Chapter 1 Part V

Documents and Other Information Received by the Panel of Jurists During Its Second Session: May/June 1962[40]

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[40] Source: National Archives Kaduna S.MOJ/12/S.1 Vol. I, 45-154.

1.

Memorandum by the Attorney-General[41] to the Panel of Jurists as to the Implementation of the Policy of the Northern Region Government on the Reorganisation of the Legal and Judicial Systems of the Region based on the Recommendations of the Panel of Jurists dated 10th September, 1958

Part 1 - Preliminary

1. The Panel of Jurists reported to His Excellency the Governor of Northern Nigeria on 10th September, 1958, and set out in their report a number of recommendations for the reorganisation of the legal and judicial systems of Northern Nigeria. On the occasion of the return of the Panel of Jurists to Northern Nigeria in 1962 it is proposed that the Attorney-General as the Minister responsible for legal affairs during the period when such recommendations were implemented shall indicate briefly in this Memorandum the steps which have been taken in and towards such implementation.

2. The report of the Panel was considered by Executive Council and a summary of its recommendations was laid before the delegates to the Nigerian Constitutional Conference which assembled at Lancaster House, London, in October, 1958. The recommendations of the Panel were later approved by the Northern Regional Government, subject to the two reservations below, and a summary of the recommendations was printed as a White Paper under the title "Statement by the Government of the Northern Region of Nigeria on the Reorganisation of the Legal and Judicial Systems of the Northern Region" and was laid on the Table of the Legislative Houses of Northern Nigeria in December, 1958. This White Paper was debated in the House of Assembly on 12th December, 1958, and a resolution was passed "That this House accepts the Government proposals contained in the Sessional Paper on the reorganisation of the Legal and Judicial Systems of the Northern Region". (See Debates of the House of Assembly (Second Legislature) Second Session, Third Meeting, 10th to 13th December, 1958, columns 937 to 964).

3. The White Paper was similarly debated in the House of Chiefs on 18th December, 1958, and a similar resolution was passed. (See House of Chiefs Debates (Second Legislature), Second Session, Third Meeting, 17th to 18th December, 1958, columns 197 to 204).

Part II - Legislation

4. Thereafter the drafting of the necessary legislation was put in hand. The first measure to be tackled was the Penal Code Bill. The first draft of this Bill was based on the Sudan Penal Code, as varied by certain elements introduced from the Pakistan Penal Code and from the Nigerian Criminal Code so far as local conditions needed to be catered for. This first draft was submitted to Executive Council and considered by it on 8th January, 1959. It was then thought desirable that the Chiefs should have an opportunity of considering the Bill's provisions before the Bill was taken at a full Council meeting, and that the Bill should be examined by representative members of the Moslem community

[41] H.H. Marshall.

in order that they might be satisfied that there was nothing in the Bill which was contrary to the Moslem religion and therefore unacceptable to the people of that faith.

5. Accordingly a committee of Moslem Jurists was requested to undertake this task of examination and reassurance. It consisted of the *Waziri* of Sokoto, M. Junaidu, M.H.C.; the *Wali* of Katsina, Alhaji Muhammadu Bello; the Chief Alkali of Bida, Malam Musa; the *Magatakarda* of Kano, Malam Jibir Daura; the Junior Alkali of Kano Malam Muhammadu Sani; the Junior Alkali of Katsina, Alhaji Muhammadu Dodo; the Alkali Babba Kura and Malam Haliru Binji. These gentlemen assembled in Kaduna on 17th January, 1959, and Mr. S.S. Richardson, Commissioner for Native Courts, was present to assist them throughout their deliberations. These deliberations continued on and off until 27th January, 1959 during which time the whole of the Penal Code Bill was examined clause by clause. The bulk of it was understood and accepted, but there were a number of points on which the jurists required further explanation and reassurance. These were set out in the report made by the jurists to Executive Council and considered by Executive Council on 4th February, 1959. Executive Council decided that it should meet the jurists informally in the Premier's Conference Room on 11th February, 1959, for a preliminary discussion on the report. This meeting was duly held. Most of the members of Executive Council, including the Attorney-General, were present, and Mr. Richardson was again in attendance. Many of the outstanding points were cleared up – in some cases by compromise concessions to the Moslems – but there still remained certain tough outstanding questions, including the subject of provocation in its relation to homicide, upon which it appeared that there would be difficulty in securing agreement. The committee of Moslem jurists was therefore again convened and three meetings were held at which were present a few members of Executive Council. Sheikh Awad of the Kano School of Arabic Studies came at short notice and explained the position of Hanafi law in relation to the Sudan Penal Code, when it appeared that there are in Hanafi law various degrees of homicide which are punishable according to the circumstances in which the homicide is committed. As a result of his explanations all the other difficulties disappeared except one, namely, the question of *diyah*, to which I shall refer later. It was apparent at the discussions that it was the attachment of both the English and the Moslem lawyers to their particular technical terms of art for the various forms of homicide that was causing confusion and difficulty to the lawyers of the opposite school. Much time was taken up by an attempt to analyse the various ingredients of the crimes of amdi, ghila, haraba and khata, on the one hand, and murder and manslaughter, whether voluntary or involuntary, on the other hand. I therefore suggested that all the names of all the different types of homicide should be abandoned and that all forms of criminal killing should be described as culpable homicide, and that we should then go on to provide that culpable homicide should be punished, as Hanafi law says, according to the circumstances in which it is committed, reserving the death penalty for the worst kind only. This proposal found universal acceptance, and the whole of the homicide portion of the Bill was remodelled and redrafted to give effect to this compromise. Difficulties as to the exact place on the ladder of homicide at which we should fix the death penalty were also resolved. Amendments to the Bill to give effect to these concessions and compromises were prepared for submission to Council with one point only outstanding, and that was on the subject of *diyah*. Several of the Moslem jurists had insisted that the relatives of a murdered persons should still be able to

exercise an option as to whether they would demand the death penalty or would accept *diyah*. It was pointed out that Government had already committed itself on this subject in paragraph 23 of the White Paper by saying that in cases of murder there would be no question of such payments, but that only in the circumstances in which the exercise of the prerogative of mercy was contemplated might the payment of *diyah* be made a condition of clemency. The point, therefore, remained a sore one. The amendments were referred back to Executive Council and I reported progress. It was decided that the Bill should be considered at a full meeting of the Council at which the Chiefs would be present. For various reasons, not unconnected with the preparations for the celebration of Self-Government, consideration of the matter by Executive Council was deferred until 20th May. But on 17th May advantage was taken of the presence in Kaduna for the Self-Government Celebrations of the Emir of Kano, the Chief Justice of the Sudan (who had been a member of the Panel of Jurists who visited Kaduna in 1958), and of the Mufti of the Sudan, to arrange a further informal conference at which they were present with certain members of Executive Council, including the Minister of Finance, Alhaji Aliyu, *Makama*n Bida, the Minister of Education, Alhaji Isa Kaita, *Madawaki* of Katsina, and the Attorney-General. The Commissioner for Native Courts was also present. At this conference the Emir was asked if he had any outstanding points and he raised several, including the questions of provocation and of *diyah*. The Mufti of the Sudan was able to satisfy the Emir by a reference to the Sunna that Moslem, and even Maliki, law recognised provocation in certain circumstances as an element which would justify the reduction of the degree of culpability in homicide so that it would be punishable not by death but by a lesser punishment such as imprisonment. He was also able to reassure the Emir on the subject of *diyah* by referring to those passages in the Koran and Sunna and the works of the Moslem jurists which treat of the power of the Imam to use his Siyasa power to punish a wrongdoer in the interests of public security.

