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Historical globalization and colonial legal culture: African assessors, customary law, and criminal justice in British Africa*

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Abstract

The idea of globalization has helped to rehabilitate universalizing categories, such as colonialism and cosmopolitanism, criticized for their tendency to ignore the differences between local cultures and the operation of power. Drawing on the burgeoning discussion on historical globalization, and focussing on the role of African assessors, this article examines how colonial courts grappled with the tension between the aspiration toward imperial legal universalism and the 'Othering' of African subjects. It argues that British colonialism in Africa represented a form of globalization of English law, generating a 'centripetal jurisprudence' that sought to square the inequities of an engagement with local custom by holding up the values of justice, equity, and conscience. Imperial legal universalism required both the accommodation and containment of African difference. The paradox of integration and differentiation in colonial constructions of globality is that imperial power and local cultures were not always in conflict, but were sometimes complementary and mutually reinforcing.

Introduction

Law was the 'cutting edge of colonialism', crucial to the 'civilising mission' of imperialism, and instrumental to justifying and legitimizing conquest and control.[1] Colonialism typically involved the large-scale transfer of laws and legal institutions from one society to another. The result was a dual legal system: one for the colonized and one for the colonizers, casting

* The author is grateful to Tunde Oduntan and John Rankin for their comments on earlier drafts of this article. Research for this article was supported in part by a grant from the Social Science and Humanities Research Council of Canada.

1 Martin Chanock, *Law, custom, and social order: the colonial experience in Malawi and Zambia*, New York: Cambridge University Press, 1985, p. 4; Sally Merry, 'Law and colonialism', *Law and Society Review*, 25, 4, 1991, p. 890.

the latter as sole possessors of law and civility.[2] Colonizing authorities well understood that the structures of legal authorities and the creation of cultural hierarchies were inextricably intertwined. However, the language of transplant and duality obscures the inherently unstable nature of colonial law, as well as its tensions and contradictions, in both metropole and colony. The introduction of colonial law promoted cultural transformations among colonized peoples, yet also established limits to these transformations, and provided opportunities to resist and negotiate colonial power. Legal conflicts between colonizer and colonized were shaped by 'jurisdictional jockeying' between competing colonial authorities, and were affected by factions within colonized populations.[3] These multifaceted legal contexts were central to the construction of colonial rule.

Recent scholarship on colonial law has broadened the focus globally, to understand transfers of legal institutions and thought between imperial centres and colonies. Lauren Benton states that one by-product of her wide-ranging study is to provide 'a historical perspective for considering some of the disruptive forces of global politics'.[4] Richard Roberts examines how colonial courts contributed to changes in the landscapes of power and authority, and how Africans negotiated these new terrains, stating that he is concerned with subaltern agency, in the sense of 'active engagement with the world'.[5] Similarly, Martin Chanock sets his account of South African colonial legal history 'within a global context', because the transcending of the nation-state provides an opportunity to de-emphasize state-centred histories and to take account of relationships between external and indigenous factors in the making of new states.[6] The broader lens of globalization helps to rehabilitate universalizing categories such as colonialism and cosmopolitanism, criticized for minimizing the differences between local cultures and the operation of power.

This article argues that globalization has not been sufficiently historicized and differentiated. British colonialism in Africa represented a form of globalization of English law that generated a 'centripetal jurisprudence', which sought to square the inequities of an engagement with local custom by holding up the values of justice, equity, and conscience. However, although globalization implies homogenization, it is not simply the result of a dominant centre activating lesser peripheries, but is jointly produced by all parties, including subaltern actors in the 'periphery'.[7] This study goes beyond the dominance of the 'core' to explore the defining roles of marginal actors, rather than describing global interconnectedness merely in terms of the spread of capitalism outwards from Europe. Furthermore, the focus on colonial law and courts reduces what is sometimes an exaggerated emphasis on the economic dimensions of globalization.

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2 Lauren Benton, *Law and colonial cultures: legal regimes in world history, 1400–1900*, New York: Cambridge University Press, 2002, p. 12.

3 Ibid., p. 3.

4 Ibid., p. 29.

5 Richard Roberts, *Litigants and households: African disputes and colonial courts in the French Soudan, 1895–1912*, Portsmouth, NH: Heinemann, 2005, p. 14.

6 Martin Chanock, *The making of South African legal culture, 1901–1936: fear, favour and prejudice*, Cambridge: Cambridge University Press, 2001, p. 31.

7 A. G. Hopkins, ed., *Global history: interactions between the universal and the local*, New York: Palgrave Macmillan, 2006, p. 5; Jeremy Prestholdt, 'On the global repercussions of East African consumerism', *American Historical Review*, 109, 3, 2006, pp. 755–81.

Although the first part of this article traces the origins of the institution of English and imperial judicial assessors, the main consideration is not primarily the evolutionary change in the place of African assessors in colonial courts. Rather, the focus lies on the tensions between the universalist aspirations of colonial legal systems, and the ethnocentric pragmatism that reinforced notions of African difference. Landmark legal cases illustrate the role of African assessors in colonial criminal procedure and serve to explore tensions arising from fluid interpretations of the judicial role of native assessors, preferred by local colonial administrators, and more rigid definitions proffered by appellate judges. To be sure, legal records alone do not tell the whole story of disputes, for disputants who came before colonial courts had prior histories, and these relationships often persisted after court judgments. Moreover, these examples are not claimed to be representative but are employed to complicate the understanding of imperial legal culture, and to challenge meta-narratives about globalization.

Given that globalization involves not only integration but also differentiation, a central question is how difference – and its conceptualization – enters into the consciousness of globality.[8] It is not enough to recognize that the 'politics of difference' lay at the heart of colonial enterprise, for the meanings of difference were always contested and rarely stable.[9] Ideologies of imperial inclusion and differentiation were constantly challenged by people acting within the empire, as well as by people seeking a political space outside.[10] Equally significant is how those who were the subjects of these debates dealt with difference themselves. Imperial legal universalism, in the loose sense of the search for commonality, at times accentuated the difference of the colonized 'Other' but at other times enhanced incorporation. Imperial power and local cultures were not always in conflict but were sometimes complementary and mutually reinforcing.

Native assessors in the colonial legal system

In administering its colonies and protectorates in Africa, Britain sought to extend, as far as practicable, the same standards of law and justice as prevailed in England. However, although the primary law administered in most British colonial courts was English, local African customary laws were often allowed to exist alongside, if they met certain conditions. Customs were recognized only in subordination to colonial law, and were denied such recognition where they were considered 'repugnant to natural justice, equity and good conscience', or contrary to the 'general principles of humanity'.[11] The precise meaning

8 Arif Dirlik, *Global modernity: modernity in an age of global capitalism*, Boulder, CO: Paradigm Publishers, 2007, p. 41.

9 Megan Vaughan, *Curing their ills: colonial power and African illness*, Stanford, CA: Stanford University Press, 1991, p. 12; Anna Crozier, 'Sensationalising Africa: British medical impressions of Sub-Saharan Africa, 1890–1939', *Journal of Imperial and Commonwealth History*, 35, 3, 2007, p. 295.

10 Frederick Cooper, *Colonialism in question: theory, knowledge, history*, Berkeley, CA: University of California Press, 2005, p. 23.

11 Peter Fitzpatrick, 'Terminal legality: imperialism and the (de)composition of law', in Diane Kirkby and Catharine Coleborne, eds., *Law, history, colonialism: the reach of empire*, Manchester: Manchester University Press, 2001, p. 21.

of 'repugnant' was largely undefined, and was often left to European judges and magistrates to determine. Customary laws were also inadmissible if they conflicted with any legislation in force in each territory, and could thus be expressly overwritten even when they met the 'repugnancy test'.[12] Moreover, since the existence of African customs had to be established before they could be applied in judicial proceedings, colonial administrators faced the challenge of determining the validity of various customs. Specifically, they had to discriminate between customs that had the force of law and those that did not, while perhaps having moral or religious sanction.

