CHAPTER FOUR

Customary Law: The Theory of Decentralized Despotism

COLONIALISM claimed to bring civilization to a continent where it saw life—to borrow a phrase from a context not entirely unrelated—as "nasty, brutish, and short." Civilization here meant the rule of law. The torchbearers of that civilization were supposed to be the colonial courts. The courts were intended neither just as sites where disputes would be settled nor simply as testimony to effective imperial control; rather, they were to shine as beacons of Western civilization. Yet no sooner was this claim made than it lay in shreds as power was forced to find ways of controlling multitudes on the ground. The history of that moral surrender was one of a shift in perspective and practice, from a civilizing mission to a law-and-order administration.

The judicial system that evolved in the colonies bore a remarkable similarity. Though names may differ, it was everywhere a bipolar affair. At one end were the courts of chiefs and headmen, courts of the first instance to which natives had ready and easy access, courts that dispensed justice according to customary law. At the other end was a hierarchy of courts cast in the metropolitan mold, courts designed to solve disputes involving nonnatives. The intermediate category consisted of tribunals staffed by white officials, called commissioners in British colonies and commanders in French ones, who listened to appeals from chiefs' courts and who were charged with the general administration of the native population. In this bipolar scheme, customary justice was dispensed to natives by chiefs and commissioners, black and white; modern justice to nonnatives by white magistrates.

The dualism in legal theory was actually a description of two distinct, though related, forms of power: the centrally located modern state and the locally organized Native Authority. The hallmark of the modern state was civil law through which it governed citizens in civil society. The justification of power was in the language of rights, for citizen rights guaranteed by civil law were at the same time said to constitute a limit on civil power. The key claim was that this form of power was self-limiting. Against this description was the reality: the regime of rights was limited and partial. Citizen status was not conferred on all within the ambit of civil society. The primary exclusion was based on race.

In contrast to this civil power was the Native Authority. It governed on the basis of ethnic identity. The Native Authority was a tribal authority that dispensed customary law to those living within the territory of the tribe. As such, there was not a single customary law for all natives, but roughly as many sets of customary laws as there were said to be distinct tribes. Customary law was not about guaranteeing rights; it was about enforcing custom. Its point was not to limit power, but to enable it. The justification of power was that it was a custodian of custom in the wider context of an alien domination.

Against this description was the reality: customary law consolidated the noncustomary power of chiefs in the colonial administration. It did so in two ways that marked a breach from the precolonial period. For the first time, the reach of the Native Authority and the customary law it dispensed came to be all-embracing. Previously autonomous social domains like the household, age sets, and gender associations—to cite three important instances—now fell within the scope of chiefly power. At the same time—and this is the second breach with the precolonial period—any challenge to chiefly power would now have to reckon with a wider systemic response. The Native Authority was backed up by the armed might of the modern state at the center. We will later see that just as civil society in the colonial context came to be racialized, so the Native Authority came to be tribalized. To the racially defined native as the other in civil society corresponded the ethnically defined stranger in the Native Authority.

In this chapter, I will be concerned with three issues. The first is the domain of the customary. Who were the natives who were supposed to live by custom? What were the courts through which custom came to be enforced? And what were the sources of this customary law? My second objective is to understand the process by which the customary came to be defined, particularly so in a context marked by a rapid shift in both the perspective of colonial powers and the situation of different groups among the colonized. Confronted first by the need to create order and then to enforce development among conquered populations, the ruling concern with law rapidly gave way to a preoccupation with locating and boosting those who would enforce the law. At the same time, this late-nineteenth-century transition from slavery to colonialism turned out to be a period of radical dislocation for different strata among the colonized. Instead of a traditional consensus about custom, it signified a time of rapid change and much contest over the customary. Yet colonial powers presumed an implicit and unchanging consensus over the customary. Who then really came to define *custom* and how? Third, given this divided legacy, of laws modern and customary, what was the promise and the limit of the legal reform effected in the postcolonial period?

THE DOMAIN OF THE CUSTOMARY

What did *customary* mean? And who were the natives to which this justice was to apply? The answers to both questions are indeed revealing, for legal pluralism in this instance was more an expression of power relations in a colonial society than a recognition and tolerance of any multicultural diversity. Colonial pluralism was basically dual: on one side was a patchwork of customs and practices considered customary, their single shared feature being some association with the colonized; on the other side was the modern, the imported law of the colonizer. In countries like Nigeria, where external influence was not limited to European powers but included Islamic sources, the law sought to remove all ambiguity: section 2 of the Native Courts Law of colonial Nigeria provided that "native law and custom includes Moslem law."[1]

Conversely, *native* was used not to mean a person whose life had historically been governed by the customary law in question, but as a blanket racial category. It is instructive to look at how the courts in Nigeria defined the term *native*. At first glance, there seems to be a range of definitions: according to the Western High Court Law, a native was simply a Nigerian; the Northern High Court Law distinguished between natives and nonnatives and remained silent thereafter; the Eastern High Court Law revealingly defined a native as a "person of African descent."[2] But all ambiguity was removed in section 3 of the Interpretations Act, which applied to the federation and northern Nigeria; according to this act, the statutory definition of the term *native* included "a native of Nigeria" and a "native foreigner." Further, a "native foreigner" was defined as "any person (not being a native of Nigeria) whose parents are members of a tribe or tribes indigenous to some part of Africa and the descendants of such persons, and shall include any person one of whose parents was a member of such tribe."[3] The point was no doubt to cast the net wide enough to catch within its fold every person with any trace of African ancestry. The objective was to arrive at a racial definition, not a cultural one. Similar racially governed formulations were found in other colonies. In Lesotho, section 2 of the General Law Proclamation spoke of customary law as "African law" to be "administered" to all "Africans."[4] Following a survey of the operations of Swazi customary courts according to the terms of section 3 of the Swazi Courts Act 80 of 1950, Khumalo concludes that these courts have civil jurisdiction over all "Swazis," meaning "a member of the indigenous population of Africa who is a Swazi citizen attached to a chief appointed under section 4 of the Administration Act 79 of 1950."[5] Pointedly excluded are all Swazi citizens of non-African descent. In Botswana the law simply defines the jurisdiction of customary courts as covering all "tribesmen"![6]

Yet customary law was not a racial catchall. The native and the tribesman were not the same. Natives were disaggregated into different tribes. Each tribe had its own customary law, which the leadership of the tribe had the power to enforce. The notion of the ethnically defined customary was both deeper and more differentiated than the racially defined native: it grounded racial exclusion in a cultural inclusion. The natives denied civil freedoms on racial grounds were thereby sorted into different identities and incorporated into the domain of so many ethnically defined Native Authorities.

The domain of customary law was confined to customary courts, being the lower courts. "Native customary law, in my view," opined a British judge in a West African case, "is more or less in the same position as foreign law and it must be established by an expert before courts other than the native courts."[7] Who, then, had the authority to establish this "matter of fact" rather than "matter of law"? What were deemed to be the authoritative sources of customary law?

