CRIME IN EAST AFRICA: 3

H. F. MORRIS

SOME PERSPECTIVES OF EAST AFRICAN LEGAL HISTORY

The Scandinavian Institute of African Studies
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INTRODUCTION

I propose in this paper to look briefly at the judicial and legal system which Britain established in her East African territories, developed during the period of colonial rule, and handed over to the successor states on independence. First, however, a short word must be said about customary law.

Whether there is a body of law which may be termed African customary law, or whether there are merely an innumerable number of different bodies of customary law in Africa, has been argued, but this need not concern us here. Suffice it to say that throughout Africa south of the Sahara each ethnic group, large or small, has its own distinctive body of law and that these bodies have a sufficiently large number of features in common to have satisfied many writers on the subject on the justification of the use of the term "African customary law". Such bodies of law were unwritten and their principal source lay in the tribal traditions and practices of the people. Another, and less important, source lay, in the case of the chiefly societies, in the edicts of the rulers, and, in the case of areas where Islam has had an impact and where the customary law has, to a greater or lesser extent, absorbed much of the content of Islamic law, then the religious law of Islam has formed one source of the resulting amalgam.

The customary law of a particular African people being but one manifestation of its society, the content of the law naturally
varied with the variations to be found in the social organisation of the different ethnic groups. Variations might be great or small, but one broad generalisation can here be made that, in the law observed by chiefly societies (and this is to some extent a relative term), one finds certain distinctive differences from the law observed by societies without a chiefly tradition. In the former societies one might expect to find the existence of something comparable to criminal law as understood in European countries - the recognition that certain actions (such as rebellion against the chief, of violation of his property rights) were offences which merited punishment. In non-chiefly societies the existence of a body of criminal law is less easy to detect, and the statement frequently made by students of African law and anthropology that the purpose of African customary law was to preserve the equilibrium between individuals or groups of individuals has here the greater validity. Another generalisation which may validly be made is that among the chiefly societies one tends to find a formalised system of courts in which the law was administered and which had the means to enforce their orders: in Buganda, for example, a chain of appeal lay traditionally from the varying grades of chiefs' courts to the Kabaka himself. In the non-chiefly societies the law was usually administered by groups of elders or clan members, *ad hoc* in composition and often with no means of enforcement save through public opinion and communal action. But we cannot dwell further on the nature of traditional customary law. Suffice it to say that, not merely did the colonial power when it established its authority in East Africa find live and effective bodies of indigenous law in existence, but fully recognised this fact, acknowledging implicitly that, although such law and the means by which it was enforced needed, in the interests of sound administration and the requirements of "natural justice", as understood by the colonial authorities, certain modifications and constant supervision, yet that this traditional system should remain in force and continue to supply the main judicial needs of the indigenous population.
THE ESTABLISHMENT OF COLONIAL RULE

The establishment of British rule was accompanied by the introduction of English law, but this did not mean the supersession of the indigenous legal system. The administration of justice being but one aspect of the exercise of sovereignty, it is relevant to look at the background to the establishment of British protectorates in the interior of Africa in the late nineteenth century. Britain was, at this time, primarily concerned in securing her control over certain areas with a view to preventing them from falling under the sway of her European rivals. This she hoped to do with as little expenditure as possible in money and man-power. Once a protectorate was established, Britain assumed responsibility for relations with foreign powers and ensured the maintenance of law and order and the collection of tax. In other respects, however, the protecting power was only too pleased to allow the traditional authorities to carry on the day to day administration of their subjects according to their customary practices, provided these did not offend the consciences of the new rulers. By the early years of the twentieth century policy had changed and it was realised that Britain must control the internal administration of a protectorate in some detail if it were to be governed and developed in accordance with the standards of efficiency which the protecting power required. Nevertheless, this did not mean the extinction of indigenous institutions, for the first four decades of the century were a period when the doctrine of indirect rule held sway. According to Lugardian principles, native authorities, re-vitalised and reformed, ought to be encouraged, and indeed required, to shoulder the responsibility, on behalf of the colonial administration and under its close supervision, for the maintenance of law and order, the provision of courts of justice and the day to day administration in respect of Africans in the rural areas.