A more practical challenge was the unfamiliarity of most colonial judges and administrators with African customs. This situation was complicated by the multiplicity of African ethnic, linguistic, and cultural groups brought together under colonial legal and administrative systems. At a 1932 conference of East African governors, senior colonial administrators acknowledged that the 'customs of the various tribes were imperfectly known' and that their enforcement 'must be attended by the greatest difficulty'.[13]

One approach to this problem was to demand 'proof' of applicable customary law before it could be accorded judicial notice, and such proof was often sought by relying on 'native assessors'. These were Africans who were presumed to be knowledgeable about local customs and traditions. They were chosen by colonial officials from the ranks of chiefs, headmen, elderly men, or 'other natives suitably qualified to aid the courts'.[14] These assessors became exponents, interpreters, and sometimes 'inventors' of local customs, shaping the processes and outcomes of colonial law and justice.

The tradition of electing court assessors may date back to medieval English manorial courts, as records refer to elected court assessors.[15] Judicial assessors were certainly present in English Admiralty courts of the seventeenth century, where the assistance of nautical assessors to evaluate matters of nautical skill and seamanship was considered crucial. While most English courts retained the discretion of summoning assessors in civil proceedings, the practice became progressively rarer in non-nautical cases. By the early nineteenth century, the Admiralty courts remained the only ones in England where judges were regularly assisted by assessors.[16]

However, just as the institution of judicial assessors was weakening in England, circumstances gave it new life in India, where the British sought to build new English-style judicial structures after taking over from the East India Company.[17] Until 1862, much of the colonial criminal law in India was based on 'Mohammedan' law. Until 1832, a trial judge was

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12 Sally Falk Moore, 'Treating law as knowledge: telling colonial officers what to say to Africans about running "their own" native courts', *Law and Society Review*, 26, 1992, p. 18.

13 Kenya National Archives (henceforth KNA), AP/1/1659, 'Proceedings of the conference of East African governors, Nairobi, 1932'.

14 Swaziland High Court Proclamation, 1938 [revised 1957], section 8.

15 Zvi Razi, *Life, marriage and death in a medieval parish*, Cambridge: Cambridge University Press, 1980, p. 145.

16 Anthony Dickey, 'The province and function of assessors in English courts', *Modern Law Review*, 33, 5, 1970, p. 494.

17 Bernard Cohn, 'Law and the colonial state in India', in Bernard Cohn, ed., *Colonialism and its forms of knowledge*, Princeton, NJ: Princeton University Press, 1996, pp. 57–75; Elizabeth Kolsky, 'Codification and the rule of colonial difference: criminal procedure in British India', *Law and History*

thus required to obtain a *fatwa* ('opinion') of a 'Mohammedan law officer' as to the law to be applied in each case.[18] However, facing complaints from non-Muslims, British authorities introduced legislation allowing colonial judges to appoint 'respectable natives' in cases involving non-Muslims, to elicit their assistance in examining witnesses.[19] Assessors were intended to serve more or less as 'native law experts', members of the court in an advisory capacity.[20]

The use of native assessors spread around the colonial world, for example in judicial systems in Fiji, Ceylon, and New Zealand.[21] Indeed, there is evidence that assessors were employed informally in European courts in Africa even before the formal establishment of colonial rule, as in the early courts of equity in the Niger Delta in the 1850s, which heard cases involving commercial transactions between Europeans and Africans.[22] In the Belgian Congo, judges heard disputes between 'natives' with the help of *assesseurs indigènes*.[23] In French West Africa, native assessors assisted European courts and were indispensable to the functioning of the native legal system and French colonial rule. Far from being simple collaborators, they followed their own legal agendas, sometimes ignoring official rules and establishing a certain 'space' of their own, which the colonial administration found difficult to penetrate.[24] Like other local employees, they were crucial to the institutionalization of colonialism because they played a central role in transmitting and interpreting knowledge and power.

In the early twentieth century, specific colonial legislation began to provide the statutory framework for the institution of 'native assessors' in the judicial systems of most British African colonies. To avoid having 'an alien court' commit injustice through ignorance of local traditions, these laws required that all criminal trials without a jury in superior courts must employ local assessors. Employing African assessors to serve in 'native courts' was particularly prevalent in the colonies of eastern and southern Africa, including Basutoland,

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Review, 23, 3, 2005, pp. 631–84; Radhika Singha, *A despotism of law: crime and justice in early colonial India*, Delhi: Oxford University Press, 1998.

18 N. B. E. Baillie, 'The Mohammedan law of evidence in connection with the administration of justice to foreigners', *Journal of the Royal Asiatic Society of Great Britain and Ireland*, 1834, pp. 496–8; G. Campbell, *Modern India and its government*, London: John Murray, 1852, pp. 472–3.

19 Henry Adolphus Byden Rattigan and Alweyne Turner, *The Bengal regulations: the acts of the Governor-General in Council, and the frontier regulations applicable to the Punjab*, London: Civil and Military Gazette Press, 1897, sections 4(1) and 4(2).

20 J. H. Jearey, 'Trial by jury and trial with the aid of assessors in the superior courts of British African territories', *Journal of African Law*, 5, 2, 1961, p. 95.

21 P. Duff, 'The evolution of trial by judge and assessors in Fiji', *Journal of Pacific Studies*, 21, 1997, pp. 190–1; Charles Pridham, *An historical, political and statistical account of Ceylon and its dependencies*, London: T. & W. Boone, 1849, p. 446; Danny Keenan, 'Aversion to print? Maori resistance to the written word', in Penelope Griffith, ed., *A book in the hand: essays on the history of the book in New Zealand*, Auckland: Auckland University Press, 2000, pp. 24–7.

22 A. E. Afigbo, *The warrant chiefs: indirect rule in southeastern Nigeria, 1891–1929*, New York: Humanities Press, 1972, pp. 38–9.

23 Marie-Bénédict Dembour, *Recalling the Belgian Congo: conversations and introspection*, New York: Berghahn Books, 2000, p. 28.

24 Ruth Ginio, 'Negotiating legal authority in French West Africa: the colonial administration and African assessors, 1903–1918', in Benjamin N. Lawrance, Emily Lynn Osborn, and Richard L. Roberts, eds., *Intermediaries, interpreters, and clerks: African employees in the making of colonial Africa*, Madison, WI: University of Wisconsin Press, 2006, p. 132.

Bechuanaland, Rhodesia, Nyasaland, Tanganyika, Uganda, and Somaliland. Assessors were also used extensively in judicial proceedings in South Africa and in Kenya, where they played an important role in Mau Mau trials.[25]

The link between judicial assessors in India and Africa is clear. The Indian Evidence Act of 1872, applied as such or with modifications in East Africa, stated: 'When the court has to form an opinion as to the existence of any general custom or right the opinions, as to the existence of such custom or right, of persons who would be likely to know of its existence, if it existed, are relevant'.[26] Similarly, the Swaziland High Court Proclamation of 1938 stated that a court could

> [c]all to its assistance one or more native assessors, who shall be chosen by the Paramount Chief of Swaziland from counsellors and headmen or other natives suitably qualified to aid the Court. The assessor or assessors shall give his or their opinion and such opinion shall be considered by the court, but the decision shall be vested exclusively on the judge.[27]

Although these and similar laws gave trial judges the discretion of whether to sit with assessors or not, most did in criminal cases involving Africans.[28]

As a general rule, assessors were of the same 'race' (tribe in Africa) as the litigants and were selected by the trial judge from suitable persons summoned to attend the trial. Trial judges could also call to their assistance two administrative officers chosen by the Resident Commissioner.[29] Some colonies further required that Africans selected as assessors had to be government employees who had served 'not less than ten years in the Native Department'.[30] Africans selected as assessors were almost always senior men, usually chiefs or headmen. While younger men were sometimes chosen, women were rarely appointed as assessors, even in cases exclusively involving them. Gender and generational imbalances sometimes became issues when the evidence of assessors was reviewed in colonial appellate courts.

Colonial administrators attached considerable importance to the process of recruiting. Potential assessors were nominated by administrative officers and appointed by judicial officers. In British East African colonies, yearly lists of eligible assessors were compiled by registrars of High Courts and published in official gazettes as 'Annual rolls of jurors and assessors'. These annual rolls, some dating back to 1897, provide us with some biographical information: name, race, tribe, gender, residence, occupation, and, in some cases, age and

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25 F. G. Gardiner and A. V. Lansdown, *South African criminal law and procedure*, Cape Town: Juta, 1957, vol. 1, pp. 344–9; Chanock, *South African legal culture*, p. 254; Louis Leakey, *Defeating Mau Mau*, London: Methuen, 1955, p. 10; David G. Anderson, *Histories of the hanged: the dirty war in Kenya and the end of empire*, New York: W. W. Norton & Company, 2005, p. 158.