On this question, there was no clear agreement and often an amusing confusion. In both British- and French-controlled territories, superior court judges, whether European or African, "often sat with African assessors who informed them what was the customary law in question."[8] That, however, still begs the question: who would qualify to be an assessor? Opinions varied. To Goldin and Gelfand, authors of *African Law and Custom in Rhodesia*, for example, the answer was obvious: "The African knows his laws, not as a result of study, but by virtue of being and living as an African."[9] Yet the matter was hardly as simple and straightforward. As Governor Cameron confided to a visitor to Tanganyika, "the difficulty after a period of disintegration is to find out what their system was. *They* know perfectly well but, for one reason or other, they may not tell you."[10] A Portuguese authority on the subject thought he had found a way out of the dilemma. Unlike "the common law [which] should be applied by a qualified jurist," he argued, "the questions relative to usages and customs should be judged by the administrator because it is he who is conversant with the local custom and the dominant mentality."[11] The same authority was compelled to add: "For this purpose he is assisted by two natives who inform him on the local law." The famed British administrator-anthropologist Rattray agreed. In calling for "the retention of all that is best in the African's own past culture," Rattray admitted: "The main difficulty lies in the fact that we and the educated African alike know so little of what that past really was."[12] But "those few who possess the requisite knowledge . . . are illiterate, and in consequence generally inarticulate for practical purposes, except when approached by the European who has spent a life time among them and has been able to gain their complete confidence." As to why that should make the literate European indispensable but rule out the literate African, he never explained.

Presumably the illiterate native was the more pristine, just as the literate African was the more contaminated by alien worldly influences percolating through the written word. But even if the anthropologists considered the illiterate native a more reliable authority on customary law, that authority was surely seen in the nature of a primary source, to be sifted through, analyzed, its internal contradictions smoothed over, its gaps and lapses filled in, all to arrive at a coherent, consistent, and comprehensive secondary formulation. Still, it was not every native, not even every illiterate native, who was presumed to know customary law. For as many an experienced administrator and knowledgeable anthropologist suspected, it was more or less a truism that "real customary law was in the mind of the oldest men (or even of the dead) and that the new elders did not know it properly."[13]

With modern law there was no such problem; it was easily imported and read. For the British brought with them the common law, the doctrines of equity, and the statutes of general application that were in force in England at a particular cutoff date: in the case of Ghana, 1874; Kenya, 1897; Nigeria, 1900; and so on.[14] The French exported their civil code and other sets of legislation to their possessions. The Belgians went so far as to enact a simplified version of the mother code, calling it the Code Civil du Congo. On top of this imported law, there was the body of statutes promulgated by the colonial state.[15]

This dual system of justice was at the heart of indirect rule, and some variation of it came to be in every African colony. The pacesetter in these matters, as in others related to indirect rule, were reforms Lugard introduced in northern Nigeria. Three key statutes defined the nature of the judicial system in colonial Nigeria.[16] The first was the Native Court Proclamation. Under it, the resident in charge could set up four grades of native courts, with the highest sitting under the presidency of the paramount chief. The paramount chief's court had "full and unlimited jurisdiction to adjudicate in all civil matters or to try all criminal proceedings in which the chief's subjects were parties." For the subjects, there was to be neither a right of representation nor a right of appeal to a court presided over by a British judge or a political officer—no matter how serious the charge or the penalty involved. The paramount chief who presided over this court as the supreme native judicial authority was, in addition, the same paramount chief who sat as the supreme native administrative authority under the Native Revenue Proclamation!

The second statute defining the judicial system in the colony was the Provincial Courts Proclamation. A provincial court was set up by the high commissioner of the protectorate and was empowered to hear all

cases involving nonnatives. Required to administer English common law, the doctrines of equity and the statutes of general application in force in England on 1 January 1900, these too were no nonsense courts that neither admitted lawyers nor were required to follow strict English legal procedure. To the nonnatives basking under the tropical sun in a nonsettler colony, they offered an English version of African customary law. The pride of place, the jewel in this thorny crown, was the supreme court of northern Nigeria, set up under a third statute. As befits a crown jewel, it was required to follow strict legality and strict technicality, complete with the right of legal representation for all parties involved, but its writ was limited to only the two cantonment areas of Lokojo and Zungeru. The crux of the matter was that more than 99 percent of the judicial work in the protectorate was carried out beyond its purview, in courts run by nonlegal administrators, whether native or European.

In French colonies, too, there were two parallel court systems, one French, the other native.[17] French courts were presided over by French magistrates, who judged according to French law, and were used in all cases involving a French citizen. Cases involving only subjects were the preserve of native courts. Under the era of direct administration, however, chiefs gradually were deprived of judicial powers, which were transferred to European administrators: a 1903 decree limited police powers of chiefs to a fine of 15 francs and five days in prison; another decree from 1912 limited their competence only to matters of conciliation; and yet another decree from 1924 conferred the chair of the court of first instance to a European official, usually a clerk. The native court of the second instance was presided over by none other than the cercle commander, this all-powerful administrator-judge, or his deputy or any other European official designated by the governor. Although customary law continued to be dispensed in these courts, it was given legal recognition only by the court of appeal at Dakar, the supreme court of French West Africa, in a 1934 decree. The court recognized the African village as a legal entity with customary rights and the village chief as the defender of those rights.[18] In the Italian colony of Somalia, state recognition of the customary came much earlier: royal decree no. 695 of 1911 stipulated that Italians be governed by Italian law and Somalis by customary law.[19]

The dispensers of customary justice were the cadres known as chiefs. The term needs to be understood in a broad sense, stripped of all racial connotations: chiefs were really nonspecialized, nonlegal administrative personnel whose broad portfolio also included judicial functions. As such, they should be seen to include both native chiefs and white commissioners (British) or commanders (French). Unlike magistrates' courts, which were staffed by professional lawyers and cordoned off by high tariff walls (fees) and a remote location, the commissioners' tribunals were an informal affair, with easy access and nominal fees. Like the courts of chiefs and headmen, of which they formed the upper tier, the commissioners dispensed a form of justice that was informal, inexpensive, and efficient. Defined by the powers and role of the office they occupied, the commissioners were really the white chiefs of colonial Africa.

DEFINING THE CUSTOMARY IN A CHANGING CONTEXT

If the customary law dispensed in the courts of chiefs was presumed to be known by "the African . . . by virtue of being and living as an African" (Goldin and Gelfand), "by the administrator because it is he who is conversant with the local custom and the dominant mentality" (Moreira), by "illiterate natives" as transmitted to "the European who has spent a life time among them and has been able to gain their complete confidence" (Rattray), or by the "oldest" of the "elders," who then defined the substantive law? There were at least three sets of contenders with claims over defining the customary: the central state, the officials of the local state (the chiefs), and a range of nonstate interests. Everywhere, the claim of the central state set the limits to the customary in the form of a "repugnancy clause." Under French and Belgian systems, this limit was set unambiguously as the requirements of "public order and morality."[20] In some instances, the formulation came close to being crass: a law passed by French authorities in Senegal in 1912 stipulated that colonial law replace traditional law when the latter was "contrary to the principles of French civilization."[21] The Portuguese, too, had a formulation that clearly spelled out their claim to being both the custodians of "humanitarian" principles and the holders of power; the decree of 1954 that formally subordinated natives to custom and nonnatives to the common law required that custom not be "contrary to public order, that is, to the principles of humanity, the fundamental principles of morality or to free exercise of sovereignty."[22]

