Treating Law as Knowledge: Telling Colonial Officers What to Say to Africans about Running "Their Own" Native Courts

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This article is presented at two levels throughout. On the surface it is a straightforward historical analysis of a directive to British officers in charge of African courts in the late colonial period, with some African data adduced to sketch the local context into which the British were trying to insert new procedures and practices. On a deeper level the article uses the British colonial occasion to explore widely held cultural assumptions in Anglo-American law about the definability of "justice," the concept of time and timing in legal affairs, and the complex place of the idea of legitimate, authoritative, and permanent "knowledge" in legal institutions.

When governments explain what they are doing "for the record," the regnant cultural logic of control is available for inspection. Nowhere does this logic seem more confidently expressed than in colonial settings. During earlier decades of this century, as British colonial officers in Tanganyika organized a system of African local courts, certain officials wrote detailed explanations of their plans and purposes for their subordinates. Their view was that they were conveying their superior knowledge of law and morality to the often benighted Africans. This article will use the text of one of those extended explanations to explore the British colonial conception of their moment in African legal history. Other archival and library materials together with fieldwork data are used to show how inappropriate some of those British ideas were to the actualities of the African setting.

The Africa of reality had its own social and legal logic, about which this article offers some new interpretations. Yet, for all the misconceptions that existed, the colonials' effort to insert their model of a court into a complex and little understood African setting was not without enduring results. British colonial ideas of courts and what courts are about have left a substantial legacy that can be seen in many parts of present-day Africa. While I shall not discuss that formal legacy in any detail here, I shall show certain tensions between courts and their social contexts that have persisted. I will, for example, indicate

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the mechanisms by which the thrust of internal community politics in rural areas affects the courts today even as it did in the colonial period. Local community control of witnesses and testimony and sometimes of local judges is at cross purposes with the central government's putative maintenance of "impartial" courts. That essentially political conflict existed in colonial times and exists now. Thus, what might be called "the colonial legacy" includes the ongoing tension between a centralized national system of courts with a standardized set of principles and rules, and the locally anchored, anti-centralized system of the rural communities. Those communities try to control their own members and do everything to maximize their internal autonomy, allowing their members effective use of the courts only as they see advantage in doing so, bypassing the courts and settling their own affairs internally as they choose. In short, there are features of the localist opposition that have not vanished from postcolonial society. The colonials had to cope with the consequences of this "localism" but did not understand the nature of local rural communities. Current political officials and magistrates live in both "central" and "local" worlds. Yet their knowledge of both has scarcely changed the situation.

What was the colonial vision of law and courts? A remarkably explicit answer to that question appears in the contents of a 1957 legal document from Tanganyika describing the design and purpose of the local courts—the 1957 *Local Government Memoranda No. 2 (Local Courts)* (hereafter cited as 1957 *Memoranda*).[1] These local courts were to be run by Africans and would apply African "customary law" but were to do so in a manner consistent with basic British legal principles and the objectives of colonial administration. That this agenda was inherently contradictory was, of course, not explicitly acknowledged, but as we shall see, evidence of considerable practical difficulty is apparent in the text of the 1957 *Memoranda*.

The document is a historical gem. Divided into three parts, it not only contains the ordinance that governed the operation of the courts but also includes two sections of explanatory text, one designed to instruct British administrative officers, the other written for translation into Swahili and specifically edited for the African court "holders." The two commentaries are intended to convey fundamental legal principles, many of them universalized by the author as "principles of natural justice." They were, of course, identifiably British in style and content. Some general remarks summarizing what "was known" about African indigenous law are also included for the colonial of-

[1] This document is 120 pages long, including the ordinance, the commentaries, and various forms to be used in the courts. Thus the discussion here is of necessity highly selective in the choice of sections to be analyzed. All otherwise unattributed page and section references are to the 1957 *Memoranda*.

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ficers, so that they will know "what to expect." Operationally, at one and the same time, this legislation involved the delegation of substantial power to African court holders and the reservation of ultimate control by the British. We have, then, a document that encapsulates the colonial conception of itself, its milieu, and its mission.

Such British official pronouncements on the "nature of justice" were phrased with great certainty. They were offered both to legitimize the design of the local courts system and to justify the continuing supervision it would require. Several of these legitimizing ideas deserve to be explored in some detail, ideas about legal evolution and the relative positions of British and Africans in the developmental sequence, about the "nature" of law as necessarily centered on a set of clear rules and durably recorded rulings, about African legal thought as hopelessly muddled, with no sense of the timely moment to bring a grievance to court, little sense of the importance of evidence and proof, no appreciation of *res judicata,* and no understanding of the need for impartiality. Read today, these statements about the idealized court-as-it-should-be of the British directives and the supposedly unprincipled Africa that badly needed British legal instruction appear as tantalizing artifacts of the colonial imagination.

Hence these memoranda could easily and accurately be characterized as self-serving discourses on power, as justificatory representations of the ideology of control. Actually, in and between the lines, the document is also a statement about the incapacities of colonial government, the difficulties built into its judicial model, and the inappropriate premises on which it was constructed. This contradiction becomes fully manifest when any part of the African side of the equation is put into the picture. For the most detailed part of that essential dimension, I draw on ethnographic material from Kilimanjaro, a district in colonial Tanganyika (now Tanzania) occupied by a people known in English as the "Chagga," in whose legal and other affairs I have had a long working interest (e.g., see Moore 1970, 1977, 1986, 1991a, 1991b).

The 1957 *Memoranda* describing the British model was put out very late in the colonial period and long after the start of the colonial courts project. However, the document draws many elements of its 120-page text from earlier editions and includes references to experiences in other colonies, accumulated administrative wisdom, and the compilations of anthropologists of the customary law rules of a variety of African peoples, by no means all of them in East Africa.[2] (Reference in the

[2] Thus, for example, the *Handbook on Native Courts for the Guidance of Administrative Officers* published by the government of Uganda in 1941 was used in Tanganyika as a model for Part II of the first edition of *Local Government Memoranda No. 2,* i.e., the sec-

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document to the British experience in India is a reminder of the time depth of the British concern with such matters.) Written after more than three decades of experience with these tribunals in Tanganyika, the pamphlet complains about the courts even as it praises them. The complaints and the general administrative unease of the text provide a compressed sketch of what the British thought were their intellectual assets and their practical problems.

The minuscule number of administrators who governed not only hundreds of thousands but millions of Africans could well have had reason to be uneasy. They had to be dominant and decisive, yet the practical "unknowability" of their social surroundings must have been one of the many uncomfortable aspects of the job, given that most of them did not speak any of the many local languages. No wonder that the logic of these officials can often be seen as an effort to keep not just the natives but their own conceptual categories in order. The colonials had to be sure of what they collectively and officially "knew" to tell it to the "others."

What we see in all of the sections of the 1957 *Memoranda* is a conflation of the requirement that a prescribed organizational order be put in place with the exhortation to accept a particular cultural rationale. The advantages of setting up a central government where there had been none seemed self-evident to the colonial officers. With central government they presumed the eventual establishment of standardized laws, courts, and units of administration. The court official who composed the *Memoranda* (and all those who preceded him whose ideas he explicitly incorporated) plainly wanted the administrative officers, through "patient" explanation, to convert "the African mind" into an apparatus that would "think" the way the British did about legal matters while somehow retaining a substantive law Africanity. Was the issue one of thought? Or one of control? Or were the two so closely connected in the the administrators' minds that there was no disentangling them? And is this remarkably anxious text to be read now as a detailed complaint that, alas, African conformity was not being offered spontaneously and must somehow be achieved either by enforcement (not desirable and not practical) or by persuasion (not likely to succeed). The answer to all of these questions is yes. For the

tion-by-section commentary on the Native Courts Ordinance. It is also instructive to read a footnote in Governor Donald Cameron's 1930 statement on native administration that alludes to the Indian colonial experience and argues that village self-government in India was destroyed by colonial policy and should have been preserved (Tankanyika Territory 1930a:33.) See also the Foreword to Tanganyika 1953, which says that the memoranda not only are the work of the Local Courts Advisor, Mr. J. P. Moffett, who held the post from 1948 to 1952, but are in a sense a community effort, i.e., based on other earlier sources and documents. The 1957 version analyzed here repeats many parts of the 1953 version verbatim.

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administrative officers the struggle to make the courts "work" was defined as an almost evangelical effort to insert ideas and ways of knowing as much as it was a labor of making and keeping an organizational structure in order.