26 Indian Evidence Act 1872, section 48, quoted in M. P. Jain, 'Custom as source of law in India', in Alan Dundes and Alison Dundes Renteln, eds., *Folk law: essays in the theory and practice of* lex non scripta, Madison, WI: University of Wisconsin Press, 1995, p. 80.

27 Swaziland High Court Proclamation, section 8.

28 Ibid., sections 7 and 8.

29 Ibid., section 8.

30 *Criminal procedure act of Northern Rhodesia* [Revised Laws, 1939], 28, section 222.

religion.[31] In some territories, notably South Africa and Kenya, great attention was paid to categorizing jurors and assessors according to race, ethnicity and religion. The annual rolls in Kenya and Uganda typically included the following categories, in order: Europeans (jurors only), Arabs, Swahili and Beluchis, Memons, Sidhis and other Mohammedans, Isma'ili Khojas and Bohoras, Ithanasheri Khojas, Hindus, Parsis, Goans, and 'Natives of African extraction'.[32] The latter were local Africans, often senior men, nominated by Resident Commissioners from their districts to serve in cases involving natives. Ultimately, assessors were chosen according to administrative reports and their perceived authority among local people.[33]

The ostensible object of using African assessors was, in the words of one judge, to 'guarantee to the native population that their own customs and habits of life are not misunderstood'.[34] In fact, the use of native assessors in the courts was equally driven by administrative expediency. African assessors were crucial to British 'pacification' agendas and to guaranteeing social order. The aim of the system was both practical and moral. It was practical in the sense that European judges often could not understand the language and customs of people in the dock, and moral in terms of legitimizing 'alien' courts in the eyes of Africans.[35] A commission of enquiry, set up in 1933 to review the administration of justice in British East Africa, stated that the central goal of employing African assessors in the courts was to prevent the appearance of injustice, which could have a 'bad effect on native minds'.[36]

Most African assessors appear to have been ambivalent about their roles in the colonial courts. Although assessors were entitled to a modest stipend, Africans rarely sought these assignments. Attending lengthy trials, in remote and unfamiliar court settings, created perils. African assessors were sometimes the target of intimidation, physical attacks, and even murder, because of opinions given in courts trials.[37] Recruiting African assessors was particularly difficult in urban centres, where they were needed for criminal trials involving Africans. In 1942, one judge in Nairobi complained about the poor quality of 'urbanised assessors' recruited to his courts, saying that they knew little about tribal customs.[38] Colonial judges and administrators preferred 'traditional' men, thought to be well versed in

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31 Details are in the *East Africa Protectorate Law Reports*, *Tanganyika Territory Law Reports*, and the *Colony and Protectorate of Kenya Law Reports*.

32 KNA, AP/89, 'Assessors 1901'; KNA, AP/1/591, 'Jurors and assessors 1910'; KNA, AP/1/823, 'Jurors and assessors 1913'; KNA, AP/1/1280, 'Jurors and assessors 1922'.

33 KNA, SEC/2/1/22, 'Magisterial powers of administrative officers'.

34 Judgment in the case of *Mahlikilili Dhalamini and ors v. R*, [1942] Appeal Cases 583, pp. 589ff. (henceforth, *Dhalamini v. R*). For this case, see Joseph Jaconelli, *Open justice: a critique of the public*, Oxford: Oxford University Press, 2002, pp. 104–5.

35 L. A. A. Kyando and C. M. Peter, 'Lay people in the administration of criminal justice: the law and practice in Tanzania', *African Journal of International and Comparative Law*, 5, 1993, p. 669.

36 KNA, AP/1/1659, 'Commission of enquiry into the administration of justice in Kenya, Uganda and Tanganyika 1933'.

37 KNA, DC/KSM/1/15/34, 'Acting Judge of Nyeri to Chief Registrar', 15 June 1954.

38 KNA, DC/KSM/1/15/34, 'Criminal session cases: list of African assessors roll and letters to the Chief Justice'.

customary law, over 'modern' Africans, who, they believed, were more inclined to be corrupted 'in modern ways'.[39]

Knowledgeable experts or peer jurors

Even when suitable Africans had been found, defining their role in colonial courts raised difficult jurisprudential issues. Colonial laws spelled out the role of native assessors, but judicial and administrative officials continually grappled with how precisely to define that role in trials. As with many imperial institutions, the challenge was how to adapt a legal institution originating in England that had been reinvented in a colonial context to meet specific legal and administrative needs.

One question was how much weight colonial courts could place on the testimonies of African assessors with respect to the 'validity' of native customary law. Addressing this question in a prominent case appealed to them from the Gold Coast in 1916, the Judicial Committee of the Privy Council held that, if a particular customary law had been proved frequently before a court by witnesses or assessors sufficiently acquainted with the native custom such that it became 'notorious', the court was obliged to take 'judicial notice' of that custom.[40] Thus opinions on particular customs frequently presented before a court were presumed to be settled customary law, requiring no further proof. Of course, such customs still had to pass the 'repugnancy test' and meet the demands of British 'justice, equity, and good conscience'. Moreover, the Privy Council's ruling raised concerns within colonial officialdom about the misrepresentation of customary law by African assessors, as the result of ignorance, bias, or corruption. There were concerns about a tendency on the part of some native assessors to idealize customary law and to present 'what it ought to be instead of what it really is'.[41] Since native assessors were used mainly in criminal trials, officials feared the spectre of grave and widespread miscarriages of justice if idealized or distorted customs were given permanent judicial recognition, such that they could no longer be challenged before the courts.[42]

Concerns were also voiced, particularly by judges and legal scholars, that customary law – on which African assessors were expected to give opinions – was continually being modified. Court opinions therefore might not always reflect the evolving and fluid nature of flexible African customs. The dominant opinion was against granting permanent judicial recognition to the testimonies of native assessors on questions of customary law, out of concern that this would freeze the law at one stage of its development.[43] Similar arguments were made against codifying customary law in English-style statute books.

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39 Ginio, 'Negotiating legal authority', p. 120.

40 *Angwu v. Atta*, (1916) Gold Coast Privy Council judgments, 1874–1928, p. 43.

41 KNA, DC/KSM/1/15/34, 'Acting Judge of Nyeri to Chief Registrar, Supreme Court of Nairobi', 15 June 1954.

42 KNA, SEC/2/1, 'Colony and protectorate of Kenya: annual confidential reports 1916'; KNA, SEC/2/4, 'Supreme Court sessions 1925'.

43 A. N. Allott, 'The judicial ascertainment of customary law in British Africa', *Modern Law Review*, 20, 1957, p. 262.

Several historical and anthropological studies have demonstrated that the so-called customary law of the colonial period was forged in particular historical struggles between the colonial power and colonized groups. Both traditional and modernizing African elites took a central role in defining 'indigenous law' in native courts.[44] The unfamiliarity of British officials with local property, gender, and power relations sometimes created opportunities for litigants in colonial courts to present local customs as they wanted them to be.[45] African assessors who were seen as 'experts' in native customs were well positioned to do this, particularly in the early colonial period, when European officials tended readily to accept their opinions on African customs. The process has been characterized as the 'invention of tradition', rather than the ascertaining of tradition.[46] Colonial administrators set about inventing African traditions for Africans because few connections could be made between British and African political, social, and legal systems. Colonists drew on European invented traditions to define and justify their roles, and to provide models of subservience into which it was sometimes possible to draw Africans. More recent studies have exposed the limits of the 'invention of tradition'.[47] However, its basic assumptions are relevant to understanding the role of African assessors in the colonial judicial system.