In British-controlled Africa, the colonial power simply claimed to be a custodian of general "humanitarian" notions of right and wrong. The standard formulation thus required that customary law be applicable if "not repugnant to justice and morality" (Kenya, Malawi), "not repugnant to natural justice and morality" (Southern Rhodesia), not repugnant to "natural justice, equity and good conscience" (Ghana, Nigeria, Sierra Leone), or not repugnant to "justice, morality or order" (Sudan).[23] Rarely did the British admit that the law must also safeguard the exigencies of power. Such a rare instance is found in the Evidence Act in Nigeria, which stated that no custom "contrary to public policy" would be enforced.[24] Similarly, the charter issued to authorize

the colonization of Rhodesia required the high commissioner to "respect any native [civil] laws and custom . . . except so far as they may be incompatible with the due exercise of Her Majesty's power and jurisdiction."[25] The same illuminating phrase can be found in the Native Courts Proclamation of 1942 in Bechuanaland.[26]

What kind of limit did the repugnancy clause set in practice? The overriding constraint stemmed from the reality of defending power. At the beginning of colonial rule, a clear distinction was made between the civil and criminal aspects of customary law: the former was to be tolerated, the latter to be suppressed. The official justification was that "humanitarian" consideration to eliminate "evil" required that chiefs be deprived of any criminal jurisdiction, for chiefs were no doubt the source of much "evil" in Africa. Not only did this appeal to Victorian sensibilities, it also made much practical sense, for any attempt to restore the old institutional order was bound to be chief centered. The colonial power understood very clearly that dealing with crime was first and foremost about social control and the exertion of power. "Criminal law," pointed out the minister of justice and defense in Rhodesia, is all about "wrongs against the government and against the community," whereas "civil law deals with relationships between individuals." Even if "the criminal law . . . does not conform to the ideas of the people who are ruled," the real point was that "the government could not tolerate any attempts against its own custom, its own law, against itself, that is to say." The chief justice of the supreme court of the Federation of Rhodesia and Nyasaland agreed: "This is a matter in which we feel our law should prevail, because we feel that when it is a question of something which wrongs the whole community—and that roughly is the definition of the word 'crime'—it should override all other considerations, and that is why we distinguish between criminal law and civil law."[27]

Rhodesia was a colony with a difference. Even when the existence of native law and courts was officially recognized in 1937, the courts were expressly denied criminal jurisdiction. This was different from other British colonies, where once the question of law and order was settled and colonial rule became relatively stabilized, chiefs did indeed receive limited criminal jurisdiction. For indirect rule, as Lugard recognized, would mean little if it did not give chiefs the "power to punish." Rhodesia, however, was much more like the Cape or those French colonies where native resistance to colonial rule had been intense and sustained. The specter of the Matebele Kingdom and the resistance it spearheaded continued to haunt settler memories. The problem was not just to crush such a resistance, but to prevent its resurgence. From the point of view of the settler-dominated state, the "exercise of criminal jurisdiction was thought to be (and in fact is) a significant instrument of social control, and its removal could go far towards making Ndebele resurgence impossible."[28]

It is not that Victorian notions of right and wrong played no part in setting practical limits to customary law. They did, in matters such as slavery, mutilation, polygamy, and bride-price; but they were subordinate to political considerations, and for that reason, they were always negotiable. French colonial authorities made a distinction between the end of the slave trade and that of slavery. The former was adhered to more or less strictly, but not the latter. After all, as we will see, the end of slavery was followed by the "rosy dawn" of compulsions. The abhorrence of mutilation—and this too we will see—did not stop any colonial power from resorting to corporal punishment as an integral part of customary law. The Boer and the British authorities in South Africa who righteously denounced polygamy as female slavery and bride-price as "purchase in women" had no qualms about legislating a customary code that treated women as perpetual minors subject to a patriarchal chief-dominated authority. We are, after all, talking of an era when English common law gave husbands controlling power over wives and the state and judicial authorities extraordinarily severe powers over those categorized as vagrant, idle, or disorderly.

Some colonial administrators, like Robert Delavignette in French West Africa, thought an arrangement that coupled customary law with a repugnancy test was riddled with contradictions. "What are these principles" of civilization to which "native law" must not run counter, he asked, "if not those of the Code?"[29] In other words, if the repugnancy test were consistently applied—so ran the logic of Delavignette's argument—the code would sooner or later have to govern all relations, whether native or nonnative. But one thing should be clear. The repugnancy test was never construed as requiring that the law in the colonies, common or customary, be consistent with the principles of English law or the Code Napoléon. Such a requirement would have sounded the death knell of administrative justice. The point of the repugnancy test was to reinforce colonial power, not to question it. One study of court cases in colonial Nigeria concludes: "It is clear that the courts decide whether a particular rule is to be rejected for repugnancy largely in an *ad hoc* manner."[30]

Conflict over the Customary

If in practice the repugnancy clause was a way of enforcing the exigencies of colonial power, does it mean that—within those limits—substantive customary law was really decided by the colonized, was really the

reflection of a traditional consensus that preceded the imposition of colonialism, and continued through it as the result of some kind of benign neglect? This could not have been, if only for one reason: the dawn of colonialism was a time of great social upheaval through most of the continent. Its most dramatic manifestation was the rise of conquest states in the nineteenth century. Their defeat liquidated the political power that had stabilized conquest-based claims. The end of slavery eroded or made uncertain an entire range of claims on the services of subordinates, from formal slavery to slave marriages. The onset of migrant labor provided young men with ways of earning cash and thus with an alternative to "service-marriage," an institution through which elders who controlled access to wives could claim a range of services from young men as prospective suitors. Instead of a consensual traditional notion of custom, the colonial era really began in the midst of conflicting and even contrary claims about the customary.

The content of customary law is difficult to understand outside this context of conflicting claims, many reflecting tensions hardly customary. These tensions were grounded in two intersecting realities: on the one hand, while an old regime of force (legal slavery) was eroding, a new one (colonial compulsions) was just as surely taking its place; on the other hand, while nineteenth-century commodity markets in slaves and artisanal products were fast shrinking, new colonial markets in wage labor and export crops were expanding just as quickly. Both those with and without claims in the old order sought to establish claims in the new one. The onset of colonial rule combined with new conditions—increased mobility and increased stratification—to generate new and contradictory claims. Not surprisingly, every claim presented itself as customary, and there could be no neutral arbiter. The substantive customary law was neither a kind of historical and cultural residue carried like excess baggage by groups resistant to "modernization" nor a pure colonial "invention" or "fabrication," arbitrarily manufactured without regard to any historical backdrop and contemporary realities. Instead it was reproduced through an ongoing series of confrontations between claimants with a shared history but not always the same notions of it. And yet—and this is the important point—the presumption that there was a single and undisputed notion of the customary, unchanging and implicit, one that people knew as they did their mother tongue, meant that those without access to the Native Authority had neither the same opportunity nor political resources to press home their point of view. In the absence of a recognition that conflicting views of the customary existed, even the question that they be represented could not arise.

To get a sense of how deep-seated was the conflict over the customary, we need to grasp how radical were the dislocations that marked the

onset of colonial rule. At least three sets of tension-producing developments interlocked and made for a single overarching process. The source of this triple dislocation lay in broad political, economic, and social changes: the process of state formation, the development of markets, and far-reaching changes in gender and generational relations. The impact of colonial rule in each instance was nothing less than dramatic.