6. The Bill was again considered at a meeting of Executive Council on 20th May, 1959, and approved as amended. Thereafter, by the direction of Executive Council, the Bill was referred to the Chief Justice (the late Sir Algernon Brown) for his comments. He had numerous suggestions to make and these were approved by Executive Council on 9th July. The Bill was then directed to be printed and presented to the Legislature. It was passed by the House of Assembly in August, 1959. (See Official Report of the Debates of the House of Assembly (Second Legislature), Third Session, 12th to 19th August, 1959, columns 482 to 492, 500 to 513, 543 to 546, 561 to 588, and 652 to 685.)

7. The Bill was afterwards debated in and passed by the House of Chiefs (see Official Report of the Debates of the House of Chiefs (Second Legislature), Third Session, 29th August to 2nd September, columns 102 to 119 and 125 to 142). The Motion for the Second Reading was in fact seconded by the Emir of Kano although no record of this appears in Hansard. The Bill was afterwards assented to by His Excellency but was not brought into force until the other legislation hereinafter referred to was also brought into force.

8. Work was then put in hand on the preparation of the following further Bills: the Criminal Procedure Code Bill, the Evidence (Amendment) Bill, the Native Courts (Amendment) Bill, the Northern Region High Court (Amendment) Bill, the District Courts Bill, the Sharia Court of Appeal Bill, the Court of Resolution Bill, the Coroners

(Amendment) Bill, and the Adaptation of Legislation Bill. From the very first, there was continuous contact with the Chief Justice and the members of the Judicial Department on these Bills, with the Moslem jurists who had considered the Penal Code Bill, and with other persons representing the varied interests of the Nigerian public. The negotiations and conferences with the Moslem jurists and the representatives of non-Moslem interests were lengthy, but not nearly so difficult as had been those during which the provisions of the Penal Code Bill were discussed. On this occasion, much less criticism came from the representatives of the Moslem world and the Native Courts' judges and native authority representatives, since the procedures provided for in the Criminal Procedure Bill were far more familiar to the Moslem lawyers and non-Moslem Native Courts personnel than they were to the members of the English judiciary. It was with the members of the English judiciary that there were protracted discussions, voluminous correspondence and difficult negotiations extending over the period from 16th June, 1959, to early October, 1959. During the course of these negotiations, objection was taken by the late Chief Justice to certain parts of the new procedure whereby the magistrate took cognizance of a case from the very beginning of the case and directed the police investigations. The Chief Justice also communicated direct with the Colonial Office on several occasions with regard to the Bill. After much correspondence and negotiation, the terms of the draft Bill were finally settled at a conference between the Attorney-General, the Chief Justice and representatives of the Legal and Judicial Departments at the end of September, 1959. The provisions of the Bill were accepted by the judiciary with some amendments on the clauses to which objection had been taken. The main provisions of the new procedure remained substantially unaltered. It appears that many of the difficulties which arose during the course of the discussions with the Chief Justice had been inspired by Mr. A.J. Price, a magistrate who had taken up a strong attitude towards the Bill and had opposed many of its provisions. (He has since left the country. He made an attack on the Codes and on the Northern judicial reforms generally in an article in the Modern Law Review of May, 1961,[42] which was inaccurate, but to which a complete and comprehensive reply was given in the same issue of the same publication by Professor Anderson, a member of the Panel of Jurists[43]). Negotiations also took place with Mr. Bovell, the Inspector-General of Nigeria Police and with the local Nigeria Police officers, as a result of which certain clauses were amended to meet their wishes. The Bill was duly approved by Executive Council and was presented to the House of Assembly in April, 1960, together with the other Bills mentioned above. These were all debated at length. (See Parliamentary Debates, House of Assembly (Second Legislature), Fourth Session, period 6th April to 3rd May, 1960, columns 619 to 638, 641 to 658, 665 to 698, 719 to 757).

9. The Bills were also debated in the House of Chiefs (see House of Chiefs Debates (Second Legislature), Fourth Session, period 4th May to 13th May, columns 99 to 152). All the Bills were subsequently assented to by His Excellency and are now Laws No. 10, 11, 12, 13, 14, 15, 16, 17 and 18 of 1960. They were not brought into force until 30th September, 1960 for the reasons explained below.

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[42] A.J. Price, "Retrograde Legislation in Northern Nigeria?", *Modern Law Review*, 24 (1961), 604-11.
[43] J.N.D. Anderson, "A Major Advance", *Modern Law Review*, 24 (1961), 616-25.

10. In the meantime, negotiations had been going on with the Federal Government, and particularly on a personal level between myself as Attorney-General of Northern Nigeria and Mr. Unsworth, Attorney-General of the Federation, as a result of which complementary Federal legislation was prepared and enacted by the Federal Parliament. This legislation took the form of three Ordinances, namely, the Criminal Procedure (Northern Region) Ordinance, 1960, (No. 20 of 1960), the Penal Code (Northern Region) (Federal Provisions) Ordinance, 1960, (No. 25 of 1960) and the Adaptation of Federal Provisions (Northern Region) Ordinance, 1960, (No. 22 of 1960). Ordinance No. 25 of 1960 was necessary because the Legislature of Northern Nigeria had no power to create criminal offences in relation to those subjects which were within the sole competence of the Federal Legislative List set out in Part I of the Schedule to the Constitution of the Federation. Similar considerations applied to the subject of criminal procedure in so far as it related to Federal penal offences, to the jurisdiction of courts, and to powers of arrest in respect of Federal offences.

11. All the legislation, Regional and Federal, was brought into force on 30th September, 1960. There were several reasons for the choice of this particular date, among the most important of which was the necessity of delaying the commencement of the laws for a sufficient time to enable subsidiary legislation under most of the Laws to be prepared, without which the Laws themselves could not be worked. Other reasons for the choice of the exact date of 30th September were that Nigerian Independence had been fixed for 1st October, 1960, and it had been arranged that, under the Constitution for Independence, all laws existing before that date should remain in full force and effect in the independent Nigeria. It was desirable, therefore, that the legislation, both Regional and Federal, affecting our reforms, should have the benefit of the description of "existing laws" as on that date and could be "taken over" as such. This device was successful except with regard to one detail, which shall be mentioned later. A third reason for the choice of 30th September was that, on 1st October the Northern Cameroons would cease to be administered by Northern Nigeria and would come under United Kingdom Trusteeship until a plebiscite was held. It would be governed by an Administrator stationed in Mubi who would have full powers of legislation by Proclamation. The Order in Council of Her Majesty establishing this regime provided that all laws in force in Northern Nigeria before the 1st October, 1960, should apply in the Northern Cameroons with such adaptations as the Administrator might make. It was therefore desirable that our new penal and legal system should be in force in Nigeria when the United Kingdom Trusteeship Government took over. In the event, this was a very successful move, as the voting in the plebiscite returned the Northern Cameroons to Northern Nigeria, and there has been no break in the continuity of the laws and no separate treatment of the Northern Cameroons has been necessary.

12. The above is a short history of the legislation passed in the implementation of the recommendations of the Panel of Jurists. It is now desirable to treat in some detail the specific recommendations made by the Panel, and to show the history of their implementation and the various ways in which they have been dealt with.

Part III - Method of Implementation of Specific Recommendations

13. The recommendations of the Panel were summarised on pages 28 to 31 of their Report, and I will deal with their recommendations in this order, but in so doing will also

make reference to the more detailed treatment of these recommendations in the earlier pages of the Report. It was the responsibility of the Attorney-General, as Minister in charge of legal matters, to implement practically the whole of the recommendations of the Panel that had been approved by Government. A Ministry of Justice was, however, created in September, 1961, and a Minister appointed in November, 1961. He took over from the Attorney-General responsibility for Native Courts, parliamentary responsibility for the judiciary, legal education and training (policy) and official oaths (policy). (See N.N.N. 1243 of 1961).

14. Recommendation 1 – "Islamic law as such should be confined to the law of personal status and family relations and, when applicable, civil cases".