In civil cases, colonial courts sought the opinion of African assessors mainly in matters involving domestic and familial issues, such as divorce, inheritance, and disputes over property. In criminal cases, assessors were central to trials for murder and manslaughter. These were capital offences, for which the customs of those involved were considered crucial to achieving justice.[48] Judicial officers stressed the importance of assessors' opinions when an African accused of a capital offence pleaded insanity. Indeed, this was so in any case where the mental state of a person accused of a criminal offence might mitigate culpability, resulting in a lighter sentence. The opinions of African assessors were also frequently sought where the defence of provocation was advanced in murder cases, to determine what constituted provocation in local culture, potentially causing fits of rage and violence. As one colonial magistrate stated, 'circumstances that may compel a native to rise and strike a fatal blow may cause no more than discomfiture elsewhere'.[49] Thus, as in other aspects of the colonial enterprise, underlying assumptions about African difference and exceptionalism underscored the place of native assessors in the colonial judicial system.

Perhaps the most contentious debate about the use of native assessors was whether they should be treated as jurors or as 'expert witnesses', outsiders invited to provide evidence

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44 Merry, 'Law and colonialism', p. 897.

45 Martin Chanock, 'Laws and contexts', *Law in Context*, 7, 2, 1989, p. 72.

46 Terence Ranger, 'The invention of tradition in colonial Africa', in Eric Hobsbawm and Terence Ranger, eds., *The invention of tradition*, Cambridge: Cambridge University Press, 1983, p. 211.

47 Sally Falk Moore, *Social facts and fabrications: 'customary' law on Kilimanjaro, 1880–1980*, Cambridge: Cambridge University Press, 1986; Thomas Spear, 'Neo-traditionalism and the limits of invention in British colonial Africa', *Journal of African History*, 44, 1, 2003, pp. 3–27.

48 KNA, SEC/2/6/54, 'Criminal records 1928'; KNA, SEC/2/1/22, 'Magisterial powers of administrative officers'.

49 *Dhalamini v. R*, p. 589.

before the courts.[50] This determined how much weight judges should place on the testimony of assessors. At both practical and academic levels, the answer was not clear. In colonial Africa, as in England, a trial judge was not bound by the opinion of an assessor appointed to aid the court, for the final decision was vested solely in the judge. However, whereas in England assessors served more or less as expert witnesses, assessors in Africa and India were required to deliver an opinion on the general issues involved in a case, and were often not confined by judges to answering questions on specific points.[51] Nonetheless, native assessors were never intended to be jurors in the sense of directly determining the outcome of trials. Evidence from law reports shows that colonial judges often overruled the opinion of assessors. Thus, in the case of *Habiab Kara Vesta and ors v. R*, the East African Court of Appeal overruled the unanimous opinion of assessors, upholding the 'absolute power of the judge to give effect to his own views'.[52] Moreover, unlike jurors, native assessors were not required to reach a consensus, for each gave his or her personal opinion. In criminal trials involving Africans, it was unclear whether assessors should simply aid colonial judges or whether they should also protect the interests of Africans by ensuring that their customs were properly articulated and duly considered.

Native assessors and colonial criminal procedure: the *Dhalamini* case

Nowhere were these vexed questions more extensively addressed than in the landmark case of *Mahlikilili Dhalamini and ors. v. The King*. Originating in Swaziland in 1941, this case eventually came before the Judicial Committee of the Privy Council (henceforth Privy Council), which was the final court of appeal for all legal disputes within the British empire. The process of appeal from the High Court of Swaziland provides unique insights into the contested role of African assessors in colonial courts. The central tension was between the position of colonial officials 'on the spot', who had to contend with the exigencies of local administration, and the detached perspectives of appellate judges in metropolitan centres, who were more concerned with upholding universalist standards of British justice throughout the empire.

The main legal question in the *Dhalamini* case was whether the opinion of a 'native assessor' had to comply with strict rules of evidence in colonial statutes or whether it could be mitigated by local administrative exigency. The *Dhalamini* case provided an opportunity for the highest court in the British empire to wade into long-standing debates among local administrators and judges over the role of native assessors in criminal trials. This case dealt with the sensitive matter of ritual or 'medicine' murder, which was of great concern to colonial authorities at the time, who feared that there was a growing incidence of ritual murders in the African colonies. The British government therefore appointed the Cambridge anthropologist G. I. Jones to inquire into 'medicine murders' in Lesotho in 1949. However, Sotho

50 John Gray, 'Opinion of assessors in criminal trials in East Africa as to native custom', *Journal of African Law*, 2, 1, 1958, p. 8.

51 Jearey, 'Trial by jury', p. 85.

52 *Habiab Kara Vesta and ors v. R*, (1934) EACA 1, p. 91.

chiefs and nationalists rejected the whole idea of medicine murder as a British invention, imposed through a series of show trials and intended to destroy the chiefship, so that the country could be handed over to South Africa.[53]

The three convicted murderers in the *Dhalamini* case were natives of Swaziland who allegedly conspired to kill their victims, also natives, in order to use parts of their bodies to make 'medicine' to increase their crops. An alleged conspirator, called as a witness by the crown, testified to the conspiracy and the actual killing. The original trial took place before a British Judge, Judge Haggard. He was aided by two administrative officers and a native assessor, as stipulated in the Swaziland High Court Proclamation of 1938, which required that all proceedings must take place in 'open court'.[54] When the case came before the Privy Council, the main legal question that arose was procedural: whether the opinions of the said officers and the native assessor had been properly obtained.

It was not evident from the trial records whether the original trial judge had consulted native assessors in accordance with the law. To clarify this, the Privy Council had a telegram sent to the Resident Commissioner in Swaziland. The latter replied that the trial had been conducted with the aid of a native assessor but that his opinions had been given to the judge in private rather than in open court. Even though the Swaziland High Court Proclamation specified that such opinions should be given in open court, this had not been the general practice, owing to 'local circumstances': experience had shown that Africans were unlikely to give their honest opinion before an open court. In the Commissioner's words: 'Insofar as the native is concerned, if his opinion had been given in public, he might feel constrained to decide in favour of a native accused, whereas in the privacy of the judge's room and in the company of the judge and the administrative officers, he could be more likely to give honest independent opinions'.[55] In many ways, this explanation typifies the workings of colonial native policies. Local officials often found it expedient, even necessary, to depart from strict regulations on the administration of justice on the grounds that, in a colony, law had to serve more as a means to an end than an end in itself. To them, the 'end' of British-style justice was more important than strict adherence to procedural technicalities.

The judges of the Privy Council were not persuaded by the argument of the Resident Commissioner. They held that this was insufficient reason for the trial judge to have disregarded the statutory regulation on the use of native assessors in criminal trials. Indeed, they rejected the argument that natives in Swaziland would be less likely to give an honest opinion if they had to give it in open court. Their rationale was that, in other British colonial jurisdictions, similar laws requiring native assessors to give their opinions in open court had not raised concerns about difficulties in obtaining honest opinions. The Privy Council stated that, in at least three legal codes with which the judges were familiar (India, Gold Coast, and Nigeria), native assessors were required to give their opinion orally in open court, and there had been no fear that a dishonest public statement by a native assessor

53 Colin Murray and Peter Sanders, *Medicine murder in colonial Lesotho: the anatomy of a moral crisis*, Edinburgh: Edinburgh University Press, 2005.

54 Joseph Jaconelli, *Open justice: a critique of the public trial*, Oxford: Oxford University Press, 2002, p. 104.

55 Quoted in Barnett Hollander, *Colonial justice: the unique achievement of the Privy Council's Committee of Judges*, London: Bowes and Bowes, 1961, p. 87.

would make it desirable to be given in private.[56] Given that the trial judge in Swaziland had not followed the statutory provision, the question before the Privy Council was whether this procedural error amounted to a fatal flaw, which warranted the nullification of the earlier judgment convicting the accused. Delivering the verdict, Lord Atkin, one of the more prominent judges on the Committee, stated:

> It must be remembered that the provision for giving the judge, at his request, the assistance of native assessors cannot be regarded solely from the point of view of aid given to the judge. It operates, and is no doubt intended to operate, as a safeguard to natives accused of crime, and a guarantee to the native population that their own customs and habits of life are not misunderstood. From this point of view the importance of publicity is manifest.[57]

In this case, not only was the opinion of the native assessor not given in open court as required by law, but it was also not subsequently made known to the public whether any such opinion had been given during the trial. Only the High Commissioner had been informed of the assessor's testimony, in the judge's confidential report. It was not until the appeal case was opened at the Privy Council in London that the facts about the role of native assessors in the trial were made public. To the Privy Council, the entire trial lacked transparency and had the makings of a secret trial, and the Council easily reached the conclusion that the trial had been irregular. On the question of what the result of a failure to hold the whole of the proceedings in public should be, the Privy Council drew comparisons with the judicial system in England, stating:

> In this country the omission would be a fatal flaw entitling a convicted criminal to have the conviction set aside.... The failure to hold the whole of the proceedings in public must amount to such a disregard of the forms of justice as to lead to substantial and grave injustice within the rule adopted by this Board in dealing with criminal appeals.[58]

On these grounds, the Privy Council recommended that the appeal be allowed and the conviction set aside. Unlike regular courts, the Judicial Committee of the Privy Council does not pass judgments but sits as a board and advises the crown on whether to grant or refuse an appellant's petition.

