

Chapter 1 Part V

Documents and Other Information Received by the Panel of Jurists During Its Second Session: May/June 1962⁴⁰

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

1.

Memorandum by the Attorney-General⁴¹ 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 *dijab*, 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 *dijab*. Several of the Moslem jurists had insisted that the relatives of a murdered persons should still be able to

CHAPTER 1: HISTORICAL BACKGROUND

exercise an option as to whether they would demand the death penalty or would accept *diyyah*. 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 *diyyah* 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, *Makaman 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 *diyyah*. 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 *diyyah* 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 Jurists⁴³). 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.

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 (*dīyah*)".

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 *dīyah* 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 *diyab* 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

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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 Alkalai' 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 matters⁴⁵) 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. Recommendation 18 – “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 ultra vires 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.

“(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. Olavoyin 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

⁴⁷ *J.S. Olavoyin 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)

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- (4) The Magistrates' Courts (Civil Procedure) Ordinance (Cap. 124 of the 1948 Laws)
- (5) The Magistrates' Courts (Northern Region) Law, 1955 (N.R. No. 7 of 1955)
- (6) The Moslem Court of Appeal Law, 1956 (N.R. No. 10 of 1956)

41B. The following subsidiary legislation has been passed under various provisions of the new Laws and obsolete subsidiary legislation revoked:

- (a) The Adaptation of Legislation Order in Council (N.R.L.N. No. 120 of 1960)
- (b) The Criminal Procedure Code (*Haddi Lashing*) Order in Council (N.R.L.N. No. 85 of 1960)
- (c) The Criminal Procedure (Punishment on Summary Conviction) Order in Council (N.R.L.N. No. 86 of 1960)
- (d) The Criminal Procedure (Statements to Police Officers) Rules (N.R.L.N. No. 106 of 1960)
- (e) The Criminal Procedure Rules (N.R.L.N. No. 110 of 1960)
- (f) The Criminal Procedure (Execution) Rules (N.R.L.N. No. 118 of 1960)
- (g) The District Courts Rules (N.R.L.N. No. 101 of 1960)
- (h) The Native Courts (Civil Procedure) Rules (N.R.L.N. No. 84 of 1960)
- (i) The Native Courts (Jurisdiction in Miscellaneous Criminal Offences – Transitional Provisions) Order in Council (N.R.L.N. No. 139 of 1960)
- (j) The Provincial Courts Rules (N.R.L.N. No. 111 of 1960)
- (k) The Provincial Courts (Amendment) Rules (N.R.L.N. No. 151 of 1960)
- (l) The Northern Region High Court (Appeals from Native Courts) Rules (N.R.L.N. No. 112 of 1960)
- (m) The Sharia Court of Appeal Rules (N.R.L.N. No. 136 of 1960)
- (n) The Native Courts (Jurisdiction and Powers) Notice, 1962

Some of the above have themselves been amended since they were made.

42. It may be added that the new system and the new Laws, involving as they did the establishment of a Penal Code and Criminal Procedure Code applying to everyone and available to and understandable by everyone have been received in the North with enthusiasm and excitement, particularly by the man in the street. At one time the Penal Code was a "best-seller" in all towns and was sold out whenever it appeared in the bookshops. Lingering objections to the new system remain in conservative quarters and particularly amongst certain old men brought up in the Moslem way of life who are reluctant to make changes. The opposition is not vocal or widespread or, indeed, patent. It takes the form of quiet, passive resistance and an obstinate determination to apply Moslem law in the old way, instead of the Penal Code, whenever this can be done without interference.

43. This memorandum is intended to be a report of the work done in the implementation of those recommendations of the Panel of Jurists which were approved by the Government of Northern Nigeria. It will be seen that the major portion of those recommendations have been implemented, and successfully implemented. This is probably not the place to make recommendations for the future, but it may be permitted to set out here those suggestions for reform which arise out of the preceding paragraphs of this memorandum. They are as follows –

- (a) the abolition of the power of review except that of Native Courts advisers;
- (b) the repeal of paragraph (e) of subsection (5) of section 52 of the Constitution of Northern Nigeria and of paragraph (e) of section 12 of the Sharia Court of Appeal Law, 1960.

[signed H.H. Marshall]
Attorney-General, Northern
Nigeria

28th April, 1962

Appendix

Course of Training for Associate Magistrates

1. Attend the course on the new Penal and Criminal Procedure Codes at the Institute of Administration. If on completing the course at Zaria the “Associate Magistrate” was invited to instruct on a subsequent course, he should be given the opportunity of doing so, as teaching is the best way of learning. He should be asked to make a special study of the Constitution and of those Ordinances and Laws with which he will be particularly concerned in administering justice; and also of the subsidiary legislation relating thereto. He should be given some training in accounts so as to be able to recognise a fraud when he sees one.
2. Be under the pupillage of a chief magistrate or a first grade magistrate of experience to learn and practise the work of a magistrate in chambers and to sit in court to see how cases are conducted.
3. Be under the pupillage of a judge to gain experience of pleadings, evidence and procedure; to study records of appeal, especially appeals from magistrates; to follow an appeal through from beginning to end, and to learn from the errors of others.
4. A short pupillage in Crown Counsel’s Chambers and be given simple cases to prosecute, at first under supervision.
5. When he is considered to have sufficient experience he might be assigned to defend in homicide cases.
6. Sit as a second grade magistrate to hear cases passed to him by a chief magistrate or first grade magistrate.
7. Continue to hear cases passed to him under 6 as a first grade magistrate when the Chief Justice so recommends.
8. At the end of two years from call to Bar be considered for permanent appointment as a first grade magistrate on probation.

2.

Memorandum from the Acting Chief Justice⁵² to the Panel of Jurists

In this memorandum are set out comments and suggestions which represent the views of the Judges of the High Court and myself on matters which we consider to be of interest to the Panel of Jurists.

2. Up to April 1961 a Judge of the Sharia Court of Appeal and two Judges of the High Court met together in the Native Courts Appellate Division of the High Court to hear appeals from Native Courts arising under the new legislation. It was a matter of great regret to the Judges of the High Court when following the decision of the Federal Supreme Court in April 1961 a Judge of the Sharia Court of Appeal was no longer able to sit with us to hear these appeals. Now that the constitutional issue has been resolved we welcome the return of the Judges of the Sharia Court of Appeal as members of the Native Courts Appellate Division of the High Court.

Statistics:

3. It may be of interest to mention that during the calendar year 1961 the High Court heard 161 criminal appeals and 24 civil appeals from Native Courts. Of these, 50 criminal appeals were allowed, including cases where retrials were ordered; and 7 civil appeals were also allowed. 41 criminal appeals and 24 civil appeals came from Provincial Courts of which 4 criminal appeals and 7 civil appeals were allowed. The remaining appeals came from Grade A and Grade A Limited Native Courts.

Provincial Courts:

4. We, the Judges of the High Court, are much impressed by the standard of work in Provincial Courts and the high reputation that these Courts have acquired. As the High Court holds session in each province of Northern Nigeria we regularly meet the Alkalai, Presidents and Members of Provincial Courts for informal discussions on our mutual problems from which all of us derive much benefit.

Native Courts:

5. Native courts generally have made commendable efforts to understand the Penal Code and Criminal Procedures Code and to apply the provisions of these Codes. Most Native Courts have wholeheartedly striven to assimilate the reforms and the progressive improvement in the standard of their work is reflected in the records of proceedings which came before the High Court on appeal. The courses for personnel of Native Courts at the Institute of Administration at Zaria have done much to raise the standard of the work in Native Courts. But with so many Native Courts in Northern Nigeria, it will take time to train sufficient personnel to man all the courts; and until that is achieved we recommend that the guiding principle in section 386 of the Criminal Procedure Code should continue to apply to Native Courts and no attempt should be made at the present time to force the pace.

⁵² J.A. Smith.

Appeals from Native Courts:

6. When hearing appeals from Native Courts the High Court endeavours as far as possible to decide an appeal on its merits and to avoid technicalities. It may however be of interest to mention the sort of procedural mistakes that arise and the way the High Court deals with them. It is noticeable that Native Courts find difficulty in appreciating the meaning and implication of a formal charge. Formal charges when framed are often defective as formal charges; but the High Court has accepted such a charge as a sufficient statement of offence under section 387 of the Criminal Procedure Code provided that it contains the particulars required by that section. Where no attempt has been made by a Native Court to frame a formal charge or to set out as such a statement of offence the High Court has accepted the record of the opening address of the prosecutor as sufficient provided again that it contains the particulars required by section 387. When there has not been a formal charge and nothing on the record of the proceedings that can be taken as a statement of offence then the High Court has applied sections 288 and 382 and considered whether or not there has been a failure of justice.

7. With regard to those sections of Chapter XXXIII of the Criminal Procedure Code by which Native Courts are bound, the High Court on appeal has dealt with a failure of a Native Court to comply therewith in the following ways. As to section 388 the High Court has where possible remedied the omission by applying section 70(1)(b)(iii) of the Native Courts Law and substituting a proper conviction. An omission by a Native Court to call upon an accused to state his defence as required by section 389 has been held to be a failure of justice and a retrial ordered. (*Samuel Bobaye v. Kano N.A.* decided 16th December, 1961). An omission to ask an accused for his witnesses as required by the same section when the accused in fact had eye-witnesses to call in his defence was also held to be a failure of justice and a retrial ordered (*Ubi Yola v. Kano N.A.* 1961 N.R.N.L.R. 103).

Records of Proceedings:

8. The recording of proceedings in a Native Court as required by section 395 has much improved but the standard varies considerably from court to court. The Judges of the High Court are from time to time left with the impression that an omission on the face of the record may be due to a failure by the scribe to record what has happened at the trial rather than a failure by the court to comply with the provisions of the Criminal Procedure Code. It is obviously important that a full and accurate record of proceedings should be kept; and we would suggest that courses be held for scribes designed to improve the standard in the keeping of records of proceedings.

Evidence Ordinance:

9. Native courts are also to be guided by the Evidence Ordinance. We recommend that they should continue to be guided by the Ordinance and not bound by it. It has been noticeable that Native Courts when hearing cases have not applied their minds to questions such as corroboration or the evidence of accomplices. These are aspects of the law of evidence which are no doubt taught on the courses at Zaria; but it will take some time before these and other aspects of the law of evidence have been sufficiently mastered by Native Courts for them to be bound by the detailed provisions of the Evidence Ordinance.

Exhibits:

10. It is not the practice of Native Courts to mark as exhibits documents put in evidence and it is often difficult for the High Court on appeal to ascertain from the record of proceedings what documents were put before the Native Court. There is a further complication in that it is the practice of Native Courts to return the documents to the party concerned when the case is over and not to retain them until the appeal has been heard. The result is that delays occur while documents are being traced and when finally produced it may not be possible to identify them as the ones which were produced before the court. We would recommend that Native Courts be directed to mark as exhibits all documents and articles produced to the court as evidence; and the way it is to be done might be included in the curriculum of courses for court scribes.

Review and Transfer:

11. We observe that under the Provincial Administration Law 1962 which is about to come into force, the powers of Residents pass to Provincial Commissioners who will have the status of Ministers. These powers include the review and transfer of cases under the Native Courts Law. We think that to give a political appointee these judicial functions will give rise to criticism no matter how fairly and impartially Provincial Commissioners exercise these powers in practice. We would suggest that as there is now a comprehensive system of appeal from Native Courts to Provincial Courts and the High Court, the power of review might be abolished as the need for it no longer exists. The power to transfer a case from one court to another may still be needed and we suggest that this power might be vested exclusively in the Commissioner of Native Courts.

Powers to Imprison and Fine in Native Courts and Magistrates' Courts:

19. There is a considerable discrepancy between the powers to imprison and to fine given to Native Courts and to the corresponding magistrates' courts. The powers of a Native Court to impose a sentence of imprisonment or a fine are to be found in the First Schedule of the Native Courts Law. The corresponding powers in magistrates' courts are set out in sections 15, 16, 17 and 18 of the Criminal Procedure Code. A comparative table is attached at Appendix A. It will be observed that while the powers of Grades B, C and D Native Courts to imprison are greater than the corresponding powers of the courts of magistrates Grades I, II and III the maximum powers to fine given to magistrates' courts are greater than the powers given to corresponding Native Courts. It is suggested that these anomalies should disappear and so far as possible the maximum powers of corresponding courts should be made uniform. In due course the posts of magistrates and alkalai will all be filled by Northerners and the powers of magistrates with their professional qualifications should in principle be at least equal to those of corresponding Native Courts. It is recommended that the powers of a Grade B Native Court and of a Grade I magistrate's court to imprison and fine should be similar; and likewise the powers of a Grade C Native Court and a Grade II magistrate's court; and a Grade D Native Court and a Grade III magistrate's court should be the same. If the powers of a magistrate Grade I are to be increased to a maximum term of three years' imprisonment in conformity with the powers of a Grade B Native Court then it is considered that the maximum powers of a Chief Magistrate to imprison should be

increased from five to seven years. It is appreciated that such an increase in the powers of a Chief Magistrate would be considerably less than the powers of a Grade A limited Native Court but it is not thought that at the present time a Chief Magistrate's court and a Grade A limited Native Court could be more closely assimilated.

Associate Magistrates:

13. To encourage newly called Northern barristers to become magistrates, the posts of "associate magistrate" analogous to that of pupil crown counsel were created in February, 1961, with the object of providing a course of training within the Judicial Department of newly called Northerners as magistrates. The period of training has been equated to that of pupil crown counsel and extends to two years from date of call. At present the associate magistrate is required before appointment to have completed the Post-Final Practical Training Course of the Council of Legal Education. His further training on appointment as an associate magistrate includes a study of the Penal and Criminal Procedure Codes and other local legislation; a period of pupillage in Crown Council's chambers; a period of pupillage under a Chief Magistrate or an experienced magistrate Grade I; and then he is given magisterial powers to try at first simple cases and progressively more difficult cases, until at the end of two years from call he becomes eligible for appointment as a magistrate Grade I on probation.

14. One Northern barrister has passed through this training and is now sitting as a magistrate Grade I. It is anticipated that two more newly called Northerners will be available for training as magistrates in August and that there will be three more next year. Thus by 1965 there would be six Northern barristers who will be magistrates Grade I.

