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NOTES AND NEWS

The Move Towards Codification

It will not escape the notice of the attentive reader of the three articles in this number of the Journal that they all relate or refer, in one way or another, to the codification of the law in Africa. Mr. Kerr, writing of the law of Southern Africa, notes that the Cape Commission of 1883 had suggested the preparation of a code of criminal law and procedure, although reluctant to codify the civil law. He also examines the construction and working of the Natal Code of Native Law, and the value of this Code as a guide to future codifiers of the customary law. Mr. Hannigan, writing of the difficulties experienced in Ghana in the judicial ascertainment of the applicable customary law in any particular case, considers " codification of the general principles of native custom " as one possible solution to the problems which arise, especially the problem of uncertainty and of local variation. Mr. Hannigan on the whole appears to favour a case-study of the judgments of English-type and native courts as a preferable alternative solution to the problem. Lastly, Professor Konvitz, as the Director of the Liberian Codification Project, writes with authority of the objects, working procedures, and difficulties of that Project. The experience of Liberia in codifying its laws will doubtless be valuable to other African countries who may be contemplating a similar step.

It is often assumed that the genius of Anglo-American law is hostile to the codification of the law that the courts are to administer; but this assumption is hardly a justifiable one. In India, which has been a powerhouse of codification in the common-law world, the bulk of Indian law was statute law by the end of the nineteenth century, thanks, in particular, to the codifying zeal of Lord Macaulay and the first Indian Law Commission, over which he presided, and the second Commission which sat in London in 1853.[1] The Codes of Civil and Criminal Procedure, the Penal Code, the Contract Act, the Succession Act, the Evidence Act, and the Transfer of Property Act, remain as monuments to the energy displayed by lawyers trained in English law in reducing that law to writing, in a modified form, for the benefit of the peoples of India.

[1] For further information on the codification of Indian law, the reader should refer to Gledhill, " Whither Indian Law ? ", 1956, from which the information which follows is largely taken.

This heritage of the Indian codes was shared by other British-administered territories. In particular, many of the East African territories adopted some or all of the major Indian Codes as their law. More recently the tendency has been to replace these applied Indian Acts in East Africa with new local ordinances; though even so the new Evidence Ordinances, Criminal Procedure Codes, and the like, show a certain family resemblance to the older Indian legislation that they replaced. (It is hoped in a later number of the Journal to give a fuller account of the history and subsequent application of the Indian Acts currently applied in British East African territories.) The trend towards codification was not exhausted in India when the twentieth century dawned; in fact, the most striking legislative changes in the previously unenacted law have taken place very recently, with the codification and substantial modification of Hindu personal law.

The law of the English-speaking African countries, dependent and independent, is thus to a greater or less degree codified at the present time; but after the pre-war impulse towards codification (of which the preparation of the East African Penal Codes was an example), there has been a certain pause. Many competent authorities now feel that a further bout of codification is required. Previously, a major reason for the codification of the English common law applying in African territories was that many of the magistrates administering the law were either not legally qualified, or else relatively unskilled in the law that they administered (being drawn, as they were, from the Administrative Service); furthermore, in outlying districts there were no, or very few, legal textbooks, reports, etc., available for consultation. Today, the position is both more complex and more urgent.

The need is more urgent because increasingly the native, African, or customary courts are being empowered to administer non-customary law—a process which will continue and extend; and the position is more complex because it is doubtful whether (in some territories) it is any longer enough merely to codify the law of English type or origin. The land law of West Africa, for instance, can no longer be neatly broken down into the law of English origin, and the customary law; the laws of different origins are now intermingling and being superimposed one upon the other. A code of land law might have to include, therefore, not only the English land law, but the customary land law as well; and, what is more, the two systems would have to be integrated or reconciled with each other. That is, it is necessary not merely to consolidate the existing law, but to simplify and improve it as well. All this creates new technical problems.