This has been done by the enactment of the Penal Code, the Criminal Procedure Code, the establishment of the Sharia Court of Appeal, the amendment of the Native Courts Law, 1956, and the provision of separate channels of appeal for cases involving personal status and family relations.

15. Recommendation 2 – "The introduction of a Northern Nigerian Penal Code and a Code of Criminal Procedure based on the Sudan Codes".

This has been done, as stated above, and there is now one criminal law and criminal procedure law for all courts in Northern Nigeria, subject to the following exceptions:

(a) The Moslem element in the community insisted on the separate treatment of certain *haddi* offences such as the drinking of alcohol, drunkenness, and the commission of adultery and defamation, some of which are crimes only when committed by a Moslem. (See Sections 387, 388, 392, 393, 401, 402, 403 and 404 of the Penal Code). Special provision is made in Section 68(2) of the Penal Code and in Part I of the First Schedule to the Native Courts Law for a Moslem to be punished with *haddi* lashing in addition to any other punishment if he commits one of these offences. Adultery is also an offence for members of those communities in which adultery was a crime at non-Moslem native law and custom. (See sections 387 and 388 of the Penal Code).

(b) While the High Court and magistrates' courts are bound by the provisions of the Codes, the Native Courts are, during the "interim period" merely guided by their provisions, except that they are bound by the provisions of certain sections providing for the fundamental principles of a fair trial. (See section 386 of the Criminal Procedure Code). More will be said on the subject of guidance in the next paragraph.

16. Recommendation 3 – "Whereas the High Court and Magistrates' Courts should be bound by these Codes, the Native Courts should, for an interim period, be "guided" by them".

The "guidance" principle, as stated above, has been introduced as recommended.

(a) Guidance in relation to procedure: The Panel suggested in paragraph 12 of its Report, that in matters of procedure the Native Courts cannot be expected to observe the details of the Code of Criminal Procedure for many years to come, but that they should be guided by the Codes except on certain essential points as stated

above. The Panel then went on to set out in detail their suggestions as to how their recommendations on this score should be carried out. It will be seen from paragraph 30 of the White Paper that the Government accepted all the recommendations of the Panel except two. One of the reservations made was that there should be further consideration of "the difficulties of legislation to provide for Native Courts being "guided" during the interim period without being rigidly bound by the new Codes". We are fortunate to be able to say that the difficulties in the preparation of the legislation relating to "guidance" were overcome, considerable assistance having been obtained from Sir Kenneth Roberts-Wray, the former Legal Adviser to the Colonial Office, in the preparation of the clauses relating to this topic. He produced for us a precedent which had been used in Uganda, and which we adapted for our needs. As stated above, the procedural provisions relating to "guidance" are set out in Chapter XXXIII of the Criminal Procedure Code, which deals with trials in Native Courts. The provision that certain fundamental principles of justice should be excluded from the "guidance" principle and that Native Courts should be bound by these has been carried out.

(b) Guidance in relation to substantive law: The "guidance" principle in relation to substantive law is set out in paragraph 12 of the Report of the Panel, in which it was stated that it was expected that the Native Courts would be able to approximate in regard to substantive law much more closely [than in regard to procedure][44] to a proper application of the provisions of the new Codes, but that the Panel hoped that legislation could be drafted which would give full scope to the judges, when dealing with Native Court cases on appeal, to take a broad and understanding view of the difficulties facing courts, which have always been accustomed to apply a different system, in learning an entirely new technique, and they further suggested that it would greatly assist these courts if the appellate court would seek to remedy minor defects, either by its revising the judgment or sentence concerned, or by sending the case back where necessary to the Native Court for further evidence, instead of quashing convictions on appeal because of such minor defects. These recommendations have been implemented in the provisions of section 288 of the Criminal Procedure Code relating to the powers of the appellate court when dealing with technicalities, and of section 382 of the same Code relating to errors or omissions in the charge or other proceedings. Section 386(4) particularly draws attention to the necessity for these sections to be observed.

(c) Guidance in relation to the law of evidence: The Panel made no recommendation as to the application of the "guidance" principle in regard to the law of evidence. But during the drafting of the Criminal Procedure Code, we were brought up against the difficulty presented by the existence of the Evidence Ordinance (Cap. 63 of the Laws of Nigeria, 1948 Edition). Evidence given in magistrates' courts and the High Court was and is governed by the provisions of the Evidence Ordinance, but section 1(2)(c) of that Ordinance provided that the Ordinance should not apply to judicial proceedings in or before a Native Court unless the Governor in Council should by order confer upon any or all Native Courts jurisdiction to enforce any or all of the provisions of the Ordinance. It does not appear that any order has been made under

[44] These brackets and bracketed language in the original.

this section. The only other provisions of importance relating to evidence in Native Courts were contained in sections 20, 21 and 26 of the Native Courts Law, 1956, which provided in effect for Native Courts, broadly speaking, to administer native law and custom and for the practice and procedure of Native Courts to be governed by native law and custom. The Criminal Procedure Code Bill, on the other hand, provided very briefly in sections 236 and 237 for the nature of the evidence which was to be given in all criminal cases. It was considered that, standing alone, these provisions were inadequate, and that the provisions of the Evidence Ordinance must be retained in force, certainly for the High Court and the magistrate's courts. The difficult question was what was to be done about Native Courts. It was considered that it would be disastrous to say that the Evidence Ordinance was too complicated for them and that they must continue to take evidence in accordance with native law and custom subject to the two provisions of the Code referred to above. Such a provision would have had the effect of perpetuating a portion of the dual system which we were seeking to abolish and would have caused immense confusion. On the other hand, we felt that it would be quite impossible to expect Native Courts to assimilate overnight highly technical English rules of evidence as laid down in the Evidence Ordinance. It was therefore proposed that the Native Courts should be "guided" by the provisions of the Evidence Ordinance also for the "interim period". The Evidence (Amendment) Law, 1960 (No. 12 of 1960) accordingly provided that in judicial proceedings in any criminal cause or matter in or before a Native Court, such court should be "guided" by the provisions of the Evidence Ordinance in accordance with the provisions of Chapter XXXIII of the Criminal Procedure Code. Some apprehension had been felt at the time of the preparation of this rather far-reaching measure that it would be the subject of considerable opposition from various quarters in the Region and that it would be opposed and criticised in the debates in the Legislature. This, however, was not the case, and the Bill passed through the House of Assembly and the House of Chiefs with virtually no debate at all. (See House of Assembly Debates, (Second Legislature), Fourth Session, 6th April to 3rd May, 1960, columns 694 to 696, and House of Chiefs Debates (Second Legislature), Fourth Session, 4th to 13th May, 1960, columns 122 to 124.).

17. Recommendations 4 and 5 – "All witnesses must be heard without discrimination (and sworn on essential points)" and "Courts must decide cases on the weight of all the evidence".

These have been carried out by the provisions of sections 389, 391 and 392 of the Criminal Procedure Code.

18. Recommendation 6 – "Specific recommendations regarding blood-money (*diyah*)".

The Panel recommended that the practice prevailing in the Sudan should be adopted in regard to blood money, i.e. that in cases of murder there would not normally be any question of such payments, but that only in those circumstances in which the exercise of the prerogative of mercy was contemplated would payment of *diyah* be made a condition for clemency. They went on to suggest that in cases of homicide not amounting to murder, on the other hand, acceptance of blood money by the relatives of the deceased might be taken into account as a factor which might justify a reduction of sentence. It was emphasised that such payment should never be regarded as a substitute for the

punishment of the offender, but rather as a means of readjusting the social equilibrium at the conclusion of a case. This recommendation was specifically mentioned in paragraph 23 of the White Paper and was among those supported by the Regional Government. As stated above, however, some difficulty was experienced in negotiations with the Moslem jurists and with the Emir of Kano over the abolition of the old *diyah* system whereby the relatives of the convicted person could waive the death penalty on payment of blood money. The problem was eventually resolved by a compromise whereby it was agreed that the wishes of the relatives should not indeed relieve a convicted person from the death penalty but should be recorded by the Native Court trying the case and should be taken into consideration by the Advisory Council on the Prerogative of Mercy when considering whether to recommend to His Excellency that he should exercise his power of commutation of the sentence of death to one of imprisonment. (See House of Assembly Debates (Second Legislature), Third Session, 12th to 19th August, 1959, column 562 and Fourth Session, 6th April to 3rd May, 1960, column 628 and section 393 of the Criminal Procedure Code).