Supernumerary Chief Magistrates:

15. In addition the post of supernumerary chief magistrate has been created as a further step towards Northernisation with the object of giving a Northern barrister of about five years' standing experience on the bench as a Chief Magistrate with a view to his acting as a High Court Judge. This post has been filled by a Northern Senior Crown Counsel who has already acted as a Judge and will so act more frequently in the future until he is eligible to be considered for appointment as a High Court Judge. Further such posts might be created if suitable candidates become available. But as the Panel is no doubt aware there is an acute shortage at present of Northern barristers of experience.

Summary:

16. The recommendations and suggestions in this memorandum may be summarised as follows:

- (i) Native courts should continue to be "guided" by the Criminal Procedure Code and Evidence Ordinance. (paras. 5 and 9).
- (ii) Courses be held for court scribes to improve the standard in the recording of proceedings in Native Courts. (para. 8).
- (iii) Native courts be directed to mark as exhibits documents and articles put in evidence before the court. (para. 10).
- (iv) The power of review be abolished. (para. 11).

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- (v) The power to transfer cases from Native Courts be exclusively vested in the Commissioner for Native Courts. (para. 11).
- (vi) The corresponding grades of Native Courts and magistrates' courts be given similar maximum powers to fine and imprison. (para. 12).
- (vii) The training of "associate magistrates" to continue. (para. 13).
- (viii) That the posts of supernumerary chief magistrates be increased as and when candidates are available. (para. 15).

[Appendix]
CRIMINAL CAUSES

	Maximum			Maximum	
	<u>Fine</u>	<u>Imprisonment</u>		<u>Fine</u>	<u>Imprisonment</u>
<u>Native Court</u>			<u>Magistrate's Court</u>		<u>I</u> <u>Imprisonment</u>
A limited	Limited only by absence of jurisdiction in homicide cases: otherwise unlimited.		Chief Magistrate	£500	5 years
B	£150	3 years	Magistrate Grade I	£200	2 years
C	£30	18 months	Magistrate Grade II	£100	1 year
D	£15	9 months	Magistrate Grade III	£25	3 months

3.

**Memorandum by the Principal of the Institute of Administration, Zaria,⁵³
to the Panel of Jurists on the Subject of Legal Training carried out in
Implementation of the Recommendations of the Panel submitted to the
Government of Northern Nigeria on the 10th September, 1958**

1. The recommendations of the Panel of Jurists submitted in 1958 on the subject of legal training were all accepted by the Government of Northern Nigeria and the training facilities necessary were duly established at the Institute of Administration, Zaria in 1959.

2. As a result the Northern Region established the first (and still the only) Law School in Nigeria. There is no doubt of the success of this operation. The work of the Institute in this field received honourable mention in the Report of the London Conference on the Future of Law in Africa published in 1960.⁵⁴ The Rt. Hon. Lord Denning P.C. visited the Institute in 1961. Lord Denning was subsequently Chairman of a Committee established by the British Government in 1961 to advise on legal training for Africans. This Committee duly reported to the British Parliament that it was highly impressed by the work of the Institute and recommended that other African territories facing a shortage of trained legal staff and similar problems in regard to native or customary courts should consider setting up a similar school. As a result a number of East African territories have established legal training institutions on the Zaria model.

3. The successful launching of the Law Department owes much to the vision, energy and drive of Mr. I.G. MacLean, a Crown Counsel seconded to the staff of the Institute from the Legal Department. He was ably supported by three Administrative Officers with legal qualifications and since the inception of the scheme, it has been possible to recruit four Northerners with long experience of the work of Native Courts as Instructors in specific subjects concerning the training of Native Courts Staff. The present staff available for legal training consists of three legally qualified lecturers and four instructors working under Mr. J.L. McNeil who heads the Department in an acting capacity. The Principal is also actively involved in teaching. The staff is to be reinforced shortly by an American Law Graduate provided under the Afro-Asian programme of the University of Syracuse and a newly qualified Northern barrister. I explain below the part which this strong and experienced team is expected to play in the establishment of an efficient Law Faculty in the Ahmadu Bello University in October, 1962.

3.⁵⁵ The present role of the Institute in Legal Training can be summarised as follows:

(a) the initiation of training for Northern Nigerians for Call to the Bar (in implementation of Recommendation 23 of the Panel of Jurists Report, 1958).

(b) re-orientation training for the staff of Native Courts (in implementation of Recommendations 26 and 29 of the Panel of Jurists Report, 1958).

⁵³ S.S. Richardson.

⁵⁴ A.N. Allott, ed., *The Future of Law in Africa* (London: Butterworths, 1960).

⁵⁵ The number 3 is repeated in the original and subsequent paragraphs continue from there.

- (c) the provision of basic legal education for students in the fields of public administration and local government undergoing courses of instruction at the Institute (in implementation of Recommendation 28 of the Panel of Jurists Report, 1958).
- (d) courses for Emirs and Chiefs (in implementation of Recommendation 28 of the Panel of Jurists Report, 1958).
- (e) a research role in preparing books, teaching material, translations and visual aids for legal training throughout the Region (and perhaps, in the future, for the Federation as a whole).
- (f) a touring role aimed at giving basic training in Provinces and following up the training provided at the Institute (in implementation of Recommendation 26 of the Report of the Panel of Jurists, 1958)

Each of these activities is reported upon more fully in succeeding paragraphs.

4. The Bar Course. Three classes of 12 students have now completed their studies at the Institute and a fourth is under recruitment. Entry standards have generally been set at West African School Certificate Grade II, but some successful students have been accepted with lower qualifications if they have been able to show a good in-service record. Instruction is given over a period of nine months at Zaria, in Roman Law, Contract and Tort, Constitutional Law, Legal History and Criminal Law. Studies are directed with the close co-operation of the Council of Legal Education and Messrs. Gibson and Weldon Limited, Law Tutors, of Chancery Lane. Arrangements have been made for students to sit the necessary examinations under the supervision of the Chief Justice in Kaduna. Successful students proceed to the United Kingdom with four passes in Part 1 and take the paper in Muslim and African Law after a course of study extending over two terms at the School of Oriental and African Studies in London. Simultaneously, they attend a course of lectures for the Final Examination conducted by the Inns of Court Law School. The Final Examination is then attempted after a five months course with Messrs. Gibson and Weldon. Providing that a student has successfully passed the Final Examination, arrangements are made for him either to read in Chambers for six months or to attend the Post Final Course organised by the Council of Legal Education. The first two students to complete this scheme of study are due to return to Nigeria in June. They duly passed the Final Examination for Call to the Bar 26 months after first joining the course at the Institute of Administration, Zaria. A further 14 students are at various stages of their training in U.K., and a further 12 are expected to leave for U.K. in September, 1962.

This programme should, therefore, produce for the Northern Region six qualified barristers in 1962, eight more in 1963, twelve in 1964 and twelve annually thereafter for as long as the scheme is continued. The fact that these students are closely supervised throughout their training in U.K. by the best teachers obtainable and have the advantage of reading in Chambers before their return to Nigeria, means that they return with better qualifications to practise than the average private student. It is hoped, also, that they will shortly be able to benefit from the courses to be organised by the Federal Government at the projected Law School in Lagos. Present policy would appear to be to continue training for the English Bar for a number of years at least until the Law Faculty of Ahmadu Bello University is producing graduates. One advantage of continuing the

programme for a while is that the Institute can accept students for this training with entry qualifications substantially lower than those required for admission to the Law Faculty.

5. Reorientation training for the Staff of Native Courts. The introduction of a codified system of criminal law in October, 1960 could not have been successful in the Region without intensive training of the staff of Native Courts. Although much valuable work was done in the Provinces by way of locally held training courses, there is no doubt that the more effective instrument in making implementation of the reforms possible has been the three months intensive residential course at the Institute specifically designed to introduce the staff of Native Courts to the new legislation. Initially the objective has been to produce at least one man trained at Zaria for each Native Court. On the 1st October, 1960, when the new legislation was brought into effect there were 752 Native Courts in the Region, almost all of which had previously administered Native Law and Custom or Moslem law in criminal matters. Appendix B of this memorandum shows that our first objective has still not been attained since only 506 of the staff of Native Courts have attended residential courses of three months or more at the Institute. A considerable number of Native Courts are therefore still administering the new Codes with only the background of training received in the Provinces. This weakness has been mitigated by rationalising the structure of Native Courts in some Provinces and reducing the number of courts with jurisdiction in criminal matters. Reference is made to this policy in the memorandum submitted to the Panel by the Hon. Attorney-General. Nevertheless, there is a clear need for continuing the three months residential course for a number of years. The course aims at giving the student a sound knowledge of the Penal Code and the Code of Criminal Procedure and through the instrument of mock trials, moots etc., some practical experience in using the legislation. Opportunity is also taken to teach the Native Courts Law, 1956, the Road Traffic Ordinance, the Native Courts (Civil Procedure) Rules, 1960, the Evidence Ordinance and other legislation of importance to Native Courts. Instruction is given in English and Hausa and it is important that the Senior Staff responsible for this work should be fluent Hausa speakers. But the main concentration of the effort in such a short course must of necessity be upon the Criminal Law and there is a need to consider the possibility of organising a further course of much longer duration to give adequate instruction in all the legislation with which a Native Court is called upon to cope.

6. The provision of basic legal education for other classes of students. As may be confirmed by examination of the statistics given in Appendix B, the Law Department of the Institute has given legal education to all categories of students at the Institute and in particular to Administrative Officers, Executive Officers, and Administrative Cadets in training. All these students have judicial functions in the field requiring considerable knowledge of the law. Administrative Officers have a major responsibility under the Native Courts Law, 1956, to supervise the work of the Native Courts and must, therefore, have a thorough grounding in the law. It has also proved beneficial to teach all students at the Institute the principles of the Constitution and the law involved in their particular field of work (e.g. Co-operative Management). The Department of Law thus makes a major contribution to the teaching strength of all the Departments at the Institute.

7. Courses for Emirs and Chiefs. The Law Department has supplied about half the tuition time on two annual courses for Emirs and Chiefs giving instruction on the new Criminal Codes, the Constitution and the Native Courts Law. These courses have been successful in that students returning to the service of their Native Authorities after judicial training at the Institute have found it easy to implement their knowledge where the Emir or Chief has himself the basic understanding of the reforms to give effective support.

8. The Research Role. The staff of the Institute have played a leading part in the translation work which has been necessary to enable the new laws to be taught in the vernacular. Members of the staff have produced a number of books and pamphlets on the legislation to be applied by Native Courts which have been widely distributed throughout the Region. This aspect of the work of the Institute is likely to assume greater importance as the Law Faculty of the University develops and the need for textbooks on various aspects of Nigerian law becomes critical. The Institute staff is alert to these requirements and at the present time the following work is being undertaken by members of staff in an attempt to meet foreseeable requirements of the Law Faculties in the new Universities to be set up in Nigeria:

- (i) a book of Nigerian Case Law and Statute Law relating to the law of Contract and Tort.
- (ii) a student's text book on the Nigerian Constitution.
- (iii) a Commentary on the Criminal Procedure Code.
- (iv) revision of the book "Notes on the Penal Code". Members of the staff are collaborating with Professor A. Gledhill of the School of Oriental and African Studies in the preparation of a comparative study of the Penal Codes of India, the Sudan and Northern Nigeria.

9. Extension Work. The staff of the Institute have made a number of tours in the Provinces with the dual object of following up the work of ex students at the Institute and of providing short courses for the staff of Native Courts for whom, as yet, places cannot be found at the Institute. These tours are valuable in that the staff of the Institute is thereby enabled to keep in touch with the realities of the task in the Provinces, judge the effectiveness of the training provided at the Institute, and assist Residents in resolving local training problems. The Institute has a well established reputation for extension work in Local Government and maintains a training team full time in each Province on this work. This organisation has recently assumed responsibility for elementary accountancy training and it might well be useful to consider attaching legal instructors to these teams in the future to continue the work no longer possible through the agency of the Special Duties Administrative Officer.

10. Government's decision to incorporate the Institute of Administration with Ahmadu Bello University in October 1962 raises the problem of the future of the Department of Law. In the absence of alternative accommodation the decision has been taken to launch the Law Faculty at the Institute, reserving until a later date the question of its permanent location. Although the teaching staff of the Institute is strong and experienced, there is clearly a need for the appointment without delay of a Professor of Law, who must have an established academic training record from overseas and, if possible, a special

CHAPTER 1: HISTORICAL BACKGROUND

knowledge of the peculiar legal and judicial problems of the Northern Region. An outline syllabus for a first degree course of three years in Law has been prepared by Professor L.C. Gower, the Federal Advisor on Legal Education. The syllabus makes provision for the inclusion of the study of Moslem personal law and North[ern] Nigerian Criminal Law as obligatory subjects. A copy of the proposed curriculum is attached to this memorandum as Appendix C. It will be seen that the proposed first year includes no subject which cannot be taught adequately by the existing staff of the Institute or which is in any way likely to cramp the style of a newly appointed Professor seeking to develop a three year LL.B. curriculum. It is, therefore, anticipated that a class of 15 LL.B. students will be admitted in October, 1962 and a start made. The entry standard required throughout the University is at least two 'A' level subjects in an examination equivalent to that of the General Certificate of Education.

11. There is no doubt about the need to continue with the task of providing legal training for the staff of the Native Courts, the Administrative Service and other categories of students at the Institute of Administration. The necessity [to] continue for some time with the re-orientation three months course for existing Native Courts staff is clear from the statistics provided in Appendix B of this memorandum. Additionally, thought must be given to the development of a comprehensive course of at least one year's duration to equip young men to enter the service of the Native Courts more adequately trained to meet the challenge of the time. It is proposed that while the year's course should be essentially practical and designed to meet the needs of the Native Courts system, it should at least aspire to achieve an academic standard comparable to that of an Inter LL.B. and include the advanced work in Moslem personal law proposed for the full LL.B. degree. The result should be a Diploma recognised by the Ahmadu Bello University and, if possible, sponsored by some overseas institution such as the School of Oriental and African Studies in London, to ensure the establishment of high standards. Sponsorship in this context means what has been accepted by the Ahmadu Bello University in other fields – advice on curriculum, assistance over the recruitment of staff, and the provision of external examiners.