The decision in the *Dhalamini* case, coming from the highest court of appeal in the British empire, had a profound impact on colonial jurisprudence throughout British Africa. It intensified ongoing debates over the proper role of native assessors in the colonial judicial system. Judges and magistrates became more scrupulous in their use of native assessors, particularly in criminal trials. Where once native assessors had been more or less arbitrarily used in criminal trials to establish the validity of African customs, there was now greater realization that the opinions of native assessors had to conform to the strict standards of English legal procedure and rules of evidence to be admissible in court. The oft-cited excuse

56 Ibid., p. 87.

57 *Dhalamini v. R*, p. 589. See also R. Vogler, 'The international development of the jury: the role of the British empire', *Revue Internationale de Droit Pénal*, 72, 2001, pp. 525–52.

58 *Dhalamini v. R*, p. 589.

that the exigencies of colonial governance required 'tweaking' procedural law had been dealt a significant blow. After the *Dhalamini* case, legal codes in some colonies (for example, in Nyasaland) were revised to emphasize that opinions of assessors must be given in open court. This case was frequently cited as applicable judicial precedent in subsequent cases involving native assessors in criminal trials.[59] It also became an important reference point for addressing legal questions concerning the admissibility of procedurally flawed evidence in criminal trials in other British jurisdictions. Nearly four decades later, it was cited as applicable precedent in a landmark judgment of the Supreme Court of Canada.[60]

Custom and gender in an 'alien court': *Rex v. Ndembera*

British colonial legal culture differed in various parts of Africa, and varied social and political circumstances meant that criminal procedures in each jurisdiction reflected distinctive local concerns about administrative control and the maintenance of social order. However, the doctrine of precedent in English common law, by which courts are bound (within prescribed limits) by prior decisions of superior courts, ensured that judicial decisions in one colony could influence decisions in another part of the empire.

This was evident in the case of *Rex v. Ndembera*, in which the East African Court of Appeal (EACA) in 1947 reversed the conviction of an African for murder, on the grounds that the original trial judge in the High Court of Uganda should not have convicted the accused based solely on the uncontested opinion of native assessors. Beyond the role of assessors in criminal trials, the judgment also addressed important questions concerning patriarchal influences and gender biases in the opinions of male assessors in trials involving women. As several studies have shown, colonial courts were often sites of intense gender and generational struggles over the interpretation of customary law.[61] The *Ndembera* case provides a clear example not only of how these gender and generational struggles played out before colonial courts, but also of how Africans in the lower ranks of colonial bureaucracy shaped these processes. It raised questions about the dominance of male perspectives in the testimonies of African assessors and the resulting implications for the rights of women in trials.

The 'facts' of this case, as presented at trial, were that the accused was found eloping with another man's wife. Thereupon, an uncle of the woman's husband attempted to 'arrest' the accused and prevent him from leaving with the woman. In the struggle that ensued, the accused killed the uncle with his spear. During the original trial, the main issue before the court was whether, under local custom, the deceased uncle of the woman's husband was entitled to arrest the accused while the latter was eloping with his nephew's wife.

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59 See, for example, *Banyamini Pande v. R*, (1951) EACA 18, p. 263.

60 *Morris v. The Queen*, [1979] Supreme Court of Canada, *Supreme Court reports*, 2, p. 1041.

61 Cheryl Johnson, 'Class and gender: a consideration of Yoruba women during the colonial period', in Claire Robertson and Iris Berger, eds., *Women and class in Africa*, New York: Africana Publishing Company, 1986, pp. 237–54; Jane L. Parpart '"Where is your mother?": gender, urban marriage, and colonial discourse on the Zambian Copperbelt, 1924–1945', *International Journal of African Historical Studies*, 27, 2, 1994, pp. 241–71.

Two male assessors stated their opinion that, according to native custom, the deceased was fully justified in attempting to restrain and arrest the accused. They stated that male family members such as brothers, uncles, and nephews had a customary right to prevent a relative's wife from eloping. This custom, they opined, was based on the notion that, in marriage, a woman became attached not only to her husband but also to her husband's extended family.[62] However, contradicting this opinion, the 'woman in question' gave the following evidence: 'Our custom about divorce is that a woman will run away with a man and then the husband will divorce her ... I did not seek my husband's consent to a divorce. It is not in our custom to do so. I could please myself. I did not need my husband's consent'.[63] This testimony, coming from the woman at the centre of the case, suggesting that she was not simply eloping with the accused but was in the process of divorcing her husband, would clearly have mitigated the severity of any sentence passed on the accused. However, disregarding the evidence of the woman and upholding the opinion of the male assessors on the applicable native custom, the original trial judge convicted the accused of murder.[64] One of the grounds for rejecting the evidence of the woman was the assumption that her views were more likely to be 'a progressive woman's conception of what a woman's right ought to be' rather than the proper native custom on divorce.[65]

This judgment was typical of the attitudes of colonial courts toward the evidence of African women, particularly on matters relating to marriage and divorce. There was a constant questioning of the identities and status of women, most persistently over the issue of whose wife a woman was. Complicating this, as in the *Ndembera* case, were questions over whose wife a woman was at a particular time, amid contested interpretations of customary law.[66] These questions highlight the role of colonialism in both the production and amplification of gender differentiation. They lend credence to the argument that colonial rule in Africa was essentially a male project, an undertaking in which European men employed and collaborated with African men, as well as confronting them.

Upon appeal at the EACA, the *Ndembera* case focussed on two main questions, of which the first was whether the original trial judge had erred by making a judgment adverse to the appellant based solely on the opinion of assessors, which the accused had no opportunity to challenge or rebut. On this, the Court of Appeal noted with disapproval that no evidence of the custom that the accused was alleged to have contravened was tendered during the original trial. The second, and perhaps more crucial, question was how to resolve the seeming contradiction between the opinion of the assessors and the evidence of the 'woman in question' as to the local custom on divorce. Unlike the original trial judge, the judges of the EACA were reluctant simply to accept the opinion of two court-appointed male assessors

62 *Rex v. Ndembera*, [1947] EACA, pp. 83–5.

63 Ibid., p. 85. See also Gray, 'Opinion of assessors', p. 10.

64 *Rex v. Ndembera*, p. 85.

65 Ibid., p. 86.

66 Judith Byfield, 'Women, marriage, divorce and the emerging colonial state in Abeokuta (Nigeria)', *Canadian Journal of African Studies*, 30, 1, 1996, p. 32; Tapiwa B. Zimudzi, 'African women, violent crime and the criminal law in colonial Zimbabwe, 1900–1952', *Journal of Southern African Studies*, 30, 3, 2004, pp. 499–517; Brett L. Shadle, '"Changing traditions to meet current altering conditions": customary law, African courts and the rejection of codification in Kenya, 1930–60', *Journal of African History*, 40, 3, 1999, pp. 411–43.

over the evidence of the woman at the centre of the case. These European men seemed acutely aware of the possibility of patriarchal and generational biases in the opinions of male African assessors. They were also aware that such gender biases, on the part of both African assessors and European judges, could subvert much-vaunted ideals of British justice in the colonies. Commenting on the dismissive attitude of the original trial judge toward the evidence of the woman, the judges of the EACA stated:

