NEC-TRADITIONALISM AND THE CUSTOMARY LAW IN MALAWI*

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"We think so then and we thought so still."
(Edward Lear)

Malawi is used here as an example to illustrate an argument which I think has more general application. Put briefly, the argument is that the failure to study historically the changes in African law in the colonial period has led to a confusion of tenses which affects our understanding of African law. As a legacy of the colonial period those states which had been under British rule had a so-called dual legal system: part British, part African. Africanist lawyers have since, quite properly, been building upon, "restating," and re-asserting this African element. Yet they know very little about how it came to be what it is; and there is a tendency to treat it as a kind of timelessly valid African "survival." But the African law of modern Africa was born in and shaped by the colonial period. I think it can be shown that in the areas of criminal law and family law, African law represents the reaction of older men to a loss of control over wrongdoing generally and, more acutely felt, to a loosening of control over women. This reaction grew in strength during the first thirty or forty years of the colonial period. Then, in accordance with the policy of indirect rule, a large portion of the administration of justice was turned over to precisely those people who had reason to define and, more importantly, to administer the law in a restrictive and authoritarian way. These definitions form the basis of current African law. Historical research into the "legal environment" in which pre-colonial law turned into the "customary law" of the colonial period could help to correct the process by which Africa is being given an authoritarian law invalidly claiming to embody its indigenous legal genius.

One of the most obvious gaps in our knowledge of the colonial period in Africa is in the field of law. The study of law has been left largely to lawyers and anthropologists, and has been bypassed by historians who have, more often than not, been content to remark upon the "repugnancy clause" and perhaps

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to describe the structure of indirect rule in British Africa in the context of their account of political change. (It is striking, for example, that Chapter 1 of Lucy Mair's text Primitive Government (1962) is on "Redress of Wrongs," a subject in which historians, for all their attention to subjects like state formation, have been little interested.) Until recently neither lawyers nor anthropologists have focussed upon legal change except in the broadest evolutionary terms. Lawyers, when they are interested in legal history, are usually interested in the practical questions of what is the pedigree and authority of a particular rule or rules, when they came to be applicable in the courts, and whether they are applicable now. Lawyers writing history are rarely interested in the general legal "culture," which includes not only the formal workings of the legal system but also the ways in which people have perceived it, their ideas about what the law should be. Law was the cutting edge of colonialism. Law in the colonial situation was the instrument of the power of an alien state and an intimate part of the process of coercion. Rulers and ruled met face to face in the colonial courts in the early years of colonial rule. Not only were the innumerable new restrictions enforced there, but ancient wrongs were punished in new ways and fundamental social ideas about rights and duties, especially those pertaining to the family, were subjected to new interpretations. A variety of myths has arisen from this confrontation. There is the myth of the colonizers (perhapy their oldest surviving myth) that the legacy of legality, the rule of law and equal and uncorruptible justice, was an important benefit conferred upon Africa by colonialism. And there is the African response: the myth that portrays a viable indigenous law pre-dating colonial rule and surviving in essence throughout the colonial period as an identifiable body of traditional African law that can still be used today. In the case of modern Malawi myth and counter myth have become an important part of politics and have been crucial to the definition of cultural nationalism. The assertion of Malawian law and legal ideas in opposition to their foreign counterparts has been explicit and frequent, and has been the rationale for the purported rejection of the colonial legal structure.

Recent statements by Malawian leaders about their dissatisfaction with the state of the law are not hard to find. In the year before independence the then Minister of Justice, Orton Chirwa, introduced the first of many legal reforms with an attack upon the administration of justice during the colonial period. In the same debate the Prime Minister, H.K. Banda, registered the complaint that "the laws under which we have been governed are not the laws of this country" (Nyasaland Legislative Council Debates, March 1963). After independence the critique of colonial law esclated a little. In 1967 Dr. Banda expressed his explicit disapproval of such foreign importations as the principle that a man was innocent until proven guilty, the need for corroborative evidence, and the notion that intention was important in cases of legal