Furthermore, with the widespread acceptance in administrative circles in East Africa in the inter-war period of the neo-Lugardian version of indirect rule as formulated by Cameron
the Governor of Tanganyika from 1925 to 1931, district officers became enthusiastic for tribal institutions as such; traditional authorities were not only preserved and strengthened, but, where necessary rescued from near-oblivion, or even created. Anthropological works were studied by district officers and customary law and the courts in which it was administered, were to many such officers matters of especial interest. This philosophy of indirect rule, which in varying forms and with varying emphasises was for so long to dominate administrative policy, had a profound effect on the manner in which justice was administered and, in particular, ensured the continuance throughout the colonial period of what is known as the dual legal system. Under this system there were, on the one hand, magistrates' courts and the High Courts, with jurisdiction over all races, administering basically English and local statute law, and, on the other, native courts, with jurisdiction over Africans only, administering basically customary law.

THE DUAL SYSTEM: THE MAGISTRATES' COURTS AND HIGH COURTS

The magistrates' courts and the High Courts were the descendants of the old consular courts, originally set up in East Africa to administer justice to British subjects, but by the turn of the nineteenth century their jurisdiction was (in theory at least) all embracing. Under the respective Orders-in-Council establishing these High Courts, they exercised jurisdiction over all persons, of whatever race, and in respect of all matters, criminal and civil. In practice, however, the exercise of this unrestricted jurisdiction was, as we shall see, very limited as far as Africans were concerned. These courts administered basically English law, that is to say the common law, the doctrines of equity and the English statutes of general application in force on a specific date, together with certain Indian Acts, which represented the nineteenth century English law in a codified, and somewhat rationalised, form. Any Acts of the Imperial Parliament passed after the date on which the English law was received into the territory did not
apply, unless specific provision was made to this effect and this was rarely done. When it was necessary to supplement or replace the received English law by statute law, this was done by passing Ordinances, the power to enact which lay first in the Governor alone and then in him with the advice and consent of the legislative Council, once such a body had been established in the territory, and over which the Secretary of State for the Colonies exercised the right of disallowance. Nevertheless, this did not mean that changes in the law in England after the reception date did not affect the law in the East African territories, since the judges of the East African courts throughout the colonial period relied to a very large extent on the decisions of the English courts after the reception date and, indeed, treated the decisions of these courts as virtually binding, though whether they were, in fact, legally required to do so is open to considerable doubt. Moreover, the local Ordinances, although normally passed to meet the specific administrative needs of the territory concerned, nevertheless followed closely, in general, comparable legislation in the United Kingdom, and, indeed, were often enacted on the instructions of the Secretary of State, who might submit a model Ordinance on a particular subject perhaps to all the African territories. The result is that the former British dependencies in Africa now have a body of statute law which is remarkably similar, not only in content but also in form. As time progressed, more and more of the common law was replaced by local Ordinances; nevertheless, the residue remained, and remains today in the now independent states of East Africa, the English common law.

It was not, however, intended that the received English law should necessarily be applied in its English purity, for there was a provision in the enactments introducing the English law to the effect that it should be applied only so far as the circumstances of the territory and its inhabitants permitted and subject to such modifications as circumstances rendered necessary — to this we shall return later. Customary law, moreover, was not entirely ignored in the enactments laying down the manner in which the superior courts should exercise...
their jurisdiction. The Orders in Council establishing the East African High Courts stated that "in all cases to which natives law and custom so far as it is applicable and not repugnant to justice and morality and not inconsistent with any Order-in-Council or Ordinance". What, however, guidance by native law and custom, as opposed to its application, amounts to has never been entirely clear, and whatever place the customary law was meant to have in the scheme of jurisdiction exercisable by the superior courts, it was the English law and Ordinances based on it that was the basis law administered by these courts.

