

Chapter 1 Part III

Report of the Panel of Jurists
Appointed by the Northern Region Government
to Examine the Legal and Judicial Systems of the Region

Submitted to the Governor of the Northern Region of Nigeria
on 10th September, 1958³⁴

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³⁴ Source: National Archives Kaduna: S.MOJ/12/S.1 Vol. 1, 1-33.

1.

Letter from Panel of Jurists submitting Report to Governor

His Excellency Sir Gawain Westray Bell, K.C.M.G., C.B.E.
Governor of the Northern Region of Nigeria

Your Excellency,

We were appointed by your Government on the 29th July, 1958 as a Panel of Jurists with the following terms of reference:

“In the light of the legal and judicial systems obtaining in other parts of the world where Moslem and non-Moslem live side by side, and with particular reference to the systems obtaining in Libya, Pakistan and the Sudan, to consider: -

- a) the systems of law at present in force in the Northern Region, that is, English law as modified by Nigerian legislation, Moslem law and customary law, and the organisation of the courts and the judiciary enforcing the systems and
- b) whether it is possible and how far is it desirable to avoid any conflict which may exist between the present systems of law and

to make recommendations as to the means by which this object may be accomplished and as to the reorganisation of the courts and the judiciary, in so far as this may be desirable.”

We assembled in Kaduna on the 28th August, 1958, and between that date and the 10th September, 1958, we held nine formal sittings and had numerous discussions both formal and informal with prominent Chiefs, political leaders, representatives of the Judiciary and Legal Departments and members of the public.³⁵ We have also studied a number of memoranda and other documents including the Report of the Minorities Commission³⁶ and the reports of the Delegations which your Government recently sent to Pakistan, Libya and the Sudan.

Our recommendations are embodied in our report which we now have the honour to submit. We have found it necessary to recommend considerable reforms. We have been greatly encouraged in our task by the excellent response with which our proposals have been met by the many distinguished leaders of Northern Nigerian opinion with whom we have discussed them. With such strong support the execution of our proposals

³⁵ For a vivid account of the successful effort of persuasion which was perhaps the chief accomplishment of the Panel of Jurists, see J.N.D. Anderson, “Conflict of Laws in Northern Nigeria: A New Start”, *International and Comparative Law Quarterly*, 8 (1959), 442-56 at 451-53.

³⁶ *Report of the Commission appointed to enquire into the fears of Minorities and the means of allaying them* (London: Her Majesty's Stationary Office, 1958). This report was serialised in 2002 by one of Nigeria's newspapers, and has recently also been republished in book form under the title *Sir Henry Willink's Report of the Commission appointed to enquire into the Fears of Minorities*, (Jos: Nigerian League for Human Rights, n.d.).

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will, we feel sure, make a vital contribution towards the successful evolution of a self-governing Northern Nigeria.

If your Government accepts our proposals, we consider that it would be of advantage if the situation were reviewed after a period of three years. Such a review would reveal what progress had been made and what adjustments might be necessary after experience of self-government.

Finally we wish to take this opportunity to thank you, Your Excellency, and your Government for the facilities which have been placed at our disposal. We are especially grateful to all those who have entertained us on so many occasions.

We also wish to record our warm appreciation of the efficiency and helpfulness of our Secretary, Mr. S.S. Richardson and to express our thanks to Mrs. Enright who acted as Personal Assistant to the Panel.

We have the honour to be,

Your Excellency's
Most Obedient Servants,

[Sayyed Mohammed Abu Rannat] Chairman (Sgd)³⁷

Mr. Justice Mohammed Sharif (Sgd)

Professor J.N.D. Anderson, O.B.E. (Sgd)

Shettima Kashim M.B.E. (Sgd)

Mr. Peter Achimugu. O.B.E. (Sgd)

Alkali Musa, Alkalin Bida (Sgd)

Kaduna, 10th September, 1958.

³⁷ In the copy of this letter found in NAK S.MOJ/12/S.1 Vol. I, no signatures appear; the names are typed, followed by "(Sgd)", as here, except that in the case of the chairman there is typed ".....?....?..... Chairman (Sgd)"; we do not know the reason for this.

2.

**Report of the Panel of Jurists
Appointed by the Northern Region Government
to Examine the Legal and Judicial Systems of the Northern Region**

THE PRESENT POSITION

The Courts

1. Our Terms of Reference direct us to consider the systems of law at present in force in the Region, the organisation of the courts and the judiciary which enforce these systems, and the possibility and desirability of avoiding any conflict which may exist between them; and to make recommendations as to the means by which this object may be accomplished. It is essential, therefore, to begin by setting out the present position, although no attempt will be made to do this in more than broad outline.

2. Alongside the High Court and the Magistrates' Courts there exists in the Northern Region, an elaborate system of Native Courts. These are graded A, A (limited), B, C, and D, according to their respective competence. The grade A courts are those of the major Emirs whose courts are authorised to try even capital offences; grade A (limited) courts are those of lesser Emirs and of the leading Alkalai (Moslem judges); and the grade B, C and D courts represent those of lesser Alkalai, in the Moslem areas, and of other personnel (usually sitting not alone, like the Alkali, but as panels of members) in the non-Moslem areas. In addition there are "Mixed" courts to meet the needs of the exceedingly cosmopolitan population of some of the major towns. The system of appeals from these various courts has recently been simplified, but is still somewhat unsatisfactory, and while the wide powers of review previously exercised over all these courts by administrative officers have recently been restricted, these powers still exist. Another recent innovation was the creation of the Moslem Court of Appeal to exercise appellate jurisdiction, immediately below the High Court, in all cases properly governed by Moslem Law.

Conflict of Laws

3. It is not, however, in the system of the courts, but in the law they apply, that conflict and confusion at present exist. This does not refer to the law of personal status and family relations, for it is natural that in a Region in which Moslems, pagans and Christians live side by side, each should be governed by their own laws in such matters; and this causes few problems. This is also true, in large measure, of the civil law in general; for little difficulty is found in practice in applying legislative enactments in commercial and company law, English law where the parties intended a contract to be so governed, and native law and custom (in its various forms) when that represents the law under which the contract was concluded. And much the same may be said of the law of tort.