19. Recommendation 7 – "During the interim period, non-Moslems should be permitted to "opt out" of trial by a Moslem court and a similar option should be allowed to a Moslem who objects to trial by a non-Moslem Native Court".

This recommendation was implemented even before the introduction of the legal and judicial reforms, as it was felt that there was a need to demonstrate the intention of the Government to support in this respect the recommendation of the Minorities Commission on which the Panel of Jurists in paragraph 15 of their report stated that their own recommendation was based. Accordingly, a new section 15A was introduced into the Native Courts Law, 1956, by the Native Courts (Amendment) Law, 1958, which came into force on 31st December, 1958. This section reads as follows:

> "15A. (1) Notwithstanding the provisions of section 15, where any person appears either as an accused person in a criminal case or as a defendant in a civil case before a Native Court sitting in the exercise of its original jurisdiction the Alkali or President of the Native Court as the case may be shall address to him a question to the following effect:
>
> "What is your religion?"
>
> (2) Where the Native Court before which the proceedings are being held is:
>
> (a) a Moslem court and it appears from the answer of such person that he is not a Moslem; or
>
> (b) a Native Court other than a Moslem court and it appears from the answer of such person that he is a Moslem,
>
> the Alkali or President of the Native Court as the case may be shall then forthwith ask him the following question:
>
> "Do you consent to your case being tried by this court or do you desire your case to be tried in the High Court, a magistrate's court or another Native Court?"
>
> (3) The record of proceedings before the Native Court shall contain:

(a) the question prescribed by subsection (1) and the answer to that question; and

(b) where it is necessary to ask the question prescribed by subsection (2), that question and the answer to that question.

(4) Where such person elects to have his case tried in the High Court, a magistrate's court or another Native Court the Alkali or President of the Native Court as the case may be shall forthwith report the case to the Resident.

(5) If the Alkali or President of the Native Court as the case may be shall not comply with the provisions of this section the proceedings before such Alkali or President of the Native Court shall be null and void.

(6) Where a case is reported to the Resident under the provisions of this section the Resident shall direct in what division of the High Court or in what magistrate's court or in what Native Court the case shall be heard."

By an amendment to section 2 of the Native Courts Law, 1956, "a Moslem court" was defined as a court which customarily administered the principles of Moslem Law. The Bill was introduced into the House of Assembly soon after the debate on the White Paper, and the attention of the Panel is drawn to the speech of the Attorney-General on the second reading of the Bill and the debate which ensued thereon, which is set out in House of Assembly Debates (Second Legislature), Second Session, Third Meeting, 10th to 13th December, 1958, columns 993 to 998.

Thereafter, the principle of opting out was frequently attacked and the practice of it abused. The further history of the subject is as follows. Early in 1959 it became apparent that the section, as drafted, would not work. The alkalai and other Native Courts judges frequently forgot to ask the accused person or defendant the required questions, and when the cases went up to a higher court on appeal that court was forced to declare null and void any conviction which followed after such a defect, even though the asking of the question had not in any way prejudiced the rights or the fair trial of an accused person. For instance, if a Moslem were brought before an alkali and the alkali forgot to ask the Moslem the necessary questions, and the Moslem was properly convicted at Moslem law of an offence of which he was guilty, the conviction had to be set aside. It mattered not that the accused would in any case have been tried by that same alkali by Moslem law and convicted of the same offence after being asked the question, because he in fact would not have had any option to exercise. Another aspect of the system that was being abused was in the exercise of the right of a non-Moslem to be tried by a court other than a Moslem court. As section 15A(2) was worded a non-Moslem might appear to have a right to choose whether he should be tried by a magistrate's court or a non-Moslem Native Court and he frequently prevailed upon the alkali to send his case to a magistrate's court instead of to a non-Moslem Native Court with consequent delays and inconveniences to the other party to the litigation. A further defect appeared as a result of the abuse of the system by unscrupulous persons for political and other ends. Undoubted Moslems who had been to their prayers at the Friday mosque might be charged with a crime before an alkali on the Saturday and would say that they were not Moslems and would demand to be tried before a magistrate. The alkali would point out to them that they had been to the Friday mosque the day before, and they would reply

that they had changed their religion overnight. He had no alternative in such circumstances but to send them to the magistrate's court or a non-Moslem Native Court. When their case came on in such other court possibly months later, the magistrate or the presiding Native Court judge might find that the charge against the accused was not proved because of the absence of witnesses, or he might convict the accused and give them a much lighter sentence than the alkali would have given them, or in the case of a magistrate's court owing to the greater technicality of English law and procedure, the accused might get off altogether. The device was also used in civil cases, where e.g. in a remote part of Sokoto, a Moslem A. would sue another person (Moslem or non-Moslem) B. for a perfectly good debt, say, for the price of a cow. B. would declare himself a non-Moslem (whether he was one or not) and would ask for the case to be transferred to the Kano magistrate. (It was not the practice in those days for the magistrate to sit in Sokoto.) The case would be transferred to the magistrate's court, and after considerable delays would come up for hearing. B. would ask for, and obtain, a number of adjournments on specious pretexts, thus causing A. to travel from a remote part of Sokoto to Kano on each occasion at great expense. B. might, and frequently did, by this means not only postpone or avoid payment of his debt, but so harass A. and put him to such expense that he was likely to give up his claim in despair and refrain from suing B. again. An attempt was made by some Emirs to deal with Moslems who thus declared themselves to be non-Moslems. The procedure was to announce that they were apostates, and to release their wives from the bonds of matrimony. This was a device which worked well for a short time, but Emirs cannot keep track of all cases and the system was not universally operated. Serious consideration was given at this time by the Northern Government to the abolition of opting out, but it was decided to make one more attempt to get the system to work. It was therefore arranged that in all cases where an accused did not consent to his case being tried before a particular Native Court, the alkali or president should report the case to the Resident, who was then given the task of finding out whether the accused person or defendant had given his answers honestly or in good faith, or whether his answers had been made for the purpose of obstructing or delaying the course of justice, or for any other improper purpose. In the latter event, the Resident had the duty to direct the case to be returned to, and heard in, the Native Court from which it had been reported to him. Section 15A of the Native Courts Law, 1956, was therefore amended accordingly. The amendment was effected by section 3 of the Native Courts (Amendment) Law, 1960, which was introduced into the House of Assembly as part of the reform legislation and which will be referred to in other contexts later on. Section 3 of this Law provided that decisions in cases in which a Native Court judge had failed to ask the statutory questions should not be null and void, but should be voidable on appeal or on review. Provision was also made for reference to the Resident in accordance with Government's intentions set out above. The speech of the Attorney-General on the introduction of this Bill can be found in the House of Assembly Debates (Second Legislature) Fourth Session, period 6th April to 3rd May, 1960, columns 719 to 722. There the matter rested for some months, but constant complaints were received from all quarters about the new procedure. On the one hand, there were complaints that Residents did not deal promptly with the cases sent to them, with the result that accused persons and defendants walked about jeering at the Native Courts and saying quite untruthfully that they had got off. On the other hand, Southern lawyers and political opponents criticised the system because the Resident had to make a quasi-judicial