12. Prudent investment by the Northern Regional Government over the past three years, the generosity of the Ford Foundation and a number of valuable gifts have enabled the Institute to build up its library resources. The Law Library at the Institute will contain about 5,000 volumes by 1st October, 1962 and will thus be the most comprehensive library available to law students in West Africa. The Government of the United States has undertaken to build an air conditioned library to house this collection and to provide adequate facilities for students wishing to use it.

13. In conclusion it is clear that the recommendations made by the Panel of Jurists in 1958 have resulted in the Institute of Administration establishing and developing a role in legal education which has given the Northern Region a clear lead (of three years) in this field over the rest of the Federation of Nigeria. Ahmadu Bello University will therefore be able to launch a Law Faculty on a surer foundation than any other University in Nigeria.

The new Faculty of Public Administration established at the Institute will have responsibilities extending far beyond normal undergraduate work and will embrace a variety of activities of a sub University standard in the Provinces aimed at generally

DOCUMENTS AND OTHER INFORMATION RECEIVED BY THE PANEL OF JURISTS – 1962

improving standards in administration throughout the Region. The Law Faculty will presumably also similarly extend its influence through its impact upon the training needs of the Native Courts and thus develop into an organisation with responsibilities substantially greater than those of a normally constituted faculty. There are obvious advantages in such a development.

APPENDIX A:

Legal Courses for Potential Barristers

Legal Course No. 1 – August 1959 – September 1960

No. of students	-	12
No. of students sent to England	-	8
No. of students who have taken finals	-	2

Balance of 6 students to take final examinations in September and December, 1962.

Legal Course No. 2 – August 1960 – September 1961

No. of students	-	12
No. of students sent to England	-	8

These 8 students to take Moslem Law to complete part 1 in May 1962.

Legal Course No. 3 – August 1961 – September 1962

No. of Students	-	12
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All students to sit Roman Law, Constitutional Law and Legal History, Tort and Contract in May 1962. Criminal Law to be taken in September 1962.

Legal Course No. 4 – August 1962 – September 1963

Expected to be at least 12 students.

APPENDIX B:

**Judicial Training at the Institute
Since September, 1959**

Persons trained up to and including Judicial Course No. 31, which finishes on 14th July 1962, in the Penal Code and C.P.C.

1. Alkalai, Presidents and Members	271
2. Scribes, Mufti and Legal Advisers	221
3. Judicial Department – Clerks	14
4. Sharia Court Inspectors	2
5. Emir's Course (held at Kaduna)	43
6. A.S.T.C.	90
7. Administrative Officers (in service)	60
8. Provincial Court Clerks	14
9. Nigerian Police	19
10. Advanced Course for N.C. personnel	<u>47</u>
Total	<u>781</u>

APPENDIX C:

Proposed Syllabus for the LL.B.

First Year (Intermediate)

1. Introduction to Nigerian Law. The sources of law, custom, English common law and equity, statutory law and delegated legislation. Outline of the extent to which English statute and common law and the principles of equity apply in Nigeria. Law Reports and the doctrine of precedent. Determining the ratio decidendi. Statutory interpretation. Text books and digests. The use of the law library. The main divisions of the law. The advantages and disadvantages of case law and codification. General principles relating to the application of Customary Law.
2. The Nigerian Legal Systems. Historical development of the machinery of justice in England. The history, development and present jurisdiction of the Courts, Magistrates and Native Courts in Nigeria from the mid-19th century to the present day. The relationship between these Courts including appellate and supervisory jurisdictions. The organisation of the Nigerian Legal profession. Outline of civil and criminal procedure in Nigeria and main principles of the law of evidence.
3. Constitutional Law.
 - (a) The Commonwealth. The main forms of constitutional development and structure within the Commonwealth; relations of Commonwealth countries with the Crown, with each other and with the United Kingdom; allegiance and citizenship in the Commonwealth; the Judicial Committee of the Privy Council.
 - (b) The Nigerian Constitution. History and development of the Legislative and Executive Councils; introduction of representative and responsible government; development of the present federal constitution; its analysis; the distribution of legislative, executive and judicial powers considered by comparison with other leading federal constitutions; fundamental rights; judicial review of unconstitutionality; the development of the local government and Native Authority system; the judicial control of public authorities and tribunals.
4. Criminal Law. General principles as embodied in the Nigerian Criminal Code and the Penal Code of the Northern Region.

Second Year

1. The Law of Contract.
 2. The Law of Tort.
 3. Equity.
- } General principles of the English Law (as applicable in Nigeria treated by reference to relevant case law and legislation in Nigeria).
4. Land Law. So much of English Land [Law] as is applicable in Nigeria; the general principles of customary land tenure; the relationship between English and customary Land Law; the legislation in Nigeria affecting the ownership, occupation, use and disposition of land.

5. The Law of Evidence. General principles of the law of evidence as embodied in the Evidence Ordinance.

Third Year

1. Legal Theory. Theories of the nature and basis of law; the law of nature and natural rights; law and ethics; law and fact; sovereignty and the imperative theory; individual and social utilitarianism; legal positivism; analytical theory and the pure theory of law; the historical school and customary law; sociological theories and theories of interests; economic interpretations and Marxist theory; legal realism.
2. Islamic Law. Private jurisprudence; history and development of Islamic Law and its different schools; the law according to the dominant school in Nigeria in such matters as marriage, legitimacy, guardianship, succession, gifts and waqf.
3. Conflict of Laws. Private international law treated by reference to English and Nigerian case law and to Nigerian legislation; conflict of customary laws in Nigeria.
4. Public International Law. Characteristics and sources of international law; the principles of Sovereignty, Recognition, Consent, Good Faith, International Responsibility, Freedom of the Seas, and Self-Defence; international order and organisation.

4.

**Memorandum to the Panel of Jurists by S.S. Richardson, Esq., O.B.E.,
lately Commissioner for Native Courts on sundry problems arising from
the Implementation by the Government of Northern Nigeria of the
Recommendations made by the Panel of Jurists in 1958**

1. This memorandum assumes that full facts have been given to the Panel concerning the action taken by the Government of Northern Nigeria in implementing the recommendations made by the Panel in 1958. It is therefore confined to stating a number of problems which have arisen during the past three years. Any opinions expressed on these problems are my own, and should not be read as representing the official view of the Northern Nigerian Government.
2. Land Jurisdiction. In 1958, the Panel discussed generally the question of jurisdiction in land cases. Since the institution of the Shari'a Court of Appeal there has been some difficulty in deciding where jurisdiction in land cases should properly lie. Some such cases have been decided by the Shari'a Court of Appeal on the grounds that Maliki Law applied. The questions which appear to arise in this matter are:
 - (a) What is the native law and custom in regard to land in the Northern Emirates?
and
 - (b) Where it is said that Moslem Law applies, what is the position when the lower courts' interpretation does not accord with an interpretation by the Shari'a Court of Appeal, which is based on classical Maliki texts?
3. A Code of Civil Procedure. Considerable benefits have flowed from the introduction of a Code of Criminal Procedure common to all courts. Many Alkalai and Native Courts Presidents have told me that they would like to achieve a similar uniformity in Civil Procedure. The provisions of the existing Native Courts (Civil Procedure) Rules, 1960 and the District Courts Law, 1960, are widely divergent. A possible precedent for a code of the type envisaged would be the Civil Justice Ordinance in the Sudan suitably amended to meet local conditions. Codification of civil procedure would enable the production of uniform records in all courts in all causes and matters throughout the North and would achieve as a by-product uniformity in the law of Evidence. Such an achievement would represent a substantial gain. The proposal in no way implies a codification of substantive civil law or the law of personal status which would be an impossible task of immense complexity in present conditions.
4. The Principle of "Guidance". "Guidance" has been substantially defined by the courts and there seems to be no reason why it ever should be abandoned in respect of proceedings in Native Courts. The concept is being accepted elsewhere in Africa as a most useful formula and there would not appear to be any strong argument in favour of "binding" the Native Courts.
5. Regionalisation of the Staff of Native Courts. The success of the Provincial Courts has undoubtedly stimulated a large number of Alkalai and Native Courts judges to press for further steps towards regionalising the Native Courts. In 1958, the Panel recognised that a large measure of local control through the Native Authorities was inevitable in

view of the many local variations of tribe, religion and custom. The problem now is one of the degree of control which should be exercised by the Government to ensure efficiency and adequate remuneration for staff. The desired measure of control might be achieved by establishing a system of grants-in-aid and a stronger Regional inspectorate. A need to strengthen the inspectorate appears to be developing since administrative control of the Native Courts at the Provincial level is weakening as a result of chronic shortage of Administrative Staff.

6. Provincial Courts. The present system of obtaining leave reliefs for Provincial Court Judges by making ad hoc temporary appointments is haphazard and gives rise to heart burning and jealousies in the Provinces. Representations have been made from time to time for the appointment of Muftai in the nine Provincial Courts at present under the control of a sole judge. The creation of such posts would accord with local tradition and would permit the establishment of a reservoir of staff available for posting as leave reliefs.

7. Abolition of the Administrative Power of Review. Administrative powers of review are set out in Part VIII of the Native Courts Law, 1956. There is pressure to abolish these powers in the Northern Region. Such powers have largely disappeared elsewhere in Africa, and the concept of administrative interference with the courts was strongly criticised at the London Conference on the Future of Law in Africa. The problem arising from abolition is that the English system of prerogative writs is not applicable to Native Courts (except for the writ of habeas corpus). There must be in any judicial system a method of righting a wrong which cannot be handled by the normal channel of appeal. Some form of judicial review is therefore desirable and it may be that the systems now in force in the Sudan and Pakistan will provide an answer to this problem.

8. The Power to issue a Fetwa. The Hon. Grand Kadi, Sheikh el Awad Ahmed, recently retired, frequently discussed with me the possibility of vesting a power to issue Fetwas in the Shari'a Court of Appeal similar to that exercised by the Grand Kadi in the Sudan. In the Sudan, this power was used sparingly after full consultation to achieve notable reforms in the administration of Shari'a law. Such a power would be an innovation to the Northern Region only in that the Fetwa of the Grand Kadi would presumably be binding throughout the Region unless displaced by legislation. Books of Fetwas issued by judicial authorities in Sokoto and Bornu dating back to the XVth century are known to be in existence.

9. The Problem of Legal Representation of Parties in Native Courts. Criticism continues to be levelled at the Native Court system because legal practitioners are not permitted to appear in Native Courts. Such argument is normally disposed of by:

- (a) drawing attention to precedents in other countries where legal practitioners have effectively milked the peasant in lower courts;
- (b) showing the cheapness of justice in Native Courts and the satisfactory nature of the procedure adopted which is readily intelligible to the peasant;
- (c) pointing out the variety of local law and custom administered in the Native Courts; with which no legal practitioner could hope to be familiar;

- (d) pointing out that if legal practitioners were permitted to appear there would be real risk that the non-professional staff of those courts would be cowed by their presence and would, therefore, not be able to administer justice as effectively as in the past;
- (e) lastly, but most important, showing that any person aggrieved by a decision of a Native Court may obtain the services of a lawyer in cases where appeal lies to the High Court.

The loophole in this argument is that the Shari'a Court of Appeal Law, 1960 does not permit representation by legal practitioners in the Shari'a Court of Appeal. If the Law was amended to permit the appearance of duly licensed *Wakils* (as distinguished from Barristers at law) the North would be able to argue that any person aggrieved by any decision of a Native Court may have the benefit of legal representation on appeal. In the Sudan, the Grand Kadi has the power to license persons learned in Moslem law and of good character to practise in the Shari'a courts. Similar persons have long been permitted to practise as *Wakils* in India and Pakistan.

10. Northernisation of the Judicial and Legal Departments. Progress in Northernisation of the Regional Civil Service has been rapid and within the next few months virtually all policy making posts in the Administration and Technical service will be held by indigenous officers. Northernisation of the Judicial and Legal Departments have lagged behind the rest of the Service for two reasons:

- (a) the Constitution prescribes minimum periods of professional experience before a person may be appointed a High Court Judge or Attorney-General; and
- (b) the dearth of Northern lawyers with practical professional experience.

There is no doubt that public opinion is in favour of taking some justifiable risks to ensure that Northern lawyers obtain experience without delay in the senior posts in the Judicial and Legal Departments, whilst experienced expatriates are available as guides and mentors. If a satisfactory solution of this problem is not found quickly, pressure may build up which could adversely affect good relations and a continuation of the progress made during the past few years towards the development of sound legal and judicial systems in the Region which are generally acceptable to the people and the world at large.

It is therefore, important that such Northerners as are qualified professionally and have obtained some experience in the field be given early opportunity to act on the High Court Bench and to occupy some of the senior policy making posts in the Legal Department. If such opportunities are not opened up there is a dangerous possibility of a vacuum when expatriates begin to leave, such as was experienced in the Sudan in 1955. There the situation was saved by the fact that some Sudanese had held high judicial office for some years before independence.

5.

Letter from the Commissioner of Police⁵⁶

No. S.3(2) 38
CONFIDENTIAL

The Commissioner of Police,
Northern Nigeria,
KADUNA.
21st May, 1962

Ag. Permanent Secretary,
Ministry of Justice,
Northern Nigeria,
KADUNA.

Review of Penal Code by Panel of Jurists

I refer to your letter reference JS. 12/43 of 28th April, 1962 and have to advise you that I have consulted with my Officers and attach a number of points on which we would be grateful of clarification and ruling.

(F.W.M. MULIN)
A.C. 'A' Dept.
For: C.P. N.N.

[Three pages are attached raising the following points:]

Backlog of Cases in Magistrates Court. Guidance was requested by P.P.O. Jos on clarification of Section 157 of the C.P.C. which states that even if an accused person admits that he has committed an offence, if the said offence justifies a penalty of more than three months imprisonment, the Magistrate is not allowed to convict him at once, but must hear witnesses and frame a charge. P.P.O. Jos pointed out that by this procedure a tremendous backlog of cases in Jos had been caused, in fact to such an extent that first hearing dates were six months in advance. The Commissioner whilst being sympathetic with this state of affairs had to concur with S.S.P. 'D's statement that a Magistrate could not be compelled to convict on the face of a plea of guilty. Clarification would be sought, however, from the Chief Registrar, as to whether a Magistrate after framing a charge is bound to record all the evidence in the face of a man amending his plea of guilty.