4. The situation is very different, however, in regard to the criminal law, for in this sphere the present conflict and confusion are inescapable. Here two mutually contradictory systems of law exist side by side in this Region. In the High Court, the Magistrates' courts and some of the non-Moslem Native Courts, the Nigerian Criminal

Code, based on the principles of English Law, is applied; while, in the courts of the Emirs and Alkalai, native law and custom (which often means, in fact, a close approximation to the Islamic law of the classical Maliki texts) reigns supreme.

5. The resulting conflict is thrown into the boldest relief in regard to homicide cases; for on the largely fortuitous circumstance of whether the case concerned is tried in the High Court or the court of one of the leading Emirs will depend, at once, the definition of the offence, the method of proof and a variety of alternatives in regard to sentence. Under the Maliki law, for example, the death penalty is applicable, on the demand of the heirs of blood, where the accused caused the death of the deceased by any hostile assault, however intrinsically unlikely to kill or wound; even the most extreme provocation is irrelevant; proof of the offence will in certain circumstances be largely dependent on whether the heirs of blood will swear fifty oaths to his guilt; the death sentence for even the most brutal murder (unless it be committed as an act of highway robbery, or in order to facilitate some other crime) may be waived at the discretion of the heirs of blood; and no Moslem can ever (with the same two exceptions) be executed for the murder of a Christian or pagan.

6. That the Criminal Code could co-exist for so many years with a system such as this, is amazing. In no other country can two contradictory systems of criminal law, extending even to matters of homicide be found side by side. Until comparatively recently, moreover, no attempt was made to reconcile these systems; and inequities were only averted, in some cases, by the exercise of those powers of transfer and review which were vested in administrative officers. Since 1948, however, various attempts have been made by the legislature to effect some measure of reconciliation; and the present position (under sections 22 and 67 of the Native Courts Law, 1956 and section 61 of the High Court Law, 1955) is that, where an act or omission constitutes an offence under both the Criminal Code and native law and custom, Native Courts may try the offence under the latter, but with the provision that they must not impose any punishment in excess of the maximum penalty provided for such act or omission under the Code. This means, in effect, that the Native Court, after trying the accused under native law and custom, should review the whole case in the light of the Criminal Code, and then adjust its sentence accordingly. This attempt to reconcile the conflict should, in theory, ensure a certain uniformity of sentence, but at the expense of a feat of juristic abstraction quite beyond the powers of the majority of the courts concerned. In practice, therefore, it is only in the case of an appeal to the High Court that this provision comes into effect, for the High Court is then empowered (*inter alia*) to substitute for the punishment imposed by the lower court any other punishment which that court could have imposed, and to do this “notwithstanding that the decision of the Native Court was correct under native law and custom”. Even so, however, evidence of important factors in the case, such as the presence of strong provocation, will, in all probability, have been ignored in the lower court. Before justice can be done, therefore, a retrial may well be essential.

Other Problems

7. This illustration of the conflict and confusion, which at present exist must suffice. Three other problems presented by the criminal law as it is applied today in the Northern Region must, however, be mentioned:

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a) The classical texts of Maliki law are chiefly concerned in [sic: with] offences (illicit sex relations, slander of a chaste Moslem's chastity, theft, brigandage, drinking alcohol and apostasy) for which the penalties are exactly prescribed. For the rest, they content themselves with stating that all other wrong-doings should be suitably punished at the discretion of the court or the wider (and "political") discretion of the Ruler. Since, moreover, those (*hadd*) offences for which these punishments are exactly prescribed can only be proved by a sustained confession or by a degree of evidence which is in most cases virtually unobtainable – and since several of the punishments so prescribed are of such severity (e.g. stoning and mutilation) as to have been forbidden by Ordinance from the inception of the Protectorate – the overwhelming majority of the criminal law administered by the Moslem Courts comes under the category of this discretionary jurisdiction. Plainly, then, no certainty or uniformity – two of the major requirements in the criminal law of any civilised state in the modern world – can be expected. Add to this the fact that most of the Alkalai owe their position and pin their prospects of advancement to the favour of the Native Authority in whose courts they serve, and it can be understood that political opponents of the regime in power sometimes complain of apprehension that they may be treated with something less than justice – particularly when they are accused, in broad terms, of what amounts to insubordination.

b) A further problem was emphasised, rather than solved, by the promulgation of the Moslem Court of Appeal Law and Native Courts Law in 1956. Before that date virtually no mention had been made of "Moslem Law" in any legislative enactment in Nigeria; and the law enforced in all Native Courts (in addition, that is, to Native Authority Orders and to such Ordinances as they are authorised to apply) was covered by the comprehensive term "native law and custom". This would, of course, approximate to the Maliki law in the more strictly Moslem areas; would represent pagan customary law in solidly pagan districts; and would represent a heterogeneous amalgam of the two in places which fall between these two extremes. The legislation of 1956, however, introduced the concept of cases "governed by Moslem law" (i.e. those to which the principles of Moslem law should be applied to the exclusion of the principles of any other system of law or of native law or custom), and all such cases, and these alone, were to go, on appeal, to the newly formed Moslem Court of Appeal. But it is often a matter of extreme difficulty, in Northern Nigeria, to determine what cases, precisely, should be regarded as exclusively governed by Moslem law. Similarly, criminal cases were to be determined by the system of criminal law prevailing in the area of the court's jurisdiction, and this, too, sometimes occasions a degree of conflict and uncertainty.

c) The third problem – and this is a major one – concerns the procedure and rules of evidence governing criminal prosecutions in the Native Courts. According to the strict Maliki view the evidence of anyone other than adult, male Moslems, who are not "interested" parties, is totally inadmissible in such cases, while the testimony of the requisite number of eligible witnesses is virtually conclusive, without any adequate opportunity being given to the accused to call his own witness in his defence. Not only so, but in homicide cases in which the testimony of the necessary two adult, male Moslems is not forthcoming, a lesser degree of evidence may be made complete and conclusive by the heirs of blood swearing oaths to the guilt of the accused – except that, where several persons are so convicted of participating in a single murder, the heirs of

blood may select one, only, for execution, while the others receive an almost negligible sentence. Much of this appears clearly contrary to any system of natural justice.

