist's view on the philosophy of the
ah and also uses the popular theories of Law used by the
calists to exonerate the Shariah from the prejudices made by
n Principles of Muhammadan Law (1964) Fyze outlines the
Abdulrahman Doi's Shariah: The Islamic law (1984) makes
sis of almost all aspects of Shariah. He starts with
itions and proceeds to outline the sources of Shariah and the
development into the different schools of thought. Part II
i's work deals with aspects of Family relationships and the
ion of the Shariah on them. Issues like marriage and its
ionships are discussed according to the Shariah. Part IV

sses the details on the law of succession (mirath) aspects
shares of each heir, and ways of disposal of property are
rated. Doi's work however is more of a Sunnite interpretation
e Shariah. Nevertheless it has been resourceful to our study,
ially so because it gives the corpus of the Islamic philosophy
heritance. point begins with the work of Ignaz Goldziher
who is among those who founded the modern science of
A.A.A. Fyzee in A Modern Approach to Islam attempts to give an
n experience of the problems experienced when the Shariah
into contact with customary law. A unique approach is
ed by Fyzee in his notion of "reinterpretation" of Islam.
suggests a philosophical re-interpretation of Islam in those
ts of Muamalat, a fact deeply rooted in Fyzee's 'western
nic orientation'. His discussion on the theory of Ijtihad is
ant to this study, since it is our adopted theory to explain
l aspects of the Islamic law of succession and the customary
f succession of the Adigo. ore in the latter case he was the
an Muslim student to enrol in Al-Azhar University. His
In Outlines of Muhammadan Law (1964) Fyzee outlines the
es of Shariah and its development. He discusses the sects,
formation and the differences in their interpretation,
cation. Problems encountered, are highlighted though examples
ostly drawn from India, The Sunnite and the Shiite law of
itance is discussed in Chapters XII and XIII respectively.
h Fyzee uses examples amongst the Indian Muslims, he
ights the global problems with communities that had their own

and had to change them to accommodate the Shariah. This
ifies the need for such a study on an East African ethnic
nity.

ration and analysis of the writings of al-shafii, with respect

We have found that the systematic study of the law from the
rn vantage point begins with the work of Ignaz Goldziher

) who is among those who founded the modern science of
mics' or Orientalism. Goldziher's career as a scholar spans

decades from 1870 to 1921 when he died. It encompasses
contributions written in German, French and English. Goldziher

mizes the orientalist tradition in that his scholarly study of
is primarily removed from the actual cultural context of

. He was a Hungarian Jewish extraction and experienced
cution of anti-semitism in the fact that he never held a

ersity position despite the depth of his scholarship. His only
to an Islamic country consisted of eight months spend between

ucus and Cairo in 1874, where in the latter case he was the
non-Muslim student to enrol in Al-Azhar University. His

edge of Hebrew led easily to the study of Arabic and Islam.

te this, Goldziher also ascribed the authorship of the Quran
rophet Muhammad (p.b.u.h.) and makes a number of other

ements that are distinctly offensive to Muslims.

Africa and Asia. In his discussion of Islamic law in

Joseph Schacht continues explicitly in the tradition of
iher (cf Preface to the origins of Muhammadan Jurisprudence,

as is regarded as the pre-eminent orientalist scholar of the

until the very recent period. In addition to his Origins, he is the author of Introduction to Islamic Law (1964) and numerous articles and treatises on the law. He may be credited with his lucid exposition and analysis of the writings of al-Shafii, with respect to the traditions emanating from the prophet as the sole basis of Islamic doctrine. Schacht's focus on this 'master' of Islamic law is one of the reasons, stems from his interest in the development of legal theory in Islam itself, the essentials of which were outlined by him (p. 1). Origins is thus mainly an assessment of al-Shafii's contribution and a deep probing of the history of traditions of the prophet. He, as his predecessor, Goldziher, agrees with the opinion that Hadith and Sunnah only began to gain currency in Islam after the death of the prophet and his companions i.e. in the hands of the 'successors' in the first century and half of the second century. He sees in al-Shafii's the rescue of traditions and the application of them in law and theology.

His Introduction to Islamic Law (1964) is a much more general treatment of the subject. During the intervening years since the publication of Origins, his terminology underwent an evolution from the characteristic orientalist's 'Mohammadan' to Islamic. This book corresponds to the demise of colonialism in many Muslim countries of Africa and Asia. In his discussion of Islamic law in this volume he aptly describes the Shariah and Fiqh as having developed as a jurists' law where legal science and not the state played the primary role in determining legislation. His discussion

the nature of Islamic Law' Chapter 26, summarizes much of his individualistic view of the law, which is that; it is fundamentally irrational and therefore to a certain degree irrational; it is a systematic body of doctrine, but legal concepts are abstract and lacking in positive content, the law has a private individualistic character guaranteeing the rights and personal privileges of all individuals, the traditionalism of Islamic Law, viewed as beginning with the closing of the door of interpretation (bab al-Ijtihad) is perhaps its most essential feature⁷.

In both his Origins and Introduction, Schacht is overwhelmingly concerned with legal theory and the purity of the sources and jurists' treatment of them. The secular character of Islamic law is not addressed as such, except as deviations in applied law from the original sources. While admitting of modernist trends in Islamic law from the Ottoman period to the Anglo-French occupation of Muslim territories, these influences are regarded as altogether alien to the pure system of law, rather than being a part of its normal development. It is the reception of Western political ideas, which, in Schacht's view, has provoked the unprecedented amount of modernist legislation in the twentieth century⁸. Indeed Schacht refers to 'modernist legislative interference with Islamic law'⁹ and criticizes the haphazard and arbitrary character of the legislation which has not sprung from any genuine demand but from governmental intervention¹⁰. Indeed and in a sense Schacht has become more sympathetic than many Muslims in his 'Sympathy' and demand for the

nal purity of Islam and the law. As with Goldziher, this is
d by his own scholarly distance from modern times, i.e.
eenth and twentieth century development.

(1959) and Family Law in Asia and Africa (ed) (1968).

Schacht's last work, published in 1974, five years after his
is an edited volume entitled The Legacy of Islam. His death
indeed leave a vacuum among senior Orientalist scholars of
ic law in the West, one soon to be filled by N.J. Coulson, who
together a different manner of scholar. The volume (edited
C.E. Bosworth) is in many ways a culmination of Schacht's
ong development as a scholar of the 'theology' of the law and
n. "Islam in Africa and Asia", "Islamic Literature", "art and
ecture", and a host of other topics are covered in the volume
ll as Schacht's last statement on Islamic religious law which
condensation of general points made in the Introduction to
Islamic Law. While there is much to be criticized in Schacht by
contemporaries', his works remain a basic starting point in
study of Islamic Law in English language. Unto themselves in
context of current scholarship, they are insufficient but as
essential orientalist treatment of the Shariah they are
ceptionable.

to African Colonies with brief visits to three
countries. The work represented is prodigious, and few would

Another towering figure in the orientalist tradition regarding
law is J.N.D. Anderson. Unlike Schacht, his scholarship has
almost exclusively with positive law and the application of
ic law in contemporary Muslim countries and regions. Anderson

also a host of articles on specialised topics in the law and reform. His scholarship has always been expansive topically and geographically as represented by Islamic Law in the Modern World (1959) and Family Law in Asia and Africa (ed) (1968). Anderson's work is without peer as a survey of the applied Shariah in a variety of historical and political contexts from Northern Africa to India and Malaysia. To his credit Anderson is among the few orientalist scholars to take a serious scholarly interest in Africa, frequently collaborating with his colleague, Peter Trimmingham. From his research in Africa and Asia, his interest took more general concern with questions of law and the development in the less developed countries.

Although a healthy departure from many of the orientalist's long held biases regarding Islamic 'theology', Anderson's work remains within the tradition because of the close association with colonialist authorities that is so evident in Islamic Law in Africa¹¹, and the usual distance from the subject matter of study characterizes orientalist scholarship. The aforementioned work, while truly a classic survey, was nonetheless the result of a short month visit to African Colonies with brief visits to three countries. The work represented is prodigious, and few would attempt such a project today, but Anderson everywhere must have had the assistance of colonial authorities and their sanction of his research.

A progressivist and modernist though, Anderson still evidences tyranny for the reformist movements which have resulted in a varied perspective on Islamic Law in a variety of circumstances. However he, as compared to his predecessors applauds the reforms and speaks frankly about progressive and retrogressive change in Shariah affecting the status of women in the Sudan. Indeed Anderson may have been faulted by some Islamic scholars for his 'modernist' bias which is alleged to be pro-western in the sense that positive change is viewed as emanating from the West. The argument follows that any move in the direction of 'westernization' is ipso facto part of the trend towards modernization. Anderson has been lumped with other orientalist scholars in one critical review¹² However his central contribution in my view, rests in the compilation of resources and legislation affecting the law and its application in a wide variety of geographical and historical contexts, and in making systematic statements about overall trends.

Perhaps the last of the orientalist scholars of the law is Coulson and his work already reflected the change in approach and thinking which is transforming orientalist scholarship. His book, entitled, A History of Islamic Law, 1964, a large section of which deals with modern legislation, was strongly criticized by Schacht (1965) in an article which contrasts the major views of modernism and traditionalism. His sharpest break with Coulson is summarized thus:

I think on the contrary (to Coulson), correct appreciation of the history of Islamic Law shows that it developed into its final, rigid form by a natural and almost inevitable process (cf my origins, p. 55) and that the modernist movement, though taking place in a situation which parallels that of the earliest lawyers of Islam, really constitutes a break with the immediate past and can hardly be said to preserve the continuity of Islamic Legal tradition¹³.

The outcome of the struggle between traditionalism, as presented by Schacht, and modernism, as represented by Coulson and Anderson, makes it clear that the latter is the contemporary historical trend in Islamic legal scholarship. In fact Schacht has to acknowledge this when he says in the same article that the neglect of the history of Islamic Law in Western scholarship has undergone a fundamental change in the last fifteen years¹⁴.

Coulson's career, in a way, began with this sharp contrast to the work of Schacht, although both scholars agree on the central role of al-Shafi'i in the development of the Law. Coulson went on to establish himself as one of the important experts in Islamic Law in the English language. His series of lectures given at the University of Chicago Law School were published as Conflicts and Unity in Islamic Jurisprudence (1969) and represent a good statement of Coulson's non-static view of Law as opposed to the staticity in the Law of which Schacht speaks. In this essay Coulson proposes a number of principles held to be characteristic of the Law, for example: revelation and reason, authority and liberty,

ity and change. In consideration of each, Coulson explores
nsion, the opposition of a Law which is at once both divinely
ed and interpreted and administered by human beings.

Coulson represents a break with the Orientalists' tradition in
e does not speak of the 'claim of Quranic revelations' or of
lleged' Hadith. He is more respectful of Muslims' beliefs,
s in part because he spent a year as a Dean of the Law
y at Ahmadu Bello University in Northern Nigeria, but also
e the style of scholarship in the West on Islamic topics is
ng towards a less ethnocentric view of Muslim institution.

Coulson's Succession in the Muslim Family (1971) is a
ght of his scholarly career as it is a systematic elaboration
e of the most difficult topics in Islamic law, that of
tance. As such it is a most welcome contribution to the
me, and it was a great assistance to the present study.

on emerged from the orientalist tradition but his work
ent certain distinct break with it. Despite of this,
ism on orientalist has not been lacking amongst Muslim
rs and also from those in pursuit of fair academic discourse.

Fazlur Rahman reacted in a passive way to the offense against
ligion of Islam conducted by the orientalists and has sought
rrect the inaccurate descriptions of Islam. Rahman in his
Islam" (1966) devotes almost an entire chapter to a critique
dziher, Margouliouth and Schacht on law and their treatment

sources of Shariah. Through his view as a Muslim scholar, enormity of the assault on Islamic beliefs and sacred traditions is conveyed. Otherwise the book is a basic description, a descriptive treatment of the development of Islam including major contributions on the law. The law as understood primarily from its sources, especially the Quran and Sunnah, and the various schools of Islamic jurisprudence, to which the orientalist have devoted so much time, are relegated to a secondary historical place. Most of the book is devoted to philosophy and Sufist thought than to doctrinal differences.

One of the earliest and most outspoken critics of orientalism was E. L. Tibawi who suggested the relationship between orientalism, a body of knowledge and system of analysis, and Zionism, as a philosophical and practical political system. He complains that the orientalist as a group, possess an attitude to Islam which is far from being in the most elementary sympathy for the Islamic religion and the nationalist aspirations of Muslim people. The denial of the divine origin of Islam and the suggestion that the prophet Muhammad falsified the Quran by some orientalist are cited as but two examples of the offensive character of orientalist scholarship, and those who claim Islam must be reformed in order to survive in the modern era are guilty of the law is of western inspiration is equally unacceptable and J.N.D. Anderson is cited as one of the most emblematic scholar. Islamic beliefs are immutable; Islamic law, on the other hand, has its own instrumentalities by which change

and has been affected and has no need of alien guidance, so
Tibawi¹⁵. of the Shariah in various countries and contexts
depend on standards established in the West using its own
important critique of orientalism does not always stem from
violence done to religion. Philosophical objection to
orientalism is also important. This is especially so from the
inseparable relationship between orientalism and colonialism. The
orientalist reduces other people to ethnic or racial stereotypes,
'oriental'; his 'mind' his 'nature', and indigenous peoples
are 'objects' of study non-active, and non-autonomous and non-
significant¹⁶. study of conflicts between customary law and the
Islamic law in ethnic societies, very little has been done. The Adigo
important critique of orientalist scholarship is the widely
known critique of Edward Said (1978). Said's book entitled
"Orientalism" in many ways is directed to a more general audience
of intellectuals and not just the specialist in Islamic studies.
Arguments are developed from basic premises inherent in
orientalism (Imagine he asks the reader, a field called
"Orientalism"), to the treatment of technical subject such as
Islamic law in his own field of literary criticism. He cites H.A.R. Gibb as
representing the orientalist preference for the term
'Islamism' over Islam as another form of ethnocentrism which
ignores other erroneous statements such as the theology over
Islamic law. Gibb the pre-eminent orientalist for Said, evidences
the same hostility to modernizing currents in Islam and staunch
loyalty to Islamic orthodoxy as was discussed above with respect

nacht. With respect to the law this means that indices of
nizations' of the Shariah in various countries and contexts
depend on standards established in the West using its own
utions as a measure. That polygamy continues to be judged as
and its elimination is viewed as a favorable step toward the
er' western model is but one example. Certainly the
elming benefit of Said's book is that with its appearance the
alist hegemony can no longer remain unchallenged in wider
nic circles.

On the study of conflicts between customary law and the
ah in ethnic societies, very little has been done. The Adigo
subject is just mention in Trimmingham (1964), J.N.D. Anderson
, and Berg Schlosser (1984). David Sperling (1988) has done
ost extensive work on the Adigo.

ETHICAL FRAMEWORK

Analysis of culture has long been pre-occupied with features
additional cultures which affect the direction and content of
e and the receptivity of a society to new ideas. There has
very little effort to examine types of traditional systems
respect to problems posed for cultural changes. The basic
rn amongst theorists of cultural change has been describing
rocess of change and the mechanisms or cultural features that
ate change. The direction and content of the process involved

tural transformation has rarely been addressed. There has been recent attempts made to relegate the general category "cultural change" for more precise concepts such as "modernization", "westernization", development etc. Contemporary approaches to cultural changes can be reviewed to bring to light the difficulties posed in attempting to organize a unified analysis of the process of cultural dynamics. This is an aspect of the subject that I feel has practical importance. Barnett¹⁷ theorizes that changes are commonly adaptation by individuals to "new ways" different from prior approved norms. He discusses all the circumstances that may favor or discourage innovations in any kind of society. There is a reminder that there are changes of one kind or another going on all times, and no matter how small (like a new way of making gestures) are too small to be ignored in the generalizations of changes. Barnett is concerned with innovations that are imitated and so become standardized as accepted forms of behavior. He recognizes that changes are encouraged in some fields and discouraged in others, but does not treat this as a significant factor for the study of cultural change. Thus changes in technology accordingly are encouraged but not changes in religions, in political structures, or in family or organizations; thus while mechanical inventions are encouraged social deviation is not. This statement in fact puts in perspective all what seems to be the crucial problem of cultural change in non-ethical Muslim societies in general.

to social order would be possible without some generally
ed picture of the roles appropriate to the relation in which
e find themselves and some confidence that these rules would
ropriately performed. The interesting thing in the study of
al change is precisely the question of what kind of counter
re (such as an ideology that can at least tolerate deviation,
e encourage it openly) makes non-conformity, worth while, and
is an aspect of the subject that I feel has practical
ificance for the transformation of traditional ethical
ies. increase in personality characteristics. He is concerned
with interactions among social organisations, individual
Wilson and Wilson¹⁸ suggested that an increase in the "scale"
e society, facilitates progressive change and "economic
opment". Since the size of a society has a direct relation
chnological receptivity by the "scale" of a society, it is
that the number of people in relation and the intensity of
relations. In comparing the scale of societies, therefore,
mpare the relative size of groups with relations of similar
sity¹⁹. ts have been of little help to date in the understanding
onow o developmant, but he tells that recent improvements in
The argument here is that change occurs when there are
iduals whose background includes acquaintance with more than
ommunity. The implication being that, if the world of an
idual includes only a single village, the range of facts he
observed is probably so limited that they will hardly have that
standing of the diversity of causes and effects, which are a

quisite of change. However, expansions of the scale of a
y can hardly be taken as a starting point in the analysis of
l change. Except with the admission that one is breaking into
iddle of a dynamic process without attempting to probe its
ns. Also expansion does not occur either by accident or by
inevitable force which can be attributed to nature or to "the
e of things". Something, internal or external generates it.

McClelland²⁰ argues that an increase could be realised by a
lel increase in personality characteristics. He is concerned
with interactions among social organizations, individual
ior and economic development. In its most general terms, he
s that "... a society with a generally high level of an
vement will produce energetic entrepreneurs who in turn will
ce more rapid economic development"²¹. His work tries to
te certain psychological factors, and to demonstrate
ously by quantitative scientific methods that these factors
enerally important in economic development²². He admits that
ologists have been of little help to date in the understanding
onomic development, but he tells that recent improvements in
iques for measuring motivation permit the application of
ology to "a problem of real interest to economists and
logists²³.

Despite his work being bold, imaginative and entertaining, it
rd to see what there is about his loosely related series of

ological experiments and statistical tests that makes his methodology more "rigorously empirical" than the cautious work of econometricians who like to have a tight, logically consistent theoretical models, mathematically expressed to begin with. He is the idea that societies conducive to the generation of effective entrepreneurship are likely to have more rapid development than societies that are not, he is therefore not adding much to what we already know. approach put forth by Risensdadt²⁷, whereby an overall print for an "idealized", structural arrangement is provided. main phases are differentiated: the pre-modernization, the To make real contribution, he must be able to identify an achievement clearly as an independent variable, measure it in a form manner permitting inter-spatial and inter-temporal comparisons, show precisely that there is a stronger link between the variable and entrepreneurship than there is between entrepreneurship and other variables, and tell us how to create or get an achievement in operational terms. His work stimulating is falls short of meeting these criteria. development process is widely acknowledged²⁷. Nevertheless, considerable divergences of It is interesting that most purposive models of cultural change have been articulated by sociologists more than any other social scientists. Moore²⁴ and Levy²⁵ come close to setting forth not only the socio-cultural process that leads to meaningful change, but also put forth explicitly what the end (quantifiable) consequences of such process will be. Anderson and Bowen²⁶ are as clear as to the particular role a specific process such as

tion should and must play in the process of progressive
ral transformation. Few scholars would boldly state that
tion is not only a vehicle for change but it should above all
as the stimulator and agent for change. Instead the
ment of a state of modernity must involve passing some
The sociologist approach nevertheless has been one of
ding recipes for change. This is quite obvious of the
tural approach put forth by Eisensdadt²⁷, whereby an overall
print for an "idealized", structural arrangement is provided.
main phases are differentiated: the pre-modernization, the
ss to become modernized, and lastly to stabilize and the
aining of mechanism in the system for modernization. His for
erately more than punctilious adherence to a recipe of two
In the light of the divergent views, the student of cultural
e is ready to agree with Gabriel Almond²⁸, that in this field,
magnitude of the formal and empirical knowledge required
ers the imagination and lames the will. In studies concerning
m societies, the complex character of the development process
ly acknowledged²⁹. Nevertheless, considerable divergences of
are expressed with regard to the most effective conceptual
work to adopt in order to understand this process. There
to be an agreement that the process of developmental change
ves a progressive substitution of new modes of perception to
ce those modes associated with traditionalism. Ideational
formation suggests the adoption of a totally new intellectual
Nevertheless traditional and rational modes of perception and

or co-exist in even the most developed societies, "Modernity" involve the total substitution of rationality for traditionalism. The mixture of the two, with predominance of traditionalism characterize Muslim societies. Instead the achievement of a state of modernity must involve passing some critical point in the developmental process beyond which the traditional mode of perception and behavior tends to dominate. Before this critical point has been reached, society is torn by the struggle between rationality and traditionalism with each trying to expand the scope of the other. This tension, in turn, reflects the fundamental diversion of the developmental process namely, "changing the contents of man's mind". The process of change calls for considerably more than punctilious adherence to a recipe of two percent economic planning, one cup administrative reform, three spoons of land reform, and a dash of violence.

What is called for is a fundamental intellectual reorientation, a shift from prescriptive to principled or ideational transformation". The term "ideational" is deliberately used in lieu of 'ideology' for the reasons that: (i) the word 'ideation' refers to the transformation of ideas about things not perceptible to the senses (ii) it does not carry the same value connotations as the term ideology; and (iii) it emphasizes action more than a disposition to act. Briefly, ideational transformation suggests the adoption of a totally new intellectual framework, which will provide a unified solution to socio-

ral problems. Ideational transformation is a necessary pre-
condition for a change, it is not simply a final effect.

Ideational transformation in a Muslim society is always
partial, intermittent and discontinuous. Those having made this
transformation at least in the past, constitute the modernizing
class. Their effort to engender mass ideational transformation are
frustrated by a vast array of psychological, institutional and
cultural obstacles³⁰. Moreover the tendency on the part of the
uneducated masses to interpret new ideas in traditional garb,
makes it difficult, if not impossible, to gauge adequately the
extent of which a society as a whole has actually made such an
ideational transformation.

As a result, a changing society, at any particular point in
time tends to give reflection to this intellectual dualism in the
form of an unstable synthesis of both traditional and "modern"
conceptions of perception. The progressive restatement of this synthesis
over time to accommodate historical permutations suggests that the
development process may be fruitfully perceived by analysing the
dialectical interaction of these two antipodal ideational
conceptions within a changing society. The purpose of adopting
this theory is to examine this possibility amongst the Adigo and
the Islamic system in general.

The style of thought and mode of behavior associated with

traditionalism and the Adigo ethical ideation will serve as a convenient point of departure. However it is clearly understood that the sociological nature of ethical Muslim societies may take much of its character from geographical and climatological conditions, and hence the intellectual foundations of the traditional ethics in Muslim milieus derive directly from Islam. Any attempts to diagnose the situation within Muslim societies without taking into account the ubiquitous influence that ethical ideas and traditions together with Islam would produce only sterile and distorted images of socio-cultural reality. For us to discuss the foundations of the Shariah amongst a society that is undergoing rapid changes, a glimpse at the sources of Shariah themselves is desirable. We thus hereby take Ijtihad as it can be practiced in its various aspects and its flexibility in applications of the Shariah as its theoretical frame work.

The sources of Shariah are the Holy Quran and the Sunnah of the Prophet (p.b.u.h). These two sources, therefore will be the principal references used in this study. The Quran is the word of Allah and it contains injunctions on laws which guide the lives of Muslims. The Quran is supplemented by Sunnah. The Quran has laws which regulate satisfactorily the relations between Allah, the Creator and his creation, an aspect of Shariah known as Ibadat (worship). The other branch of Shariah is human relations (Muamalat), which mainly deals with the different and overchanging conditions of human society, is mainly left to the Muslim to define

organize. It, is to define the spirit of Islamic Law, which
the establishment of social justice, the guarantee of
The Muslim community (Umma) is thus left to devise suitable
to deal with the problems of human relations. This is
ary to what has been called the classical Islamic theory of
here law does not grow out of or develop along an evolving
ty, as is the case with western society. In Islam Law is
ed from above. In the Islamic concept, also, human thought
ed cannot discern the true values and standards of conduct;
knowledge can be attained only through divine revelation, and
are good or evil exclusively because Allah has attributed this
ty to them. In Islamic Law therefore precedes and is not
ded by society³¹; it controls and is not controlled by the
ty. Although in the western systems the Law is molded by
ty in Islam exactly the converse is true. The religious law
des the comprehensive, divinely ordained and eternally valid
r plan to which the structure of state and society must
ly conform. Still, the prophet (p.b.u.h.) was
to have approved and encouraged the exercise of Ijtihad³².
Obviously, the clash between the dictates of the rigid and
c religious Law and any impetus for change that a society may
ience poses for Islam a fundamental problem of principle.
so in ethical societies that had at one time upheld customary
ices. decisions (especially of muamalat) among different
ities. For outside the limited field covered by the Quranic
The objectives of the guidelines for the formulation of the

n Muamalat, is to define the spirit of Islamic Law, which
at the establishment of social justice, the guarantee of
m of belief and practice and the provision for equal
unities to all members of society. Details as to how social
e is to be established is at times left to the Muslim
ity (Umma) to work out. This is the function of Ijtihad on
the principalities behind its use as a source for the
lation of Laws on Muamalat will be the basis of our
etical framework.

Neither the Quran nor the Hadith of the Prophet had given all
sary detailed information about the muamalat, such detail had
me gradually and in accordance with the overchanging social-
mic conditions in which the Muslim society develops. The use
tihad was not as great during the life-time of the Prophet
u.h.), as it became later. This was so as directives were
coming either from the Quran which was still being revealed,
om the prophet himself. Still, the prophet (p.b.u.h.) was
a to have approved and encouraged the exercise of Ijtihad³².

Thus there was a wide scope for the use of reason in the
ulation of social principles. And it is not surprising that
freedom to speculate led to considerable divergence of
stic decisions (especially of muamalat) among different
lities. For outside the limited field covered by the Quranic
epts, the thought of the scholars was naturally influenced by

ties, and local customary practices were accepted as part of the real scheme of things where some explicit principle of the law was not flagrantly violated. Judgment unless there was text dictating it. In the absence of the text (Nass) they would use Ijtihad. Although Ijtihad was an accepted method of arriving at legal decisions, on matters affecting the welfare of the Muslim community, Muslim jurists at the initial stage of legal formation were not unanimous in using it as a legitimate means to reach legal decisions, some used ijtihad without restrictions, others either rejected it or used it only in a very restricted sense. Those who used it without restrictions were known as ashab al Ray, and beside them were ahl al-Hadith.

When exercising personal reasoning, they (Ahl al-Qiyas) did so. During the early period of Islam, decisions reached by the Mujtahidun (those who exercise Ijtihad) were mostly Fatwas (legal opinions), given as answers to questions raised. Later there were attempts to write those fatwas down, or systematize them. This was the period of the foundation of the schools of Law (Madhahib). During this period Ijtihad was used widely. Decisions reached by the great Jurists, were collected to form the basic tenets of these schools. This marks the beginning of the systematization of Islamic Law, from the different schools of Law. There emerged a rapid expansion of Islamic world, the collection and systematization of the law, with the emergence of the great Imams, and the founders of the schools of Fiqh³³ (Islamic Jurisprudence).

Amongst the learned of this period were the Ahl al-Hadith who based their judgment exclusively on the texts of the Quran and Hadith. These would not pass judgment unless there was text supporting it. In the absence of the text (Nass) they would refrain from passing any judgment. Besides, there were other groups known as Ahl al-Ray and Ahl al-Qiyas. These conceived Law as a subject of rational thinking, which they believed must be governed under general principles based on the Quran and Sunnah. To these principles (Usul), they related all issues which might arise. In the absence of a text, they never hesitated to use al-Istihsan in order to reach a legal solution. In the great change preceding space in the Muslim world is not when exercising personal reasoning, they (Ahl al-Qiyas) did not hesitate, whenever they found something they considered as good and in conformity with the spirit of Islamic Law, to make use of al-Istihsan. This they called al-Istihsan or al-Masalih al-Mursalah. According to them, whatever is considered good (Hasan)³⁴ by the Muslim Community (Umma), should also be good and acceptable to the Lawgiver. The purpose of using al-Istihsan and al-Masalih al-Mursalah, seems to have originated from the belief that dependence on the text could lead sometimes to the deviation from the spirit of the Law which is to make things easy and not to complicate them³⁵. There emerged thus distinguished jurists, who made systematic studies of the Quran and Hadith. By means of Qiyas and Ijtihad, they synthesized the Islamic law, trained numerous scholars who devoted themselves to organizing legal theories and

ns, handed down to them by their masters in the form of
s of law. These also exerted themselves in spreading the
ng of these schools and defending them against other orders.
ndependent reasoning in Law (that is Ijtihad). Thus all
uslim dominion, peoples, expanded territorially, and
lly disintegrated politically, culturally and socially. It
e difficult, if not impossible, to impose a unified school of
ver all parts of the Muslim world. had These new kind of
ies and cultural patterns emerged amongst Muslims and with
they used to make new choices. Western scholars may believe
s a question that must involve the reformation of Islam. In
the great change preceding apace in the Muslim world is not
eliberate reformation of Islam as a religious system but
ormation of Muslims as individuals and members of a new
y. Despite this, most of the efforts of the learned
ars, at that time, was geared towards the promotion and the
ce of the already established schools of Law. This situation
ced a group of scholars known as the Mughallidun (the
ctors), who made some effort to exert themselves not to the
of the Quran and the Hadith, rather they satisfied themselves
what was written down in established schools. *slim community,*
is because the text, whether of the Quran or the Hadith, is
This tendency gradually resulted in the closure of the gate of
ad. This serious and rather unfortunate decision was reached,
y an official decree, but rather, by general feeling among
ars belonging to various schools of law that "all essential

ons had been thoroughly discussed, and finally settled, and
sus gradually established itself to the effect that from that
n, no one might be deemed to have the necessary qualification
ndependent reasoning in Law (that is Ijtihad). Thus all
ties were confined to the application and interpretation of
ctrine laid down in the established schools"³⁶.
The closure of the gate of Ijtihad had led to the
ntinuation of all personal efforts exerted by learned people
nderstand the Shariah. Others continued to say "Islam is not
roperty for us to offer to others, with alterations suitable
e requirements of the market"³⁷. This again emphazies blind
tion of the great Mujtahidun. Referring to the unfortunate
ion and urging against the closure of Ijtihad, it is noted
it is through Ijtihad that the true teaching of Islam can be
stood, and properly applied to promote the interest of the
ms. We wonder, on what grounds can one deny others the right
aims for himself"³⁸.
Through the use of Ijtihad, Muslim people could decide on what
Mustahsan (good) and what was not for the Muslim community.
is because the text, whether of the Quran or the Hadith, is
ed while events which are the subject of the text have no
. Ijma and Qiyas thus evolved the exercise of Ijtihad. In
ion, the concept of al-Istihsan (preference) and al-Masalih
arsalah (public interest) which the learned jurist used to

update al-Urf (useful social customs) in Islamic Law, was used as a legitimate ground for interpreting Shariah on the exercise of Ijtihad. The theory and practice of Ijtihad, the development of Islamic Law, that the Law of succession the majority of decisions reached by the Muslim community were meant to serve the interest of the community, by solving problems peculiar to specific periods and circumstances mostly based on certain customs (Urf) known to those communities. Such decisions could not always be binding to other community with different socio-economic conditions, unless decisions can serve the same purpose and render the same results that they were initially designed for, regardless of economic differences. Otherwise, the imposition of such decisions on Muslims in all times, will create more problems than could have solved.