As regards the personnel who staffed the High Courts and magistrates' courts, the former were judges who were members of the Colonial Legal Service and who possessed the normal qualifications of their profession. The magistrates' court, however, certainly until after the second world war, were for the most part presided over by officials who were at the same time administrative officers - a district commissioner and his assistants being *ex-officio* the magistrates of the district court. Such officers were required to pass an examination in law before they were confirmed in the administrative service, but few had any professional legal qualifications. During the nineteen-thirties argument raged in colonial official circles, on the one hand, whether it was desirable that judicial and executive powers should be combined in the hands of one officer who was responsible both for the maintenance of law and order in his district and for administering justice to those who infringed it. On the other hand, there was argument as to whether any professional magistrate, unacquainted with, and remote from, the life and attitudes of mind of the African population, as such magistrates unhappily all too often were, could administer justice as acceptable to the African as that dispensed by the administrative officer, whose work brought him into daily contact with the African and who was not emmeshed in the professional legalism of the members of the judiciary. The battle was won by the opponents of the existing system, and, after the second world war, district officers' magisterial duties were progressively taken over by professional magistrates. Yet the con-
tact between the district officer and the district court lingered on and has, indeed, in places survived till the present time. 11

Appeal from the magistrates' courts lay to the High Court and from there, in certain circumstances, to the Court of Appeal for Eastern Africa. Further appeal might then lie to the Privy Council.

As has been mentioned, the High Courts and Magistrates' courts had jurisdiction over all persons and matters. 12 Nevertheless, the bulk of the litigation, as far as Africans were concerned, never came before these courts but, instead, before the native courts, which were not merely permitted, but encouraged, to entertain any case the parties to which were natives and which was not expressly outside the scope of their jurisdiction. The general pattern was, in practice, as follows. Serious crime was dealt with by the superior courts under the statute law, whilst minor crime, certainly if committed in the rural areas, was, in general, dealt with by the native courts mainly under the unwritten customary criminal law. As for civil litigation between Africans, the vast bulk of this was disposed of under the customary law by the native courts. We shall now look in some detail at the nature of the jurisdiction enjoyed by the native courts during the colonial period and, in particular, at the close connection which existed between these courts and the Provincial Administration.

THE NATIVE COURTS

With the establishment of protectorates, existing traditional courts were given recognition, or, in societies which the Administration felt lacked adequately developed judicial bodies, native courts were established de novo. In either case, the constitution and powers of these courts were prescribed by legislation. The powers of these courts varied from territory to territory and from court to court, depending normally upon the
terms of the warrant of the court. Normally the severity of the punishment which might be imposed was severely restricted and serious crimes lay outside the courts' jurisdiction. Jurisdiction was confined at first to natives of the local area; it was then extended to those of the territory concerned, then to those of neighbouring territories and finally to Africans in general. The native courts administered the native law and custom of the area of the courts' jurisdiction, though these courts were usually also empowered to administer a small number of specific Ordinances, such as the Pell Tax Ordinance.

The administrative officers of the Provincial Administrations were responsible for the supervision of these courts and these officers held appellate and revisionary powers in respect of the native court decisions. Although during the first three decades of the century overall control of the native courts lay in the hands of the High Courts and the administrative officers exercised their functions in respect of these courts in their capacity as magistrates responsible to the High Court, in practice it was the Provincial Administration, and not the Judiciary, which concerned itself with native court affairs. When, therefore, in 1929 and 1930 respectively Tanganyika and Kenya removed the native courts from the High Court's control and district officers in these territories thereafter carried out their functions in respect of the native courts purely in their capacity as administrative officers and not as magistrates, the effect on the development and operation of the native courts was, in practice, small.

The native courts formed an integral part of the native administrations, which in the inter-war period were being developed in the African territories as a major plank in the prevailing policy of indirect rule. The chiefs, who were recognised under the Native Authority Ordinances as the native authorities, were the presidents of the native courts. Not merely did this enhance the chief's prestige, but it was upon the decisions of his own court that he relied to a large extent for the enforcement of the wide, if somewhat ill-defined, executive authority
which possessed under these Ordinances for the enforcement of law and order and rural administration. It is hardly surprising, therefore, that district officers serving in East Africa before the second world war should have devoted so much of their time and energy to the supervision of the native courts.