In fact, of course, the British administrators appear to have thought they knew what they needed to know about Africa to keep working at their local courts project. (The "details" they were missing about the substantive rules of African "customary law" could be filled in later.) They envisioned themselves as involved in laying the foundation for a "modern" local court system to succeed indigenous, precolonial, quasi-judicial institutions. They seem to have envisioned a smooth sequence of replacement without seriously considering the social-context dependence of legal institutions. Cheerfully unconcerned with the connections between African community life and their chronic problems with the courts, the colonials attributed the difficulties they encountered either to the bad character of particular chiefs, to "attitudes" in the "African mind," or to unfortunate habits acquired in precolonial legal institutions. There is no discussion of anything so simple and crude as resistance to colonial rule or, for that matter, resistance to legal interference in the playing out of community micropolitics. The 1957 document conceives of African communities as solid aggregations of kinship groups in harmonious equilibrium, normally peacefully ruled by their chiefs. The colonials did not picture these villages as they were, as social arenas seething with internal activity in which social credit was being accumulated and lost, reputations being made and broken, factions organized and loyalties mobilized. Had they known what we now know about the internal political life of African neighborhoods and villages, they might have had a very different understanding of what was going on. But while that might have changed their logic, it might not have altered their plans and policies, which were, after all, hitched to much wider processes.

This article concerns that logic, the premises and conceptions with which the colonials inserted British legal ideas into an African milieu, and the very different rationales certain Africans had for a very different logic. It concerns the way two "legal cultures"—the inside-the-court formal system and the outside-the-court form of "community justice"—have continued to interpenetrate. And, of course, contrary to what the British expected, the court system has not replaced the community framework.

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The Paradox of Directing Change and Preserving "Custom"

The attempted transplantation of British legal ideas to African courts during the colonial period was part of a much larger administrative strategy. The master concept was surely that of indirect rule, the system by which certain local chiefs were designated the official agents of colonial government (Tanganyika Territory 1930a, 1930b; Phillips 1945). In keeping with that broad plan, it was both practical and politic that local courts for Africans be run by "Native Authorities." To be sure, the jurisdiction of these courts was limited under colonial law, and they were to be intermittently checked on by colonial officers. Nevertheless, because Africans ran the courts, and Africans appeared before them, and African "customary" law was applied in them, these courts were thought of by the British as fundamentally African institutions. At the same time they were to be a vehicle for remolding the native system "into lines consonant with modern ideas and higher standards" (Governor Donald Cameron in Tanganyika Territory 1930b, quoted in Tanganyika 1954:1).

Thus there were two agendas, one for the maintenance of "custom" and one for change and "improvement." The general conception was that Africa was a backward part of the world arrested in an earlier stage of social evolution. Yet, "this is not to say that native judicial institutions cannot change and develop as the people among whom they have evolved advance in prosperity and civilization" (ibid.). In keeping with the idea of evolution as continuous, the link between indigenous judicial institutions and the form of the new local courts was stressed.

Native courts, wrote Cameron, are

> not a new system invented by us, but a continuation of the judicial functions of native authority which have existed in a more or less primitive form ever since the emergence of those units possessing a common language, a single social system, and an established customary law, units which we call tribes. (Ibid.)

The official mythology was that once exposed to some of the most fundamental and time-honored British concepts of law and procedure, Africans would see at once how sensible, practical, and moral these ideas were and would reform the native system by adopting them. The "natural" process of legal evolution would thus be accelerated. British knowledge would become part of African knowledge.

> We endeavor to purge the native system of its abuses, to graft our higher civilization upon the soundly rooted native stock. (Cameron in Tanganyika Territory 1930a, quoted in Tanganyika 1954:1)

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> Native customary law is a living system which is constantly going through a process of development and adjustment to new circumstances and new impulses of thought, which in time become crystallized as part of that law. (Cameron in Tanganyika Territory 1930b:1)

The idea of transplanting legal ideas and institutions is one thing. Doing it is another. Most of the British officials who supervised the native courts in Tanganyika were not lawyers and had no specialized training in the law. There was no assumption that the most fundamental principles of British legal ideology would be part of the culture of laypersons in Britain. That was not an insurmountable problem. As noted earlier, the 1957 *Memoranda* carefully instruct administrative officers in what they need to know. The pamphlet spells out for the administrators both what is to be considered most sacred in the British legal-cultural heritage and what is most commendable about African law. For the administrators' part of the pamphlet, "the African mind," "African traditional procedures," and "African customary law" tend to be mentioned as if there were no need to make distinctions between one people and another. In those few parts of the text where the existence of local "tribal" differences in customary law systems is acknowledged, these differences are taken as largely superficial details. African legal principles and practices are presented to the British officers as being generally rather alike. The tone is that on the whole the Africans are good fellows with a sound legal "tradition," who simply need some guidance to ensure that in the future the courts and the law will evolve as they should.

The pamphlet repeatedly expresses this double-think, this appreciation and critique of African ways. The sermon that Africans and African institutions must be respected is stated again and again. But the disapproval of many African practices is also made manifestly clear. So, for example, in the part of the pamphlet written for African readers, the court-holders and their clerks are told:

> A local court is set up by a warrant signed by the Provincial Commissioner. . . . But the courts are nevertheless not something new created by the Government, they are merely a continuation of the *barazas* which have existed in all tribes for longer than anyone can remember. . . .
>
> This was a very good system and nearly always justice was done under it. For this reason the British Government decided to allow the people to continue to settle their own disputes in their own way. To assist them, the *barazas* were given a court clerk, court houses were built and fees were fixed; but the law remained the local customary law and only a few cruel things were forbidden, such as torture, ordeals, cutting off the hands of thieves, selling offenders as slaves and other practices which are not permitted in civilized countries. Apart

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> from these practices the *barazas* were allowed to carry on as before and to settle disputes in the old way. *They were not expected to model themselves on British courts except in so far as their first concern was to dispense justice.* . . . They were not allowed to take very serious cases, such as murder, but all ordinary cases could be heard, and heard in the traditional manner. Because the *baraza* now met in a proper court house and had a clerk, it was not therefore expected to become a kind of "European" court. It was expected to hear cases carefully, however, and to see that justice was done, for that is the main function of a court—to dispense justice—and *this cannot be repeated too often.* (P. 55; emphasis mine)

A skeptical note is audible in the allusion to "civilized countries" and in the phrases about the need to "dispense justice" and in the admonition that "this cannot be repeated too often." An even more critical statement appears in that part of the pamphlet addressed to administrative officers. They are told openly that they must be made "aware of the lines along which it is thought best that" the courts "should develop" (p. 1).

The *Memoranda* are attempts to train the trainer, to outline what the administrative officer must learn and then communicate to the Africans who actually run the local courts. However appreciative of the practicality and popularity of "customary law" the administrator is, he must ensure that only the acceptable portions thereof are actually applied. Thus the Local Courts Ordinance includes a well-known provision common throughout the British colonies and known as "the repugnancy clause." The commentary "clarifies" the meaning of this clause for the young officer by using a strong moral tone and some dramatic illustrations.

The advisory pamphlet says,

> The Ordinance re-introduces the limitation that no customary law shall be administered which is repugnant to natural justice or morality or which, in principle, is in conflict with any law in force in the Territory. It should be noted these limitations apply to the sanctions which local law and custom impose as well as to the substantive body of law itself. It must be most clearly understood that injustice and illegality . . . are "repugnant" in this sense and that only one course is open to an officer in such cases and that is to put them right. (P. 25)

Thus customary law is endorsed provided it is congruent with a British conception of natural justice, morality, or legality. "There are some things which a British Government cannot permit, since they outrage our sense of what is just or right" (ibid.). The illustrations of unacceptable behavior given include the murder of twins and ordeal by poison. However clear these extreme instances seemed to the writer of these guidelines, he also acknowledges that other cases might be occasions for dis-

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cretionary judgment. A high moral tone was thus coupled with a low level of precision about definitional boundaries.

The document is at pains to say that in any case in which the officer acts to set aside the local law, the government must *explain* the reasons for its decision and must try to elicit consent for its action.

> Whenever this occurs the opportunity should be taken by discussion with chiefs and elders to induce them and their people to consent to the suppression of the objectionable features of the law or custom in question, but care should be exercised that the result is not simply to drive underground what is objectionable. (Ibid.)

The idea that verbal argument would change minds and *elicit consent* (innocent prefigurations of Habermas) expresses a British idea of democratic legitimation. It is probably no accident that this consent to directed change in a colonial document is emphasized at the very time that the pressure for the end of the colonial regime had gained substantial force. But it should also be noted that the text nevertheless emphasizes unidirectional explanation. The British explain things to the Africans. There is no suggestion that any effort be made to explore the Africans' rationale for the practices targeted for suppression. What the British prescribe can be "explained." British knowledge of morality and justice can be imparted. It follows that Africans are to be instructed. African practices that conflict with the government's conception of the range of acceptable behavior cannot be "explained." African knowledge on these topics is, by definition, nugatory.

Whenever the British author of the *Memoranda* recognizes that there is a cultural clash, he also sees an evolutionary lag. The "weaknesses" of the native courts as identified by the *Memoranda* are said to arise from "the nature of local customary law" (p. 7). The weaknesses are listed as (*a*) failure to observe the principles of natural justice; (*b*) failure to appreciate the rationale of punishment, with which is bound up failure to appreciate the distinction between civil and criminal liability, (*c*) failure in procedure, and (*d*) corruption (ibid.).