[Bicycle stealing.] Bicycle stealing is a popular offence in Nigeria. Most cycles are fitted with a lock but apparently it is possible by the process of re-shaping a bicycle key to open almost any of the types of lock fitted. The general name given to this sort of key is the "master cycle key". It seems that it is necessary to prove that the person in possession of such a key was in fact the person who re-shaped or altered it. This being

⁵⁶ Alhaji Kam Salem.

so, neither section 361 nor 319A of the Penal Code is applicable. Would it be possible to insert a provision in the Penal Code to make it illegal for any person to be in possession of a master cycle key?

[Screening of offenders.] The provisions of section 167 of the Penal Code (Screening of Offenders) does not appear to cover the following hypothetical case akin to accessory after the fact: “a person who knowing or believing an offence has been committed, and knowing the identity or whereabouts of the offender intentionally withholds such information or takes no action to see that the offender is brought to justice...” The opinion of the Panel of Jurists would be appreciated on this point.

F.I.R.s. Is it permissible for the Police to verify an information or complaint before completing a First Information Report?

Sections 117 and 133 C.P.C. imply that the first duty of the police is to make out an F.I.R. if complaints or information are likely to be accepted.

We are not always in a position to confirm at a given moment that we are going to accept such complaints neither do we know whether we are going to refuse them. Certain courts insist on the existence of an F.I.R. before they will issue a search warrant. It may be that the execution of such a warrant will enable the police to make up their minds whether there is any substance in an information or not. But as indicated we are not given the chance to make any decision in some instances.

[Prosecutor’s right of reply.] It is desired to know whether a prosecutor in summary trials in Magistrates’ courts has a right of reply after an accused person has called witnesses in his defence. Chapter 16 of the C.P.C. is quiet on this point.

Chapter 18 dealing with High Court cases gives the prosecutor a right of reply. Would it be correct to say that what applied in the High Court also applies to a Magistrates’ Court?

Section 27 of the C.P.C. Could the word “require” where used in this section be substituted by the word “order”?

The commonest meaning of the word “require” is “to be in need of” and it seems that as used in section 27 of the C.P.C. it is not fully understood by some Police officers.

6.

Memorandum from the Ministry for Local Government⁵⁷

Memorandum of Increases in Salary Granted to Alkalai, Native Court Presidents and Other Members of the Native Courts Judiciary: 1958

From the 1st of October, 1958, the salary of all judicial staff employed by Native Authorities were reviewed and the majority received increases. A year later on the 1st September, 1959, all judicial staff received further increases along with the general increases for all N.A. staff following the Mbanefo recommendations for revision of salaries. Thus all staff over the period 1st October 1958 to 1st September 1959 received increases in salary some very considerable increases.

2. The Panel of Jurists recommended that salary should be based upon qualifications, experience and length of service. This recommendation was carefully examined by Native Authorities, Residents and a Regional Committee. The final finding was that the recommendation could only be accepted if there was a unified Native Courts Judicial Service, and that this was not considered an appropriate time to start such a service; the recommendation could not therefore be accepted as it stood without regard to any other factors. The reason for this was the very wide difference in the revenues of the Native Authorities. Instead, the principle was accepted that the salaries of Chief Alkalai, Alkalai and Court Presidents should be related to their status in the community in which they served.

3. Following this principle the recommendations given below were approved by the Government.

(a) General

- (i) Salaries should be fixed and not incremental for Alkalai and Court Presidents.
- (ii) The salary of an Alkali or full-time Court President should be related to that of the District Head in whose District he served. Normally his salary would be lower than that of the District Head but there was no objection where local conditions warranted for his salary to be higher than that of the District Head, as it already is in some areas.

(b) Chief Alkalai

- (i) In those Native Administrations where the majority of Appeal cases lie to the Chief Alkali the salary of the Chief Alkali should be adjusted to become the third or fourth highest salary in the Native Administration, excluding professionally and technically trained staff (e.g. teachers, engineers, etc).
- (ii) In those Native Administrations where the majority of Appeal cases do not lie with the Chief Alkali (e.g. in Adamawa N.A.) the salary of the Chief Alkali

⁵⁷ The source of this memorandum is identified in several other places as being the Ministry for Local Government. See e.g. Memorandum by the Attorney-General, no. 1 *supra*, ¶ 31. The Minister for Local Government at the time was Alhaji Sule Gaya.

should be related to his place in precedence among the traditional members of the Native Administration.

(iii) The salary of a Chief Alkali should be not less than the salary of the ninth most highly paid employee of the Native Authority. (In fact, in most Native Authorities, the Chief Alkali is in very much higher than the ninth place).

(iv) The salary of the Chief Alkali should be not less than £25 more than the salary of the highest paid District Alkali employed by the same authority.

(c) Alkalai and Full-time Court Presidents

(i) The minimum salary of an Alkali or full-time Court President should be £189 per annum. If an N.A. cannot afford to pay this, then it should be able to reduce the number of its Alkalai so that one Alkali serves more than one District. In this way it is considered that any N.A. should be able to pay the minimum salary recommended.

(ii) Where the District Head's salary is higher than that of the Alkali or full-time Court President then the Alkali's salary should be not only not less than £189 per annum but also not less than 50% of the salary of the District Head. To this minimum salary could be made additions as merited by the Grade of Court, volume of work, character of work and individual qualification of Alkali. This latter would be in the form of a personal allowance. (The salary of Alkalai would be subject to the approval of the Minister for Local Government after consultation with the Ministry of Justice).

(iii) An Alkali previously on an incremental scale should not suffer in any way by the abolition of that scale but should receive the equivalent salary by way of a personal allowance while holding that appointment.

(iv) Full-time Court Presidents, full-time Court members and Alkalai who passed the proposed new course at the Institute of Administration recommended by the Panel of Jurists should be granted a personal allowance of £15 per annum in addition to the basic salary of £189.

(v) A Kano graduate on being appointed an Alkali should be granted a personal allowance to bring his emoluments up to not less than £216 per annum.

(d) Mufti (Assistant Alkalai). Mufti known as Assistant Alkalai in the Estimates, should have their salaries revised so as to attract able and qualified men to take up a judicial career. The minimum salary of a Mufti qualified at the School of Arabic Studies should, therefore, be not less than £216 per annum which is the entry point for similarly qualified Arabists entering the teaching profession. The minimum salary for unqualified Mufti should be £120 p.a.

(e) Part-time Court Presidents. The emoluments of part-time Court Presidents should be either in the form of sitting fees or preferably as a salary computed as consolidated sitting fees.

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(f) District Court Members. These members should have their sitting fees revised so that their revised fees are proportionately no less favourable than the revised allowances of members attending N.A. and Provincial Councils.

(g) Members of Emir's Council. Those members of Emir's Courts other than members who were also Councillors should have their salaries revised. The increases, if any, should be at the discretion of the Native Authority and approved by the Minister for Local Government after consultation with the Ministry of Justice.

4. Attached is given a table which shows salaries of Chief Alkalai, Alkalai and Registrars (taken at random from the Estimates) for the year 1958/59 before the increases and in 1962/63 after the increases. In most cases the 1962/63 list gives the salary for the same post as for 1958/59 list. In one or two cases the post may be different but this can only be checked by references to the N.A. concerned.

[Attachment]

SALARIES OF ALKALAI

N.A.	POST	SALARY	
		1958/59	1962/63
BORNU	Chief Alkali	720	1278
	Alkali	400	780
	“	360	766
KANO	Chief Alkali	1248	1519
	Alkali	588	1176
	Registrar	564	(Insp. of Cts.) 1282
KATSINA	Chief Alkali	716	1285
	Alkali	323	854
	Insp. of Cts.	282	564
ILORIN	Chief Alkali	345	660
	Snr. Alkali	282	540
	Registrar	270	510
IDOMA	Court President	200	250
	Registrar	162	225
	President	48	250
BORGU	Alkali	180	264
	Alkali	162	Abolished
GUMEL	Alkali	252	552
	Alkali	132	290
	Asst. Alkali	132	290
TIV	Alkali	216	240
	Registrar	180	180
	President	150	500
LAFIA	Alkali	120	366
	Alkali	66	216
	Mufti	66	138

7.

Letters from Judges of Provincial Courts

No. PCS/P.14/Vol. 1/70
Sokoto, Provincial Court
5th May, 1962.

The Permanent Secretary,
Ministry of Justice,
Private Mail Bag 2035,
Northern Nigeria,
Kaduna.

With reference to your letter No. JS. 12/17 of 15th March, 1962, I am very grateful to forward herewith my points and suggestions which I wish the Panel to consider in the light of the experience gained in adopting the new Penal system are as follow below:

(1) This introducing the new Penal system in this Northern Nigeria is very good because it deserves the people of this Region due to differences of religions and customs and tribe, but if you go through Penal Code carefully you would see, it governs and fits all these differentiations.

(2) I understood that if Alkalai follow all instructions they received from their courses or from their Departments and put them into practice, surely they would prevent them from misleading which will result injustice to their judgments.

(3) I suggest that section 68(2) this to be inserted after the word Penal Code: “And if the offence is confirmed by witnesses as prescribed by Moslem Law”.

(4) I suggest that if a man being a Moslem and found guilty contrary to “*Haddi* Lashing” as prescribed by Moslem Law and if it is first offence to be sentenced to *Haddi* Lashing only. But if he is shown to have been convicted of an offence under *Haddi* Lashing sections, be published with imprisonment or fine or both.

Judge, Provincial Court
Sokoto

Ministry of Justice
Kaduna
CONFIDENTIAL

The Permanent Secretary,
Ministry of Justice,
Northern Nigeria,
Kaduna.

Reference to your circular letter No. JS.12/17 of the 15th March, 1962, I forward herewith my suggestions.

1. Yearly conference of the Provincial Court Judges to be arranged. This will help both Court Members and the Ministry of Justice to solve certain problems in general it will throw more light in the mind of the Ministry about the different problems existed in each Province that will enable the Ministry to know more about how he will introduce new policy and how to remedy certain mistakes for the interest of Justice. In other words this will keep the Ministry to be more aware about the different problems of each province and the matters which are common and need some sort of policy and direction for the interest of justice.
2. The position of the jurisdiction of the Provincial Courts to be a Court of Grade A Limited to be reviewed so that the Court may be upgraded to Grade A unlimited. This will cut down the volume of works for the High Court about the Homicide cases. Even to give them a power of examining Homicide cases and to commit an accused person for the trial at High Court.
3. Federal offences to be extended to the jurisdiction of certain Native Courts if not to all.
4. Duty of the Justices of the Peace appointed need more explanation about how, when and where it be discharged. And a method about how the public will be aware of that to be introduced, because up to now even the Public will be aware of that to be introduced, because up to now even the Police Department I think especially N.A. Police didn't know the power or duty of the J.P. Even most of the N.A. didn't although some of them may know whom they are.
5. F.I.R. as a procedural first step in criminal matters another arrangement about forwarding it to the Native Courts by the Police Department still left very much to be desired because it was often neglected unless if it was intended as a formality. The biggest problem about this occurred in the N.A. Districts areas where normally only 2 N.A. Police men detailed on duty in the District for 3 to 6 months there was no Police charge office and the P.C.s attached are illiterate but they prosecuted offenders without F.I.R. and no case diary kept for those cases. This is common everywhere. (Needs attention).
6. The idea that Provincial Courts like the rest of the Native Courts have no right or power to give direction to the Nigerian Police needed to be reviewed. Provincial Courts is among the distinguished Government Courts in the Region though called a Native Court.
7. Is Provincial Court solely responsible direct to the Ministry of Justice or solely responsible to the Ministry through the Residents of the Provinces, because I see that every major instruction came to us through the Resident but not direct from the Ministry? Those instructions used to reach us lately. I should like the Ministry to view this matter on the point of view that Judiciary should be a separate body from the Administration so that independence of the Judiciary should be assured. (There must be a separation of powers).
8. Sections 387 and 388 now need more attention because some people took it as a shield of committing adultery, this seemed to me an encouragement of immorality on the ground of local custom of the offender.

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9. Up till now certain tribes recognised enticing each other's wife lawful according to their primitive local custom whereas the Penal Code law of the Region recognised it as a criminal offence. But certain Native Courts were prevented by the N.A. not to punish them on the ground that it was their lawful custom in local custom law existed in that area. This problem should be viewed and reconsidered for interest of justice, because the Penal Code was not passed into law to be fanned with [sic].

10. Posting of Provincial Court Judges to be arranged so that they may gain experience of every Province and that will broaden their mind more.

11. Security, Independence of the Provincial Court Judges to be assured with an enactment of the Legislature of the two Houses of the Region if possible so that the Judges may feel independence, if they acted according to law.

Provincial Court Judge
Sardauna Province, Mubi

PC. 2/189
Provincial Court,
Makurdi 14th April, 1962.

The Permanent Secretary,
Ministry of Justice,
Northern Nigeria,
Kaduna.

With reference to your circular No. JS/12/17 of 15th March, 1962 I append hereunder my comments at moment:

1. There does not appear to be a section in the penal code of harbouring a thief/thieves except for harbouring robber/brigands. What happens to an accused who harbours a habitual criminal who is neither a robber nor a member of brigands.
2. Section 315 of the criminal procedure code stipulates the procedure to be followed when a contempt is committed in the view or presence of any criminal court. But what will be the way out if a person commits contempt in the presence of a civil court which has no criminal jurisdiction at all.
3. Under section 140(1)(b) of the criminal procedure code no court shall take cognizance of an offence under sections 155, 158, 159, 160, 161, 164, 165, 174, 175, 176, 179, 180 and 182 of the penal code. But supposing that a person commits contempt before a court under section 155 of the penal code and the court is unable to hear the case as required by criminal procedure code section 315(1), I wonder why the court should have to give a consent before prosecution could be begun.