Summary of Present Position

8. Such then is the position as we found it. A major conflict prevails between the Nigerian Criminal Code, on one hand, and “native law and custom”, on the other – and the legislative devices which have been introduced to remedy this conflict are far from satisfactory. In addition, a number of anomalies exist, some of which seem contrary to natural justice and to those fundamental rights which will, it is hoped, be entrenched in the new Constitution (as agreed at the Constitutional Conference held in London in 1957). It may be observed, in this context, that the unsatisfactory features in the present position can only be explained as a perpetuation, long beyond their time, of the traditional concepts and procedures for the application of Maliki law which existed at the inception of the Protectorate; while the subsequent stagnation must be attributed to a meticulous if exaggerated loyalty, on the part of the British Administration, to the promises of Lord Lugard that there would be no interference in the religion of the people, and to the fact that the Nigerians, on their part – cut off, as they were, from the currents of thought which have had such influence elsewhere in the Moslem world – could scarcely be expected to urge the Administration to initiate reforms. But the Panel considers it essential that this situation should be remedied before the advent of Independence brings new responsibilities, additional contacts with the outside world, and an increasing need to attract foreign capital. It is, moreover, strengthened in this conviction by the fact that many other countries have taken advantage of their new-found independence, or imminent prospect of independence, to put their own house in order in a way in which a non-indigenous Administration had hesitated to do.

OUR MAJOR RECOMMENDATION

The Principle Involved

9. Our Terms of Reference direct us to consider this position “in the light of the legal and judicial systems obtaining in other parts of the world where Moslem and non-Moslem live side by side, and with particular reference to the systems obtaining in Libya, Pakistan and the Sudan”. We took note, therefore, that in each of these countries – and, indeed, in all parts of the world where Moslem and non-Moslem live side by side – the conflict which prevails in this Region is precluded by the fact that the Islamic law, as such, is confined to the law of personal status and family relations (that is, questions of marriage, divorce, paternity, guardianship of minors, interdiction, guardianship of interdicted persons, wakfs, gifts, wills, and succession – with the exception of claims to immovable property) in respect of Moslem litigants; other civil litigation (that is, questions of Company and Commercial law, claims to the ownership of immovable or moveable property, and questions of tort) are dealt with, respectively, under statute law, customary law, or the law under which the parties concluded their contract; while all that concerns criminal law is governed by a Penal Code which ensures certainty and uniformity. It seems clear to the Panel, therefore, that their first major recommendation must be that the same principle should be accepted in this Region.

A Suitable Code

10. The Panel is of the opinion, moreover, that the Sudan Penal Code (which is virtually identical with Code in force in Pakistan) is much better suited to the circumstances of the Northern Region than is the Nigerian Criminal Code at present in force. This is in part because the Sudan Code is much simpler, and, therefore, falls more within the competence of courts which have not enjoyed any professional training; and in part because it has proved acceptable to millions of Moslems in the sister country of the Sudan and to millions more in Pakistan, Malaya and elsewhere. It was, indeed, explained by members of the Panel that this Code might well be regarded as a codification of the way in which the overwhelmingly greater part of the Islamic criminal law (that is, the duty of courts and Rulers suitably to punish, at their discretion, all wrong-doing which falls outside the scope of those few highly technical – and virtually improvable – *hadd* offences to which reference has already been made) should be exercised by the courts; for only in this way can this discretionary jurisdiction attain the necessary certainty and uniformity. It was stated, moreover, that there is nothing in this Penal Code which is contrary to the principles of Islam when properly understood; and that there is virtually no wrong-doing known to Islam (with the exception of the law of apostasy as this has been developed by the jurists) which is not punishable under its provisions.

The Action Proposed

11. The Panel recommends, therefore, that the Sudan Penal Code and its accompanying Code of Criminal Procedure should be introduced, as soon as possible, as the criminal law of the Northern Region, after such minor amendments have been made therein as the circumstances of this Region may require – except that those few subjects which are reserved to the Federation must, presumably continue to be governed, for the present at least, by the existing Criminal Code. After promulgation, these Codes would be fully applicable, forthwith, in the High Court and the Magistrates' Courts, and should be followed as closely as possible by every Native Court throughout the Region – for one of the major purposes of our proposal is to preclude the present conflict and uncertainty by means of a law which is uniform and certain. The Panel is of the opinion, however, that it would be premature, at this juncture, to provide that the Native Courts must be bound by these Codes in all particulars, and that it would be preferable to prescribe that all such courts should for an initial or interim period, be “guided” by them. This expression is not intended to imply that any other law prevails in the Region, or can properly be applied by Native Courts, in any criminal matter; it merely recognises the fact that at first – and until the schemes for training recommended in another part of this Report can not only be implemented but have had their cumulative effect – a broad and sympathetic view must be taken of courts which are in process of learning a wholly new technique.

The Meaning of “Guided” – (a) in Procedure

12. In matters of procedure, for example, the Native Courts cannot be expected to observe the details of the Code of Criminal Procedure for many years to come. Instead, it should be regarded as sufficient if they inform the accused of the offence of which he is alleged to be guilty (without, that is, framing any formal charge under a specified section of the Penal Code) and if they ask him, after the witnesses for the prosecution

have been heard, what he has to say in his defence and what witnesses, if any, he has to call. All witnesses, without discrimination, must be heard. They would not, normally, be put on oath before beginning their testimony, but only regarding the truth of that part of their evidence which is material to the determination of the case. Even so, however, their testimony should not be accepted without the court doing its best to test its reliability by questioning them and by inviting the accused to suggest such questions as he would wish the court to put on his behalf. The case would then be decided, not by some self-operating rule regarding what witnesses are, or are not, admissible, but on the basis of the court's considered opinion regarding the credibility of these witnesses and the conclusion to which all the available evidence leads. An oath proffered to the accused would, in suitable circumstances, constitute one factor in this evidence. That for a court thus to ascertain the truth by every suitable means in order to effect impartial justice is in no way contrary to the Principles of Islam was emphasised by members of the Panel.