A further factor, which makes the codification of customary law a topic requiring further consideration, is that the customary law is rapidly changing, and is also being administered by judicial officers or authorities who are not familiar with its rules; to some it appears that the only solution is the preparation of codes of customary law for use in the courts. Others reject codes, as importing excessive rigidity into what ought to be a flexible system of adjudication; though they would favour the production of manuals of customary

law for the guidance of courts. A close examination of the possibility and desirability of restating or codifying (*a*) the general law of English or local origin, (*b*) the African customary law, ought to be made as a matter of urgency. (The work of the Law Revision Committee in Western Nigeria is relevant and important here.)

JUSTICE AND THE RULE OF LAW IN BRITISH DEPENDENT TERRITORIES

JUSTICE, otherwise the British Section of the International Commission of Jurists, is an all-party organisation of lawyers who are actively concerned with the administration of justice and the Rule of Law in the United Kingdom and in the dependent territories of the Commonwealth. Its history dates back to December, 1956, when lawyers from the three main political parties formed an *ad hoc* alliance to endeavour to secure fair trials for those accused of treason in Hungary and South Africa, and took JUSTICE as their title.

The International Commission of Jurists in the Hague was found to be working on the same tasks, and cooperation was soon established between the two bodies. The Commission, which is an independent association of lawyers dedicated to upholding the Rule of Law, was anxious to form a British Section. There was also a desire among the sponsors of JUSTICE that there should be a permanent all-party organisation concerned with the proper administration of justice in British territories.

On 16th January, 1957, Mr. Norman Marsh, the Secretary-General of the Commission, met representatives of the Inns of Court Conservative and Unionist Society, the Society of Labour Lawyers, and the Association of Liberal Lawyers. These societies each agreed to suggest three of their members for inclusion in the Council of a permanent organisation, which was completed, after further consultations, by the Commission issuing invitations to a number of solicitors and professors of law. The Rt. Hon. Sir Hartley Shawcross, Q.C., the British Member of the Commission, was invited to be Chairman.

The Council was formally completed and the Constitution approved on 4th June, 1957, and it was decided to retain the original name of JUSTICE. Mr. Tom Sargant, who had given voluntary help to the Society in its early stages, was appointed part-time Secretary. As the Council had no funds, the Commission offered it an initial loan and generously undertook to print and circulate a membership appeal to British lawyers with its own literature.

The response to the drive for membership has to date been somewhat disappointing, though one notes with pleasure that, apart from legal practitioners, there are also 10 members of the judiciary and 33 university teachers of law among the members. Steps are now being taken to bring the work of JUSTICE to the attention of all those who are interested in maintaining the Rule of Law, both in the United Kingdom and its dependent territories, and in other parts of the world.

JUSTICE has been active in the international sphere, *inter alia*, sending Mr. Gerald Gardiner, Q.C., as an observer at the preliminary hearings in the South African treason trials (it is reported

that Mr. F. H. Lawton, Q.C., will attend on behalf of the society when the trials themselves commence shortly), and assisting with the reconciliation of the parties to the recent conflicts arising out of the deportations in Ghana.

JUSTICE is taking a particular interest in legal problems in British colonial territories. The Council considers that a most important part of its work may lie in the administration of justice in dependent territories. Where the granting of independence is still in the distant future, there is always the danger that political pressure and racial tensions may undermine the Rule of Law and endanger fundamental rights. Where independence is soon to be granted, it is vital that respect for the independence of the judiciary be built up before power is handed over. In all territories, the quality and integrity of judges and magistrates, and the standards of practising lawyers, are of the highest importance, as also is equal access to the law.

Efforts are being made to enrol members and ultimately to form affiliated sections in the main territories.

JUSTICE does not act as a legal advice or enquiry bureau, though breaches of the Rule of Law are brought to its attention and investigated by it where such action is required. It is the practice of the Council, when dealing with reports from colonial territories, to try to obtain reliable evidence from lawyers on the spot and only then to make representations to the Colonial Office or to the authorities in the territory. Because it is difficult to obtain evidence and to reach a fair judgment without sending a trained observer to the territory, it is considered more useful to make constructive suggestions than public criticisms, except in the last resort.

