This document has been provided by the International Center for Not-for-Profit Law (ICNL).

ICNL is the leading source for information on the legal environment for civil society and public participation. Since 1992, ICNL has served as a resource to civil society leaders, government officials, and the donor community in over 90 countries.

Visit ICNL's **Online Library** at
http://www.icnl.org/knowledge/library/index.php
for further resources and research from countries all over the world.

AUSTRALIA
The Law Book Co. of Australasia Pty Ltd.
Sydney : Melbourne : Brisbane

CANADA AND U.S.A.
The Carswell Company Ltd.
Toronto

INDIA
N. M. Tripathi Private Ltd.
Bombay

NEW ZEALAND
Sweet & Maxwell (N.Z.) Ltd.
Wellington

PAKISTAN
Pakistan Law House
Karachi

BRITISH COLONIAL LAW

A Comparative Study of the Interaction between English and Local Laws in British Dependencies

BY

T. OLAWALE ELIAS, Q.C., B.A., LL.M., PH.D.
Federal Attorney-General and Minister of Justice for Nigeria

LONDON
STEVENS & SONS LIMITED
1962

Contents

PART TWO

THE MAIN ELEMENTS OF COLONIAL LAW

PART THREE

THE JUDICIAL PROCESS AND LEGAL DEVELOPMENT

2

The Organisation of Colonial Legal Systems

INTRODUCTORY

ONE of the inevitable consequences of British rule over dependent territories is the introduction into them of English law at the same time as an existing local law is recognised within limits. In certain cases one finds express provisions in colonial legislation stating the dates from which English law applies to particular territories. The usual clause runs something like this: the principles of English common law, the doctrines of equity and statutes of general application, which are in force in England on a given date, shall apply to this colony (or protectorate, as the case may be). Thus, to take a few random examples: in the case of Bermuda[1] the date is July 11, 1612; of Northern Rhodesia,[2] August 17, 1911; of Hong Kong,[3] April 5, 1848; of British Columbia,[4] November 19, 1858; of the Gold Coast (now Ghana) and the old Lagos Colony,[5] July 24, 1874; of Fiji,[6] January 2, 1875; of Gibraltar,[7] December 31, 1883; of Uganda,[8] August 11, 1902, and of Nigeria,[9] January 1, 1900.

It follows from this operation of English law in the colonies

[1] See Colonial Reports: Bermuda, for 1951 and 1952, p. 36.
[2] Courts Ordinance, Cap. 3 of 1953 revised edition of the *Laws of Northern Rhodesia*, s.11.
[3] Supreme Court Ordinance No. 12 of 1873.
[4] Supreme Court Ordinance No. 7 of 1867.
[5] Supreme Court Ordinance No. 4 of 1876.
[6] Supreme Court Ordinance No. 14 of 1875.
[7] Order in Council of Feb. 2, 1884, c1.2.
[8] Order in Council of 1902 and Report for 1952, p. 69.
[9] Supreme Court Ordinance, Cap. 211 of 1948 editions of the Laws, s.17.

that fundamental doctrines based upon it should also apply therein unless specifically excluded either by legislation or on the ground that local circumstances render their adoption impracticable. As it is, the all-important doctrine of judicial precedent, with which we are here concerned, is such a corner-stone of any legal system based on case-law that it automatically applies in all British colonies, protectorates and trust territories, all of which take the English legal system for their model. Even those colonies[10] which were formerly administered by other European Powers before coming under British rule and which were allowed to retain the foreign laws already established there conform to the pattern of judiciary law in the rest of the colonies.[11]

But legal theory apart, the existence in every British colony of hierarchically graded courts necessarily involves a chain of appellate jurisdication,[12] with varying degrees of authority in their judicial pronouncements.

HIERARCHY OF COLONIAL COURTS

Since the more detailed consideration we are about to give to the principle of judicial precedent within the framework of colonial law will unavoidably revolve round the existing organisations of courts in the several colonies, it seems expedient to attempt a summary account of these here.

