“OPTING OUT”: AN EXPERIMENT WITH JURISDICTION IN NORTHERN NIGERIA

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With the commencement of the Native Courts (Amendment) Law, 1961, the Government of the Northern Region of Nigeria abolished “opting out”, an experiment with jurisdiction which must surely be unique within the history of modern legal systems and therefore worthy of recording before the facts are obscured and lest any other African state, faced with similar difficulties, is tempted to adopt this expedient as a temporary palliative to meet a similar situation. It is all the more desirable to publish the facts since the strong case for abolition presented by the Northern Regional Government is in danger of being lost by default. On 14th October, 1961, the Daily Service in Nigeria published a bitter attack on the Native Courts (Amendment) Law, 1961, under the title “The light goes out in the North”. A most responsible critic, Professor J. N. D. Anderson, Professor of Oriental Laws in the University of London and a member of the Panel of Jurists, which recommended the introduction of the “opting out” procedure, in a public lecture recently stated:

“It is regrettable therefore, that the Northern Nigerian Government should already have felt compelled to bring the opting-out procedure to an end. The reason given for this action was that the procedure had been manifestly abused—both by false declarations of religious affiliation and by the delays and unnecessary expense often deliberately caused by an insistence on the reference of litigation to distant tribunals. This was deplorable; but action designed to remedy these abuses had already been taken by the Native Courts (Amendment) Law, 1960, which somewhat restricted the scope of the option as originally interpreted, and empowered a Resident to reject it where, in his opinion, it was not exercised in good faith. It seems clear, however, that this compromise proved ineffective in practice, and that there was no feasible alternative to bringing the opting-out procedure to what might otherwise appear to be an untimely end.”

“Opting out” was first proposed as a means of avoiding controversy and injustice in the administration of the law in native courts. The main purpose of the device was to avoid a non-Moslem being convicted of an offence under Moslem law without his consent and when he might not be subject to such law and similarly to safeguard a Moslem from being convicted under some other native law and custom to which he might not be subject. The first record of the idea is to be found in the Report of the Royal Commission appointed

1 Principal, Institute of Administration, Zaria.
to enquire into the fears of minorities in Nigeria\(^1\) presented to Parliament by H.M. Secretary of State for the Colonies in July, 1958. The Report contains a detailed analysis of the conflict prevailing between Moslem law, English law and other native law and custom administered at that time in the Northern Region.

To smooth the path to self-government and in an attempt to allay the fears of the non-Moslem minorities, it is believed that the Hon. Premier of the Northern Region himself suggested the proposal that the possibility might be employed of legislating to give an accused person, or a defendant who was not a Moslem, the right to claim trial in a non-Moslem court. The proposal commended itself to the Commission, who reported:

"We consider that the fears of minorities in respect of Moslem law would be reduced if the Government of the Northern Region were to adopt the following proposals, some of which they already have in mind:

(i) Non-Moslems to have the option of being dealt with by non-Moslem courts."

The Report of the Minorities Commission was followed within a few weeks by the Report of the Panel of Jurists which reported to the Government of the Northern Region in September, 1958. The Panel was presided over by the Chief Justice of the Sudan with Mr. Justice Muhammed Sharif, a retired judge of the Pakistan Supreme Court, and Professor J. N. D. Anderson, as overseas members. After a masterly survey of the area of the conflict which had caused trouble for so many years and clearly could not survive independence, the Panel recommended the adoption of a series of measures to resolve the dispute and to modernize the judicial and legal systems of the Region. The most significant proposal was that uniformity and certainty of the law governing criminal matters were essential and that native law and custom (including Moslem law) should be replaced in these matters without delay by the adoption of a Penal Code and Criminal Procedure Code modelled on the equivalent Codes in force in the Sudan and Pakistan. The Northern Nigerian Government accepted this important proposal after receiving an assurance from the Moslem members of the Panel that there was nothing in the proposed Codes contrary to the injunctions of the Holy Qur'an and Sunna. The Panel recognized that an interim period of uncertain duration would elapse before the native courts would be sufficiently well trained to administer the new Codes satisfactorily. During this period the native courts would be guided and not bound by the new Codes. They also recognized that since the drafting of the new legislation would take time it was highly desirable for the Northern Nigerian Government to make a positive gesture indicating willingness to allay the fears of minorities and to proceed with reform of the native courts system. The Government White Paper\(^2\) on the reorganization of the legal and judicial systems of the Northern Region presented to the Legislative Houses

\(^1\) Report of the Commission appointed to enquire into the fears of minorities and the means of allaying them. 1958, H.M.S.O. Gmdn. 505.