killing. Technicalities had to be done away with; treatment in prison was too lenient. There was much passion in his exposition and he was supported by other leaders (Malawi Parliamentary Debates, April 1967). The scene was repeated in 1969 when the Malawian Government proposed its most far-reaching reform of the legal system, creating "traditional courts" outside the ambit of the ordinary court system. It has been suggested that this move was the result of the Government's difficulties in getting the Supreme Court to convict in a series of politically motivated axe murders that had swept the largest town, Blantyre (Brietzke, 1972; Hooker). But while this was a crucial factor in the timing of the measure, its introduction was already forshadowed. Aleke Banda, (no relation to the President) who was in charge of the measure, told the Malawian Parliament that the courts had been "very much governed by the practice in Britain" and now that independence had come they could no longer "slavishly copy" the British example (Malawi Parliamentary Debates, November 1969). Taking part in the debate, other members of Parliament objected to the "English tradition" of paying for the defence of "the very same person who committed the offence," the presence of lawyers, and the constraints of the British rules of evidence. The current of feeling, in both 1967 and 1969, and the gist of the reforms was hostility to technicalities in criminal justice and nostalgia for a traditional justice that was supposedly free of these.

By itself, the rejection of foreign influence is not remarkable. Of greater interest are the statements of social ideology and the images of the past that were produced by the debates. Dr. Banda's own hostility to his version of the "permissive society" is a subject on which he expresses himself frequently and legal reform, to him, was a means of securing surer and harsher punishments. "There is a tendency now in Britain," he said in the debate of 1967, "not to punish anyone...we cannot afford it here." The other members of Parliament also saw matters this way in the 1969 debate. And along with Dr. Banda they linked the demand for a more punitive justice to their picture of traditional justice before the coming of the white man. To give some representative examples:

> *traditionally, before 1891...we had our traditional passion.... For example if one killed a person and he was found... he was tied up, his arms, his legs, a lot of firewood gathered together and made into a fire; that man thrown on the fire to burn and pay back what he did. That's what we used to do....*
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> *Our tradition was that if a person was found pickpocketing...that hand must be cut* (Interjection) *"Yes"* (Interjection) *"Or eyes plucked out."* (Malawi Parliamentary Debates, November 1969).

Lest it be thought that this kind of rhetoric is just one of the quirks of the current leadership it should be pointed out that this image of traditional justice at work has been shared by Malawian lawyers and other members of the Malawian elite for the last fifty years. Emily Maliwa has written that punishment for theft in pre-colonial times was "excruciating" because there was "no justifiable excuse for stealing," and she quotes the former Resident in Zomba, Sir Hector Duff, to the effect that "among primitive people where the moral sense in essentially feeble, legislative retribution is of necessity exceptionally severe" (1967 : 48-49). Likewise L. Chimango-Lefani (1971) writes :

> *Customary law was notorious for stringent penalities. Even for petty thefts the death penalty was possible. Homicide and adultery invited death. The culprits might be consumed by fire.*

His authority is not a white observer but G.S. Mwase who was an outstanding and vocal member of the Malawian elite from the 1920s onwards and who wrote at length about the law (Rotberg, 1967). It is not particularly surprising that the colonial rulers all over Africa depicted pre-colonial law in terms of savage punishments but it appeared to me to be odd, on the face of it, that this view should be so widely, and enthusiastically, accepted by Malawians. There are many accounts of pre-colonial law written by Malawians over the years since the 1920s and all are agreed that mutilations, death by burnings, enslavement of offenders, revenge killings, and the like, were features of criminal justice in the pre-colonial past.