Now, in nearly every colony there is a Supreme Court, which is the highest court for the territory. It consists of two parts, a Divisional Court and a Full Court (as was until recently the case

[10] E.g., Mauritius, a French colony, was surrendered to Great Britain in 1810 on the condition that the inhabitants retain their religion, laws and customs: accordingly, the French Code has prevailed there in civil cases: *Re Adam* (1837) 1 Moo. P.C.C. 460, at p. 470. Again, in British Guiana, the Roman–Dutch law governs civil matters: *McDermott* v. *Judges of British Guiana* (1868) L.R. 2 P.C. 341. Similarly, Spanish law which was in force in Trinidad in 1797 when the island was captured by Great Britain, has remained operative in the colony: *Escalier* v. *Escalier* (1885) L.R. 10 App. Cas. 312. Of course, in every case, the specific limits of these permitted laws have had to be fixed by subsequent legislation.
[11] This does not mean that one wants the strict English doctrine of judicial precedent to be applied in the colonies.
[12] Per Lord Stowell in *Ruding* v. *Smith* (1821) 2 Hagg Const. Rep. 371, at p. 382): '. . . a colony subject to British rule and sovereignty is governed by the general principles of administration of the law including appellate jurisdiction'.

law of the peninsula Malaya is composite; it is ancient Malay custom modified or supplemented by subsequent adoption of part of the Mohammedan law; the extent to which the Moslem law has superseded the customary law varies from place to place but nowhere has the customary law wholly disappeared.

Let it be carefully noted that these observations are in substance true of the relation between indigenous customary law on the one hand and Mohammedan law on the other, wherever Islam has been introduced into any colonial territory. The learned judge's remark that adoption is a recognised part of the personal law of the Pahang Malays is equally true of other communities in the colonies. Finally, Taylor, J., rightly warned that, as a matter of evidence, a particular custom might nevertheless be valid even though it be at variance with the orthodox Mohammedan law. Indeed, the Privy Council in *Khan* v. *Rai*[48] expressly ordered that evidence be admitted to prove a customary rule of inheritance which was found to be at variance with Mohammedan law.

Similarly, mere incompatibility between an alleged rule of customary law and English common law which is not 'repugnant to natural justice, equity and good conscience' will not render the former invalid. That is why, for example, one finds that, in spite of the judicial strictures recorded earlier in the *Tanistry Case*,[49] an English judge (Johnson, J.) approved in *Ahmed & Others* v. *Mohamed and Others*[50] the following bequest to an executor in the will of a Shafei Mohammedan in Zanzibar:

> To buy an immovable property in Zanzibar and keep it as a *wakf* in perpetuity, not liable to disposal or bestowal until God inherits the Earth and what is on it. Out of the income of the *wakf* a person shall be engaged to recite the Quran over his grave morning and evening for ever. Out of the balance thereof the executor should make expenditure according to his discretion in keeping the said *wakf* in good condition – and if anything remained over, the same should be given away to the poor of the said testator's *arham*.

[48] 17 C.W.N. 96 (P.C.) D.
[49] See p. 104–5 *supra*.
[50] (1931) Zanzibar L.R., Vol. IV, p. 23.

Again, in *The Public Trustee* v. *Her Highness, the Sultana*,[51] Chief Justice Pickering of the High Court of the same Protectorate had to construe a gift in which the testator had 'endeavoured to import English ideas and procedure into the manner in which he sought to make provisions for his children'. The testator gave a sum of money to trustees on the condition that they should invest it and pay the interest so derived to 'A for life and thereafter hand the capital sum over to such of A's children as should have attained the age of 18 years and, in the event of no child of A attaining that age, then to the brothers and sisters of A in equal shares'. The learned Chief Justice held *in limine* that, on his view of the authorities cited to him by counsel, trusts are known in Mohammedan law. He then decided that the words of limitation did not constitute an immediate gift to A of the money handed to the co-trustee but that, where a completed transfer is made to trustees, a court administering Mohammedan law can and ought to give effect to the trust or conditions attached to such transfer.

In all these cases the strict principles of English law would, however, be applied where the testator evinces a clear and unambiguous intention that his will in part or as a whole is to be governed by English law.

The same principle of holding valid all customary law practices that are otherwise lawful has been applied in such matters of indigenous tenure as *primogeniture* (i.e., succession to a man's land or land use by his eldest son alone), *ultimogeniture* (i.e., succession only by the youngest son), matrilineal inheritance, and the like: all of which are, however, institutions dying out by default and not as the result of any legislative disallowance of, or judicial frown upon, their observance.