The Meaning of “Guided” – (b) in Substantive Law

13. In regard to the substantive law, on the other hand, it is expected that the Native Courts will be able to approximate much more closely to a proper application of the provisions of the new Code. The Panel earnestly hopes, however, that legislation can be drafted which will give full scope to the Judges, when dealing with such 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. It would be fatal to the success of this proposal – on which the future progress of this Region as part of an independent Federation of Nigeria must in large part depend – if cases tried by Native Courts, during the period when they are “guided” by this Code, should be quashed on appeal because of some minor defect, while it would assist these courts greatly if the appellate court would seek to remedy such defects either by itself revising the judgment or sentence concerned or by sending the case back, where necessary, to the Native Court for further evidence. Only so will it be possible to help these courts to eliminate these defects in the future, and, at the same time, to avoid the sacrifice of justice on the altar of ignorance or mistake. The Panel is fully aware that it may not be easy to give legislative expression to these proposals in any way which leaves no loophole for misunderstandings, and that much will depend on the way in which the discretion is exercised which must necessarily rest in the Judges of the Appellate Court; but we do not believe that it will be beyond their good sense and ingenuity to find a variety of ways in which they can assist the Native Courts in their difficult task throughout the period during which these courts are both to be guided by the provisions of this Code and also guided towards its proper application. It is hoped that the relevant legislation will be so phrased as clearly to exclude the applicability of past precedents in this matter and thus allow the appellate court to approach the problems of this interim period unshackled by any decisions of the past.

Blood Money

14. In regard to questions of blood-money, the Panel recommends that the practice prevailing in the Sudan should be adopted. Thus, in cases of murder there would not, normally, be any question of such payments; only in those circumstances in which the exercise of the prerogative of mercy is contemplated might the payment of *diyah* be made a condition of clemency. 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. Such payments should never be regarded as a substitute for the punishment of the offender, but rather as a means for readjusting the social equilibrium at the conclusion of a case. If, moreover, such payments are continued in Nigeria, it will be necessary to ensure that the discrimination against non-Moslems in this matter mentioned in the report of the Minorities Commission is excluded.

A Temporary Option Clause

15. During this interim period, moreover, the Panel recommends that non-Moslems should be permitted to “opt-out” of trial by a Moslem court, if they still fear they will not receive a fair hearing, in favour of trial before a Magistrate’s Court; and a similar option would be allowed to a Moslem who objects to trial by a non-Moslem Native Court. This proposal is based on one of the recommendations of the Report of the Minorities Commission and is designed both to assuage the anxieties of those who point to certain inequities in the past and to encourage a mutual re-establishment of confidence. But the Panel considers that a perpetuation of such options on a long-term basis would only serve to deepen the existing divisions in the Region and to retard the unification of the judicial system. It recommends, therefore, that as soon as the Regional Government is satisfied that the Native Courts have acquired adequate training and experience, and is prepared to make the new Codes binding on all courts without exception, all such options should cease. The personal and family law would still, of course, be separate and distinct for the followers of each religion, but in all other cases the civil and criminal law would be applied, on a Regional basis, by each court according to its competence, without any distinction of religion.

Summary

16. Our proposal is, therefore, that:

- a) Matters of personal status and family law should continue to be governed, as at present, by the personal law of the parties, according to their religion. In the case of Moslem litigants such cases would go first to the Alkalai and then to the Sharia Court of Appeal (see below) which will be exclusively concerned with such questions. This suggestion accords with current practice throughout the entire Moslem world, except for parts of the Arabian peninsula and Afghanistan; for everywhere else the Islamic law, as such, is now confined to the law of personal status. In the case of pagan and Christian litigants such cases would continue, as at present, to be handled by the suitable Native Courts or the Magistrates’ Courts, with an appeal, in the first place, to the Native Courts Appellate Division of the High Court (see below) and, in the second, to the High Courts as at present constituted.
- b) Other civil causes should be governed, as at present, by Ordinance and English law, before the Magistrates’ Courts and High Court, in questions of Company and Commercial law; by customary law, before the suitable Native Courts (e.g. the Emirs’ Courts), with an appeal to the Native Courts Appellate Division of the High Court, in questions involving land tenure; by the law under which the contract was concluded, before Native Courts (with an appeal to the Native Courts Division of the High Court)

or the Magistrates' Courts (with an appeal to the High Court as at present constituted), in litigation regarding contracts; and under the law of tort applicable to the parties, before the same courts and with a corresponding chain of appeal, in questions of civil wrong.

c) All criminal causes would be justiciable under the new Northern Nigerian Criminal Code and Code of Criminal Procedure. In the Magistrates' and High Court these would be fully binding from the date of their promulgation, while the Native Courts must be "guided" by them as explained above. Appeals to Native Courts would lie to the Native Courts Appellate Division of the High Court, and from the Magistrates' Courts to the High Court as at present constituted.

Our more detailed proposals regarding the organisation of the Judiciary demand, however, separate treatment in the next chapter of this Report.

ORGANISATION OF THE JUDICIARY

Existing System

17. It is at once apparent from a study of the judicial organisation of the Northern Region that by far the greater part of the day to day burden of administering justice lies with Native Courts organised under the Native Courts Law, 1956. There are only seven professional magistrates serving in the territory. It does not appear that the District Officers who are generally gazetted with magisterial powers in fact exercise them at all extensively; instead they seem to confine themselves largely to supervising the work of the Native Courts within their Divisions, using the powers of review and transfer which the law vests in them. The High Court under the Chief Justice, at first instance and in the exercise of its appellate powers, exercises an over-all function of controlling the administration of justice – sitting with two assessors when dealing with cases involving Moslem law. The 1956 legislation has established the Moslem Court of Appeal, the jurisdiction of which is restricted to appeals in cases governed by Moslem law. This court consists of an Alkali and two or more assessors selected respectively from panels of Alkalai and assessors, which are appointed by the Governor.