A Mujtahid bases his decisions on the prevailing customs in a society set up or in a different period of time, he would be expected to reach a different conclusion. The Mujtahid must acquire thorough knowledge of all customs and social norms prevalent in a society. Also legal decisions suitable to a particular society do not necessarily be suitable to another different social set-up. Legal decisions, when imposed in places and situations with a different social set up, will inevitably result in inflicting hardships on the people in the society, contrary to the spirit of Islamic law which is based on ease and flexibility in dealing with

problems.

It is in the light of the theory and practice of Ijtihad, in the development of Islamic Law, that the Law of succession be examined in relation to the customary law of inheritance of Adigo. The adopted theory will initially reveal the need for, and successions are closely related and commonly proceed differently, of the practice of Ijtihad and its relevance to the inheritance confers rights over things; em. In putting the said theory to test, this study shall investigate how it can be useful when the Shariah is in conflict with the customs, with reference to the Islamic law of succession, the laws of inheritance of the Adigo. Const., 1826-1933" Ph.D Thesis, University of London, 1989 p.140

M.J. Coulson, Conflicts and Tensions in Islamic Jurisprudence Chicago: University of Chicago Press, 1969 p.3

This explained by Trimmingham as a factor that caused conflict between customary law and the Shariah. J.S. Trimmingham, Islam in East Africa (Oxford University Press, 1964) p.151 Cf.D. Berg-Schlosser, op. cit.

J.S. Trimmingham op cit p. 151.

However this notion is not correct since the Hadith was there during the lifetime of the prophet (p.b.u.h.). Its only that it was not recorded in a large scale as it was done during the period of successors (the tabiun which started from 11 A.H.)

We should note that despite Islam allowing human legislation in Islamic jurisprudence, legislative powers are vested in Allah. Hence Islam does not totally agree nor exclude human legislation. It only limits its scope and guides it on the right lines.

J. Schacht, Introduction to Islamic Law (Oxford: Oxford University Press 1964) p. 4.

Ibid p. 103

Ibid p. 105

This was first published as Colonial Research Publication No.

No. 16, 1954.

See A.L. Tibawi, "English Speaking Orientalists: A critique of their approach to Islam and Arab Nationalism", in Muslim World vol. 53 1963 pp. 185-204.

J.W.D. Anderson, "Recent Reforms in the Islamic Law of Inheritance". International and Comparative Law Quarterly Vol. 14 1965 p. 390.

NOTES
By inheritance I refer to the transmission of property rights, by succession to the transmission of statuses. Inheritance and succession are closely related and commonly proceed together; but they are analytically distinct and may proceed differently. Inheritance confers rights over things; succession transfers statuses, defined by right and interests vis-a-vis person.

Berg-Schlosser. D Tradition and Change in Kenya: A Comparative Analysis of Seven Major Ethnic Groups, Zurich: Munchen-Wien Publishers, 1984 p.87, also Cf. D.C. Sperling "The Growth of Islam among the Mijikenda of Kenya Coast, 1826-1933" Ph.D Thesis, University of London, 1989 p.140

N.J. Coulson, Conflicts and Tensions in Islamic Jurisprudence Chicago: University of Chicago Press, 1969 p.8

This explained by Trimingham as a factor that caused conflict between customary law and the Shariah. J.S. Trimingham, Islam in East Africa (Oxford University Press, 1964) p.151 Cf. D. Berg-Schlosser, op. cit.

J.S. Trimingham op cit p. 151.

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J. Schacht, Introduction to Islamic Law (Oxford: Oxford University Press 1964) p. 4.

See Almond, G. and Coleman J.C. (eds) The Politics of Islam. Princeton: Princeton University Press 1960.

Ibid p. 105

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F.N.D. Anderson, "Recent Reforms in the Islamic law of inheritance". International and Comparative Law Quarterly Vol. 4 1965 p. 390.

Schacht op. cit p. 388.

A.L. Tibawi op cit p. 113.

See A.A. Malek: "Orientalism in Crisis" in Diogenes Vol 44 1959 pp. 307-21.

H.G. Barnett, Innovation: The Basis of Cultural Change, (New York McGraw Hill) 1953.

G. Wilson and M. Wilson. The Analysis of Social Change. (Cambridge, Cambridge University Press), 1945.

Ibid p. 25.

D. McClelland, The Achieving Society, (New York: D. Van Nostrand Company), 1961.

D. McClelland op. cit. p. 205.

Ibid p. ix.

Ibid pp. 18-19.

W.E. Moore : The Impact of Industry. (Englewood Cliffs; Prentice Hall), 1965.

R. Levy, The Social Structure of Islam. (Cambridge: Cambridge University Press), 1945.

A.D. Anderson and M.J. Bowen (eds) Education and Economic Development (Chicago : Aldine), 1965.

S.N. Eisenstadt, Modernization: Protest and Change (Englewood. Prentice-Hall) 1966.

See Almond, G. and Coleman J.C. (eds) The Politics of Developing Areas. Princeton: Princeton University Press 1960.

See D. Lerner., The Passing of Traditional Society: Modernizing the Middle East. (Glencoe: The Free Press) 1964, also Berkes Niyazi: The Development of Secularism in Turkey.

Montreal, McGill University Press), 1964.

See D. McClelland. Op. Cit.

Every Law should be of that nature but that in not the case with "man-made" Law.

For a discussion of this cf, I.A. Doi, Shariah: The Islamic Law (London TaHa Publishers) 1984 p.71.

These are Imam Abu Hanifa, Imam Ibn Anas, Imam Ahmad Ibn Hanbal and Imam al-Shafi'i

Here it should be clear that "to be good" means that which conforms with the "maqasid al-Shariah" i.e. the intention of the Shariah or the spirit of the law.

This notion is based on the interpretation of the verse of the Quran which says "Allah desires ease for you and He desires not hardship for you". Quran 2:185

Al-Ijtihad 1026-27. Quoted from Umar Jah: "The importance of Ijtihad in the Development of the Islamic Law" Journal of Islamic and Comparative Law. vol. 7 (1977): p.36.

I.A. Maududi The Islamic Law and Constitution. (Lahore: Islamic Publication Ltd.) 1960 p.115.

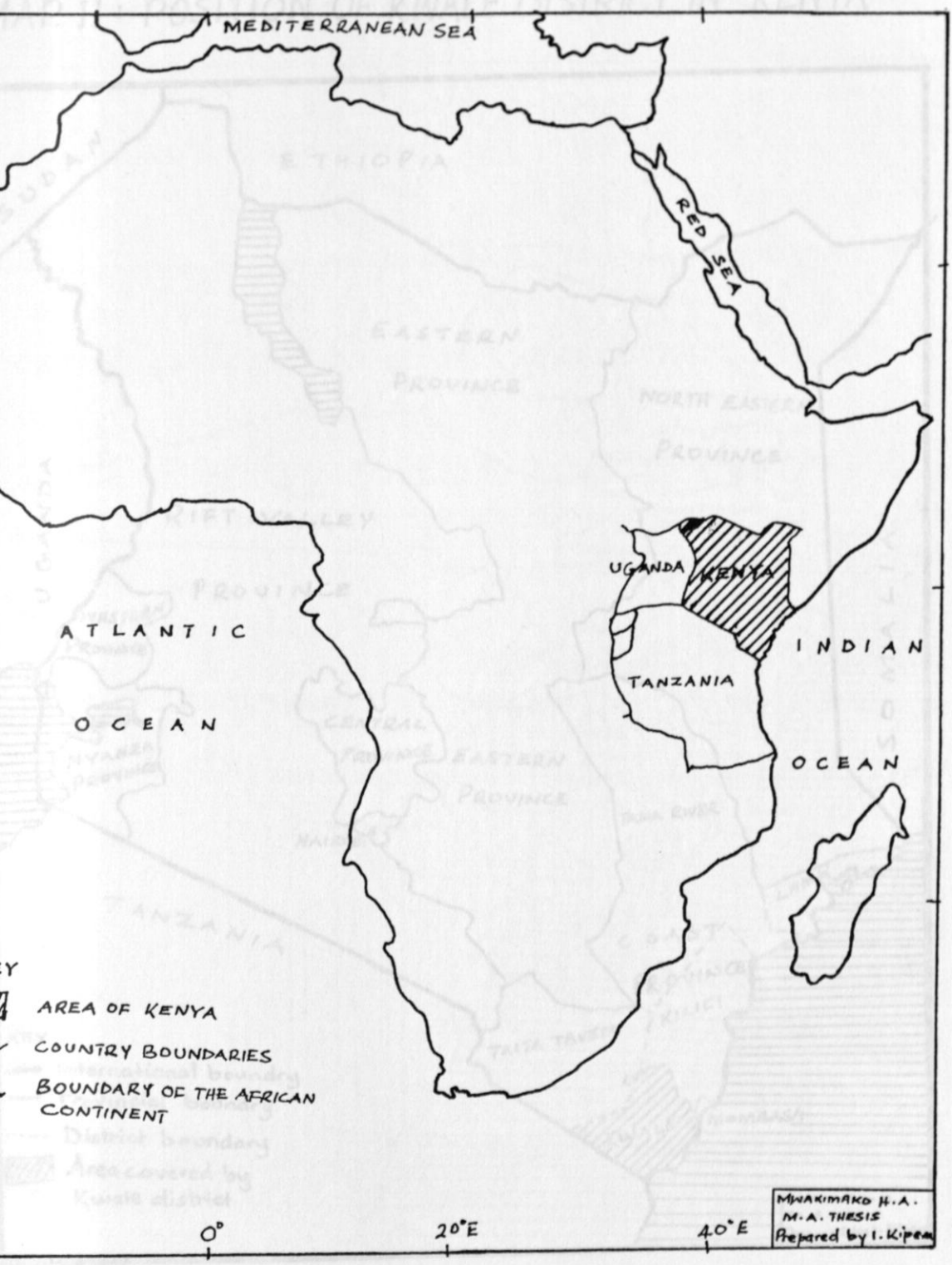
H. Hourani, Arabic Thought in the Liberal Age 1978-1962. (Oxford University Press), 1962, p.147.

THE ADIGO AND ISLAM

DISTRIBUTION OF RESEARCH POPULATION

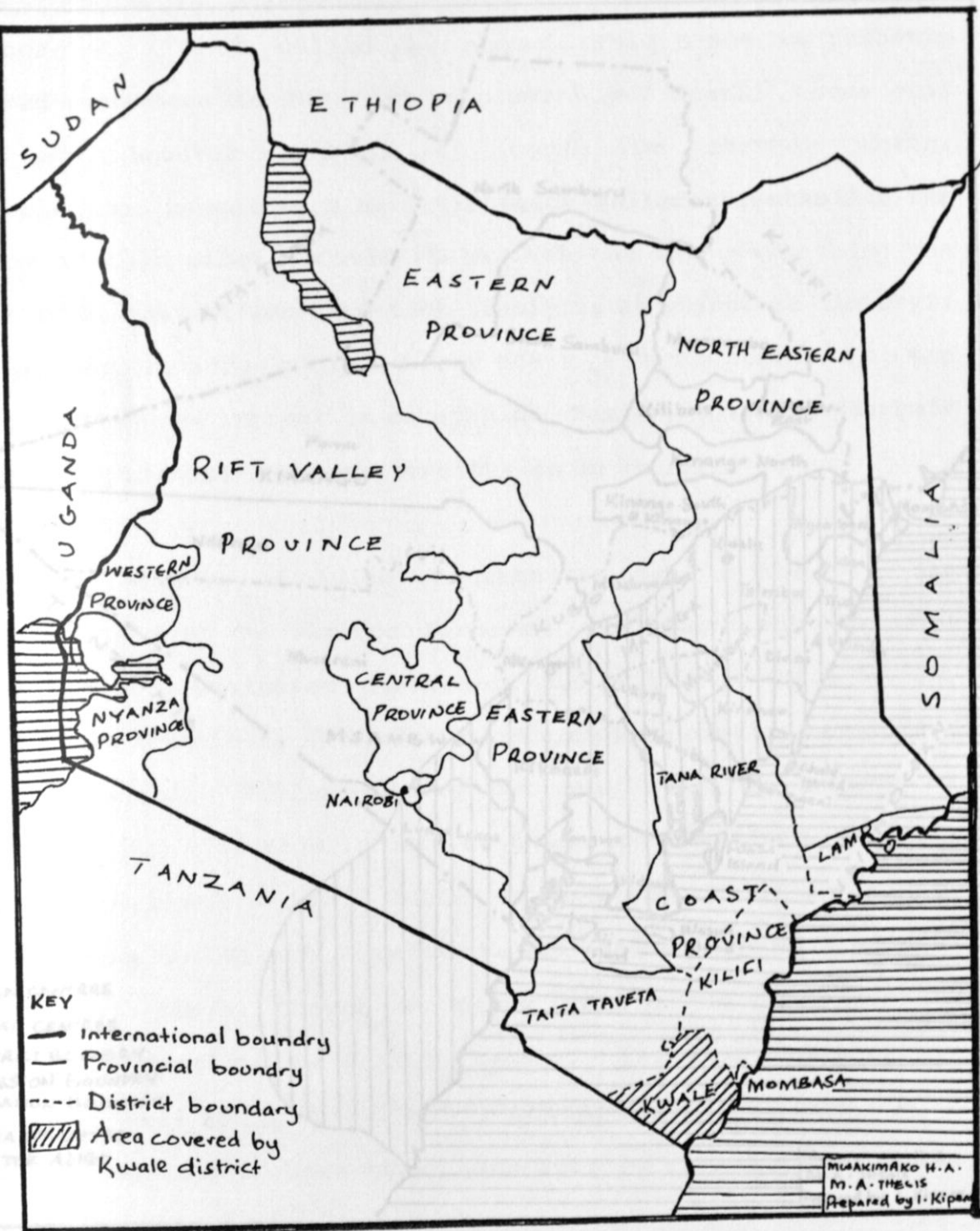
Adigo people or perhaps more appropriately Adigo form the second largest cluster of ethnic Mijikenda in the Coast Province of Kenya. Schlosser¹ argues that at the time of the 1969 Kenyan Census, there were about 100,000 people of the approximately 520,000 Mijikenda (Amidzichenda) family. Reliable demographic data on the Adigo do not exist, the Kenya Population census of 1969 placed them under their collective identity; the Mijikenda. Adigo however stretches several miles South-West into Tanzania's Morogoro District, perhaps making the Adigo the most populous group among the Mijikenda². Adigo live in the Southern-most part of the Coast Province of Kenya relative to the Chonyi, Duruma, Giriama, Kambe, Kauma, Rabai, and Ribe. On average most of Adigo live at altitudes below 300 meters above sea level except for the hills and Mau Mau rising up to 46 m at Dzombo. There are two main rainy seasons. The short rains (Vuri) come in October and November, and the long rains (Mwaka) between April and June. Though the area receives two rainfall seasons, it is mostly hot and dry with annual rainfall totals nearly 800mm. Some pockets however such as Shimba may receive up to 1500mm per annum³.

POSITION OF KENYA IN AFRICA

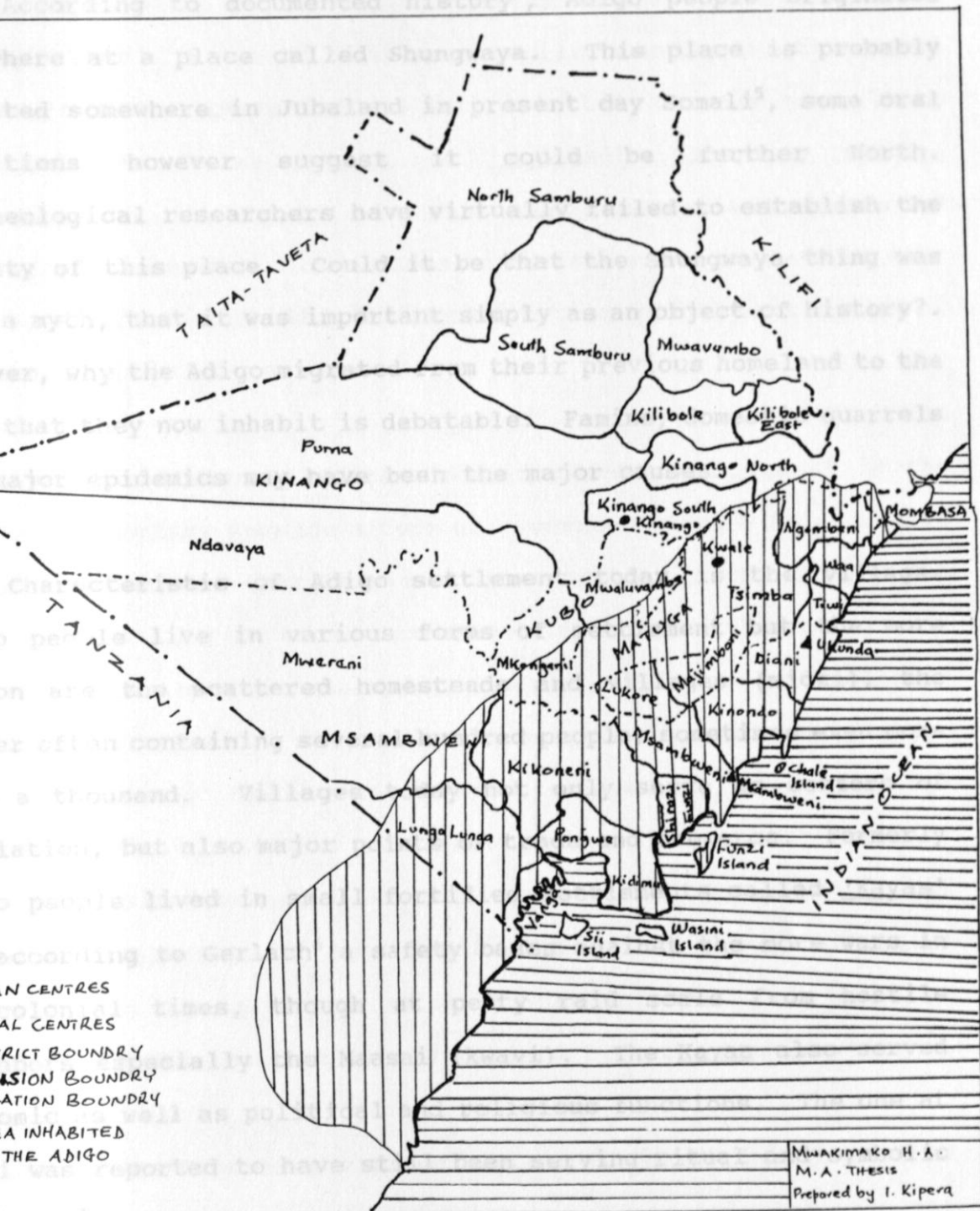


MWAKIMAKO H.A.
M.A. THESIS
Prepared by I. Kipera

MAP 11: POSITION OF KWALE DISTRICT IN KENYA



KWALE DISTRICT SHOWING LOCATIONS AND AREA INHABITED BY ADIGO



-CULTURAL ASPECTS OF THE ADIGO

Adigo has revealed that Adigo authority rested upon elders who formed councils (Ngambi). According to documented history⁴, Adigo people originated here at a place called Shungwaya. This place is probably located somewhere in Jubaland in present day Somali⁵, some oral traditions however suggest it could be further North. Anthropological researchers have virtually failed to establish the identity of this place. Could it be that the Shungwaya thing was a myth, that it was important simply as an object of history? However, why the Adigo migrated from their previous homeland to the place that they now inhabit is debatable. Famine, domestic quarrels and major epidemics may have been the major causes. Movement in the nineteenth century towards a form of government with a ruler titled 'Kaya'. Characteristic of Adigo settlement today is the village. Adigo people live in various forms of settlement but the more common are the scattered homesteads and villages (midzi), the latter often containing several hundred people, sometimes even more than a thousand. Villages today not only serve as centers of social interaction, but also major points of trade and commerce. Formerly Adigo people lived in small fortified settlements called 'Kayas'. According to Gerlach⁶ a safety bases against the more wars in colonial times, though at petty raid scale from hostile neighbors especially the Maasai (kwavi). The Kayas also served economic as well as political and religious functions. The one at Achinalei was reported to have still been serving ritual and symbolic functions⁷. The other clans. Thus there are for example Achinalei, Achinalei and Achinakalanga clansmen and women amongst

Our own research among the Adigo has revealed that Adigo
of authority rested upon elders who formed councils (Ngambi)
the Kayas which performed judicial as well as public decisions
g duties. From each of these councils, usually the three most
or or most respected elders were selected, usually men. These
referred to as 'atsi', or 'enyetsi'; literally meaning
essors of the land. In this case centralized system of
rity existed but did not consist of the entire society or some
of a paramount chief. This segmentarian-gerontocratic kind of
ership is still manifest⁸.
rtant finding is somewhat inconsistent with what our study
Gerlachs's account of the Adigo indicates a movement in the
teenth century towards a form of government with a ruler titled
o' exercising authority over a large section of the Adigo. The
in the tradition of the paramount chief had no standing army
maintained military as well as social alliances particularly
the Vumba polity, then a strong neighboring confederate Arab
e. 'Kuboship' however is reported to have been disowned by the
o because it was not originally meant to be authoritarian.
of the Kubo even enslaved their own people. It is noted that
ship was perhaps as the result of the need for a protective
anism in the presence of a strong neighbor and that the
cture of the institution was derived from the Arab example.

The Adigo also have various clans and all of them belong to
or to the other clans. Thus there are for example AchinaNgome,
riphe, Achinalela and Achinakalangwa clansmen and women amongst

rs. Clans used to inhabit specific areas. However this
ern is changing with increased social mobility through the
ess of nationalism and inter-nationalism. In spite of this
ge, clan members wherever they settled are expected to remain
ed and mutual help is obligatory. It has been contented that
Adigo, unlike most other Kenyan ethnic groups were
itionally matrilineal, according relative power and autonomy to
n. Under the Adigo matriliney as expected women played
gnised economic and public roles, inherited and transmitted
erty and were key figures in the descent system. This
rtant finding is somewhat inconsistent with what our study
als regarding the origins of matriliney and the role of men on
sion making functions. We thus contend that it is important to distinguish the
ent rules amongst the Adigo from such social rules as those
rning inheritance, succession, residence and the locus of
al authority over descent group activities, whether the group
matrilineal or patrilineal, or formal authority over descent
p activities is found (if at all) in the hands of men. While
iliny means matrilineal descent, patriliney indicates descent
p membership is gained through the father. If either form
ates exclusively in a given society, the system is called
neal. Thus matriliney is not necessarily matriarchy; in matriarchy
en hold ultimate authority over the family, household, community

tate. Matrilineal descent, matrilocal residence and a complex
other related customs were supposed to be associated with a
em in which women hold the reins. Whether such a state of
irs preceded or followed patriarchy (its logical counterpart)
volution is debatable depending on societies. Few societies
known to be organized matriarchically.

If there ever were matriarchates in the very earliest times
e is little evidence for their existence. In the light of
blished data, there exists no single, indivisible complex that
be called a matriarchy; particularly, the empirical absence of
crucial element of matriarchy (ultimate authority in the hands
women); this strips the term its relevance especially when
erence of it is given to the Adigo. Although in some cases
ens' may rule with almost absolute power, a society as a whole
never been found in which women in general have authority over
in general. Formal authority in a patrilineal group resides in
husband, father, father's brother and father's father. The
hority in a matrilineal lineage is in the hands of brothers who
re the same matrilineal clan, mothers' brothers, the
ndmothers's brothers and so forth.

While there is no necessary and inevitable correlation between
rility and any particular rule of inheritance, succession,
vidence or authority; nevertheless certain rules tend to occur
ether in logically and functionally consistent clusters. Thus,
all the rules of residence and matrilocal and avuncular rules

n a sense) the most consistent with the rule of matrilineal
t. Descent groups differ in terms of the particular
ation of social rules under which they are organised.
ineal and patrilineal descent groups might be thought of as
e mirror images of each other in the essential features of
structures. However empirically they may have important
ural differences. No one believes that mankind everywhere
ce matrilineal or matriarchal. Attempts to explain matriliney
ever be successful, and all hypotheses to account for the
tence of it, or patriliney and mixed descent methods, may
since the advantages of remaining true to a customary pattern
urvive the circumstances which produced custom. y whom they
'wlongu'. Between the two were ancestral spirits (koma)
Whether a community develops from patriliney to the sort of
ral possibilities known to modern Western Societies-a
pment very slowly occurring among the Adigo, can be predicted
the behavior of people today and from the sort of disposition
will make if that are dissatisfied with their law of
ssion. A polygynous society will tend to be patrilineal, but
no means follows that matrikin should not have rights
lar to themselves cutting across the patrilineal and
archal family structure.

In such cases a tendency is seen to modify exogamy to enable
lineally inherited assets to remain within the patriclan. The
f it amongst the Adigo seems to be this: to whom did the
situs belong. If he belonged to one family, one line, in that

y and line his assets and liabilities will be attended to if
longed to two in two different senses (for even the patrician
the labor of the individual because his mother bore him), by
different sources or two different allegiances, some assets
go in one direction, some in the other, and doubtless his
liabilities should be shared. In that sense the belonging is much
important than succession and succession itself is only one
restatement of it. The point in both these views or their
thesis are part and parcel of the collective creation of the
ception or knowledge we have about the Adigo people.

Culturally the Adigo used to believe in a deity whom they
called 'mlungu'. Between the two were ancestral spirits (koma)
which acted as mediators. There were also the non-human or
personal spirits referred to as 'Mizuka', considered to be of a
violent nature they were often consulted to punish evil doers as
cases of moral transgression. But what kind of 'god' was the
Adigo 'god'? Was he a high 'god' with attributes identical to
the one in Islam? Okot 'P'Bitek' points out "... African people may
describe their deities as "strong" but not "omnipotent", "wise" not
"omniscient", "old" not "Eternal", "great" not "Omnipresent"..."⁹.
The clothing of the present understanding of God amongst the Adigo
and those attributes were the contributions of Islam.

Contemporary the Adigo are overwhelming Muslims. The Adigo
who live at Mtwapa for example, Parkin notes "... acknowledge their
Muslim African origin but aim constantly to transcend them

... indigenous African practices and origins) through Islam".
... the Adigo as indigenous African people embody in their
... temporary culture what has been termed as the "triple heritage-
... can tradition, Islam and Western influences ¹⁰. While studies
... tended to show the Adigo as traditional being matrilineal, a
... distinguishing feature of the Adigo and important to our study, is
... a unique combination of matrilineal and Islamic background.

... effective directing man towards emancipation and human liberation
... Islamization, however together with colonization and
... talist penetration induced changes from matriliney to patriliney
... a corresponding corrosion of the female status and autonomy if
... all it existed. Elements of matriliney may still be traced in
... Adigo culture today, but both the national state through legal
... em and formal education, media and Islam reinforced a
... iarchal ideology. Today the Adigo are beset with conflict
... een matriliney and patriarchy, thus-traditional and modernity.

... Generally the Adigo of today are at significant point in
... ory. We are at a crucial point on the road of rebirth,
... scovery and redirection. Our history is at last being
... iled, the overwhelming factor being the paramount roles,
... mization, colonization and foreign intrusion and capitalist
... tration which have played in shaping our indigenous-tradition.
... even here our study gives itself away. It is part and parcel
... he collective creation of knowledge and history. John Mbiti,
... written: "with the undermining of traditional society, has come
... search for new values, identity and security..."¹¹. He believes

er that the end to this search will be religion in general and
ianity in particular'.

was brought to this region by Arab foreigners whether
plied by all this is that maybe philosophical reflections
required to direct society. However advocates of critical
ogy on other hand have noted that educational research
es not only empirical inquiry but also an ideological
ective directing man towards emancipation and human liberation
nization). This exercise points to a basic kind of concern:
ucidation and explication or reconstruction of indigenous
tions of society as it is found in the logos of man, the aim
interpreting the framework of thought, beliefs and vehicles
ion in view of the fact that the 'welfare' of man is a first
ity.