Prescription under Customary Law

This is another aspect of customary law which in proper cases is usually upheld by colonial courts. As Osborne, C.J. put it in a Nigerian case:[52]

[51] (1930) 4 Zanzibar L.R. 14.
[52] (1931) 2 Nig. L.R. at p. 39.

and remoter of the two systems of law. In the practice of the Natal courts this has been held to mean that preference should be given to native law, wherever possible. Thus in the *Moima Case* itself, the plaintiff's demand for the repayment of an alleged loan of stock from the defendant was held good against the latter's plea of prescription which, being unknown to Native Law, must be disregarded. But in *Mhlongo* v. *Mhlongo*,[38] a later case, the same judge held that the Roman-Dutch Law applied to the exclusion of native law, since the loan of *money* (as distinct from stock) was foreign to native law, and that the defendant brother's plea of prescription against his plaintiff brother's demand for repayment succeeded. It seems that, on the whole, the tests as to which of the two systems of law should be applied under (*a*) are: (1) The intention of the parties, (2) the nature of the transaction, and (3) the environment of the parties. But none of these is alone decisive. Under (*b*), i.e., where only one system applies to the case but not the other, that which affords a remedy must be applied. Thus, in *Muguboyo* v. *Mutato*,[39] where the trial judge had dismissed an action for damages for defamation on the ground that slander was not an offence among the tribe, it was held on appeal that, instead of dismissing the case, the trial judge should have applied the Roman-Dutch Law which recognises the offence.

We will now conclude this examination of the South African practice with a statement of the five summary propositions suggested by Julius Lewin: (1) The Roman-Dutch Law as the common law of the Union is the primary source, and native law applies only in matters peculiar to it; (2) if a cause of action is recognised by only one system, that system which affords a remedy is alone applicable; (3) the system of law indicated by the plaintiff in his writ is the one to be applied, thus giving the plaintiff a discretion similar to that given by statute to the judge; (4) if no such indication is given by the plaintiff, then the true test is the nature of the transaction. If still in doubt, then the court is to apply the

[38] (1937) N.A.C. (N. & T.) 124.

[39] (1929) N.A.C. (T. & N.) 73.

Roman-Dutch Law (5) 'where possible, the rules followed in the conflict of laws apply.'

All these are suggestive, but it is submitted, with respect, that they are inapplicable to British Colonial Africa or, indeed, British colonies generally. In the first place, colonial courts can hardly ever countenance any suggestion that the plaintiff should be free to choose his law, not in a prior agreement, but in a writ. In the second place, colonial ordinances specify which matters of customary law shall be subject to the jurisdiction of the native or local courts, leaving the residue to the British-established courts. It is only in certain well-defined class of cases that resort is had to English law; it is not, like the Roman-Dutch in South Africa, the primary law. In the third place, there does not seem to be any clear evidence of statutory provisions to the effect that, where there is no express rule of law either way, the court is to be guided by principles of 'natural justice, equity and good conscience'.[40] It is to be noted that this gap is not filled by the principle of effectiveness implicit in proposition (2), for it is just possible that neither of the two systems envisaged there may afford a just solution, so that it then becomes necessary to apply a *tertium quid*. Fourthly, we may accept proposition (4), but without the conditional clause. Finally, if by the phrase 'the rules followed in the conflict of laws' mentioned in the last proposition is presumably meant those applied by the courts of the Union of South Africa, one must register dissent.

SUMMARY

We may now attempt a summary re-statement of the rules which seem to have been fairly established both by judicial decisions and by legislation in British colonial courts. It makes for simplicity to consider in the first place two broad categories: (1) Cases of conflict in which English law tends to be invariably applied, and (2) those in which indigenous or customary law similarly applies. We shall then proceed to consider (3) conflicts between English

[40] Cf. Courts Ordinance (Ghana), Cap. 4, s. 87(1), *proviso*.

law and customary law, and (4) conflicts between one customary law and another.

1. English law seems to be the proper law in *seven* types of situation:

(i) Where it has been expressly or impliedly adopted by the parties;
(ii) Where it is the only one applicable to the dispute or transaction to be judged;
(iii) Where at least one of the parties to a case is a 'non-native' and the matter in issue is not one exclusively within the province of customary law;
(iv) Where a local statute provides that, in the absence of an express rule of either English law or customary law on the point, a court is to be guided by the principles of 'natural justice, equity and good conscience', it is English law that is in fact applied in practice;
(v) It is more or less according to doctrines of English law that issues of repugnancy of certain rules of customary as well as such general issues as those of public policy or morality have hitherto been determined;
(vi) English Acts of Parliament embodying rules of law extending *ipso facto* to a British colony prevail in that colony over any repugnant or inconsistent local enactments or other law (The Colonial Laws Validity Act, 1865);
(vii) The rules and practices of the English conflict of laws are normally followed in matters of contract, tort, wills, domicil, and the like. The more cosmopolitan and the less traditional a colony's communities are, the more readily do its courts adopt these English doctrines and rules.