> If this [woman's evidence] is to be regarded merely as a progressive woman's conception of what a woman's right ought to be, it is surprising that it elicited no re-examination and no question by either assessor. It may well be that the trial Judge who has had a long African experience, was himself conversant with the native custom on the point, but if that was the case, we respectfully suggest that it would have been better had he attempted to elicit evidence of it by questioning either Mosho [the woman in the case] or her husband who was also a prosecution witness. Had such evidence been forthcoming, whether *pro or contra*, or both, the opinion of the assessors would have been pertinent and could rightly have been acted upon by the learned trial Judge. As it is, we feel bound to leave out of account this part of the judgment and treat this case as if the deceased had no business to interfere with the person of the appellant by physical force.[67]

The EACA accordingly altered the conviction of the appellant from murder to manslaughter, guided by the Privy Council's ruling in the *Dhalamini* case, delivered five years earlier, that the role of assessors in trials involving natives could not simply be seen from the point of view of aid given to the trial judge. The institution of assessors was also intended as a safeguard to natives accused of crimes, and to guarantee that the courts properly understood and applied their customs. Achieving this objective meant that accused natives had to be given ample opportunity to challenge the opinions of court-appointed assessors on native customs, particularly in trials for capital offences. In the *Ndembera* case, the EACA was particularly critical of the dismissive approach of the lower court towards evidence on native customs that contradicted that of the court-appointed assessors. The court noted that such an uncritical approach to the use of native assessors threatened to prevent 'an alien court doing justice through ignorance'.[68]

The reference here to an 'alien court' in the judgment of the EACA is telling. Whereas local administrators for the most part saw the courts as definitive institutions for colonial social reordering, appellate judges at the regional levels and at the Privy Council tended to be more cognizant of the foreign character of English-style courts in the colonies. Since these were 'alien courts' with procedures and conventions unfamiliar to Africans, the legal safeguards put in place to ensure that native customs were properly represented in court trials had to be strictly observed. Unlike the lower courts, colonial appellate courts were less concerned with the maintenance of social order. Their focus was more on fashioning a centripetal jurisprudence of empire: that is, the promotion of consistent standards of British imperial justice and the homogenization of local legal cultures, through the

67 *Rex v. Ndembera*, pp. 85–6.

68 Ibid., p. 87.

application of precedents from communities and contexts across the empire. Colonial appellate judges were therefore less inclined to accommodate arguments for local exigencies and administrative discretion.

Imperial universalism and the imperative of difference

The *Dhalamini* and *Ndembera* cases typify a trend in the 1940s whereby colonial judges and magistrates became stricter in their application of legal rules of evidence and criminal procedures in cases involving Africans. Apart from the legal precedents that appellate cases such as these provided, the growing involvement of an emergent African intelligentsia in colonial politics meant that greater attention had to be paid to the role of Africans in the colonial legal system. Courts became increasingly reluctant to accept the opinions of assessors that were unsupported by other evidence, particularly in trials for capital offences, in which such opinions were deemed unfavourable to accused natives. The significance of both the *Dhalamini* case and the *Ndembera* case lies in the possibilities for new historical interpretations that they offer. One aspect of this relates to the discourse on imperial universalism and the historicization of globalization.

The *Dhalamini* case in particular reflects a central paradox in colonial legal systems in Africa: that between imperial universalism and local exceptionalism. There was a conflict between upholding fundamental principles of British justice, which became a basis for legitimizing empire, and recognizing local African customs, which were indispensable to achieving that justice. On the one hand, there was an aspiration towards maintaining a standard of law and justice in the colonies consistent with, or at least comparable to, what obtained in the metropole. Courts in the colonies were expected to serve no lesser function than the courts in England, their purpose being to deal with cases of conflicts with clear-cut rights and duties established by objective investigation of only those events deemed relevant to each case. Strict rules of evidence were to restrict the content of testimony that the courts could hear. Cases were to be treated as involving a right and a wrong, with judges and magistrates making final decisions, sometimes after consultation with local 'experts'. On the other hand, there was some recognition that these principles, on which European-style colonial courts operated, differed from existing African notions of law and justice.

The contrasts were amplified by colonial anthropologists and legal scholars.[69] Unlike the English-style courts, it was argued, what was sought in disputes under traditional African and Asian systems was not the strict legal rights of the parties but the amicable resolution of the dispute.[70] The duty of chiefly authorities that administered the law in settling disputes was to 'assuage injured feelings, to restore peace, to reach a compromise acceptable to both

69 For example, Max Gluckman, *The judicial process among the Barotse of Northern Rhodesia*, Manchester: Manchester University Press, 1955.

70 W. C. E. Daniels, *The common law in West Africa*, London: Butterworth, 1964; A. N Allott, *Essays in African law*, London: Butterworth, 1960; Robert L. Kidder, 'Western law in India: external law and local responses', in Harry M. Johnson, ed., *Social system and legal process*, San Francisco, CA: Jossey-Bass, 1978, pp. 159–62.

disputants'.[71] Of course, some scholars have questioned the historicity of these representations. Sally Falk Moore argues that the 'social equilibrium' presentation of African disputational logic is a mixture of African self-idealization and colonial and anthropological political theory.[72] Yet, although this presentation is not entirely without foundation, it is a well-edited version of the facts. There is ample ethnographic evidence of inner struggles within groups in anthropological works written during both the colonial and postcolonial periods.

Such notions stood at the core of colonial assumptions about native difference, law, and justice.[73] Colonial legal reordering was founded on the idea that the maintenance of social harmony and equilibrium was the dominant objective of African legal proceedings. A government memorandum, issued in 1957 to regulate the activities of local courts in Tanganyika, stated: '[w]heras amongst Europeans the stress is on the individual and his rights, amongst the Bantu it was ... upon the community, upon the family or clan, and its continuing solidarity'.[74]

In spite of such emphasis on native difference, the legitimacy of the European-style legal systems introduced in the colonies also rested on a certain imperial universalist idealism, which was evident in the establishment and regulation of the institution of native assessors. In British East Africa, just as the law providing for native assessors derived from the Indian Evidence Act, so the provisions of the East African Criminal Procedure Codes were taken directly from the Indian Code of Criminal Procedure.[75] Thus, in terms of legal procedure, Indian legal codes, rather than extant English laws from which these codes may have derived, provided the required imperial standards. The unification of the Colonial Administrative Service on the eve of the Second World War and, specifically, the creation of a unified Colonial Legal service in 1933, were important parts of this homogenizing and universalizing process. Although the main goal of unifying the colonial legal service was the standardization of conditions of employment, it also set imperial standards in the administration of justice.[76]

However, there was also a conscious effort to moderate the impact of colonial laws imported from England or India by recognizing pre-existing local customs, which were seen as traditional regulators of the lives of Africans. Imperial legal culture could accommodate such customs to the extent that they were not patently incompatible with English law, universal justice, equity, or 'good conscience'. The logic was simple and self-evident: desirable as it was to extend more 'civilized' English legal cultures to natives in the colonies, local extenuating circumstances made wholesale imposition impractical. What colonial

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71 J. N. Matson, 'The Supreme Court and the customary judicial process in the Gold Coast', *International and Comparative Law Quarterly*, 2, 1, 1953, p. 48.

72 Moore, 'Treating law as knowledge', p. 32.

73 O. Adewoye, *The judicial system in southern Nigeria, 1854–1954: law and justice in a dependency*, London: Longman, 1974, p. 4; A. N Allott, *New essays in African law*, London: Butterworths, 1970, pp. 48–65.

74 Tanganyika Local Government Memoranda No. 2 (Local Courts), Dar es Salaam: Government Printer, p. 2; quoted in Moore 'Treating law as knowledge', p. 18.