decision without necessarily observing any judicial procedure or hearing either side in any set form. It was also generally alleged that abuses continued in the same old way and that, even where a non-Moslem legally exercised his option it was still the cause of the delays and expense referred to above. Another curious point was made against the practice of opting-out so far as criminal cases were concerned. It was pointed out that an alkali or an Emir when trying criminal cases and administering the Penal and Criminal Procedure Codes was not a "Moslem court" within the meaning of the definition quoted above. His court might be a "Moslem court" in popular parlance, but he was not administering the principles of Moslem law and therefore in strict law the right to opt out did not exist! An amendment of the Native Courts Law, 1956 to define a Moslem court as "one which was presided over by a Moslem" would have created more difficulties than it would have resolved and was not considered desirable. Accordingly, late in 1961 the Northern Government reluctantly decided that, opting-out having failed, it should be abolished. This was done by section 5 of the Native Courts (Amendment) Law, 1961, which repealed section 15A of the principal law and came into force on 30th October, 1961. The debate on this Bill in the House of Assembly can be read in House of Assembly Debates (Third Legislature), First Session, period 27th September to 13th October, 1961, columns 437 to 440. It is remarkable that on this occasion practically no criticism of the Bill was raised by the Opposition. There was only one speaker on the Opposition side; and the Leader of the Opposition and most of his supporters were absent from the House. Abolition in fact caused no stir and little comment. It may be thought unfortunate that opting-out should thus have had to be abolished long before the expiry of the interim period, but Government cannot be blamed for this. The blame lies on those members of the public who, by their irresponsible conduct, have spoiled a device which was intended for the benefit of the public as a whole. It is shocking that such a beneficial and simple device should have been made so complicated and ultimately reduced to unworkability by ignorance, malice and corrupt opportunism.

20. Recommendation 8 – "Advocates should not be admitted to Native Courts".

This has been carried out by a continuance of section 28(1) of the Native Courts Law, 1956, and by the extension of its provisions to Provincial Courts (see new section 60(2) of the Native Courts Law, inserted by the Native Courts (Amendment) Law, 1960). It has also been provided that advocates shall not appear before the Sharia Court of Appeal. (See section 19(1) of the Sharia Court of Appeal Law, 1960.)

21. Recommendation 9 – "Retention of Administrative Officers' powers of review and transfer, particularly during the interim period. Prisoners' friends should not be permitted".

This has been carried out. Many responsible persons inside the Government and out of it have, however, urged the abolition of the power of review of the Resident and administrative officer (but not that of the Native Courts adviser) as being an unsuitable anachronism in an Independent country with a reformed legal and judicial system. But up to now it has been retained, and several Residents are known to be of the opinion that it is a useful power when used sparingly in favour of a litigant who may for one reason or another have not been aware of his right to appeal to a Provincial Court or to the High Court, or for one reason or another has not been able to exercise it. In such circumstances the power of review can be exercised within the restricted limits permitted

by section 57 of the Native Courts Law, 1956. It is apparent, however, that most of the reasons for the retention of the power of review disappeared on the establishment of Provincial Courts for each province. Experience has shown that these are generally efficient and popular with the public. A further compelling reason for the abolition of the Resident's powers of review has recently come into being. Under the provisions of sections 3 and 7 of the Provincial Administration Law, 1962, passed in the Budget Meeting of the Legislature in March and April, 1962, all functions under any written law at present exercisable by a Resident of a province were vested in and exercisable by the Provincial Commissioner of the Province and all functions formerly delegated to Residents were deemed to be delegated to Provincial Commissioners. Provincial Commissioners will be political and, indeed, party men, and it seems inappropriate that they should be able to exercise a Resident's judicial powers of review under the Native Courts Law, 1956. It is upon this ground, if no other, that the recommendation set out later in this Memorandum, that the powers of review of administrative officers should be abolished, is based.

22. Recommendation 10 – "Regionalisation of Native Courts would be premature". Government accepted the recommendation contained in paragraph [23] of the Panel's Report that regionalisation of the Native Courts judiciary should not proceed beyond making the judges and staff of Provincial Courts regional public servants, and offering newly qualified alkalai and court members a choice of entering the service of native authorities direct or of joining the Regional service and accepting secondment on agreed terms to a native authority willing to employ them. The first recommendation has been implemented by the amendments to section 61 of the Native Courts Law, 1956, and can now be found in subsection (3) of that section. The second recommendation does not appear to have been used to any extent.

23. Recommendations 11 and 12 – "Provincial Alkalis' Courts should be established in the predominantly Moslem Provinces to hear appeals from 'B', 'C' and 'D' Grade Native Courts. These Courts should also have first instance powers. Staff to be Regional servants"; and "Provincial Courts of three members, including one Alkali, to be set up in Plateau, Benue, and Kabba Provinces to fulfil the role of the Provincial Alkali as detailed in recommendation 11."

These recommendations have been carried out by the provisions of sections 60 to 66, as amended, of the Native Courts Law, 1956, incorporated by the Native Courts (Amendment) Law, 1960.

24. Recommendation 13 – "Admission of suitably qualified Alkalai and Native Court members in the future to the Regional Service. These persons should continue to serve with Native Authorities on secondment".

As stated above, there does not appear to have been much development in the direction of implementing this recommendation.

25. Recommendation 14 – "The Moslem Court of Appeal to be renamed the Sharia Court of Appeal".

The Moslem Court of Appeal has been abolished by the repeal of the Moslem Court of Appeal Law, 1956, and a new court called the Sharia Court of Appeal has been created

by the Sharia Court of Appeal Law, 1960. It was thought desirable to carry out the recommendation in this way, because the functions, personnel and jurisdictions of the two courts were so totally different that a mere renaming, which would have involved extensive amendment and patching of the Moslem Court of Appeal Law was impracticable.

26. Recommendations 15 and 16 – "Creation of a permanent bench of Judges for the Sharia Court of Appeal consisting of a Grand Kadi, Deputy Grand Kadi, and two Sharia Court Judges" and "Abolition of the Panel of Assessors and adoption of a system of a quorum of three Sharia Court Judges sitting as a Bench to hear appeals".

This has been done by the enactment of sections 3, 4, 7 and 26 of the Sharia Court of Appeal Law, 1960 (No. 16 of 1960).

27. Recommendation 17 – "Sharia Court of Appeal to hear appeals in matters involving personal status of Moslems exclusively. Decision of Sharia Court of Appeal to be final in these matters".

This has been carried out by sections 3, 11, 12 and 13 of the Sharia Court of Appeal Law, 1960. Section 13 makes provision for the judgment, order or decision of the court on any matter within its jurisdiction to be final, subject to a right of appeal to the Court of Resolution on the ground of jurisdiction, and to a right of appeal to the Federal Supreme Court from decisions on questions as to the interpretation of the Constitution of the Federation or the Constitution of the Region, and from decisions on questions as to whether any of the provisions of fundamental human rights has been contravened in relation to any person. This is in accordance with section 112 of the Constitution of the Federation, to which the Panel is referred.