President
Provincial Court

DOCUMENTS AND OTHER INFORMATION RECEIVED BY THE PANEL OF JURISTS – 1962

Reference your No. JS.12/17 of 15th March, 1962

My suggestions are as follows:

1. The Quorum of the Provincial Court to be one (irrespective of the special position of the Alkali) to permit sittings in a maximum of three divisions.
2. All Criminal Courts and if possible all customary Civil Courts to be taken over by Government, so that the staff of these courts are paid by Government.
3. All Judiciary to be separated from Administration e.g. no Chief, District Head, or Village Head to sit on Court.
4. To consider means of compelling Native Authorities to make a Declaration of Custom which will clarify the relationship between customary law in adultery, fornication and correction of wives by chastisement on one hand, and the Penal Code Provisions on adultery and causing hurt on the other.
5. That the powers of transfer to a Magistrate's Court or a District Judge's Court be granted to all Native Courts to facilitate transfer where the Native Court lacks jurisdiction and to avoid the hiatus which occurs at present because such transfers can be effected only by District Officers or Residents.
6. To withdraw the powers of Administrative Officers to sit in and advise a Native Court in session, but to retain their powers of review.
7. To consolidate the jurisdiction of part-time Courts (i.e. Courts with insufficient jurisdiction or work to give them a full-time occupation) so that fewer and full-time Courts need be established.
8. That the principle of one-man courts (cf. Alkali and Magistrates) be extended to all Native Courts to ensure practice for each appointed Judge, and the responsibility of the individual Judge alone for his official action. This will reduce expenditure and at the same time, enable a proper salary to be paid commensurate with the work and status of the Judge.

President, Provincial Court
Lokoja

NC.PCT/NC.4/199.
Ilorin, 24th March, 1962.

The Ag. Permanent Secretary,
Ministry of Justice,
Northern Nigeria,
Kaduna.

Thank you for your letter No. JS.12/17 of 15th March, 1962. I have much pleasure in forwarding these two suggestions which I hope you will wish the panel to consider.

(a) Jurisdiction of Native Courts over Nigeria Police Force. Several complaints are being made here against Nigeria Police Constables in respect of adultery offences and

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enticement of married women and as a result of the provisions laid down under the Criminal Procedure Code Law of 1960 and section 16(1) – (3) of Handbook for Native Courts Law which prevent Native Courts from having jurisdiction over the offenders, by virtue of Public Notice No. 146 of 1944 that is in Vol. IX Chapter 142 of the Laws of Nigeria 1948 also refers.

I suggest that there should be some sort of review to solve these situations.

(b) Robes. It is also noticed that the Sharia and the Provincial Courts are newly established and it is therefore more honourable and proper for the Government of the North to consider and supply all the Judges of Sharia and Provincial Courts including their Registrars with most acceptable kind of robes similar to that of Pakistan or India by doing this, it will also signify their position. For the Government to consider this, is another progress.

Provincial Court Judge
Ilorin Province

8.

Memorandum from the Grand Kadi⁵⁸ to the Panel of Jurists

The following components and suggestions represent my personal views which I hope will interest the Panel of Jurists.

2. The experience I gained in the High Court Appellate Division is very limited as the period we sat together with the Judges of the High Court in that division was very short following the decision of the Federal Supreme Court in April, 1961. The Constitution has now been amended so that we shall return to sit again as members of the High Court when hearing appeals from the Native Courts. Our return to sit in that Appellate Division has a great importance, as I know many appeals had been given up by some Moslems due to absence of a Sharia Judge on the bench.

3. The above mentioned amendment has given the Sharia Court of Appeal a lot of work in addition to its own. This will lead us sometimes to defer some of our duties in wait of quorum. I, therefore, suggest that the number of the Sharia Judges be extended from four to five.

Penal Code

4. With very little criticism, the Penal Code of 1960 is widely accepted in the whole Northern Nigeria as it has done away with the conflict of different laws in the Region and it is written in the language which are understood to the people and that has given a great effect in keeping the peace.

But I suggest that all offences in the Chapter XXII in connection with Moslem Parties should come within the Emir's and Alkali's jurisdiction only. Nothing of that kind should go to a Magistrate or a Judge of the High Court at the first instance. The reason for making such suggestion is that, although the offences in the chapter involve Moslems who commit them according to their customs and religion, the wording of the code is not at all Islamic.

The offences of sections 387, 388 and 390 of the Penal Code in Islamic Law are the same in their penalty. I agree that the punishment should not exceed what is prescribed in the Penal Code. I am also afraid that a non Moslem Judge or Magistrate who has no knowledge of Moslem Law of the chapter may be involved in a libel offence in the course of his proceedings on such cases or convict some of accused persons who are innocent according to the Law binding them. For example, in Case Notes of Northern Nigeria 1961, Part I, Page 9, paragraph 3, "Maryam vs. S" which reads "Since, although the pregnancy began during the period of Iddah there was proof that the Appellant had not cohabited with the Respondent during the vital period and the child would have technically been the product of a quasi adulterous union" is not a good expression to be made by a court in connection with Moslem parties. The procedure to be followed in connection with Moslem parties must be purely Islamic, which is quite different from the C.P.C., see section 142. Any statement given by the prosecutor cannot be regarded as evidence on which such a judgment can be based, neutral witnesses must come in to give evidence to support the claims of the prosecutor. The offence of adultery is a great

⁵⁸ Alhaji Abubakar Gumi.

defect of a Moslem side that is why we do not like to confirm it upon him easily, that is why the Law of evidence here is very strict.

Issuing Fatwa

5. It is known that the most Native Courts are following the classical texts of Maliki Law in all their civil proceedings and the books are written in classical Arabic. Although most of the Alkalis understand Arabic and learn the Law in Arabic but those who are properly learned and can make their way throughout for all the problems are very limited. You sometimes find some of them very versed in the classical knowledge he has learnt but he lacks the knowledge of the current affairs, so that that makes a defect in his ability to mince and measure today in the measurement of yesterday or to know what should be used in an environment which is different from that of the author of a text book. A judge in all cases whatsoever must know the time and the place where the causes of the matters arise or must be guided by one who has a sufficient experience of the two, otherwise, no full justice can be obtained. In all Moslem world, old and new, besides Nigeria, the Fatawa (giving legal opinions) is not left to many different Malamai (learned men) it is confined in one person who has authority of promulgating those opinions always. In Jordan and Saudi Arabia for example there are Grand Muftis and in the Sudan there is Grand Kadi whose opinions, in addition to the official rite of the country, are followed.

6. Northern Nigeria is for a long time influenced by Islam but it is not an Arab country, so it must have some good customs of its own which are quite different from those of the Arabs and which should be reserved for the society and observed in the Law Courts. Although the country within itself has different customs and environments, and cases are also like faces, no two of them are similar in all aspects, yet as far as it is in one country, something should be done to unify the work of the courts. I therefore, suggest the Northern Nigeria will adopt the method of practice in the Sudan for issuing Fatwas on things according to the suitability of the country and the current affairs of the time. I think that that will help greatly in doing away with conflicts not only in courts but also in religious services and will lead to peace and preclude political tensions in religious matters.

7. There should be no distinction between Moslems in personal and family Laws as far as Moslems, whether they are old Moslem or newly converted to Islam parties, are concerned. I do not appreciate the Amendment of the Sharia Court of Appeal Law published in Northern Nigeria Gazette No. 30 of 17th November, 1960 page A 310 section 3. Because that will make more confusion in the system and create another conflicts of Laws which we are trying to avoid both in civil and criminal cases. The Islamic Personal and Family Law has provisions for affairs built on the Islamic basis and those based on other customs before the parties concerned have embraced Islam. This Amendment gave the jurisdiction to the High Court to hear the appeals on the case "Maryam vs. S", hereabove mentioned, the report of which will remain as a disgrace for the parties and the child in dispute.

Advocates

8. It is not prohibited, in Islam for a litigant in a case to employ a counsel to represent him in a court. Those counsels are known as Muhami or *Wakil* el Khusumah. What will

not coincide with Islam is the dress of eagle form used by advocates or judges of the Western type, as that is a token of Christianity or Western paganism of the olden days. In order to satisfy the time, I suggest that the Grand Kadi will be given a power to appoint some learned people as *Wakil al Khusumah* who can represent litigants in the Sharia Court of Appeal, Provincial Courts and Grade A Courts only. There are Muhamis in all modern Moslem courts including Saudi Arabia's courts.

Provincial Courts

9. In the Native Courts Law 1956, section 6(2) reads: "A Provincial Court in each of the Provinces of Plateau, Benue and Kabba shall consist of a President and two other Permanent members of whom one of the three shall be an alkali." In my opinion the Alkali should be the President of the Court because the Alkalai in those courts at present are the only members with the professional knowledge of law they cannot be dispensed with in all cases and they sit alone when hearing an appeal on a personal Law case. I am sorry to say none of them is in the position of Presidency. They should be given a special consideration if justice is to be observed and their work appreciated.

10. I would like also to suggest that each one of the Provincial Courts other than those of Plateau, Benue and Kabba should get at least one permanent assistant to sit with the Provincial Judge. This assistant will help in pointing out the Laws and in giving more confidence to the peasants in the Court. It was stated in the report of the Panel of Jurists, 1958, page 19, that "It is pointed out, however, that every Moslem Country in the world including Saudi Arabia has recognised that in an appeal court the judgment of an Alkali sitting in lower court should not be reversed by a single judge sitting alone."

Sharia Court of Appeal

11. This Court is established in order to hear appeals on the personal status, family affairs and when the litigants choose their case to be tried according to the Islamic Law alone in other civil cases. I want to point out that the court has a very big responsibility in its jurisdiction but it is not given a least power to see that its decisions are carried out or its dignity is observed. To say that it is a superior court of Record (see N.R. No. 30 of 1960 page A 310 section 2) is not sufficient for it nowadays in such a country, unless its authority to fine and imprison for contempt of its authority is clearly written among its Laws and rules. The experience shows that most of the corruption in Native Courts is committed during the trial of personal Laws. When an appeal lies from the lower courts to the Sharia Court of Appeal and is accepted, we, in may times, have difficulties in getting the parties or executing the judgment if it is not in favour of the lower court of the first instances. If a court cannot enforce its decision immediately, it is no more than a school, especially in a new country like Northern Nigeria.

Transfer

12. Sharia Court of Appeal, after hearing an appeal is given the power of section 70A of the Native Courts Law, 1956 sometimes when it quashes the proceedings of the lower court it considers it desirable to order the cause to be reheard de novo before the Provincial Court but it is not made clear that it can do that when the appeal does not lie from the Provincial Court. I do not know whether the Panel can recommend that Sharia Court of Appeal, when it is desirable for the sake of justice, can transfer any case within its jurisdiction from a lower Native Court to another one including a Provincial Court

after hearing an appeal or in a course of proceeding of the lower court of first instance on the application of all or one of the parties.

Grant in Aid

13. I suggest and recommend that the Government will subsidise the Native Authorities for the payment of Alkalis. This will make the Native Authorities before appointing an Alkali consider the right person qualified for the grant. This, if carried out, I think, will raise the standard of the Native Courts as the situation is in Education.

SUMMARY

14. The recommendations and suggestions I have stated above can be summarised as follows:

- (a) The number of the Judges of the Sharia Court of Appeal to be increased to five (para 2 & 3).
- (b) Chapter XXII of the Penal Code to be confined within the jurisdiction of Alkalis and Emirs when the parties are Moslems (para 4 & 5).
- (c) An authority for issuing Fatwa should be given to one person (para 5 & 6).
- (d) All appeals on cases of personal Law concerning Moslem parties without distinction, lie to the Sharia Court of Appeal.
- (e) Advocates should be allowed in the Sharia Court of Appeal, Provincial Courts and all Courts of Grade A and "A" Limited (para 8).
- (f) Alkalis of the Provincial Courts of Plateau, Benue and Kabba to be presidents of the Courts and other Provincial Judges to have assistants (para 9 & 10).
- (g) Sharia Court of Appeal as a Court of record should be given a written power to punish for contempt of its authority and the power of transfer (para 11 & 12).
- (h) Grant in Aid be given to Native Authorities for their Courts (para 13).

9.

Letter from Haliru Binji

Sharia Court of Appeal,
Private Mail Bag 2050,
Kaduna.

22nd May, 1962

The Permanent Secretary,
Ministry of Justice,
Kaduna.

With reference to your letter No. JS.12/17 of 15th March, 1962, I would like to raise two points:

1. A school for training the Alkalai and Muftis to be established

I am suggesting this because the Kano School for Arabic Studies which used to produce these Alkalai will no longer carry on with this course as from December, this year. The last batch used for this purpose is passing out next December and no provision has been made for a substitute.

Some arrangements are going on between the Sokoto N.A. and the Ministry of Education about the possibility of improving and transferring the Sokoto N.A. Kadi School to the Regional Government. It was suggested that the School would admit students who completed the Standard VII of Senior Primary School to give them a four years course on the teaching of Maliki Law. But I learnt that, though I am not sure, that the Ministry of Education likes to transfer this kind of training to the Ministry of Justice.

The establishing of this type of School is an urgent matter. Because without it all the future recruits into the N.A. Judicial Service will be from the conservative Mallams who have no Western education at all. Even if the School starts to operate next January, 1963, it will take four years before the first intake will pass out.

My second point is that I would like to suggest that the salaries of registrars of the Provincial Courts be increased. The basic salary for this post, I learnt, is £450 p.a. The present registrars have already been committed to heavy expenditure by giving them advance to purchase private cars. The prices of cars and some of their spare parts have gone up this year. It is difficult for them to maintain themselves and their cars with this small income. And to minimize temptation, an increase in their salaries will be justifiable.

I have the honour to be,
Sir,
Your obedient Servant,

(Sgd) Haliru Binji

10.

Memorandum by the Minister of Justice⁵⁹ to the Panel of Jurists on the occasion of its return to Northern Nigeria in May, 1962

Part I: Preliminary

1. The report which the Panel of Jurists submitted to His Excellency the Governor of Northern Nigeria on 10th September 1958 contained a number of recommendations for the reorganisation of the Legal and Judicial systems of Northern Nigeria. These recommendations were, with two reservations, approved by the Northern Regional Government, and they were embodied in a White Paper entitled, "Statement by the Government of the Northern Region of Nigeria on the Reorganisation of the Legal and Judicial Systems of the Northern Region." The Paper was debated by the House of Assembly and the House of Chiefs during the Second Session of the Second Legislature in December 1958, and the proposals of the Government included in that White Paper were accepted by both Houses.

2. The main responsibility for the implementation of the reorganisation fell to the Attorney-General, and that Minister has submitted a Memorandum indicating the steps that have been taken in and towards such reorganisation. However, on 8th November 1961 the Minister of Justice assumed responsibility for the following business of government, that is to say, Native Courts, parliamentary responsibility for the judiciary, legal training and education (policy), and official oaths (policy). (See N.N.M. 1243 of 1961). In furtherance of this assumption of responsibility, the office of the Commissioner for Native Courts was removed from the Chambers of the Attorney-General to the Ministry of Justice.