In this connexion it is useful to remember that for conflictual purposes, colonial territories are treated in the practice of English courts as foreign countries, though in certain exceptional cases a colonial territory is assimilated to that of England.[41] Thus,

[41] e.g., *The Tolten* [1946], P. 135.

in *R.* v. *Wilson, ex parte Pereira*,[42] the mother of a bastard child applied to the High Court in England for an order of *mandamus* directed to a metropolitan magistrate requiring him to exercise the jurisdiction conferred upon him by the Bastardy Laws Amendment Act, 1872 and the Maintenance Orders Act, 1950, and to issue a summons under those Acts against the person whom the applicant alleged to be the father of her bastard child. The child was born on July 15, 1950 in Gibraltar to the applicant who, though a British subject, was at that time domiciled in Gibraltar. On the ground of this foreign domicil of both applicant and her child, the magistrate refused to issue a summons in bastardy, and it was held that he was right.[43]

2. Customary or other traditional law appears to be primary in the following cases:

(i) Matters expressly reserved for customary law by local statutes – e.g., customary marriage, land tenure, succession and inheritance, testamentary dispositions,[44] and chieftaincy disputes;[45]
(ii) Where, although one of the parties to a case is a 'non-native', substantial injustice will be done by a strict adherence to English law, customary law will be applied if the other parties are themselves subject to the jurisdiction of customary law or court;[46]

[42] [1952] W.N. 457.
[43] One other consequence of treating colonial territories as foreign countries is that special ordinances have had to be passed by most colonies with a view to securing such reciprocal advantages, *vis-à-vis* Great Britain and *inter se*, as enforcement of foreign judgments in one another's courts, the service of writs out of their respective jurisdictions, and similar matters in the Conflict of Laws. Those wanting more details should consult the Statute Book of the colony concerned.
[44] 'Testamentary dispositions' is an item to be found in certain colonial ordinances, e.g., West African Supreme Court Ordinances. As we have pointed out earlier in this chapter this is hardly a legislative recognition of testamentary capacity on the part of Africans of this area, although no one has questioned their growing exercise of the right to make wills. Also, are the 'dispositions' only such as customary law permits?
[45] Subject, however, to the conditions stipulated by Lord Wright in *Laoye and Others* v. *Ojetunde* [1944] A.C. 170, for which see pp. 93–4 earlier.
[46] But this seems applicable to some territories only.

(iii) *Prima facia*, where all parties to the dispute, ◯tives' as well as 'non-natives', agree to be bound by customary law.

3. Conflicts between English law and various types of customary law (including Islamic law) may be resolved as follows:

(i) If there is a conflict between a local enactment and an English statute of general application in England, then the English statute prevails (Colonial Laws Validity Act, 1865);

(ii) If the conflict is between an English common law rule and a local enactment, then, provided the enactment is later in date than the origin of such English rule, there is a presumption that the colonial enactment prevails whether or not it can be shown that it has been passed in ignorance of the English rule. If the English rule is laid down as a judicial precedent subsequently to the colonial enactment, the latter of course prevails.

(iii) If a rule of customary law is at variance with a principle of English equity, it seems clear that a colonial court is as bound as an English court to follow section 25 (*b*) of the Judicature Act 1935 and to allow the particular principle of equity to prevail. The reasons for this proposition are two: (*a*) Many colonial Supreme Court Ordinances contain a provision analogous to that in the 1925 Act making equity prevail over statute within the colony: For this purpose, Equity must be the same in England as in the colony concerned; (*b*) the touchstone of the validity of an alleged custom though not of a local statute, is that it is not repugnant to 'natural justice, equity and good conscience'. *Sed quaere:* If a colonial enactment is at variance with a principle of English equity, with reference to the same subject-matter. In England, equity prevails over such an enactment. It is tempting, but probably plausible to say: *Ergo*, the colonial enactment ought to be superseded. There is no authority on the point;