The "failures" and "weaknesses" identified by our administrative guide are given very general labels. They are identified as inherent characteristics, that is, they arise from the "nature" of African ideas and practices. These "weaknesses" seem to be offered as reason why it is difficult to plant the British judicial model in African soil. So much for the many times this is said not to be the colonial objective.

What parts of these official directives were actually put into practice, and what was the nature of the message they communicated to Africans? Obviously the local courts were a colonial institution. The courts were a link in the chain of organization

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of the colonial state. That tie, to an imposed political system, to a non-African conception of government by definition made those courts something other than purely "local" courts. Nevertheless in today's postcolonial Africa many Africans themselves have come to think of these colonial local courts and their postcolonial successors as African institutions. For that reason, among others, they are. African governments and African citizens have made these once colonial institutions their own.

The transformative and recombinant potential that resides in all cultural forms and practices is epitomized by this colonial institutional modification and its subsequent African appropriation. The history of the West is replete with examples of such insertion, addition, and cumulation. In the West, there was a time when scholars were the principal people who dwelt on the particular origins of cultural elements and indulged in a kind of cultural etymology (see, e.g., Miner's classic comic piece of 1956 on the foreign origin of American objects and customs). But now, in Europe as elsewhere, with the politicization of ethnic boundaries, the particular origins of cultural items have by no means always lost their political interest (see Herzfeld 1987 on the Greeks and the Turks, for example). Thus it is not surprising that for a certain group of African intellectuals the question what is authentically and originally African seems politically salient today (see Mudimbe 1988). For most other Africans the question whether change means "westernization" is of no great concern provided the standard of living improves.

Present inquiries into the nature of African knowledge seem framed to emphasize the issue of provenance (see Mudimbe 1988; Comaroff 1985). Why ask such a question at this moment? Perhaps to emphasize that the issue cannot simply be treated as a matter of separating out the "traditional." There is much that is now emphatically *African* but that is not a matter of ancient custom at all. Surely "culture" must always be thought of as a cumulative accretion, from many times and sources. In such circumstances, to ask with some historical seriousness how the present African amalgam developed is for theoretical reasons of no small interest. It is possible to attempt such an analysis in the field of local law.

Where the records are full enough and field studies are sufficiently detailed, African legal practices and the ideas that informed them can be followed as they changed over the past century. Even where some legal norms have continuity, the contexts in which they are used have changed (Moore 1986; Snyder 1981). A larger processual question this raises is whether and to what extent intentionally constructed organizations, inserted institutions, and directed behaviors are recognizably different from culturally inherited ones, and at what

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point in time this can be said to be the case. At the moment of their inception? After their subsequent "reproduction?"

As we have already observed, in Tanganyika, the introduction of a system of local courts and the transfer of a set of accompanying practices, principles, and ideas was anything but a simple one-time act. The process of structuring this introduction initiated was far from "complete" at the time of independence. Constructing and conveying various legal "packages" was a long-term, ongoing colonial project that the independent government has now inherited and to which it has made its own amendments and additions. But my work on Kilimanjaro suggests that not only has much of the British-designed structure of the courts been inherited, but so have many of the resistances to it and circumventions of it. That dynamic combination is the African institution today.

The Rule of Law and Law as Rules

One of the central matters on which the 1957 pamphlet instructs the novice officer was what law was to be applied in the courts. The answer displays rhetorical gymnastics performed in a time-ripened colonial style.

> THE RULE OF LAW.
> Fundamental to the British way of life is the concept of the Rule of Law, and while there may be many concepts which will not merit transplantation from Britain to Africa this is not one of them. In considering the future of the local courts it is clearly desirable to bear the Rule in mind and to base their further development unequivocally upon its requirements. (Pp. 13–14)

According to these *Memoranda* the first requirement of the Rule of Law is "that there should be a known body of law," and the pamphlet argues "that the development of the courts cannot be guided unless there is certainty as to what the law is" (ibid.). But, of course, there was no repository to which the administrative officer could go to discover what the African law was. There were no written legal archives to consult. The pamphlet wants to redress this deplorable situation. It identifies the project of recording customary law as a necessary next step. The fact that customary law systems were themselves dynamic and changing is acknowledged. Such change was, indeed, welcomed as "most necessary" for a period of fundamental and rapid social transformation. In this respect, our colonial advisor likens customary law to the common law of England.

> Customary law as a body of law is comparable in its nature to the common law of England, and officers should disabuse their minds of the widely prevailing view that the expression "customary law" covers only what remains today of the an-

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> cient rule for controlling the affairs of any community prior to the advent of the European; such is not the case. No body of law can remain static; . . . In the last fifty years of European administration in Tanganyika customary law has lost none of its vitality and it follows that it must have developed considerably in that period. (P. 26)

However full of vitality the customary law system might have been, it was time to capture it and set it down. It must be put in writing to fulfill the need for certitude which the Rule of Law demanded. The potential dangers in "codification," the worry that it might lead to "ossification," are considered to be no great risk (p. 14). By recasting African law as a set of rule statements, not only would an authentic African law be accorded its full dignity, but it would be adapted to modern court use.[3]

In this conception, the effort of all parties appearing in court should be to prove that the circumstances of their cases made one or another rule or principle "applicable" as is done in Anglo-American courts. The pivotal notion is that there should be a rule-governed judiciary that dispenses justice uniformly and a rule-minded citizenry that mobilizes that judiciary when it thinks it has a case "under the rules." This ideal of rule standardization goes hand in hand with the requirement of judicial impartiality. Such a model is also predicated on the existence of some kind of authoritative hierarchy that ultimately determines what the rules are and who the judges are—who commands, who obeys, what is obeyed (Hart 1961). A judicial system so conceived is manifestly a close partner of centralized government and bureaucratic administrative structures. Such a design is not practical without a system of writing and record-keeping and without effective techniques of long-distance communication (Anderson 1983). The catch-22 in Africa was that virtually none of the preconditions of the model obtained at the beginning of colonial rule. By the end much still had not been successfully instituted (see Chanock 1985:20; Mann & Roberts 1991:35–36; Moore 1986; Snyder 1981).

Was customary law simply a set of rules? There has been a venerable debate on the topic of the complex place of norms in "customary" systems (see Comaroff & Roberts 1977, 1981; Roberts 1979; Gulliver 1969, 1979; Moore 1986). It is fairly

[3] The body of rules formally entrusted to the court for enforcement was tripartite: rules from two African sources and from one explicitly colonial one. The African sources were (1) the rules of customary law (which, as the 1957 *Memoranda* note, were not unproblematic), and (2) orders and laws made under the Native Authority Ordinance (i.e., orders and laws made by chiefs and other native authorities in an officially approved manner), and (3) the laws of colonial provenance that specifically conferred jurisdiction on these courts, such as tax laws and the like (pp. 25, 87). In the *Memoranda* and other official documents about the colonial courts, the legitimating rhetoric for the court is largely directed toward the "application" of these three types of rules and principles.

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well agreed that in many (most) African settings there was much that operated in the "resolution" of disputes other than a system of norms. But as far as the colonial administration was concerned, that nonrule part of the process was irrelevant to their renovating concerns. The rules should be identified and written down.

Like fat rendered in cooking, the product was to be altered even as it was extracted. The administrators and academics who were enthusiastic about recorded rules at the time were very much aware of the change embedded in the very act of constructing such a restatement. That was part of the intention, to "modernize" the existing African system by bringing it formally into the courts. The idea was that once converted into a body of stated rules, the law would be only then in a form in which it could be authoritatively interpreted by the judiciary. This conception of legal modernization was not confined to Tanganyika: It enjoyed broad administrative and academic support throughout many other parts of Anglophone Africa.

In 1959, a Restatement of African Law Project was formally started at the School of Oriental and African Studies in London. Ten years later Professor A. N. Allott, the project's director, reported on its first decade. He made it plain that restatements were conceived of as a contribution to "nation-building" and "modernization." He explains that there was a large demand "for a convenient and authoritative source of reference on the customary laws. This source had to be cast into a legal form, i.e., its language had to be legal and integrable with the language of the general law" (Allott 1969:1). Although by no means the first to record customary rules, Allott and his associates performed the task far more technically and professionally than had earlier scholars of African law. As he put it, "Good work was done by anthropologists, but this usually failed to meet the criteria outlined above for a work usable by the courts" (ibid., p. 2). The Restatement was not primarily conceived as a contribution to social science. It was to be a practical step toward "the reform of local and native court systems, and their partial or total integration in the general judicial system" (ibid., p. 1).[4]

On the ground that it was necessary to take some measures

[4] In the United States a "restatement" approach had been successful in clarifying and summarizing the cumulative gist of court cases on many topics. But the Allott effort, though it carried the same label, was quite different. It was, as is evident from the 1957 *Memoranda*, an academic elaboration on earlier colonial policies. The recording of local customary law had long been one of the tasks suggested to district officers and other administrators. Such documentation was thought useful in carrying out their job of supervising the native courts. Thus it is not unusual to find scattered notes on customary rules in the District Books and in a variety of administrative reports. But Allott was right. These notes were rarely systematic or comprehensive (see, e.g., Griffiths 1930).