These were not, however, the only considerations directing the district officer's attention to these courts. Here were indigenous institutions existing at all levels of African society and serving the needs of all. If, in fact, many of the native courts lacked roots in the pre-colonial past, this was soon lost sight of by all concerned. To the Africans of the time, living for the most part in what was still a traditional society, the native courts were their own courts administering their own unwritten customary law and it is not surprising that it was to these courts, rather than to the magistrates' courts, that they chose to bring the vast bulk of their litigation. That such traditional bodies should be nurtured and fortified, whilst at the same time being developed and reformed so as to meet the needs of the time, was a policy particularly attractive to the disciples of the doctrine of indirect rule.

With the wide powers of supervision, revision and appeal which they enjoyed under the native court legislation, administrative officers had virtually a free hand in their control and education of the native courts. Under the guidance of these officers, the reform, and, indeed, the transformation, of these courts was by degrees effected. The first stage was to ensure that the requirement that native law and custom was only enforced if it were not "repugnant to natural justice and morality" was complied with: the imposition of barbaric punishments and the relics of slavery, for example, had to be eliminated from the customary law administered and as far as procedure was concerned a court would be required to decide cases according to the weight of evidence heard and to give the accused an opportunity of presenting his defence. Then followed the introduction of more and more of the procedure in use in the magistrates' courts, though in a simplified form, the employment of
court officers and the use of written records. Finally when the native courts were nearing their extinction there was little of principle left to distinguish the procedure found in them from that in the magistrates' courts save that the former remained free of the complexities of the latter. So too the customary criminal law developed so as to become a rough approximation to that administered in the higher courts. All this was accomplished, almost unaided by the Judiciary, by administrative officers without formal training in the law, and one of the virtues which their approach was believed to possess was that it effected reform in the interests of justice and to meet the practical needs of the people without the intrusion of legal complexities, so dear to the lawyers, but which the administrative officer believed were more often than not a major obstacle in the pursuit of justice. Even in Uganda, which, unlike Tanganyika and Kenya, did not abolish the supervisory powers of the High Court in respect of native courts, the influence of the Judiciary on these courts was, until the nineteen-fifties, extremely slight. Members of the Judiciary might strongly disapprove in theory of the control of the native courts being in the hands of men who were also administrative officers, and moreover laymen, but it was generally accepted by them that even if the Judiciary were to be required to undertake the primary responsibility for the native courts it would with its limited staff be unable effectively to do so. Furthermore, few judges or resident magistrates of this period showed any interest in, or knowledge of, customary law or the working of the native court system.

In focussing his attention on the native courts in his district, the administrative officer was, however, achieving much more than merely the effective operation of the court system. His periodic visits to the native courts in his district probably brought him into closer contact with the rural African population than did any other aspect of his work, and in inculcating into the court members and understanding of the principles of British justice he was also educating the general mass of the population to accept and to take for granted such ideas as part
of contemporary thought. By use of his revisional powers, in-
justices could be promptly rectified and the district officer
expected anyone aggrieved by any decision of the local court
to bring his complaints to him, if he felt that immediate ac-
tion was justified, a revisional order would be made on the
spot. Thus was the district officer able to derive under-
standable satisfaction from being able to alleviate the lot of
the individual, whilst at the same time propagating by his ac-
tion the virtues and efficacy of British justice.

The virtues of the native court system have frequently been
extolled, particularly by their partisans among the Provincial
Administration in the inter-war years. These courts were, it
was maintained, part of the indigenous society and the people
whose needs they served knew, understood and accepted as just
the customary law they administered. The procedure was simple
and intelligible to all and the members of the court were known
by and, it was presumed, trusted and respected by the general
public. The courts by reason of their situation and number,
were easily accessible to the public, and the justice they dis-
pensed was cheap and without the delays which litigation in
the High Court at any rate usually entailed. One of the great-
est benefits which the administration felt the native courts
offered to the public was that it provided justice free from
the intrusion of advocates (who were excluded by the Native
Courts Ordinances from appearing in these courts). Were advo-
cates allowed to appear in the native courts, then, district
officers were convinced, the law and procedure would soon lose
its simplicity and become in African eyes as mysterious a
science as that practised by the superior courts: justice
could then be bought by those who could afford a lawyer's fees;
and the court members would be browbeaten into decisions
against their better judgment.