We have seen that nowhere in nineteenth-century Africa had the territory-based claims of the state singularly triumphed over kin-based claims of lineages. Everywhere, and not just in the nonstate societies, kin groups contested with and balanced the claims of state authority. The onset of colonial rule tipped the balance decisively in favor of state authority. This was particularly evident in kin-based societies, where every person had depended on kith and kin to protect life and property—for there was no other authority to turn to before colonial rule created one. It was also true, however, where hierarchical authority (chiefship) had preceded colonialism, for the consolidation of colonial power went alongside setting up a parallel court structure that would not only recognize individual rights, but also do so with a sweep so exclusive as to include even the domestic realm. In her study of the Kilimanjaro region in Tanzania, Sally Falk Moore argues that customary disputes brought to the chief's court in the colonial period "were probably decided in pre-colonial times at home, that is, in the social fields in which they arose."[31] Whereas the practice in the precolonial period was for chiefs "simply [to] announce the decisions of the [age-grade] assembly," the colonial chief "presided over" the assembly and "made the decisions," in the process phasing out the role of age sets. With the onward flow of colonial rule, the tendency was for chiefly power to become consolidated, if only for one reason. The operation of the chief's court "was permeated by the knowledge that the colonial government could be relied on to supply excessive force behind chiefly authority": the chief "could turn any recalcitrant over to the colonial authorities by falsely accusing him of breaking the rules of the colonial government," or he could "manipulate those rules to deprive individuals of opportunities to work for cash by executive fiat."

If native courts provided an alternative authority to that of the kin group, the cash economy also made it possible for some to escape obligations to one's kin. The beneficiaries of the new legal order came from diverse social strata. At one end were new and relatively prosperous peasants whose springboards were offices in the local state and opportunities in expanding market agriculture and whose vision often coincided with a more individualized notion of rights. At the other end the expanding money economy and market-based relations often generated a rising spirit of independence among those women and (junior) men

who but yesterday were locked in servile relationships. Sometimes this led to a coalition of old victims and new beneficiaries around commonly advanced claims. Take the example of kin groups where households—persons and property—used to be inherited upon the death of the husband but where women and children often refused to be so inherited. Among the Langi people in northern Uganda, as among many others, such an inheritance used to be the right of the male sibling of the deceased. The former wife (*lako*), once inherited, was known as the *dako*. Although inheritance broadly continued to be practiced, women struggled for the right to choose a partner, even if within the confines of the kin group; in time widows won the right to refuse to be inherited by the husband's brother, in favor of a preferred—usually a better-off—member of the larger kin group.[32] Consider also "the typical circumstances of the migrant labourer who remitted his earnings home to his mother's brother who invested them in the purchase of cattle"; the resulting conflict as to whether the cattle "belonged to the individual whose earnings bought them or to their matrilineages" was often resolved by the new courts in favor of the younger man alone. As new property demanded new rights, old institutions (chiefs) newly recast recognized them, in the process emerging triumphant over other similarly traditional institutions (kin groups) more or less bypassed in the constellation of a new power. As Martin Chanock concludes in his brilliant study on law, custom, and social order in colonial Malawi and Zambia "economic individualizing and jural individuation went hand in hand."[33]

The spread of market relations, however, did not always lead to greater individual freedom for all concerned. When it came to conflict-producing and tension-ridden relationships, freedom for one could be only at the expense of another. This was often the case with the marriage bond between male migrants on the move and female agriculturists bound to village communities under the grip of a chief. As migrants appealed to tradition, chiefs often—as in Southern Rhodesia[34]—imposed punishments for adultery and enforced paternal control over marriage. In migrant labor zones, women could and did turn into cash crop–producing peasants, but their workload often increased alongside diminishing freedoms and increased compulsions.

In spite of the tendency of colonial texts to collapse the customary and the tribal into a single noncontradictory whole, there was seldom a clinical separation of tribes or even a homogenous internal culture in these times of great change and tension. The tendency was for a more or less mixing of tribes and an internal differentiation that went alongside varied and even conflicting practices within the same tribe. Not only

were the boundaries of ethnicity blurred and elastic, there was often little that was traditional about tribal boundaries drawn by colonial administrators, as we have already seen. As Chanock asks with reference to those conquest states where patrilineal authority had often incorporated many a matrilineal peoples into expanding state systems, whose custom was considered law—the patrilineal rulers or the matrilineal subjects—and therefore a reference point for the tribe?

How a customary relationship between the sexes came to be forged gives a better idea of the nature of forces whose interaction shaped that outcome. The beginning of colonial rule was marked by a combination of forces predisposed toward improving the position of women, even if each had its own reasons. Missionaries were appalled at the institution of polygamy and bride-price. Settlers, too, were convinced that polygamy allowed the native male to live in sloth and idleness and was at the root of their labor problems. An astute writer in the *Natal Witness* of 1863 poked fun at the "alliance between the missionary and the labor-needing colonist, to alleviate the sufferings of the native woman," and suggested that both were interested in the abolition of a custom "which materially interferes with the object for which they have respectively left their mother country."[35]

This alliance, however, did not last long. Once again, as law sought to establish order and the central state looked for allies to consolidate its hold over local spaces, perceptions changed. By giving rights to sons and women, wrote the British administrator Charles Dundas in 1915, European law "falls like a thunderbolt in the midst of native society"; "all precedent and custom are cast aside, and the controllers of society are disabled." The British had "loosened the ties of matrimony," "freely granted divorces in favour of frivolous girls, and permitted them to run from one man to another, heedless of the bad example thereby set."[36] As they sought out the "controllers of society," the search for good laws gave way to one for effective authorities. As they came to appreciate the possibilities of control in the customary, their interest focused more on customary authorities than on customary law. As the substance of the law was subordinated to the quest for order, the claim to be bringing the "rule of law" to Africa became handmaiden to the imperative to ground power effectively. With this slide into pragmatism, colonial powers were usually content to let customary authorities define the substantive customary law. These authorities were the officials of the local state, with some variation between settler and peasant colonies. Where customary law was not codified, local initiative was inevitably greater. In the settler colonies there was great interest in codification; in the free peasant economies, this interest did not surface until after the Second World War. It

is in the latter that, subject to the repugnancy clause, customary authorities came to have a disproportionate influence in shaping the substantive law.

Chiefs as Customary Authorities

The customary authorities were the chiefs. Stripped of military power and losing control over long-distance trade, chiefs faced the new era with great anxiety. Take the example of Chagga chiefs in the Kilimanjaro region of Tanganyika.[37] As most of their old sources of income dried up—from warfare to cattle raiding, from slave trade to ivory trade—chiefs desperately looked for and created new ways of earning extra income. Court fees were one means; extra-economic and extralegal exactions were another. Whatever the combination, a German observer of the pre–World War I period estimated that "the chief was paid seven times as much as the colonial government in this process."

Alarmed at how old service-yielding claims were disintegrating, chiefs were in a strategic position to seize the initiative under the new order. To do so, they claimed as customary every right that would enhance their control over others, particularly those socially weak. Central to this was the right of movement or settlement and sometimes even the right to claim children. In the increasingly stagnant pool of freed persons that this created over time, chiefs could glimpse multiple possibilities; the old slavery, with its innumerable gradations, from outright control to slave marriage, was giving way to the new clientelism, also with its multiple gradations. The chiefs were not alone in this quest. At different times, they were joined by different strata seeking to protect or gain privilege: free men in relation to women, the propertied in relation to the propertyless, seniors in relation to juniors, those indigenous against migrant strangers in their midst.