In the course of the year, the Council has investigated complaints from Northern Rhodesia, Cyprus, Seychelles and Singapore and has taken what it considered to be appropriate action. In Northern Rhodesia, following representations made by JUSTICE, the Law Society has instituted a legal aid roster for Africans accused of political and industrial offences. The continued " rustication " of a number of Trade Union leaders from the Copper Belt is receiving attention.

Besides its other activities, JUSTICE has recently organised a successful two-day conference, which was held on the 10th and 11th May, between members of the British Section and members of the French Section of the International Commission of Jurists. At this conference problems of the Rule of Law in British and French colonial territories were jointly considered and discussed. The conference which was held in London, dealt, not merely with legal, administrative and constitutional problems (*e.g.*, the status and functions of the judiciary, native courts and customary law) in the dependent territories in normal times, but also with the special problems and challenge to the Rule of Law of periods of emergency.

The conference was under the chairmanship of, on the first day, Sir Hartley Shawcross, Q.C., and, on the second day, Mr. John Foster, Q.C., M.P. Among those who gave papers from the British side were Sir David Edwards, former Chief Justice of Uganda, Sir Harold Willan, former Chief Justice of Malaya and

of the High Commission Territories, and Messrs. D. C. Holland, S. de Smith, and A. N. Allott of the University of London.

A further project, which has recently been initiated by JUSTICE, is a comprehensive enquiry into the administration of justice in colonial territories. Two special sub-committees have been established, to undertake research into (*a*) the appointment and conditions of service of colonial judges and magistrates, and (*b*) the working of native courts, the administration of indigenous law, legal education and the structure of the legal profession, in the dependent territories of the British Commonwealth. Although the field of reference of the committees is wider than Africa alone, yet undoubtedly an important part of the committees' investigations will be concerned with the continent. A former Colonial Chief Justice is serving on each committee.

The committee on native courts, etc., has drawn up a questionnaire, which is in two sections, and which is reproduced below for the information of readers. The committee hopes that lawyers and others concerned with the administration of justice in the dependent territories will cooperate by providing answers to all or part of the questionnaire in so far as it affects the territory with which they are familiar. It is hoped that it will be found possible for a group of lawyers to work together in the preparation of replies to the questions. Any reader who desires to assist in the investigation by furnishing replies to the questionnaire, or in any other way, is cordially invited to get in touch with the Secretary of JUSTICE. The address for correspondence is:—

The Secretary,
JUSTICE,
1 Mitre Court Buildings,
Temple, E.C.4.

The Council of JUSTICE has recently issued its first annual report on the activities of the society, from which many of the above details are taken.

JUSTICE

Sub-committee on native courts, indigenous law, the legal profession, legal education and legal aid in dependent territories within the British Commonwealth.

Questionnaire

SECTION 1: THE LEGAL PROFESSION, LEGAL EDUCATION, LEGAL AID

1. What arrangements exist and what difficulties, if any, are experienced regarding the recruitment of the local legal profession, especially affecting persons of non-European origin ?

2. What facilities exist locally for the provision of legal education? What is the content of such education if it is available ? (*i.e.*, is it of University standard, or similar to that provided at the Inns of Court or Law Society's School of Law, etc?). Is there scope for a regional Law School ?

3. What local provision exists for practical training, by reading in chambers, articled service in a solicitor's office and the like ?

4. Are there any local law examinations ? If so, what is their content, and who is required to sit for them ? If not, what qualifications are required to practise ?

5. What provision is made by the Government of the territory by way of scholarships and grants for would-be lawyers to go out of the territory for training ?

6. What are the relations between the legal profession and the judiciary ? To what extent are legal practitioners eligible for recruitment to the magistracy and judiciary ?

7. Generally, in what ways might the existing provision for legal education and the structure of the legal profession be altered or improved ?

8. What provisions are there in the territory for legal aid, and what need exists for further provision in (*a*) criminal cases and (*b*) civil cases ?

Section 2: Native Courts and Indigenous Law

1. *General Law*

What is the system of general law in force in the territory ? Are there any peculiar circumstances, conditions or limitations under which it functions in your territory ?