Academic Africanists will know that this picture could not be further from current anthropological orthodoxies about the pre-colonial law (or even current Africanist legal orthodoxies). I cannot here attempt to sum up the changing fashions in the writing about "primitive law" that have taken place during the colonial period except to say that under the influence of anthropology there has been a steady move away from an Austinian analysis of law as a series of commands backed by state power and courts as instruments for enforcing these rules. Early legal analysts looking at Africa often found no such rules, power, or courts, and emphasized the differences between "primitive" and western law (e.g., Hartland, 1924; Rattray, 1929). But gradually the view took hold that all societies had laws and means of settling disputes, though these might not necessarily be the same. While some, for example Gluckman (1955, 1972), argued that African legal ideas and methods were essentially similar to those found elsewhere, the prevailing fashion has been to look for and try to define a distinctive African legal genius. The picture of African dispute settlement that has gradually emerged from this is typified by Maquet's statement:

> *Compromise is a key word in Africanity. It is a way of settling personal disputes and conflicts of interest by trying to find a solution acceptable to both parties....the antithesis of settlement by compromise is settlement by reference to abstract principles. The application of such principles often results in an extreme solution: one of the parties has to be right and the other has nothing.* (1972:76)

This was "distasteful" to Africans who knew that "reconciliation" was better. Basil Davidson in the significantly little he has to say on the subject of law in his "entry into African cultural history" has written to the same effect. The governing principle of African law lay in the duty to conserve the "ideal equilibrium." The emphasis was on compensation (1973: 206-07). Legal writers have also contributed to the Garden of Eden view of African law. Nekam, for example, tells us that African law was "a system of keeping the balance...geared...not to decisions imposed but to acceptable solutions...." In the "traditional African community" there was "no polarization of needs, of taste, or of values," and once the facts were established "the same solutions will appeal to all and ways to achieve them will seem obvious...the feeling of balance will be something spontaneous and self evident" (1966).

Whatever these statements may be they are clearly not descriptive. Disputes in pre-colonial Africa, like those elsewhere, were unpleasant and often violent. Persons were harmed and felt serious infringements upon their sense of what was right and wrong, and often wanted revenge as well as compensation. Conciliation was not always possible and solutions could be imposed by stronger upon weaker. The conciliatory discussion, the award based upon a mutual perception of equity, can never have been more than a partial aspect. Even where moral positions are agreed upon the cry for a lex talionis is a common one. Where morals and rights are in dispute between groups, between generations, and between sexes, the positions assumed in anger, or in anxiety, or from power, will also define the law and the kind of settlement. The idealist view is clearly of no use to an historian as a description of what happened, any more than the nineteenth century English legal system can be described in terms of its self image of incorruptible judges administering the law without "fear, favor or prejudice" to free men equal before the law and the judgement of their peers. But if we reject the idealist view, must we fall back on the Malawian one, with its deaths, burnings and mutilations? (Lest it be thought, as it sometimes is, that there is something particularly wicked about Malawians, the view of customary law enunciated by their vocal elite does not differ essentially from that given in other countries in East and Central Africa) (see, e.g., H.H. Daudi Chwa in Low, 1971: 105-06). The gap between anthropology and the African evidence is as wide, if not wider,

in the field of family law. Why is there so wide a gap between academic knowledge and conceptualizing and the popular view, and how do we go about acquiring a truer picture?

It was with these kinds of questions in mind that I began the study of Central African legal history. My intentions were not only to use the written records of the colonial government and missions but to gather oral evidence as well. Modern Africanists, particularly historians, have a great deal invested in the value of oral evidence and strongly resist suggestions that seem to detract from its use as a research tool. In particular it might seem to have special validity as a means of gathering materials from essentially African sources on precisely the kind of African cultural history that was both denigrated and distorted by outside observers. But there are special problems that arise when considering how to use oral evidence in the legal field. For in an unwritten law the very claim that a rule is or was the law rests upon the assumption that it was changeless, that it was the way things were always done. The fact of its changeless regularity is what gives it authority as a rule. Furthermore the claim of regularity and immutability is fortified by the consideration that when people make statements about the law they are often making statements about deeply held moral positions. The rules about how a husband and wife should behave towards each other, or what should happen after a killing, to give two examples, involve fundamental positions. People making statements about them find it very difficult to separate "is" from "ought," or in this case, "was" from "ought to have been." Marc Bloch in _Feudal Society_ (1965:I/113-14) presents a sensitive account of the historicity of the customary law and the changes it undergoes behind a facade of changelessness. The law of feudal Europe, Bloch wrote, was based upon the idea that "what has been has _ipso facto_ the right to be." In a law case "the prestige of the past could scarcely be contested save by setting it against a past more venerable still. The strange thing is that this law, in whose eyes any change seemed an evil, far from being unchangeable was in fact one of the most flexible ever known." Law was not fixed in writing and memory was the only guardian of tradition: "human memory, the fluid memory...is a marvellous instrument of elimination and transformation." The past was continually being remade: "Jurisprudence was the expression of needs rather than knowledge."