During the course of an inspection of Native Courts in Kabba Province in July, 1960, it appeared to be manifest that in certain parts of the riverain areas of Northern Nigeria the personal relationships of some Moslems were governed not by Maliki law but by the secular or territorial native law and custom existing in the particular area. It was realised that it would be improper for appeals from decisions of Native Courts given in accordance with any such native law and custom to lie to the Sharia Court of Appeal and to be determined by that Court in accordance with Maliki Law. Section 12 of the Sharia Court of Appeal Law, 1960, had set out the subjects in respect of which the Sharia Court of Appeal had jurisdiction. In order to remove any doubt that might arise as to the particular law that should be applied in cases involving personal relationships between Moslems who were subject to such a native law and custom the Sharia Court of Appeal (Amendment) Law, 1960 (No. 30 of 1960) was passed. This (inter alia) amended section 12 of the principal law so as to provide for questions of Moslem Law regarding a marriage, dissolution of marriage, family relationship, a foundling, the guardianship of an infant, a wakf, gift, will or succession, where the endower, donor, testator or deceased person was a Moslem, an infant, prodigal or person of unsound mind who was a Moslem or the maintenance or guardianship of a Moslem who was physically or mentally infirm, to be decided by the Sharia Court of Appeal, and not merely questions (which might be governed by some other system than Moslem law) to be so decided. The opportunity was taken to obtain the insertion of a similar amendment in the Constitution when the Constitutional Conference was resumed in Lagos in July, 1960. (See Section

52(5)(b) to (d) of the Constitution of Northern Nigeria.) Events have shown that such a provision was timely and necessary because an attempt has been made to extend the jurisdiction of the Court in several ways. Moslem law inspectors were created by the Grand Kadi in 1961. These were to have had the functions of Native Courts advisers under the Native Courts Law, 1956, but to be subject to the control of the Grand Kadi and exercise supervisory and advisory functions in relation to Moslem cases only. It was proposed at one stage by the Grand Kadi that a circular should be issued to all alkalai and judges of Moslem courts drawing their attention to section 12(e) of the Sharia Court of Appeal Law and instructing them to advise litigants to request in writing that their cases should be determined in accordance with Moslem law. This was, however, not proceeded with. Complaints were also received from Emirs and alkalai that appeals in land cases which are usually determined in Native Courts of first instance in accordance with local native law and custom (Moslem law never being really supplanted by native law and custom in land matters[45]) were being attracted to the Sharia Court of Appeal and there being determined in accordance with Maliki law to the great confusion of litigants and Emirs and alkalai who were being overruled after having given perfectly good and just decisions. The pretext for such action by the Sharia Court of Appeal was that Maliki law applied to all land cases in the North and that it was wrong to apply any other law. These two incidents were indicative of a trend which gave cause for grave concern at the time. At about this time, however, Sheikh Awad, the Grand Kadi, retired and the movement now appears to have died down. As stated above, in November 1962, a Minister of Justice was appointed and given a limited schedule. Shortly afterwards the Moslem court inspectors were transferred from the control of the Grand Kadi to that of the Commissioner for Native Court who is an official of the Ministry of Justice. It is my opinion that section 52(5)(e) of the Constitution of Northern Nigeria and section 12(e) of the Sharia Court of Appeal Law might well be repealed to the great advantage of the inhabitants of the Region.

28. <u>Recommendation 18</u> – "Establishment of a Native Courts' Appellate Division of the High Court, with details of its composition and functions".

This was affected by sections 59B, 59C and 59D of the Northern Region High Court Law, inserted by section 23 of the Northern Region High Court (Amendment) Law, 1960 (No. 14 of 1960). While the clauses for these sections were being drafted, however it was realised that they were <u>ultra vires</u> the Constitution of Northern Nigeria which provided in section 142A of the Nigeria (Constitution) Order in Council, 1954, as amended, that "a person shall be qualified to be appointed a judge of the High Court of a Region if he is or has been a judge of a court having unlimited jurisdiction in civil and criminal matters in some part of Her Majesty's dominions, or a court having jurisdiction in appeals from any such court, and he has been qualified for not less than ten years to practise as an advocate or solicitor in such a court." It was provided that no other person should be qualified to be so appointed. It was realised that none of the persons who would be appointed judges of the Sharia Court of Appeal would have the qualifications prescribed by section 142A. Accordingly, application was made to the Colonial Office

[45] Sic: should probably read "(Moslem law never really having supplanted native law and custom in land matters)", which is consistent with the rest of the sentence; cf. J.N.D. Anderson, *Islamic Law in Africa* (London: Frank Cass, 1955), 184-185 (confirming the amended reading).

for an amendment to the Constitution to enable the required provision to be made. There was strenuous opposition to this proposal from the Western Region Government, but the proposal was nevertheless agreed to by the Colonial Office and the Secretary of State agreed an interim amendment to the Constitution to enable the necessary provision to be made. This was carried out by section 9 of the Nigeria (Constitution) (Amendment) Order in Council, 1960, which amended section 142A of the principal Order by the insertion of two new subsections (13) and (14) as follows:

> "(13) A law enacted by the legislature of the Northern Region may provide that, when the High Court of that Region is exercising jurisdiction on appeals from decisions of a Native Court in such cases as may be prescribed by any such law, members of any such court as is referred to in paragraph (b) of the proviso to subsection (1) of section 148 of this Order may sit as additional members of the High Court.
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> "(14) For the purposes of subsection (13) of this section "Native Court" means a court established by or under the Native Courts Law, 1956, of the Northern Region (No. 6 of 1956), as amended, or any law replacing that law."

The "any such court" was in fact the proposed Sharia Court of Appeal which drafting decorum had apparently decreed should not be named before birth. This amendment came into force on 13th February, 1960. It was accordingly possible to draft and ultimately pass into law sections 59B, 59C, 59D of the High Court Law referred to above. The amending law, as previously stated, was brought into force on 30th September, 1960. On 1st October, 1960, the Constitution for Independence came into force. Thereafter the Native Courts Appellate Division of the High Court sat several times, and on one occasion was presided over by the Deputy Grand Kadi, Alhaji Abubakar Gumi, as being the member of the court considered by the majority of the judges of such court to have the greatest knowledge of the law to be administered in the particular appeal then before it. On 23rd January, 1961, an application was made to the Native Courts Appellate Division of the High Court in Kaduna in the case of *J.S. Olawoyin and six others v. Commissioner of Police* for an order under section 108(2) of the Second Schedule (i.e. the Constitution of the Federation of Nigeria) to the Nigeria (Constitution) Order in Council, 1960, that the following questions be referred to the Federal Supreme Court -

> "(1) Whether the provisions of section 59C of the Northern Region High Court Law in so far as they make the Grand Kadi or the Deputy Grand Kadi or an appointee of the Grand Kadi capable to sit as a member of the Appellate Division of the High Court have not been invalidated by the provisions of Chapter IV of the Third Schedule to the Nigeria (Constitution) Order in Council, 1960, [i.e. the chapter of the Constitution of Northern Nigeria which relates to courts][46].
>
> (2) Whether the Appellate Division of the High Court is properly and adequately constituted by two judges of the High Court or
>
> (3) Whether the Appellate Division of the High Court is properly and adequately constituted by three judges of the High Court."

[46] These brackets and bracketed language in the original.

The reference to the Federal Supreme Court was duly made, and the case came on for hearing before the Federal Supreme Court on 10th March, 1961, before Ademola CJ, Brett, Unsworth, Taylor and Bairamian, JJ, when the Attorney-General of Northern Nigeria and Mr. N. Henderson, Senior Crown Counsel, attended in Lagos to argue the Reference on behalf of the Government of Northern Nigeria. On 6th April, 1961, the Federal Supreme Court gave judgment, holding that section 59C was ultra vires the Constitution.[47] The cause of the trouble had been that the amending subsections (13) and (14) to section 142A of the Nigeria (Constitution) Order in Council, 1954, had not been reproduced in the Constitution for Independence, in response to a desire of the Colonial Office draftsmen to tidy up all such amendments which had in their opinion been implemented and could be regarded as spent. It was apparently thought that by the passing of sections 59B, 59C and 59D of the Northern Region High Court Law, the Northern Regional Legislature had in fact done that which it had been given power to do, namely establish a division of the High Court for the hearing of appeals from Native Courts in which a judge of the Sharia Court of Appeal could take his place with the High Court judges, and it was also apparently thought that the provisions of section 3 of the Nigeria (Constitution) Order in Council, 1960, providing for the continuance of "existing laws" would have the effect of preserving the existence of sections 59B, 59C and 59D of the Northern Region High Court Law. Section 5(1) of the Constitution of the Federation, however, provided that the constitution of each Region should have the force of law throughout that Region and if any other law was inconsistent with that constitution, the provisions of that constitution should prevail and the other law should, to the extent of the inconsistency, be void. Sections 59B, 59C and 59D of the High Court Law were technically in conflict with section 50(3) of the Constitution of Northern Nigeria which laid down the qualifications of the judges of the High Court. The provision in section 4 of the Constitution Order that all offices, courts and authorities established under the previous Orders in Council should, so far as was consistent with provisions of the Constitution Order, continue after the commencement of the Order as if they were offices, courts and authorities established under the Order, was also unable to assist in curing the defect for a similar reason. The question would not have arisen if a provision had originally been inserted in the Constitution itself to the effect that the Northern Region High Court might be constituted as indicated above. Much consternation was occasioned in Moslem circles by this decision and some irresponsible persons alleged that the drafting omission was not accidental but a deliberate attempt to reduce Moslem influence in the North after Independence. The fact that one of the counsel who had appeared for the applicant in the case was Mr. F.R.A. Williams, Q.C. (former Attorney-General and Minister of Justice of the Western Region, but now in private practice) whose Government had at his instance objected to the amendment to the Constitution at the time it was proposed in 1959, did not improve matters. Steps were immediately taken to amend the Constitution of Northern Nigeria so