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to ensure that customary rules not would "ossify" but would continue to be alterable, the 1957 *Memoranda* proposed that recorded customary law rules not be given the full status of law. They should not have conclusive and binding authority but be regarded simply as guides (p. 14).[5] Thus in the very same authoritative document, we find statements on customary law that lead in quite contrary directions. The need to produce a written and authoritative set of customary rules was strongly urged to conform to the first principle of the Rule of Law. At the same time it was made clear that once produced, the courts need not be absolutely bound by the customary law rules so written. The latter should serve merely as guides. Thus, the text says repeatedly that Africans are best qualified to know and handle their own business and should do it according to their own rules. The subtext says that the colonial government knows best, and must reserve the power to intervene when Africans fail to deliver "justice." The voice that gives legitimacy to African ways speaks again and takes back that recognition by giving it only conditionally.

The ambivalent situation in which the colonial administrators of this mid-century generation found themselves could not be clearer. They were committed to discovering and respecting the authentic African legal "tradition" and to writing it down in the form of rules. At the same time they recognized that it had already changed a great deal and also acknowledged that they were committed to changing it further. (For recent discussions of the place of African "tradition" in the colonial period see Ranger 1983; Chanock 1985; Moore 1986.) Thus the double-valenced tone of the 1957 *Memoranda.* The assets of customary law are accorded many nods of appreciation, but its shortcomings are also resolutely and relentlessly noted.[6] This tension is presented in its most general form in the statement: "An understanding of customary law . . . is important not only because proper supervision of the courts cannot be given without it but

[5] The author is well acquainted with various anthropological works and refers to a similar "guidelines proposal" Schapera had made many years earlier. In his introduction to the *Handbook of Tswana Law and Custom* ([1938] 1955) Schapera said in support of it, "Adherence to customary law should neither be blindly rigid nor yet capriciously fluctuating" (ibid., p. 27). The fine line was for someone else to draw.

[6] Under the heading "Aspects for retention," the *Memoranda* (p. 4) give this definition of the assets:

> We have seen that customary law is primarily concerned with the restoration of the social equilibrium, with adjustments and reconciliations, with restitution and the award of compensation; that its procedure is informal but effective, designed to bring about an agreed solution, not an imposed judgment; that its sanctions are the fear of offending public opinion, living and dead, and the fear of magical retribution. . . . Customary law is, in addition, local and popular, it is firmly based on the realities of tribal life and thus understandable to all, it is open to all members of the tribe, and finally, it is cheap. These are characteristics which in any system of law would be admirable and worthy of retention.

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because it enables one to appreciate what is worthy of retention and *what must be discarded*" (p. 4; emphasis mine).

The commentary goes on to foretell that homogenization and standardization are the "natural" direction in which the evolution of the legal system as a whole will develop. The prediction is that as more and more customary law is recorded, "the general principles of Bantu Law which it is thought are effective throughout the patrilineal area of the territory should begin to emerge and become capable of definition, to the great benefit of all concerned with their practical application" (p. 15). Thus it was anticipated that a kind of uniform Bantu law in the patrilineal area would eventually emerge from the very process of recording the rules. The "local anomalies" and "local dissimilarities" of different customary systems would "be thrown into prominent relief" thus accelerating "the *natural* tendency toward uniformity" (p. 15; emphasis mine). The possibility that legal pluralism might be permanent or at least very durable is not countenanced.

With or without an evolutionary rationale, postcolonial successor governments in Africa have all had to face the uniformity versus pluralism issue. Should there be one set of laws for all citizens or diverse ones that take account of local custom? Clearly these legal issues once faced by colonial governments were not particular to the colonial form but rather are characteristic dilemmas of government centralization in most culturally plural settings (see Hooker 1975).

The report of a Tanganyika government-sponsored conference on Local Courts and Customary Law held in Dar es Salaam in 1963 said: "There was wide agreement that there was no question of the disappearance of customary law in the foreseeable future as a significant part of African legal systems" (African Conference on Local Courts 1963:22). Nevertheless, a later international seminar on African law held at Addis Ababa in 1966 noted the postcolonial pressure on the new nations of Africa to "codify customary law" in order to "unify" their legal systems (Gluckman 1969:28). Many countries were said to consider the unification of laws "a necessary ingredient of nation-building and mobilization for economic and social development" (ibid.). In Tanzania (fulfilling the prediction of the *Memoranda* about "natural" tendencies toward uniformity) the government had already undertaken to produce a formal "restatement" of its own "modified" version of customary law for all of its patrilineal peoples and planned to do the same for the matrilineal peoples, with some rather unspecific notion that the two sets of rules might be combined at some eventual time.[7]

[7] The system adopted in Tanzania involved locality-by-locality approval and adoption of the newly standardized rules. So the District Council Minutes of 15 Oct.

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What actually ensued in each African country as it contemplated the standardization of its laws is not the present concern. It is rather the very fact that on gaining independence each African country had to ask itself the same questions. (See discussion of pluralism in Kuper & Kuper 1965:Introduction; Kuper & Smith 1969; Hooker 1975. Note also Ofuatey-Kodjoe 1977 on the principle of self-determination.) To what extent should there be a unitary system, and to what extent should a multiplicity of local legal systems continue to operate? Can national centralization of control and some degree of local autonomy in these matters be reconciled? This, which at first glance seems only a formal legal dilemma, actually raises the profound political question of African identity at the national level. The legal uniformity issue is an implicit commentary on the pluralism of African "knowledge." Which forms of cultural difference are to be officially *acknowledged?* Which laws are to be standardized and universalized within the state?

Writing: Legal Knowledge and Durable Records

The discussion of the Rule of Law and the enthusiasm for the project of recording customary law take for granted the larger, quite general reliance of the "modern" jural institutions on written records. There is a considerable difference between legal systems that are fundamentally oral and legal systems predicated on writing everything down. These differences have been touched on by Goody (1977, 1986) in his work on literacy but deserve more extensive treatment. Used in law, writing is a technique that affects substance.

Despite the declared intention to respect indigenous institutions, the whole conception of what native courts should be and become was founded on the making and keeping of several types of written records. In the beginning these were necessarily minimal and unreliable. In 1930 the *Native Courts Memoranda No. 2* (Tanganyika Territory 1930b:7–8) commented on the prevalent illiteracy of chiefs and other members of the courts. "Even now it must still be rather the rule than the exception that the clerk is the only literate man among them" (ibid., p. 7). It goes on to say that "since they can have no idea what he has recorded," the clerk may misrepresent the record. Administrative officers are admonished to check with chiefs and elders and especially with the litigants themselves to make certain that the record reflects the reality. "No inspection of a native court

1963 at Kilimanjaro show that in that session they approved unification with respect to *ulinzi, urithi,* and *wosia* (guardianship, inheritance, and wills). However, local practices were not changed by this document except for those few cases in which a lawsuit was brought by a discontented party. A double system continued inside and outside the courts.

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should be regarded as adequate which goes no further than the written record in the register" (ibid., p. 8).

Nevertheless, on Kilimanjaro the supervision of the courts of first instance usually took the form of an inspection of the written case reports. This was so of necessity as the courts were too numerous and too inconveniently located to make ongoing direct observation of hearings a practical option. Even in the late colonial period when the court holder and the clerk were both likely to be literate, there were many ongoing problems. The quality of the records kept still left much to be desired.[8] Thus, after a long statement on this topic, the *Memoranda* exhort the new administrator not to be in too much of a hurry about requiring everything to be in order. Being too exacting might lead to trouble.

> In this connection attention may be drawn to the effects of insisting on too high a standard of competence all at once: in some courts, in the past, this has led to the suppression of any evidence thought to be unpalatable to the District Commissioner, to the recording of fictitious pleas of guilty . . . and to difficult cases not being recorded at all.

If the colonial control of native courts was to be built on the written record, the misconstruction of records was a way Africans could arrange in their own way what information reached the colonial authorities.

Clearly, the recordkeeping "failures" were not just a matter of an absence of literacy. Having the technical means to carry out the recordkeeping task did not guarantee the administratively desired performance. The example of Kilimanjaro illustrates this point very well. Though there was a high literacy rate in the area, recordkeeping was irregular. As late as 1960, virtually on the eve of independence, the district commissioner wrote a memo to the president of the Wachagga saying that "case files mysteriously disappear from local courts and persons to whom judgment was given find it difficult to establish their rights."[9] The district commissioner recommended that all local court records be kept under lock and key and that the senior court clerk be held personally responsible for them.