18. Members of the Native Courts are appointed by the Resident of a Province with the exception that an Alkali is appointed by the Native Authority subject to the Resident's approval. The Chief Justice and the Judges of the High Court are appointed by the Queen, and adequate constitutional safeguards are provided to ensure that they are free from political interference.

The Native Courts are of several types:

- (a) The Alkali's Court, administering Moslem law, Native Authority Rules, and some Nigerian Statute law, and presided over by a single judge.
- (b) The Customary Courts established in non-Moslem areas; hearing cases under local law and custom and also applying Native Authority Rules, the Nigerian Criminal Code and the Statute law. These courts are usually constituted of a President and a panel of members, and some of the panels are excessively large.
- (c) The Mixed Courts, which are special courts established to deal with the large strangers' wards in a few towns.

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(d) The Emirs' Courts (or Chiefs' Courts), known generally as "siyasa" courts, which administer Moslem law and native law and custom as requisite within their jurisdiction. These courts have wide powers, extending in some instances to hearing homicide cases.

19. In Libya and Pakistan, Native Courts as they are found in the Northern Region are unknown, but the Sudan places great reliance on an efficient system of Native Courts, although there the Native Courts are closely controlled by District Commissioners who themselves undertake much magisterial work. Native Courts are not permitted in the Sudan to dispose of homicide cases or other serious offences.

20. The Native Court undoubtedly provides a cheap and accessible form for dispensing justice in a country where the population is so widely dispersed. The local knowledge of law and custom and proximity to the people which are salient features of the Native Court could never be provided as efficiently by professional magistrates. Nevertheless, it must be recognised that the system is open to abuse unless a satisfactory system of supervision is established. The Panel has therefore paid particular attention to the powers of review by Administrative Officers and the appellate powers of the High Court in order to see whether adequate safeguards are provided in the present arrangements. It must be recognised that in the Northern Region there is no alternative to an attempt to strengthen and improve the efficiency of the Native Courts. Handling as they do over 90% of the litigation of the Region, the peasant must have confidence in these Courts if the administration of justice is not to break down in the rural areas.

Admission of Advocates to Native Courts

21. Clearly, from what has been said to the Panel and from the evidence contained in the various memoranda before us, there is in the mind of the unsophisticated peasant a profound distrust of the professional advocate, and it is our firm opinion that no advocate should be permitted to appear before any Native Court. Only a professional court can be expected to admit advocates and ensure that both parties to a dispute have a fair chance to present their case with legal representation. Advocates are already permitted to appear before the High Court on appeal from Native Courts.

22. The Report of the Minorities Commission has made a recommendation that a type of legal representation in the form of the "Prisoner's friend" should be permitted, if it is the Government's intention to remove the present safeguards afforded by the powers of review and transfer vested in Administrative Officers. The Panel is of the opinion that it is most important, at least for the period during which the reforms proposed in this report are developing, that Administrative Officers retain these powers. Review and transfer will continue to be required if Administrative Officers are to play their part in guiding the Native Courts into the new technique of administering criminal law which is the Panel's salient recommendation. Apart from this consideration, the introduction of the "Prisoner's friend" would make litigation more expensive to the peasant, and possibly make it more difficult for the Court to arrive at the truth.

Regionalisation of Native Courts

23. Another recommendation of the Minorities Commission to which we have given careful thought is that of the regionalisation of the Native Courts system. There is weight

in the criticism that the present system is too closely associated with, and dependent upon, the executive in the shape of the Native Authorities. However, there is no doubt that the locally appointed Alkali is more likely to be acceptable to a rural community than a stranger, and is more likely to have the local knowledge of law and custom which is essential for the efficient performance of his duties. Moreover, many of the existing Alkalai and court members lack qualifications on which the Government would have to insist if a policy was accepted of admitting such staff to the Regional Public Service. The Panel is therefore of the opinion that it would be premature to proceed with Regionalisation beyond the limits of the two proposals which now follow.

24. Criticism of the dependence of Native Courts upon the appointing Native Authority in the Report of the Minorities Commission also makes reference to the provision in section 62(c) of the Native Courts Law, 1956, which prevents a further appeal from a Native Court of Appeal in cases in which a fine of £25 or less or a term of imprisonment of six months or less has been ordered. The intention of this sub-section was clearly to put a limit to the number of appeals in petty cases, but there is undoubtedly a widespread desire that there should be at least the possibility of an appeal to an independent court in such cases. Occasions also arise in Provinces where it would be desirable, for political and other local reasons, that an independent court should hear specific cases at first instance. For these reasons the Panel recommends the setting up of a new type of Native Court in each Provincial Headquarters. The staff of these Courts must be Regional Public Servants appointed by the Judicial Service Commission. These Courts would hear all appeals from Grade 'B', 'C' and 'D' Courts in the Province, and the present appellate powers of Chief Alkalai and other Native Courts of Appeal would be abolished. The new Courts would also have first instance powers to dispose of the type of cases mentioned above. It is recommended that in the predominantly Moslem Provinces, these Courts should consist of an Alkali, who would exercise his powers both in respect of criminal and civil matters and also cases involving personal status. The Alkali would be able to call upon assessors in cases involving native law and custom with which he was not personally acquainted.

25. In the three Provinces of the Plateau, Benue and Kabba, a variant of this Court would be required to meet the needs of a population where the prevailing law and custom is of non-Moslem origin. It is recommended that in these Provinces the Provincial Court should be composed of a President and two permanent members, one of whom should be an Alkali. The Alkali would be responsible for disposing of all cases of personal status involving Moslems and, in these matters, he would sit alone. In all other matters, he would sit as a member of the Court. The powers of these Provincial Courts would otherwise be identical with those of the Province Alkali in the Moslem Provinces.