\(^2\) Statement by the Government of the Northern Region of Nigeria on the Reorganization of the Legal and Judicial Systems of the Northern Region. 1958, Govt. Printer, Kaduna.
in December, 1958, presented the proposal of the Panel in these words:

"During the interim period when native courts will be 'guided' but not rigidly bound by the new Codes, the Panel have recommended that non-Moslems should be permitted to 'opt out' of trial by Moslem courts and that a similar right should be allowed to Moslems who object to trial by non-Moslem courts. As soon as native courts have acquired adequate training and experience, however, such options will no longer be justified and should be terminated by the Regional Government."

There is in fact no doubt that the Panel of Jurists recognized the difficulties inherent in the proposal and that "opting out" had nothing to commend it as a permanent feature of the legal and judicial systems of the Region.

As a measure of good faith, the Northern Regional Government proceeded at once with legislation to introduce "opting out", having early in the same session of the Legislature obtained approval in principle of the proposals of the Panel of Jurists set out in the White Paper. The Native Courts (Amendment) Law, 1958, inserted a new section 15A into the Native Courts Law of 1956, as follows:

"15A. Right to opt out of trial by native court. (1) Notwithstanding the provisions of section 15 where any person appears either as an accused person in a criminal case or as 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 the 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."

"Moslem Court" was defined as a native court which customarily administers the principles of Moslem law.

In introducing the Bill to the House of Assembly, the Attorney-General, after explaining the Government’s objects and reasons, assured the House that:

"this is a Bill which will remain law for just so long as is necessary. When the Legislature feels that all courts are able to administer efficiently all the provisions of the law civil and criminal which have been entrusted to them, then this legislation will be repealed."\(^1\)

Notwithstanding exceptional measures which were taken at once to ensure that all native courts had knowledge of the amendment it is not surprising that confusion and misunderstanding arose over the introduction into the native courts system of this complication at a time when political feelings were rising in anticipation of Nigeria-wide elections to the Federal Parliament. There were at the time over 700 native courts in the Northern Region administering a variety of statute law and native law and custom. Immediate reactions arose over the definition of a "Moslem court". Alkalis' courts were clearly Moslem courts but what was to be the position of the many customary courts, including the courts of some of the most powerful Emirs, which administered Moslem law and other native laws and customs, as appeared appropriate to the cause or matter before the court? For the purposes of the amendment would a native court be at once a Moslem court and a non-Moslem court? There are few, if any, native courts in the Region which do not from time to time customarily administer Moslem law (often with the aid of assessors) and there were no native courts which could be said customarily to administer Moslem law to the exclusion of all other native law and custom. Throughout the history of the legislation this difficulty of interpretation was never satisfactorily resolved, although a rough-and-ready rule of interpretation was established, albeit never tested in the High Court, to the effect that a court could not be both a Moslem and a non-Moslem court. This rule, in effect, meant that the court had to choose what type of court it wished to be for the purposes of the Amendment.

Further difficulties of interpretation were soon experienced. The second statutory question to be put to the accused or defendant ended with the words—"do you desire your case to be tried in the High Court, a magistrate's court or another native court?". This wording implied not only that there had been established a right to "opt out" but also that a further right vested in the accused or defendant to choose the court of trial. Subsection (6) of section 15A makes it clear that the power to decide the court of trial rested with the Resident, but the original wording of the second question continued to give rise to misunderstanding until amended.

Subsection (3) of the section directed that the answers to the question prescribed in subsection (1) and, if asked, the question in subsection (2), must form part of the record of proceedings in the lower court. Subsection (5) stated that if the lower court failed to comply with any of the provisions of the section the proceedings were null and void. In practice, the basic requirement to put the questions was soon widely recognized but many cases arose where no record was made of the reply and consequently many proceedings were null and void ab initio, although no question of opting out or even of appellate proceedings arose at all. One needs only to consider the very high proportion of cases coming before native courts affecting marriage, divorce and inheritance to appreciate the chaos which could follow the rigid application of subsection (5), and it was soon clear that a relaxation of this provision was desirable. In passing it may be remarked that many native courts tackled this problem effectively by providing themselves with rubber stamps and other devices calculated to ensure that the record of the questions and answers was duly made.

Two further complications arising from the operation of the legislation were, however, to prove fatal to the experiment. Firstly, the section inspired many cases of apostasy before the Moslem courts in many parts of the Region. Consequently, widespread agitation for repeal of the law was built up amongst good-living Moslems who regarded this development as a real threat to their faith.