ISLAMIZATION AND ISLAM AMONGST THE ADIGO ¹²

Discussing Islam amongst the Adigo needs a brief discussion on
in the East African Coast. The first arrival of Muslims in
East African Coast is uncertain¹³ some records say the first
ms to arrive were Zaidiya refugees who were freeing after the
re of their appraising uprising in Kufa (ca. 740 A.D.).
ing records that among the Swahili Oral-tradition, it is said
the first Muslims to reach East African Coast may have come
and through Ethiopia and Somalia rather than the sea.

Nevertheless the complexity of evidence about the beginnings of Islam in East African Coast does not over-rule evidence that Islam was brought to this region by Arab foreigners whether traders, slave raiders, refugees or immigrants. These foreigners settled in or near towns along the Coast of East Africa and in their trades they intermingled with the indigenous people. This process brought about an exchange of cultures between the two peoples. The contact of cultures was gradual and of varying degrees. It was also a 'bi-process' where both peoples adopted elements from one another. The indigenous were Islamized and the Muslim immigrants and their offspring became indigenized.

Historians may tend to overlook the impact that Islam has had on the indigenous people during the initial contacts, hence they do not make general conclusions about Islamization amongst the peoples of the coast of East Africa. However, today, the influence of Islam and its adoption by the indigenous peoples of the coast of East Africa speaks for itself. Though the Arab immigrants who settled at the coast of East Africa were mainly traders, they never ventured initially to venture into the interior. They depended on the local people to bring goods for sale to the island towns. As the local people brought their goods, they established the initial contacts between the Muslim immigrants and the non-Muslim indigenous people.

It is reported¹⁴ later during the 19th century when the pattern of trade began to change, the need for larger volumes of trade allowed Muslim traders to venture into the interior, thus

some traders began regular journeys deeper into the interior, supplies of ivory were known to be abundant. Caravans were travelling inland from Vanga by 1820¹⁵. This allowed a closer contact with many people in the inland as opposed to only those who travelled to the coastal towns. Furthermore it enhanced the spread of Islam in the hinterland. Thus apart from the Adigo who brought their merchandise to the towns for trade, those who lived in the hinterland managed to come into closer contact with not only from their fellow kinsmen who had already been influenced but also by the Arabs directly.

Trade as a factor for the spread of Islam was confined as according to D.C. Sperling in between ten and twelve miles per meter, thus making the Adigo who lived in Adigo villages of Mbeje, Likoni, Mtongwe, Pungu and Tiwi the first adherents to Islam, during the last two decades of the 19th century¹⁶.

In the inland, Islam spread due to contacts later on by the merchants who associated in the first instance with one or more of the coastal towns, because they had been converted by someone from the coastal towns during the trades, or because they went to town for community prayers and Muslim festivals. Naturally, such visits would result in sending a teacher to the hinterland who would establish first a mosque, with the help of the local community. In these 'mosque lessons' (darasas) the tenets of Islam were taught to the adherents. The building of mosques¹⁷ marked a turning point in the rural development of Islam. It brought a

t contact between the rural Adigo people with the urban
ms. striking. Thus in some respects, Islam has appeared to

re accommodating to the wider culture of Africans, more ready

The building of mosque and the sending of teachers to the
erland of the Adigo homes encouraged a widespread of Islam, let
e instilling strict Islamic practice and observance of prayers.

also helped alot in the spreading of Islam amongst the Adigo

n who rarely took part in the coastal trade. The students of

n who studied under their Swahili masters and those teachers

were sent to teach amongst the Adigo encouraged Adigo youngmen

women to be more ardent Muslim than their immediate ancestors.

of multi-culturalism. Thus in African generally and here

The younger generation of Adigo Muslims potrayed a steady

th of Islam amongst the Adigo. The teachings of Islam and the

rvance of the Shariah signified a period of conflicts between

traditionalist Adigo and the Islamised. The traditionalists

d have been more at ease in conducting their lives in

rdance with their traditions, while for the Muslims, the

iah and its strict adherence was their goal. Relations between

two groups became a bit tense when the need to practice Shariah

matters of inheritance was advocated. These were instances of

ural conflicts not amongst the Adigo Muslims, but between the

o who had not yet embraced Islam and the Muslims, especially so

these were from the same family. Even those who had embraced

m would at times be perplexed by the Islamic laws that were in

ct conflict with the accepted norms practiced by the majority

gst the Adigo. All change of life which brings about a complete

Though conflicts did occur, intermingling of Islam and Adigo was striking. Thus in some respects, Islam has appeared to be more accommodating to the wider culture of Africans, more ready to compromise with African ancestral customs and usages. Islam has been less militant against certain practices which were non-Islamic. The ability of Islam to accommodate many cultures can be seen from its various organs of its Shariah such as al-Masalih al-Mursalah, Istihsan, urf etc. to encompass and merge into its fold the change occurring in society.

Hence doctrinally, almost from the beginning, Islam had the characteristics of multi-culturalism. Thus in Africa generally and here specifically amongst the Adigo, Islam was more culturally accommodating and less subject to dis-Africanization. This is also due to the fact that Islamic religion is not under a formal ecclesiastical authority, and not subject to formal structures of decision-making, hence a major element in its cultural flexibility. There is no priestly hierarchy, no Vatican in Islam's infrastructure. The management of the business of the religion has been completely decentralized. Islam does not have to look for a fountain head of authority to legitimise particular departures from mainstream Islamic teachings.

Also the concept of conversion in Islam has enabled many of the differences between the Adigo and Islamic ideology to prevail. For the Adigo, conversion may mean to others as an aversion from something rejected, thus a full change of life which brings about a complete

e of outlook, a break with the past and kind of
tergration from, for example the converts ethical society, in
such a dichotomy does not occur. African custom was
ted, a convert could continue with traditional life as before
ng as that traditional life did not conflict with the spirit
beliefs of islam. The Adigo thus left on their own developed a
politicised kind of islam. Despite Muslims being an
whelming majority, they are likely to explode in defence of
al interests than in pursuit of religious concerns.

Inter-marriages between Muslim emigrants and the Adigo was
nsible for much of the assimilation of Islam and expansion
st the Adigo. From the allies made between the Adigo and the
nized Swahili at the coast, intermarriages between the two
bs were domant. Thus

....the Tangana, one the three tribes of
Mombasa were closely allied with the Adigo,
especially the Shimba and Longo. Though resident
on Mombasa Island since the 17th century with
the Adigo throughout the 18th century... some
Tangana took Digo wives, and Digo migrants to
Mombasa and lived amongst the Tangana¹⁸.

e intermarriages did not only give rise to a strong force of
nization to the Adigo but also gave rise to some Adigo clans.
'achina Lela' clan amongst the Adigo is said to be from the
endants of a woman (Adigo) who married an Arab at Mtwapa¹⁹.

Islam amongst the Adigo was thus as a result of trade,
milations, through voluntary and individual adoption,

marriages, proselytization and Islamic education. These factors played significant roles in the nature of Islam amongst the Adigo today. It is important to discuss some of their influences dealing with the problems of conflicts that the Adigo experience with Islam. Something in them will explain the origin and nature of the conflicts amongst the Adigo Muslims.

A.H.J. Prins The Coastal Tribes of the North-Eastern Bantu (London: International African Institute), 1952.

L.P. Gerlach. The Social Organization of the Digo of Kenya. Ph. D. Dissertation. (University of London), 1960.

C. Gillette. A Test of the Concept of Backwardness: A case study of the Digo Society of Kenya. Ph. D. Dissertation (Cornell University, 1978); also see Berg-Schlosser op. cit.

A.H.J. Prins op. cit. p. 78.

Okot P'Bitek. African Religion in Western Scholarship (Nairobi: Kenya Literature Bureau) 1970.

See A. N. Mazrui The Africans: A Triple Heritage (London, BBC Publications), 1986.

J.S. Mbiti African Religions and Philosophy. Herker (London Heinemann), 1970 p.262.

To avoid ambiguities of historical dates, we shall only be concerned with the factors that influenced the spread of Islam generally. For those interested in historical dates on the spread of Islam amongst the Adigo they can consult D.C. Sperling, op. cit.

It is also important to note that the date of entry of Islam in the coast of East Africa cannot be fixed with precision. It was unannounced and unplanned.

See D.C. Sperling op. cit. p. 34.

W.F. McKay A. Pre-colonial History of the Southern Kenya Coast. Ph.D. Thesis (Boston University), 1975.

D.C. Sperling, op. cit. p. 102.

The first mosque built by Adigo is recorded to have been built in 1879 at Likoni. See *Ibid.* p. 106.

OTES

D.C. Sperling Op. Cit. pp. 32-35, 62.
D. Berg-Schlosser, Op. Cit.
D.C. Sperling, Op. Cit.

Kwale District Development Plan 1984-1988 pp. 1-2.

F.T. Spear. The Kaya Complex: A History of the Mijikenda people of the Kenya Coast to 1900. (Nairobi, Kenya Literature Bureau), 1978.

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The first mosque built by Adigo is recorded to have been built in 1899 at Likoni. See Ibid. p. 106

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SOURCES OF SHARIAH

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CHAPTER TWO

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The Shariah is thus comprehensive. It comprises the spiritual The religious code of conduct thus established is an overall acing one in which every aspect of human relationship is lated in meticulous detail. Furthermore, the Law, having once eved perfection of expression, was in principle, static and table, for Muhammad (p.b.u.h.) is the last prophet, and after

death in A.D 632, there could be no further direct communication of the divine will to man. From then on, the divine law was to float above Muslim society as disembodied, representing the eternally valid ideal forward which man aspires.

The Shariah comprises of two categories of commandments. One The objective of the Shariah are the protection and promotion of the well being of religion, the human mind the human honour and dignity, the human body, and wealth. Religion bears the sense that it inspires awareness of the Creator's Presence, Power, and Wisdom, or it ensures discipline on the part of its adherents. Shariah also urges the pursuit of whatever would lead to the fertilization of the human mind, and forbids all that which would be harmful. Human dignity being the right of every individual, the Shariah teaches that this honour must be protected. Shariah urges that the human body must be taken good care of and forbids all that can be harmful to it. Wealth and its resources, according to the Shariah, have to be sought, developed, protected and treated, and made ready for human good use and consumption. During the time of, and after prophet Muhammad (S.A.W.), two sources were recognised as the original sources of the Shariah. The Shariah is thus comprehensive. It comprises the spiritual and material domains, the individual and social life. It defines the relationship of the individual to his creator and his position in the universe. It explains the individual's obligation to himself and to all those around him. Shariah is thus a creed, a way of life and a harmonious social order. Islamic law thus is

. the epitome of the true Islamic spirit, the most decisive
ession of Islamic thought, the essential kernel of Islam"⁴.
at once law and morality. These factors have been recognised
y Muslims, but orientalist as well⁵.
The Shariah comprise of two categories of commandments. One
iven in fixed categorical details, while the other is a set of
al rules which, when combined, comprise a flexible and
able framework that fosters peace and harmony. The former
ory involves the details of the creed the rules of worship,
a few cases dealing with certain human relationships and
ities, emphasis of which are numerous⁶. The shariah is
e, which means it is infallible, perfect, and cannot be
ed. Man must apply the Law, thus Allah proposes and man
ses.
People differ due to change of time and social life. In
en the original divine proposition and the eventual human
sition, is interposed an extensive field of intellectual
ity and decisions. During the time of, and after prophet
amad (p.b.u.h.), two sources were recognised as the original
and for, the explanation of the Shariah. On one hand is the
tional sources, the authoritative 'given', that is the Quran
he Sunnah of the prophet, which serve as the base. This notion
its own basis in the Quran⁷. The other sources of the Shariah
"Qiyas" and "Ijma". The term "Qiyas", according to Muslim
sts, means analogical reasoning, that is concluding from a

a principle embodied in a precedent that a new case falls under principle, or is similar to this precedent on the strength of common essential feature called 'reason'. "Ijma", or consensus, used to decide whether certain opinions of a jurist, or decisions made by a practising judge, are correct or incorrect; authenticates Qiyas. The basis of Ijma, as a source of Shariah from prophetic tradition which states, "my followers will not err on an error."

QURAN: A DEFINITION

The Oxford Dictionary spells the word Quran as 'Koran' and defines it as the "sacred book of Mohammedans⁸, the collections of Mohammed's oral revelations written in Arabic". In Encyclopaedia Britannica⁹, the Quran is described as "the sacred book of Islam in which the religion of more than seven hundred millions of Mohammedans is founded, being regarded by them as the true word of Allah". In Arabic, the language in which the revelation came down, the word Quran means "that which is often recited and read over again". The root of the word Qur'an being Qara'a, the Arabic word meaning "read" or "he recited"¹⁰. Thus the noun Quran can signify "recital, reading or recitation". The literal connotation of the word Quran can be, the book that is often read - referring to none other than the sacred Book of Muslims.

The Quran however has numerous titles and names. In Arabic it is seldom mentioned without the addition of such exalted titles.

lations as al-Quran al-Karim (The Bounteous, Noble and
rable), al-Quran al-Hakim (The full of wisdom, the Great or
me), al-Quran al-Majid (The Glorious). However, each of these
lations can convey only a shade of the true, rich meaning of
Arabic original. Thus

No translation can convey more than the
barest suggestion of what is in the Quran,
that can move men to tears and ecstasy¹¹.

Quran as described by Prophet Muhammad as quoted by Ali Ibn
Talib¹² is

The Book of Allah. In it is the record of
what was before you, the judgement of what
is among you, and the prophecies of what
will come after you. It is the decisive; not
a case of levity. Whoever is a tyrant and
ignores the Quran will be destroyed. Whoecer
seeks guidance from other than it will be
misguided. The Quran does not became distorted
by tongue nor can it be deviated by caprices;
it will never dulls from repeated study; scholars
will always want more of it. The wonders of the
Quran are never ending. Whoever speaks from it
will be just and whoever holds fast to it will
be guided to the straight path.

Quran can however be described by Muslims as the word of Allah,
aled to prophet Muhammad (p.b.u.h.) through Angel Jibril (a.s).
ontains the knowledge imparted by Allah and the guidance for
nkind. The Holy Quran also describes itself in some of its
es as the declaration (Bayan)¹³ of truth and light (Nur)¹⁴. It
he wise (al-Hakim)¹⁵ and the clear message (al-Balagh)¹⁶. The
n also describes itself further as the rope of Allah (Habl-
h)¹⁷, thus by holding unto it individuals and societies can
eve salvation. Most important is that the Quran describes

f as a criterion (al-furqan)¹⁸ to choose between the truth and
hood. Nasr S.H. referring to the Quran as the criterion says

".... the Quran also a furqan or discrimination
in that it is the instrument by which man can
come to discriminate between the truth and
falsehood, to discern between the real and the
unreal, the absolute and relative, the good and
the evil, the beautiful and the ugly¹⁹.

This helps in defining the Holy Quran and understanding its
age. The Quran thus is revelation of Allah and the Book in
which Allah's message is contained. It is the word of Allah
revealed to prophet Muhammad (p.b.u.h) through angel Jibril (a.s.).
The prophet then was the instrument chosen by Allah for the
conveyance of His revelation to humankind, in which both the spirit
and the letter, the content and the form are divine.

QURAN: ITS SCOPE AS A SOURCE OF SHARIAH

The Holy Quran is divided into 114 chapters, each of which is
called a Surah, literally meaning 'eminence' or 'high degree'. The
chapters are of varying length, the longest comprising one twelfth
of the entire Quran. All chapters with the exception of the last
thirty five are divided into sections (ruku), each section dealing
generally with one subject and the different sections being inter-
connected to each other. Each section contains a number of verses,
which brings a total of 6666 of the verses of the entire Quran. In
all verses the Quran is addressed to the entire humanity,
transcending all barriers and limitations of race region and time.

er, it seeks to guide humankind in all walks of life, actual, temporal, individual and collective. It contains directions for the conduct of the head of state as well as the simple commoner, of the rich as for the poor, for peace and war, for spiritual well-being as for commercial and material prosperity.

The Quran seeks primarily to develop the personality of the individual and then shapes them into an ideal society, for ushering in an era when goodness and virtue may flourish and evil and vice be eliminated. It declares that every human being will be personally responsible to the Creator. The Quran does not only give commands, but also tries to educate the people and convince them about the wisdom and usefulness of its injunctions. It appeals to the intellect of humanity and invites them to exercise their own intellect in order to understand themselves, their station and purpose of their conduct with one another and, above all humanity's relationship with the Sustainer.

The fundamental root of the Shariah is that Allah is the Sovereign of the universe. Allah is not only All-Powerful but also Most Gracious, Most Merciful and Lord of the Worlds. It is He who has sent messengers to mankind in order to propagate His Divine Laws. Thus the system of Shariah is built upon the principle that Divine Laws are transmitted to mankind through the messengers. The Prophet Muhammad (p.b.u.h) is the last prophet and unto him was revealed the Holy Quran which he conveyed to humankind.

In its verses the Quran contains guidance and wisdom which can be divided into verses which relate to the science of Tawheed, or unity of Allah (ilm al-Kalam), verses which relate to principles (ilm al-Akhlak) and verses which deal with human actions (Fiqh) thus contains matters as marriage, usury, transactions, penal matters and state matters. Nevertheless the Quran also says of itself as a source of Shariah thus...

We made for you a law, so follow it, and do not follow the fancies of those who have no knowledge²⁰.

verses that authenticate the Quran as a source of Law include specific injunctions which Muslims are obliged to obey. Such issues as fornications and adultery, the Quran does not only warn Muslims but also explains the consequences that will befall those who may not heed the warning. Hence...

Do not come nearer to adultery for it is shameful (deed) and an evil, opening the road (to other evils)²¹.

As to those who transgress this commandments vis-a-vis a law on adultery and fornication, the Quran outlines their punishment as..

The woman and the man guilty of adultery or fornication, flog each one of them with a hundred stripes, let no compassion move you in their case in a matter prescribed by Allah, if you believe in Allah and the last Day and let a party of believers witness their punishment²².

The Quran thus stipulates the Law and its punishment for those who

to observe the commandments. The Quran injunctions concerning purifications (Taharah), prayers (Salat), fasting (Sawm), Alms (Zakat) and Hajj are the most important however of the Quran as a source of Shariah are Legal Injunctions (Ayat al-Ahkam). These injunctions are of primary importance in the life of Muslims for amongst other verses, they form the basis of the Quran as a source of the Shariah. The number of verses with legal connotations in the Quran is still a subject of study by Muslim scholars, others claim that there are about a hundred verses of this type and others say there are more than 200. Whatever the case, these Ayat al-Ahkam form the code of conduct of every Muslim from birth to death. These verses provide a touchstone to distinguish the truth from falsehood, good from evil and lawful (Halal) from unlawful (Haram). The Ayat al-Ahkam can be grouped into 3 categories depending on how concise their contents are. Thus we have:-

(i) Concise injunctions

(ii) Concise-cum-Detailed Injunctions and

(iii) Detailed Injunctions.

Concise Injunctions

These are the precise commandments contained in the Holy Quran. However the Quran does not give the detailed rules regarding

the commandments. We have in the Quran injunctions concerning
Purifications (Taharah), prayers (Salat), fasting (Sawm), Alms
(Zakat) and pilgrimage (Hajj) and many others. Detailed rules and
practice of these are to be found in the traditions and practice
(Sunnah) of the Prophet.

Concise-cum-Detailed Injunctions

These injunctions are contained in verses which mention the
commandments in brief, but other verses mention them in detail and
therefore leave them to the hadith and Sunnah. Here are found
injunctions on war, peace, Jihad, Prisoners of war, Booty and
relations with non-Muslims among others. The details though left to
Sunnah, can also be explained through Ijtihad.

The Detailed Injunctions

These Injunctions are contained in the verses of the Quran
which give complete details of the commandments such that there is
no question of Ijtihad in order to find solutions. These are
commandments that Muslims must obey without question. In here are
also verses that deal with Hadd (punishment), Qisas, Equitable
relations amongst others. By and large, the Quran being the
relation of Allah to humankind stands alone as the only source
through which Allah could order humanity on how to conduct
themselves in the universe, hence no doubt the primary source of
Shariah.

THE SECOND SOURCE OF SHARIAH: MULTIPLE MEANING

been brought down from the period of the companions of the

The Sunnah is the second source of the Shariah after the Holy Prophet. The word Sunnah may have different meanings depending on the context and usage. According to Arabic Lexicographers, Sunnah; means a way, course, rule mode or manner, of acting or conduct of the Prophet. Sunnah may therefore mean, a way of behavior which is observed after actual practice by a society. At times Sunnah may be confused with Hadith, whereby hadith means a piece of information, account or story narrated by a person. When these words are used in their Islamic context they may as well give different meanings.

(1) *ri'ā*, which includes the action or practice of the

As noted that according to Arabic Lexicography sunnah means the mode of life, its Islamic usage will give us the meaning of the mode of life of the Prophet (p.b.u.h). That is to mean, the way the Prophet led his life in its daily basis. Thus even when the Almighty Allah ordered Muslims to obey the Prophet and to take his life as a good example and follow it, the expression Sunnah of the Prophet came into use. Henceforth the notion Sunnah to Muslims has always meant the mode of life of the prophet.

ITS USE AS A SOURCE OF SHARIAH

Hadith on the other hand though at times used interchangeably with Sunnah, came to mean, the narrations about the life of the Prophet, thus imply that hadith is a record of the Sunnah. This is because, while not all ahadith (pl. of hadith) may be Sunnah, all hadith of the prophet may at the same time contain as many Sunnah

ossible. Through the record of hadith the Sunnah of the prophet
been brought down from the period of the companions of the
et (p.b.u.h.) to the present era. In a broad sense both the
h and the hadith cover the sayings and deeds of the Holy
et. There are then three types of Sunnah of the prophet,
ugh which Muslims learn about the actual practice of the
et and also in implications with the real meaning of the
age of the Holy Quran. The kinds of Sunnah are:

(i) Qaul, which is a statement given by the prophet
(p.b.u.h.) which has a bearing on any matter
concerning the Islamic code of life.

(ii) Fi'l, which includes the action or practice of the
Holy prophet which has a bearing on any matter
concerning the Islamic code embracing all spheres
of life, and

(iii) Taqrir, which are the action or practices of some
person (usually companion) of the prophet which has
the silent approval of the Prophet.

SHARIAH: ITS USE AS A SOURCE OF SHARIAH

We have already seen that when we talk of Sunnah, we are as
talking of Hadith, mainly that part of the Hadith which has
content on the text (Matn) of the Hadith. The practice of the
phet can be used as a source of Shariah because of the unique

tion of the Prophet Muhammad amongst the Muslim Umma. Muslims
unanimous that the authority of the Quran is binding on all
laws and the authority of the prophet comes next. The authority
of the prophet is derived through the community's acceptance of the
Prophet as a person of authority, rather his authority is expressed
through Divine will²⁴. Because of this the narrations and
recordings of the mode of life of the Prophet has this Divine
authority over Muslims. The Sunnah as a source of Shariah has its
basis in the Holy Quran a factor that is emphasised by the
recognition of the Prophet as explained in the Quran as the expounder
of the Quran appointed by Allah. The Almighty Allah says in the
Quran:-

We have revealed unto thee the Remembrance
(the Quran) that you may explain to them that
which has been revealed for them....²⁵

In the above verse the prophet is given the authority to explain
and expound the Quran to humankind. It is found that Allah commands
Muslims to be faithful to perform prayer (Salat), but there is no part in
the Quran that explains the mode of praying. It now became the duty
of the Prophet to show the Muslims how to perform prayers through
his own practice. The prophet then demonstrated the mode of prayer
practically and orally.

The Prophet Muhammad also has the legislative power bestowed upon
him by the Almighty Allah. The Quran speaking about the legislative
power of the prophet says:-

....He will make lawfull for them all good things and prohibit for them only the foul, and will relieve them of their burden and the fetters which they used to wear....²⁶

The activities of the Prophet are covered by the Sunnah. The authority of the Prophet is binding upon Muslims is explicitly declared by the Quran again that, "O you who believe, God and His Messenger" (Quran viii:20) and, "whoever obeys the messenger, he indeed obeys God" (Quran iv:80). These verses of the Quran explain clearly that that the Prophet is charged with the responsibility to explain the laws, such that his actions are the correct ones and Muslims should emulate him. Through the Sunnah the Prophet formulates the do's and don'ts of the society. Yet another verse of the Quran explains the basis of the Sunnah of the Prophet as a source of Shariah:-

And whatsoever the messenger gives you, take it, and whatever he forbids abstain from it....²⁷

The verse and many others state the authority of the Prophet emphasizes the fact that his whole life, decisions, judgements and command, have binding authority and ought to be followed in all spheres of life. Obviously the authority of the Prophet does not depend on his acceptance by the community through the opinion of scholars. The Muslim Umma thus ought to accept the authority of the Prophet as binding as the Quran, and accept all his verbal commands, his deeds, his tacit approvals as the way of life, and a guiding factor and model which has to be followed as again explained in the Quran:

A noble model you have in Allah's Apostle for all whose hope is in Allah, and in the Final Day, and who often remember Allah²⁸.

the activities of the Prophet are covered by the Sunnah, which will therefore remain one of the main sources of Islamic law, second only to the word of Allah; the Holy Quran.

SECONDARY SOURCES OF SHARIAH

Apart from the Holy Quran and the Sunnah Being the primary sources of Shariah Islamic Jurisprudence recognises Ijma, Qiyas, Ijtihad, Istihsan, Istislah (Masalih al-Mursalah) and Urf as secondary sources of Shariah. However in the recognition of these sources of law, laws that are enacted from them are derived from the injunctions of Quran and the Sunnah of the Prophet. Thus the sanction of all intellectual activities in respect to the development of the Shariah comes from the Holy Quran. These sources are discussed below.

1. THE CONSENSUS OF OPINION OF MUSLIM SCHOLARS

Ijma in the concept of Islamic Jurisprudence can be defined as the 'consensus of Juristic opinions of the learned ulama of the Muslim community after the death of Prophet (p.b.u.h.), and the agreement reached on the decisions taken by the learned Jurists on various matters pertaining to the Muslim Ummah. The use of Ijma as a source of Shariah brought about different meanings of the term. Thus Ijma

an agreement of the Islamic community on a religious point is the consensus of opinion of persons competent for the practice of Ijma when religious issues arise, whether rational or not. Ijma can as well be a unanimous agreement of the Jurists of a particular community of particular era on a certain issue.

Ijma has been noted to have played crucial roles in the development of Islamic Law. In the history of Islam, it has been a gradual process for solving problems through the gradual formation of the majority opinion of the community. The idea of using Ijma came into use as a socio-political necessity, approved of later on the basis of the Qur'anic verses and tradition (ahadith) of the Prophet. The usefulness of Ijma as a source of Shariah can be summarised as follows: the consensus guarantees the authenticity and correct interpretation of the Quran, the faithful transmission of the teachings of the Prophet (p.b.u.h.), the legitimate use of analogy and the resulting legal outcomes. In short it covers every detail of the Shariah, including the recognised differences of the several schools of "Islamic Jurisprudence". Ijma is therefore a principle for guaranteeing the consistency of the legal content that emerges as a result of the application of "Qiyas" and Ijtihad.

The practice of Ijma has its basis in the Holy Quran when the Almighty Allah encourages seeking the opinion of others on religious matters. The Quran says:-

It is through the mercy of Allah that you are lenient with them: if you were to be hard-hearted; they would have deserted you;

pardon them and seek for the forgiveness for them and seek their opinion in the matter; wherever you decide upon something, have belief in Allah, Surely Allah loves those that rely on Him²⁹.

about the practice of consultations and agreement within the community, Allah advises:

Those who answered the call of their Lord, and established regular prayer (salat) and whose affairs are a matter of council and spend out of what we bestow on them for sustenance³⁰.

However the consensus of the Ulama must be based on the book of Allah, the instructions of the Prophet (Qaul al-Rasul), the traditions and demonstrations of the Prophet (Fi'l al-Rasul). Muslim scholars are of the opinion that any Ijma that has to do with some fundamental issue on the Ibadat (acts of worship) must be ratified by every member of the community that is concerned. However if laymen do not agree on a matter raised it must be ignored and not accepted as invalid. On the other hand, if the Ijma has something to do with Mu'amalat (transactions) which need thorough consideration, the layman's point of view has to be considered.

Nevertheless no matter the rank of the pious Ulama and their thorough deliberations, no amount of Ijma can abrogate a text, that provision laid down in the Quran or the Sunnah of the Prophet (Sunnah al-Rasul). If any Ijma is soundly founded on a text of the Quran or the Sunnah, it can not be repealed by any subsequent consensus,

the Ijma is merely based on public interest (al-masalih al-ah) it may be repealed if the public welfare so requires.

(ANALOGY)

Muslim Jurists have described 'Qiyas' as analogical reasoning. It is then concluding from a given principle embodied in a precedent that a new case falls under this principle or is similar to this precedent. The earliest predecessor of this conscious analogical reasoning has been called 'personal judgement' or 'personal opinion (ra'y)'. Whenever the Ummah was faced with a new or refined and complicated issue, the Quran or a general principle or specific case in the Sunnah was taken and a decision was made on its strength with regard to the present issue. When no clear and unequivocal decision was found in the Quran and Sunnah, a tendency to use Qiyas was predominant. However in both the process of the model and the discernment of the point of resemblance too much unbridled liberty was taken and the result varied between loose analogy on the one hand and almost complete arbitrariness on the other. Thus after several decades, the unregulated products of pure personal opinion produced a strong and bitter reaction against itself.

In the first half of the 2nd/8th century more systematic thought arose both in Medina and Iraq. In Medina, Imam Malik (79/795) continued to use the term ra'y, but the procedure had become systematic, helped no doubt by, the further strengthening,

fact that a more or less uniform doctrine by this time emerged in Medina, characterised by the concept 'agreed practice' of Ijma. While in Iraq Abu Hanifa - the exemplar of logical thought in Islamic law and his early followers formulated expressions like 'this is the category of', 'this is similar to', in order to justify their opinions in Qiyas. At the same time the concept of Ijtihad or 'systematic original thinking' which from its narrower beginnings in the first half of 2nd/8th century bloomed into a powerful principle of original thought in the later 2nd/8th and 3rd/9th centuries, swallowing up Qiyas as its method³¹.