26. A second step towards Regionalisation might reasonably be taken by the Government. The Panel has made detailed recommendations on the training of judicial staff which will be necessary if this report is to be implemented. It is considered that Alkalai and Court Members who obtain the necessary qualifications in various training institutions should be offered the choice either of entering the service of their Native Authorities direct or of joining the Regional Service and accepting secondment on agreed terms to a Native Authority willing to employ them. In this way a new entrant

would enjoy the advantages of Regional conditions of service, while the essential local character of the Native Courts system would be safeguarded. Furthermore, the Government would slowly build up a nucleus of trained and experienced staff in the Provinces upon which it could base a policy of Regionalisation if such was considered desirable in the future.

Appeals

27. The present system is that appeals from the Magistrates' Courts are dealt with by the High Court under the High Court Law of 1956.

28. A more complicated system has been necessary for Native Courts, since it has been necessary to provide a channel of appeal to resolve the conflicts which have arisen between the various systems of criminal law which at present prevail in the Region. Thus the Moslem Court of Appeal set up by the law of 1956 was intended to serve as a bridge between those courts applying Moslem law and the High Court; and appeals from Native Courts Grade 'A' and 'A' Limited (and some 'B' Courts), together with appeals from Native Courts of Appeal, go to the Moslem Court of Appeal in all cases governed by Moslem Law. A further appeal lies to the High Court in all cases coming before the Moslem Court of Appeal.

29. In dealing with Regionalisation, a recommendation has been made to establish Provincial Native Courts to handle appeals from 'B', 'C', and 'D' Courts in the Provinces. The effect of this proposal is that all appeals from Native Courts will in future be heard in the Regional Courts, thus avoiding the weighty criticism that section 62(c) of the Native Courts Law has prevented appeals outside the Native Authority system in over ninety percent of the cases heard by Native Courts.

The Moslem Court of Appeal

30. This Court should be renamed the Sharia Court of Appeal. Sharia is the appropriate word to use in describing a Court administering Moslem Law, and the role of this Court will be more likely to be understood by the minorities if this change of name is accepted.

31. The present system of selecting Presidents and assessors for this Court from panels approved by the Governor has proved unsatisfactory in practice. Presidents selected by this method have been of varying calibre and their judgements have not been consistent. The selection of Presidents and assessors from all parts of the country *ad hoc* for separate cases has been necessary to ensure that the Court has been constituted in such a way that an Alkali or assessor is not placed in a situation where he has to judge a cause coming from his own Native Authority Courts. It has been said that judgements arrived at in this way have caused resentment and aggravated traditional inter-Provincial rivalries. Finally, the present system seems to be wasteful in time and staff, and consequently expensive.

32. The Panel is of the opinion that the Sharia Court of Appeal should be given the prestige of a permanent bench of Judges, and strongly recommends that the posts of Grand Kadi, Deputy Grand Kadi, and two Sharia Judges should be created as early as possible. These posts must be filled by men of learning and experience who command the respect of the community, and should carry suitable salaries and rank. It is further proposed that the Panel of Assessors be abolished and that the Sharia Court of Appeal

should sit as a bench of three judges, each with an equal voice in the judgment. Tradition in this country has been in favour of an Alkali and assessors rather than a bench of judges. 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 a lower court should not be reversed by a single judge sitting alone. A quorum of three judges will ensure a decision and add weight to its finality.

33. With the introduction of a Penal Code, the Sharia Court of Appeal will confine itself to hearing appeals in all cases involving the personal status of Moslems in the Region. The decision of the Court should be final and there should be no further appeal to the High Court in such matters. In the provisions detailed below for the disposal of appeals in criminal and civil matters, it will be seen that the Judges of the Sharia Court of Appeal will also have an important role to play.

The Native Courts' Appellate Division of the High Court

34. To meet the situation arising from the introduction of a Penal Code, the Panel recommends that an Appellate Division of the High Court is set up to hear all appeals in criminal and civil matters coming up from the 'A', 'A' Limited, and Provincial Native Courts. The Court should be constituted by a panel of three judges – two of whom should be Judges of the High Court, while the third is the Grand Kadi or another Judge of the Sharia Court of Appeal. All three members should have an equal voice in the decision of the Court, and the Judge considered to have the greatest knowledge of the law to be administered should preside.

35. It is proposed that a Sharia Court Judge should sit in this Court for two reasons. Firstly, it is important that there should be African representation in this Court at once to ensure that it will gain the respect and confidence of the public. In course of time, when Northern Nigerians take their place on the High Court bench, it may be possible to dispense with the presence of the Sharia Court Judge in criminal cases. Secondly, the Panel has recommended that there should be no changes in the law regarding civil matters, and civil cases governed by Moslem Law will continue to come before this Court. In such cases, the Sharia Judge would presumably be regarded as the judge with the greatest knowledge of the law to be administered. As long as cases of this nature are appearing before the Court, it will be necessary to have representation from the Sharia Court of Appeal. It is suggested that powers be given enabling this Division to sit in two or more panels, so that appeals can be heard on circuit in the Provinces.

Conflicts of Jurisdiction

36. It will be necessary to provide a machinery to resolve any conflict of jurisdiction which may arise between the Sharia Court of Appeal and the Native Courts Appellate Division of the High Court. In the Sudan, such disputes are resolved by a court presided over by the Chief Justice with the Grand Kadi, one Sharia Court Judge and two High Court Judges sitting as members. It is recommended that similar action be taken in this Region.

Appeal in Homicide Cases

37. Cases were brought to the notice of the Panel in which accused persons sentenced to death in Native Courts had not filed appeals. A person under sentence of death should

be given every opportunity to have his case fully considered by the Appeal Court. Since he has not had the opportunity in the Native Courts of obtaining the services of a legal adviser, it is strongly recommended that appeal to the Native Courts Appellate Division should be regarded as automatic in all these cases in which a sentence of death has been passed, and that the condemned person should have the right to free legal aid.

Salaries of Alkalai, etc.