The commissioner also complained in some detail to the Chagga Appeal Court about the adequacy of the case records

[8] The 1957 *Memoranda* express the hope that the judiciary and the executive would eventually be separated everywhere, as was already the case for certain districts. The idea was that the local chiefs should continue in an executive role but appoint a judiciary deputy to do the work of the court. It was expected that the judiciary deputy would be more literate and better at making and keeping case records than the chief and his clerk might have been in previous times. "It is to be hoped that" where there is a judiciary deputy, "the court-holder will not only be able to do his own recording but will also be able to supervise more effectively the routine clerical work" (p. 18).

[9] District Commissioner to President of the Wachagga, Chagga Council File 3/16, Letter 214, dated 13 Dec. 1960.

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that were *not* missing. He said that all sorts of necessary items were omitted from the local case records, namely, the names of the magistrates and assessors hearing the case, the dates at which the hearings opened and closed, the record of adjournments and the reasons for them. He also objected to Appeal Court judgments that referred to statements and evidence put before that court which were not recorded, and might not have been made in the court of first instance. Moreover, the record was not always clear about whether the parties were present at the reading of the judgment.[10]

Thus British recordkeeping efforts were directed not only to the distant goal of writing down the rules of customary law but also to the more immediate one of recording the rulings (and the reasons for them) in particular cases, and toward the maintenance of these records, both to make administrative review possible and to provide an adequate basis for appeals. An implied aim was to make the work of the court durable over time, to make uncontested unappealed decisions permanent, to create in the court an institution whose record of its past was an accessible part of its present.

On each one of these recordmaking and recordkeeping points, it is fairly obvious that the "system" did not work very well. Thus the whole order of courts and of "justice" to be built on the Rule of Law and on thoroughly documented and inviolable records was continuously frustrated by irregularities. Those irregularities were sometimes a matter of inefficiency and sometimes of failure to possess the necessary skills. But they were also used (as the district commissioner's 1960 letters imply) as a means of retaining local power and of putting obstacles in the path of the authorities. A certain degree of studied carelessness could serve local interests by systematically frustrating surveillance. The struggle over recordmaking and recordkeeping may often have been a struggle over the location of control, but since deliberate malice carried uncomfortable political implications, authorities tended to redefine the situation as a matter of incompetence, inefficiency, and ignorance. It may be of some comfort to emphasize superior skill when losing the game.

Legal Knowledge and the Conception of Time: Perishable Claims and Immortal Decisions

Two of the matters noted in the 1957 *Memoranda* as difficult for Africans to understand involve legal conceptions of time and timing. Africans are represented as having difficulty grasp-

[10] District Commissioner to the Chagga Appeal Court, Chagga Council File 3/16, Letter 208, 10 Dec. 1960.

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ing the idea that claims can be delayed too long before being brought to court and that cases that have been decided once should not be reopened and reheard. The writer describes a clash between what is in "the African mind" and what should be done—what the colonial administration deems appropriate or even "natural." The officers being instructed are told that Africans think in terms of permanent claims. Africans are said to suppose that unmet obligations give rise to permanent claim rights that may be raised at any time. That is so however much time has passed since the event that gave rise to the grievance. From the administrative view, all this must change. The *Memoranda* instruct the novice: all claims and accusations should be treated as perishable.

> It is quite foreign to traditional African ideas that there should be fixed periods of limitation in the institution of suits, nevertheless it must be explained that a complainant should be reasonably active in filing his claim and that delay may result in its being rejected out of hand. The principle involved is that the delay should not be so great that the defendant is likely to be prejudiced in his defence, e.g., by failure of memory, absence of witnesses, loss or destruction of documents. (P. 9)

> The general principle of *natural* justice is quite clear; he who is aggrieved should, if he desires redress, be reasonably active in filing his claim; if he is indifferent and sleeps upon his rights he forfeits the prerogative of every citizen to ask the State to intervene upon his behalf. (P. 34; emphasis mine)

The courts officer is preoccupied with the question of evidence and its availability. But in many African rural economies, to be worth anything a claim must endure until the obligee has the means to pay it. That may take more than one generation. An indefinite time frame can be a major economic element in the effectiveness of a claim. As the Chagga say, it is no use claiming a cow from a man who does not have one. But if you wait until the original debtor's son or grandson prospers, your claim may be easier to lodge, your case easier to win in the local arena.

The delayed exchange economy has its costs and its quirks. Both debts and assets are heritable, but until there are adequate assets, and the way is socially clear for collection, a debt is not worth very much. For example, there is the question of community sympathy for worthy debtors. Collecting large debts at an "arbitrary" time—without regard to the debtor's ability to pay—can have lasting, severely punitive, and destructive consequences. Local people may not approve of requiring payment, however clear the indebtedness. A debt is not worth very much if there are such obstacles to collection in the micropolitical arena. A creditor who presses his claim against a tragi-

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cally impoverished debtor when the creditor might have waited for a more favorable moment may find himself in trouble. This is likely to be so when the debtor is well liked. There can be other social deterrents to collection. A debtor with a powerful local ally may be impossible to pursue for fear of retribution against the creditor.

The good news for creditors is that the politics of the situation can change. If someone dies or emigrates or other changes of local alignments take place, a claim that was socially impossible to bring forward at one time may suddenly become viable at another. Thus delayed claims have their economic and social rationales. In a sense, one may think of a local community among the Chagga as constantly seething with latent claims which may or may not be brought forward. Timing is crucial. The economic or politic moment may never arise. So, from the Chagga point of view claims can evaporate. They *are* perishable. But the issue of the debtor's assets (at what moment he has any) and the issue of the politic moment are more cogent to the vitality and durability of the claim than the simple passage of time.

The question of producing witnesses or other evidence raises a related point of social technique. For delayed claims to be effective in the absence of the written records, there must be some collective memory of the original transaction. If not, the necessary mobilization of micropolitical pressure will not be possible. Thus among the Chagga there is an endless reiteration of new and old obligations. There are many formal and informal, oral, and even ritual ways of commemorating transactions in order to make them public. The memory of some of these bits of knowledge actually fades with time, and some perfectly well-remembered claims "fade" because enthusiasm for particular causes (or persons) becomes increasingly difficult to muster. Even when they do not disappear from local minds, oral "records" leave much room for reinterpretation and negotiation.

The perpetuity of certain claims in many African legal systems is not an indication of a defective concept of time. It is just a different strategic use of time for the purposes of litigation. In a rural settlement in which families live cheek by jowl for several generations and build their expectations on the continuation of those relationships, it is easy to see the logical fit between a heavy involvement in delayed exchange and a practice that tolerates delayed claims. That logic is not the exclusive property of a "traditional" economy. Opportunistic economic or social reasons for harboring and delaying a legal claim often fit just as well into a market-oriented, cash economy. The extension of credit time between sellers and buyers is not unusual

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in industrial society. Keeping a debtor viable can be a good economic strategy.[11]

What of the other time-related legal "idea" addressed by the 1957 *Memoranda,* the matter of *res judicata?* Consonant with British conceptions of justice, the *Memoranda* emphasize that full adjudication terminates a legal case once and for all. "It is a salutary principle of law that a matter once decided in a court is final, subject only to interference by a higher tribunal by way of appeal or revisions and that a case, finally determined, cannot be brought a second time" (p. 35). Subject to these conditions, the case is closed. The *Memoranda* complain, therefore, that from the African perspective, the case may only be closed for the moment.

Most African courts, it goes on to say, have come to understand that in criminal matters a person cannot be tried twice or more for the same offense, "but in civil matters this is by no means so, and cases of a civil nature, which have already been the subject of a decision of a court, are not infrequently resuscitated after many years and retried without question although the courts are aware of the previous proceedings" (ibid.).[12] The *Memoranda* attribute what it calls "the curious behavior" of reopening previously decided cases to "the nature of indigenous judicial procedure" and draws on a rationale attributed to the Kikuyu that had been quoted in the Phillips Report on Native Tribunals (Phillips 1945). The gist of that rationale is that lacking higher appellate courts, a similar function is fulfilled for Africans by the possibility "unbarred by time" of going back to the same tribunal of first instance for a replay of the case (ibid., p. 36). The reason for this, the text asserts, is that the objective of indigenous judicial proceedings is to create social equilib-

[11] The dichotomy so dramatically sketched by Bourdieu (1977) that clearly distinguishes and contrasts two models of "economy," the gift economy and the market economy, divides them into two pure, mutually exclusive types, yet these are actually joined in today's Africa. The concurrence of these two economies is not a new development. Most Africans have long participated in more than one type of exchange, some ritually elaborated and gift labeled, and some nakedly "commercial." All indications are that this economic and conceptual range was in use in many areas long before the colonial period began. This was certainly true of the Chagga. The Chagga have been implicated in a money economy since the late 19th century and were involved in long-distance trade at least a half-century before that. Today many Wachagga steadfastly maintain both a "traditional" ethos about certain debts and grievances and also, when necessary or desirable, operate entirely comfortably within the terms set by the "new knowledge" of money, courts, laws and documents. They are involved both in "gift" exchange and "commodity" exchange. No doubt other Tanzanian peoples were and are similarly situated (Iliffe 1979).