It is in the "needs rather than knowledge" that the essential clue is to be found to the nature of the Malawian evidence about what the customary law was. For the statements which were (and are still) made about it are not so much statements about what the law was in the past as claims about what it ought to have been in the past and should be in the present. The question which faces us, then, is not "Are these statements true about the period of which they are being made?" but "Why is there the need to present the past in this parti-

cular way?" This question can only be answered by considering the whole legal environment of the colonial period, especially the upheavals of its earlier part. An oral statement about the law, then, both is and is not a statement about the past but a claim about the present. This claim must be rigidly presented since customary law, especially when in a state of flux, cannot afford to appear flexible because its source of legitimacy is tradition.

The first thing to strike an historian faced with the problem of writing about African law is the question "when was the African law?" In the case of Malawi this cannot be answered just by assuming that a customary legal system functioned during the pre-colonial years of the nineteenth century, elements of which now form the African part of the Malawian legal system. It hardly needs pointing out that the British conquest of Malawi in the 1890s was but the last of a series experienced by the indigenous matrilineal peoples. The Ngoni conquests, imposing very different concepts of marriage, and laws and power to go with them, effected an upheaval in the sphere of family law. As the slave trade grew during the nineteenth century it also transformed the institutions of personal and family law and imposed on many some kind of servile status. The general decline in effectiveness of local political institutions under the impact of the series of nineteenth century crises affected the instruments, machinery, and methods of dispute settlement generally. The "when" in the minds of the neo-traditionalists is the immediate pre-colonial period, but it was hardly a time of functioning normality. The next question is "whose was the African law?" It is clear that prior to the colonial conquest there were several systems, some of which co-existed in varying relations of dominance and others of which were in fierce conflict.

It was into this situation that the British administrators came, with exaggerated notions of legal messianism in the early years. They did not think much of the African law, or of anything else African, and were determined to bring law and order, and above all what they saw as equitable justice, to the savages they had just rescued from chaos. One example will suffice. Duff, who was a Magistrate in Zomba. the capital, wrote that before the British had come virtually all offences were punishable by death preceded by torture because "savage governments can only be upheld by a policy of terror," and that the British were trying to apply their "humane ideas" to those who had lived by "international rapine." Justice was meted out in a "decidedly patriarchal fashion" by the Residents. No special training was needed to "distinguish *meum* from *tuum*, plain right from plain wrong" (Duff, 1903 : 238, 326, 330). In this atmosphere, in the early years, the administration gathered court work unto itself in the belief that its beneficent justice would not only establish its authority but make that authority more acceptable. These expectations were not to be fulfilled.

The young residents were ignorant of the language of their new subjects, and at the mercy of interpreters, Boma messengers, and police, many of whom saw the opportunities to do well for themselves out of the new dispensation. Even without these handicaps the court books testify to the fact that justice was often administered in an atmosphere of scorn, impatience, and cruel schoolboy humor. The role of the new courts made it inevitable that they would become unpopular. For far from bringing a new justice, they settled down to a daily routine of punishing tax offenders and offenders against the employment laws and the host of other new ordinances. They were, and they came to be seen as, the arms of colonial social discipline, and they would often go beyond the law to punish behavior. And, yet, in the early years, the new courts filled with civil litigants who preferred to seek justice in them in spite of the risks. Who were these people and what brought them to the courts? To answer this question I must turn from the criminal law to the law of the family.