3. It is proposed that the Minister of Justice shall now briefly review the progress made in and towards the implementation of the recommendations of the Panel of Jurists of September 1958, and to make mention of some of the difficulties which have been encountered, in so far as they affect matters which are within his responsibility.

Part II: Native Courts

Provincial Courts

4. In accordance with the Recommendations 11 and 12 of the Panel of Jurists, Provincial Courts with appellate and some first instance jurisdiction, were established in and for each Province of the Northern Region. (Subsection (1) of Section 60 of the Native Courts Law, 1956.) In Kaba, Benue and Plateau Provinces, the Provincial Courts consist of three members, one of whom is an alkali. (Subsection (2) of Section 61 of the Native Courts Law, 1956.) In other Provinces, the Court consists of an alkali sitting alone. A list of approved assessors has been drawn up for each court.

5. All Provincial Court Judges, Registrars and court staff are members of the Regional Public Service. (Subsection (3) of Section 61 of the Native Courts Law, 1956, and see Recommendation 10 of the Panel of Jurists.)

⁵⁹ Alhaji Mamman Nasir.

6. Provincial Court Judges were selected from those distinguished members of the Native Court benches, whose standing in their Native Authorities and generally, indicated their suitability for such responsible posts. They were selected and appointed on the advice of the Judicial Service Commission and come under the control of that commission for disciplinary purposes; the Ministry of Justice is responsible for these Judges administratively.

7. Initially Provincial Court Registrars were outside the control of the Judicial Service Commission, but an amendment to Section 61 of the Native Courts Law, 1956, effected by the Native Courts (Amendment No. 2) Law, 1960 has changed this position.

8. As the occasion has arisen, because of the leave or absence for some other reason of the substantive Provincial Court Judge, suitably qualified persons have been temporarily seconded from Native Authority service to the Provincial Court bench. This has been done to offer wider experience to promising men, who might, in the future, be promoted to the higher courts.

9. Some of the Provincial Alkalai have urged that permanent Muftai should be appointed to each Provincial Court. It is claimed this is a useful and traditional appointment, which would assist Alkalai in the dispatch of Muslim matters. Whatever the merits of such a suggestion as affecting the day to day working of the Courts, such appointments would create a clearly defined reservoir of persons who would have experience of the working of the Provincial Court system, and from which the Government could draw for future appointments to the Provincial Court Bench.

10. In an assessment of the work of the Provincial Courts it is almost impossible to overestimate their influence on other Native Courts. Apart from formal instruction in the new laws which some Judges have given, the example which they have shown in respect of integrity, learning and sense of duty has made a very wide impression. Much encouragement has been given to Native Court personnel by the establishment of these courts, but the discrepancy between the salaries paid to Provincial Court staff and that of even the highest paid Native Authority Alkalai has been generally noted.

11. A table showing the amount of work undertaken by Provincial Courts during the period 1st July 1961 to 31st December 1961 appears at appendix 'A' to this Memorandum. A table showing the incidence of appeals per thousand first instance cases for the same period and comparing these figures with similar ones for 1949 appears at appendix 'B' to this Memorandum.

Other Native Courts

12. Native Courts have not been Regionalised, and there has been no move for the Government to appoint Government servants to posts in Native Courts, other than Provincial Courts. In its Recommendation 10, the Panel suggested that Provincial Courts staff might properly be Government servants, and further, that newly qualified Alkalai might be offered the alternative of entering Government service, with the prospect of secondment to a Native Authority. The latter part of the Recommendation has not been implemented although it was accepted by both the Government and the Legislature.

13. In the absence of Regionalisation which has been rejected by the Government as a matter of policy, the Government does exercise a variety of controls over the Native

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Courts under the provisions of the Native Courts Law, 1956. The types of control, none of which are recent innovations, are summarised at Appendix 'C' to this Memorandum.

14. The requirement for confirmation by the Governor, acting on the advice of the Judicial Service Commission, and in some cases the prior approval of the Premier of the appointment of Native Court judicial personnel (Subsection (8) of section 4 of the Native Courts Law, 1956), was introduced by the Native Courts (Amendment No. 2) Law 1960 as a direct result of agreement reached at the Resumed Nigeria Constitutional Conference of 1958. Paragraph 29 of the Report of that Conference provided as follows:

“29. The Conference considered the methods of appointment of Judges of Customary and Native Courts and agreed –

(a) the appointment, dismissal and disciplinary control of Judges of Customary and Native Courts should be divorced as far as possible from political and executive control.

(b) each Regional Government should review the situation in its own Region and should prescribe by legislation those Customary and Native Courts whose members should be appointed on the recommendation or under the supervision of the Judicial Service Commission.

(c) the Regional Governments should seek to ensure that the powers of appointment, dismissal and disciplinary control of all Judges of Customary and Native Courts (other than Emirs) with power to impose prison sentences of more than six months or fines of more than £50, should be exercised on the recommendation or under the supervision of the Judicial Service Commission.

(d) the appointment of Emirs as Judges should be by the Governor in his discretion after consultation with the Judicial Service Commission.”

15. Subparagraph (c) of this paragraph caught all Native Courts in the Region since even Grade 'D' courts may imprison for nine months. Thus it became necessary to devise a method of appointment of Native Court judiciary which was “on the recommendation or under the supervision of the Judicial Service Commission.” The Government had already set its face against the regionalisation of Native Courts and so did not implement this agreement by providing that the Governor should make appointments to the Native Court judiciary on the advice of the Judicial Service Commission, as it might have done by extending the scope of Section 180E(2) of the Nigeria (Constitution) Order in Council, 1954, as amended. It was therefore decided that the method of appointment, including the existing requirement for approvals should remain unaltered, but that the appointment should, in every case, be made subject to confirmation of the Governor acting on the advice of the Judicial Service Commission, and this is the purport of subsection (8) of Section 4 of the Native Courts Law 1956.

16. As a result of these changes in the requirements for appointment, suspension and dismissal of Native Courts judicial personnel, the procedure is now as follows:

(a) Appointment etc. of a Chief to be President of a Court. Such appointments are made by the Governor in his discretion after consultation with the Judicial Service

Commission. (See Section 3A of the Native Courts Law, 1956 which was inserted by the Native Courts (Amendment No. 2) Law, 1960).

(b) Appointment etc. of Members to Native Courts, other than Alkalai Courts.

(i) To posts carrying salaries of less than £450. The Resident selects the person to be appointed and signs the warrant of appointment, then forwards the warrant to the Commissioner for Native Courts with such comments as he thinks appropriate. The Commissioner then submits the warrant to the Judicial Service Commission with any further comments which may be called for. The Judicial Service Commission then advise His Excellency whether to confirm the appointment or not. If the appointment is confirmed, the warrant is returned to the Resident direct from the Judicial Service Commission, and a copy of the warrant is lodged with the Commissioner for Native Courts.

(ii) To posts carrying salaries of more than £450. The Resident again selects the person to be appointed and signs the warrant of appointment. The warrant is passed to the Commissioner for Native Courts with such information as the Resident thinks necessary. The Commissioner for Native Courts then passes the warrant to the Premier for him to signify his approval of the appointment, or otherwise, in accordance with subsection (2) of Section 36 of the Native Courts Law, 1954. If the Premier approves, the Commissioner for Native Courts, to whom the papers are returned in any event, passes the warrant to the Judicial Service Commission for its consideration. That Commission advises the Governor, and if he confirms the appointment the warrant is returned to the Resident direct from the Judicial Service Commission. A copy is lodged with the Commissioner for Native Courts. (See subsections (1), (5) and (8) of Section 4 of the Native Courts Law, 1956).

(c) Appointment etc. of Alkalai to Native Courts.

(i) To positions carrying salaries of less than £450. The Native Authority selects the person to be appointed and completes the warrant which is passed to the Resident. The Resident then considers the appointment and if he approves it, he sends the papers to the Commissioner for Native Courts who passes them to the Judicial Service Commission. That Commission thereupon advises the Governor as to confirmation of the appointment. If the appointment is confirmed, the warrant is returned to the Resident direct from the Judicial Service Commission and a copy is lodged with the Commissioner for Native Courts.

(ii) To positions carrying salaries of more than £450. The Native Authority appoints the Alkali, if the Resident approves the appointment the warrant is passed to the Commissioner for Native Courts. The Commissioner then seeks the Premier's approval in accordance with subsection (2) of Section 36 of the Native Courts Law, 1954. After the Premier's approval has been obtained, the Commissioner for Native Courts sends the papers to the Judicial Service Commission which advises the Governor whether to confirm the appointment or not. The warrants are then disposed of by the Commission as before. In all cases the Resident sends the Native Authority sufficient copies of the approved

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and confirmed warrant for its records and for the court concerned. (See subsections (3), (6) and (8) of the Native Courts Law, 1956).

17. It may be noted in passing that the only control possessed by Government in fixing of standard qualifications and standards of integrity and efficiency of alkalai lies in the power of approval vested in the Resident and the Premier by Section 4 of the Native Courts Law, 1956 and Section 36 of the Native Authority Law, 1954 respectively.

The terms of Section 4 of the Native Courts Law, 1956 are such that an alkali or member is appointed to a particular court. Thus, when he is transferred from one Court to another, it is necessary to go through the procedure indicated at paragraph 16 (above). Several times in the career of an alkali the Government may have the opportunity of refusing to approve his appointment to a new court, but at no time can it initiate disciplinary action against him short of a criminal prosecution. Should there be a decline in an alkali's performance, even if it falls below the desired standard, only the Native Authority has the power of suspension or dismissal. Similarly, subject to review by the Native Authority at the age of 55 under the Native Authority Staff Regulations, aged alkalai may continue in office for as long as they live, provided that they remain in the one court and the Native Authority takes no action to remove them. This is not the case with court members of courts other than alkali's courts, for the power to initiate appointments, suspension and dismissals is, there, in the hands of the Resident.

18. The introduction of the Penal Code has been met with enthusiasm in most courts. At the same time it rendered necessary a survey of courts possessing criminal jurisdiction. It was seen that many customary courts staffed by traditional office holders and community representatives would be quite unable to administer the provisions of this, or any other written law. As a result of this, widespread reorganisation of courts has been undertaken in Benue, Adamawa, Plateau, Kabba and South Zaria Provinces.

For example, in the Tiv Division of Benue Province, criminal jurisdiction was withdrawn from 61 customary courts, of these five were left with only civil jurisdiction and fifty-six were given criminal jurisdiction only in respect of the offence of enticing etc. with criminal intent, a married woman. There were created sixteen courts of purely criminal jurisdiction which now deal with the bulk of the criminal work of the Division. The same policy has been followed on a wider scale in Kabba, Zaria and Plateau Provinces (See Native Courts (Jurisdiction and Powers) Notice 1962 N.R.L.N. of 1962).

19. The device of separating criminal from civil jurisdiction is the only way to permit the application of written criminal law in areas where most court members are illiterates. The device was adopted first in Kabba and Benue because there, there was an adequate reservoir of educated persons to staff the new criminal courts. However, in Plateau and Sardauna Provinces the low general standard of education, plus the extreme insularity of the population makes it difficult either to find trainable local material or to import strangers to staff courts capable of applying the new law. There must be a higher degree of education and enlightenment for any reorganised court system to work properly in these areas.

20. In such reorganisations as that mentioned in the paragraph above, the opportunity might well be taken to revise the membership of customary courts. It may be considered that in most civil and all criminal courts it would be desirable for there to be but a single

Judge, assisted, if need be, by assessors. The advantages of this form of court would be to eliminate the representative concept of members duties and to eliminate internal conflict, both of which reduce public confidence in this type of court. A corollary which would follow, would be that the standard of qualification for this type of appointment might be considerably raised, to approximate more closely with that of alkalai.

22. A further matter for consideration is whether it is desirable to create Government Native Courts possessed by powers similar to those of Native Authority Courts. Such courts, staffed by Government employees would be established in centres of mixed and moving populations, such as Kano, Jos, Kaduna and Makurdi. The courts would have perhaps only one or two members who would be posted as required. The purpose would be to fill a position between Native Authority courts and magistrates, and, it might be thought, possess the advantages of both.

23. With regard to the salaries. The Panel's Recommendation 21 that "salaries of alkalai etc. should be increased" has to some extent been implemented. The Minister for Local Government has addressed you on the subject. It is clear that now, when administrative costs are increasing and new commitments involving Native Authorities in the recruitment of larger staffs, are put upon them, all but the largest Authorities have reached a position when it is impossible to pay higher salaries. An additional handicap is the policy of making an alkali's salary conform with a certain formula involving the salaries paid to other employees in the Native Authority.

24. It is clear that the need for increased salaries becomes more urgent as the task of the alkalai etc. becomes more technical and expert. The Government has tacitly endorsed this in the salaries of the Provincial Court staff. It may well be necessary for Government to seek ways of subsidising the Native Authorities in the payment of approved basic salaries to qualified Native Court staff. In this way the Government would be in a position to lay down a minimum salary for persons of a recognised qualification. This, in turn, would raise the standard of court personnel and would enable even the smallest Authority to have properly qualified and properly paid alkali. To lay down a fixed salary scale for Native Authorities would work a hardship on the staff of the larger ones which will always be able to pay more than the others. A fixed minimum is desirable.

25. An incidental benefit to be gained from the institution of a grant in aid system would be the sanction which its withdrawal would constitute, to enable the Government (as contrasted with the Native Authority) to deal with the problem of the declining alkali adverted to in paragraph 17 (above).

Part III: Commissioner for Native Courts

26. The work of the Commissioner for Native Courts during the last three years has been largely concerned with the establishment and staffing of the Provincial Courts and implementation of the Penal Code and the Criminal Procedure Code. The new legislation has been translated under his supervision, and much effort has been devoted to securing its acceptance in all parts of the Region. Native Courts have been supplied with the texts of laws and rules within their competence; they are without doubt better equipped to administer the law than they have ever been in the past. The Commissioner has issued a number of circulars elucidating points of law and practice for Native Courts,

as the need for these has arisen. The duties of the Commissioner includes the supply of criminal forms to Native Courts.