[12] Allott 1960:297 noted a similar attitude in Ghana, "Native law and the native courts . . . did not recognize *res judicata* . . . and any claim might be reopened." Fallers (1969:267) quotes Allott and compares the Soga courts after 70 years of British rule, asserting that virtually any complaining party could get a hearing: "Notions related to the Anglo-American *res judicata,* . . . enter into the arguing of a case rather than into its acceptance for argument." Fallers felt that earlier decisions on exactly the same issues would generally be considered decisive in Soga courts but that such previous decisions would never bar a plaintiff from *initiating* a rehearing.

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rium and that if there is a change in the equilibrium, from the African point of view that justifies a change in the judgment. Thus there emerges the possibility of a justified retrial of the same case (ibid., pp. 2, 36).

The idea that the maintenance of social harmony and equilibrium is the dominant objective of African legal proceedings not only figures in colonial documents like the *Memoranda* but also has been a prominent part of the analytic argument of various anthropologists, including Max Gluckman (1955:21; 1965:279). The idea as expressed in the *Memoranda* is: "The life of the clan (or other unit) proceeded harmoniously only so long as the members discharged their duties and obligations faithfully. If one member defaulted, the equilibrium was upset in greater or lesser degree" (p. 2). This argument is founded on the notion that "[w]hereas amongst Europeans the stress is upon the individual and his rights, amongst the Bantu it was . . . upon the community, upon the family or clan, and its continuing solidarity" (ibid.).

This is an effort to show sympathetic understanding. It belongs to a certain era. Both the colonial officer and the anthropologist of the late colonial period want to argue that African ways of doing things are entirely reasonable given the social premises on which they are based. They also want to argue that African ways rest on a moral foundation rather than on a purely strategic rationale. The image of the moral, rational, and educable African replaces an earlier colonial one of the rebellious, ungovernable indigene. The attitude is: They are reasonable, therefore reason with them. And so with *res judicata,* if African court holders and their elders exhibit consternation when they are told that they cannot rehear and reverse a judicial decision about a piece of clan land made twenty years before, a patient explanation is all that is required. "The courts' consternation may be in large part dissipated by discussion and explanation and District Commissioners should patiently educate them to a realization of the need for finality in the settlement of disputes" (p. 36). For whom was there such a need and what ends did it serve?

I would argue that the "social equilibrium" presentation of African disputational logic is a mixture of African self-idealization and colonial/anthropological political theory. It is also not without some foundation in fact, but it is a well-edited version of the facts. According to this interpretation of "traditional life," the disputants are obliged to work out mutually agreeable settlements because they are fated to go on living together in the same community. Collective pressures encourage them to achieve a harmonious settlement. That is surely sometimes a part of the story, but it is emphatically the view from the outside. As I have written elsewhere on the question of collec-

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tive liability, the view from the inside is of a much more competitive, much less harmonious entity. Within these groups there are factions and subsegments and individual interests (Moore 1972, 1986). There are superiors and inferiors. There are more and less powerful persons in these communities, and they can mobilize more or fewer individuals in the local political arena. Individuals can not only be discredited, they can be expelled (Moore 1991a). What appears to be equilibrium from the outside is often a temporary moment of agreement in which a dominant segment of the group has prevailed and everyone recognizes that predominance and acquiesces in all public behavior. This is what often gives the appearance of unanimity to collective decisionmaking (El-Hakim 1978).

This situation is a kind of "equilibrium" if one chooses to call it that, but it is hardly the harmonious justice that the more sentimental version of native life would have us believe. There is ample ethnographic evidence of inner struggles (submerged and explicit) within local groups in anthropological works written both during the colonial and postcolonial periods. Was the situation different in precolonial times? Is there any reason to postulate a harmonious, egalitarian, communitarian past, a Garden of Eden from which colonial intervention caused Africa to fall, a period Chanock (1985) calls "Merrie Africa"? I doubt it.

In my experience on Kilimanjaro, the "disturbance" of "equilibrium" that encourages an Mchagga to reopen a dispute that was previously heard and "settled" in or out of court is a change in the micropolitical situation in the neighborhood that makes the claimant think that a more favorable settlement is possible. The weight of partisan influence can be reshuffled by many events, anything from a sickness, a death, a marriage, a fight, to an enduring absence. Changes in local leadership can produce changes of loyalty. Altered balances in creditor-debtor relations can shift attitudes toward other matters. A witness who was once reluctant to come forward may become willing to speak when the social wind changes. Subtle realignments and redivisions of partisanship may be expected to result from any power shifts within a local group.

How does this change in partisanship outside the courts have impact on what goes on in a contemporary judicial proceeding? Among the Chagga today the answer is obvious enough. The willingness of witnesses to testify, let alone the content of their testimony, is often influenced by intragroup politics. It is not healthy to testify against the wishes of the powerful and their proteges. In circumstances in which agreements are seldom recorded in writing, it is only the testimony of witnesses that makes or breaks a case. Whoever controls the witnesses controls the outcome.

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In the 1957 *Memoranda, res judicata* is considered simply as having to do with the closure of cases. The principle invoked is that having had one's proper day in court, one cannot start all over again on the same issues with the same evidence in the same tribunal. What is done is done. The closure argument has an internal logic. It puts the matter in terms of closing the dispute between the parties once and for all. But this emphasis on sorting out the disputants' affairs and finalizing some "solution" to their disputation masks the role of *res judicata* in the life of the court itself.

Res judicata is a declaration of the power of the court and is one of the practices that constitutes the bureaucratic-like character of judicial office. Not only does the court thereby rearrange a relationship in a conclusive way, but it simultaneously proclaims the finality of its own authority. What is more, *res judicata* is a statement about the bureaucratic continuity of judicial office. *Res judicata* binds a judge to honor the decisions of his predecessors. The judicial office and its rulings are thus made more durable than the tenure of its incumbents. British law has its own cultural constructions of time.

The *Memoranda* assert that Africans should be taught that a court decision has binding permanence, that claims and grievances must be promptly brought to the court or they will expire. This mission of instruction depends on the attribution of an African counterview: that from the African perspective it is not the decision but the grievance or obligation that has permanence, that a complaint should be able to be made at any time and a case reopened at any time. What submerged assertions are embodied in the difference between the temporal limits on claims and the permanence and finality of decisions? Is this an argument about the difference between African and British constructions of time or is it really about the locus of authority stated in terms of cultural ideas about time?

The difference between Chagga and British official attitudes on these matters is undeniable. But as a characterization of the African "mind," the 1957 *Memoranda* misrepresent the central issue. The argument is an argument about the authority of a local institution empowered and endorsed by a central government and about the nature of that institution. It is a question whether what happens in the court is to be defined in terms of the ebb and flow of local micropolitics or in terms of a central government standard, a rule-oriented, delegating, judicial/bureaucratic model. The judicial/bureaucratic mode is repeatedly presented in the *Memoranda* not as a form of power but as a form of knowledge.

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Judicial Knowledge, Truth Finding, and African Partisanship

Deeply permeating the field of Chagga local micropolitics is a syndrome I call "obligatory partisanship." What this phrase encapsulates is the notion that certain kinds of social assistance are, at least ideally, supposed to be supplied on demand in given social relationships. The public demonstration of partisan support is one of those demand-driven forms of help. Being able to mobilize such support is a very important social asset and affects various court-related performances including judging and testifying. This kind of obligation existed during the colonial period, and it exists in rural communities today.

The 1957 pamphlet tells us early in its pages that there was no indigenous foundation for the kind of impersonal evidence taking and truth finding that the British were trying to introduce (pp. 2–3).

> It should . . . be noted that the attitude towards evidence was quite different from that which obtains in a modern British court. The elders did not come together to ascertain the facts, they either knew them already or invoked the aid of the supernatural to find the truth. They met to decide the penalty. (P. 3)

These assumptions also seem to lie behind the alleged difficulty of persuading Africans that in a criminal case they ought to presume the innocence of a defendant until guilt is proven. "It is realized that this is a conception which may come but slowly to African minds, but it is nevertheless a principle which must be continually kept before them" (p. 41).

The impartiality of judges and the truth telling of witnesses were areas of court performance that were very difficult for the colonial administration to manage effectively. The administrators seem to have reserved some of their most powerful rhetoric for such uncontrollable domains.[13]

> **Standard of Justice Dispensed.**—Now that the courts have been in operation for over thirty years it is possible to make some assessment of their efficiency, to indicate their weaknesses and short-comings and to suggest in what respects guidance is most required. . . . Their weaknesses are largely those which arise from the nature of local customary law and procedure. . . .
>
> They may be listed as follows:—
>
> (a) Failure to observe the principles of natural justice. . . .
>
> **Principles of Natural Justice.**—As regards (a), the principles of natural justice have been described as follows:

[13] Our pamphleteer extracted the principles of natural justice from the Phillips Report on Native Tribunals in Kenya of 1945 (Phillips 1945), which in its turn quoted them from a report of 1932. I have cited only one principle. There are seven in the document.