That there would be cases of irregularities, injustice and cor-
ruption in the native courts was accepted as being inevitable,
but it was confidently believed that constant and close super-
vision by the district officers would keep these abuses in
check. It was also accepted that the union of executive and judicial functions in the same person - whether chief or district officer - was contrary to British theory and practice, but, it was maintained, this had always been a feature of African life and the public saw nothing wrong in it, nor would it have been practicable or advisable in the interests of good government to have attempted to separate the two.

Much in the arguments outlined above is incontrovertible, but they cannot be accepted without considerable reservations. The dangers of a system under which administrative considerations were bound to influence judicial policy, and even its judicial decisions of the supervisory authority, are obvious. Moreover, the system would seem to have given far too extensive discretionary powers to junior and inexperienced officers, since even the most junior cadet, once appointed as an assistant district commissioner, possessed, ex-officio, the full plentitude of the powers conferred by the Native Courts Ordinances. Such an officer was likely, on the one hand, to accept at face value the decisions of the native court president, being unaware at this stage of his career of the various pressures that might have influenced the court in reaching these decisions, and, on the other hand, without the controlling discipline of formal procedural rules, to be too ready to make hasty orders overruling the court's decisions in what appeared to him to be the interests of justice. Nevertheless, the native courts, until almost the middle of the century served their purpose well, providing a vehicle for the administration of justice, of an acceptable if limited, degree of efficiency, to the whole African population, who, in general, did not as yet question the system. It is, moreover, on the context of the political and social conditions of the time, and in particular in view of the limited ex-patriate judicial staff, hard to see what alternative system which would have been more effective and acceptable could have taken its place.

In the post-war period, and particularly during the last decade of colonial rule, the position was very different. The whole native court system now came in for increasing criticism
in Africa political circles and it soon became clear that the system had begun to outlive its usefulness. The growing educated elite now resented their subjugation to the jurisdiction of courts composed of persons without legal training, enforcing criminal law which was unwritten and could, be used to harass the opponents of authority, the only effective means of redress lying through administrative authorities, who would probably be equally antipathetic: the fact that a litigant, moreover, could not protect his interests by the employment of an advocate increased this resentment. This hostility to the native court system as such was coupled with a growing distaste for the customary criminal law administered in these courts, particularly as, with the growth of political parties in the nineteen-fifties, it became evident that certain courts were yielding to the temptation to use their criminal jurisdiction to silence their political opponents. Moreover, as opposition to any form of legislation on a racial basis developed, it was felt that a system of courts with jurisdiction over one race only was anachronistic and undesirable, and that the time had come for the integration of the native courts into the general court structure of the country. Among the members of the Provincial Administrations themselves there was no longer any unquestioning acceptance of the virtues of the existing system. The doctrine of indirect rule was now in eclipse and with it the pre-war concept of administration through traditional native authorities of which the native courts had formed so vital a part. The attention of the Provincial Administrations was now being directed away from the native courts: the energies of the district officers were now principally employed on the development of the district councils and on their conversion into modern democratic local administrations, and the time which they had to spend on the growing volume of revisions and appeals from the native courts was increasingly felt to be disproportionately great and a burden from which these officers welcome relief.