The introduction of Qiyas as a source of Shariah is said to have been introduced by the founder of the Hanafi school of law in the 2nd century. He is said to have introduced Qiyas with intention of curbing the excessive thinking and digression of the people from the Islamic legal point of view. This he thought so because during the Abbasid period, people engaged themselves in reading various books of logic, philosophy, etymology and literatures of various languages; which was said to corrupt their minds.

These people wanted to apply what they had read to Islamic jurisprudence. Also many Muslims in far away lands had thought of their own philosophical outlook, their culture and even some religious and legal notions in the fold of Islam. Abu Hanifa thus introduced Qiyas as a measure to curb their excessive thinking and keep them on check.

The argument about Qiyas brought about groups who agreed with its introduction into Islamic Jurisprudence and those who objected to its introduction. Those against Qiyas argued that Almighty Allah revealed the Holy Quran to humanity for its guidance, no more is needed. A Muslim thus must look for solutions of his problems in the Quran. For those who advocated the use of Qiyas, they supported their claim through the verse of the Quran that "think deeply, O ye people of understanding". The people of understanding in the above sense are those who use common sense to deduce Islamic Law. They often quote a Hadith of the Prophet which says:

"The Prophet sent Muadh Ibn Jabal to Yemen as their Judge and governor. Before Muadh left the Prophet, he asked the latter on what basis would he judge if he was confronted with a problem. Muadh said that he could judge on the basis of the Quran. The Prophet then asked him: "assuming that you do not find it in the Quran, on what basis would you judge?", Muadh said he would judge on the basis of the Sunnah of the Prophet. The prophet asked him: "assuming you do not find it in both the Quran and the Sunnah of the Prophet, on what basis would you judge?", Muadh replied that he could use his own individual judgement. And the Prophet was very happy to hear this statement³³.

Thus Qiyas can be accepted as one of the principles of Islamic Jurisprudence provided it is strict Qiyas. By strict Qiyas it is meant that it must be based on the Quran, the Sunnah and Ijma. Still Shafi'i and other jurists laid down conditions which Qiyas can be accepted, amongst which are that, the Qiyas must be applied only when there is no solution to the matter in the Quran and the Hadith; that it must not go against the contents of the Quran neither

dict with the traditions of the Prophet; and that it must be
t Qiyas based on either the Quran, the Hadith and Ijma.

Farid Rahman, *Islam*, 2nd edition (Chicago: University of
Chicago Press, 1979), p.100.

A.A.A. Fyzee describes Shariah as the central core of Islam;
"...the road to the watering place..." as a technical term
it means the Canon Law of Islam, the totality of Allah's
commandments. A.A.A. Fyzee, *Outlines of Muhammad Law*, 3rd ed.
Farid Rahman, *Islam*, 2nd ed. (Chicago: Univ. of Chicago Press, 1979)
Urf, the known practices and customs (adat) are recognised as
subsidiary source by all schools of Jurisprudence. These are
rules which do not contradict the four principal sources of the
Shariah. Hence customary rules are valid as long as, there is no
provision on the matter in the Quran and the Sunnah. If any of the
rules contradict any other rule of Shariah, they will be
considered outside the pale of Islamic law. The authority for this
is defined from the doctrine of (al-Masalih al-Mursalah),
rules that are of benefit to the society about which the source of
Shariah neither speak nor oppose them.

See Quran 4:59. cf. Saïd Ramadan where he quotes "... O
people, bear in mind what I am saying, for I might not see you
again, I have left two things. If you hold fast to them,
I never will let you go astray after me. They are God's book,
and His prophet's Sunnah said Ramadan, *Islamic Law: Its
Scope and Equity* (London: P.R. Macmillan Ltd, 1961), p. 24.

Muslims categorically reject the adjective "Mohammedan" as a
description of their religious group as it falsely implies
that they are worshippers of Muhammad rather than the one God,
Allah. Muslims nevertheless love Muhammad and feel such
indebted to him and frequently pray that peace be upon him.

New Encyclopedia Britannica Vol. VIII, p. 341

E.W. Lane, *Selections from the Quran with an Interwoven
Commentary* (London: James Madden, 1843) p. 83.

J. Kritzeck ed. *Anthology of Islamic Literature*
(London: Penguin Books, 1964) p. 13.

See Al-Qortoby *Exegesis of the Quran* (Arabic classics) 3 vol.
(Cairo: Dar-al-sha'b, 1960) vol. 1 p. 4

OTES

Fazlur Rahman, Islam, 2nd edition (Chicago: University of Chicago Press, 1979), p.100.

A.A.A Fyzee describes Shariah as the central core of Islam; "...the road to the watering place..." as a technical term it means the Canon Law of Islam, the totality of Allah's commandments. A.A.A. fyzee, Outlines of Muhammand Law, 3rd ed.

Fazlur Rahman, Op. Cit. cf. N.J. Coulson, Op.Cit. 1969), p.3.

H.A.R. Gibb, Mohammedanism: An Historical Survey. 2nd edition. (New York: Oxford University Press, 1962) p. 84.

This is emphasized by J. Schacht when he writes "the sacred law of Islam is an embracing body of religions duties rather a legal system..... it comprise on an equal footing ordinances regarding cult and ritual, political and legal rules" J. Schacht, An Introduction to Islamic Law (Oxford University Press, 1964) p. 1.

A.A. Maududi notes "the most distinguishing characteristic of Islamic law.... is that it is a sacred law, emanating from Allah Himself as the sole Law giver and transmitter to mankind through prophet Muhammand (p.b.u.h.) whose practice, "Sunnah supplements this Law "A.A. Maududi, Islamic Law and Constitution (Lahore: Islamic Foundation Publication, 1960) p. 46.

See Quran 4:59. cf. Said Ramadhan where he quotes "... O people, bear in mind what I am saying, for I might not see you again. I have left two things. If you hold fast to them, never will let you go astray after me. They are God's book, and his prophest's Sunnah said Ramadhan, Islamic Law: It's scope and Equity: (London: P.R. Macmillan Ltd, 1961). p. 24.

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New Encyclopedia Britanica Vol. viii p. 361.

E.W. Lane, Selections from the Quran with an Interwoven commentary (London: James Madden, 1843) p. 83.

J. Kritzeck ed. Anthology of Islamic Literature. (Harmondsworth: Penguin Books, 1964) p.33.

See Al-Qortoby Exergesis of the Quran (Arabic classics) 8 vol. (Cairo: Dar-el-sha'b, 1960) vol. 1 p. 4

Quran 3 : 138

Ibid., 4 : 4

Ibid., 10 : 1

Ibid., 14 : 52

Ibid., 3 : 103

Ibid., 25 : 1

Nasr H.S. Ideals and Realities of Islam. (London. George Allen & Unwin Ltd. 1966) p. 49.

Quran 45 : 18

Ibid., 17 : 32

Ibid., 24 : 2

M.M. Azami, Studies in Early Hadith Literature Beirut: Maktab Islami, 1968) p. 302.

See Quran, 53 : 3 & 4

Ibid., 16 : 44

Ibid., 7 : 157

Ibid., 59 : 7

Ibid., 33 : 21

Ibid., 33 : 159

Ibid., 42 : 38

With the development of systematic reasoning, the use of ray was severely condemned by the Ahl al-Hadith. Every major and systematic collection of Hadith contained alleged Prophetic tradition denouncing personal opinion.

See A.I. Doi The Shariah; Islamic Law. (London. Taha Publishers, 1984) p. 70.

A.I. Doi Op. Cit p. 71 or M.A. Quraishy. Text Book of Islam Bk.2 2nd ed. (Nairobi. The Islamic Foundation, 1987) p. 165.

CHAPTER THREE

MIRATH: THE ISLAMIC LAW OF SUCCESSION

In legal terminology, Mirath means inheritance to be divided the property of the deceased among the successors. The force of mirath in the Shariah gives rules which guide as to who inherits and who is to be inherited, and what shares go to which heirs. The death of a person brings about the transfer of most of his rights and obligations to persons who survive him. Rules of inheritance in the Shariah are based on the principle that property which belonged to the deceased should devolve on those who by reason of consanguinity or marital relations have the strongest claim to benefit by it and in proportions to the strength of such claims.

During the pre-Islamic (Jahilliya) Arabia, society was patriarchal and patrilineal. The customs of the Arabs of the time had as one principle object in view with regard to succession of a deceased's property. This was the practice of keeping property within one's family. Accordingly, succession of a deceased property was confined exclusively to the male relations and further among them to only those who were capable of bearing arms. With the pre-Islamic tribal Arabs being patrilineal in their structure and patrilineal in ethos; individual tribal societies were formed to which those who traced their descent from a common ancestor through

sively male links ('asaba). The tribe was bound by the body written rules that had evolved as a manifestation of its spirit and character. These rules served to consolidate the tribal strength and to preserve its patrimony by limiting inheritance rights to the male agnate relatives of the deceased, arranged in a hierarchical order with sons and their descendants first in order of priority¹.

Relations through females in pre-Islamic Arabia was not a valid ground for succession because; if it were, property would pass to another tribe. The daughters, widows, mothers and sisters as well as the minors were excluded from succession. The daughters because they ceased upon marriage to be members of the original tribe. The widows were excluded because they were placed in the same category as chattels. The minors were excluded because they were unable to defend by their arms the tribal rights and privileges, and their goods therefore belonged to their chattels.

The aim of the pre-Islamic system of succession amongst Arabs was to preserve the fighting unit of the family or tribe. Hence a woman may marry out of the tribe, but they would remain no longer connected with their ancestral tribe. Therefore no right of inheritance was accorded to them. The principle of priority of inheritance amongst the 'asaba was:

- (i) Descendants are superior to ascendant and ascendant are preferred to collateral. Minors were not

thus... allowed to inherit because they could not bear arms.

(ii) The nearer in degree among the 'asaba excludes the more remote, and there is no representation in the rules of inheritance.

(iii) Among equal collateral, the strength of blood ties is to determine priority.

With the advent of Islam, the normal and social position of women was raised giving the widow, the mother, the sister and the daughter heritable rights; the Quran made it obligatory by allocating certain specific shares to certain relations most of whom were females. These shares are called 'Faraidh', of which the Quran mentions nine and three others were latter added by the consensus of the jurists by way of Qiyas.

REFORMS INTRODUCED BY THE HOLY QURAN IN INHERITANCE

The Quran introduced reforms in the law of succession by allocating specific share to about twelve certain relatives who could not have received anything at all under the customary law of the pre-Islamic Arabs. The novel rules of inheritance introduced by the Quran emphasized the tie existing between a husband and his wife and between parents and children. Those rules also had a particular goal of raising the status of women within the nuclear

, thus....

The Quranic inheritance legislation came to reform the tribal customary law of pre-Islamic Arabia².

The Quranic reform came as a super structure upon the ancient law. It corrected many of the social and economic realities then prevalent. Thus the Quran is not to be likened to an amending Act rather than an exhaustive act. The sunnite Islamic inheritance has wedded together the 'asaba and the Dhul -
dh (the Quranic heirs) their shares and then distributes the among the 'asaba. The newly created heirs were mostly women to the customary heirs in proximity to the deceased. However, the female heir gives her half the share of the male. Contrary to the customary law, where the nearest male agnate succeeded, the female agnates were excluded, descendants were preferred to ascendant and collateral to collateral.

It is found that in the sunnite schools of law as opposed to the shiite, the same tendencies, are still at work, where to a certain extent retain these principles of ancient law. On this account it may be argued that the Islamic law of inheritance is not to be considered an arbitrary system. However this may be a superficial view, for on a systematic examination of the fabric of Islamic law, it will be found that it consists of the two distinct elements, namely the custom of the ancient Arabia and the Quranic reforms.

through the spirit of reforms introduced by the Holy Prophet (s.a.h.), the ingenuity of Jurists and the forces of circumstances, the two distinct elements were welded together into a harmonious and complete system, yet it is still possible to distinguish them. Here is an example of a location of the 'Asaba representing a classical patrilineal system. In its most archaic form, women in the patrilineal line do not possess inheritance rights. At the core of the patrilineal system are the father, the brother and the sons; the uncles and the grandfathers are secondary.

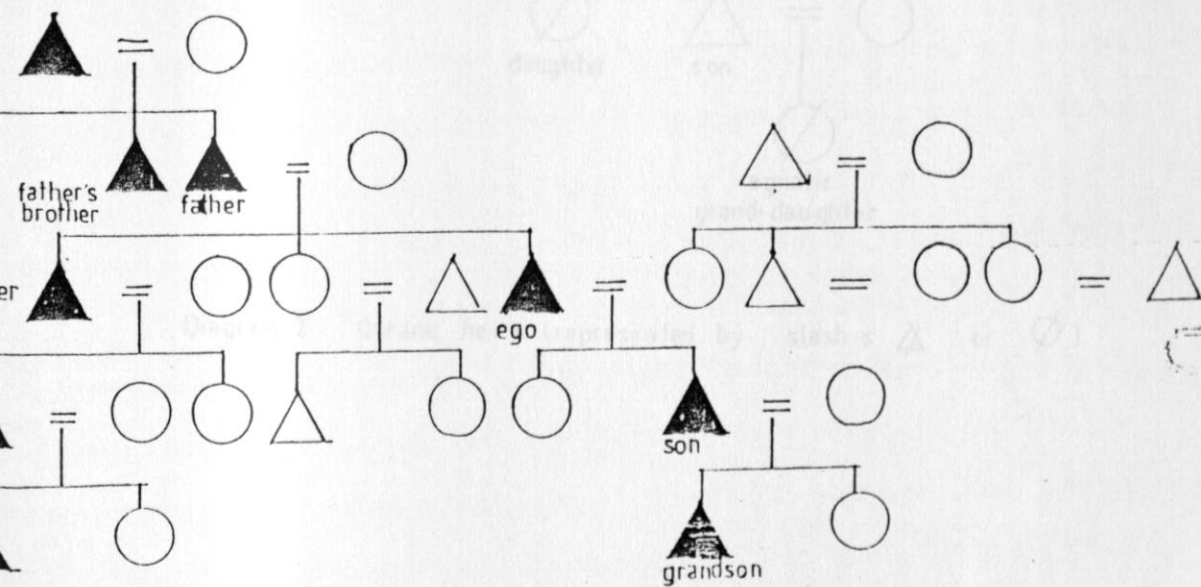


Diagram 1 The 'Asaba', the agnate male (▲ shaded)

Comparing the diagram of the strict agnatic kin (diagram 1) with the one which the Quranic heirs are shown (diagram 2), the shift away from the 'asaba and forward the recognition of female heirs is clear.

there is a separate set of priorities which can be very
 indeed depending on the total size of the estate and the
 of eligible heirs. It may be, for instance, that the
 distinction of the estate among the 'asaba heirs

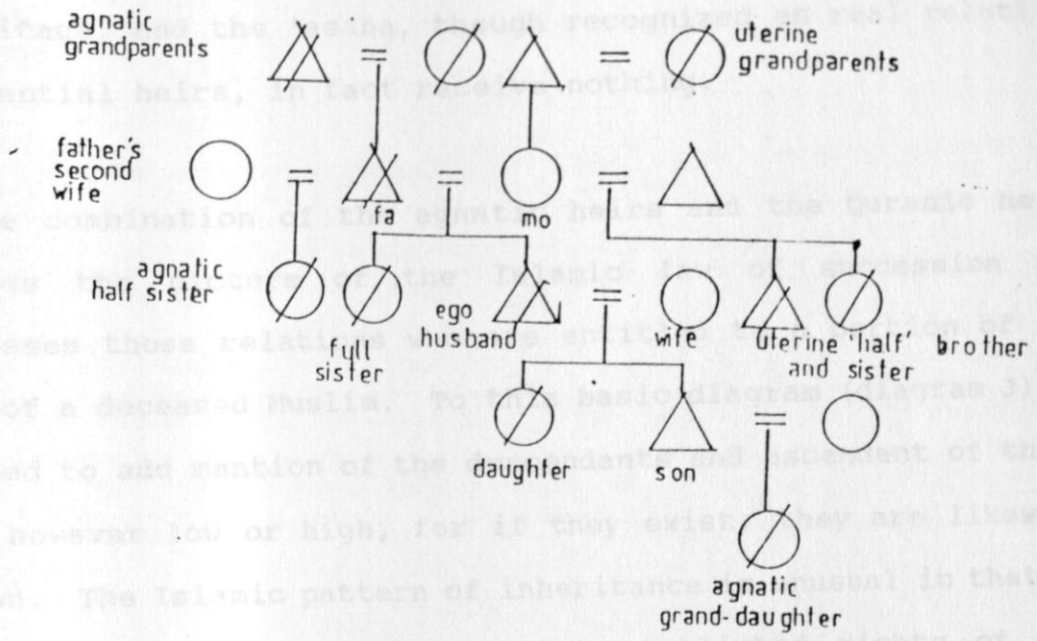


Diagram 2 Quranic heirs (represented by slash is Δ or \emptyset)

It is apparent that there is a certain structured tension
 between the two classes of heirs, and certain principles setting
 priorities have been established in juristic practice. The
 primary heirs are within the nuclear family and after they have
 taken their portion, the Quranic heirs take their share; the
 residue is taken by the 'asaba. This is the basic rule and within
 the framework of these levels of nuclear family, Quranic heirs and the

, there is a separate set of priorities which can be very
x indeed depending on the total size of the estate and the
of eligible heirs. It may be, for instance, that the
ed distinction of the estate among the Quranic heirs exhausts
ritage, and the 'asaba, though recognized as real relations
potential heirs, in fact receive nothing.

The combination of the agnatic heirs and the Quranic heirs
etes the picture of the Islamic law of succession and
passes those relations who are entitled to a portion of the
e of a deceased Muslim. To this basic diagram (diagram 3) we
need to add mention of the descendants and ascendant of those
, however low or high, for if they exist, they are likewise
led. The Islamic pattern of inheritance is unusual in that it
sents a compromise between the established rights of the
lineal or agnatic kin and the entitlement of important females
e kin system not necessarily grouped together by the descent
iples alone. It is not the addition of the matrilineal kin as
scent group, but the addition of certain females and males
ed to the deceased as often by marriage ties as by blood ties.
it recognizes the importance of inter-group alliance though
lage, along with the primary male descent group.

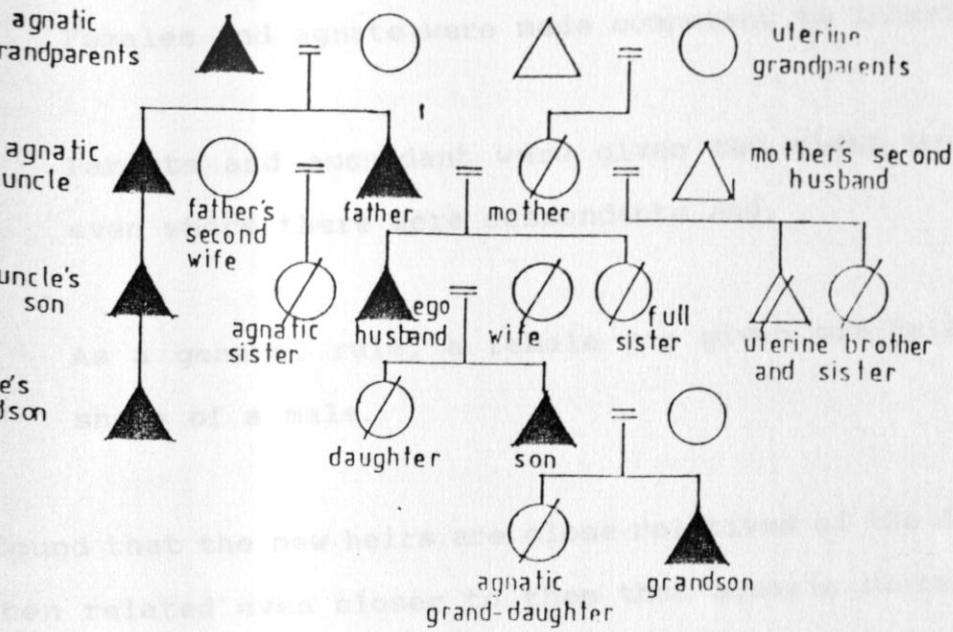


Diagram 3



Agnatic heirs 2

Quranic heirs combined

Taking a broad view, the Islamic scheme of inheritance poses three peculiarities viz:

1. The Quran gives specific shares to certain individuals.
2. The residuary goes to agnatic heirs and
3. Failing them to uterine heirs.

main reforms introduced by the Quran may be stated as that:

Husbands and wives were made heirs.

Females and agnate were made competent to inherit.

Parents and ascendant were given the right to inherit even where there were descendants and,

As a general rule, a female was given one-half of the share of a male.

Entitlement thus, according to the shiite, depends solely on blood relationship. It is found that the new heirs are close relatives of the deceased, often related even closer to them than agnatic heirs. These are mostly females, equal to one-half of the share of a counterparty of the corresponding order and degree. This system thus differs fundamentally from the sunnite law in that it affords no special preference to males. In spite of the Quran giving explicit rules on inheritance, the shiite groups nevertheless portray some differences in actual practice and ideology of the law of succession. The shiite law of inheritance in practice is different from the sunnite. Entitlement to succeed on intestacy vests, for the sunnites unlike for the shiites, on three distinct groups which produce three separate classes of legal heirs viz: the Quranic heirs, the male agnate relatives of the deceased and failing these, two primary groups, wives and cognate relatives. The shiite on the other hand recognises one basis for entitlement only, that of relationships (muhababa) simply and accordingly divides all relatives (with the exception of the spouse relict who always takes the Quranic shares)

three classes, which are in order of priority. Thus

- i) Lineal descendants and parents of the deceased
- ii) brothers, sisters and their issues and grandparents of the deceased and,
- iii) Uncles and aunts and their issues.

Entitlement thus, according to the shiite, depends solemnly on the position of the claimants, and while the Quranic heirs, who are entitled will take their allotted share, and the basic rules of inheritance apply that a male relative gets twice the share of a female relative of the corresponding order and degree. This system thus differs vitally with the sunnite law in that it affords no effective place to the male agnate relatives. All in all the shiite law distributes the estate among the claimants in such order and proportions as is most in harmony with the natural strength of their claim.

CONDITIONS PREVAILING INHERITANCE AND HERITAGE

The estate of an individual who died intestate can be inherited after the satisfaction of the death of propositus, the survival of heirs at the time of death and ascertaining the relationships which justify inheritance. It has to be proved that the heirs are surviving at the time of the death of the propositus,

they are allowed to inherit. In the case of an embryo the
share has been that it will not be accounted to inherit unless
it is alive. At times their share is put aside pending their
birth, usually the share of a male child. According to other
schools the whole estate should be saved awaiting the delivery of
the child before the distribution. The heritage that which
remains is to be divided comprises of:

That which the deceased owned before their death in the form
of tangible property, debts and any pecuniary right like the
right consequent to demarcation of ownerless vacant land with
the intention of cultivating it, where they intend to
cultivate ownerless vacant land and demarcates it by
constructing a wall or fence or its equivalent thus acquiring
a right to cultivate it in preference to others; or an option
in a contract of sale; or a right for pre-emption; or a right
of retaliation (qisas) for murder or injury, where there is a
guardian of the victim e.g. if a person kills your son then
dies before retaliation, causing the right to qisas to change
into a pecuniary right payable from the murderer's estate
exactly like debt.

That which the descendant comes to own at his death e.g.
compensation for unintentional homicide (qatl al- khat'a),
where the heirs opt for compensation instead of (qisas). The
rule applicable to this compensation is the one applicable to
all other properties, and all those entitled to inherit.

at which the descendant comes to own after their death e.g. an animal caught in a net that they had placed in their lives and similarly where they are indebted and their lives or creditors relinquishes the debt, after their death or someone volunteers to pay it for them. Also if an offender mutilates their body after their death and amputates their hands and legs, compensation will be taken from them. All these will be included in the heritage.

Different deductions are made from the heritage. Some are made from only a third of the heritage and some deductions are from the whole heritage. Hence if the heritage suffices, they will be completely met and what remains of it after these deductions and the execution of the will, will be for the heirs. If 'tarikah' (deceased property) falls short of meeting these deductions, the more important among them will be given precedence over those of lesser importance. If anything remains after the required deductions are made, the next in order will follow; otherwise only the deductions of higher preference will be covered.

According to the consensus of Shiite jurists, the first obligations before any other thing is to meet the wajib funeral expenses of ablution (al-ghusl) shrouding, carrying of the body and burying the grave, if required irrespective of whether the descendant has made a will to this effect or not. Thus funeral expenses are prior to debts, irrespective of debts related to the fulfillment of the religious duties (haqqu Allah) or to the

ors (haqq al-nas). Differences also occur among the shiite
s (of the Immamiyyah school) regarding the case where a
or has a right over the estate itself, such as where the
nt dies after mortgaging his/her property with a pledge, the
ty being all that he/she owned. Some jurists may give the
l expenses preference over the right to the pledgee, because
e nature of the tradition which includes the order of
ence where no difference is made between pledged and
ged properties. Other jurists give precedent to the right of
edgee because the owner of the pledged property is forbidden
e Shariah to exercise his/her right of ownership and that
is forbidden by the Shariah is like that which is forbidden
ason³.

Thus meeting the funeral expenses, the repayment of debts will
, irrespective of their being haqq Allah or haqq al-nas, such
paid zakat, pecurinary atonements (kaffarat) and other similar
ious and non religious liabilities. All these debts are in a
e category, thus if all of them cannot be completely met from
state, they will be covered pro-rata like the liabilities of
solvent person, allowing no exception to this except zakat,
ded these relate to the actual items of their incidence
nt, in which case the two will be preferred over other debts.
ver before the distribution of the estate of the deceased
y heirs, it is required by Quranic injunctions first to settle
claims of debt and other rights of Allah and His servants on
deceased as well as the Will that they may have left behind.

oly Quran emphasizes that:

The distribution in all cases is after the payment of legacies and debts⁴.

1 debts are those which are proved by the admission of the before the death sickness either in writing or by any other and secondly the debt which was mentioned by the admission of dead person while on death sickness. Funeral expenses are fully deducted from the estate of the deceased. Islam preaches simplicity, particularly so when one dies. Every one is given a less shroud, therefore funeral expenses must be reasonable. In conclusion the schools of law of the Sunnite and those of the te, concur that funeral expenses are preferred over debts ble from the estate after death.

EDIMENTS TO SUCCESSION

According to the Shariah there are three reasons than can stop from inheriting. These are homicide, difference of religion slavery.

(i) Homicide

Muslim jurists agree that a killer or murderer shall not merit. Sayyidna Umar (R.A.) is said to have prevented a murderer one's father from inheriting him. The rationale for this is at if such people were allowed to kill and then benefit from the estate of the victims, it will seem as though people were

ing incidents of homicide because the accused persons were
to benefit from the crimes they have committed. Due to
stances that prevailed in murder, jurists have classified
ers into two categories:

a) Qatl al Amd: intentional murder

b) (b) Qatl al - Khat'a: unintentional murder.

Qatl al-amd is an intentional and premeditated murder, while an
an insane person or a minor will be considered as neither
intentional or unintentional. Qatl al-khat'a may be through
negligence or through mistaken identity. There are cases of murder
permitted by the Shariah where the right to inheritance will not
be affected. These are:

(a) When one kills as a result of exercising judicial
punishment resulting to death, and on the battles between
Muslims and non-Muslims.

(b) Killing if it's as a result of self defence which has to
be proved.

(c) In an act of a mad person and a minor.

Differences of Religion:

Differences of religion will definitely prevent succession to certain conditions. The majority of Muslim jurists hold that a Muslim will not inherit his/her deceased relative who is to be non-Muslim and vice-versa. Thus when a Muslim dies leaving behind his Christian or Buddhist wife, she cannot inherit him through Wasiyyah (will). However, her inheritance (as a wife) will not be more than one third of the net estate. This rule is still not universal amongst Muslims. The Shi'ite jurists are of the opinion that the people of a different religion will not inherit one another, thus a Jew will inherit only a Jew and a Christian will inherit only a Christian. They base their view on the hadith that.....

Yahya related from Imam Malik from Ibn Shihab from Ali Ibn Husayn Ibn Ali from Umar ibn Uthman Ibn Affan from Usama Ibn Zayd that the messenger of Allah (may Allah bless him and grant him peace) said, "A Muslim does not inherit from a Kafir"⁵.

(iii) Slavery

All Muslim jurists agree that slavery is a bar to inheritance. They will not be inheritance. If a slave died he/she cannot be inherited by his/her relatives, because, as a slave he owned nothing since all that a slave owned belonged to his master and was himself/herself treated as property. Islam, however, made it a great reward to free slaves as an act of expiation and included it in expiation (Kaffarah). Thus there are no

today and the problem does not occur.

QURAN AND INHERITANCE

Islamic law is regarded by Muslim as an ordinance of Allah; when Islamic experts are called upon to give evidence of it in cases, it is to the Holy Quran first of all that they will refer to for their authority for the basic principles before referring to any book on the subject which gives details. It is therefore to the verses of the Quran itself that we must turn to for the original text of the law before directing our attention to any conditions on the Islamic law.

Chapter 4 verses 11 and 12 of the Quran set out the law of estate succession in a rather detailed and exhaustive manner. It is as follows:

Verse 11. "Allah enjoins you concerning your children; for the male is the equal of the portion of two females; but if there be only daughters, two thirds of what the deceased leaves is for them; and if there be one, for her is a half. And as for his parents, for each of them is the sixth of what he leaves, if he has a child: but if he has no child and (only) his two parents inherit from him, for his mother is the third; but if he has brothers for his father, her is the sixth, after (payment of) a bequest he may have made and a debt. Your parents and your children you know not which of them is nearer to you in benefit. This is the ordinance of Allah. Allah is surely ever Knowing, Wise".