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> (1) A man may not be judge in his own cause; decisions should be on purely judicial grounds and should not be liable to be influenced by motives of self-interest, political opinions or other extraneous considerations. (P. 7)

Personal interest and corruption are two matters about which administrative officers are stoutly warned. Yet the problem is pervasive.

> A special section has been inserted in the Ordinance to draw attention to one of the cardinal principles of the Rule of Law, that no one should adjudicate upon any matter or things in which he has any pecuniary or personal interest. . . . It is one of the commonest failings of the courts to overlook this principle. (P. 24)

In the Kilimanjaro court records from 1930 to 1980, instances alleging bias or corruption can easily be found, but so can apparent even-handedness. In colonial times, in the days when local chiefs or their deputies were the court holders, there is no doubt that chiefs often used the courts to further their own interests and those of their close kin and associates. Yet some of the matters that came before them must have been cases to which they were indifferent, since each court necessarily handled the accusations and disputes generated by a large population. As for crude bribery among the chiefs then, and with reference to the magistrates and the clerks today, there has always been a good deal of gossip, but it is difficult to know how much credence to give it. Certainly there is great sensitivity on the subject, and accused judges can be very touchy (see, e.g., Marangu, Case 72, 1968; Kilema, Case 78, 1936). In both the cited cases, persons who had been heard to allege that the judge had been bribed were severely punished. In the Kilema case, the judge meting out the punishment was the very chief about whom the allegation had been made (so much for disinterest). In the Marangu case, in the interest of fairness a fellow magistrate was substituted for the one who had been accused, but the two magistrates were friends.

Improper extensions of personal power also took another form, one that the *Memoranda* call "political cases." Thus a chief might use the court to bring a case against an administrative subordinate, a subchief, or other official, find him guilty of some form of insubordination or incompetence, and then dismiss him. The *Memoranda* go on to say: "This is perhaps a very natural error for one who has both executive and judicial functions to discharge, but it should be clear even to a chief that dismissal from office is not one of the forms of punishment which local courts are authorized to impose" (p. 10).

Court holders were not the only people identified as possibly "biased." Witnesses, too, might have less than truth-seeking motives. There were well spelled-out clauses in the Local

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Courts Ordinance prohibiting the giving of false evidence and outlawing any interference with witnesses (1957 *Memoranda*, secs. 29, 30, p. 94). But practice was another thing.

In comparative perspective, the "false" or absent witness issue looks less like a question of local Chagga misbehavior and more like a general systemic practice. In many societies the normal expectation is that testimony will regularly be baldly distorted by partisanship, and it is accepted as such. Scholars concerned with such settings have tried to construct explanations making this behavior plausible and understandable to Western readers. The standard rationale is that such evidence giving is more of a testimonial to the character and social place of the person on whose behalf the witness is testifying than it is an account of the "facts." (For a recent version of this explanation applied to Islamic courts in Morocco, see Rosen 1988.) But what is it about a social/cultural milieu that makes the general social standing of the parties primary and the situational facts secondary once they get to a court?

I would argue that the primacy of the persons is a regular product of social settings where obligatory partisanship is a general rule of public behavior. The structural requirement that there be partisanship and that it be given public demonstration necessarily has deep effects on community micropolitics. Collective decisionmaking and public dispute resolution are common instances of the playing out of such pressures (El Hakim 1978). Lending, borrowing, and collecting debts also have such dimensions. One of the complex preconditions of neighborhood social life among the Chagga today is the frequent requirement of just such a show of partisanship. However, it would be a mistake to think of this as an exotic phenomenon or a rare one. There are often circumstances in many other kinds of society in which people *must* stand up and be counted, in which neutrality is not an option. Circumstances in which an individual must side with one set of persons against another, one ethnic group against another, one political or religious collectivity against another, are all too familiar in the many violent confrontations of our world. The dynamics of obligatory partisanship are also observable in much less extreme circumstances, in the academic department that must make an appointment and divides openly over the candidates, the business meeting that must decide whether to develop a particular product, the political setting in which voting is in public rather than by secret ballot (Bailey 1983; March & Olsen 1976; Simon 1957; D. C. Moore 1976).

In the courts on Kilimanjaro in the postcolonial period, witnesses often testify (or fail to appear) with the idea of helping to construct a story favorable to the person to whom they owe a partisan account, either because of kin relationship, or for fa-

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vors done in the past, for favors anticipated, for fear of displeasing, or the like. Sometimes, the effort to produce such witnesses fails. Magistrates tend to "read" that failure as a significant indication of a lack of social respectability. To the extent that the court is dealing with cases arising out of long-term relationships, those relationships are bound to impinge on everything that is said in court (and also what is omitted). There is every reason to believe that this situation is not new. The social standing of individuals in the Chagga "village" is an ongoing product of the unfolding of myriad intertwined events. Reputation is the product of time. Social position is continuously renegotiated, sometimes to be affirmed, sometimes to be destroyed, sometimes to be rebuilt. As in the collection of debts, time and timing are important elements in the construction of good "standing." Allies are always needed, in communications, in exchanges, in acts of cooperation, in the arena of competition, and in the moments of actual conflict. The magistrates today are usually Chagga and live in this milieu even as do the parties who appear before them. They experience daily the contrast between what goes on in the environment in which these social transactions take place and what is considered legitimate in the kind of court conceived by the 1957 *Memoranda* and the later *Primary Courts Manual* (Tanzania 1964b; see also Tanzania 1963, 1964a).

Do these settings generate two forms of knowledge, one being knowledge of the way to conduct oneself in the shifting sands of ongoing social life outside the job, the other of the way to play one's role as a magistrate, honoring the ideal of impartiality and the rule-governed model of law, and managing a career in a formally organized, bureaucratically designed state institution? Certainly the difference between the designed judicial institution and the "event-evolved" set of neighborhood institutions is very great. In many respects, the court is being directly and continuously stage-managed by the state. The question of the specifics of delegated authority is central to its operation, as is its subordinate position within a hierarchical structure. The other, the neighborhood social field, while shaped and affected by the state, by policy, by the market, by political events, is neither as tightly managed nor as fully planned and designed as the operation of the local court. But that does not make the neighborhood less powerful when it comes to controlling witnesses and the outcome of litigation. The local court escapes its designers in a thousand ways. It did in the colonial period and it does today. What the kinsmen and neighbors "know" may never be declared in court. The magistrate may know the rules in the *Courts Manual,* but he may never "know" what actually "happened" in the case before him.

One can only guess what the same multiplicity of domains

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of "knowledge" and of loyalty must have meant to "court holders" in the colonial period. Certainly, the colonial government regarded its agents, the judges, as highly susceptible to bias, bribery, misjudgment, and error. To ensure against the effects of these failures, the colonial government reserved to itself the ultimate right to undo whatever an African judge might have done. Like Penelope undoing by night what she had woven in the day, the colonial government constructed the courts, defined their work, and insisted on the worth and the permanence of their decisions, but could undo it all.

The law used the performative power of words quite magically. By decree it could make something into nothing. It could nullify proceedings by "quashing" them. For a quashed proceeding, *res judicata* did not apply. It was as if there had been no hearing. When it came to *res judicata* the Africans were supposed to obey the rules as they stood, but the colonial government could declare itself exempt from the norms when necessary through this magical form of erasure.

Thus, as previously noted, the *Memoranda* state: "In criminal cases, it seems to be already appreciated by the courts that a person cannot be tried twice or more for the same offence" (p. 35). But in another section it makes it plain that such double jeopardy could be countenanced if the appropriate colonial officer deemed it necessary. Thus,

> In English law, in a criminal case which has resulted in an acquittal, there is no appeal by the complainant against such acquittal. *At the present stage of development* of the local courts it has been considered advisable to make provision for the possibility of an order of acquittal being made on inadequate or incorrect grounds and section 34(1)(b) indicates the procedure to be followed in such cases: the proceedings should be quashed and a re-trial ordered before whichever court is considered appropriate in the circumstances. (Pp. 47–48; emphasis mine)

However fine a principle, and however well the African courts seemed to understand it, the principle of double jeopardy in criminal cases could be made selectively applicable by the authorities given "the present stage of development of the courts" (ibid.). By thus adopting an evolutionary rationale, the colonial power could legitimately break its own legal rules. It simply established a regular procedure for discretionary exceptions: "The Provincial Commissioner and any Provincial Local Courts Officer or District Commissioner . . . may of his own motion, or upon the application of any interested party . . . quash any proceedings" (p. 95). A subsequent part of section 34(1)(b) reads, "Provided that where proceedings are quashed and an order for rehearing is made as aforesaid, no plea of *res judicata* or *autrefois acquit* or *autrefois convict* shall be deemed to

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arise out of the proceedings so quashed" (ibid.). In short, when it saw fit, the administration could nullify *res judicata.*

Here again is a complex and convoluted communication. First there is a strong message about the way native courts should operate. They should be like British ones and give full force to *res judicata* and the principle of no double jeopardy. Then comes a statement about the benighted Africans who do not operate that way and who seem to think any case can be reopened at any time. And lastly, in the technical procedural paragraphs of the ordinance we find a carefully crafted exception allowing the British to disregard the very rules they had been trying so hard to impart. The circumstances of governing by indirect rule were leading the British both to empower Africans to run the native courts and also to pull back from some of the implications of that decision. Customary law is both defined as potentially satisfying the requirements of the Rule of Law and then reduced to being a mere "guideline." The local courts are given the powers implied in the principle of *res judicata,* yet a way is provided for the administration to circumvent those. The colonial government was operating on two tracks, trusting and mistrusting, delegating and withholding final authority, creating durable judicial institutions to make lasting decisions, and leaving the door open to undermine the institutions and do away with the decisions.