The fact that custom should be shaped by those in control of customary institutions was nothing new. The new thing about the colonial period was, to begin with, the privileging of a single institution—chiefship—as customary. Conferred the power to enforce their notion of custom as law, chiefs were assured of backup support from colonial institutions—and direct force, if need be—in the event they encountered opposition or defiance. Customary law thus consolidated the noncustomary power of colonial chiefs. Should it be surprising that this power came to enforce as custom rules and regulations that were hardly customary, such as those arising from a newly expanding market economy? The courts in Kilimanjaro thus penalized as a violation of the customary any failure to pay taxes or school fees, to observe price controls or obtain a marriage certificate, to terrace certain lands or to keep away from cultivating land alongside streams.[38] As they were turned into an enabling arm of the state power, the courts not only enforced authority as such, but were often key to setting up a colonial export-import economy. The orders of agricultural inspectors and veterinary officers on the Kilimanjaro were enforced by native courts through fines and jail sentences. Take, as one instance, the case of peasants who were fined in 1947 because they failed to plant cotton with seeds provided by the Native Authority.

The case of colonial Malawi and Zambia illustrates the incredible range of rules that gave Native Authorities criminal jurisdiction.[39] These rules did not only control "drinking and the carrying of weapons and freedom of movement"; they went so far as to regulate "villages' cleanliness and sanitation, control of infectious diseases, control of fire, road-making, tree-felling, limitations, tax registration, reporting of deaths, grass-burning, the killing of game and other administrative matters." The rules were often technical to the point of minutiae. Rules on tree cutting, for example, "encompassed and defined such matters as the width of tree which could be cut and permitted distances from roads and rivers," and similarly with "rules on the use of streams and control of diseases." The more technical the specification, the more objective would seem the justification and the more infallible would appear the authority in question.

The administration and the courts moved like a horse leading a cart. As administration became established, its demands were enforced under the threat of penal sanctions. More and more activity previously considered civil now became criminalized with a corresponding increase in the number of criminal prosecution in the courts. The number of convictions in colonial Malawi rose from 1,665 in 1906 to 2,821 in 1911 to 3,511 in 1918. Two-thirds of the latter were for new statutory offenses that had nothing to do with custom: of 8,500 convictions realized in 1922, 3,855 were "for offenses against the Native Hut and Poll Tax Ordinance of 1921," 1,609 for "leaving the Protectorate without a pass," and another 705 for "offenses against the Employment of Natives Ordinance." A decade later, a second category of convictions appeared alongside those for failure to pay tax, breach of a labor contract, or insisting on free movement. That year, 776 were convicted for offenses against the Forest Laws, 387 for violating Township Regulations, and 227 for breaches of the tobacco and cotton uprooting rules. Could there be a better illustration of the law functioning as an administrative imperative?

By the late 1930s, administrative control had taken on the proportions of a stranglehold. In one colony after another, peasants were being ordered to leave their homes in the interest of soil conservation, to destroy ("destock") herds so as to restore the balance between livestock and grazing land, and to uproot subquality coffee trees to improve crop husbandry. None of this was being done by the central state; all of it was being enforced on the command of Native Authorities, everywhere instructed by European advisers. Take, for example, colonial Tanganyika, where Native Authorities were given powers to make orders (section 9) and rules (section 16) for "the peace, good order and welfare of the natives" under the 1927 Native Authorities Ordinance. In agriculture the power to make orders covered not only the "protection of trees and grassland" and "the control and eradication of animal and human diseases," but also "the increase of food production." In 1930 these powers "were greatly added to" by specific orders of the governor. The regulation "related to every conceivable aspect of farming practice and land use." There were orders "on everything": from "anti-erosion measures (compulsory tie-ridging and terracing, de-stocking, control over grazing, etc.)" to "improved methods of cultivation (destruction of old cotton plants, mulching of coffee, etc.)," and from the practice of "animal husbandry (cattle-dipping, etc.)" to methods "designed to prevent famine (compulsory production of some famine crops such as cassava or groundnuts)." The fiction was that rules were locally formulated and imposed by the relevant Native Authority in response to local conditions and needs, but "the fact that so many of the individual Orders were couched in more or less identical terms" led at least one analyst to conclude that they were issued "invariably at the instigation of the Administration."[40] Not surprisingly, "complaints against regulations went hand-in-hand with criticisms of chiefs and the chiefly system," and revolt brewed as "enforced agricultural change" gathered pace.[41] Whereas the rationale was inevitably technical, the effect was life draining. Behind the mask of indirect rule lay the day-to-day routine—customary—violence of the colonial system.

Should it be surprising then that *enforcing custom* became a euphemism for extending colonial administration and developing a colonial economy? Run by native administrators, native authority courts were supervised by another set of administrators, only they were European. The Native Courts Proclamation in Nigeria, for example, set up native courts without spelling out their procedure or practice, except for empowering the district commissioner to make the relevant rules. When the rules were so made, they "were not exhaustive so the courts were left to the District Commissioner's administrative guidance."[42] It was the administrator in charge who defined the uncodified customary law. Lawyers, however, were kept at bay, out of courts. The whole point of indirect rule was "to find a chief and build a court around him."[43]

Customary law was never concerned with the problem of limiting state power, only with enforcing it. Liberal theory emphasized the double-sided character of law, that while it came from the state it also restrained power. Power was said to be grounded in consent. State command was presumed to be rule bound, not arbitrary. This was the meaning of the claim that civil society was framed by the rule of law. None of these claims, however, sounded sensible where power sought to secure order through conquest, not consent. In such a context, the triumph of techno-administration under the guise of indirect rule through customary law was nothing but a retreat into legal administration. That retreat was indirect rule. "The separation of judicial and administrative power," rationalized Lugard at one point, "would seem unnatural to the primitive African since they are combined in his own rulers." And at another point, just a few pages later, he conceded the necessity: "In a country recently brought under administration, and in times of political difficulty, occasions may arise when the strictly legal aspect may give way to expediency."[44]

Under colonial conditions, respect for the law was really respect for the lawmaker and the law enforcer, often the same person. Consider, for example, the daily routine of the British district commissioner of Tunduru in southern Tanganyika.

> D was in the habit of going for a walk every evening, wearing a hat. When, towards sunset, he came to the point of turning for home, he would hang his hat on a convenient tree and proceed on his way hatless. The first African who passed that way after him and saw the hat was expected to bring it to D's house and hand it over to his servants, even if he was going in the opposite direction with a long journey ahead of him. If he ignored the hat, he would be haunted by the fear that D's intelligence system would catch up with him.[45]

In the French colonies after the Second World War, for example, a native who passed an administrator and failed to salute him risked the confiscation of his head dress and its deposition in the office of the cercle commander's office.[46] The 1920 "reforms" in Ghana made it a crime to "insult a chief," to "drum," or to "refuse to pay homage to a chief."[47] In a similar vein, the KwaZulu Legislative Assembly proposed in 1976 to increase the fine for insolence from R 4 to a maximum of R 100. In the event, the central state actually outdid the chiefs; it permitted the ceiling to be raised even higher, to R 200. But a member of the assembly argued that increasing fines "would not change the insolent behavior which exists in the community because we normally find that people

who are disobedient to their chiefs are poor people." Not being in a position to pay fines, he argued that the poor should be meted out corporal punishment for insolence.[48]

The injustice that commissioners and chiefs administered was infinitely flexible: if a transgressor had property, he would be fined; if not, he would receive lashes in the nearest marketplace. Corporal punishment was not only an integral part of the colonial order but a vital one. In the Portuguese colonies, the *palmatoria*, a punishment delivered by means of a beating on the hands, became the symbol of the colonial legal system.[49] The French, the British, and the Boers preferred to administer the strokes of a hippopotamus hide—called the *manigolo* in Malinke, the *kiboko* in Kiswahili, and the *sjambok* in South Africa—on parts of the body less exposed but more sensitive.