It was against this background of opinion that the Judicial Advisers' Conference met at Kampala in 1953. This conference,
which was under the chairmanship of the Legal Adviser to the Secretary of State for the Colonies and which was attended by representatives of most of the British African territories, recommended that the aim should be the creation of a fully integrated court system in each of the African territories.\(^1\) This recommendation was accepted by the East African Governments which then embarked upon a policy of preparing the way for the eventual abolition of the native (now termed African or local) courts. This policy was pursued by different means and at a different pace in the various territories, but certain important features of the policy are clearly discernible. In the first place, steps were taken to separate judicial and administrative authority at the supervisory level, their powers being progressively taken over by officers known as Judicial (or Courts) Advisers. These officers, although usually members of the Provincial Administration, were expected to have some formal legal qualifications and were employed full time on judicial work. The same process of separation of powers was also carried out at the level of court president, chiefs with administrative responsibilities being, where practicable, replaced by full time judicial officers. The latter would almost certainly be very different from their predecessors - young men reasonably well educated and, if possible, English speaking, capable of profiting from academic legal instruction. Such men could in no way be considered to be the repositories of customary law and tradition and their whole outlook towards their judicial work would be likely to differ from that of the old-time court presidents. Secondly, courses of instruction would be provided for African court personnel in the elements of English law and procedure. Thirdly, there was to be a steady introduction of the statutory procedure and the statutory criminal law.\(^1\)

Independence came before this process of the integration of the African courts into the general court system was complete, and the independent governments of Kenya, Tanganyika and Uganda all inherited a dual system of courts. These governments felt impatience at the pace at which integration was proceeding and,
a few years after independence, integration was effected by legislation sweeping away the African court structure. Yet the legacy of the dual system has not entirely vanished. In Tanganyika, for example, where there is now one judicial hierarchy, integration is more apparent than real, and, in fact, the lowest grade of courts, the primary courts, are to a large extent the old local courts under another name. True certain important political and judicial desiderata have been fulfilled: there is now one national hierarchy of courts, all lower courts being under the control of the High Court and all courts having jurisdiction over all races. Nevertheless, the primary courts remain very largely a distinct entity: they are presided over by persons who do not necessarily have any formal legal qualifications, and may even be the same individuals as those who presided over their predecessors, the local courts, in the same areas of jurisdiction. They administer basically the customary law in civil matters, civil cases involving the statute and common law being still, in practice, normally instituted in the higher courts. Advocates are still excluded from appearing before the primary courts and special simplified rules of procedures and of evidence have been enacted for use by these courts.

Furthermore, integration of the court systems does not, in itself do anything to solve the problems which arise from a dual system of law, the statutory and common law on the one hand and the customary law on the other. Indeed, the problems involving choice and application of law are likely to be accentuated by the integration of the court systems, at any rate in the early stages. Under the dual system of courts, although the potential for conflict was great, in practice this problem comparatively seldom arose: if a case were instituted in a native court, then customary law would be applied; if it were instituted in a magistrates' court, then it would normally be the common or statute law which would be applied. In an integrated court system, where all cases come before magistrates' courts or the High Court, which courts have jurisdiction to apply both the customary law and the general law, the problem
must persistently arise of which body of law is applicable in a particular case. As yet, there is virtually no case law to which a court may look for guidance on this matter, and, although Tanganyika has enacted certain choice of law rules, no such rules exist in Kenya or Uganda.

SOME REFLECTIONS ON THE IMPORTED LEGAL SYSTEM

The question now presents itself of whether the legal system introduced by the colonial power has proved a satisfactory framework for the suspending of justice to African peoples. We shall not here be concerned with the native courts, for enough has already been said about these. But what of the law and procedure - basically English in origin - which the High Courts and magistrates' courts administered? There are many criticisms which could be made and perhaps the chief one is that the introduction of English law and procedure may have resulted in the imposition upon the indigenous population of too inflexible a legal system which was, in any case, in many ways inappropriate in an African context: that this imposition was only tolerable because the existence of the native courts shielded the African from its main impact. The reply to this might well be that the framers of the legislation introducing English law into the East African territories provided adequate safeguards against inflexibility and inappropriateness. In the first place, there was the provision in the respective Orders-in-Council that the English law was to apply only so far as the circumstances of the territory and its inhabitants permitted and subject to such modifications as circumstances rendered necessary. In the second place, there was the provision that, in cases to which natives were parties, courts were to be guided by native law and custom, and thirdly it was provided that such cases were to be decided according to substantial justice without undue regard to technicalities and without undue delay. These were, indeed, wide provisions which might have permitted the development of a legal system in East Africa which was peculiarly African in content, tied only in fundamental principles to its English parent. But
such was not to be, for the conservatism of the English judicial is notorious and the East African judges of the colonial period were, in general, immutably wedded to the legal system in which they had been trained.