(iv) If there is a variance between the procedure adopted in

the trial of ◯ case in the native or local courts and that which a British-established court would have employed in hearing the same or similar action, the former is not necessarily set aside as a nullity merely on the ground of such difference if substantial justice has nevertheless been secured therein;

(v) If a colony's ordinance, e.g., its Criminal Code, regards an offence as amounting, say, to manslaughter but an alleged rule of customary law (including Islamic law) imposes only the death penalty for murder for the same offence, the provision of the particular code prevails or ought to prevail. But this line has not always been the one followed in practice in some colonies;[47]

(vi) Where English law imposes only imprisonment for certain offences in circumstances where the local customary or traditional law would only award compensation to the injured party or to the surviving relatives of the victim of a murder, practice varies from one colony or group of colonies to another. In some, notably the East African ones, in deference to local sentiment, the normal sentence of imprisonment in a British-established court is sometimes supplemented by the award of customary blood-money or compensation against an accused person in the native or local court – but with a correspondingly diminished term of imprisonment as well as a lesser amount of compensation. In other colonies, e.g., the West African and the West Indian, only the English mode of punishment is enforced; there is no recourse to native or local courts, with the possible exception of Moslem courts in certain cases.

4. Conflicts between one body of customary law and another do not, as we have seen, follow any well-defined principle or set of principles. The judges are very often blissfully unaware

[47] The reader who is interested in this problem may be referred to T. O. Elias' *Groundwork of Nigerian Law* (1954), pp. 26, 173, and J. N. D. Anderson's article, 'Conflict of Laws in Northern Nigeria', in *Journal of African Law*, Vol. 1, No. 2, 1957, pp. 87–98.

of the problems of choice of law. The one sound instinct on which they seem to rely is that a solution to the dispute before the has somehow to be found, and in the process they seem to resort to an appeal to natural justice and 'sweet reasonableness' – a mixture of *ius gentium* and *jus naturale*.

Thus, an Alkali in Northern Nigeria, a Liwali in the Tanganyika township or a Cadi in Malaya sits in judgment, apparently with no qualms, over disputes between a believer and an unbeliever, applying now the Islamic law of one school or another, now a mixture of it with elements of purely indigenous customary law; no infrequently, he manufactures his own law whenever other sources fail. Sometimes, a statute attempts to lay down rules of guidance. An instance is the Tanganyika Administration (Small Estates) (Amendment) Ordinance of 1947, and another is the Kenya Mohammedan Marriage, Divorce and Succession Ordinance, both of which have been designed to settle the conflicts that often arose between the Islamic rules and the customary rules of intestate succession to the estate of a deceased Moslem. Formerly, non-Moslems were rigidly excluded from the succession. Similarly, in Northern Nigeria, certain more or less definite rules as to the proper law to be applied in mixed cases were embodied in the Native Courts Law and the Moslem Court of Appeal Law, both of 1956.

There are, however, no similar statutory provisions for settling mixed cases invlving two or more bodies of indigenous, customary law; apart, that is, from the universal one that a native or local court is to apply the customary law prevailing in the area of its jurisdiction. It is submitted that it is as well that the task of choice of law has been left to the courts.

II

Land Tenure in the Colonies

PRINCIPLES OF INDIGENOUS LAND TENURE

PROBABLY the most fascinating feature of the systems of land-holding in the British colonies is its variety. Forms of tenure range from the ubiquitous corporate holdings in African, Asian and Pacific territories to the untraditional and more or less individualised holdings in most of the Caribbean islands in the West Indies and similar places like Hong Kong.[1]

This diversity of the colonial tenurial systems is reflected in the differing forms of land legislation and agrarian policy introduced and fostered by the British administration. After much initial mishandling and uncertainty, a cardinal principle of the colonial governments has come to be established that there should be as little interference as possible with the prevailing forms of indigenous tenure. Another principle, which must be regarded as fundamental to the whole question of colonial land law, is that laid down authoritatively in the Privy Council judgment of *Amodu Tijani* v. *Secretary, Southern Nigeria*[2] to the effect that the Crown does not have proprietary ownership in the land of a ceded colony, even if the instrument of cession uses language that may lend an operative clause such a legal interpretation. The point is emphasised that, whatever else is transferred or surrendered to the Crown under the Treaty

[1] See p.p. 9–10, *supra*.

[2] [1921] 2 A.C. 399. See T. O. Elias' *Nigerian Land Law and Custom* (1953), pp. 74–76, for a full discussion of the problem.