38. The Panel considers that this subject is not strictly within its terms of reference, but has agreed that comments on the Proposals made by the Native Authority Staff Committee will be made under separate cover, as the question would appear to require decisions independently of this report. Here it will suffice to say that the Panel heard evidence that the staff of the Native Courts, especially in the lower grades of courts, are very poorly paid. Such a situation must be rectified speedily, for the administration of justice requires that salaries should be paid which are adequate to minimise temptation to corruption. It is not considered that the suggested minimum salary of £189 per annum as the entry point into the service of a Kano trained Alkali is adequate for this purpose. A further attempt should be made to agree upon a grading system which will take into account qualifications, length of service, and experience. The volume of work undertaken by the court should indicate the grade of Alkali, or other person, required to fill the post. Those with training and experience should not necessarily be compelled to seek their futures in the smaller Native Authorities, and a system of interchange and transfer between Native Authorities might offer a solution to this problem.

Language of the Courts

39. The Panel was informed that there was widespread criticism in the Region that Judges and Magistrates were not required to pass a prescribed examination in a native language and did all their work through interpreters, who were frequently of Southern extraction and commonly thought to be corrupt. Both in the Sudan and Pakistan the Judiciary have always been expected to acquire a proficiency in the local language. The Panel considers that this factor may well have contributed to the belief in the minds of the people that the High Court and Magistrates' Courts are the "English" or foreign courts. It is most desirable that the people should now realise that these courts are the courts of a self-governing Northern Region. With this in mind, the Panel recommends that all Magistrates and Crown Counsel should be required to pass a prescribed examination. It may be that conditions of service of officers already in the Region cannot be altered, but the condition should be inserted into all future contracts. Officers already in the Service should at least be given every encouragement to acquire a knowledge of a local language.

The Future Development of a Northern Nigerian Judiciary

40. It does not appear to the Panel that any long term plan has yet been settled to produce the Northern Nigerian Judges and Magistrates who will be required in the future. No one can foresee for how long it will be possible for the Region to retain the services of expatriate Judges and Magistrates, and it is an urgent necessity that a training policy is evolved which will aim at producing Northern Nigerians adequately qualified and trained to take up these responsible posts in due course. The Panel's views on

training appear later in the Report. It will also be necessary to make provision in the Constitution for the Grand Kadi or his representative to be a member of the proposed Judicial Service Commission.

41. With experience of the Sudan in mind, the Panel is of the opinion that it is essential to retain expatriate Judges and Magistrates until such time as the local product will find acceptance internationally. But it is of paramount importance that suitable men are given adequate academic training and posts of responsibility in the Judicial service at an early date to equip them for higher posts. For this reason consideration should be given to reducing the period to be spent in practice at the Bar before admission to the Magistracy. A more positive policy in this direction will help to obviate political criticism which will inevitably be heard in the future if adequate steps are not taken to open up to Northerners the opportunity of a career reaching to the highest posts in the Judiciary.

Training

42. If these proposals are to be implemented, the provision of adequate training becomes a matter of particular importance. It is on such training that the success, and relatively short duration, of the interim period will principally depend, and it is on this alone that any solid foundations for the future can be laid. Planning must, therefore, be directed, from the very first, towards two distinct objectives; first to make provision for an application of the new policy, during the interim period, which is as smooth and efficient as possible, and which will enable the Government to terminate this period with the minimum practicable delay; and secondly to lay foundations for a legal service, Magistracy and Bench which can be staffed by Northern Nigerians.

43. The first essential is the appointment of a suitable Commissioner of Native Courts. This officer must have legal qualifications, but he must also have a wide experience of guiding the work of Native Courts. It is essential, moreover, that he should be a man of drive and initiative who is thoroughly convinced of the importance of his task. A suitable assistant should also be appointed from the first; and his post should be filled by a Nigerian at the earliest possible moment.

44. The next essential is to create a team of Officers to provide legal training centred on the Zaria Institute of Administration. This team should consist of a Grade II Officer, to correspond with the other courses centred on the Institute; a Crown Counsel or Grade III Administrative Officer; and a Grade IV Officer. All should be Hausa speakers. It would be preferable that both the senior posts should be filled by Officers with legal qualifications, and essential that one of them should (while the other might be filled by one who had had considerable experience in the guidance of Native Courts), and the junior post might be filled by an administrative officer who is aspiring to obtain legal qualifications.

45. This team should organise courses of three different types, as and when this becomes possible:

(a) Short courses at Zaria for Chief Alkalai and other Senior Native Court personnel who will have to be “guided” by the new Northern Nigerian Penal Code. These courses should, initially, concentrate almost entirely on practical teaching as to how the new Penal Code and Code of Procedure are to be applied. It is understood that from the

beginning of next year accommodation will be available at the Zaria Institute for some thirty such senior personnel at least for three periods of six weeks' duration; and it is felt that an intensive course, even as short as this, would be of the greatest benefit in explaining the rudiments of the new Code and Procedure to those whose duty it will be to apply them in the more serious cases.

(b) Courses arranged in different Provinces for District Officers, Alkalai, Registrars and Court Members. These courses should be arranged in between the courses at Zaria described under (a) above. A particular point should be made of including District Officers in the scope of these courses; for it must be emphasised that this major change in the administration of the law in the Region can be successfully effected only if administrative officers in charge of Divisions give continued guidance and encouragement, particularly in the early stages, to those who will be called upon to learn a new technique. In this context the Panel strongly recommends the appointment, in each Province, of an Administrative Officer, parallel to the present Councils D.O., to be charged with the general supervision of all Native Courts in the Province.

After District Officers, these courses should concentrate on all the personnel of the Native Courts – giving priority, initially, to those in the senior appointments. The objective should be elementary and practical instruction on how the new Code and procedure are to be understood and applied.

46. In addition to the practical instruction provided under (a) and (b) above, it is extremely important that a few lectures on law, and, in particular, on the importance of a proper application of the new Code – should be included in other courses given at the Zaria Institute (for A.D.O.s., Emirs, Local Government Personnel, etc.). In this and other ways every effort must be made to foster wide-spread enthusiasm not only for the Code but for the efficient administration of the law throughout the Region.