In much of the writing about the colonial era African marriage is seen as crumbling under the impact of outside forces. In the case of Central Africa labor migration and the influence of the missions are said to have been the vital factors for change. What has been obscured is the acute conflict between different types of African marriage, which carried over into the colonial system. The new courts found themselves flooded with women seeking divorce or, as they often put it, release from slavery. In a large proportion of cases in the early years these were Chewa or Tumbuka "captive wives" seeking release and an opportunity to return home. The new white magistrates were at first eager to help. After all, part of the legal mission was to provide succour and uplift to African women, who were regarded as being in a degraded position. The competence newly granted to women to initiate cases, and the ease with which they obtained dissolution of their marriages, produced an intensely angry reaction from the male population. Gradually there emerged a picture of a golden age in which women had been submissive, divorce rare, and adultery heavily punished. It was the counterpart to the picture of pre-colonial criminal law--virtue maintained by strictness--which the colonial generation was also manufacturing. In former days, as the Reverend Ysaye Mwase put it, women had occupied themselves with "cooking and pounding...helping their husbands and fathers...[they] were loving and amiable in their homes...divorce was very rare.... Where the authority of parents or chiefs is obeyed implicitly...there could be no common divorces" (Malawi National Archives, Native Customs General, NS1 /3/26) "Strict and terrible" punishments had been inflicted for adultery and fornication. If the offence was repeated a man's relatives "would be disposed to give him over to be burnt up alive in an open field, without mercy, in the presence of a great crowd of people." Similar accounts of the pre-colonial laws regulating sexual behavior were offered for all parts of the country during the 1920s. G.S. Mwase was clearly unhappy about the way in which the new laws not only required that a woman consent to her marriage but also treated

women as if they had the right to arrange their own marriages. While the parents of a young woman were looking for an appropriate husband, he wrote, "Another whimsical fool wheedles her and falls into adultery with her without the permission of her parents. This is...a case which the whiteman's laws say absolutely nothing against it. It is said that both are free agents and can arrange and agree whatsoever is between them." He felt that the man in such cases should be treated as an adulterer and punished very severely, although there were now

> *a lot of doubts in the way the whiteman decides it. [Formerly] this is one of the capital charge...followed with death sentence by consuming both the culprits by fire...even a spear would play his flesh or her flesh until they were both perished...And sometimes both culprits were to be given away by cutting of parts of their bodies such as ear, arms, nose or something else in the way of emasculation.... But the whiteman's law is very much relaxed in dealing with this case. I am afraid such slackness in this respect encourages the crime to be done publicly or without shame.* (Rotberg, 1967: 115-17).

This reaction among Malawian men was shared by the colonial courts. District Officers soon grew impatient with the number of marriage cases and came to believe that the men were right, that women were getting out of control, that the authority of parents and husbands was being dangerously undermined, and that this threatened the moral standards and well being of the community as a whole. There was nothing essentially incompatible between the British conception of the male dominated monogamous family and the kind of morality African men were demanding. A great deal has been written about the clash between Christian monogamy and African polygamy and the fascinating problems of law which arise. Yet I would stress that this is really a fringe issue. Few people were directly affected by Christian marriage, and Christian marriage was not essentially subversive of male or parental authority. Many of the complaints about social dislocation, about weakness in authority leading to immorality among women, came from the new Christians, but their main concern was not the polygamy which bothered the missionaries, but adultery by women and divorce. In so far as the Christian concept of marriage did influence the bulk of the population it served to provide an extra weapon, the divine sanction of indissoluble marriage, in the struggle to keep women disciplined. An idealized concept of the old morality could make common cause with the new mission morality.

The coming of the missions and their obsession with sin was an added ingredient in the making of a punitive and authoritarian customary law. One observer describes the Livingstonia Presbytery meeting in 1914 and its discussion of marriage and divorce at which "the sympathy of the native elders seemed to go out chiefly to the husbands."

