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COLONIAL LAW IN TROPICAL AFRICA: THE CONFLICT BETWEEN ENGLISH, ISLAMIC AND CUSTOMARY LAW

J. N. D. ANDERSON†

Some of you may have seen in the *New York Times*, an account of a speech made to the members of the South African Parliament by the British Prime Minister. In this speech Mr. Macmillan spoke of the awakening of a national consciousness among many formerly dependent peoples, and more particularly of the strength of African national consciousness today. "The wind is blowing through this continent," he said; and anyone who has visited Africa in the recent past will endorse this statement. But Mr. Macmillan went on to say that Britain's aim in those territories for which she still has responsibilities is "not only to raise the material standards of life, but to create a society in which men are given the opportunity to grow to their full stature"—on the foundation of "Christianity and the rule of law as the basis of a free society."

We are concerned with the legal problems—complex and important as they are—of these rapidly developing colonies. Recently I took part in a conference, under Lord Jenning's chairmanship, on "The Future of the Law in Africa," at which we discussed the three systems—the English, the customary, and the Islamic—which co-exist in so many of these territories today. But how, it may well be asked, did this situation come about?

First then, the "English" law. When the English colonists first settled in America, they were regarded as having brought the common law with them. This was because it was previously a barbarous country, in which no law which was considered worthy of the name was in force. It is, indeed, on this basis that international lawyers normally distinguish between countries which have been settled, conquered or ceded; for where a country which already possesses any adequate system of law passes, by one means or another, under alien rule, the existing laws are regarded as continuing in force unless or until they are specifically replaced.

Examples of all these phenomena may be found in Africa. But in all those African territories which are, or were, parts of the British Commonwealth, this consideration is of no more than academic interest today, for in each the application of English law—within suitable limits—is now governed by some Order in Council issued by the Crown. And

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such Orders in Council commonly provide not only for the establishment of a Court of Record (sometimes termed the Supreme Court, sometimes the High Court) with "full jurisdiction, civil and criminal, over all persons and all matters," but specify that this jurisdiction shall be exercised in accordance with the "common law, the doctrines of equity and statutes of general application in force in England" on the relevant date. It must, however, be observed that in several of the East African Colonies and Protectorates the appropriate Order in Council provides first for jurisdiction to be exercised in conformity with the "Civil and Procedure Codes of India and the other Indian Acts in force in the Colony," and only thereafter in accordance with the common law, equity, and English statutes of general application. The reason for this, of course, is that in India much of the English law had been reduced, down the centuries, to the form of statutory enactments—the Penal Code, the Evidence Act, and the Contract and Transfer of Property Acts, for example—and that many of these admirable codifications were adopted, initially at least, in the East African Colonies, which were at first regarded juridically as an extension of the Presidency of Bombay.

Such then, today, is the juristic basis for the application of English law in those parts of Africa which are, or were, British Colonies, with the exception of Southern Rhodesia and the Union of South Africa, where the Roman-Dutch law of the original Boer colonists still prevails, although considerably diluted by concepts and principles derived from the common law. And it is interesting to observe that the common law and doctrines of equity have also been extensively adopted in the Anglo-Egyptian Sudan, which was never, of course, part of the British Colonial Empire, although administered for some years almost exclusively by the British. The basis for its adoption in that country—as originally in India—has been under the comprehensive umbrella of "justice, equity and good conscience."

But to return to those territories which are our immediate concern. Subsequent to the date of the relevant Order in Council, the English law has, of course, continued to develop. To some extent this has been effected by what we may term Imperial legislation, whether in the form of Orders in Council or statutes of the Parliament of Westminster, although the application of the latter to Colonial territories has been chiefly limited to legislation regarding matters such as British nationality which are of general, rather than local, import. But the overwhelming majority of changes in the law have been introduced by local legislation in the territory concerned, whether this was promulgated by the Governor, or by the Governor in Council, or by the democratic procedures of the Legislative

Council or House of Assembly. As a result it may be said, first, that the majority of Indian Acts which were previously applied in East Africa have now been replaced by local ordinances; secondly, that the greater part, but by no means all, of the changes in law effected by legislation in the United Kingdom have been reproduced in the Colonies by local enactments; and, thirdly, that the Colonial courts have tended to follow, wherever possible, the trend of judicial decisions in England and Northern Ireland.