Verse 12. "And yours is half of what your wives leave if they no child; but if they have a child, your share is a fourth of they leave (after payment) of any bequest may have bequeathed debt: And if a man or woman having no children leaves property inherited and he/she has a brother or a sister, then for each them is the sixth; but if they are more than that, they shall be parts in the third after (payment of) a bequest that may have bequeathed or a debt not injuring (others). This is an ordinance from Allah, and Allah is knowing, For bearing. Depending on this law of inheritance as given in these verses of Quran, Anderson said

..... It should also be observed that there is no aspect of the law in which the logical and technical excellencies of the Islamic system are more advantageously displayed than in the law of inheritance indeed there is a famous dictum attributed to the prophet that a knowledge of the shares allotted to the various heirs under this system constitutes the equivalent of one-half of all human knowledge. However this may be, it would, I suppose, be true to say that there is no system of inheritance that has been worked out with the detailed thoroughness, the meticulous precisious, and the religious devotion even to the discussion ad nauseam of hypothetical problems that could scarcely ever arise in the vicissitudes of real life - which has been accorded so lavish by Muslim jurist to the Islamic law of succession⁶.

detailed treatment of the shares are dealt with in Anderson's work⁷. We do not consider it necessary to repeat these complicated details. All we need to do is to refer to a few general important points embodied in the rules relevant to our study. One general principle is that a spouse, parent and son or grandson (son's son) include all other heirs in succession to a deceased; further than

one class of heirs had definite shares of the net estate assigned for it, while another class of heirs share the residue net i.e after those entitled to specific shares have had their shares.

The Islamic law of inheritance also makes a great difference between male and female that may be seen by others as discrimination of women. Firstly, in the shares a male gets more than a female though they may be of equal entitlement e.g. sons and daughters, the brothers and sisters. Consequently whatever shares of the estate is left to children, sons and daughters, each son takes double the portion of the daughter. Secondly, relations in the male line direct and collateral are with one or two degrees preferred to relations in the female line. Thus a son's male heirs are: (i) sons (ii) the paternal grandson (son's son) and lower such descendants (iii) the father (iv) his father's father (the paternal grandfather) (v) the brother (vi) the brother's son (vii) paternal uncle (viii) the son of paternal uncle (ix) the husband. And the female heirs are; (i) the daughter (ii) the son's daughter (iii) the mother (iv) the grandmother (maternal as well as paternal) wife's sister.

Upon this principle a person cannot be succeeded by the father's son or by the daughter of a brother or the daughter of an uncle, or the maternal grandfather or mother of the maternal grandfather. In this respect the Islamic law is quite at variance with the Adigo system of inheritance.

Another general principle is that the full-blood relations preference over the half-blood. Therefore, a brother germane exclude a brother consanguine, and a brother consanguine will preference over the son of a brother germane. Another general principle is that the lower in relations exclude the remote in relation; therefore children, parents and spouse inherit together do not exclude each other except that the son's share is of the due. These principles can also be expressed using diagrams.

Inheritance thus according to Islam is the entry of living person into possessions of a deceased persons' property and exists in some form whenever the institution of private property is recognised as the basic of the social and economic system. The various forms of inheritance and laws governing it, however differ according to the ideals of different societies. The law of inheritance in Islam is seen to be based upon five main considerations:

To break up the concentration of wealth to individuals and spread it out in society.

To respect the property rights of ownership of individuals earned through honest means in their lives.

To hammer in the consciousness of man the fact that man is not the absolute master of the wealth he produces but its trustee and he is not therefore authorised to pass it on to others as

pleases. and determined in clear-cut terms the shares of
heritor and set limits on the right of the property owner to
consolidate the family system which is the social unit of
Islamic society. loosely thought as chattels, the co-sharers
This has not only restored her dignity but safe-
to give incentive to work and encourage economic activity as
sanctioned by Islam. concentrated wealth in the society and
in its proper and equitable distribution among a large
e can even say that Islamic law of inheritance is geared
s a just society, unlike during the pre-Islamic period, and
modern un-Islamic society where its laws of inheritance have
evils which may include denying women any share of
tance, because they were rather regarded as part of the
ty of the deceased and therefore their right to property
h inheritance was ignored. Also unlike during the pre-
c Arabia and even other societies today which are tribal,
not only are women deprived inheritance, but even the weak,
and minors were not accorded any shares because the common
ples of inheritance was that he alone is entitled to inherit
ields the sword.

Also in certain societies there had existed the law of
geniture which entitled only the eldest son to inherit the
of the father's property or to get the largest share. Islam
thus introduced many reforms in the perception of inheritance
its laws which can be summarized as:

t defined and determined in clear-cut terms the shares of
nheritor and set limits on the right of the property owner to
e of his property to his whims and caprice. It also made
s who had been previously thought as chattels, the co-sharers
he male. This has not only restored her dignity but safe-
ed her social and economic rights. It has also laid the rules
he break up of the concentrated wealth in the society and
d in its proper and equitable distribution among a large
r of persons.

"Al-Muwatta", Kitab al-Faraid. (Oxford, Black
1902, Hadith No. 10 and No. 13 p. 241. Also of Imam
Shahin Muslim Vol III. (Lahore, Sh. Muhammad Ashraf
Publishers) 1999 p. 852 Hadith No. 3028.

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Ibid pp. 62-66 also A.H. Buhri, Mirathi A handbook of the Mohamedan Law of Inheritance (translated by) Mitchell Tanga 1923 p.6.

CHAPTER FOUR

THE DEVELOPMENT OF THE ADIGO RULES OF INHERITANCE

FAMILY: THE ADIGO BASIS OF INHERITANCE

The family according to the Adigo is the social group into which a person is born¹. That unit consists of all members of the family group linearly descended from one common ancestor, female or male, who in ancient times, together occupied the house or compound in which a child first finds itself in this mortal world; a group of people united together either by the possession of common land, or united together by common controlling spirit or personality.

Thus of all the important qualities in a human being, the Adigo belief attaches special significance to two things, the physical body and the sacred spirit which constitutes their full personality and builds them up into real being². The former is of maternal ancestry, the latter of paternal ancestry. Each of these groups constitute a distinct family. Every Adigo belongs to one of these two groups of ancestry, the maternal and the paternal (Mbetuni and Kulumeni). They may belong to one of the groups, for one or more purposes and to the other for one or more other purposes; they may belong to both for all purposes³. We say then there are two family systems amongst the Adigo, the matrilineal and

matrilineal. of that person e.g. if 'W' is the father or the
of A,B,C, the immediate family of each of A,B,C, is the
The family which succeeds to self acquired property upon
tacy may therefor be; maternal, paternal and in special cases
matrilineal and patrilineal.

MEMBERSHIP OF FAMILY

Membership in a Chidigo family is an incident of birth and
ends upon generations of ancestors (akare)⁴. Each person is
into families, these are: (i) the family of the generation
diately preceding theirs, i.e. the family originating from
r father of mother, (ii) the family of the last generation but
before theirs i.e. the family originating from their
dfather of grandmother (iii) the family of the generation
re that i.e. the family originating from their great
dfather or great grandmother and so on, until the family of the
test known ancestors, male or female. This family may be added
y evolution of raising of subsequent generations i.e. by birth
a child to a member of the last generation, but it may not be
tracted from, since once a generation has come into being, it
t always retain its position in the ring of the ladder, it
not be undone, even though every single individual who
stituted the particular generation may become extinct.

The family of the generation that gave birth to a person i.e.
e family originated by a person's father or mother is the

ate family of that person e.g if 'M' is the father or the
of A,B,C, the immediate family of each of A,B,C, is the
of the circle of persons generated around 'M' namely
(A+B+C). The family of the generation of the grandfather, the
mother or of the remotest known ancestress is called the
or extended or ancestral family. Thus if 'X' was the father
mother of 'M', 'N' and 'O', the extended family to which each of
children belong will be $(X+M+N+O) + (A+B+C)$ and if 'Y' was
remotest known ancestor of 'A' the child of 'M' and extended or
ancestral family to which 'A', 'B' and 'C' belong is
 $(M+N+O)+(A+B+C)$.

Therefore to ascertain the family of the person you have to go
to their birth, to their father or mother unto whom they were
born, and the first circle or group into which they were born, that
is the circle or group into which they were born, that is the
circle having their said mother and father as its center or origin
with all the radii thereof; and to ascertain, their
extended or ancestral family you go further back to their
grandfather or grandmother or the remotest known ancestors male or
female. In short a person's immediate family does not begin with
himself or herself; it is the immediate family of his or her
children which begins with her or him.

We may illustrate the principle with a tree; the trunk of a
tree with buds on it: a bud may or may not be fertile to develop
and generate a branch permanently fixed or attached to the trunk.

and at its first appearance forms part of the trunk, and the
together with all the buds on it constitute the first body in
each of the buds has its existence or the body to which each
primarily belongs. The trunk therefore constitutes the
the family to which each bud on it belongs, the trunk being
father or mother, the buds, are children. Some of the buds may
sterile, others may not.

A branch of the tree may develop out of a fertile bud, and
particular bud or root which produced the branch is
traceable either from the bud emanating from
trunk which it emanates unless the one is completely severed
from the other. By producing the branch, the bud links up the
branch with the trunk. In other words which in later life a person
wishes to have children, he or she becomes inseparable from either
the immediate family into which he or she was born, or from the
family which he or she raises; he/she therefore must of necessity
be linked jointly to the trunk and to the branch. It must be
remembered that an infertile bud is incapable by itself of adding
to the trunk.

It is most important that these concepts of membership of the
family should be clearly understood in order to appreciate and
apply the principle of regulating succession to property
against the Adigo. We may summarize the principle as:

- (i) The immediate maternal family of a deceased male or

female consists of his or her mother, the mother's brother and sisters and all who were descended matrilineally from the same womb or himself or herself i.e. their surviving uterine sisters (if any) in the case of a woman or her own children and uterine grandchildren, and in the case of a man surviving children of all his sisters, dead or alive, save that as long as their mother lived, such children of sisters would not normally be regarded as principal members of the said family: in short the immediate maternal family consists of all children of his or uterine grandmother and all descendants of his or her mother in the direct female line.

ii) the immediate paternal family (Kulumeni) of a deceased male or female consists of his or her father, the fathers, brothers and sisters, and all who descended paternally from the same father as himself or herself, i.e. his or her surviving paternal brothers (if any), his or her paternal sisters (if any) in the case of a man, his own children and paternal grandchildren, and in either case, surviving children of all his or her paternal brother, dead or alive, save that so long as their father lived, such children of brother would not normally be regarded as principal members of the family.

CONCEPTION ON THE ADIGO MATRILINEAL FAMILY

Amongst the Adigo as earlier pointed out, the term "Family" denote a large number of people grouped in one or another of categories, or in a combination of these two categories, all of trace descent or are united by the belief in a descent from a

on ancestor, male or female, however remote that ancestor may Among the Adigo matrilineal system, for the purpose of session to and ownership of property the family denotes a group all the members each of whom was fed and natured by a common ed blood in the mother's womb. That common sacred blood runs ough each of the persons lineally descended from the common stress in the direct and broken female line.

Being a peculiarity of the womb, that blood is passed on by a female member of the family to each child born of her. It ever dies with every male member, as biologically it is possible for a male so to feed and nurture a child in the womb. Consequently the maternal family which the Adigo call "Kuchetuni" traced through the mother, the maternal grandmother, the ernal great-grand-mother, right down to the remotest female estors in the direct female line. This has been defined as ... that family which consists of all persons lineally descended rough females from a common ancestress"⁵.

As a male member of a matrilineal family is incapable of transmitting to his children the blood he receives from his mother,

en do not possess that blood and therefore cannot be
f his maternal family; and since membership of the
l family with a deceased person is one of the essential
s which determine a person's right to succeed to or to a
the enjoyment of property left by the deceased, children
e member of a matrilineal family do not inherit their
estate, and are normally not entitled to be appointed
s⁶.

children are not considered members of their father's
as far as having any right to his property. Thus
g inheritance the maternal clans have been predominant,
e Adigo have been branded a matrilineal society. However
likely that patrilineal clan had at once dominated the
of the Adigo inheritance. Amongst the factors that have
many to see the Adigo as a matrilineal society are the
inheritance. It is important to have a closer look at the
and establish the basis of matrilineality in their rules of
nce.

DEVELOPMENT OF ADIGO RULES OF INHERITANCE

e Adigo people have often been referred to as a matrilineal
y, more so because the maternal clans have been known to have
ed certain aspects in the lives of the Adigo. The maternal
ad an upper hand in decision making on matters pertaining
ansman. Maternal clans have always exercised considerable

rol over the clansmen, let alone taking responsibility on
lf of a clansman. The maternal clans thus paid blood-money
e) in order to bail out a clansman in trouble and arranged for
payment of dowry for a clansman's wife, let alone making
sion on which clans they can inter-marry. Maternal clans have
ys been known to take the most active role in organising for
burial of a deceased kinsman⁷.

Within everyday life of the Adigo members of the same clan
e always recognized themselves as brothers and sisters, fathers
mothers and so on. Other aspects that the Adigo people
hasise about the importance of the maternal clan are like
eritance. However, despite the dominance of the maternal clan
the affairs of the Adigo, the paternal clan has always exercised
onsiderable influence if not prevailing over the maternal clan
other aspects.

The Adigo can be matrilineal hence it has always been assumed
at their rules of inheritance also follow strictly matrilineal
les. In a matrilineal system a man's own sons are members of
s wife's lineage, not his own (for his lineage is that of his
ther and his sister's); and the most closely related male in next
neration, who would inherit his goods and titles at his death,
s his sister's son. The relationship between a man and his
ster's son (or to proceed in the opposite direction between a man
nd his mother's brother) was the key link in questions of
nheritance. The logic of matrilineal system emphasised by the

is also that you always know who your mother is, if not your father. The fact that they moved as one group under one leader. Clans

the Adigo started maybe during the migration and up to the present. However, a closer study on the evolution of the idea of inheritance amongst the Adigo portrays a system of inheritance not so clear and uniform rather one that has evolved over a long time and influenced by the socio-economic and political condition for that time. Nevertheless there seems to be a process of evolution in the customs and rules of inheritance amongst the Adigo to-day. It is important to look at the history of the Adigo people, if we are to understand the evolution taking place in the rules of inheritance practiced by these people.

The history of the Adigo is mainly intertwined in the history of the Mijikenda. The Adigo are thus incorporated in the history of the migration from Shungwaya and the settlement along the southern coast of Kenya and Tanzania⁸. Though the rules of inheritance of the Adigo portray a matrilineal bias, it is not ascertained from the migration history which were the first clans to migrate from Shungwaya or if clans were there before the migration either. Oral history on the Shungwaya migration is today in conflict. The Adigo are said to have left Shungwaya under the leadership of a legendary leader known as Digore⁹ who also led the war against the Oromo (Oromo) and the subsequent expulsion of the Adigo from Shungwaya.

It is difficult in ascertaining the clans of these people is the fact that they moved as one group under one leader. Clans of the Adigo started maybe during the migration and up to the settlement and formation of the Kayas¹⁰. Probably at this time authority was through the system of age sets, a system which has male dominance amongst the entire Mijikenda people. With the absence of clans, transfer of authority and property which can be referred to as a form of inheritance was from father to son. This system is what the Adigo called 'Kuhala ufwa' - "to inherit from the dead", where the eldest son, most certainly because he will be the first to be initiated into the next age set within the family, and so become the elder hence take the responsibility of being the head of the family after the death of the father. Usually the father's brother would take care of the property in consultations with the mother of the children (widow)¹¹.

In this 'Kuhala ufwa' system of inheritance practiced by the Adigo, the symbolic tools of authority were the one's 'taken' (inherited) by eldest son thus as recognized "... a son would receive personal items that had been used by his father such as a staff, a chair, a hat and the bows and arrows"¹². As recognized, it should be noted that the eldest son here did not only inherit, but also become the head of that particular household (Mudzi), who symbolized the father. The personal belongings 'taken' by the son symbolize authority in the Adigo tradition. Also recognizing the importance of this factor in Adigo patrilineal inheritance McKay writes:

Theoretically where the son of the deceased is a minor the deceased's eldest brother acted as guardian till the son was of age. Practically the uncle continued in possession till his death when the real heir might succeed¹³

Thus in reality succession to office and inheritance went to the most powerful and influential member of the . Hence within the formed clans, the Kaya as well as within the Kaya, seniority based on a monopoly over knowledge and material resources provided the principle of hierarchization. The Kaya controlled and allocated land to various heads of Kaya (Midzi). The principle is also institutionalised in the Kaya organization, but confined to the individual Kaya. The men of the Kaya were formed into age set (rika) and they progressed gradually from childhood through adolescence to adulthood. The rika were in turn sub-divided into sub-rika and the three most prominent of which constituted the senior elders (Ngambi) who respectively "ruled" the affairs of the Kaya for a definite number of years.

The claim that matrilineal inheritance amongst the Adigo was the original system of inheritance may not be easy to establish. Keeping in mind the influence that matrilineality has had amongst the Adigo. However a look at the origins of some clans gives a hint that matrilineal inheritance was an aspect of evolution and change that the Adigo were undergoing. A brief look at some major clans reveals the fact that clans were not there in Shungwaya, and their emergence during the settlement was as a result of deeds by

individuals during the settlement, and due to slavery and
es¹⁴.

The 'Achina Ngome' clan is a well known clan of the Adigo, it
is reckoned to be the first clan of the Adigo. The origins of this
clan is said to have been during the settlement on the Coast of
Kenya. A group of Adigo men wandered from the hinterland to the
coast where they saw the Fort Jesus in Mombasa. When they
returned to their Kaya, and reported what they have found, they
were subsequently known as the 'Abiri Ngome', the Chidigo word
'Abiri' means 'to see', and 'Ngome' is the fort. Thus these became
the people who saw the fort. Today, the 'Abiri' Ngome' are just
known in short as the 'Abirini' and 'Achina ngome' denote later
generations of the original 'Abiri Ngome' clan. Different from the
fact that the Adigo are matrilineal, the Abiri Ngome (or Abirini
Achina Ngome) was a clan formed by the activities of men, it was
not there in Shungwaya, rather it came as a result of the
settlement.

There are also the 'Ayombo' clans, these were also as a result
of the migration. Amongst the Adigo, those of the Ayombo clan are
the descendants of amongst the last group to settle along the East
African Coast. The people are said to have travelled by sea
in vessels to the East African Coast. Thus they would anchor and go
to the mainland, either looking for places to settle or looking for
their kinsmen who migrated earlier. These were referred to as the
'Ayombo', a Chidigo word meaning vessel, since that was their means

gration. Again the Ayombo clan did not originate from any
etess as many of the matrilineal clans would be expected.
factors of clan formation may mean that matriliney was not
ant here. The influence and strength of matrilineal clan was
result of factors during the migration, settlement and
nal influence. Inheritance at this time was not yet
lilineal oriented.

The known practice of 'inheritance' amongst the Adigo
diately after the immigration was known as "Kuhala Ufwa", to
e from the dead". This was a form of guardianship by the eldest
or uncle (father's brother) when the eldest son was not yet
re to take responsibilities. Family ties at this time were
easingly stronger and closer paternally, and inheritance was
er the event of death, hence something of the burial rituals of
Adigo is intimately bound up with succession and inheritance.

If the elder's death is expected the members of his major
rilineages will remain at home waiting. When the elder actual
s, his sons -especially the eldest who is at home, reveals the
th to the other people. Ideally it is the task of the eldest
of the deceased to direct the burial. If he is absent, the
est son present should take charge, and he will be recompensated
his expenses by the eldest son at a later date. The burial
der is strongly supported by his minor patrilineages, and major
rilineage members will also take part, as well as others in the
mpound who are not related by descent to the deceased; The

male member of the minor patrilineage, or the eldest son, out younger members to notify the adult male matrilineage members of the deceased and also any prominent members of the man's clan who do not live too far away to come to the funeral. The eldest son also asks a number of young men of the village, to dig the grave at the dead man's patrilineal graveyard (ani).

Patrilineal kinsmen of the son in charge, if they are closely related, or if they like the son may sit about and sympathize with him as the funeral progresses, but the son is usually busy directing the funeral and receiving advice from senior patrilineal relatives as to how to proceed. The deceased's own matrilineal relatives normally take part in the burial usually providing some assistance in things needed to bury the deceased. There is very little known today of the pre-Islam Digo burial rites, thus the traditional way of preparing the body for burial is practiced.

Space has been taken here to describe the burial of a male and to indicate the nature of subsequent funerals because it is through these rituals that the basic patterns of social relationships in inheritance and succession operate. Crucial features present in these rituals are:

First, the heavy load of ceremonial duties associated with burial and funeral ceremonies fall primarily on the eldest son, and also on the eldest sons of the other 'houses' of the

deceased and on the minor patrilineage. The matrilineage stands ready to perform these rituals, spurred on by the possibility of the vengeance of a neglected ancestor, if these persons fail;

Second, the deceased becomes an ancestor. As such he is sociologically not dead; rather, his role has changed within the domestic grouping and the patrilineage to which he belongs. He can become reincarnated and he can cause sickness amongst or and the living members of all his descent groups. The death of a man brings about a series of re-organizations in the domestic roles which take patterned forms. His transition from male elder to male ancestor is part of the pattern.

Property transfers following the death of a male elder, is that moveable household goods or personal effects including axes, clothes, spears, arrows are divided among the 'houses' a short time after the burial. This is usually supervised by the matrilineage - head of the deceased (Mwenenhu Mwanamayo), a person who generally lives outside the dead man's compound, and often outside his village as well, and thus is not usually a fellow kinsman. The head may live at some distance and may appoint a younger matrilineal relative who lives closer to the compound to carry out the duty.

The value of the property to be divided is not great, and it

not considered a very exacting task to be the divider, though there was a strong feeling among the Adigo that the division should be done according to customary practice and rules. This was based on the same ranking of 'house'. The 'house' of the eldest son gets the largest share, the next 'house' with the next eldest son, the third and so on; then houses with no sons determined by the seniority of age of the eldest daughter of each 'house', receive shares and finally, 'houses' with no children¹⁵, although these usually get a small share. For wives who did not have children, it is common for the husband, if he is sympathetic to give her special presents, and he may do so again when he thinks he is going to die, for he knows that she will receive little after his death. Further, if a man has a favorite wife he may give her special gifts when he knew he was going to die, though he is not supposed to do so, and if other wives discovered it they would be jealous.

If there are both males and females in a 'house' the divider divides the 'house' goods suitable for each sex for there are some goods which are clearly male e.g. spears, others such as water pots which can be used by daughters. If there are only females in a 'house' he sees that the house receives only those items which females can use. A 'house' with more children than another does not necessarily get a larger share than another 'house' it depends on the usual ranking of the 'houses'.

During his life time the husband is supposed to treat his wives more or less equally with respect to gifts, provision of

and, sexual relations, and so on, though the first wife
ly has a somewhat better position than others. In the
ion of the deceased's personal effects there is again the idea
oughly equal treatment for all the 'houses' except that
ity is given to the 'house' of the eldest son, which is not
sarily the 'house' of the first wife. The burial of the
and and the division of his personal effects is a reminder of
nheritance conflict among Adigo wives between position based
rder of marriage and position due to birth of children, of the
ess or failure of the wives in childbearing, one of the chief
us-symbols of the Adigo. It is a time of reckoning of what the
stic grouping has accomplished up to the time of the husband's
h.

The division of the personal effects is said by the Adigo to
within the patrilineal grouping, and to be on essentially
rilineal transfer, rather than merely husband - 'house'
eritance. The Adigo feel that it is desirable that a non-
rilineal relative acts as a divider since he will not be subject
bias or influence in the manner that a patrilineal relative of
deceased might be. Maternal inheritances amongst the Adigo are
nges in the rules of inheritance that these people have
erperienced due to factors like famines, slavery and colonial
icies. These factors and how they have influenced the Adigo
les of inheritance are the subject of the discussion below.

AND THE FORMATION OF CLANS

Disasters such as famines can be quite disruptive by tearing societies. They put great stress on local institutions and threaten the very existence of a society. Famines can also be constructive or desirable as they create new forms of life. At times famines provoke unusual unity among members of a household, but they also often inspired a breakdown of traditional social values. Famines sometimes trigger off human advancement due to the adoption of new ideas and building up new institutions. Famines therefore have wide social, economic and political implications. Societies affected by famines at the same time may possess a repertoire of survival mechanisms which lie dormant in good times and stand out in their boldest reality in a crisis. Thus social roles within a community are mobilised into action, sometimes there are structural changes to better manage the crisis.

Famines have been a major historical factor in the evolution and change of the Adigo rules of inheritance¹⁶. Perhaps famines played a more significant role in determining and influencing the course of historical events pertaining to inheritance amongst the Adigo than generally assumed. This is so since scholars have been led to have thoroughly debunked those once popular myths of tribal group insularity. While evidence from these myths might be incomplete, few attempts have been made to study these myths much more.

However famines that have occurred amongst the Adigo provide interesting case studies of their implications on the social organization of the people. The history and events of famines as experienced by the Adigo is certainly a history of desperation made necessary by a series of natural catastrophes culminating in famines of breadth and severity unprecedented in recorded history to the people. Under these pressures, the Adigo society devised a series of innovations affecting inheritance through kinship and marriage.

The Adigo rules of inheritance have been greatly influenced by famines. As a result of famines many Adigo clans were formed which directly influenced the rules of inheritance from patrilineal bias to matrilineal and dual inheritance. The clans formed during this period were either through sub-division of major part-clans or through adoption of aliens displaced by the famines. Famines of varied magnitude affected the Adigo people during the period 1836 - 1947 and probably earlier. Various famines have been recorded which occurred within the Coast Province of Kenya today. These famines were caused by amongst other factors drought and pests. Thus we have famines like Maere 1836 - 1838, Chingo 1857 - 1862, Mufu (1889), Bom-Bom 1894, Magunia 1898, Memarongwe (1910 - 1912), Muni (1914 - 1915) Dzua Bomu 1921, Nzige 1934, Ngano 1943 - 1945, Mbushutsii 1947 and the recent recorded one named Makusudi 1979.

Amongst the clans that were formed due to the events of famines is the Achina Kalangwa clan. It is said that during one of

Early famines there was need to store enough seeds anticipating rainfall in order to plant these seeds. These seeds were under the care of a woman, who was to ensure that they were used for any other purpose other than planting. The effects of famines was diverse, there were no food and the weak did not survive. The woman could not endure the hunger and see her children dying. In order to save them she cooked the seeds for her children. Out of rage, she was sent away from the other members of the family together with her children and was disowned by her maternal clan. She and her descendants were named 'those who saved the seeds' (Chidigo: Achina Kalangwa) and thus was formed the Achinakalangwa clan from the descendants of the matriarch. It is from this fact that the children could not 'hala ufwaa' from the patrilineal clan, because they were disowned. They had therefore to depend on what their mother could give and what she left after her death.

Here was started the idea of matrilineal inheritance, and also a system that emphasized the maternal side more than the paternal. The recognized ancestor was the mother rather than the father. Because of famine therefor, there was formed a clan that emphasized matrilineal lineage since they were disowned by the patrilineal lineage because of the actions of their mother. No doubt the springs here looked only at the matrilineal side for almost everything inheritance being one.

The 'Achina Nyiro' is another Adigo clan that was formed due to the activities of people during the famines. The descendants of the Nyiro were nevertheless prophetess, this time it was members of a patrilineal group. It so happened that these people were much affected by one of the famines, because they had kept themselves enough food supplies. While others went hungry in this household always had enough, so they were called 'those who were over fed' (Nyirwa is to over feed in Chidigo), the name of the clan is Achina Nyiro or descendants of the people who over feed during the famines. The Achina Nyiro were originally amongst the clan discussed earlier, so they are a sub-clan or the

The 'Achina Chinyavu' clan also came about as a result of the famines. Again a woman was widowed during the famines. She was left alone to take care of her family. This keeps in mind that the famines at this time had greatly weakened social bonds and the need for communal survival was no longer communal but individual. This poor woman was always participating in activities like hunting with her husband. However, due to male dominance of the act of hunting, she was always given a share smaller than others. She was always complaining. It is from these complaints that she was named together with her descendants as "those who complained of being given a small piece of meat" - Chinyavu is a Chidigo word derived from the word 'Chinyamafu' meaning a small piece of meat. The Achina Chinyavu clan amongst the Adigo are the descendants of that particular matriarch.

Major clans of the Adigo were thus formed because of their activities during the migration and settlement and the famines. It is evident that during the migration and at Shungwaya before settlement, the Adigo had not known one another by clan name¹⁷. The basis of matrilineal inheritance as the original form of inheritance is disputed by this evidence. What is of concern here is to look at how famines emphasised a change from patrilineal to matrilineal.

This incident radically changed the importance of the children's names and a shift from patrilineal to matrilineal inheritance.

The rise of Adigo matrilineal clans was thus through naming individuals from what they did incorporating into the Adigo aliens displaced by natural calamities such as famines, and marrying from other ethnic groups thus incorporating these people into the clan matrix and form a sub-clan. Nevertheless, this does not explain how inheritance came to be matrilineal from patrilineal. These changes occurred later on due to a shift in the importance between the tri-clan and parti-clan. Again events led to the drastic change in ideas on inheritance.

Famines left many of the Adigo and generally the Mijikenda people weak and desperate. They were prone to Arab attack and taken to slavery. During the famines many Adigo were reduced by selling themselves or their children for food. While it is not clear which famine the Adigo sent their children in order to get food, the father would give out his children as Kore. It is said

one man did exactly that and gave out his child to pay for
. Incidentally the marriage contract had not been completed
and the father was leaving with his children. The mother and
brothers objected to this because the child was still the
property of maternal clan. The father was thus in a dilemma to
hold himself or produce someone to bail him out. Luckily his
mother managed to sacrifice her child and bailed out her brother.

This incident radically changed the importance of the children
to their father, mostly it was seen that the children will not
help the father anymore, especially so when certain marriage
contracts were not completed. The nephews and the nieces who could
bail out their mothers' brothers gained considerable importance.
Whenever one was expected to pay 'Kore' because they had
bailed someone, or they were indebted they would rather give their
nephews and nieces instead of their own children. These were the
people who 'saved' or bailed out their mothers' brothers. Sons were
no longer useful to their fathers. Inevitably the importance that
the father had initially placed on his sons weaned away since they
were no longer be useful.