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[47] *J.S. Olawoyin v. Commissioner of Police* (1961) 1 All N.L.R. (Part 2) 203. Cf. *Ado v. Dije* (1983) 2 F.N.L.R 213, 5 N.C.L.R. 260, once again striking down §59C (by then = §63(1) of the High Court Law of the Northern Region and subsequently of the states into which the region was divided), this time under Nigeria's 1979 Constitution, which also failed to make the provisions necessary to allow judges of the Sharia Courts of Appeal to sit with divisions of the High Courts hearing appeals from Native (by then "Area") Courts.

as to undo the effect of the decision of the Federal Supreme Court and to restore the position as it was before. Accordingly, the Constitution of Northern Nigeria (Amendment No. 2) Law, 1961, (No. 27 of 1961) was passed by the Northern Legislature and assented to on 20th May, 1961, but was expressed not to come into force until appointed by the Governor by notice in the Regional Gazette. This Law amended section 50 of the Constitution of Northern Nigeria by the insertion of a new subsection (3A) providing that, when the High Court was exercising jurisdiction on appeals from decisions of a Native Court, a member of the Sharia Court of Appeal might sit as an additional member of the High Court in such manner, and under such conditions, as might be prescribed by any law enacted by the Legislature of the Region. It was thought desirable to insert this affirmative authority in the Constitution rather than to repeat the oblique and, as it turned out, disastrous provision enabling a law of the Region to make the required provision. This Law was followed up by the Northern Region High Court (Amendment No. 2) Law, 1961, which inserted new sections 59B, 59C and 59D in the High Court Law, providing for the manner and conditions in and under which the High Court should hear appeals from Grade A and Grade A Limited Native Courts and Provincial Courts. Here again, the former phraseology was simplified and the expression "Native Courts Appellate Division", which had been the source of criticism and confusion, was omitted. This Law, which was dependent for its efficacy on the Constitution (Amendment No. 2) Law, was also expressed to come into force when appointed by the Governor. Because of the provisions of sections 5(4) and 6(c) of the Constitution of the Federation, the Constitution (Amendment No. 2) Law could not take effect unless a resolution supported by the votes of at least two-thirds of all members was passed by each House of Parliament signifying consent to its having effect. Considerable time elapsed before a two-thirds majority of the House of Representatives could be mustered, but this majority was eventually obtained and a Resolution duly passed in that House on 23rd November, 1961. The Bill was debated before the Senate on the 25th and 29th November, 1961 but the Senate declined to pass the Resolution and adjourned the debate. The required Resolution was, however, passed on the 27th March, 1962 and both Laws are to be brought into force by the Governor of Northern Nigeria on 1st July, 1962, (N.N.L.N. No. [89 and 92] of 1962). It is now hoped that the High Court constituted in accordance with the recommendation of the Panel of Jurists will be able to hear its appeals without any further political interference based on legal quibbles.

29. Recommendation 19 – "Provision for a Court to resolve conflicts of jurisdiction between the High Court and the Sharia Court of Appeal".

This recommendation was carried out by the establishment of the Court of Resolution by the Court of Resolution Law, 1960, (No. 17 of 1960). The court was so named because it was a court created for the purpose of the resolution of conflicts of jurisdiction between the High Court and the Sharia Court of Appeal. The equivalent court in the Sudan is called the Court of Jurisdiction. This name was not followed here because every court is in one sense a court of jurisdiction. The court is, by section 2, stated to be a court "for the resolution of any conflict of jurisdiction arising between the High Court of Justice of the Northern Region and the Sharia Court of Appeal". It has not yet sat.

Since the coming into force of the new legislation, it has been found that numerous instances have arisen of litigants lodging their appeals in the wrong court. In all these cases, there has been no dispute between the High Court and the Sharia Court as to which court was the appropriate one to hear the appeal, and therefore there was no need to invoke the Court of Resolution.[48] It was found, however, that the lodging of appeals in the wrong court worked hardship to the litigant since, if a case was called on in the wrong court and the appeal was dismissed for lack of jurisdiction, he might be too late to lodge it in the other court, and in any case if he were in time he would have to pay fees all over again in that other court. Provision has accordingly been made in the High Court (Amendment) Law, 1962, and the Sharia Court of Appeal (Amendment) Law, 1962, for mutual powers of transfer between the High Court and Sharia Court of Appeal to meet such cases.

30. Recommendation 20 – "An automatic appeal to the Native Courts' Appellate Division of the High Court in all cases in which the death penalty is imposed".

This is the one recommendation which the Northern Government found itself unable to accept. See paragraph 30 of the Government White Paper. As indicated in that paragraph, further consideration was given to the desirability of automatic appeals in homicide cases, but it was again decided not to implement this recommendation.

31. Recommendation 21 – "Salaries of Alkalai, etc. should be increased".

This has been done. Details will be supplied by the Ministry for Local Government.[49]

32. Recommendation 22 – "Recommendation that Magistrates and Crown Counsel should pass a prescribed examination in a local language".

This recommendation, although accepted in principle by the Government, has not yet been implemented. The difficulty of obtaining an adequate number of expatriate magistrates and Crown Counsel during the years since the grant of self-government, and the availability of only a few Northern magistrates and Crown Counsel persuaded us that the time was not ripe for such a requirement to be introduced. When the steady flow of barristers returning to fill the posts of magistrates and Crown Counsel in the Region reaches adequate proportions the problem will have largely solved itself, and all such officers will in fact speak a local language and should be able easily to pass an examination in one.

33. Recommendation 23 – "A policy should be decided upon without delay to train Northern Nigerians to fill the posts of High Court Judges and Magistrates in the future".

[48] In fact the Courts of Resolution, whether of the Northern Region or of the states into which the Region was subsequently divided, were never once invoked. Before 1979 this was presumably because there were no disputes about High Court/Sharia Court of Appeal jurisdiction that could not be resolved informally, as the Attorney-General here indicates. After 1979 there were many such disputes, but appeals were now allowed from the Sharia Courts of Appeal to the (Federal) Court of Appeal in all matters, so the cases went there instead of to the Courts of Resolution. The Court of Resolution Laws were dropped from all of the "Revised Laws" of the Northern states published in the late 1980s and early 1990s, on account of desuetude.

[49] See "Memorandum of Increases in Salary Granted to Alkalai, Native Court Presidents and Other Members of the Native Courts Judiciary: 1958", no. 6 *infra*.