For many years, apostasy, although a most serious criminal offence at Moslem law, had not been regarded as such in the Northern Region. Criminal proceedings for apostasy could not be brought without bringing up questions involving the fundamental human rights of Nigerian citizens set out in Chapter III of the Nigeria (Constitution) Order in Council, 1960. In an attempt to discourage apostasy, some native courts attempted to impose the civil consequences of apostasy from Islam such as the granting of divorce to wives married by Moslem rites and loss of custody of children born of Moslem marriage.

Secondly, there was the clearest evidence that political parties in opposition to the Government were advising accused persons to opt out automatically and to claim a right of trial before a magistrate in furtherance of their campaign to denigrate and bring into disrepute the native courts of the Region. Had this effort to disrupt the work of the native courts and destroy public confidence in them been successful, the result would have been a breakdown of the judicial system, since native courts account for over 90% of the work of the Regional courts and there was and is no practical or acceptable alternative to them in the North. Happily, by and large, the native courts system has responded well to the reforms of 1958 and 1960 and has been strengthened in its technical skills by an intensive training programme under way at the Institute of Administration in Zaria. It is, however, no exaggeration to say that section 15A of the Native Courts Law carried with it the threat of an attack upon the social structure and political stability of the Region. Proof of the impact of the section upon the provinces can be seen by
reference to the Provincial Annual Reports of 1959.¹ No Resident reported favourably upon the effects flowing from the legislation and nine out of twelve Residents considered the result to be highly damaging. For instance, the Resident of Adamawa reported:

“It was not until the second half of the year that the first applications for transfer were made. What started as a trickle has grown to be a sizeable stream which threatens, if it continues to grow, to undermine the whole administration of justice in large areas where the only native court is a Moslem court.”

(The nearest professional magistrate to Adamawa is stationed at Jos, some 400 miles away.)

Resident Ilorin reported:

“The introduction of section 15A has resulted in a most unsatisfactory state of affairs: accused persons have forswn their religion in the hopes of avoiding trial in the Alkali’s court.”

Resident Kabba stated:

“The amendment has impeded the smooth working of justice in an entirely artificial and unnecessary way.”

In 1960, the Government resisted strong pressure to repeal the section and introduced amendments in an effort to save the principle of “opting out” for a further period. The Attorney-General, speaking at the second reading of the Native Courts (Amendment) Bill, 1960, spoke on opting out as follows:

“There are a very large number of cases where persons who are notoriously well-known as Moslems declare in court that they are not, in order that their cases may be transferred to a magistrate’s court. They do this not so much because they fear they will not get justice from the Alkali but in order to obstruct the processes of justice, to obtain postponements and adjournments of their cases and very often to bring the other party to the litigation many times to a magistrate’s or non-Moslem native court which may be many miles away. Many non-Moslems, also, play the same game in non-Moslem courts. It is not possible for magistrates to visit remote parts with any great frequency, particularly in the present reduced state of the judicial establishment, and cases then tend to accumulate and pile up to the disadvantage of all concerned.

As a result of the protests received from all quarters, Government contemplated the possibility of abolishing opting out altogether; but after mature reflection it considered that this would be far too drastic a course to adopt, particularly having regard to the fact that opting out was specifically recommended by the Minorities Commission as one of the ways in which minority fears could be alleviated, and that it was also recommended by the Panel of Jurists that during the interim period when native courts were being guided by the provisions of the Code and guided towards its proper application opting out should continue. It should be borne in mind, however, that the Panel recommended that as soon as the Regional Government was satisfied that native courts had acquired adequate training and experience, and as soon as the Government was prepared to make the new Codes binding on all courts without exception, all such options should cease. The Panel considered, however, that a perpetuation of such options on a long-term basis would only serve to deepen existing divisions and to retard the unification of the

¹ Provincial Annual Reports, 1959, Government Printer, Kaduna.
Judicial system. It is clear, therefore, that the Panel intended that opting out should only continue for a time after the new penal system came into force.