(c) The third type of course which should be arranged as soon as practicable is one in which the short term and the long term objectives coincide: namely, a succession of courses at Zaria for registrars, scribes, and court members from throughout the Region. In order that these courses should not make undue demands on the teaching staff, every effort should be made to train Nigerian instructors and to provide standardised lectures and demonstrations. It is only by a succession of such courses that the standard of the lower courts can be raised.

47. In addition to courses of these three types, all of which might be handled by the team of instructors centred on the Zaria Institute of Administration, the long-term project of training Northern Nigerians for the legal service, Magistracy and Bench, will require facilities for courses of a longer duration and a higher quality for selected candidates who have passed out of Secondary Schools at the Advanced level. The pick of these, who might be expected to develop into the High Court Judges of the future, should be sent straight to London to combine a University degree with the completion of their Bar qualification; and it is noteworthy that the London LL.B. makes provision for a candidate to choose the Indian Penal Code in place of English Criminal Law and that an option in Mohammedan Law (the syllabus for which covers the law of the family and personal status) is available both in the London LL.B. and in the Bar examinations as an alternative to Real Property. But the greater number should concentrate on the Bar

qualification alone; and it would be beneficial if they could do their first year's study in Nigeria. The Panel is uncertain whether it is intended that a Faculty of Law should be started at Ibadan University in the near future. Alternatively, suitable provision for such a course might be made at the Zaria College of Arts and Technology. For such a course two qualified instructors would be needed.

48. It has also been suggested, we understand, that the legal side of the Kano School of Arabic Studies should be strengthened by the addition of a second year course which would include some Comparative Law – which, if the proposals put forward by this Panel are accepted, would presumably take the form of instruction in Criminal Law from the new Penal Code: in procedure and evidence from the new Code of Procedure; and in the elements of the English Law of Contract. But it would effect a considerable economy if this scheme were abandoned in favour of one year of specialised legal study at Kano (chiefly in the Maliki Law of personal status), followed by transfer to Zaria to join the one year course designed for those proceeding to London to read for the Bar. In addition to economy, this plan would have the advantage of obviating too wide a divergence between those following these two lines of study. Additional instruction for specialists in the Islamic Law of personal status whether from the Maliki texts or on a more comparative basis, could be provided in London.

49. These proposals, taken together, might seem to represent an excessive strain on the Region's financial resources, and the possibility of obtaining a grant towards the necessary capital expenditure involved from Colonial Development & Welfare funds might well be explored. The Panel would emphasise that the proper administration of the law is of primary importance in the light of imminent independence, when this administration is bound to come under the searchlight of international scrutiny. It is partly for this reason that the Panel has felt bound to make proposals which involve a fundamental change in the way in which the law is to be administered in the Region; and it is essential that everything possible should be done to ensure that this change is satisfactorily effected and that sound foundations for the future – when expatriate Judges may not be available – should be laid forthwith.

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Summary of Recommendations

1. Islamic law as such should be confined to the law of personal status and family relations and, when applicable, civil cases. Para. 9
2. The introduction of a Northern Nigerian Penal Code and a Code of Criminal Procedure based on the Sudan Codes. Paras. 10 and 11
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 meaning attached to "guided" is explained in Paras. 12 and 13.)
4. All witnesses must be heard without discrimination (and sworn on essential points). Para. 12
5. Courts must decide cases on the weight of all the evidence. Para. 12
6. Specific recommendations regarding blood-money (*diyah*). Para. 14
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. Para. 15
8. Advocates should not be admitted to Native Courts. Para. 21
9. Retention of Administrative Officers' powers of review and transfer, particularly during the interim period. Prisoners' friends should not be permitted. Para. 22
10. Regionalisation of Native Courts would be premature. Para. 23
11. Provincial Alkalis' Courts should be established in the predominantly Moslem Provinces to hear appeals from 'B', 'C', and 'D' Grade Native Courts. These Courts should also have first instance powers. Staff to be Regional Servants. Para. 24
12. 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. Para. 25
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 secondments. Para. 26
4. The Moslem Court of Appeal to be renamed the Sharia Court of Appeal. Para. 30
15. 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. Para. 32

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| 16. | 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. | <u>Para. 32</u> |
| 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. | <u>Para. 33</u> |
| 18. | Establishment of a Native Courts' Appellate Division of the High Court, with details of its composition and functions. | <u>Paras. 34 and 35</u> |
| 19. | Provision for a Court to resolve conflicts of jurisdiction between the High Court and the Sharia Court of Appeal. | <u>Para. 36</u> |
| 20. | An automatic appeal to the Native Courts' Appellate Division of the High Court in all cases in which the death penalty is imposed. | <u>Para. 37</u> |
| 21. | Salaries of Alkalai, etc., should be increased. | <u>Para. 38</u> |
| 22. | Recommendation that Magistrates and Crown Counsel should pass a prescribed examination in a local language. | <u>Para. 39</u> |
| 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. | <u>Para. 40</u> |
| 24. | The Grand Kadi should be a member of the proposed Judicial Service Commission. | <u>Para. 40</u> |
| 25. | A suitable Commissioner of Native Courts should be appointed at once, together with an assistant to allow for extensive touring. | <u>Para. 43</u> |
| 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. | <u>Para. 44 and 45</u> |
| 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. | <u>Para. 45</u> |
| 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. | <u>Para. 46</u> |
| 29. | That a succession of courses should be arranged at Zaria for registrars, scribes, etc., throughout the Region. | <u>Para. 46</u> |
| 30. | 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 & Technology for other promising | <u>Para. 47</u> |

CHAPTER 1: HISTORICAL BACKGROUND

candidates who would proceed to London for eighteen months to complete their call to the Bar.

31. 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. Para. 48
32. That a few of these future Alkalai or Instructors might be sent for a course of specialised study in London. Para. 49

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KADUNA,
10th September, 1958

³⁸ In the copy of this report found in NAK S.MOJ/12/S.1 Vol. I, no signatures appear; the names, evidently as signed, are typed in the places for the signatures, prefaced by "(Sgd)", as here.