During the first and second world wars, the British demanded
that the Adigo should send their sons for duty as porters or as
coolies. This, they would do if the parents could not be enlisted
themselves. Again the aspect of 'who bails who out of trouble'
was emphasized. The idea that a member of a clan should be the one to bail
out his clansmen was again emphasized. For those who did not serve

lives, and had nephews they would send them instead. Sometimes the British insisted that sons or ones own children be sent. Both sons and nephews were sent in some cases. Thus:

At times sons would just be pin-pointed at home and they were taken to fight in the wars¹⁸

for the father to give out his nephew it was because he was giving out a member of his clan as 'Kore'. Also the fact that a nephew could be taken forcefully by the British, it was a form of a matrilineal version of 'Kore'. Hence another factor that brought about a change was that in which the sons claimed to be as important as the nephews because they were also given out as 'Kore'.

The basis of Adigo matrilineal inheritance is that the nephews would bail out the uncle in times of disasters, because they belonged to the same clan. It was thought fair that the nephews would benefit from those they can bail out, hence they inherited from the mother's brothers. It is a form of a compensating relationship between mother's brother and the children. It is basically a change on who is important in the family hierarchy. Here the family is now composed not of the father as the head of the household (Mudzi) but of the mother's brother as the head of the matrilineal clan. Another factor that emphasized matrilineality amongst the Adigo was slavery.

TRADE AND ITS INFLUENCE ON INHERITANCE

slavery and slave trade existed along the Kenya coast prior to the 19th century. Its scope expanded greatly as a result of the growth of trade and agriculture. The recruitment of slaves, as well as the enslavement of persons took place in many different ways. One important means of recruitment was that people were born into slavery, out of slave parents. Other mechanisms of capture included warfare in which the slaves resulted as prisoners of wars, booty, raids aimed particularly at the capture of slaves but also other booty; kidnapping on an individual level, courtship in which persons were enslaved for violating rules of morality; witchcraft accusations in which persons were enslaved for engaging in illicit super natural activities or sale of ones kin in the wake of famine or epidemic. These mechanisms were of varied importance at different times and climes.

There are no major slave raids that have been recorded in the history of the Adigo. Nevertheless a considerable number of Adigo were taken into slavery especially to work in plantations. Since the 19th century there had always been at one place or another in the interiorland the petty type of warfare which produced slaves. In the course of such wars men, women and children were carried away and villages burned. Thus of 145 slaves freed in Kwale District in 1900, fifty-five were Adigo, nineteen were Yao, eighteen were Makua, ten were Zigua, three were wa-shenzi (Bondei) and three from Nyasa¹⁹. When famines occurred either because slave raids

...ed crops and people were taken away for the necessary labour families sometimes sold their children and sometimes gave lives into slavery, as this was reasoned to be the best tee available of food and security. Many Adigo people are ed to have pawned their nephews into slavery in order to off starvation²⁰.

It was impossible for the Adigo society to have accommodated e effects of the slave trade without undergoing serious e. Examples amongst the Adigo indicate that their social n emerged as a consequence of the slave trade which seemed depended upon the entrance of intrusive cultural elements into particular region; the disruption, by slave traders and other rs of the indigenous political and social systems; and the ively permanent settlement of new slave merchants and their ly recruited minions. Given this intrusions; disruption and ement, a new stratified social order began to develop, further enting Adigo society and leading towards the emergence of nct cultural groups from amongst the detribalized offsprings lavery.

Slavery reinforced the social order amongst the Adigo people. ctures of Kinship, status and seniority were transformed. In hip, slavery influenced the rules of marriage and patterns of age structures, and in seniority, the pervasive chronological gories of age sets distinguished by ritual initiations were sformed. The Adigo cases provide a straight forward example of

ry reinforcing a social order though in other areas slavery
more to corrupt, subvert and otherwise transform kinship
ms than it did to reinforce them; these systems were not
pt by slaveholding amongst the Adigo rather the corruption was
result of the societies need to transform and fir with
ailing situations.

Because of slavery the Adigo matrilineage structure is further
veloped and reinforced, at the cost of a minor increase in the
al distance between husband and wife. In the Adigo matrilineal
em as stated earlier a man's own sons are seen to be members of
wives lineage, not his own (for his lineage is that of his
er and his sisters); and the most closely related males in the
generation, who would inherit his goods and titles at his
ch were his sister's sons (or proceeding in the opposite
ection between a man and his mother's brother) was the key link
questions of inheritance. The logic of the matrilineal system
hasized by the Adigo also is that you always know who your
ner is, if not your father.

Slavery substantially emphasized patterns of matrilineal
eritance. As explained earlier such calamities like famines
used the need amongst the Adigo to establish a social system to
e with the disasters. During the famines and slavery it was
ortant that one was able to save the others. Activities during
hines emphasized matrilineal inheritance because many Adigo
wned their nephews into slavery in order to stave off starvation

reported ... inheritance.

When nephews (or nieces) were went to Mtongwe they would have to go and work there and the father of the boys or girls had no say in the matter²¹.

While the fact remains that it was the nieces or nephews given, it should be noted that emphasize here is on 'who saves who' during times of calamities and disasters. The nephews and nieces from the fact that they belonged to the same matrilineal clan as their mothers' brother (Chidigo; Aphu) were given out to save or pull out their clansmen. In order for the elder clansmen to escape every an element of 'Kore' (bloodmoney) is given in the form of a niece or nephew. These practices that were enhanced by famines and droughts did nothing amongst the Adigo other than emphasizing the continuity of matrilineal inheritance.

Were it that the clans did not exist and society remained one of kinship, where patronage was based on seniority of age, no doubt fathers would have had enough control over their children. They could have prevented the one's who would, have suffered in the form of being taken into slavery, or for the wars; and with their subsequent return or possible freedom, they would have been in a better position to demand a share in inheritance. Because it was the nephews or nieces who suffered, they had every right to demand inheritance from their mother's brother's property as their right in the same way as it was the right of their mother's brother to pawn them when need aroused. The nephews thus displace the sons in strength of

claim to inheritance. Marriage to slave wives amongst the Adigo, or women displace
lavery activities was responsible later on in the process of
ge, for again it brought the corruption of matrilineage. The
dren by slave wives had no mothers' brother standing in
sition to the father²². Also since a slave woman had no known
ilineal lineage except that of his husband a man's son by slave
es would be in his own lineage or in no lineage at all. Thus
a man to marry slaves provided more than the advantage of his
sonal power over her. It also gave him a new control not to be
red with his brother or elders over the labour of his offspring
inheritance of his goods without breaking matrilineal descent
es of inheritance. Again slavery creates and reinforces
ernal supremacy amongst the Adigo. However, here the concept of
riarchy underwent definition. The initial one meant that
munity leadership resided with the senior male - the patriarch,
was maintained by a consensus of the community, but now the
riarch's position is defined more by raw power than seniority.

Slavery thus brought about changes in the Adigo rules of
heritance in that it gave rise to clans and changed at a later
age the ideology of inheritance due to the situation of the time.
ese changes might not be the only changes which took place at
at time and conceivable not even the most important changes that
is society underwent. Other changes are however beyond the scope
our study. Changes brought by slavery in the Adigo rules of

heritance not only verify a succession of transformation in Adigo but demonstrate that these changes were part and parcel of the transformations of the modern world. Slavery has been abolished nearly three generations. Yet its great extent in earlier days the repeated and tumultuous social changes which it brought about over a three century period cannot be ignored as a factor of influence in the Adigo life today. Effects of slavery still mark social realities of the modern Adigo society.

The combination of all these factors have shown amongst the Adigo, a body of law developing, at a time that is still recent, without deliberate guidance from either legislator or authorities, colonial or indigenous. It is this law thus developed that we shall discuss in our next chapter.

Kuhala Uvira, may as well include the widow marrying one of the deceased brothers.

Many of these stories about Adigo clans are from interviews conducted with Adigo seges from various areas where Adigo live today. Their names are given in appendix III. However special mention is made here of Saldi Rimo Mwaqumbo (Kinonda), Juza Keko (Galu), Khamis Nwachidegere (Waa) who seemed to be precise with the information on Adigo clans. This usually gave rise to women owning property individually which in turn gave rise to matrilineal tendency towards inheritance.

Interviews: Masad Nwachirenje (Kinonda) 12.10.1991, Oscar Mwaqumbo (Muhaka) 18.11.1991 and Swacha Nwachitso (Waa) 12.11.1991.

See T.T. Spear op. cit. p. 7

TES

Interview, Juma Keke (Galun) 11.1.1992, Hamisi Mwachidegere (Waa) 15.1.92 and Bakari Kufaa Mwadzowa (Waa) 15.1.1992

Interview, Bwana Kali (Ng'ombeni) 12.1.1992, Omari Bakari Mwakaniki (Muhaka) 22.1.1992.

Interview, Omari Bakari Mwakaniki (Muhaka) 10.12.1991, Rimo Said Mwagumbo (Ukunda) 11.11. 1991.

Interview, Saidi Kongo Mwachaunga (Diani) 11.11.1991, Saidi Rimo Mwagumbo (Ukunda) 12.11.1991.

Interview with Said Rimo 12 Oct. 1991

Interview Juma Keke (Galun) 2.12.1992, Saidi Rimo (Ukunda) 13.2.1992

Interview, Muhammad Tsari (Msambweni) 3.2.1992, Muhammed Omar Mwakilalo (Msambweni) 6.12.1991, Hamisi Mwachirenje (Kinondo) 4.12.1991.

For a history of the migration of the Mijikenda refer to T.T. Spear The Kaya Complex (Nairobi: Kenya Literature Bureau) 1978.

Interview with Rimo Said Mwagumbo (Ukunda) 10.10.1991.

T.T. Spear op cit p.7

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D.C. Sperling op.cit 135

W.F. McKay op.cit p.136

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Interview, Hamad Mwachirenje (Kinondo) 12.10.1991, Omar Mwakaniki (Muhaka) 18.11.1991 and Swalehe Mwadzitso (Tiwi) 15.1.1992.

See T.T. Spear op. cit p.7

Interview with Mwakaniki (Muhaka) 22.10.91

W.F. McKay op. cit p. 116

See D.C. Sperling op cit

Ibid. p. 135

See L.P. Gerkach op cit pp. 24 - 25

Law is such a common word that most people in different
cultures are not likely to seek its meaning in a dictionary.
They may think that they know what 'law' means, even though they
are ignorant of specific laws. Law may be accepted in a society
that views government and religion as part of its social
structure. In a society's dealing with fellowmen it may equate law
with politics with government and religion with God.

For jurists who designate their disciplines as social sciences
rather than legal studies. They are confronted with problems of
method and generalizations when defining law. That they
use familiar concepts and probe beyond current verbal symbols
to deeper cultural meanings. Hence they ask: Are politics,
religion and law conventional ethnocentric categories of western
civilization, rather than analytic constructs of
universal validity? Are they reflections, not of any universal
truth, but of our pragmatic culture bound methods of organizing
social life? Do they provide any unifying (or systematic)
principles? Answers to these questions from different societies
may help to clarify the meaning of law.

CHAPTER FIVE

THE ADIGO CUSTOMARY LAW OF SUCCESSION

AN OVERVIEW

Law is such a common word that most people in different societies are not likely to seek its meaning in a dictionary. One may think that they know what 'law' means, even though they have a certain ignorance of specific laws. Law may be accepted in a society together with government and religion as part of its social organization; in a society's dealing with fellowmen it may equate law with order, politics with government and religion with God.

For jurists who designate their disciplines as social science the matter is less simple. They are confronted with problems of comparison and generalizations when defining law. Thus they question familiar concepts and probe beyond current verbal symbols for deeper cultural meanings. Hence they ask; are politics, religion, and law conventional ethnocentric categories of western intellectual development, rather than analytic constructs of general validity? Are they reflections, not of any universal reality, but of our pragmatic culture bound methods of organizing thought and behavior? Do they provide any units for systematic comparison? Answers to these questions from different societies have a perplexing meaning of law.

In studying societies and their understanding of law there has been much controversy over definition, in terms of the relative emphasis to be placed on function, structure or ideation. The functional emphasis served to distinguish among general principles of social control; functionalist analyzed the operation of institutions (moral and ritual as well as 'legal') behind rules of conduct, rather than the structured units through which they were effected¹. Structurally, the legal system was conceived as embedded in corporate groups whose boundaries might be deduced by relations of membership, the alignment of these groups vis-a-vis another provided the broad framework for social behavior. The functional dimension was derived from interpretations of justice, rights, wrongs and obligations of people towards one another and towards those selected meaningful things that the property constituents of their society.

Law can be considered as an inclusive rubric for all rules of conduct. Sometimes it can be narrowly defined as rules enforced by specific and limiting procedure. If defined in narrow legalistic terms as that which is recognized by courts, or as social control through the systematic application of force by politically organized society, the existence of 'Law' is denied in many societies. When such a denial of law occurs, it does not however deny the maintenance of order in a society by other mechanisms, hence " ... some simple societies have no law although all have customs which are supported by sanctions"².

societies may not have separate law making body, no courts, specific legal machinery for enforcing rules, yet they carry on related existence and are able to cope with disputes without annihilation. Such societies apparently continue to operate actively through other types of organization and control. In societies that are relatively undifferentiated the component units structure are multifunctional. Multifunctional in that they perform purposes we commonly define as religious, political and economic. Multifunctional units are also more frequently based on the organizing principles of status - descent, locality and age, than on individual relationship established on the basis of individual interests or interests. Even when their structures are consciously differentiated, they may operate within a single conceptual framework of ideology, so that the ideology of religious activity may act as a moral code or a political dogma. So is the law of the Adigo.

LEGAL PROCESS OF THE ADIGO

Traditionally Adigo law was expounded and applied by the *Adigo* elders³. In terms of rank they were ordinary men who had no prescribed authority or status; their position depend on skill in mediating disputes and on 'knowing the society well'. People would patronize them for these special abilities in much the same manner as a skilled herbalist or a harp player might be patronized.

Every Adigo accepted in principle certain codes of law, usage and convention. Political and legal relations were scarcely

entiated. As competition is considered inherent in the
of man; Adigo clans competed for territory and power;
es and individuals for cattle and personal influence. There
o recognized agents for peaceful settlement of disputes
n clans.

Within the clans the most specific procedure for dealing with,
ssening recourse to violence, was provided by appeal to
individual men who were sufficiently recognized to be
ically designated. Despite their position being based on
ality, knowledge and ability, they were not rigidly defined
ttached to any corporate body, and carried no executive
ity. Yet, their opinion was taken as expressing a general
sus, which, if not accepted by a disputant, permitted the
party to seize his due with the approval of the community.
oxically, in a society emphasizing the principle of descent,
ain position of legal significance was hereditary.

In the Adigo traditional system of law, the decisions of the
elders were not backed by force, but by the moral consensus
e community. The promulgation of a decision gave the
ssful disputant an assurance of his legal and moral right, and
tisfaction was not made then, one might forcibly seize his
with the community's approval. It was largely at the Ngambi
that the Adigo began to evolve new codes of rules about
itance.

disputes over succession to an estate may arise between members of the succeeding group or between them and non members of the group. No matter who are the parties to succession disputes, the Adigo are reluctant to engage in a protracted succession dispute or, in fact, to be involved in one at all. The reasons for these attitudes are varied. Among them are superstition, fear and respect for the dead. Most Adigo feel it is disrespectful to a deceased person to dispute over their property. The reasoning is that, people should not quarrel over wealth arising from a death occasion, the death of a person. It is always thought more important and honorable to mourn the dead than to dispute over property left behind.

The underlying spirit of administration of estates is that of alleviation of disputes through reconciliation; the objective is attainment of family unity and peace. The rules of the distribution of property can sometimes be so flexible to allow administrators to by-pass many causes of disputes. While an strict application of the rules of distribution within the broad general principles may spark off disputes, administrators have, on the other hand, exercised their discretion in such a way that disputes are more likely to be avoided than created.

Every effort was made to nip succession disputes in the bud. It is the duty of the family and elders of the society to bring about an understanding between the parties. Disputes must not be made a public affair. The result of this being a handful of succession

es amongst the Adigo reached the courts. It is also a common
of complaint by the elders (Ngambi) of a kindred that their
, and, in consequence, the family solidarity, had been
ly undermined by some of their members referring cases to
. Disputes over inheritance are usually settled by the
rs of the kindred concerned, and if they were unable to
e them, they would refer them to a meeting of the whole local
irrespective of their parents' wealth and no matter how
it is worth.

Other reasons for paucity of succession disputes are that,
recently, people did not leave much property for
tribution. The bulk of wealth was land and the practice was
it was not divided but inherited as family property by the
of successors, care to this land being the responsibility of
head of the family. Also, the oral form of testamentary
sition of property in customary law, as opposed to
mentary succession by written rules did not occasion the
em of construction of will and the ascertainment by courts of
tator's intentions for his written wills. Arguments as to the
ngs of words, particularly technical words of limitation and
rtions (shares), do not arise in the Adigo customary law.

ROLE OF CUSTOMARY LAW OF PROPERTY AND SUCCESSION AMONGST THE

A discussion of the functions of the law of succession in any
ety cannot present a complete picture unless it also refers to

ctions of the law of property. One of the most important
y amongst the Adigo is land. Land forms the bulk of wealth
up ownership of land was a characteristic feature of land
in the region. Thus the birth of a person into a group
s him to succession rights in the ancestral property owned
group. Thus within a family, the succession laws guaranteed
y and succession right to land to most of its members at
irrespective of their parents wealth and no matter how
it is worth.

are not regarded as permanent members of their fathers'
y its rules of management and succession to land, the Adigo
ary law, has ensured that ancestral property is not wasted by
iving members of the owning group. Sometimes strict rules are
d to achieve this. About ownership of land some informants
"... land belonged to a vast family of which many are dead,
e living and countless number are still unborn"⁴ Hence the
tion of this heritage is understood by the Adigo in the
round that there are those who are born and those who are
in the womb, they will require means of support whereof, the
y land and possessions must not be wasted or squandered.

also the liabilities in the estate. This means that the
Group property ensured group unity, solidarity and inter-
dence amongst the Adigo⁵. These characteristics were more
ficant in the not-so-distant past of the Adigo when might and
gth rather than the rule of law were instruments for the
rvation of life and property, not only of the individual but
e community. A community must be strong enough to resist

s from its neighbors. As a general principle, the succession of the Adigo ensures that males derive property and succession in the family or community to which they belong.

Because property and succession laws have evolved in such a way as to promote family cohesion, the laws deny daughters succession rights to land, in particular and to chattels to a certain degree. The exogamous system of marriage removes daughters from their parents to their husbands' family. The result is that daughters are not regarded as permanent members of their fathers' family and for that reason are denied rights of succession to a share of property. In the case of an unmarried daughter, the possibility of a future marriage subjects her to the same consequences as if she were married. In her husband's family, the possibility of a divorce and the fact that she is not a blood relative or descendant of her husband's family deprive her of succession rights in the family.

A distinctive characteristic of the Adigo customary law is the principle that a successor inherits not only the assets in an estate but also the liabilities in the estate. This means that the successor assumes the duties of the deceased dependents. In this customary law of succession ensures that a deceased's duties and obligations survive him. Thus a successor is liable to pay all debts owned by the deceased even if the estate is insufficient for discharging the debts.

One should also note that intestate succession is more frequent under customary law than testate succession. The result being that the estate of the deceased person is succeeded by his successors according to the rules of intestate succession. In testate succession, property may be succeeded to by anybody to whom a valid will on demise has been made. Thus customary law of succession which testacy is the norm, ensures that only a deceased's successors within his lineage, and not outside it stands to gain or be materially affected from the death of a member of his lineage.

The Estate Amongst the Adigo: Categories of

Heritable Property

An understanding of the categories of property which constitute an estate and the nature of the rights and interests in it is essential for an appreciation of the law of succession of the Adigo.

No doubt the definition of the term 'property' may be an abstraction. Informed cognition occurs that an estate belongs to X. The fact that the cognition occurred can be described as 'property'. But when we speak of a man living property by the word 'property' means the asset, what was called an estate above. For our present purposes a man's property will mean not only his estate but his asset. The heritable rights constituting an estate include rights of succession to title and offices held by the deceased in his lifetime. Within the family it may include the

of the headship of a family - either headship of a
deceased's household comprising his children and wives, or the
headship of the extended family. The headship of a family is
intimately connected with the administration of estates. However
in this study we are least concerned with succession to status. Our
concern is on the broad and conventional classification of property
into immovable and movable.

IMMOVABLE PROPERTY

It is common amongst the Adigo to find that ownership of land,
on which trees and buildings stand, and the ownership of or the
usufructuary rights in some of the trees, crops or buildings are
held in different persons. This situation arises from the
practice by which a land owner may choose to sell or pledge only
economic trees on his land, or he may lease his land while
retaining the usufructuary rights over the trees on the land. The
significance of this distinction in the rules of succession is
obvious since land and the objects on it may belong to different
persons, the successors to these respective owners will inherit the
property owned by their deceased relative. We therefore subdivide
immovable property into land, trees, crops and buildings.

LAND HELD ON PLEDGE

The pledging of land is common amongst the Adigo. It consists
in the transfer of land from the pledgor to the pledgee as security

loan or money. The pledger delivers the possession of the
to the pledgee who enjoys usufructuary interests in the land
its redemption. The pledgee appropriates the product
ng from the land as his interest for the loan. The interest
rived does not diminish the capital. A pledge in customary
differs from a mortgager in the general law, in that a
gator retains both legal title and possession of the property
he makes default in the payment of the money, at which event
ortgagee may exercise his right of foreclosure. In the Adigo
mary law, the possession of the property passes to the pledgee
the legal title or ownership of the property remains with the
er. The mortgage type of transaction in Adigo customary law
re.

A detailed treatment of the law relating to the pledgee is
de the scope of our study. We are, here mainly concerned with
ating the nature of heritable rights and interests in a pledge
actions. We may, however point out that the payment or tender
ne money to the pledgee determines the pledgee's interests.
money may be paid to his successors, and may even be paid by
pledger's successors. This is one of the consequences of the
n in customary law that 'once a pledge always remains a
ge'.

LAND HELD ON LEASE

There are two types of lease in the Adigo law. One type is the granting of land to a tenant on payment for a fixed period or on a year to year basis. Subsequent renewal depends on the mutual consent of the parties. The second one is granting of land for a definite period on payment of a token sum of money or gifts. This type of grant is made for the building of house, and for agricultural or industrial uses. The permanency of the grant is essential to the grantee. Therefore, provided the grantee uses the land according to the terms of the grant, does not attempt to alienate the land as distinct from the fruits of his labour, and pays the agreed yearly rent, the grantor cannot at will terminate the tenancy. A grantor will not be allowed to eject people who have spent a considerable amount of money in developing land granted to them, provided the development is limited to the agreed or other uses ancillary to it.

CREATION OF FAMILY PROPERTY

Kinship is the major basis of land-holding over many societies. It is particularly so amongst the Adigo. Societies are organised into kin groups known to social scientists as 'lineage', that is to say, groups consisting of all the descendants of a particular ancestor through a determinate number of generations. A number of related lineage (or lineages which believe themselves to be related) constitute a 'clan', and we may find a single

age or group of villages occupied by a clan in this sense. On the other hand, a large lineage may consist of a number of segments or sub-lineages, so that it is not always easy to distinguish between a 'clan' and a large lineage.

Kinds of immovable property that can be held by a family include land - both residential and farmland; trees - economic, timber and other trees, crops, buildings - living houses and houses for other uses.

Family property amongst the Adigo is created by the operation of the rules of intestate succession. A deceased's property, on his death intestate, becomes the family property of his successors until the property is divided amongst them, and if it has not been disposed of otherwise. Before death 'self acquired land is not turned into family land though the owner might have been kind enough to allow some of his family to live on the land and enjoy the use of it.

Another method by which family property arises is by the making of wills. A person may, in a will made under the general law, constitute some of his property as family under customary law. Family property is thus created by a declaration to that effect in an oral will by an owner of property before his death. It is respectfully submitted that such dying declarations do not, in customary law, constitute property as family property unless such property would have devolved otherwise on intestacy, but for the

ation. A declaration of what is already provided for in the
s superfluous. A dying declaration in this respect is
nt only where property is given to one or more specific
s to the exclusion of others who would have been entitled to
intestacy but for the declaration.

NATURE AND EXTENT OF A MEMBER'S INTEREST IN FAMILY PROPERTY

As noted earlier, the ownership of family property amongst the
is the corporate body of the family and that a member of the
y can only acquire possession and subordinate interests in the
rty. A member's interest in family property terminates at his
and does not form part of his heritable estate. Thus there
question of a deceased leaving behind him an estate in the
y property for his children to inherit. They inherit as
ers of the family, not by virtue of any estate left behind by
r father. As a matter of fact the deceased will have left no
ce in the family property. Nor could he have left any such
te, because up to the time of his death he had no separate and
nable estate in the family property.

A member cannot, therefore validly bequeath his interest in
ly property to anybody, not even to his children. The general
ciple is that the right of a member to make use of and enjoy
ly property never ripens to ownership. The occupation of
ly land does not pass ownership of the land to the occupier.
one is allowed to live in a family house, he has only personal

ational right which can never ripen into ownership. A member
s the power unless, with the consent of the family, to sale,
gauge or lease his interest in family property. Neither can he
gn his interest in individual family property in payment of his
nor can it be attached by his creditors. A member has the
t to live in family house, but if he lives outside it, he
ot let to tenants any rooms which were allocated to him. The
s will be re-allocated to other members of the family. It will
een that these examples reflect different aspects of the same
eral principle that a member's interest in family property is
co-extent with the right of ownership of the property which is
ted in the family.

INDIVIDUALS ACQUIRES LAND, TREES AND CROPS

An individual may acquire the totality of interest in
ovable property by gift, purchase or inheritance, and, in the
e of trees and crops, by cultivation as well. Houses may be
lt by their owners, as well as acquired through one of the ways
ve. Some trees are self-sown. The general rule is that
ership of such trees follows that of the land on which they
w.

It is important to emphasize that inherited land becomes the
ividual property of the successor if he is not obliged to
ilize it with any other person and if the principle succession
der which it was inherited confers on the successors the power to

nate such land without the consent or authorization of
ody⁶. A person may be the sole successor to a piece of land,
rtheless his interests are only for his lifetime and, at his
h, the land passes to another member of his lineage. Thus the
fact that a person enjoys alone, to the exclusion of other
ers of the succeeding group, the interest in an ancestral land
uilding (for example their father's living house), does not, by
elf, confer on the successor unqualified rights in the property.
eldest son in a family has, amongst the Adigo, a life interest
some economic trees and pieces of land, other than the father's
ing house. Such property is still family property until is
titioned by the successors, in the case of land, or shared in
case of trees.

PRINCIPLES UNDERLYING THE DIVISION OF THE ESTATE AMONGST THE ADIGO

The main patterns of distribution of property amongst the
go corresponds to different methods of reckoning family
relationships in the succeeding group. There are, therefore, the
trilineal, matrilineal and bilineal families relationships. The
trilineal is the pattern in which a man's estate is inherited by
s children and in lieu of his children, by his patrilineage. In
matrilineal system, the matrilineage is entitled in the estate in
e exclusion of a man's children, and his patrilineage. In the
lineal pattern each of the lineages, succeeds to different parts
the estate. The succession rules of the Adigo family which is
trilineal is not however, as homogeneous as is one which is

neal, especially as regards the choice of successors within the lineage. Sometimes the Adigo may sub-classify the lineage family, following the patterns of choice of the breeding group. For our study we shall adopt a classification of inheritance based on both the pattern of distribution of the estate and the choice of successors. The result being following classification of patrilineal, bilineal and matrilineal families. We shall further discuss the nature of these families below.

PATRILINEAL FAMILY

In a polygamous⁷ Adigo family, an individual owner of property may have a number of wives. Some of the wives may have male issues as well as daughters. Some may have only daughters and some may have no issues at all. During the lifetime of an individual, all self-acquired property is his and does not become family property, although he may be making use of the property with his children and wives. A man and his children may be described as a family. It is important to note that within each Adigo polygamous family there are sub-families each comprising the father, his wife and children. This organization of a polygamous family into sub-families is important in the distribution of property at intestacy.

At the death of a man, his property is by the operation of the law of intestate succession, vested in his children as a corporate body. The children of the male members of this owning group become members of the group as they are born.

e earlier noted that a patrilineal family is that in which members run through all descendants of a common male ancestor in the direct male line and is transmitted by each man to his children - male or female. Membership of the family cannot be transmitted through a woman member and consequently her children are not members. The owning groups amongst the Adigo are male-orientated in that female members have no rights of succession but are expected to be maintained from the property by the male members. Members of the member of the owning groups have no succession rights in the property on the ground that they are not descendants of male members of the family.

Thus a 'family' may comprise members of different generations in the family. The number of generations of members of a 'family' may continue to increase (ad infinitum) as long as the property is in existence and still belongs to the family. After a partition of the property or distribution in case of chattels, each member becomes the owner of his or her share. It must be emphasized that self-acquired property of an individual remains his own freely disposable property, so that at his death it revolves on his own children as family property and from this point, a new family owning group starts to grow. Thus at the death of a male member of the original family, his children will constitute a new family in respect of his self acquired property. By applying the above principle, the owning group of every property can be determined. A man may therefore have rights in more than one 'family property' in the same extended patrilineage. A patrilineal family is

ly a residential group and this facilitates the
stration and use of the family property by its members.

TRILINEAL FAMILY

The matrilineal family consists of all persons male and
e, linearly descended in the female line from a common female
cor. Membership of the family is transmitted by each female
r of the family to her male and female children, but the
ren of the male members will in turn belong to their mother's
lineal family. A fiction has been evolved amongst the Adigo
by children of a man by a woman married from a patrilineal
ty becomes a member of their father's matrilineal family. The
also becomes a member of her husband's matrilineal family and
fore becomes entitled to succeed with others to her husband's
erty.