2. *Application of indigenous law*

(*a*) What systems of law of local origin (*e.g.* customary law) or of non-European origin (*e.g.* Islamic law) are applied in the courts of the territory ?

(*b*) Under what conditions are the indigenous systems of law applied by the superior or British courts, and how are the relevant rules of these laws ascertained by the said courts ?

(*c*) What difficulties, if any, arise from the ascertainment and application of indigenous law in the superior courts ?

(*d*) What difficulties arise from the need to use interpreters ?

3. *Functions of appellate and revising courts*

(*a*) What courts or authorities exercise powers of review, revision, or transfer, or appellate jurisdiction, in cases originating in native courts ?

(*b*) On what principles is this jurisdiction exercised ? What is the procedure (*i.e.*, by way of rehearing or otherwise), and what are the respective roles of the judiciary and the executive in the trial of such proceedings ?

4. *Native Courts*

(*a*) How are the native courts constituted ? To what extent is their composition traditional, determined by statute, or subject to administrative appointment and control ?

(*b*) To what extent is there separation of judiciary and executive at the lower levels of the judicial and administrative system ?

(*c*) Where members of native courts also have executive powers, is there any evidence that they abuse their judicial office ?

(*d*) What in general is the standard of the administration of justice in native courts ? What breaches of justice, if any, are to be found there ?

(*e*) What actual or possible advantages may the indigenous system of law and procedure have over the imported or British system, in the light of local circumstances ?

(*f*) To what extent is indigenous law being assimilated to the general law, and is this considered desirable ?

5. *Native court members and officials*

(*a*) How are the court members and officials appointed or selected ?

(*b*) What provision is made for the training of members and officials in their duties ?

(*c*) What career prospects are open to court members and officials and how far is there a unified local service with transferability between appointments ?

Commission of Enquiry

Federation of Nigeria: *A Report on the Registration of Title to Land in the Federal Territory of Lagos.* By S. Rowton Simpson, C.B.E., M.A. 1957. Federal Government Printer, Lagos: 9d.

Mr. Simpson, Land Tenure Specialist at the Colonial Office, was appointed sole Commissioner by the Federal Government to " examine the working of the Lagos Titles Registry ", and to make recommendations on various matters connected with registration of title to land in Lagos.

After describing the land law at present applicable in Lagos, based partly on the English common law, doctrines of equity and statutes of general application in force in England on 1st January, 1900, partly on " native law and custom " as applying in Lagos, and partly on Nigerian legislation either applying to Nigeria generally, or to the lands of Lagos in particular—Mr. Simpson examines more closely the present system of registration of deeds and titles as it operates in Lagos. He considers that the system of private conveyancing of unregistered land is wasteful of time, energy, and money, and productive of uncertainty as to title and boundaries, and he recommends that provision should be made for systematic settlement of titles within selected compact areas of the Federal Territory, with the ultimate object of registering all titles to land in the Federal Territory. Voluntary registration would be allowed everywhere in the Territory; registration would be compulsory in the selected areas. Mr. Simpson proposes that the extension of registration throughout the Territory should be by way of amendment of the present Registration of Titles Ordinance, cap. 197, which he suggests —rather confusingly, but quite justifiably—ought to be retitled the " Land Registration Ordinance " (though this title has been pre-empted by the present cap. 108, which deals with registration of *deeds*).

What titles should be registered under the new legislation ? The Report suggests that registrable " estates " should be limited to " freehold (not merely a ' fee simple ') and leasehold "; though provision is apparently to be made for recording, or at least having regard for, other types of rights and interests. In this connexion it might have been better if the word " estate " had been entirely abandoned, and if no dichotomy had been made between certain types of interest in land and others. The all-important question of what is to be done about interests under customary law is not, with respect, adequately faced, though several possible approaches are canvassed. Mr. Simpson says:—

> " Land which is held by ' Native Law and Custom ' (in its original sense) appears to be heritable but inalienable and to revert to the grantor in the event of ' misbehaviour ' or of an attempt to alienate or charge it. It would appear to have much in common

> with English copyhold . . . such a right can only appear as an incumbrance . . . on the ownership of the grantor (individual family or group), and until it is alienable, or subsidiary interests can be carved out of it, there can be no sense in making it a separate entity in the Register " (para. 55).