Much has been written about the French colonial system of the *indigénat*, but inevitably it has been exceptionalized as a specifically French practice, and an early one at that. Its origin lay in an early colonial presumption that almost all the whites "had the authority to inflict punishment" on any native. Formalized as the indigénat in Algeria in the 1870s, the system was imported into French West Africa in the 1880s.[50] A decree of 1924 limited this generalized white privilege "to officials representing the public powers, administrators and their clerks." The privilege was then extended to nonadministrative chiefs for whom the "ceiling" was fixed at five days' imprisonment and a fine of 25 francs. The decree limited the offenses for which subjects could be penalized to twenty-four, "but their variety was such and their definition so loose that the effect was arbitrarily to cover anything." It gave the administrator a list of motives, "among which he could simply take his pick, and be sure of finding one that would suit a subject he wished to punish." In Guinea, for example, it included a penalty for anyone appealing the decision of an authority: "complaints or objects, knowingly incorrect, repeated in front of the same authority after a proper solution has been found." In Senegal it included penalties for "negligence to carry out work or render aid as demanded," for "any disrespectful act or offensive proposal vis-à-vis a representative or agent of authority" (including a failure to salute a passing administrator), or for "speech or remarks made in public intended to weaken respect for French authority or its officials" (including songs or "false rumors").[51] So marked was popular outrage against the indigénat by the time of the Brazzaville conference in 1944 that de Gaulle felt obliged to acknowledge publicly the need to abolish it.

Call it white privilege, rule by decree, or administrative justice, the point about the indigénat that set it apart from normal practice in the colonies was only that it crudely and brazenly put on the law books as

rules the gist of day-to-day practice in the colonies. For was not the whole point of administrative justice to let administration operate unfettered by judicial restraint? Take, for example, the following list of charges taken from the Fort James court book:

- four lashes for "wasting time instead of buying food";
- five to ten lashes for "sitting around fire instead of working";
- one man was fined for "absenting himself from hospital while under treatment";
- another man was fined for "singing near the native church at 11:30 P.M.";
- some were fined for "being late to work";
- others were fined for "gross disrespect";
- two men were fined five shillings each for "constantly running away at the approach of the Boma official."[52]

How different was the practice in a British colony from the French indigénat? Was not the point to teach the recalcitrant a lesson, to ensure they learned to respect authority the next time around?

Listen to the testimony of those with direct experience of this rough-and-ready justice. A Dahomey newspaper reported in 1935: "Every day men and women, even those who owe nothing to the fiscal authorities, are arrested, lashed together and beaten under the pretext of refusal to pay their taxes. . . . Many of them, to comply with the payment of their taxes . . . pawn their children."[53] Around the same time, a Senegalese journal illustrated the kind of customary authority which it was a crime to oppose.[54] Salif Fall was a canton chief whose way of recovering overdue taxes was to tie up all the natives who could not produce a tax receipt during his inspection tour; "these unfortunates were then whipped in sight of the whole village till they bled, and, as a more effective reminder of the canton chief's authority, their sores were smeared with *wet salt through the good offices of the Diaraff.*"

In words not very different, another newspaper described what it meant to live in a British colony, with its "denial to natives of the principles and procedure of British courts" while "subjugat[ing] the judiciary to the executive," under an authority that "invest[ed] District Commissioners" otherwise "innocent of English law and practice" with "powers of life and death in the provinces over natives of whatever standing without any trial by jury or the right to retain counsel" while "detest[ing] . . . educated natives as the *bete noire* that haunts its political and autocratic dreams," under an order that prescribes "public floggings of general offenders stripped naked in the public markets" while "maintain[ing] . . . so-called 'white prestige' at all costs." This powerful indictment of administrative justice in colonial Nigeria was published by a

native paper, the *Lagos Weekly Record*, in its official tribute to Sir Frederick Lugard, the architect of indirect rule, on the eve of his retirement in 1919.[55] Two decades later, another Nigerian newspaper reported a meeting of the resident with representatives of various tribal unions and societies in the district, held in the Enugu High Court to discuss the question of the Enugu Native Court: "It is noteworthy that the general feeling of the meeting was against having anything to do with a native court for Enugu. . . . We ourselves have always been entirely lacking in enthusiasm for these so-called 'native courts.' In our opinion the scandal of bribery and corruption permeates the whole system and we see little likelihood of there being any improvement in this respect."[56] But having a native court was hardly a matter of choice, for written into the legal system of every colonial power was the distinction between subject and citizen. The prototype subject was the free peasant, ruled indirectly through an administrative cadre that was both native and European, purporting to work through traditional institutions that in reality were a mishmash—of practices severed from their original context, imposed by the colonial power, or initiated by officeholders—dispensing a customary justice that should more appropriately be understood as a form of administrative justice.

DERACIALIZATION AS POSTINDEPENDENCE REFORM

If customary law and the office of the chief, native or white, cannot be seen as a simple continuation of indigenous, precolonial forms of control, it is also true that this ensemble—the system of indirect rule—did not simply cease to be with independence. Nor was it just reproduced thoughtlessly or without restraint. The anticolonial platform of the 1950s often combined a demand for a unified legal system with a newfound respect for customary law as the embodiment of a much-maligned tradition. In this context, the call for a unified legal system meant a creative blending of customary and modern law and a single hierarchy of courts open to all as citizens. Such, indeed, was the agenda set by a conference of judicial advisers who met at Makerere University in 1953.[57]

But legal reform did not await political independence. It came as part of a larger reform of the colonial system undertaken in response to the great anticolonial movement of the postwar era. Anticolonial protest brought to center stage a debate that had been going on for decades within metropolitan circles, pitting administrators against lawyers, and conservatives against liberals. While administrators stood for efficiency, and in its name a "simple and speedy justice," lawyers called for "the transplanting of the technicalities of English criminal law and procedures." Professional legal criticism of administrative justice came to a head in the early 1930s with the appointment of the Royal Commission of Inquiry into the Administration of Justice in Kenya, Uganda and Tanganyika Territory in Criminal Matters. Chaired by H. G. Bushe, the legal adviser to the Colonial Office, the commissioners found it "fundamentally unsound" that "district officers should rest their prestige on their powers to judge and punish, and should base their judicial functions not on legal training and strict application of the laws of evidence but on their general knowledge of African life."[58]