Conclusions

I have here traced a selective course through the 1957 *Memoranda* on local courts in Tanganyika to look at some of the conceptions the British had of this judicial project, what they thought about Africa, and about law and the law courts established there. This could not be a matter of steadily following a consistent thread of reasoning. For many assertions in the document, there are twinned, contradictory assertions. And such apparently unambiguous statements as there are often can be shown to have unstated multiple implications. Thus, for example, the argument that British legal ideas are one of the great achievements of that civilization is belied by the accompanying argument that these ideas are actually no more than the embodiment of the universal principles of "natural justice." The idea that social evolution must be generated from within a society is paired with the idea that in Africa change can be and should be introduced by the colonial state to accelerate the march toward "civilization." And the declared courts policy of controlled native empowerment itself incorporates a contradiction because the aims of control and the aims of empowerment are bound to face in opposite directions (see Hailey 1950:212, 217, 220). All of these are uneasy statements about the place of

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the British colonial project in history, about the location of directed social change both in "real time," that is, at a particular, dated historical moment, and in some grand, undatable total trajectory of social evolution.

In that sense, evolution is an idea about the ultimate direction of history, in which more effective ideas and techniques are eventually bound to drive out less effective ones, better organizational arrangements to replace worse ones, morality to replace immorality, fairness to replace unfairness, justice, injustice, and the like. Thus from the evolutionist perspective, social and moral achievement and technical achievement are all assumed to be driven by the same dynamic of replacement. The colonial experiment seems to have brought a substantial amount of evolutionary rhetoric out of its officials, some of it not at all surprisingly implicated in the setting up of systems of courts. In that context, the British colonial claim to "know" what was best for Africa and most advanced in matters of law and courts in the world was a double statement about time, about the colonial moment in a dated chronological history and the colonial place in an evolutionary trajectory.

But in addition to making explicit statements about legal evolution, the British administrators seemed to harbor less clearly articulated assumptions about how important or unimportant the then African side of things was, given the direction in which and the pace at which history was moving. If indigenous African law was changing rapidly and was, in an evolutionary sense, slated to be first homogenized and then replaced, the implication must surely have been that the details of contemporary indigenous local practice did not matter too much. They were only temporary. But the British also cited the venerated Rule of Law that required that there be a "known" body of law and that there be certainty about it, and argued that customary law should be recorded to meet that requirement. They did not devote much effort to doing so, however.

In Tanganyika, the administrators who dealt with the courts system had an important responsibility and some serious practical problems. They could not supervise the courts very closely. They seldom had the time, the language skills, or the interest to learn much about local "customary" law or the goings-on in local African communities. What they were strongly aware of doing was giving power to some Africans to make judgments about, and impose penalties on, other Africans through their powers as court holders. The technical infrastructure that might have made routine bureaucratic oversight of these courts successful existed neither at the level of record-keeping, nor at the level of legal certainty, nor at the level of juridical impartiality. By itself, judicial review could not repair these deficiencies and could not function very well unless they

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were repaired. The colonials needed the cooperation of Africans or their administrative scheme of indirect rule would in practice be controlled by Africans rather than by themselves.

The courts were one of the testing grounds where this tension between central control and local control was manifest. African strategies in response were doubtless variable, different in different places or at different times. In the Kilimanjaro area, it is clear that Africans responded actively to the contradictions in British policy. They had no choice about receiving the framework of imposed institutional arrangements. But as a great deal of the day-to-day management was left in African hands, the practice often could be adapted to local political ends. That semiautonomy aside, the African chiefs and their deputies and clerks who ran the courts in colonial times were nevertheless repeatedly exposed to the logic of their foreign rulers. After independence many aspects of this logic were formally incorporated into Tanzanian legal rationales, as were colonial administrative forms, but the struggle over local control versus central control continued, and continues.

Outside the courts, African communities have always gone their own way as much as they could, continuing to transact their own business on their own terms and continuing to control their own members through unofficial strategies. That control was and is given its mandatory force by the micropolitics of local social standing. The "village" capacity to control emanates less from "tradition" than from the extreme dependence of members on the community to which they belong. Local courts in rural areas are thus in a peculiar relation to two domains. They are the standard creations of national government, but the cases that come to them for decision arise in the ongoing flow of rural life, with its distinctive style. This circumstance raises a question in relation to the colonial instance that has far wider application: Is it possible to "know" much about a legal system without knowing the character of the case-generating milieu?

Using the Chagga material, it is not at all difficult to show that at the colonial center where the local courts legislation was designed for the whole country (to apply to its many different peoples), the government did not fully understand or accommodate the inner workings of this particular local African society, and that by implication the same was likely true of other local systems. That much is very easily illustrated and probably uncontroversial. To suggest that in that sense the colonial administration "did not know what it was doing" is just the kind of demonstration that pleases in 1992. As the colonial period has been safely over for more than thirty years, showing colonial flaws coupled with colonial arrogance is not only politically

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risk free, it is a rather conventional version of history for our time (Rabinow in Clifford 1986:252).

My analytic purpose has been more experimental. Visible beyond the double demonstration that the colonial government, however powerful, was ignorant of many African matters and often impotent in the face of African intentions is a complex set of further questions. As they say in Haiti, "Behind the mountains lie other mountains." The story of the local courts in Tanganyika bears on the cumulative historical production of institutions and on the multiple meanings and sources of legal thought.

How context-dependent are legal principles and procedures? There are at least two quite inconsistent answers provided in the 1957 colonial document. One assumes that British legal principles are portable and exportable, extractable from their societal context, a piece of knowledge that administrators can keep, cherish, and also give away to Africans at the same time. The counterpiece of colonial logic is that there are basic legal principles that are universal, that there are ideas of "natural justice" to be found in legal thought everywhere, that the colonial project is simply to further develop those from African root stock. In the first version the colonials were introducing serious reforms on a British model. In the second they were merely building on what they found. In the first version African legal thought was different from the British. In the second the fundamental principles were the same. In our composite document, the British "knew" both to be true.

Much has been written about the nature of Christian missionary activity in Africa. Much less has been said about the secular moralizing, practical admonition, and redefinition of reality that accompanied the legal and administrative apparatus of the colonial period. A glimpse of that secular preaching was presented here, as was the way it was preoccupied with questions of time and timeliness, permanence and evanescence. To the extent that that reasoning had embedded in it a particular idea of African law, it is not difficult to use ethnographic data to show that African legal sociologic was in some particulars built on premises that diverged strongly from those of their colonial rulers. Without fully intending to do so, the colonial administrators forced an active juxtaposition of these two kinds of legal "knowledge" in the court system and had to cope with the consequences. The purpose here has been to examine some of the premises on which these two sets of ideas of "knowledge" were constructed.

Because the concepts used in the colonial system of courts are so familiar, some of their implications are normally invisible: the nature and place of rules of law, of *res judicata,* of case records, of the requirement of judicial impartiality, and a score

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of others. But some of the submerged implications of these rubrics come to the surface as the colonial government tries to communicate their import. The ongoing struggle between centralized beureacratic authority and local autonomy is played out in the definition and redefinition of legal ideas and practices. The African side presented here is less familiar, both in content and interpretation. The connection between elements of a delayed-exchange economy and legal ideas about the durability of claims has not been suggested before. And although the proffering of testimony as testimonial has been often been noticed, the connection between the obligatory public demonstration of partisanship outside the courtroom and performances inside the court have not always had adequate attention. Both delayed claims and obligatory partisanship affect what a court "knows" and can "know."

Thus fundamental thematic issues that concern time, timing, and knowledge implicit and barely noticeable in law in other contexts become unexpectedly visible in this British-African colonial setting. The colonial predicament uncovers some of the premises of our own legal culture. The basic problematic here has been epistemological, the basic framework temporal. Thinking about British ideas in an African setting and about colonial courts in 1992 "displaces" the one and "re-times" the other. The reading of the 1957 *Memoranda* grounds the discussion in a particular text but serves as the occasion to raise questions about history and social context, about time, and about the foundations of legal "knowledge."

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