The cases in which the received English law was adapted by these judges to suit local circumstances have been conspicuous mainly on account of their rarity, whilst English precedents were almost slavishly followed. As for the East African superior courts of the colonial period being guided by native law and custom, a reader of the East African law reports covering decisions of the High Courts and East African Court of Appeal during the last half century of colonial rule might well imagine that native law and custom was no longer recognised or applied in East Africa, so infrequent and cursory are any allusions to it. Not merely did most of the judges have little interest in, and scanty knowledge of, the customary law, but they also tended to look upon it as something less than real law.

The provision requiring that cases to which natives were parties should be dealt with without undue regard to technicalities of procedure gave rise in East Africa in the period between the wars to bitter and acrimonious debate between the officers of the administration and those of the judiciary. To many administrative officers of this period, the application of the full paraphernalia of the English legal procedure to a largely illiterate African population could only result in a negation of justice. Since it was only in cases of a serious criminal nature that the English law and procedure would be likely to affect Africans (civil disputes and petty crime being in practice almost entirely the concern of the native courts), it was mainly with the attempt to introduce a simplified form of criminal procedure that the administration was here concerned. The complexities of the Criminal Procedure Codes were, it was maintained, quite incomprehensible to the African, who, unless he were on a capital charge, would be most unlikely to be represented by counsel. Also incomprehensible to the African population were the complexities of the Evidence Acts, with
their complex rules concerning the inadmissibility of evidence, rules which, in any case, had evolved in England with a view to excluding evidence which could not safely be presented to a jury. In East Africa, where the trial of Africans was not conducted with a jury, there was a good case for arguing that such rules were inappropriate. A more sensible approach, and one more conducive to justice, would be, it was argued, to enable a judge or magistrate to obtain the maximum amount of information by way of evidence, whether or not such evidence was, for example, hearsay: he could then safely be left to assess what weight he should place upon such evidence in reaching his verdict. So too it was maintained that the cumbersome procedure whereby a magistrate held a preliminary inquiry prior to committal for trial by the High Court was inappropriate to conditions in Africa where trial was not normally by jury. The procedure was, it was argued, not merely a time wasting duplication of effort, but confusing to the accused who imagined that he was thus being tried twice over for the same offence, whilst the judge, who himself gave the verdict, would have had access to the record of the prior inquiry and might, therefore, be influenced by information additional to that which he had obtained from evidence at the actual trial.

These were but some of the aspects of criminal procedure which the critics of the existing system considered could, and indeed should, be modified, rationalised and simplified under the general umbrella of the provision disallowing an undue regard to technicalities. The Judiciary, however, were adamantly opposed to almost any modification of the existing system. Here there was, they felt, no room for compromise: what might appear to the members of the administration to be mere technicalities, were, in fact, rules of procedure essential for ensuring that the administration of justice was properly carried out. The setting up in 1933 of the Bushe Commission, to which reference has already been made, gave the partisans of both the judicial and administrative schools of thought an opportunity to present their case. The Commission, however, came down uncompromisingly on the side of the judiciary: there could be no watering down, or substantial modification of, the English rules of procedure
if a legal system based on English principles were to operate effectively. Reluctant though the administration was to accept the Commission's decisions, the argument in East Africa did not long service the publication of Commission's Report. During the post-war period, with the administration being progressively removed from the magisterial field and the professional judiciary being vastly expanded, there was little vocal criticism, either African or non-African, of the legal system as it was operated.