The rising wave of anticolonial protest tipped the scales in favor of lawyers. The postwar reform of customary law proceeded along two lines: codification to blunt its arbitrary edge and professionalization of legal cadres while introducing a single unified appeal procedure to soften its administrative edge. Codification had been the preoccupation of settler regimes, concerned with limiting the autonomy of local state officials. It clearly had a double edge: while narrowing the scope for local initiative, codification also put the initiative in the hands of the central state. Codification as colonial reform began in 1938 when the government of the Bechuanaland Protectorate commissioned Schapero's *Handbook of Tswana Law and Custom*.[59] More books on African legal rules followed in the postwar era. Prominent among these was the work of Cory, who developed a method of recording customary law while working for the Tanganyika colonial administration.[60] This trickle of reform turned into a stream in the late 1950s as Britain moved into the decade of independence. Based at the University of London and inspired by earlier "restatements" prepared by the American Law Institute, an ambitious project, "The Restatement of African Law," was launched in 1959. It covered the countries of Commonwealth Africa and aimed at codifying the core of customary law: the law of persons, family, marriage and divorce, property (including land), and succession.[61] A parallel initiative attempted to build linkages between customary and modern courts, almost completely isolated from one another in the interwar period. Attempts were made in the 1950s to give high courts "a revisionary jurisdiction over native court proceedings" while attempting a shift of personnel "of the native courts from the traditional chiefs and elders to young lay magistrates with some basic training in law."[62]

To the radical leadership of the anticolonial movements, however, these appeared as no more than timid efforts at a late window dressing. Nothing less than a surgical operation that would unify the substantive law, customary and modern, into a single code would do. The militant edge of the anticolonial movement would be satisfied with nothing less than equal citizenship for all under the law. But soon it became clear

that this was a herculean task, daunting and even utopian under the circumstances. Ironically, the first step in postindependence legal reform was a continuation of the preindependence reform process. Its starting point was the narrower agenda for the unification of courts and not of the substantive law.

Broadly speaking, the reform of the court system proceeded along two lines. The minimalist tendency was content to stay with the colonial reform, retaining the dual structure of customary and modern courts while providing for a single integrated review process. The resulting linkages between the two court systems could be limited to the apex (as in Chad, the Central African Republic, and Zaire in the 1960s), or they could be effected at various levels (as in Togo).[63] The native courts were renamed, as either African courts (Kenya) or simply lower or primary courts. A variation of the reform was effected in Nigeria, where the supervisory and review powers of administrative officers were done away with and lawyers were admitted to top-grade customary courts and to customary appeals in higher courts. But lawyers continued to be barred from most customary courts, which were the vast majority of tribunals in the country.

The maximalist reform aimed at a unified court system. This was the major tendency in the former French colonies and in the more radical of the Anglophone countries. Niger, Mali, and Ivory Coast simply abolished all customary courts. So did Senegal. Ghana followed suit in 1960, and Tanzania in 1963. The Tanzanian reform is perhaps the most far-reaching: the language of the primary courts is Kiswahili; in theory, it has jurisdiction over all cases; also, in theory, lawyers are admitted to all courts. Yet in practice primary courts—the lowest level in the triple-tiered hierarchy of the unified court structure—"have broader competence in cases of customary law than in those of modern law."[64] Similarly, in Senegal, a country considered a pacesetter in progressive legal reform in Francophone Africa, "no special court is set apart for the adjudication of customary cases," but "the jurisdiction of the courts of the justices of the peace is limited to minor cases in modern law, while it extends to all cases of customary law."

A unified court system without a simultaneous unification of substantive law was clearly still a long way from realizing the nationalist dream of "equality before the law." Neither did a unified court system mean that its several levels were now governed by a single and uniform set of procedures. To effect that would require a vastly expanded body of professional jurists. Not surprisingly, the managers of independent states soon discovered the advantages of customary courts in terms of their nonprofessionalism and accessibility. The problem was that the agenda

of creative synthesis that would transcend the limitations of both customary and modern courts, while incorporating advantages of both, had been replaced by a triumphant modernism: the modern court was considered the desirable goal, but so long as resources were beyond reach and peasants remained "backward," the customary was accepted as a compromise, inevitable but hopefully temporary.

Thus the restatement initiative, based at the School of Oriental and African Studies (SOAS) in London, began to gain adherents among African governments; by 1966 these included Kenya, Malawi, Gambia, and Botswana.[65] The SOAS initiative was very much a continuation of colonial notions of the customary. Restatement retained its tribal flavor. In Malawi, for example, even "where two or more ethnic groups inhabited the same district," an "attempt was made to present significant differences between their laws" and to "re-present the material by ethnic groups."[66] Also, although the law was restated in written form, it was not codified, leaving a degree of initiative in local hands. But the restatement was seldom so simple an exercise as to involve no more than a transcription of oral into written custom. Anthropologists who examined the restatement process, as in Kenya, argued that the outcome was more "a set of ideal statements as to how the law should be administered" than "a reflection of contemporary Kipsigis customary law."[67] This was even more so in Tanzania, where restatement was part of a wider reform process; a single unified body of customary law cutting across ethnic boundaries was written and codified. Restating thus involved ironing out differences between ethnic practices and arriving at a single norm restated in a single law.[68] Henceforth, "unification" referred not to a process whose object was to arrive at a single body of law applicable to all, whether customary or modern, but to a more restricted process that aimed only at a unified body of customary law applicable to all ethnic groups!

Yet a third variant obtained in countries such as Ghana and Senegal.[69] Both attempted to arrive at a single body of law enforced by a single system of courts. Yet in both cases the written law contained customary alongside modern rules. In Senegal, for example, "78 officially recognized bodies of customs, chosen from 33 different ethnic groups, were applicable in the courts."[70] In African legal discourse, this attempt to join the customary and the modern into a single body of law was termed integration. All three variants, however, shared a common dilemma, for all tried to overcome the colonial legacy formally rather than substantively. Whether customary rules were simply restated in writing or were also codified through unification or whether they were integrated into a single body of law, the distinction between the customary and the

modern remained. Both the courts and the parties to a dispute had to choose between two sets of rules in case of conflict. On this score, African countries divided into two: those which continued with the colonial tradition of a presumption in favor of the customary and those which reversed it.[71]

The latter group were the modernizers. Among their ranks were found a core, the radical anticolonialists, determined to bring to an end the colonial legacy with the proverbial surgical stroke. More than any other states, two officially Marxist-Leninist states exemplified this tendency: Ethiopia and Mozambique. Whereas the Mengistu regime in Ethiopia simply abolished the customary by implementing a radically modern civil code,[72] the example of Mozambique under Frelimo is of greater interest, for it claimed to have employed a strategy of reform more political than administrative, arriving at "a uniform judicial structure applying a uniform set of legal norms" but through a process that depended "to a large extent on a flexible and non-coercive relationship between the formal and the informal sectors of justice." This claim is made in an eloquent defense of the Mozambican road by two of its participants, Albie Sachs and Gita Welch.[73] The secret, argue the authors, lies in understanding change as the result of a "process," a "protracted struggle," in which "the objective is never seen to be that of destroying the old, but of transforming it, of developing the aspects that are positive and eliminating the aspects that are negative." The point, we are told, is to "ensure as far as possible that the people should be at the center of the process, so that the rate of advance in creating new structures is conditioned by the capacity of the people to assume new values."