This has been implemented, and a scheme has been put in hand for the training of Northern Nigerians to fill the posts of High Court Judges and magistrates in the future. The panel is referred to the Memorandum of the Principal of the Institute of Administration on this subject.[50] In addition, the following progress in filling judicial posts may be noted. One Northern Senior Crown Counsel has been transferred from the Legal Department to the Judicial Department as Chief Magistrate, and now sometimes acts as a High Court Judge. A system of appointing newly-called Northern barristers to be Associate Magistrates has been formulated. It is intended that they should assist Magistrates Grade I for a probationary period of two years, during which they should receive training at the Institute of Administration, in Crown Counsel's Chambers, and on the Bench, sitting with a magistrate and studying how cases are tried. So far, one Northern Associate Magistrate has been appointed. It is intended that Associate Magistrates should be the counterpart in the Judicial Department of the Pupil Crown Counsel in the Legal Department. They have been designated Associate Magistrates because for obvious reasons it would have been undesirable to have described them as "Pupil Magistrates". A statement of the course of training and of the duties of Associate Magistrates during their two years' probationary period is set out as an Appendix to this Memorandum.

34. Recommendation 24 – "The Grand Kadi should be a member of the proposed Judicial Service Commission".

This recommendation has been implemented. It required an amendment to the Constitution which was effected by section 55(c) of the Nigeria (Constitution) (Amendment) Order in Council, 1959. This was carried forward to the Constitution for Independence and is now contained in section 53(2)(c) of the Constitution of Northern Nigeria.

35. Recommendation 25 – "A suitable Commissioner for Native Courts should be appointed at once, together with an assistant to allow for extensive touring".

This recommendation was implemented, and Mr. S.S. Richardson, an administrative officer in the Northern Nigeria public service and a former officer of the Sudan Administrative Service, was appointed to fill the post.[51] The appointment was a great success, and Mr. Richardson not only made an excellent Commissioner for Native Courts, but also materially assisted the Attorney-General and his staff in the preparation of the legislation referred to above, based as it was on the Sudan legislation. In this respect, his experience in the Sudan was invaluable to us. An Assistant Commissioner for Native Courts was also appointed, and he and the Commissioner carried out extensive touring, on some occasions being accompanied by the Attorney-General. The standard of Native Courts has been considerably raised by the new measures, and by the training of the Native Courts judges. There has been a considerable overhaul and reorganisation of Native Courts in non-Moslem areas and criminal jurisdiction vested in a few central courts only. Jurisdiction in criminal matters has been taken away from

[50] No. 3 *infra*.

[51] S.S. Richardson's separate memorandum "on sundry problems arising from the Implementation by the Government of Northern Nigeria of the Recommendations made by the Panel of Jurists in 1958" is item no. 4 *infra*.

those courts deemed incapable of applying the Codes except in cases of adultery. This crime has been left for them to deal with in order to supplement their divorce jurisdiction.

36. Recommendation 26 – "A team of officers based on the Zaria Institute of Administration should provide short residential courses based on the new Code and procedure for Senior Native Courts personnel, and should also visit Provinces to give similar instruction to Administrative Officers and Native Courts' personnel".

This was implemented, and particulars of the courses given to senior Native Courts personnel by the team of officers at the Zaria Institute of Administration and to administrative officers and Native Courts personnel by that team in the provinces are set out in the memorandum of the Principal of the Institute of Administration which will be presented to the Panel.

37. Recommendation 27 – "During the interim period an Administrative Officer in each Province should be specially charged with the supervision of Native Courts and all District Officers in charge of Divisions should regard such supervision as a major responsibility for the next few years".

This recommendation was implemented during the period when preparation was being made for the inauguration of the new legal and judicial systems. A "D.O. (Courts)" was appointed in each province and he was charged with the responsibility for the legal training and supervision of Native Courts staff. These officers worked hard and produced good results, and their training was an excellent supplement to the training given at the Institute. It was naturally not possible for the team of officers at the Institute to train all the Native Courts personnel, native authority police, and others before the system was brought into force, but the D.O.s (Courts) organised courses in each province. These were elementary, basic courses in the nature of "first aid" and were successful beyond all expectation. I personally visited a number of these courses and can testify to the keen interest taken by all those whom I met. Owing to constitutional changes, shortage of staff, the retirement of expatriate officers, and Northernisation, it has not been possible to maintain a separate officer in each province as D.O. (Courts) since the new legal system has been inaugurated.

38. Recommendation 28 – "That existing courses at the Institute for Emirs, Assistant District Officers, etc., should include lectures on the importance of the proper application of the new Code".

This has been done. Please see particulars in the memorandum of the Principal of the Institute of Administration.

39. Recommendation 29 – "That a succession of courses should be arranged at Zaria for registrars, scribes, etc. throughout the Region".

This has been done. Please see the Principal's memorandum as set out above.

40. Recommendations 30, 31 and 32 – "That plans be made to provide for the Judges and Magistrates of the future by sending a few of those holding the best Certificates straight to London to take both a University degree and the Bar qualification, and that a first-year course be established at the Zaria College of Arts and Technology for other promising candidates who would proceed to London for eighteen months to complete

their call to the Bar", "That those on the legal side at the Kano School of Arabic Studies should join the one-year course at Zaria after completing one year's specialisation in the Moslem law of personal status at Kano", and "That a few of these future Alkalai or Instructors might be sent for a course of specialised study in London".

These have been implemented as far as possible. Please see memorandum of the Principal as stated above. The whole subject is now under reconsideration, having regard to the impending establishment of the Ahmadu Bello University of Northern Nigeria. It is intended that the School of Arabic Studies in Kano (to be named the Abdullahi Bayero College) and the Institute of Administration are to be colleges of the University. It is intended to establish a Faculty of Law in the University so that the degree of LL.B. may be granted to successful students. Even though a law degree is to be made available in other Universities in Nigeria, it is thought necessary that the Northern University should be able to grant its own, having regard to the radical differences between the legal systems of the Northern Region and the rest of Nigeria. The degree course has not yet started, but Dr. Alexander, the Vice-Chancellor of the University, hopes to initiate the first one in October of this year. Further particulars can be obtained from him. In the meantime, it is hoped to proceed with the present training programme at the Institute, so that by the time it is discontinued (and it was always contemplated that it would only be temporary) an adequate supply of trained local lawyers will have been built up.

41. This brings us to the end of the recommendations of the Panel. In addition to the legislation specifically referred to above, the attention of the Panel is drawn to the following Laws which have been passed for the specific purpose of amending particular sections of the Laws which are an integral part of the new legal system. The amendments speak for themselves and were made either to implement decisions taken at the various Nigerian Constitutional Conferences to bring legislation into accord with the Constitution or as a result of experience in working the system.

(1) The Penal Code (Amendment) Law, 1960 (No. 19 of 1960)
(2) The Native Courts (Amendment No. 2) Law, 1960 (No. 21 of 1960)
(3) The Criminal Procedure Code (Amendment) Law, 1961 (No. 48 of 1961)
(4) The District Courts (Amendment) Law, 1961 (No. 34 of 1961)
(5) The Northern Region High Court (Amendment) Law, 1961 (No. 9 of 1961)
(6) The Northern Region High Court (Amendment No. 3) Law, 1961 (No. 35 of 1961)
(7) The Penal Code (Amendment) Law, 1961 (No. 47 of 1961)
(8) The Coroners (Amendment) Law, 1962 (No. 20 of 1962)
(9) The Penal Code (Amendment) Law, 1962 (No. 11 of 1962)
(10) The Criminal Procedure Code (Amendment) Law, 1962 (No. 12 of 1962)

41A. The passing of the new legislation has involved the repeal of the following Ordinances and Laws:

(1) The Criminal Code Ordinance (Cap. 42 of the 1948 Laws)
(2) The Criminal Procedure Ordinance (Cap. 43 of the 1948 Laws)
(3) The Magistrates' Courts (Civil Procedure) Ordinance (Cap. 124 of the 1948 Laws)