This is the only instance in either the patrilineal or
lineal families of the Adigo where a wife has succession
s in her husband's property. The reason for this custom, the
lineal families explained above is to enable the wife and her
ren to belong to an existing matrilineal family, for since the
n comes from a patrilineal society, she has no matrilineal
y in her husband's society and her children will be exposed to
al and economic hardships for some generations to come, until
develop their own matrilineal family. This custom has
uraged men from the matrilineal families, whose families are

nishing to marry women from patrilineal societies so that their
s and children will increase the number of the matrilineal
ly. Many young Adigo men who resent the matrilineal rules of
heritance decide to marry from patrilineal societies to ensure
their children will have succession rights to their father's
acquired property.

Since marriage is exogamous in the matrilineal as well as in
patrilineal families, the matrilineal family is not normally a
idential unit. Members of the matrilineage tend to live in
ighbouring villages. As in patrilineal families, the self-
quired property of a member of a matrilineal family is his or her
ely alienable property until the death of the owner, when it
l be inherited by his, or her matrilineage.

BURIAL AND FUNERAL

Before the estate of a deceased is sub-divided, it is usually
ministered by an appointed person. This administrator and its
ministration serves at least a four-fold purpose: (i) it ensures
at a deceased person shall be buried in accordance with agreed
actice (ii) that the property comprised of the estate is
otected, preserved or accounted for before distributing (iii)
at the deceased's responsibilities to his dependant - children,
ves and wards in particular are discharged until the
sponsibility for caring for them is formally shared and (iv) that
e balance of the property in the estate after the funeral

ny of the deceased person is distributed among his successors
ordance with the rules of interstate succession.

Contributions among successors may be per capita or by each
the burial of a deceased person in customary practice is
ed by a funeral ceremony (Hanga). Normally it lasted seven
though it takes only three days now. There was also the
d burial' (Hanga Ivu) which would be done normally between a
and one year after the burial. Responsibility for both
nies lies with the same person or persons. The burial of a
ed person is relevant to customary law of succession because
responsibility for the burial of a deceased, as a general rule
on his successors. It is thus important to examine the
e of this duty and the consequences of its non-performance.

RESPONSIBILITY TO BURY IN A FAMILY

idren, her brothers, sisters and father? A husband does not
The person entitled to the lion's share of the estate assumes
responsibility of financing the burial of a deceased person.
e case of the death of a man in a patrilineal family, his
t son is the principal mourner and on him falls the
nsibility for the burial of his father. However, on a married
's death, the husband buries his wife although he may not be
led to a lion's share of the estate. Her sons who are her
essors usually provide most of the burial requirements. The
on primarily responsible for the burial of a deceased person
not always shoulder the expenses alone. All the other
essors are obliged to contribute their share, usually less than

chief mourner.

Contributions among successors may be per capita or by each family in the case of a polygamous family. Apart from the successors, the extended family and relatives generally make contributions (Mazikwa) to the funerals. These contributions may include providing livestock, money and food. In the case of a man, his wife, her husband, where he is not the successor to the property, has a duty to assist his wife's successor, her sons, in the case of their mother; but if he is the chief successor, the full responsibility is on his shoulders.

Within the Adigo matrilineal family, the burial of a married woman does always follow the right of succession to her property. The line of succession in respect to a married woman's property is to her children, her brothers, sisters and father⁸. A husband does not inherit his wife's property. At the death of a married woman her husband and brother have the privilege of nominating who should bury her. If the husband is wealthy, and particularly where the woman has no issue from him, he is asked to bury his wife. This duty does not confer on him any rights of succession. He normally does not inherit, so as not to antagonise his children by that marriage. If the husband cannot shoulder the expenses or refuses to do so, her children would be responsible and, if they have not the means, her brother, brother and sisters will do it. Where children do not inherit their father's property the duty to bury follows the right of succession. Thus a father buries his sons; if the father is

an elder brother buries his junior brothers and sisters, and bury their mother.

In bilineal families, the general principle is the same as in patrilineal families: that the duty to bury follows the right of succession. It is the primary duty of the matrilineal family to bury one of their deceased member. Thus despite the fact that sons are expected to make a substantial contribution towards the burial of their father, yet the matrilineage accepts it as its duty to do so. While in the bilineal families the sons of a man succeed to the living house, yet this does not saddle them with the primary duty to bury their father. The legal responsibility is on the matrilineage who inherit a great bulk of the estate. Where the patrilineage assumes its legal responsibility to bury, the matrilineage normally makes a contribution towards burial. On the death of a married woman, it is the primary duty of her sons and matrilineage to bury her. But patrilineal family and husband normally contribute, though it's not their primary duty to do so.

POSITION AND RIGHTS OF THE ELDEST SON

The eldest son is the most senior in age among his brothers at the death of their father. Between twins, the older is the first. A son who dies in his father's life time has no succession rights in his father's estate.

This rule is based on the general principle that rights of succession are vested in a successor's at the death of the owner of the estate. If however a son survives his father but dies before his father's burial and the distribution of the estate, the eldest son's son succeeds only to those rights to which his father is entitled absolutely and not to any property in which his father would have had a life interest.

The eldest son is entitled to special property by virtue of his status in the family. He enjoys this property during his life to the exclusion of his brothers. He is entitled to reside in his father's dwelling house. Subject to the accommodation required for his own family, he will allow his junior brothers to move into the house with his sisters. In case the younger brothers move into the house with their wives, then customs do not allow the eldest brother to occupy the house anymore. The eldest brother is entitled to the use of the piece of land within or surrounding his father's compound and to harvest the economic trees in it. The special property to which the eldest son is entitled includes his father's hat, stool, knife, spear and arrows. He is also entitled to the dresses which his father wore on special occasions and to his walking stick. A common characteristic of the moveable property which is left for the eldest son is that it is the property an average man in society is expected to own.

The eldest son enjoys these special rights in addition to his share in the remainder of the estate. In the Adigo society the

st son does not succeed to the remainder of the estate to the
usion of his junior brothers. Though it is often said that the
st son succeeds to his father's estate, what it means is that,
the head of the family, he succeeds to the estate not
usively but for himself and his junior brothers. Thus the
st son administers his father's undivided property as a trustee
eneficiary on behalf of himself and his brothers. There is an
ication then on this principle of primogeniture which may mean
of these three:

- (i) Succession to man's estate by his eldest son, where
all his sons, were born of one and the same wife.
- (ii) Succession by a man's eldest sons the eldest sons
by his various wives irrespective of their ages, or
- (iii) Succession by the oldest man among a class of
persons each of whom can in turn be described as
his nearest patrilineal blood relation.

It is to be emphasized that amongst the Adigo, when people
k of the eldest son succeeding to his father's, what this means
that the eldest son succeeds to his father's status as the head
the family. As regards succession to property, he is entitled
the largest share when the property is distributed, but until
en, he holds the property as a trustee - beneficiary for himself
d his brothers.

When the property is distributed according to the number of families in the larger family, that is number of wives or sons with sons, the eldest son of each wife or mother does not take the property to the exclusion of his junior full brothers. The share of each of these sub-families is then divided again if there is a dispute between the individual sons who compose it. It has often happened that brothers have left the whole of their inherited land to their eldest brother. In a sub-family in which the brothers have not inherited, there will be no necessity for dividing their inherited property. It will remain their sub-family under the eldest son's management until it is divided. The principle of primogeniture in Adigo families applies only in succession to the headship of a family and not in succession to property whether movable and immovable.

Immovable property remains the family property of the head of the family until it is divided. It often happens that the head of a family does not divide on one occasion, but divides on two occasions.

OF DISTRIBUTION

There is no legal distinction amongst the Adigo between the inheritance of real and personal or movable and immovable. The legal nature of an object will always affect the manner in which it is to be shared. The classification that can be made of movable and immovable property should not suggest different rules of inheritance applying to them. This type of classification can only serve to bring out the kinds of interest in different categories of property. In Adigo families where women do not succeed to a man's property no distinction is made between succession to realty or personalty, and where women do not succeed to a man's property no distinction is made between succession to realty or personalty, and

women succeed to a man's property, they succeed to both and personalty.

There is no fixed ratio for the sharing of an estate among the sons. The share of the eldest son, which is usually larger than that of his junior brothers is determined on the basis of what the administrator thinks reasonable, taking into account the size of the estate and the number of the successors. When division is on a family basis, they would inherit (sons) what their mother inherited (land). Thus the size or area under their mother's management will be theirs. After the eldest son's special share has been allocated, the deceased's sons decide which of the remaining property they wish to divide amongst themselves. The undivided property remains the family property of the sons. Usually the whole property is divided. It often happens that the whole of an estate is not divided on one occasion, but in bits as the need arises.

METHODS OF DISTRIBUTION

There are two main methods of distribution of estates: (i) distribution per capita (ii) distribution into as many sub-families which comprise the family as eligible. Under the first method, per capita, the property is divided into as many shares as the number of sons to inherit irrespective of the number of sons of each of the deceased's wives. The eldest son receives the largest share and shares of the other sons diminish

respondingly according to their seniority in age.

The distribution of heritage among sub-families involves dividing the property into as many portions as there are wives or mothers with male issues. the eldest son takes first for himself on behalf of his full brothers, then the eldest son of another wife who is next in age takes for himself and his full brothers, then the eldest son of yet another wife who is next in age takes for himself and his junior full brothers etc. Thus in sub - families the eldest son of each wife or mother receives the share in as trustee - beneficiary for himself and his fullbrothers. Let us look at some examples on how property can be distributed in the event of death of certain figures in the family. The rules to be considered in relation to the estate of the following persons⁹.

- i. a married man with male issues.
- ii a man without male issue.
- iii a married woman.
- iv. unmarried woman.

SUCCESSION TO THE ESTATE OF A MARRIED MAN WITH MALE ISSUE.

The rules of distribution of estate which will be discussed under this heading affect the estate of married men who are survived by at least a male issue. The estate of a married man without male issue falls to be distributed as if he had not married

since a wife or daughter does not inherit a man's estate. There are two important characteristics of the law of succession in a patrilineal family,

- i. Women, whether as wives, daughters, or sisters do not succeed to a man's estate, except in those families in which a man may appoint his daughters to succeed to his estate. In a few cases, however, daughters are given a few chattels but not land.
- ii. The eldest son as already noted occupies a unique and important position. He succeeds to his father's status as the head of the family - a position of respect and responsibility.

Succession to the Estate of a Man with No Male Issue.

Rules of succession to the estate of a man with no male issue are the same whether he is a boy, married or unmarried. Amongst patrilineal families, the one to inherit property in default of sons is usually the father or in default, the father's brothers or their descendants who inherit. There are also important categories of successors in the name of the deceased full brothers.

Amongst the Adigo the brothers of a deceased man without male issue have a right of succession which takes precedence over that of the deceased's father and full brothers have a claim prior to

of their father. When differences occur between the father of deceased and his brothers, these variations mostly arise because the father has only a life-interest which entitles him to use of some of his deceased son's property, but the successors are the full brothers of the deceased.

DECEASED'S FULL BROTHERS, BUT FATHER HAVING A LIFE INTEREST.

Amongst the Adigo families, when a father is said to have succeeded his son's property it only means that he is able to utilize the property for the benefit of the full brothers of the deceased and that after his death the property passes over to the deceased's full brothers. Under this rule the father is not denied his right to benefit from his deceased's son's property in a way which is detrimental to the interest of the full brothers of the deceased. The estate is not inherited and owned by the father but by the deceased's full brothers. Therefore, at the father's death his property does not pass into his estate and his sons by other wives will not inherit. Thus in such a case the order of succession is as follows;-

- i. Full brothers, father having a life interest.
- ii. Father.
- iii. Half brother i.e the same father but different mother.

accession to a married woman's property acquired during
in iv. Nearest paternal male relative i.e father's
priority : successors other than his sons.

CONCESSION BY FULL BROTHERS TO THE EXCLUSION OF FATHER

Under this rule, the Adigo can stop the father completely from
ceding his son's property if the deceased son is survived by a
brother. He may be given a few things as presents. Even if the
father may be permitted to make use of some of the property in the
estate, the concession may be withdrawn at any time by the full
brothers. The difference between the rule which gives the father a
life interest and the one we are discussing is that in the former
the father may not be deprived of his life interest in the
property, but in the latter he has no right whatsoever. When this
is the order of succession will be:

- i. Full brother.
- ii. Father.
- iii. Half brother.
- iv. Nearest paternal male relative.

CONCESSION TO THE ESTATES OF A MARRIED WOMEN.

Women usually take most of their movable property to their
husband's place. Such property is succeeded to as if it was
acquired during coverture. Any movable property which a woman does
not take to her husband's place belongs to her father's family.

Succession to a married woman's property acquired during
her life, in the case of land is succeeded to in the following
order of priority :

i. Her sons of that marriage.

ii. Her husband.

The property of a woman is mostly inherited by her daughters,
if married or unmarried. The property they inherit includes their
husband's cooking utensils, dresses and ornaments. The sons or
other male issues, inherit her money, cows and any important
movables. Her daughters may be given some livestock.

In default of female issue the deceased's son's daughter
succeeds to their feminine property. In default of these, the sons
succeed to the property and may give some of their mother's
share to their daughters. A married woman's movable property is therefor inherited
by her children. Whether the husband has a share in whatever is
inherited by the sons or not, depends on the rules in that family,
if the husband has no share in the feminine property inherited by
the daughters. In default of children, the husband or his successors
succeed to the estate. The proposita's son's daughter inherit her
share of the feminine movable property in default of daughters. In default of
her successors, her male successors inherit all her movable
property. Similarly the grandsons of a woman (her sons' sons and
her daughter's sons) succeed to her property in default of a

e reason is because a son's son is considered to be the male descendant to his father's mother if the grandmother survived by a son.

ION TO AN UNMARRIED WOMAN'S ESTATE.

e immovable property of a woman who has never married and without children is inherited in the following order of y:

- i. Her full brothers and father - the latter's interest being for life. If the daughter is survived by a full brother, the father has no share.
- ii. Her father's male successors. These male successors are also entitled to her money and any of her important chattels.

ne proposita's feminine property, such as dresses and items are taken by her full sisters, or her half sisters; and in default of these the property is succeeded to by the male line successors. It should be emphasised here that though the eldest son or brother may take the lion's share of the property he or she does not inherit the whole property to the exclusion of other members of his or her class.

DISTRIBUTION OF ESTATE IN THE ADIGO BILINEAL FAMILY

The bilineal families are those in which a part of a man's estate is succeeded to by his patrilineage and the other part by his matrilineage. In the case of a woman, her matrilineage succeeds to her estate to the exclusion of her father, her half brothers by different mother, and her father's successors. Here any property of property which is inherited patrilineally always remains to be default of son's and any property which is succeeded to by matrilineage remains in that line of succession and never passes over to the patrilineage in default of the nearest class of patrilineal successors.

A growing practice amongst the Adigo bilineal families is that the matrilineage gives the deceased man's sons and daughters some of their father's chattels such as money, clothes e.t.c.

This practice is so widespread nowadays amongst the Adigo families that it has become difficult to say whether the strict customary law has been altered by usage or has only relaxed its rigidity. Nevertheless it is the matrilineage who determines the property to be given to the sons. This relaxation is to placate the feelings of the modern generation of sons who resent the rules of bilineal succession. Thus in conclusion we can say that under the strict customary law chattels are succeeded to by matrilineage, who in recent times have had a share to the deceased children or patrilineal successors.

Men as well as women, may inherit matrilineal land. This applies to a man's as well as a woman's land. All of a woman's land goes to her matrilineage, marriage is not a barrier to a woman's rights to succession in her matrilineage and also does not affect the rights of her matrilineage over her estate. A problem may arise at the marriage of women from matrilineal into patrilineal families especially concerning the rights of such women and their children they will be succeeded to on patrilineal principles, being under their newly acquired personal law and consequently their matrilineage will not be entitled to succeed their property. It is somewhat doubtful if the matrilineage will permit their daughter married into a patrilineal family to inherit matrilineal land which at her death, will be succeeded to by her husband's family. It is not likely that the woman and her children may be permitted to enjoy such property only during their lifetime.

The Adigo law of inheritance as we have expounded here shows significant conflicts with the Islamic law of succession. These conflicts are mostly in the areas of ideas on the nature and composition of the family, the need for and occurrence of succession, the principles used when dividing inheritance and more so when to determine inheritance, the composition of the estate and the different modes of division taking into account the nature of the family relationships. Various reasons are responsible for the impact that the Adigo customary practice have had on the practice of the Islamic law of succession and not just the conflicts, in the comparison of the two systems of law. The fact that the Adigo may look back at

historical incidents concerning the property to be inherited gives
flexing views when compared to Islam's view of direct allocation
shares to heirs.

Nevertheless similarities in the two systems do occur
sometimes, and these may be due to certain influences that the
people have undergone in their socio-cultural history. Education,
both secular and religious, penetration of and adoption of new ideas
in the family, the influence of neighbouring communities, breaking down
of indigenous traditions amongst the younger generations are
factors that have influenced to certain limits the impact that
customary practice has had on the practice of the Shariah on
matters of inheritance among the Adigo society. How these factors
have had an impact and what the future has on this impact is the
subject of discussion in our next and last chapter.

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Interview, Salim Mwarangi (Muhaka) 14.10.1991, Saidi Rimo
(Ukunda) 13.11.1991 and Ali Mwamachache (Galun) 14.12. 91.

Though Islam recognises polygamy the Adigo practice may at
times exceed the number of wives that a muslim can marry at
ago.

Inheritance laws are believed to be closely
allied to and strongly indicative of the
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and principles of family organisation.

Amongst the Adigo rights of inheritance are generally regarded
as a consideration for duties of protection and support owed to
dependants during lifetime. So that the stronger the family
the greater the right of inheritance. There had been amongst
the Adigo a special sense of ethnic cohesiveness and solidarity.
These sentiments are mirrored in their inheritance law which aimed
at keeping the estate intact as long as possible. While
inheritance laws of the Adigo have shown an index of intrafamily
relations, nevertheless the direction of social change is not

CHAPTER SIX

TOWARDS ACCOMMODATION AND CONFLICTS BETWEEN THE ISLAMIC AND CUSTOMARY LAWS OF INHERITANCE

FAMILY SYNTHESIS AND INHERITANCE

The Islamic Law of inheritance and the Adigo customary law of succession reflect the structure of family ties and the accepted values and responsibilities within them. Abd Al-'Ati states that ...

Inheritance laws are believed to be closely allied to and strongly indicative of the society's normative system, social structure and principles of family organisation¹.

Amongst the Adigo rights of inheritance are generally regarded with more consideration for duties of protection and support owed to the deceased during lifetime. So that the stronger the family ties, the greater the right of inheritance. There had been amongst the Adigo a special sense of ethnic cohesiveness and solidarity. These sentiments are mirrored in their inheritance law which aimed at keeping the estate intact as long as possible. While the inheritance laws of the Adigo have shown an index of intrafamily continuity, nevertheless the direction of social change is not reversed.

Adigo rules of inheritance were easily applicable when Chidigo
es were geared towards their ethnic ideology. The structure
ation of the ethnic group and its social entities to enforce
aw were active. Ethnic sentiments and alliances were strong
ways prevailed over individualism. Emphasis was mostly on
urvival and well begin of the ethnic group. Every man or
had a duty to perform in the maintenance of the equilibrium
e group be it, social, political or economical.

As the Adigo believed themselves to have all descended
ately from a common ancestor, the obligatory nature of the
becomes more pronounced. In most cases it was considered
ed'. The corollaries of this position must be, and are, both
eral deflection of any extra ordinary powers or rights from
elders. Hence created a socio-political group maintained
y as a family unit. The entire economic, political and social
em of the Adigo was most closely related to the family. Their
mary laws were a very substantial entity in their native
sprudence.

As we note, the basic unit of holding property has been the
ly. However the Adigo have been going through many social
ges which have not spared their traditional extended family.
e changes in the nature of the family have generated
siderable conflicts of prescribed norms and behaviour.
eworthy to our study are the influences in the practice of
eritance. The factors of internal group cohesion are fast

earing amongst contemporary Adigo. The family structure and institutions (Ngambi) have been transformed and still in the process of transformation. Thus what used to prevent men and women from exercising independent control of ideas as apposed to group decision making is no longer there. Due to those changes there has been a series of conflicts and accommodations between the customary law and the Islamic law, in the practice of inheritance by the Adigo people as discussed below.

Though the Adigo may have traditionally prescribed to a certain family type, Islam does not prescribe any specific organizational form or family type. There can however be little doubt that traditional Adigo family structure has actually been closer to the extended family than to the nuclear family². The family organization in muslim societies has assumed or rather continued the extended family form. There is no provision to give it a universal sanction or approval. While the extendedness of the muslim family structure is a function of historical continuity or if other social conditions as it has happened to the Adigo family, Islam apparently accepted this form and took no further stand on it, unlike its stance on various other aspects of the family.

While Islam was by no means totally indifferent to the social conditions and precedents, there was no particular need to restrict the Adigo family structure to any exclusive form be it extended, nuclear or polygynous. However, such forms are also crucial to the Islamic perception of family solidarity and societal cohesion. Both are of

concern for Islam, and that emphasis should be placed not
form but rather on the behavioral components. Nevertheless
rights and obligations in Islam are independent or
differentiated from the organizational forms of the family; the
being fixed and the later open and malleable.

Islam's position as regards the family was produced by or, is
in accordance with a general outlook that seems to presume
continuity of the precedents. So long as they do not violate
basic principles or conflicts with the basic needs. Thus when it
comes in mind that the extended family does not necessarily
include the nuclear type, at least as a subsystem, then Islam
seems to have considered the extended form acceptable though not
necessary. It was apparently working and workable. It was thus
used, though Islam did not insist that it must or must not be
done in any particular ways.

Islam's accommodation of the extended family type and making
further specifications may suggest that under certain
circumstances, such as those socio-economic-political conditions
prevailing in muslim societies, then the extended family may be more
desirable to, though not indispensable, whatever functions the
family is to serve. Flexibility of the organizational form, on the
one hand, and specificity of the mutual, religiously prescribed
expectations of the members, on the other would seem to indicate
that the Muslim family structure was or may be conceived as partly
fixed and partly human and variable.

Moreover, Islam may have taken a position whereby, family
cohesiveness is crucial, it does not or should not, mean absorption
of individual members by the family collectivity. Personality
is allowed a certain measure of freedom to develop alongside the
collectivity. So that individualism may not be forced to submerge
itself. Hence the idea of the Adigo that family cohesion must
be paramount than any other things does not always conform to
the practice of Islamic practice within the nuclear family. Children

of such unions automatically become Muslims. Adigo principles
However to avoid apathy, estrangement, and authoritarianism,
adaptive mechanisms have to be devised to allow collectivity and
personality to co-exist and interact to their mutual benefit. One
of doing this was ensuring that family members inspite of
cognitive differences maintained some mutual expectations of rights
and responsibilities. But individuals conscience cannot be totally
controlled by the collectivity. To assess the full development of
personality to that level at which the individual can differentiate
between intermediate and ultimate ends, some inviolable principles
have to be emphasized.

One such principle in Islam has been to hold the individual
accountable directly to God, and not to society or personality.
To orient him to something beyond the immediate and the
temporal. To show him how to reconcile private convictions with
socio-religious requirements. The Adigo Muslim thus adheres to the
principles of Islam, just like any other Muslims, because in the
profession of the Islamic faith, the law is an ordinance of Allah,
the Adigo.

lah is surely ever Knowing and Wise.

Nothing could have changed the traditional Adigo family thanous marriages. We have noted that, the strength of family were not weakened by intermarriages. In turn intermarriages aged the observance of the Shariah, for example where the intermarried with the Tangana. This allowed the spread and vance of Islamic practice within the nuclear family. Children of such unions automatically became Muslims. Adigo principles rriages which initiated the family were not in conflict with 's. Adigo marriages were solemnized by the consent of the s family and was traditionally arranged between the kinsfolk e couple. The bridegroom usually presents the family of the with an agreed sum of money (wealth), and ritual gifts. The m of bride wealth which authenticated Adigo marriages has been leled with Islam's payment of mahr, thus an attempt is made to fy the impact of Islam on traditional marriages system without plete departure of tradition. Hence

...The share of the bride wealth which goes specifically to the bride, generally called Mahari, payment of Mahari; the Digo believe, is strictly in accordance with Islamic law... There is a share which goes to the bride's mother which is commonly known as Mkaja. It is given as an expression of gratitude for the good work done in raising the daughter... there is a portion of the bride wealth which goes to the bride's maternal uncle, Kilemba. Evidently both Mkaja and Kilemba are non-Islamic yet people who... are devout muslims would not be prepared to drop them, apparently because these transactions strengthen family ties, especially the position of the bride's mother and maternal uncle among the Digo...³

uch practice as explained above shows that Islam has had an
on the Chidigo family and almost changing the concept, from
ional to the Islamic one. Hence making it more easy for the
to follow the Shariah.

POPULATION EXPLOSION AND URBANIZATION: TOWARDS AND ADAPTATION OF ETHIC PRINCIPLES OF INHERITANCE

As population of the Adigo increased, people began to disperse
the centralized homesteads (Kaya). New contacts developed as
es took their toll, and slavery broke down ethnic cohesion.
holds became isolated from their wider family groups and
ations to their kin were much more difficult to fulfill.

In such circumstances, traditional ethic loyalties were
ace. Survival was for the fittest and gradually the extended
y and the once strong ethnic ideology disintegrated. The
nsibilities of the extended family like those of socialization
a helped to instil the ethos of the group were transferred from
community to the family. The ethnic psychology was at risk and
ividualism gained ground. With all this, people were forced to
lue their traditions. They either repudiated or reaffirmed
by deliberate choice, mostly in conflict with the ideal which
ers of society (Ngambi) were seeking to impose. This made it
icult for the Adigo to keep on following the traditional system
aw. Instead other systems were followed and new ideas and
ciples of inheritance were followed.

can as well subscribe to the idea that the inheritance laws of the Adigo registered new trends of 'human evolution'. To the struggle which was between individualism and collectivism, between the individuals rearing and social tendencies, is revealed in the later development of the laws of inheritance. Contrary to where individualism demands equality for all recipients or eligible, the social mission of the family demands a deviation from this equality principle, and forces more individuals into the background. Instead of the individuals' rights being forsaken for the groups sake it was the opposite. This made it easy for those who were muslims to accept the Shariah without much cohesion.

Another factor that broke the traditional family relationship was and is influenced the social structure of the people was and is temporarily in sway, urbanization. There has been a gradual integration of the extended family due to urbanization. There are more contacts between the Adigo and neighbouring urban centres which resulted in not only enculturation but also a form of rural - urban migration by the Adigo.

In the urban areas relationship became rather impersonal. In the urban set-up individuals could not develop intimate social relationships with so many people of their ethnic group. Not only social cohesion at the village was instilled by the clan members within the traditional homestead. In the urban areas the individuals were introduced to alien system of authority, which was

ent from the 'Ngambi Council'. This in turn encourage a
ce of the Shariah.

PRIMARY LAND INHERITANCE AND ITS SHIFT TOWARDS ISLAMIC MODE OF

TENURE

Land, probably the most important source of wealth has always
been a subject of a great many interests and derivative rights.
This is not only, to the Adigo customary practice, but also in
Islamic law. These have often been difficult to elucidate for the Adigo.

The land 'laws' of the Adigo are simple and effective.
Historically and traditionally we have seen that Adigo land
was vested to the Ngambi (Enyetsi, atsi) as the heads of the race.
However this did not mean that the land was the private property of
the 'enyetsi'. It was only theirs as representatives of the race.

Where land has been subject to customary tenure, it is always
a subject of rights and interests vested in both the individual
and the group. Such rights and interests are frequently co-
incident with each other. Such forms of family land holding
have largely restricted the freedom of many members of the family to
dispose off the property on which they ultimately had a claim.

Ancestral worship on common grounds as was practiced by the
Adigo, and many forms of social and religious ceremony held on land
'commonly held' for example, have also helped to make more obscure

ready entangle subject. However it is, of course clear on analysis, that the control exercised by the community as a whole on land was mostly social or political and did not extend to the limits necessary to maintain the group solidarity of the community. Actual physical control of land was vested in the individual owners and, speaking in general, only in the sense that it is an aggregate of the constituent family group could the community or the group be said to own land. Nevertheless land has always been treated as a 'property' which aroused sentimental inheritance rules as in the Adigo.

The traditional Islamic system of land tenure can be said to be the product of classical Islamic law. Also included are those supplementary rules issued by the jurists, often described as qanun or qanun. The Islamic law to be sure did not have a comprehensive theory of property law, but scattered throughout various parts (the Quran), particularly those parts dealing with contracts, acquisition of property and state revenue, are many provisions which, if taken together, constitute a fairly well-defined system of land tenure.

In Islam land belonged to the state. But the concept of state ownership may be confusing. It should not be assumed that the state's claim to ownership of the land means a form of public ownership analogous to that which exists in western countries. In western countries the state does not own land as a juridical person. The legal categories of land as based on the Shariah are:

alk land: Land held in absolute freehold ownership. It is governed by the provisions of sacred laws. Land ownership comprises two rights: the (raqaba) or right of absolute ownership and (tasarruf), or right to the usufruct of land.

iri Land: Land of which the raqaba belongs to the state, but the usufruct (tasarruf) belongs to the individual. It is a form of heritable leasehold ownership in which the state leases land to the individual.

atruka Land: Land reserve for some public uses.

When the two systems are compared we can say that amongst the both ownership and prestige initially lay in the lineage, rather than the individual. Also no lineage established ascendancy in the village. However in Islam ownership of land can be defined by saying that the owner of the 'thing' had alone, within the limits of the law, the right to use, to enjoy and to dispose of it. Further the right of ownership can mean that the owner can absolutely dispose of that which he owns, whether it be the 'thing' itself, its use or its usufruct. He can use the specific 'thing' for its crop, fruit, and produce and dispose of its corpus by all the usual dispositions. Thus we can note disparities between the two systems. While the Adigo system emphasizes communal ownership, the Islamic system portrays emphasis on individual ownership. However, the Adigo system did not last long. It was weakened by factors such as the growth of families and urbanization already discussed above.