It must, however, be emphasized as strongly as possible that English law has never been applied in these territories either rigidly or exclusively. It has not been applied rigidly, because the relevant Orders in Council always provide something to the effect that the common law, doctrines of equity and statutes of general application "shall be in force in the Territory so far only as the circumstances of the Territory and its inhabitants . . . permit, and subject to such qualifications as local circumstances may prove necessary."¹ It would, indeed, be a most interesting study to determine to what extent such provisions have in fact been used to effect modifications in the English law—but such a study has never yet been adequately tackled. Far more important, the English law has never been exclusively applied, because the Orders in Council all include provisions to the effect that:

In all cases civil and criminal to which natives are parties, every court shall (a) be guided by native law so far as it is applicable and is not repugnant to justice and morality or inconsistent with any Order in Council or Ordinance; and shall (b) decide all such cases according to substantial justice without undue regard to technicalities of procedure and without undue delay.²

All this primarily concerns what we may term the British courts (*i.e.*, the Supreme or High Court of the territory, the magistrates' courts, and the courts of appeal). But the overwhelmingly greater part of all litigation which concerns Africans is in fact conducted in a system of courts which are called, according to the territory concerned, either native, local, African or customary. Provision for these has been made by local ordinances, under which a whole hierarchy of such courts has been set up. Sometimes, as in Kenya, there is no link whatever between the two systems of courts, the British and the African; sometimes, as in Tanganyika, an exceedingly tenuous link has been forged; and sometimes, as in Nigeria, the two systems have been fully integrated. Where the systems

1. Quoted from the Tanganyika Order in Council, 1920.

2. *Ibid.*

are kept separate and distinct, appeals from the native courts go to their own appellate courts and then to British administrative officers—who are felt, by their knowledge of the local languages and customs, to be more competent to deal with such cases than are professional lawyers—and these same administrative officers commonly enjoy wide powers of revision. It is generally accepted today as an objective that the courts must be integrated as soon as it is practicable, although administrative officers must retain, for some years in the more primitive areas, the right and duty to supervise, to exercise revisionary powers, and to transfer cases in suitable circumstances, to the British courts. All such problems were examined and discussed at two Judicial Advisors' Conferences, the first held in East Africa in 1953, and the second in West Africa in 1956, to which delegates were sent by almost all British territories in Africa; and the recommendations of these conferences have led to a considerable simplification of the chaos which previously existed in some territories in the form of a positive plethora of possible reviews and appeals.

Broadly speaking, the law administered by these native courts is precisely the "native law and custom" to which reference has already been made. As a consequence, their jurisdiction is commonly limited to "natives"—a term which is somewhat differently defined from territory to territory—while provision sometimes exists for including certain immigrants who have adopted the manner of life of the indigenous inhabitants, or for excluding such natives as may have abandoned that manner of life. In addition, the native courts regularly enforce what may be termed local legislation in the form of Native Authority Orders, and even territorial legislation in the form of such ordinances, or parts of ordinances, as they have been specifically empowered to apply.

But what, it may be asked, of Islamic law? Where does this fit into the picture in these territories; and how does it come about that it should be applied in Africa at all? The best illustration, to my mind, is provided by the way in which the Roman-Dutch law originally developed. I am no sort of expert on this system, but the process, as I understand it, was somewhat as follows: In those parts of northern Europe where it had its origin, Germanic customary law previously held sway. Then, from a certain date, the rediscovered Roman law began to infiltrate, chiefly through the influence of the Church and the universities. Still later, the Roman law was officially "received." But it was never, in fact, imposed in its purity and entirety; instead, it was fused with the existing customary law, and a sort of amalgam of the two systems came into being. Exactly the same thing has happened in Africa in regard to the law of Islam, and in some areas is still happening today. Islam has penetrated,

or is penetrating, many parts of the continent, and the influence of Islamic law is spread by Muslim merchants, holy men and members of the religious orders. As a result the indigenous customary law has been influenced and interpenetrated in certain areas, whether to a greater or lesser extent, by the law of Islam; and this tendency is strongest where a native ruler has not only embraced Islam but attempted to impose its law upon his people. But nowhere, in tropical Africa, has the imposition been complete; for traces of the customary law survive even in the most rigidly Muslim areas. In every Muslim locality, it may therefore be said, the "native law and custom" today represents an amalgam, in which sometimes the customary law, and sometimes the Islamic precepts, preponderate.