Government and this Legislature have, of course, already approved that policy. It would therefore be a defeatist act and a sign of a bankrupt ingenuity if Government were to abolish this system out of hand because it has been abused. Government has therefore decided on a middle course which has two aspects. First, it is intended to make it clear that no accused person in a criminal case or defendant in a civil case in a native court has a right to be tried by a magistrate as opposed to a native court. The second aspect, which is the subject of an amendment which I have put down in the Order Paper, is to give the Resident power to refuse to transfer a case from a particular court, whether Moslem or non-Moslem, if he is satisfied that the accused person or the defendant in opting out is not acting honestly or in good faith, but is exercising his option for the purpose of obstructing or delaying the course of justice or for any other improper purpose. In this way, every genuine case will receive proper consideration and treatment, but the case of the mischiefmaker will be promptly returned to the court from which it has come. Once a case has been sent back by a President to the court from which it was reported, or indeed sent by a Resident to another court as a result of a successful opting out, the accused or defendant will not be asked again whether he wishes to opt out. It is hoped that this new device will bring an end to the abuse of the system.1

The effect of the Native Courts (Amendment) Law, 1960, was to give to Residents the power to refuse to transfer if they considered that the request to opt out was not made honestly or in good faith but with the purpose of obstructing or delaying the proper course of justice or for any other improper purpose. Opportunity was taken to clear up the ambiguity originally inherent in the second question by restating the question as: "Do you consent to your case being tried by this court?" Finally, if the native court failed to comply in detail with the section, the proceedings were to be voidable on appeal and review and not null and void ab initio.

Despite these amendments, pressure to repeal the section continued to increase as evidence from the provinces indicated that its operation was generally unsatisfactory and achieving no useful purpose. With the introduction of the new Penal Code and the Criminal Procedure Code on 1st October, 1960, the raison d'être for the section had largely disappeared in criminal matters. The reforms of 1958-1960 had also established strong independent appellate tribunals in each province and had ensured that in all cases, criminal or civil, parties had a right of appeal to the High Court except in cases involving Moslem personal law, where appeal lay to the newly created Shari'a Court of Appeal. But perhaps the most powerful factor of repeal was the success of the training of native courts staff accomplished by the Institute of Administration in Zaria. By the end of 1961, over 500 Alkalis and native court judges had undergone comprehensive courses designed to orientate them to administer

the new criminal law. A great deal of training had also been accomplished in the Provinces. The new Codes were accepted, understood and administered by all the native courts and this achievement had been accomplished in a remarkably short time. With evidence of the failure of the Native Courts (Amendment) Law, 1960, coming in from all provinces, Government decided to abolish the right to opt out. The Native Courts (Amendment) Law, 1961, was passed by both Houses of the Regional Legislature in October, 1961, and has clearly been received in the provinces with relief. The Hon. Alhaji Isa Kaita, Minister for Education, moving the second reading of the Bill in the House of Chiefs, summed up the history of opting out in these words:

"The House will remember that the opting-out device was proposed by the Premier as a means of avoiding controversy and injustice in the administration of the law in native courts, and that its implementation was recommended by the Minorities Commission and by the Panel of Jurists in 1958. One of the main purposes of the device was to avoid a non-Moslem being convicted of an offence under Moslem law when he might not be subject to such law, and to avoid a Moslem being convicted of a criminal offence under some other native law and custom to which he might not be subject. It was contemplated that opting out should be a temporary expedient and should be abolished when the time was suitable for this to be done. As this House is also aware, the opting out system has not worked smoothly, very largely because the concessions introduced by the section, which were intended to be a benefit to the inhabitants of this Region, have been abused by some sections of the population for personal or political purposes and the whole system has been brought into disrepute."

The Minister then declared that the amendments introduced in 1960 had failed to eliminate the abuse of the system and concluded:

"Government has now come to the conclusion that the time has arrived for the complete abolition of opting out. This is for two reasons. The first relates exclusively to criminal cases. The right to opt out has become meaningless in criminal cases since the introduction of the new Penal Code and Criminal Procedure Code. A Moslem court has been defined in the Native Courts Law as a court which customarily administers the principles of Moslem law. In criminal matters no court administers the principles of Moslem law, and the Penal Code is administered by all courts alike. The right to opt out in criminal cases has therefore in practice already disappeared, although not formally abolished. In addition, the new Codes have been in force for nearly one year, and it is considered that the courts and their judges have had sufficient experience to enable them to administer the Codes correctly.

The second reason is that in civil cases, and notwithstanding the strenuous efforts of the Residents, the right to opt out continues to be abused. This causes delays and miscarriages of justice to parties to the litigation. Government is therefore of the opinion that the time has arrived for opting out to be abolished in civil cases also."

All this does not mean that the device of "opting out" did not serve its purpose. At a time when feelings were high and the fears

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of the minorities were very real, "opting out" did offer a safety valve
and allow for a breathing space during which the Government of
Northern Nigeria had the desired opportunity to implement the
far-reaching reforms recommended by the Panel of Jurists. The
conditions in which the idea was conceived no longer exist and its
perpetuation would have handicapped the further development of
a rational legal and judicial system in Northern Nigeria.