Mr. Simpson then remarks that in England registration works with separate registers for " ownership " and " leasehold " only.

Unfortunately, the practice of England in this matter is irrelevant, since rights by native law and custom are not recognised there. It is also apparent that Mr. Simpson is using the phrase " land which is held by native law and custom " in a very special way, which would limit its application—or so it would seem—to an individual's inherited interests in family land on the one hand, and a person's (whether individual or family) interest in land controlled by a superior political authority (as in parts of Yoruba-land) on the other hand; since he makes a distinction between the interest of the " grantor "—" individual family or group "—which is one of ownership, and that of the grantee, which is something less. It can be argued that the interests of the grantors are also by virtue of native law and custom, and their land is therefore " land which is held by native law and custom "; in other words, the purported distinction falls to the ground.

As regards family lands in particular, Mr. Simpson sees no reason why " full ownership " should not be vested in a family; he does not recommend protecting the interests of those jointly entitled to the family land (*i.e.*, the members of the family) by a distinction between the legal and equitable interests in the land, and by registering merely the legal interest of the trustees (though he does suggest that, if the names of trustees are entered in the register, they should be shown as trustees, and transfer by them of their interest without the consent of the beneficiaries or the court should be forbidden). It is not clear whether Mr. Simpson opts for registering as the registered proprietor of the interest in the family land (i) the family as such as a legal person, or (ii) trustees for the family, or (iii) all the members of the family as co-owners, or (iv) certain persons as " heads and representatives " of the family. One feels that the term " family land " is ambiguous; it would be better to abandon it, and replace it with " family interest in land ", or an expression of that sort.

Paragraph 87 deals with succession (inheritance) to registered interests. It is possible that in practice a system of registration which has not been devised with the special difficulties created by the Nigerian customary laws of testate and intestate succession in mind may break down on this very point; it is not sufficient, for instance, to register the " heirs " to a deceased person, who died holding an absolute interest in land, as " co-owners " of that interest, if in fact the absolute interest passes to a larger lineage or family group, and the " heirs " get no more than limited interests of use. Mr. Simpson does say, at para. 53, that:—

> " Land which is owned by some person or group of persons may be subject to individual rights of user by a member of the group or some other person. If these rights are inalienable they will be

> recorded as incumbrances on the ownership title. . . . No separate register need be kept of them as, being inalienable, there can be no dealing in them. If the right is alienable as well as heritable and amounts to the full beneficial use of the land, it is in fact ' ownership ' and should be shown as such."

There is, however, a *tertium quid*, that is, an interest which does not satisfy all three conditions as set out by Mr. Simpson in his last sentence: what if a right is heritable but not alienable, but amounts to full beneficial use (whatever that may mean in an African context), and what about interests which are inalienable without another's consent or authorisation, or which are defeasible upon a condition ? The word " alienable " is ambiguous in this context.

Mr. Simpson next recommends that a Prescription and Limitation Ordinance should be enacted, which would introduce the principles of prescription and limitation into the law of Lagos. The Report strongly argues that these principles should be introduced into Lagos; but indeed there is an equally strong case for their introduction into other parts of Africa. (Perhaps one ought, more correctly, to speak of the *extension* or *application* of prescription and limitation to cases governed by customary law, or interests in land held by customary tenure, since generally speaking, prescription and limitation form part of the general law applying in each British African territory, either by reason of their forming part of the statute or other law of general application taken over from England, or because of the adoption of Indian legislation or the enactment of a colonial ordinance.) There is no reason at all why (*a*) stale claims should not be barred in the courts, (*b*) positive acts of ownership for a sufficient period of time should not create an interest in the occupier, if his occupation has been neither *vi*, *clam* or *precario*.

The Report makes a large number of practical and useful suggestions about the organisation, administration and staff of the Land Registry, and about the working procedure that should be followed there. Altogether this is a valuable document, which will doubtless contribute to the long-delayed modernisation of the land law of West Africa.