27. Extensive touring has been undertaken and recently two Assistant Commissioners have been working with the Commissioner. More recently, two Inspectors of Courts (Shari'a) have been appointed to the Ministry of Justice, and these work in cooperation with the Commissioner.

28. With the establishment of the Ministry of Justice, the Commissioner now works under the direction of the Minister and Permanent Secretary, who has assumed responsibility for the administration of Provincial Courts. The functions of the Commissioner in respect of the appointment of Native Court judiciary, have been explained at paragraph 16 (above).

29. The Commissioner for Native Courts is in theory assisted by two assistants, two Inspectors of Shari'a, the legal staff of the Institute and by thirteen D.O. Courts, one in each province. Staff shortage has eliminated the D.O. Courts to all intents and the staff of the Institute has not been very effective. The diversity of control and effort in the work of those persons who are outside the control of the Commissioner (Institute Staff and D.O. Courts) has probably been wasteful. The Panel is invited to consider the desirability of establishing a central inspectorate of say ten under the immediate control of the Commissioner for Native Courts and which would be divided up into groups each of which would be allocated a certain field of activity within the Region. It might be thought that the centralised control would promote efficiency and direction in inspection.

Part IV: Legal Education and Training

30. The responsibility of the Minister of Justice is for the policy of legal education and training. The Principal of the Institute of Administration has submitted a memorandum concerning legal training at the Institute. Such training is divisible into that of Native Court staff and that of potential barristers and others.

Native Court Staff

31. The standard course for Native Court staff is that of three months which is designed to instil the elements of the Penal Code, Criminal Procedure Code and Evidence Ordinance. This course can only incidentally improve the general standard of performance of the Native Court judiciary, since it has such a limited aim. Advanced courses do have the aim of rendering alkalai better equipped to run their court, but these courses are, like the other, supplementary in nature and limited in scope.

32. There is a need, if Native Courts are not to continue to lag behind others, for the opportunity to be made for some formalised and uniform qualification to be adopted as the standard for appointment to Native Courts. It is thought that such a standard might be a Diploma issued by the Institute but underwritten by a reputable University, which would be awarded on the successful completion of a special year's course in subjects of concern to staff of Native Courts.

33. It is regarded as essential that the standard and the reputation of this course should be of the highest. Unless it is of or near the standard of Inter LL.B. there is a danger that the intelligent schoolboy will be attracted to another course which would lead him away

from the Native Courts, where he might otherwise have made his career. If the year's course falls below the desired standard the natural drain of the best young men from the Native Courts, which were once, virtually, the highway to a respectable and satisfactory livelihood, but which, now, must be much lower on the scale of desirable careers, will be exaggerated and not stemmed.

34. Such a diploma, if of the right standing would make a suitable prerequisite for the award of a grant in aid mentioned in paragraph 22 (above). It would further be a useful yardstick for those concerned with appointments to Native Courts, who are now faced with a large variety of qualifications and virtually no standard.

35. In the more distant future one could foresee that for alkalai, the degree in Islamic Studies or Islamic Law at the Ahmadu Bello University, plus the one year diploma course at the Institute would be a very satisfactory qualification which might be regarded as in no way inferior to that of Barrister. The one year at the Institute would be equivalent to the year at law school which will become a compulsory part of a Barrister's training this year. If that were accepted, however, it would be difficult to see how staff of non-Muslim courts could obtain a qualification as well suited to the needs of their courts, as the Ahmadu Bello degree would be to alkalai's courts. The truth is that there is no prospect of teaching customary law until it has been rationalised and codified. Only then, could one expect a respectable standard in non-Muslim Native Courts.

Barristers and Others

36. The Principal of the Institute of Administration has adverted to the training of barristers at the Institute of Administration. This type of training must clearly continue either there or elsewhere. It is a matter of importance that as many Northerners with recognised legal qualifications should be produced as soon as possible.

37. At a time when it would seem that the first signs of coalescence between the two systems of law in the North are appearing, it would be wrong to perpetuate the rift simply because of the methods of training the young men who will inherit the legal system from our hands. Every effort should be made to render their training as balanced as possible. To this end, it may be considered that for many years to come that selected persons should be urged to continue their studies abroad, and, for example, on the completion of their barrister's training, to continue their studies in Sudan, Tunisia or other Muslim countries. In this way, it will be possible to build up a cadre of men well qualified to occupy the highest legal, judicial and academic posts in the future.

38. Mention was made at paragraph 31 above that there might be a need for the rationalisation and the codification of the customary law of the country. It is recognised that the codification of Muslim Law of procedure, and those parts which deal with the concepts of torts and contracts, would also be beneficial; this, not so much for the purposes of instruction, but for the benefit of litigants and the alkalai's courts generally. The Minister would wish the Panel to make a recommendation on this point and specifically on the question of whether the law of divorce should be included in such codification.

CHAPTER 1: HISTORICAL BACKGROUND

[Editor's note: coming after the memorandum of the Minister of Justice in the file in the National Archives, are brief hand-written notes, on three separate pages, on the recommendations to the Panel of Jurists made in the memoranda of the Attorney-General and the Minister of Justice. It is unclear who made these notes; they are omitted here.]

11.

**Records of Conversations between the Panel of Jurists
and Various Persons⁶⁰**

Record of conversation with Alkalai of Sokoto on 25th May, 1962

After introducing the Panel and explaining the reason for its visit, the Chairman invited comments on the Penal Code. The points raised were as follows:

(a) The Alkalin Gusau felt that when grave suspicion fell upon an accused person, but there was no evidence against him, it should be permissible under the Criminal Procedure Code for the Alkali to call upon him to swear an oath in regard to his innocence, as in Maliki Law. The Panel explained to the Alkalin Gusau that the basis on which a trial under the Criminal Procedure Code was conducted was that the judge must weigh all the evidence against the person and decide the cause only on the evidence produced, therefore it would not be permissible to call upon a person to swear his innocence.

(b) With regard to the offences of adultery and enticement of married women, it was suggested that to permit the aggrieved parties in such cases to compound the offence, was to encourage immorality. To get over this difficulty the Native Authority should be able to institute proceedings as well as the husband, or guardian, or father of the woman involved. It was pointed out that the persons aggrieved are the only ones concerned with the offence and therefore it should be for them to institute action. However, further consideration would be given to the question.

(c) With regard to the punishment for being drunk in a public place (7 days or 1 month imprisonment) this was thought to be too small and should be increased. The Panel was in general agreement with this.

The Panel asked the Alkalai whether a simple code of civil procedure would be of value. The general opinion was that it would be but that care should be taken in its drafting and some Alkalai found difficulties in relation to the case of marriage and divorce.

Record of conversation with Chief Alkali of Sokoto on 25th May, 1962

The Chief Alkali in reply to the Chairman's introduction said that the Penal Code is a good piece of legislation and that it was in conformity with the country's requirements. There was nothing in it which was objectionable but he would like to see some provision made whereby a suspected person could be compelled to swear his innocence.

The Panel explained that the Alkali should hear all the evidence from both sides in determining the issue as to whether it was proved or not, and decide solely on the evidence before him.

⁶⁰ These records are evidently typed-up summaries of notes made during the conversations recorded. Occasionally hand-written corrections have been made in the typescript; these are incorporated here.

Record of conversation held at Sokoto between the Panel of Jurists and Provincial Court Judge, Sokoto at 8 a.m. on 26th May, 1962

The Panel of Jurists visited the Provincial Court Judge, Sokoto in his Court at 8 a.m. on the 26th May, 1962. The Provincial Judge Sokoto mentioned two points which he had raised in his letter of the 5th May, which were:

(i) I suggest that section 68(2) this to be inserted after the word Penal Code: “And if the offence is confirmed by witnesses as prescribed by Moslem Law”.

(ii) I suggest that if a man being a Moslem and found guilty contrary to “*Haddi* Lashing” as prescribed by Moslem Law and if it is first offence to be sentenced to *Haddi* Lashing only. But if he is shown to have been convicted of an offence under *Haddi* Lashing sections, be punished with imprisonment or both.

And the Panel agreed to give further consideration to these matters. The Provincial Judge had no further points to raise.

2. The Provincial Judge considered that it was desirable for Alkalai of Provincial Courts to sit with Muftai.

Record of conversation with Sultan of Sokoto and members of his council

After greeting the Sultan the Chairman explained the reason for the Panel’s visit to Sokoto. The Chairman invited comments on the Penal Code and Criminal Procedure Code.

2. The Alkalai, speaking on behalf of the Native Authority said that with regard to adultery by a woman, section 140 of the Criminal Procedure Code required that the complaint should be made by either the woman’s father or guardian or by the woman’s husband, it was considered that in order to maintain public peace it was desirable for the Native Authority to be given such power to institute proceedings in such cases.

3. With regard to section 392 of Criminal Procedure Code, the Native Authority has experienced difficulty because as they understood it, the court was not permitted to convict on the confession of the accused person.

The Panel explained that the meaning of the word “evidence” in English was wide enough to include a confession, and thus a conviction could be had on the confession of the accused person. It was agreed that the confusion arose from the poor translation of the word “evidence” in [the] Hausa version of the Criminal Procedure Code, and that this would be corrected.

4. The Alkalai said that he considered that the law as represented in example (c) in subsection 1 of Section 222 was misconceived. Professor Anderson explained the principle of provocation and that in the example the provoked person was only an instrument of the bystander, who put the knife in his hand.

Conversation with the *Waziri*, Chief Alkali, the President of the Mixed Court and other Alkalai of Kano at 8 a.m. on 27th May, 1962

In reply to the Chairman’s explanation of the reason for the Panel’s visit, the *Waziri* said that the Penal Code and the Criminal Procedure Code were useful laws, but that

lack of understanding caused difficulty in their application and that there were a number of proposed amendments which would be put forward on behalf of the Native Authority, these were:

Changes in the schedule to Criminal Procedure Code which set out the jurisdiction of Native Courts over offences in the Penal Code. The changes suggested were:

(i) To allow Grade B Courts to hear cases under section 216 of the Penal Code (dealing with witchcraft). The reason for this was that such cases usually occurred away from the major towns, in places where there was no Grade A Court. The limiting of jurisdiction to Grade A Courts resulted in villagers, who were frightened by supposed instances of witchcraft, sometimes taking the law into their own hands.

(ii) He would suggest further amendment in the cases of sections 284 (unnatural offences), 232 (causing miscarriage), 248 (causing grievous bodily harm) and 320 (cheating) and in all these cases he would have Grade B Courts granted jurisdiction. He had no further amendment to either code.

2. In reply to questions by the Panel, he said that he thought that the Alkalai had begun to understand the Code but that there was an urgent need for further courses to be held. The Chief Alkali was of the opinion that a Civil Procedure Code would be inappropriate.

3. It was agreed that since there was no crime of apostasy in the Penal Code a person could avoid a *haddi* lashing or a conviction under section 403 by stating that just before the time when he was supposed to have committed the act which constituted the offence, he had abandoned the Muslim religion.

4. The opinion of the *Waziri* and other persons was that the effect of abolition of section 403 of the Penal Code would be to encourage drinking of alcohol by Muslims and not make it less popular.

Record of conversation with the Ag. Provincial Court Judge, Kano, Alhaji Mohammed Dodo

In reply to the Chairman's introduction, the Provincial Court Judge said that if the Codes were properly understood they are very good and operated to decrease injustice. However, in Kano it was clear that there were some Alkalai who did not understand the Codes, he agreed that a remedy might be to collect the Alkalai together and to give them instruction on those portions of the Codes which he observed were not applied properly and that this might be done periodically.

2. He was of the opinion that the Code of Civil Procedure would be acceptable.

3. He would welcome the appointment of Muftai to Provincial Courts.

4. He pointed out that there seem to be a number of irregularities in the administration of the Kano Provincial Court, in particular that the record book had not been kept since February 1961 in cases of criminal cases and July 1961 in cases of civil cases. Also that difficulty was experienced in obtaining records of first instance cases from the lower courts.

5. The Ag. Provincial Judge said that he observed that some courts submitted records of cases to be heard in the Provincial Court through the Emir and that he had stopped this practice.

6. The Panel interviewed Alhaji Muhammed Sani who said that in his opinion Penal Code was a very useful instrument in keeping public peace and that he had no recommendation for its amendment.

7. He told the Panel that he had experienced difficulty in obtaining Court records from first instance Courts and that the majority of these, though not all, were written in Hausa. He explained that in the Provincial Court it was his habit to keep the record himself in a file, but to have it rewritten by the Court Registrar and this accounted for the absence of Court record since 1961.

8. When asked his opinion about a proposed Civil Procedure [Code], he said that he considered it was not yet time for this and that in any event the Code should not depart from Muslim law.

**Record of conversation with Provincial Court Judge
Maiduguri on 28th May, 1962**

The Provincial Judge in reply to the Chairman's opening remarks said that he had prepared a list of seven points to be discussed and he presented the list to the Panel.

(a) With regard to point 1: "Amendment of section 287 of the Penal Code seems to be essential as the maximum punishment provided by this section for the offence of theft is only 5 years whereas habitual criminals who deserve longer term of imprisonment could not be dealt with properly according to the nature of their offence."

The Panel agreed that there might be some provision to deal with habitual offenders and that this might be inserted, perhaps in Section 68 of the Penal Code. The Panel agreed to take note of the point.

(b) With regard to point 2: "Section 216 of the Penal Code is also to be amended as witchcraft is commonly practised in most areas and it is mentioned in many books of Islamic Law and Traditions, therefore a provision is to be made that once a person is accused of witchcraft he is to be dealt with in accordance with the Native Law and Custom of the area concerned."

The Panel said that it did not doubt the belief in witchcraft but it felt that if the law was to compel the person accused of witchcraft to do some act to remedy a supposed instance of witchcraft it would seem that the Government was encouraging the belief in witchcraft and similar superstitions. It pointed out that section 216 was carefully worded so as not to refer to witchcraft as any more than imaginary fact.

(c) With regard to point 3: "A separate section for quarrelling between two parties where both parties used criminal force and assault is to be created as such an offence is not constituted unless both offences of criminal force and assault are committed and no injury of whatsoever is inflicted on either party."

The Panel considered that there was sufficient provision in the Penal Code under the section dealing with the injuries to the person and affray to meet the point raised by the Provincial Judge.