Broadly speaking, British territories in Africa may be divided, in this context, into those in which the Islamic law is regarded, juridically, as a variety of "native law and custom" and those in which the Islamic law is regarded as a third, distinct system, alongside the English and the customary law. Examples of countries where Islamic law has been administered as a form of native law and custom include, surprisingly enough, Northern Nigeria prior to 1956. The same is true today of Ghana, Sierra Leone, Uganda, and Nyasaland—except, that is, within the scope of certain ordinances which provide for the Islamic law to be applied, as such, in these territories in certain strictly limited respects: *e.g.*, the Marriage of Mohammedans Ordinance, 1905, in Ghana (but this applies only to those Muslims who register their marriages thereunder, and scarcely any do); the Mohammedan Marriage Ordinance, 1905, in Sierra Leone (but this applies only in the Colony of Freetown, not the Protectorate); the Marriage and Divorce of Mohammedans Ordinance, 1906, in Uganda (but this makes no provisions regarding succession); and the Asiatics Marriage and Divorce Ordinance, 1929, in Nyasaland (but this, by definition, does not apply to indigenous Muslims).

Examples of territories where the Islamic law is regarded as a third, distinct system, on the other hand, are provided by Somaliland, Kenya and Zanzibar. In Somaliland both Qadis' courts and other subordinate courts have been set up, each concerned with a different system of law. In Kenya, again, both Muslim courts and African tribunals exist, while there is also a Marriage and Divorce of Mohammedans Ordinance. In Zanzibar, by contrast, Islamic law virtually divides the field with local statute law, but provisions also exist for the application of customary law.

Between and between these two categories of territories, as it were, lie the Gambia in the West and Tanganyika in the East. Gambia represents, in this respect, what may be described as the "tidiest" arrangement

to be found in any of these territories, for the Mohammedan Law Recognition Ordinance, 1905, provides for the application of Islamic law in the colony of Bathurst, under Islamic rules of procedure and evidence, in all matters of marriage, divorce, guardianship and succession concerning Muslim litigants. Subsequent legislation has set up a second Qadis' court, with similar jurisdiction, in the neighboring area of Kombo St. Mary; and the Native Tribunals Ordinance, 1933, which provides for the enforcement of native law and custom throughout the Protectorate of the Gambia, allows for the application of Islamic law there also, in matters of marriage, divorce, guardianship and succession, when the parties are Muslims. In the first case, it may be said, the law which is in fact applied approximates to the pure Maliki doctrine, while in the second it represents a heterogeneous amalgam between customary law and the doctrines of Islam, compounded according to the knowledge and inclination of the court concerned. Somewhat the same situation obtains in Tanganyika, but on a less orderly juristic foundation. For here only the Administration (Small Estates Amendment) Ordinance, 1947, specifically provides for the application of Islamic law—in matters of succession alone, and with certain important reservations—in regard to the indigenous population, while the Asiatics (Marriage, Divorce and Succession) Ordinance, 1947, applies only to Asiatics. For the rest, Islamic law is applied to Muslim litigants largely at the discretion of the Liwalis' courts, or of the other local courts concerned.

It is noteworthy in this context that where Islamic law is regarded as a variety of native law and custom, it is, naturally, applied under the legislation providing for the latter—except, that is, within the scope of some of the particular ordinances we have noted. Where, on the other hand, it is regarded as a distinct system, it is applied either as the law which was in force before the territory was conquered or the Protectorate was established (as in Tanganyika, Zanzibar and Somaliland) or—strangely enough—it is applied, in British courts, under Bombay Regulation IV of 1827, section 26. This section provides for the application, in default of some relevant statute, of the custom of the country, the “law of the defendant” or “justice, equity and good conscience,” and has always been regarded as opening the door, in suitable circumstances, to the personal or religious law of the litigants. This Regulation became applicable to Zanzibar and Somaliland when the legislation of the Bombay Presidency was extended to parts of East Africa.