Looking back at the colonial period, one can hardly escape the conclusion that the critics of the legal system as it operated in East Africa were justified in many of their structures. Far too little attempt was made to adapt the law to African circumstances and African thought. Far too little of the content of the customary law was absorbed into the general legal system, and the details of English procedure were all too often zealously applied regardless of their appropriateness in a social environment very different from that in which they had evolved. Much of the imported English law, particularly that dealing with marriage, was quite unsuitable in an African context.

Nevertheless, when all this has been said, the fact remains that, as has so often been stressed, the greatest contribution which colonial rule made to the British dependencies, and the one which appears to stand the best chance of surviving the ending of British political control, has been the introduction of the English legal system. Furthermore, African political opinion, certainly during the post-war period of colonial rule, would hardly have tolerated any watering down of the pure English law and procedure by the colonial administrations, even if this were presented as "Africanisation" and the giving of adequate recognition to customary law. It would, undoubtedly, have been interpreted as the palming off on the African of some inferior version of what he had been taught to believe was the Englishman's greatest heritage. Indeed, respect for the English legal system was very real even among those politically conscious Africans who were most opposed to colonial rule.
This is evidenced by the fact that in the last years of the colonial regime, when the political attack on authority was at its height and the actions and motives of government servants from the Governor downwards were persistently questioned, there was little criticism of the judiciary, whose impartiality was, in general, accepted, political leaders being prepared to submit cases involving attack upon the government to the courts and, in general, accepting with good grace the courts' verdicts even when they were hostile, which, indeed, they often were not.

With independence, there has been no rush to discard, or even drastically to modify, the legal legacy of the colonial period. Some stirrings of change are apparent and these will doubtless grow in force. What direction future changes are likely to take cannot be considered in this paper which is concerned with the past rather than the future. Suffice it to say that each of the East African countries will, no doubt, succeed, in the course of time, in evolving for itself a single national legal system, combining elements of the customary law and the received English law, as well as drawing on other legal systems where appropriate, and that in the resulting amalgam the inheritance of the English common law is likely to remain clearly evident.
NOTES

1. Kenya, Uganda and Tanganyika. It is not proposed in this paper to cover Zanzibar, the legal history of which was during the colonial period very different from that of the mainland territories.


8. East Africa Order in Council, 1911 (amending the Order of 1902); Uganda Order in Council, 1911 (amending the Order of 1902), Tanganyika Order in Council, 1920.


10. This had been the recommendation of the Bushe Commission, but it was a number of years before the East African Governments were prepared to accept that this was, in principle desirable. District officers retained powers of a judicial nature in respect of the native courts for a longer period.


12. Except in so far as certain matters were reserved to the High Court.

13. On the other hand, the Principal Court of Buganda had jurisdiction over natives in any criminal matter governed by customary law, except where death was involved.

15. Though in Kenya the policy during the latter part of the inter-war period was to remove the chiefs from the native courts.

16. The test of what is repugnant to natural justice must needs be a subjective one. To the administrative officer of this period it meant no more than what he found to be offensive to his conscience. A very different, and far less justifiable, criterion was used by the Tanganyika High Court in the case of Gwa bin Kilimo, IT.LR.(R) 403 in which the Court in effect virtually equates natural justice and morality with the law and procedure of the English courts.

17. This feeling of hostility to the customary criminal law culminated in the inclusion in the Independence Constitutions of Uganda and Kenya of a clause prohibiting the conviction of any person for an offence which is not defined, and the penalty for which is not prescribed, in a written law. Similarly under the Tanganyika Magistrates' Courts Act, 1964, no one may be convicted of any offence contrary to customary law.


19. In Uganda the expedient was adopted in the African Courts Ordinance, 1957 of providing that an African court should "be guided by" certain enactments such as the Penal Code, the Criminal Procedure Code and the Evidence Ordinance, though it was further stated that the fact that a court had not been so guided, or properly so guided, would not of itself be cause for the reversal of a judgment on appeal.


21. i.e. the mainland part of Tanzania.

22. Judicature and Application of Laws Ordinance, s. 9 as amended by the Magistrates' Courts Act.
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