> *A more highly instructed member rose to a point of order. The Presbytery, he said, had already settled the law of marriage. Upon this Dr. Elmslie started to his feet. "It is not the Presbytery that has made the law. It is the law of Christ." ...he repeated [this] in the native speech with a passionate vehemence* (Morrison, 1969: 47-48).

The law was no longer man's but God's; its transgression was not a social wrong but a sin. Consequently notions of punishment also escalated. The neo-traditionalists, animated by a fiery version of the Christian conscience and under the pervasive influence of the Old Testament, represented the former mutilation of thieves or the killing of sorcerers as having been a punishment for moral infraction rather than a means of deterrence and prevention. The escalation of the consequences of crime, and the tendency to equate crime with sin and to demand an appropriately apocalyptic punishment, can conveniently be illustrated again from G.S. Mwase. He concludes his comments on the kindness of his treatment in prison with the following remarks:

> *I wonder if divine treatment towards sinners is like this one which our local government is doing to its sinners. I think the divine punishment is more better than the Government can do. Picking out from what I am taught the divine punishment is very cruel. There is no mercy or grace towards a convict.... Out of what I am taught is clearly that once you are convicted by the divine court and sentenced to everlasting punishment [you have] no food, cloth, water...* (Rotberg, 1967: 114-15).

In Mwase's view, not the Zomba prison but the missionaries' hell was the just desert for the criminal.

To this must be added the problems caused by the administration's outlawry of the ritual trial to detect witchcraft. A good deal has been written about anti-sorcery movements in Central Africa but nowadays the problem is rarely put in the context of a discussion of the law. Yet Malawians in the colonial period often identified the problem of witchcraft

detection with law and still do. All I wish to say in this context is that when the muavi ordeal trial was outlawed the effect was to take control of a major area of malfeasance away from the community. The abolition of former sanctions against the "criminal" sorcerer led to the demand for new sanctions. Death by ordeal was a necessary part of some muavi trials since it proved the suspect's guilt. I would suggest that it was death in this context that was the basis for the assertion that homicide of any kind in pre-colonial Malawi was punished by death, a claim often advanced in support of demands for the extension of the death penalty. The abolition of muavi had also an effect on the atmosphere surrounding family law, for it had commonly been used to test allegations of adultery by women. Its abolition was another reason for the male community to feel that women could misbehave with impunity.

Finally, the briefest mention of slavery, which was widespread by the late nineteenth century, especially in the new conquest societies of Central Africa: Slaves, or their matrikin, soon found that the new courts did not recognize servile status, and could be used to obtain release (even though Livingstone's heirs were rather less anxious to effect a social revolution than he had been). For the former rulers of African society this was another blow to status and authority generally. It also outlawed the main means of paying compensation in order to restore the equilibrium of which the idealists write. And it destroyed many of the "marriages" that formed the structural basis of Ngoni and Yao conquest states. It is thus part of the context in which the leaders of Malawian society developed feelings of anger and anxiety about social breakdown.

It is not particularly remarkable to point out that the former rulers in Malawi and elsewhere suffered a loss of authority. But for the legal historian it becomes crucial because this loss was felt in "legal" fields over which these men were again given power in the early 1930s. The temporal conjunction of a social reaction and the creation of the Native Authority Courts was to leave a distinctive legacy not only in Malawi but widely in East and Central Africa. The establishment of the Native Authority Courts led to the creation an African customary law in a particular historical context by men whose outlook had been formed by the particular processes of the social history of the early colonial period. This was a time not only of disintegrative impact and structural change but also one of attempted restoration and rebuilding, both contributing to the growth of a neo-traditional ideology. It was a time, too, not of the reception of the English common law but of the imposition of institutions which shaped the new legal environment in which the African legal response was formed. This new environment structured the conflict not only between African and English legal ideas but between sometimes conflicting African legal systems. Focussing upon these processes, rather than upon theories about dispute settlement in small societies or idealization of the pre-colonial past and its pur-

ported survival, may be the most useful way to understand the growth of the customary law, for it brings to the forefront the circumstances in which emphasis was placed on certain kinds of values, and the ways in which these were turned into law.

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