It is also interesting to observe that in Zanzibar Islamic law is specifically proclaimed as the “fundamental law” in the Sultan's courts, except where excluded by local legislation, whereas in Northern Nigeria

the Islamic law was not so much as mentioned in any legislative enactment, prior to 1956, except (quite incidentally) in the Sheriff's and Enforcement of Orders Ordinance, 1945. Yet in Zanzibar the Islamic law has, in fact, been excluded from the whole field of crime and procedure and much of the field of contract and commerce, by the Sultan's Decrees, while in parts of Northern Nigeria it has enjoyed a more extensive enforcement than anywhere else in the world outside Arabia or Afghanistan, but under the comprehensive umbrella of "native law and custom."

Yet again, whereas in the Kenya Protectorate the Muslim courts are regarded as forming part of the British hierarchy of courts, in Tanganyika the Liwalis' courts are considered to be part of the local courts system. And this, in turn, leads not only to a difference in the relevant chain of appeals, but also to a fundamental distinction in regard to the rules of evidence and procedure which these courts are required to observe.

It seems plain, therefore, that the Golden Text, in the British Colonial Empire, has been "let not thy right hand know what thy left hand doeth," for somewhat similar problems have received a different treatment in almost every territory. But however "untidy," and in some ways undesirable, this may seem, it at least means that the solution has nowhere been doctrinaire, but pragmatic, and it should at least bear some relation to local circumstances.

The question necessarily obtrudes itself, however, as to whether it is preferable to regard the Islamic law as identical with native law and custom, or as a distinct and separate system. To the purist it may, of course, appear most inappropriate to identify a law which was brought to full maturity, centuries ago, in Arabia or Spain as the native law of an African people today. But we have already seen how the Islamic law has in some areas infiltrated the customary law and become fused therewith. The expedient of treating it as a variety of this law has many advantages, for it covers, equally, a law which approximates to the classical doctrine in the most strongly Muslim areas, a law which is frankly pagan in the areas to which Islam has not penetrated, and a variety of amalgams in those districts which are of more mixed or indeterminate allegiance.

Let us now turn to the question of conflicts between these different systems of law, and how they are resolved. First, then, in conflicts between the Islamic and the customary law, we must again distinguish those countries where the Islamic law is regarded as a variety of native law and custom from those where it is administered as a distinct system. In the former such conflicts can largely be left to the courts and the people—

as, for example, in the Native Tribunals of the Gambia. This represents a considerable advantage; and it is just here that the particular genius of native courts makes itself felt, and they are able to make special concessions, at times, to Muslim litigants in a way that British courts could scarcely attempt to emulate. For the native courts are less concerned to enunciate and enforce clear-cut propositions of law than to reach an equitable solution to the individual case—a solution based on legal principles, but with a flexibility of adjustment designed to preserve the social equilibrium and satisfy both the parties and the public.

Where, on the other hand, the Islamic law is applied as a distinct system, this solution is not possible. Instead conflicts are avoided, in Somaliland for example, by the fact that different types of cases are tried by different courts. Matters concerning the contract of marriage, the pronouncement of divorce and questions of testate and intestate succession, for instance, lie within the exclusive jurisdiction of the Qadis' courts, which administer the Islamic law (with very minor concessions, at times, to local customs); whereas disputes about such matters as bride-price and adultery go to the other "subordinate courts," where Somali customary law (influenced as this has been, in part only, by the law of Islam) regularly prevails. In Kenya and Tanganyika, on the other hand, statutory provisions exist for deciding whether the Islamic or the customary law is to be applied in matters of succession. In Kenya the Islamic law is to be applied in this regard only where the deceased not only died a Muslim but was either the child of a Muslim marriage or one who had himself contracted such a marriage (*i.e.*, was either a second-generation Muslim or one who had shown some indication of intending to follow the Islamic way of life). In Tanganyika a distinction is made between "Swahilis" (*i.e.*, those who have adopted a semi-Arab culture) and members of African tribes, for in the former case the Islamic law and in the latter the customary law, is to apply—unless, in each instance, the court is satisfied, from the statements or way of life of the deceased individual, that he intended the contrary solution.