With the Adigo Socio-political organization coming under
growing pressures from famine and slavery, the social leadership
of the traditional form tended to collapse. Before any new forms
of political leadership had been reorganized and taken definite
shape, the government mechanism of the day stipulated new codes of
law. The rules of this system were either biased against customary
practice and procedure or did not recognize them completely.

With the collapse of ethnic form of leadership, moral and
social pressures on the individual to subordinate his personal
interest to those of society (lineage) weakened. Uncomfortable
conflicts between educated ideals and traditional loyalties arose.
The individual by his note and his access to modern courts of law
stood in an immediate relationship to civic authority. Thus he
was no longer protected and controlled by the laws of the ethnic
group to which he belongs. The traditional concept of the ethnic
group which initially had a profound influence weakened. Thus for
example when land registration was introduced amongst the Adigo, it
was readily accepted.

This was so since the authority recognized was the government,
and its laws were accepted, and not the Ngambi any more. With
this it was unlikely for customary practice to prevail, neither
Islamic Shariah. It is thus our submission that at a certain period
the customary practice of the Adigo was weak. Emphasis has been on
common law recognized on the land (common law in this case). It is
fortunate for the Adigo Muslims, that the Shariah is not

ized. They are thus left in a limbo, caught in between their
e heritage' again.

he growing scarcity of land due to population explosion, the
dualistic tenets of the people, together with the needs of
thorities recognized have greatly modified the customary land
e. Capitalist ideas on land tenure which were instilled with
ntroduction of land adjudication and issuing of individual
deeds to land, encouraged the breaking down of customary
ice on land issues. The adoption of a market economy on land,
from influencing a move towards parallel practice with
ic ideas on land tenure, also alienated the individual land
r from the general conscience of the ethnic group, which was
sized by the ownership of a common and sentimental property.

Thus land adjudication is said to have been enthusiastically
ted by the Adigo.⁴ The reasons for this being, no one could
prior claim to the land. Hence property could be improved
out fear of losing it to someone else after one had fertilized
lanted trees on it, something that could happen in customary
ice. Also land could be left idle without fear of someone
claiming it after it was registered under their names. Under
new system, land could be bought and sold, a practice contrary
he customary practice of the Adigo. Land adjudication thus
ed some people ownership of land. Children and grandchildren
he extended family many times outgrew their inheritance, in a
e that there was not any more for the community to allocate to

these were forced to buy land elsewhere. Eventually they were
to pass land according to their wishes and not those of their
ary practice. Such cases could have encouraged the practice
e Islamic law of succession, since land was now inherited
ing to the wishes of the individual owner. Not only that
idual title deeds have eradicated the traditional tenets of
ng back at historical events like slavery and famines and use
to decide inheritance.

When the individual was allowed ownership to sentimental
erty like land he was inclined to practice the Shariah as his
nal law. The customary practice and its principles were
y applied or applicable, since the mode of acquiring that
erty did not any more conform with the customs. While
tional customs were weak, The Adigo could not practice the
lah law of inheritance because emphasize was not on the Shariah
er, it was on the Secular Law.

THE PRINCIPLES ACCOMMODATE AND CONFLICT

There have already emerged different principles that are used
cases of inheritance between the Shariah and the customary
tice of the Adigo. Principles that shall be discussed include
n is inheritance due', means of acquiring land (rights of
rship) which comprise the limits of those rights and the ways

protect them, the restrictions on the rights of ownership and ownership. We shall discuss how they conflict and where they accommodate one another.

When need arises for property to be inherited, the first principles to be observed in Islam have been shown to be the provisions of the expenses of the burial, debts and the will of the deceased. Thus in Islam the estate is directly related to the deceased. However amongst the Adigo, the practice was that one was buried notwithstanding the payment of debts. What is of concern here is whether the individual was considered separate from his property. As already shown the individual owned only the movable property amongst the Adigo. While there might be no direct relationship between this and immovable assets like land, it is clear that the principles used whereby one has to provide for his burial expenses are parallel between the Adigo customary practice and the Shariah. This is so since amongst the Adigo, though it might be a requirement that one undertakes the expenses from his own property, but the practice has been that farm produce like rice, maize and livestock may be used to feed those who have attended the funerals. Thus while Islam makes it a requirement that one should provide for himself in terms of burial expenses, Adigo customary practice accommodates, but it is not made as a requirement.

The issue of payment of debts is also crucial. In Islam one is required to pay his own debts from his estate. However, Adigo customary

ce is that, the living relatives of the deceased shall take responsibility of paying the debts. Though they may take the property of the deceased e.g. livestock to pay for the debts, this is not necessarily have to be done before the burial. Thus when the property is divided immediately after death, debts of the deceased might be cleared by the living relatives, even when it is necessary that it has to come from the property of the deceased. shares depending on their closeness (ascendants, collaterals).

The Adigo idea is however that if one owed less than the value of a certain property it would not be necessary to dispose off that property in order to pay the debts. Heirs may clear the debt, but again this is not considered anything to do with the property of the deceased. In such matters, the Adigo have been left to practice not even their primary practice but wishes of the individuals depending on the circumstances that they find themselves in.

Let's say 'Achima Numa' this person can inherit property left by the deceased. Family relationships were amongst the first principles to be considered when the property of the deceased was due for inheritance. Relationships like those of matriline and patriline are recognised, but the Adigo place much emphasis on the deeds and actions of individuals and current family cohesion between the deceased heirs and the deceased. Thus like in Islam where a son of one's parent will not inherit, the Adigo will go further to disinherit anyone who had bad relationships with the deceased during their lifetime. This is an influence of the Adigo

ce of revering ancestors and the thought that they still
lled the lifes of living family members.

Despite that shares of inheritance were accorded a large
of heirs depending on the importance and closeness of their
onships. The difference between this system seems to be
ogical. In Islam matrilineal and patrilineal relatives are
ed shares depending on their closeness (ascendant,
dants, collateral). The Adigo ideology however portrays the
lineal and patrilineal families to be autonomous when it came
ses of inheritance. Property that was initial from the
lineal or matrilineal lineage had to be inherited by relatives
the same lineage.

The principles of who inherits before who as is the practice
lam are used amongst the Adigo, though applicable only to the
rs of the same clan. Thus if one belonged to a matrilineal
lets say 'Achina Ngome' this person can inherit property left
y 'Mchina Ngome'. The idea being that he belonged to that
However he may not inherit because other 'Achina Ngome' are
e to the deceased than himself. Thus with the changing
asis of the composition of the family, sons, daughters and
dchildren can inherit instead of nephews and nieces who are now
ed as distant relatives.

Property thus is distributed amongst many relatives but
omary practice prevails because some heirs that could probably

orded shares according to the Shariah might not get anything
e already the close relatives have exhausted the estate. The
setback here is that land is immovable and it is rarely sub-
ed. Individuals were only allowed usufructuary rights, hence
when nieces 'inherited' instead of son's the idea was that
were only going to plant on the land but could not alienate
Thus even when land was adjudicated many nieces and nephews
ere allowed usufruct rights to land could not register the
under their names instead they were only compensated for their
s and crops on the land, and such land registered under the
or daughter's names.

The issue of whether property has to be inherited immediately
death or can be inherited later portrays some perplexing
udes within the two systems of law. The Adigo customary
ice is not specific on when property is to be inherited. Thus
the eldest son holds property on behalf of others, the others
not be at ease when they demand their share. Doing so may be
rpreted as a wish to break away from the family. This is a
dvantage to others because many people end up surpassing their
ritance.

While Islam accords property to a large group of heirs,
tly when inheritance is due for division depends on the wishes
he apparent heirs. The verses that explain the division and
ions of each heirs do not explain when property is due for
ritance. Such factors have allowed people to leave property

ded for very long durations. This is so since joint
ship without necessarily ascertaining proportions is practices
th Islam and the customary law. Islam recognizes joint
ship out of inheritance because the estate of the deceased is
to be jointly owned by the heirs and it is often that joint
ship continues for long periods of time. Thus even when the
hold property today by the use of the ideals of customary
ice it is difficult to draw a line here to show that it is
mary tenets or the allowances of Islam that have been used.

In the event of death it is a must for a Muslim to be buried.
l and funeral in both Islam and Adigo practice are the
onsibility of the family and if not, the community (Ummah).
o ethnic tenets seem to prevail in these cases. The family in
, in the event of burial is almost the same in composition as
mongst the Adigo. Thus when the eldest son, or the uncle takes
ge of the burial when other relatives are still minors, it
mes almost difficult to say whether that is done according to
omary practice or following Islam. It's more difficult
temporarily because of the influence of Islamization.
isions for the necessities to bury a Muslim (expenses of the
al etc) are deducted from the estate of the deceased in Islam.
gst the Adigo, the living relatives will always provide for the
al of the dead and other responsibilities because doing so
blishes their right of inheritance amongst other things.

the idea of joint ownership (Shuyu) defined as:

...Where two or more persons are owners of the same thing, but their respective shares are not divided, they are co-owners and in the absence of any proof of the contrary, their shares, are deemed to be equal (as per the law)⁵

is used to accommodate the customary practice on creation of joint property.

However while there is this accommodation of principles, the customary practice may be weakened by Islamic principles at times. This can be so when the eldest son develops the property (land) and becomes the owner through Islamic principles of appropriation. When the eldest son develops the land and when the Shariah is used to sub-divide the land the principles of appropriation may favour the eldest son.

This is because the Shariah allows that he who revives uncultivated land (mawat) acquires ownership thereof. Though uncultivated land which has no (individual) owner is the property of the state, the ownership and possession of these land cannot be acquired except by a license from the state in accordance with the Shariah.

After stating that, however the law allows that if one cultivates or plants uncultivated land or builds thereon, he becomes forthwith owner of the part cultivated, planted or built even without the authority of the state. Thus the appropriation of free and empty land (mawat) by virtue of a legal act is allowed.

from the state like the title deeds, entitles the
variation to a right of preference over others for acquiring
right of possession (tasarruf) over such lands.

Acquisition by possession (hiyazah) can be used at the expense
of additional systems of land tenure. In hiyazah, ownership can
be acquired through uninterrupted possession i.e. acquisitive prescription.
Possession is a material situation whereby a person exercises
factual control either himself or through others over a thing
which is not extra commercium⁶. The rules pertaining to possession
include its acquisition and transfer. This system may be
favoured by Adigo families that may want to do away with extended
family relatives who would want to take advantage of customary
rights and claim property at the expense of the nuclear family.
It can be so since transfer of possession here can be affected in
various ways.

In the first, possession passes by the effect of law when the
present possessor is a general successor to the previous possessor, as in
the case with the heir. In the second, possession passes by means
of a disposal emanating from the previous possessor i.e. a bequest.
In the second way, the present possessor is a special successor to
the previous one. The difference between the two types of
possession is that the general one is considered a continuation of
the previous possession, whereas the special one gives rise to a
new possession, but again this kind of possession may allow
for the continuation of the previous practice under its principles of tasarruf.

When the main ideas of the practice of inheritance of the two systems of law are compared, we can say that the aim of the Islamic practice of inheritance has been to break down the concentration of wealth and spread it to individuals in the society. This has been done in that it "emphasized equality in society in terms of distributing justified wealth. It would have been un-Islamic if wealth was left in the hands of one member of the family. This would have encouraged unfairness and even rivalry.

The Adigo practice of holding property as a family venture does not seem to be far from the ideas that property has to be used collectively. Though it might not be divided, the Adigo customary practice made property available to any member who was in need at any time. Differences between the two systems occur when the property is not divided (as the case for the Adigo). Even when the family decides to hold a particular property jointly, it will be disadvantageous for them in the Islamic sense to have a written guarantee of the shares (or interest) that every member holds in the family. This will be in conformity with the verse of the Quran which encourages Muslims to write contracts in any dealings⁷.

Other principles that can be compared is that of respect of individual property ownership of individuals, as recognised by the Shariah. This principle may not always be observed by the Adigo because the individual did not traditionally own anything personal (especially land). Individuals could have owned crops which could easily be disposed off on the land. However with factors like the

ing down of family unit, introduction of land registration and
iration of the Adigo to follow the Shariah have influenced
individual to recognize personality in ownership of land.

here has also been varieties of property that the Adigo hold
These did not have an adequate explanation on how they can
erited according to customary practice (e.g cars, shares and
forms of wealth). Since the Shariah has allowances on how
particular properties can be inherited, it has become easy
ne Adigo Muslim to apply the Shariah.

In the consolidation of the family system and its importance
social unit, the two systems have proved to be parallel.
mporarily the Adigo leave as a family unit that comprises at
the father, mother, children and grandparents (usually
nal). Some extended relationships are considered, but rarely
preference. When it comes to inheritance, therefore the
ic principles where full-blood relatives have preference over
blood, and relative lower in relation are excluded by those
er in relation have made it easy for the Adigo family to
orporate the current family into the Islamic scheme of
ritance. This has also been possible since some family
tives are heirs in both system. Such that nephews and nieces
liable to inherit but only when they are the only close
tives available, or when they can take precedence over other
tive.

TES

Hammudah 'Abd ak 'Ati. The Family Structure in Islam (Indianapolis; American Trust Publications) 1977 p.250.

cf. Hammudah Abd-al'Ato op cit p. 30

M.H.Y. Kaniki "Religious Conflict and Cultural Accommodation. The impact on some Aspects of African Societies" Utafiti Vol. 1. No.1. 1976 p.90.

Nancy Gray "Acceptance of land adjudication among the Digo" Institute of African Studies, University of Nairobi. Discussion Paper No. 37. 1971.

Farhat J. Ziadeh op cit p. 30. Bracket is mine.

Ibid p. 51.

See Quran, 2:282

CHAPTER SEVEN

CONCLUSIONS

This study has attempted to correct the skepticism on the validity of the sources of Shariah. We conclude that the Shariah is a valid system of law and its application amongst muslims is mandatory. The sources of Shariah which have been mentioned here to be valid. We have used the case studies on inheritance to conclude that the sources of Shariah can be used to come up with a complete code of law and practice. The verses of the Quran have been used to show how an understanding of the meaning and message of the Quran is vital in implementing the Shariah. The descriptions of the Quran gives a clear basis to draw the conclusion that it is a source of law.

Other sources of Shariah, apart from the Quran have also been mentioned and explained with collaborating evidence which shows how these sources have confusing meanings and at times led to confuse the whole concept of the Shariah and its sources. This work has attempted to show how confusion on the meaning of Sunnah has at times led to the inclusion of Sunnah as a source of Shariah. Thus the popular sentimentalistic notion of 'alleged hadith' is clarified to have been the result of confusing the meaning and usage of the word Sunnah. In the use of the verses of the Quran we have shown how the practice of the Prophet (Sunnah) is emphasised in the Quran as a

law. Islamization. Customary practice may have been dominant. It may be what led earlier researchers to conclude that the Adigo. There is no hesitation here to note that the secondary sources of Shariah make it a living system of law. The Shariah thus allows those who follow it to accommodate new precedent without going contrary to the principle of the law. It is our submission that those who were skeptic on the Shariah and its sources and its abilities to accommodate reform had not grasped the intricacies of the Shariah. With our definitions of the sources of Shariah we conclude that the Shariah is a valid system of law, and thus allows us to compare and use it with other systems of law, specifically the traditional law of inheritance.

The practice of the Islamic law of succession and its conflicts with the Adigo customary law has been discussed and this study refutes our hypotheses that matrilineal practice of the Adigo has been the factor responsible for the 'alleged' persistence of matrilineal practice of the customary law as opposed to the Shariah. This has been done by exploring the influence of Islam amongst the Adigo. The long history of interactions between immigrant muslim people and the Adigo encouraged a widespread Islamization of the people. We thus conclude that, in a way Islam has been a force to reckon with amongst the Adigo people today. It is therefore possible that matrilineal practice was weakened through the influence of Islam.

Though the Adigo had been muslims, we observe and conclude that a strict practice of the Shariah was not strong in the initial

of Islamization. Customary practice may have been dominant. It may be what led earlier researchers to conclude that the Adigo had not agreed to be governed by the Shariah. Also the change of matrilineal practice by the Adigo may have been over-emphasised to prove that customary practice of inheritance was in conflict with the Islamic practice of succession.

This survey nevertheless differs with earlier works. Our study concludes that the Adigo rules of inheritance were similar to the Islamic rules. The initial practice of inheritance Kuhala of the Adigo was patrilineally biased. We conclude that matrilineal practice amongst the Adigo was emphasised by socio-economic and political forces like famines, wars and slavery. These forces are no longer significant in the lives of the Adigo, hence they are no longer used when determining cases of inheritance. We conclude that Islam as a religion embraced by the Adigo is the predominant factor that people use when determining cases of inheritance. This is so especially with the weakening of customary ethnic social bonds.

A system of law depends on its agents of implementation to prevail over other systems of law in a society. We hereby conclude that factors that could have emphasised customary practice and allowed it to prevail over the Shariah are no longer in practice. The elders councils 'Ngambi' which used to administer the customary practice have been replaced with the government machinery which emphasises the common law, an unfortunate factor for both the

ionalists and the adherents of the Shariah. ^{has been on the}
law and not the Shariah. ^{The law enforcing bodies have gone}

Since the Ngambi Councils emphasized the traditional ethnic
ology, their demise also meant a demise of the ideas they
ised. We thus conclude that the younger generation of Adigo
arely aware of the customary practice and its morality.
e they are muslims, the Shariah is what they aspire to
y. Thus the weakening of customary practice left a morality
n, one to be filled by Islamic teachings and practice. Since
w of inheritance may strongly indicate a society's normative
n, its social structure and family organization we have
sed principles used in the two systems to discuss inheritance
tes and hence been able to draw conclusions on that some
iples do accommodate one another amongst the two systems of

This survey has also noted and concluded that the political
social factors have influenced a change in the emphasis of
ic law. We have shown that land which has some sentimental
e amongst the Adigo, has been judged by a system of law which
not emphasise or even acknowledge the sentimental feelings of
people, but by the administrative power recognised. Despite
fact that some principles on the issues of land inheritance
een the Islamic law and customary practice do accommodate one
her, the Adigo people might have missed a chance to practice
Shariah because it was not the system of law recognise
nistratively.

This survey concludes that emphasis has always been on the law and not the Shariah. The law enforcing bodies have done little to emphasise a practice of the Shariah, even when those concerned profess the religion of Islam. While a tendency to view a particular law depends on the individual concerned, but certainly the law enforcing organs need always play a greater

It is thus important that the Islamic personal law should be managed by the organs of the judiciary system, in order to allow those who adhere to the Shariah be judged according to the Shariah. This has been done, how it will be done and what will be the expected results may be the concern of other researchers.

Legal pronouncement, or opinion of a jurist.

Precept of the divine law. The term faraid (pl. of farida) is used particularly of the quota shares of inheritance prescribed in the Holy Quran.

Islamic jurisprudence.

Records of the sayings, deeds, of the prophet Muhammad (p.b.u.h.).

Exerting one's self in order to reach a legal decision independently.

Period before the coming of Islam in Arabia, also the period of ignorance.

Homestead, traditional fortified homes of the Adigo people.

A title of leadership or some form of a paramount chief, introduced to the Adigo from influences of the Wasba Arabs.

Maternal family relationship.

Paternal family relationship.

Bloodmoney.

Schools of legal thought. Usually refers to the four Sunni Schools of thought.

GLOSSARY

- adith; Followers of Hadith, Jurists who depend on the text of Hadith to make judgements.
- al Mursalah; Opinions given considering public interest.
- ahidun; Scholar who practiced Ijtihad but restricted themselves to a particular school of law.
- ; Agnate relatives
- al ray; Jurists who made independent decisions, those who followed their own opinions.
- (enyetsi); Possessors of the land.
- l Islam; Abode of Islam
- ; Legal pronouncement, or opinion of a jurists.
- Precept of the divine law. The form faraid (pl of farida) is used particularly of the quota shares of inheritance prescribed in the Holy Quran.
- Islamic jurisprudence.
- h; Records of the sayings, deeds, of the prophet Muhammad (p.b.u.h.).
- ad; Exerting one's self in order to reach a legal decision independently.
- liya; Period before the coming of Islam in Arabia, also the period of ignorance.
- ; Homestead, traditional fortified homes of the Adigo people.
- ; A title of leadership or some form of a paramount chief, introduced to the Adigo from influences of the Vumba Arabs.
- etuni; Maternal family relationship.
- meni; Paternal family relationship.
- ; Bloodmoney.
- ahib; Schools of legal thought. Usually refers to the four Sunni Schools of thought.

at; Social relationships e.g. marriage divorce, inheritance etc.

id; A scholar who imitated the judgements of others.

n; Peace be unto him.

Retaliation, the Islamic legal sanction in cases of homicide and wounding.

Juristic speculation or opinion.

Age mates

h; The Islamic Law.

; The sayings and deeds of the Holy Prophet.

ssion; This will refer to the taking over of property through the prescribed rights after the death of the proprietor. It will be used synonymously with the term inheritance.

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INTERVIEW SCHEDULE I

be used to acquire information from Muslim elites, which include Kadhis, Madrassa Maalims, Imams and students.

NAME: _____ AGE: _____
ADDRESS: _____ OCCUPATION: _____
LEVEL OF EDUCATION: _____
RELIGION: _____

Which of the following sects in Islam do you belong, Shia, Sunni, others - specify if others?

Which school of thought do you follow, e.g. Shafi, Malik, Hanbali, Hanafi, Imamiya?

What are the Quranic rules concerning inheritance?

Who are the people included in inheritance according to the Shariah?

What is the procedure in deciding inheritance amongst Muslims?

Who may not be excluded in inheritance?

Who can be excluded in inheritance?

Is there any differences in the practice of inheritance amongst Muslim communities that you know?

What can you say are the causes of the differences, if any?

Do you know of any traditional communities in Kenya who are Muslims?

Do you know of the Adigo people? What can you say about their practice of Islam, especially on inheritance?

Can you say that the Islamic law of succession can be practiced together with traditional customary laws of succession?

What areas of succession can you say can accommodate customary laws?

What areas of succession can you say cannot be compromised with any customary laws?

What difficulties can you say are faced by Kadhis who have to settle cases amongst Muslims who adhere to both the Shariah and customary laws of inheritance?

What can you say is the position of women in the Islamic law of succession?

When is it necessary for a Muslim to write a will?

Can a will which does not conform to the Shariah be valid for Muslims?

Can Muslims dis-inherit their children? Is it obligatory for every child to inherit?

Do you think Muslims in Kenya generally practice the Islamic law of succession?

What do you think are the ways which Muslims flout the laws of succession?

What is your opinion concerning Ijtihad?

Do you consider Ijtihad applicable on matters concerning inheritance amongst Muslim communities?

Can you say that the Holy Quran has all rules concerning the practice of inheritance today?

Which specific areas on inheritance does the Quran set fixed rules?

Why do you think some Muslim communities still practice traditional rules of inheritance?

Can you say the Islamic law of succession can accommodate customs and practice of traditional societies.

INTERVIEW SCHEDULE II

Which areas of the Islamic law of succession do you think can accommodate customs?

Have you decided any case where you had to deal with problems concerning customs of a people who have adopted Islam?

How did you go about deciding on these matter(s)?

What is your general overview of the situation concerning the Islamic law of succession in Kenya today?

How many Fuko groups do you know? Name them.

How does one become a member of a particular Fuko?

How does one become a member of a particular Mwari?

Can one be a member of as many Fuko and Mwari groups as one wishes?

What are the restrictions (if any) that govern one from joining a particular Mwari group?

What is the importance of Mwari groups in deciding marriage partners?

What is the importance of Fuko groups in deciding marriage partners?

Can members of the same Fuko groups intermarry?

Can members of the same Mwari groups intermarry?

Traditionally, can you say the Adigo had their own rules of inheritance?

How did the Adigo inherit property?

Do you consider the Adigo to be following traditional rules of inheritance today?

What are the Adigo traditional rules of inheritance?

INTERVIEW SCHEDULE II

used to acquire information from Adigo Sages.

DATE: _____

AGE: _____

NAME: _____

What do you understand by the following Chidigo terms?:

Mbari: _____

Fuko: _____

How many Mbari groups do you know? Name them.

How many Fuko groups do you know? Name them.

How does one become a member of a particular Mbari?

How does one become a member of a particular Fuko?

Can one be a member of as many Fuko and Mbari groups as one wishes?

What are the restrictions (if any) that hinders one from joining a particular Mbari group?

What is the importance of Mbari groups in deciding marriage partners?

What is the importance of Fuko groups in deciding marriage partners?

Can members of the same Fuko groups intermarry?

Can members of the same Mbari groups intermarry?

Traditionally, can you say the Adigo had their own rules of inheritance?

How did the Adigo inherit property?

Do you consider the Adigo to be following traditional rules of inheritance today?

What are the Adigo traditional rules of inheritance?

What are the properties traditionally inherited amongst the Adigo?

The Adigo being Muslims, what can you say about their practice of inheritance? Do you think they still follow the traditional rules of inheritance?

Do you consider the Adigo to be observing fully the Islamic law on inheritance?

Do you think the Adigo have abandoned their traditional rules concerning inheritance? Explain your answer.

Do you think the Islamic law of inheritance and the Adigo rules of inheritance have differences?

What can you say are the differences between the Islamic law of inheritance and the Adigo rules of inheritance?

Do you think the Adigo rules of inheritance hinder the practice of the Islamic law of succession amongst the Adigo people?

Do you think there are similarities between the Adigo rules of inheritance and the Islamic law of succession? Explain your answer.

Can you say the Adigo practice both their traditional rules of inheritance and the Islamic laws on succession?

Which areas of inheritance do you think the Adigo practice their traditional rules of inheritance, only?

Which areas do you think the Adigo practice the Islamic law of succession only?

Have you been called upon to decide a case concerning inheritance? How did you do about this case(s) if any?

Can you say in future the Adigo will abandon their rules concerning inheritance? Please explain your answers.

If the Adigo practice their traditional rules of inheritance, can you consider them wrong? Explain your answer.

Answer: *Samia Mwariale, 61 yrs, Hamuwari*

What can you say is the future of the practice of the Islamic law of succession amongst the Adigo people?

Muhammad Mwanachacha, 60 yrs, Hamuwari

Kari Rufaa Mwandawah, 64 yrs, Uru

Musa Kall, 66 yrs, M'ochani

Mwizi Mwachireje, 62 yrs, Kiondo

Mwizi Mwachireje, 59 yrs, Kiondo

Mwizi Mwachireje, 59 yrs, Kiondo

Mwizi Mwachireje, 58 yrs, Kiondo

Mwizi Mwachireje, 58 yrs, Uru

Mwizi Mwachireje, 51 yrs, Uru

Mwizi Mwachireje, 56 yrs, Kiondo

Mwizi Mwachireje, 63 yrs, Kiondo

Mwizi Mwachireje, 76 yrs, Kiondo

Mwizi Mwachireje, 63 yrs, Kiondo

Mwizi Mwachireje, 69 yrs, Kiondo

Mwizi Mwachireje, 71 yrs, Kiondo

Mwizi Mwachireje, 63 yrs, Kiondo

Mwizi Mwachireje, 65 yrs, Kiondo

Mwizi Mwachireje, 101 yrs, Kiondo

Mwizi Mwachireje, 72 yrs, Kiondo

Mwizi Mwachireje, 51 yrs, Kiondo

NDIX IIILIST OF ORAL INFORMANTSODIGO SAGES

<u>NAME</u>	<u>AGE</u>	<u>PLACE INTERVIEWED</u>
Modallah Hamis Mwariale,	63 yrs	Msambweni
Modalla Mwamurya	59 yrs	Mabokoni
Modulrahman Mwazewe	55 yrs	Mabokoni
Muhamad Ali Muhammad Mwamachache	60 yrs	Msambweni
Muhamad Bakari Kufaa Mwadzowah	64 yrs	Waa
Muhamad Wana Kali	96 yrs	Ng'ombeni
Muhamad Ahmad Mwachireje	62 yrs	Kinondo
Muhamad Amisi Mwachireje	59 yrs	Kinondo
Muhamad Nassah Kiperah	30 yrs	Mwabungo
Muhamad Suma Salim Pati	68 yrs	Chitsanga
Muhamad Suma Keke	68 yrs	Galu
Muhamad Hamisi Bambulo Mwachidegere	61 yrs	Waa
Muhamad Muhammad Mwajinga	68 yrs	Mkwakwani
Muhamad Muhammad Tsari	63 yrs	Msambweni
Muhamad Muhammad Omar Mwakilalo	76 yrs	Msambweni
Muhamad Omar Bakari Mwakaniki	63 yrs	Mtambwe
Muhamad Omar Suleiman	69 yrs	Mtambwe
Muhamad Omar Mwafumbwe	71 yrs	Mabokoni
Muhamad Walehe Mwadzitso	63 yrs	Tiwi
Muhamad Aidi Mwakaphola	68 yrs	Ukunda
Muhamad Aidi Mwagumbo Rimo	101 yrs	Ukunda
Muhamad Hee Mwadzimendza	72 yrs	Mabokoni
Muhamad Yusuf Ali Muhambe	51 yrs	Ukunda

MUSLIM SCHOLARS (Madrassah Teachers, Mosque Immams and Kadhi)

NAME	AGE	PLACE INTERVIEWED
Maalim Suleiman Hassan Setu	51 yrs	Mwabungo
Maalim Muhammad Mwamboga	48 yrs	Mwabungo
Maalim muhammad Mwafujo	67 yrs	Mwabungo
Maalim Salim Bakari Mwarangi	42 yrs	Muhaka
Maalim Hamisi Mwakibarua	58 yrs	Tiwi
Shee Omar Mwafumbwe	30 yrs	Mabokoni
Maalim Athman Hussein Kilalo	56 yrs	Galuu
Maalim Molid Hussein Kilalo	59 yrs	Msambweni
Maalim Said Mwacharo	65 yrs	Msambweni
Sheikh Juma Chambeya	95 yrs	Msambweni