75 Gray, 'Opinion of assessors', p. 8.

76 Jerry Dupont, *The common law abroad: constitutional and legal legacy of the British empire*, London: F. B. Rothman Publications, 2001, p. xvii.

courts were therefore expected to enforce, was not law exactly as it might have applied in England, or even in India, but a curious blend of English common law and local African customary law, within a framework of supposedly universal notions of morality and natural justice. As one colonial judge argued in 1906, 'it is not *law* that is required to be applied [by the courts] in Africa but *Equity*: the complex laws of England are unsuited to the primitive conditions under which people live in Africa'.[77]

The paradox of accommodating native difference and universal standards was not easily resolved. Colonial law may have sought to accommodate African difference but imperial universalism required the containment of that difference. In both the *Dhalamini* case and the *Ndembera* case, colonial appellate courts were unwilling to compromise fundamental principles of colonial law in the name of local administrative expediency. In the *Dhalamini* case, the Privy Council insisted that the statutory provision requiring that the opinion of African assessors be given in open court could not be dispensed with by invoking African difference or exceptionalism. To do so would compromise the transparency considered to be the bedrock of British justice.[78] What made this case even more significant was the Privy Council's insistence on the strict interpretation of legal codes relating to native assessors and native customs, issues on which official attitudes were typically laissez-faire. On the question of transparency and openness of judicial proceedings, the Privy Council came down quite firmly on the side of imperial universalism. The Council also stressed that the law requiring the use of native assessors in trials involving Africans could not be construed simply as aid given to the judge. It should also be construed as a 'safeguard to natives' accused of crimes, and a guarantee to them that their customs and traditions were not misunderstood or misapplied by an 'alien court'.

Such concerns that the inflexible application of English law could distort the customary order in African societies were commonplace. Michael Cowen and Robert Shenton have argued that the legal philosophies of prominent British judges who sat on the Judicial Committee of the Privy Council, such as Chief Justice Richard Burton and Lord Haldane, were influenced by early twentieth-century beliefs in the existence of a 'natural' African community. This notion, they argue, arose from a 'complex web of radical liberal, neo-Hegelian and Fabian socialist thought'.[79] In a 1928 article, Lord Haldane argued that different nations had different experiences and thus their laws embodied different 'stories of development'. When these different nations were grouped together under a common imperial crown, institutions evolved to take account of the difference. The role of the Judicial Committee of the Privy Council and other colonial appellate courts, as Haldane saw it, was a continually evolving one that had to meet the legal needs of a complex and expanding empire.[80] Although he made a case for the imperial and mediating role of the Judicial Committee of the Privy

77 Quoted in *The Lagos Weekly Record*, 21 April 1906.

78 *Dhalamini v. R*, p. 592.

79 Michael P. Cowen and Robert W. Shenton, 'British neo-Hegelian idealism and official colonial practice in Africa: the Oluwa land case of 1921', *Journal of Imperial and Commonwealth History*, 22, 2, 1994, p. 217. See also Michael Cowen and Robert Shenton, 'The origin and course of Fabian colonialism in Africa', *Journal of Sociology*, 4, 2, 1991, pp. 143–74.

80 R. B. Haldane, 'Judicial Committee of the Privy Council', in R. B. Haldane, *Selected addresses and essays*, Freeport, NY: Books for Libraries Press, 1970 [1928], pp. 222–5.

Council, he also acknowledged the real difficulties of adjudicating cases from varied and unfamiliar jurisdictions across the empire:[81]

> It is convenient to have as the tribunal of ultimate resort, a body which is detached and impartial, and which yet administers the law of the particular Dominion and administers it with a large outlook which is the result of having to take cognizance of systems of jurisprudence of a varying nature ... As Native territories are becoming organised under new local governments, their jurisdiction is assuming more crystallised form. Custom is turning itself into law with the aid of Crown Ordinances. Some of the questions thus raised for example in West Africa, are of exceptional difficulty because of the novelty of the customs embodied in the native laws which are highly divergent from the common law traditions of this country.[82]

What we see here in Haldane's treatise, as in the appellate judgments in the *Dhalamini* and *Ndembera* cases, is at once the affirmation of imperial legal universalism and the accommodation of local difference. In these contexts, imperial power and local cultures are not contradictory or in conflict but complementary and even mutually reinforcing.

Ideological cosmopolitanism and hybridities of legal cultures

Our cases also provide some context for understanding the cosmopolitan nature of British imperial legal culture, and the ideological hybridities that shaped it. They show how unsure, tentative, and expediential colonial rule was. Far from being the culmination of some grand vision of colonialists, colonial legal culture was the product of a complex interplay of personalities, policies, and institutions in both colony and metropole. Most scholars of empire now agree that colonialism can no longer be viewed simply as a process of imposition from a single European metropole on a monolithic colonized space. Rather, colonialism must be seen as tangled layers of political relations and lines of conflicting projections and domestications that converged in specific local misunderstandings, struggles, and representations. Social action in the empire cannot be reduced to such polarities as metropole and colony, or colonizer and colonized, or to balanced narrative plots of imposition and response, or hegemony and resistance. Such narratives, however refigured and nuanced, limit our appreciation of the complexities and contradictions opened up by sustained research in the field and in archives.[83] The focus must therefore be as much on the tensions and ambiguities of empire as on its power and triumphs.[84]

Within the context of the history of law and justice in colonial Africa, this approach requires a reconfiguration of the discourse beyond what has been described as the paradigm

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81 Ibid., p. 225.

82 Ibid., p. 224.

83 Nancy Rose Hunt, *Gendered colonialisms in African history*, Oxford: Blackwell, 1997, p. 4.

84 Frederick Cooper and Ann Stoler, eds., *Tensions of empire: colonial cultures in a bourgeois world*, Berkeley, CA: University of California Press, 1997.

of 'domination and legitimisation'.[85] Studies undertaken within this paradigm often proceed from the premise that colonial law and justice were 'centres of power and privilege, feared sites, replete with structures of patronage and favouritism'.[86] The courts, and the justice that they dispensed, were not ends in themselves but instruments for legitimizing colonial rule and fostering the hegemony of the colonial state or privileging emergent African elites at the expense of underprivileged Africans. Beyond the rhetoric of legal rights and objective justice was an overriding need to maintain social order on a scale conducive to colonial interests.[87] While this approach to the study of colonial legal systems in Africa provides useful insights into how colonial legal systems furthered the ascendancy of dominant groups, it stands in the way of a fuller understanding of the creative tensions between and within European and African legal cultures in syncretic processes that produced new hybrid cultures. As others have shown, rather than being simply arenas of colonial power and elite domination, African courts often turned into battlegrounds on which both Africans and Europeans contested access to resources and labour, relationships of power and authority, and interpretations of morality and culture. They remade colonialism in the process.[88] In executing their judicial duties, 'native assessors' (like other African employees of the colonial state) shaped the interactions of subject populations with European officials. They blurred colonial dichotomies of European and African, white and black, 'civilized' and 'uncivilized', and created key intersections of power, authority, and knowledge.[89] Such blurring of dichotomies created hybrid legal cultures shaped by both Europeans and Africans.[90]

Colonial courts in Africa, particularly the 'native courts' were themselves hybrid institutions: they were created and backed by the British government, partly or fully staffed by Africans, and employed a mixture of 'customary law' and colonial law.[91] Although subordinate to superior and appellate courts providing judicial oversight, these 'native courts' were crucibles where European and African legal experimentation produced imperial legal cultures. The institution of native assessors was one example of how these hybrid colonial cultures evolved. Originally a creation of European colonialism with roots in English legal culture, the institution was reinvented, first in India and later in Africa, ultimately bearing

85 Bonny Ibhawoh, 'Stronger than the maxim gun: law, human rights and British colonial hegemony in Nigeria', *Africa: Journal of the International African Institute*, 72, 1, 2002, pp. 55–6.

86 Maurice Nyamanga Amutabi, 'Power and influence of African court clerks and translators in colonial Kenya', in Lawrance, Osborn, and Roberts, *Intermediaries*, p. 203.

87 Kidder, 'Western law'; Martin Lynn, 'Law and imperial expansion: the Niger Delta courts of equity, c. 1850–85', *Journal of Imperial and Commonwealth History*, 23, 1, 1995, pp. 28–39; Dupont, *Common law abroad*; Singha, *Despotism*.

88 Kristin Mann and Richard Roberts, eds., *Law in colonial Africa*, Portsmouth, NH: Heinemann, 1991; Chanock, *Law*; Moore, *Social facts*; Margaret Jean Hay and Marcia Wright, *African women and the law: historical perspectives*, Boston, MA: Boston University, 1982; Lawrance, Osborn, and Roberts, *Intermediaries*.

89 Benjamin N. Lawrance, Emily Lynn Osborn, and Richard L. Roberts, 'African intermediaries and the "bargain" of collaboration', in Lawrance, Osborn, and Roberts, *Intermediaries*, p. 4.