Secondly, what of conflicts between the Islamic and the English law? Here the obvious example is Northern Nigeria, where even homicide cases may be tried either in the British courts under English law as codified in the Nigerian Criminal Code, or under Islamic law in its Maliki variety, in the court of some Emir who still has the right to try capital cases—and it is often largely a matter of chance in which court, and therefore under which law, the accused is in fact prosecuted. The definition of what we may term "capital homicide" in the Maliki law, moreover, is considerably wider than in the English law. Circumstances of

extreme provocation are normally regarded as irrelevant. The death penalty commonly depends on the caprice of the "heirs of blood"—except that they can never demand the execution of a Muslim for the dispatch of a non-Muslim; and the relevant rules of evidence are fundamentally different. The injustices which ordinarily result from such a system were averted, in practice, by the right of British administrative officers to transfer cases from the native to the British courts, by the right of appeal to these courts, and by the governor's prerogative of mercy. But this was by no means a satisfactory position on the verge of independence. It was for this and many other reasons that the Northern Nigerian Government recently appointed a Panel of Jurists to consider, in the light of what happens in other parts of the world where Muslims and non-Muslims live side by side, how conflicts could be avoided between the different systems of law which obtain in Northern Nigeria, and to make such recommendations as seemed necessary to that end in regard to both the legal and judicial systems. I had the honor to serve as a member of this Panel. We recommended that the only practicable solution—and one which had already been adopted in all other countries where Muslims and non-Muslims live side by side—was that the Islamic law must be replaced, in the whole sphere of crime and criminal procedure, by suitable codes of general application. This recommendation has been accepted by the government, and is now in the course of implementation.

But the possible sphere of conflict between the Islamic and English law is not limited to the sphere of crime, nor to Northern Nigeria (where alone, in British Africa, this particular problem arises). Questions of child marriage or compulsory marriage, of the exclusion of converts from inheritance on the Islamic principle that there can be no inheritance between those who differ in religion, of procedure and evidence, of the law (*e.g.*, in regard to conspiracy) applicable to polygamous or potentially polygamous marriages, and of whether decrees of restitution of conjugal rights should be executed by force, all provide possible fields for conflict.

Thirdly, there is also the possibility of conflict between the customary and the English law. Here an obvious example is provided by questions of land tenure, where the English law favors full rights of individual ownership and customary law favors a communal or family title, coupled, as it may be, with individual rights of user. As in the case of Islamic law, moreover, customary rules regarding child marriage, compulsory marriage and the implications of polygamous unions provide a fruitful field of conflict, particularly where an African contracts a legal, monogamous marriage under statute law and, at the same time, indulges in additional unions of a customary nature. An interesting case of a

rather different character, moreover, was recently reported from Northern Rhodesia, where an African member of the Roman Catholic Church was initially convicted of a breach of native law or custom in persuading other African Christians that it should be contrary to their conscience to make those contributions of millet demanded by their chief which they knew were to be used to propitiate his ancestors. It was admitted, curiously enough, that a Christian had now acquired the right himself to withhold such contributions on grounds of conscience, but it was held that to suggest a similar refusal to others still constituted an offence. And although this conviction was in fact quashed on appeal, it provides a fascinating example of possible conflicts where the traditional customary law is exposed to the incursions of a new faith and different way of life.

Nor are these problems in any sense merely of an academic interest. On the contrary, they are of vital moment in Africa today, where one territory after another is rapidly advancing to independent status. What is to be the law of the future? It seems obvious that a dual—or triple—system of courts cannot be perpetuated indefinitely. But the question remains as to whether a suitably modified English law is to prevail; whether the indigenous law can be developed—as it is developing today in certain areas—to the point where it can provide an adequate alternative; or whether some amalgam between the two is to evolve.

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