(d) With regard to paragraph 4: “We have seen in the Regional Gazette a bill for the general information that a supplementary section 403(A) of the Penal Code has been proposed to be put before the House of Assembly prohibiting Moslems from manufacturing and selling of any alcoholic drink, but we do not know whether this bill has been passed into Law. If it is not passed into Law we consider it to be passed into Law.”

It was explained that the bill dealing with section 403(A) was never placed before the legislature and the Panel was satisfied that a properly administered system of licensing could regulate Muslims dealing in or manufacturing alcoholic drink.

(e) With regard to paragraph 5: “A separate section is necessary for punishing those who extend their lands either farms or houses without the consent of their neighbours and this type of offence does not fall in the definitions of either theft or criminal misappropriation of property as land is not a movable property and also it does not fall in the definition of cheating and this can be regarded as crime in Maliki Law according to Traditions.”

The Panel considered that section 342 of the Penal Code was sufficient to deal with the point raised.

(f) With regard to paragraph 6: “We also consider that a provision is to be made in the Penal Code. When any property is stolen and the footprint of the thieves or the animals stolen stops in a village or town the persons suspected to be involved in this theft are to be charged as having committed the offence of theft.”

The Panel realised that the Provincial Judge was seeking collective punishment for the village to which the tracks led and the Panel decided to give further consideration to the point involved.

(g) With regard to paragraph 7: “Native Courts Law section 65 subsection (2) (ii) where it said that a Provincial Judge can sit with or without assessors. It will be more beneficial if the section is amended and that the Provincial Judge sits with assessors.”

The Panel told the Provincial Judge that it was giving consideration to a proposal that Provincial Alkalai should sit with Muftai and this satisfied the Judge.

2. The Panel then asked the Provincial Judge whether he considered that a simple code of civil procedure would be acceptable in Northern Nigeria.

The Judge recognised that there are two points involved in a trial:

- a. how to bring the case before the court, and
- b. how to determine the issue involved.

He considered that a Code dealing with the first of these to be acceptable but that to try to regulate the second would necessarily involve conflict with Maliki Law and therefore

was unacceptable. He would welcome the Code if it were designed to regulate mixed civil causes, where it might be of particular value.

3. The Provincial Judge raised the question of whether it would be possible to introduce the provision requiring an accused person on whom there was grave suspicion to swear an oath of innocence. This he considered was a very appropriate requirement.

The Panel agreed to consider the matter further.

4. In its conversation with the Legal Adviser and Alkalai of Bornu, the Panel was presented with a similar list of subjects to that to which reference has been made under the conversation with the Provincial Court Judge. To this list the same answers were given.

5. Professor Anderson asked the Legal Adviser and the Alkalai whether a simple Code of Civil Procedure might be useful if it did not carry the law beyond the terms of Maliki Law. The Professor pointed out that the Criminal Procedure Code did this but it has been accepted. The general feeling was that it would be desirable not to allow a Civil Code to interfere with the Maliki Law.

**Record of conversation with the Provincial Court President and Members
Makurdi on 29th May, 1962**

The President of the Provincial Court Makurdi in reply to the Chairman's opening remarks said that he has no comments on the Penal Code or Criminal Procedure Code but that he found the Hausa translation of the Penal Code difficult to read.

2. In reply to the question put by Professor Anderson the Alkali said in mixed civil causes concerning guardianship or marriage the Alkali looked at the Law governing the contract or the ceremony of marriage concerned and applied this to the case. In inheritances he looked at the deceased's mode of life and applied the law which was appropriate to this.

3. In reply to further questions he said that *haddi* lashing was unknown in the area.

4. Mr. Kondon raised the question of Screening of Offenders (Sections 167 and 168 of the Penal Code). The Panel explained that it was impossible to convict a person of these offences if the person did not have guilty knowledge.

5. Mr. Kondon raised the question of Contempt of Court before a Civil Court which had no jurisdiction to try criminal offences. It was pointed out that the civil courts action should be to commit the offender for trial under section 155 of the Penal Code to another court which possessed criminal jurisdiction. The Panel pointed out that in modern times, the general feeling was against a Court trying instances of contempt alleged to have been committed before it.

6. Professor Anderson asked the Court's opinion as to whether a simple Code of Civil Procedure might be useful.

Mr. Kondon said that he could foresee difficulty if the Code conflicted with Muslim Law and particularly in that category of cases known as Akwal Shasiya but otherwise such a Code would be widely welcomed.

DOCUMENTS AND OTHER INFORMATION RECEIVED BY THE PANEL OF JURISTS – 1962

7. Mr. Kondon raised two points in regard to Native Courts. Firstly, it was very apparent that some Native Courts were still not yet independent of the pressure and influence of Native Authorities and secondly it is a most difficult job to get records of proceedings from some Native Courts, when cases come from them on appeal.

8. With regard to courses at the Institute of Administration, Mr. Kondon felt that the courses were too short and not all together effective.

The Panel informed him that the Panel was considering a proposal for a one year or eighteen months course for Native Courts Personnel.

Record of conversation with Reed and Smith JJ. on 29th May, 1962 at Makurdi

Mr. Justice Reed said that the Penal Code and Criminal Procedure Code had effected a marked improvement in the standard of Native Courts. The establishment of Provincial Courts had reduced greatly the number of appeals coming to the High Court. Records of cases were much better than before, but of course they were not yet perfect.

2. Both Judges agreed that a simple Code of Civil Procedure will probably be of value.

3. The Judges considered that it might be better at this stage not to make any of provisions of the Evidence Ordinance mandatory.

4. The Judges considered that it was possible for system of judicial review to be established.

5. Mr. Justice Reed said that Provincial Courts erred during the hearing of appeals in retrying the case without proper reason.

Professor Anderson pointed out that the lack of sophistication in Native Courts made it necessary in a large proportion of cases to re-examine witnesses etc. Both the Panel and the Judges thought it might be desirable that when the Provincial Court embarked on a retrial that it should give its reason for doing so.

6. Mr. Justice Reed objected in principle to Prosecutor having the right of appeal under Section 67 of the Native Courts Law 1956. Since that it gave the Prosecutor two bites at the cherry.

It was pointed out that it was necessary in many cases for this right to be given because the Native Court is not yet entirely free of external influences.

7. The Judges felt that it was desirable for Native Courts personnel to be employed by Government and to be made transferable.

The Panel agreed to this as an ultimate objective but that language barriers would prevent absolute freedom of postings in any event.

Records of conversation with the President and Members of the Grade B and Grade D Native Courts of Makurdi Town on 29th May, 1962

The President and the members had no comments on the Penal Code apart from saying that they were satisfied that it was a good piece of legislation. They would welcome the Code of Civil Procedure.

Record of conversation with Mr. Stafford D.O. Makurdi, on 29th May, 1962

Mr. Stafford told the Panel that he considered that there is a great deal of interference by Native Authorities with Native Courts personnel. This was to be seen in the financing, in the staffing, and appointments to the Courts and in some clear cases of political interference in execution of judgements, etc.

2. Mr. Stafford thought that the time had come for definite standard to be fixed for Native Courts employees.

3. Mr. Stafford hoped that the political Provincial Commissioner would not be vested with the powers now held by the Residents under the Native Courts Law.

4. He pointed out that much of the good work done in training court personnel was spoilt by the ignorance of the law in the Police prosecutors and said that the Police tended not to use the prescribed forms.

5. Mr. Stafford thought that it was desirable to establish one-man customary courts in order to raise the standard and to pay larger salaries and attract qualified persons to Native Courts. Many of the reforms of the last couple of years had been undermined by the appointment of untrained and inexperienced staff, by understaffing courts and administrative mistakes.

6. In Kabba and Benue Provinces the Provincial Courts were overworked and [he] wished to suggest that these courts should sit in three divisions.

7. He wished to see an efficient system of inspection and training. He would encourage the codification of customary law which he thought was now not being pursued as energetically as he would wish.

8. With regard to the power of transfer, he considered that Native Courts should be able to transfer cases to Magistrate Courts and to refer matters to the High Court of their own initiative.

9. Finally, he considered that Provincial Courts should have no first instance jurisdiction.

**Record of conversation with the Provincial Court Judge, Ilorin on
30th May, 1962**

In reply to the Chairman's remarks, the Provincial Judge said that the only change which he would like to see in the Penal Code and Criminal Procedure Code would be to introduce a section permitting the court to call upon a person upon whom grave suspicion fell to swear his innocence. It was pointed out that the whole basis of the Code was that a person is innocent until he is proved guilty.

2. The Judge expressed doubts about the admissibility of evidence and it was explained that the basis to be found in Muslim Law to relatives of the accused giving evidence were not to be found under the new system. The Judge had to weigh all the evidence presented to him in the case.

3. The Judge raised the question of the immunity conferred upon Nigeria Policemen by N.P.N. No. 146 of 1944. The Panel said that they would consider this.

4. The Judge raised the question of the provision of a suitable uniform or robe for the Judges when on the Provincial Bench.

The Panel agreed that this might be appropriate.

5. Professor Anderson said that the Panel might recommend that Provincial Alkalai should sit with Muftai in the North, but would like the Judge's opinion on whether a bench of three members would not be more appropriate for Ilorin. The Judge agreed to this proposal provided that the Alkali would deal with Muslim matters.

6. The Judge considered that the simple Code of Civil Procedure was not a subject on which he would give any definite answer but he was confident that if ever adopted it should not conflict with Muslim Law.

7. The Judge told the Panel that in most cases local custom was followed but that the pure Muslim Law was applied when dealing with land and Iddah.

**Record of conversation with Emir of Ilorin speaking on behalf of the
Native Authority and Alkalai on 30th May, 1962**

The Emir said that he would welcome regular meeting of the Panel and that the fruits of their last meeting were good and that [fears that] the Penal Code might conflict with Muslim Law had proved ill-founded. He raised a number of points:

1. With regard to section 142(b) of the Criminal Procedure Code he said that this worked a hardship in Ilorin because it did not include a person to whom a girl was betrothed as an aggrieved person capable of instituting an action for adultery, whereas in Ilorin such a person was regarded as quasi husband of the girl. It was pointed out that the question turns on whether the girl was regarded as being married in Native Law and Custom or not and that usually the marriage actually took place on the conclusion of the contract and that this is a matter for local determination.

2. The Panel said that it would consider some sort of definition of the term "marriage" in the Penal Code but too strict a definition would do more harm than good and the Emir said that he was satisfied with this.

3. With regard to question of Nigeria Policemen being exempted from the jurisdiction of the Native Courts under the provision of 1944 Public Notice.

The Panel said that they would consider the matter.

4. The Emir considered that there was nothing in the Penal Code which would enable a court to enforce its judgment properly for example when a woman refused to follow a court order to return to her husband's house after an enticement action.

The Panel said that it would consider this further.

5. The Panel pointed out that the prosecution had a power of appealing against an acquittal under Section 67 of the Native Courts Law 1956.

The Emir said that a simple Code of Civil Procedure would be most useful in the Emirate.

12.

Summary of Recommendations, etc.⁶¹

I. Native Courts

A. General

- (i) Policy for future.
- (ii) Provisions regarding “guidance” to be continued.
- (iii) Certain sections of Evidence Ordinance to be mandatory.
- (iv) Courses to be provided for Scribes in recording.
- (v) Exhibits to be marked.
- (vi) Single judges as objective, especially in Criminal Cases.

B. Power of Review

- (i) Review by administrative officers to be abolished.
- (ii) Review and transfer of cases by Commissioner for Native Courts (and Court Advisers or Inspectors) to be retained.
- (iii) Provision for judicial review to be made.

C. Regrading of Courts

- (i) Provincial Courts to be made Grade A, and take homicide cases.
- (ii) Emirs’ Councils to be made A (Limited) and not take homicide cases.
- (iii) Powers of Native Courts to be co-ordinated with corresponding Magistrates’ Courts.

D. Regionalisation of Courts

- (i) Government Native Courts to be established in Kano, Jos, Kaduna, Makurdi, etc.
- (ii) Divisional Criminal Courts to be established, under Provisional Courts for criminal cases.
- (iii) System of Diplomas and grants-in-aid for Alkalai and others.
- (iv) Appointment, transfer, dismissal and discipline through a ‘Judicial Service Board’ (consisting of C.J., Grand Kadi, Chairman, Commissioner for N. Courts (for Minister and Head of Legal Section of Institute of Administration).
- (v) Prescribed qualifications for appointment.

⁶¹ This summary is at the back of the National Archives file containing the documents and other information received by the Panel of Jurists in 1962. It is not clear who made it or at what stage of the proceedings. It bears comparison with the actual proposals made in the “Report of the Panel of Jurists, Second Session”, *infra*.

- (vi) Central Inspectorate.

II. Provincial Courts.

- (1) Those in North to be made bench of three alkalai, or at least Muftai provided.
- (2) Those in Riverain always to be presided over by Alkali.
- (3) To be regarded as A Courts (unlimited).
- (4) To be directly responsible to Ministry of Justice, not through Residents.
- (5) Salaries and Registrars to be increased.
- (6) Postings to be watched – not to own Province.
- (7) Security and independence of Judges.

III. Sharia Court of Appeal

- (i) One extra Judge to be added.
- (ii) Repeal of Section 12(e) of Sharia Court of Appeal Law.
- (iii) Problems of Islamic Law and Customary Law in land, marriage and succession cases.
- (iv) Power to punish for contempt, or order transfer of cases.
- (v) Power to issue Fatwas or Judicial Circulars (with safeguards).
- (vi) *Wakils* to be appointed and permitted to appear.

IV. Codification

- (i) Code of Civil Procedure to be drafted (along lines of Sudan Civil Justice Ordinance).
- (ii) Law of tort to be codified – and contract.
- (iii) Declarations of customary law to be requested.
- (iv) Law of divorce.

V. Training

- (i) Diploma for Alkalai, etc.
- (ii) Basic training for future Alkalai.
- (iii) Training for customary law judges.
- (iv) Co-ordination of training for different types of Courts.

VI. Special Offences for Muslims (Drinking, Slander, Adultery)

- (i) *Haddi* lashing only if offence confirmed by witnesses prescribed by Muslim law.
- (ii) Lashing to be only penalty in cases of discrimination.
- (iii) Such cases to be tried by Muslim Courts only.