90 D. A. Westbrook, 'Colonial discourse theory', in Robin W. Winks, ed., *The Oxford history of the British empire: volume V: historiography*, Oxford: Oxford University Press, 1999, p. 609.

91 Brett L. Shadle, 'African court elders in Nyanza Province, Kenya, ca. 1930–1960: from "traditional" to modern', in Lawrance, Osborn, and Roberts, *Intermediaries*, p. 181.

little resemblance to the original nautical assessors of English Admiralty courts.[92] This process of hybridization and creolization of colonial legal culture is evident in colonial debates over whether native assessors were more akin to expert witnesses or jurors in an English court.

While it was clear that an assessor in English courts was an expert witness, in Africa the time-honoured English convention became an entirely new institution, which defied easy definition or classification, even by colonial officials and legal experts. A. N. Allott, a leading legal scholar of the late colonial period, argued that the 'native assessor' in Africa was unique because he had both the duty to assess (like jurors) and the duty to advise (like expert witnesses):

> The functions of assessors can be collected under two heads – their duty to assess and their duty to advise. In the light of their special knowledge of African habits, customs and modes of thought and language, they are peculiarly qualified to judge the probability of a story told by a witness, and they may detect in his demeanour what may escape the presiding judge. In this role the assessor's task is similar to that of a juror's though he gives no verdict, but only his opinion on the evidence. Secondly, the assessor's duty is to advise the judge or magistrate on matters of which they have special knowledge, and to give their view, in the abstract, of what the custom or law is in the circumstances postulated ... The assessor though serving as an expert witness is not, therefore, an expert witness in the ordinary sense.[93]

What Allot described, albeit in different words, was a hybridization process, typical of colonial legal institutions in many parts of Africa. Beyond being simply devices of domination and colonial hegemony (although that may indeed have been the original intent), they were ultimately shaped by local initiatives and responses. The twists and turns taken by colonial legal reforms depended in large measure on indigenous institutions and the responses of local people to British moves.[94] The difficulty in recruiting elderly natives, presumed to be more knowledgeable in local customs, led colonial officials to draw assessors from the ranks of urbanized men, resulting in unexpected outcomes. The Privy Council's ruling in the *Dhalamini* case implicitly acknowledged the role of assessors as purveyors of customary law and justice within the colonial courtroom, and yet insisted that the framework in which such customary justice was dispensed had to be grounded firmly in universal common-law principles. In the *Rex v. Ndembera* case, colonial officials were deeply aware of the possibility of distortion and idealization – informed by gender, class, and generational prejudices – in the representation of African customs in the courts.[95] Such concerns about the possibilities of gender biases in the opinions of native assessors underscored the tensions within colonial officialdom over the proper place of African customary law.

However, the emphasis on imperial liberal universalism, dialogue, and hybridities should not overshadow the real hegemonic power relations that, for the most part, defined the

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92 For English courts, see Dickey, 'Province and function', pp. 494–507.

93 Allott, 'Judicial ascertainment', p. 250.

94 Benton, *Law and colonial cultures*, p. 152.

95 *Rex v. Ndembera*, p. 85.

interactions between colonizer and colonized within the legal system. If there was a dialogue about universalism and difference in colonial courts, it was a dialogue premised on and suffused by power. Indeed, it is instructive that neither of the cases examined here were potentially threatening to colonial social and political order. This may well explain the tone and substance of juridical dialogue that they engendered. Debates over legal universalism appear to have been more constrained, if not muted, in cases with high political stakes. For instance, in the trials of Jomo Kenyatta and other officials of the Kenyan African Union in 1957, Justice Thacker found all the defendants guilty, and pronounced the maximum sentence of seven years hard labour. Remarkably, in what has been described as a 'scandalous miscarriage of Justice', the Judicial Committee of the Privy Council refused the defendants leave to appeal the verdict, even though their defence rested on an appeal to universal rights.[96] The conclusions I make about dialogue and hybridities in the workings of colonial legal systems must therefore be located within the framework of contested but overarching power relations in the colonial state.

Conclusion

Seen from a purely legalistic perspective, the *Dhalamini* and *Ndembera* cases were not particularly remarkable, and the basic legal principles enunciated in the judgments in these cases were rather commonplace. Both upheld the principle of greater judicial oversight over the use of African assessors in criminal trials. Colonial law reports are replete with cases where similar principles were either espoused or upheld on appeal. What makes these cases significant, from a historical standpoint, are the insights they bring to our understanding of the workings of colonial legal systems in Africa, and what they tell us about the processes of African engagement with colonial judicial institutions.

On a broader level, the analysis of the *Dhalamini* and *Ndembera* cases draws attention to the benefits inherent in going beyond the paradigms of domination and hegemony to discern more nuanced patterns of hybridization and cosmopolitanism in the development of colonial legal cultures. The contestations over the role of native assessors in both cases suggest that, at some level, colonial legal universalism required both the accommodation and containment of African difference. The paradox of integration and differentiation in colonial constructions of globality is that, in the realms of law and justice, imperial power and local cultures were not always in conflict but were sometimes complementary and mutually reinforcing. This underscores the heterogeneity of globalizing processes. Under certain circumstances, the process reinforced rather than destroyed local affiliations, and local influences could be recycled in ways that shaped the originating and supposedly universal impulse.[97]

The benefits of these perspectives to understanding the development of legal cultures and colonial constructions of globality are neither solely historical nor simply academic. They are also relevant to contemporary legal debates about the rise of supranational adjudication

96 Ronald Hyam, *Britain's declining empire: the road to decolonisation, 1918–1968*, Cambridge: Cambridge University Press, 2006, p. 191.

97 Hopkins, *Global history*, p. 5.

and emerging trends in international criminal jurisprudence. The term 'supranational adjudication', which has recently gained currency in international law scholarship, refers to adjudication by courts or other judicial organizations sitting above rather than within or between states.[98] In the past few decades, several such supranational judicial organizations have emerged, reflecting the increasing globalization of legal and judicial culture: the International Criminal Court, the International Court of Justice, the European Court of Human Rights, the Inter-American Commission of Human Rights, and the United Nations Human Rights Committee.[99] Like the Judicial Committee of the Privy Council and other colonial appellate courts, the jurisdiction of these supranational judicial organizations cuts across national and cultural boundaries. They include judges who, like colonial judges, often have limited knowledge of the cultures and customs of the disputants. As with earlier colonial judicial institutions, they too must struggle to find the right balance between promoting contemporary universalist legal ideals about human rights and social justice, and allowing for some degree of local autonomy and difference.

In an increasingly interdependent and globalizing world, these supranational courts play a vital role in fashioning and upholding a nascent universal legal culture founded on international human rights law both within and between states. Yet, like the colonial appellate courts of old, these new institutions must grapple with the inevitable tensions between aspirations towards universal legal standards and the persistence of local difference. These processes and outcomes will engender new legal and jurisprudential universalisms, as well as new and contested constructions of globality. Even now, there are voices of dissent. Sceptical about these new constructions of legal globalism, they worry about sacrificing local culture, initiative, and autonomy for supposedly universal legal and human rights standards in the processes of supranational adjudication.[100] Historians are in a unique position to contribute to these debates by looking back at the tensions between imperial universalism and local difference in colonial legal cultures, not only as a contribution to knowledge about the imperial past but also to provide directions on how better to understand and grapple with the challenges of contemporary legal and cultural globalization.

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98 Alex Mills and Tim Stephens, 'Challenging the role of judges in Slaughter's liberal theory of international law', *Leiden Journal of International Law*, 18, 2005, p. 4.

99 Laurence R. Helfer and Anne-Marie Slaughter, 'Toward a theory of effective supranational adjudication', *Yale Law Journal*, 107, 2, 1997, pp. 276–80; S. Choudhry, 'Globalization in search of justification: towards a theory of comparative constitutional interpretation', *Indiana Law Journal*, 74, 81, 1999, pp. 838–9; Kanishka Jayasuriya, 'The rule of law in the era of globalization: globalization, law and the transformation of sovereignty; the emergence of global regulatory governance', *Indiana Journal of Global Legal Studies*, 6, 425, 1999, pp. 421–683.

100 See Michael P. Scharf, 'The politics behind U.S. opposition to the International Criminal Court', *Brown Journal of World Affairs*, 6, 1, 1999, pp. 97–104.