But can a democratic political process result in a uniform outcome—not only "a uniform judicial structure applying a uniform set of legal norms," but more so "the remarkable achievement of the community courts" applying a uniform family law throughout the country[74]—under an incredible diversity of conditions, both historical and contemporary? Part of the answer lies in the modified version of "revolution from above" summed up in the earlier claims: the people are said to be at the "center of the process" only to the extent that they "condition" its "rate of advance," not its outcome! The outcome, the substantive law, is a given. What "facilitate[s] the attribution of a single set of rights and duties to all," Albie Sachs assures us, is that the substantive law sums up no more than the demands of "simple justice." After all, "the problems which tend to give rise to family conflict tend to be the same independently of how the family was constituted: men abandoning their wives, excessive drinking, physical abuse, sexual problems, financial stress, sterility, incompatibility of temperaments and so on." In such situations, "simple justice" means recognizing that a "wife-beater is a wife-beater, and it does not matter whether he paid lobolo, or is a Christian or a Muslim or a non-believer."[75]

The demands of simple justice are then summed up as a series of "orientations" that the "judges receive on how to deal with family disputes," and these "constitute the principles equally applied to all unions." One such principle, for example, is to "facilitate the departure of a wife from a polygamous union." To be sure, since the relationship between the "formal and the informal sectors of justice" is said to be "flexible and non-coercive," there is "no attempt to penalize practices regarded as wholly incorrect"—"such as polygamy and child marriages"—but the "orientation" contains a strong presumption against these. "In all parts of the country," Sachs and Welch assure us, "independent of what was permitted by local tradition, the judges will regard it as wrong for a man to take a second wife." "He will not be punished for so doing, but his first wife will have a judicial remedy if she so chooses, and any determination in divorce proceedings made about the division of property or the custody of children would not be influenced by any claim he might make or imply to the effect that his religion or ethnic background permitted polygamy."[76]

The consequences of this simple justice are hardly this simple, for a presumption in favor of the first wife in a polygamous marriage is not simply a presumption against the polygamous husband; it is equally a presumption against the rest of the wives in the polygamous marriage. To entrench the rights of the first wife is simultaneously to erode the rights of the rest. This lesson can be drawn both from Victorian attempts of Boer republics to "abolish" polygamy in turn-of-the-century South Africa and from radical nationalist attempts to reform tradition in postindependence Ghana. The Volksraad of the Orange Free State recognized the "customary law of inheritance" but "only in administering estates of *de facto* monogamists." "Tribal marriages" were invalid in both the Transvaal and the Orange Free State. The supreme court in the Transvaal "ruled that polygyny was inconsistent with the general principles of civilization."[77] None of this was very different from the eventually abortive postindependence bill in Ghana, which "sought to withdraw legal recognition from all but the first wife,"[78] and so on with the so-called noncoercive way of abolishing *lobolo*, bride-price; for although "there is no legal prohibition of the payment of cattle by way of *lobolo*," at the same time "no one can go to court to argue that cattle so promised have not been paid, or cattle so paid should be restored." Sachs concludes with a straight face: "the state does not interfere." What is to be the likely consequence of such an orientation? Surely, the flourishing of the "informal sector of justice," with its provisions (at

least in the patriarchal societies) for ensuring that lobolo is both paid when customary and returned when customary.

If that is the case, one would have reason to doubt the claim that the Law on Judicial Organisation, passed in 1978, had within a decade been the instrument of realizing a "uniform family law" within all of Mozambique, "from the Ruvuma to the Maputo." To be sure, our authors also do concede a nonuniform outcome. "The new court system and the new forms of family law are most deeply rooted," we are informed, "in the areas where new relations of production and new forms of social organisation are most evident, namely in the communal villages in the countryside, and in the more strongly organised residential areas in the towns."[79] The communal villages "constitute more than 10% of all inhabitants of the countryside." In some of these villages, in Nampula, for example, where the family system was matrilineal, women "were reluctant to leave their traditional family villages where . . . they could count on a degree of protection from their kinfolk." "To move to a communal village," however, meant "entering a mononuclear relation with their husbands." One does not have to read much more to get to the root of the women's reluctance: in some villages, "some men left their original wives and children behind and entered into new 'monogamous' marriages in the communal village."[80] In this case monogamy becomes just another name for male license to shed a wife as a snake would shed its skin. And the "new forms of social organization" turn out to be a transition from a matrilineal to a patrilineal family organization, and the "orientation" a presumption against matriliny.[81]

The Mozambican reform was not without its positive side. But the gain was very much local: in the "people's tribunal at the lowest level," the system of chiefship was eliminated, and "the judges were elected from among the local population on the basis of their common sense, feeling for justice and their knowledge of the revolutionary principles contained in the Constitution."[82] As with colonial courts of chiefs, no lawyers were allowed; "all procedural formalism [was] reduced to the minimum." But not so in the higher courts, in the district, provincial, and national levels.[83] This means that poor people who won a case in a people's tribunal could easily find the tables turned in case of a review in a higher court if they could not afford a lawyer. But even if the lower court was no longer the customary court oriented by the chief, it was now a people's tribunal oriented by a judge whose "knowledge of the revolutionary principles contained in the Constitution" was an important qualification for election. That orientation and that knowledge, part of the revolution from above, was the key to the substantive justice administered in the new tribunals. As our authors disarmingly state, "The state sector at its best should represent all that is new, that transforms, that helps to establish a new consciousness"[84]—indeed a far cry from the principle that "the people should be at the centre of the process."

A less dramatic but no less drastic legal reform—from above—was introduced in postindependence Tanzania. Both family law and land law were "the subject of special legislation which either wholly or partly removes them from the jurisdiction of the normal court system." The reform channeled land disputes to land tribunals, four of whose five members were appointed by the ruling party (TANU) and the Ministry of Law and Settlement. Appeals were to go directly from the tribunal to the line ministry "without passing through any other courts." Family controversies, however, were to be handled by arbitration tribunals, all of whose five lay members were "appointed by the TANU Branch Committee having jurisdiction over the ward."[85]

I will put the legal reform in its wider political context in a later chapter. My interest now is in exploring the thread that links together the experience of the radical African states. This was the presumption that all one needed was a proclamation from the summit to change the flow of life on the ground. Were not the radical African states the true inheritors of the colonial tradition of rule by decree and rule by proclamation, of subordinating the rule of law to administrative justice so as to transform society from above? One radical regime after another carried out drastic changes, but mostly on paper. This is how Ghana tried to end polygamy and Ethiopia decreed an end to customary law. In a similar spirit, Tanzania proposed—as did a conservative state like Malawi—"the replacement of a matrilineal system of succession by a patrilineal one."[86] If the vision of change was audacious, the presumption that all that was needed to effect it was the stroke of a pen was breathtakingly naive. If the conservative regimes held up one part of the colonial tradition, recognizing African society as no more than an ensemble of tribes, each with its own customary law and thus with the right to be judged by its own law, the radical regimes took their stand on the ground that for all persons to be equal before the law, the law must be modern! It was a perspective best summed up in Samora Machel's well-known call: "For the nation to live, the tribe must die."[87] Just as they decreed a unified society—in the form of a single party, a single trade union, a single cooperative movement, and a single movement of women or youth—the radical regimes decreed a single body of substantive law. Whereas the conservative states were content with continuing the colonial legacy of a customary decentralized despotism, radical states tried to reform that legacy, but in the direction of a modern centralized despotism.

The result, predictably, has been an ever-widening gulf between what is legal and what is real. One cannot remove matriliny or polygamy or

bride-price by legal fiat. One cannot even do it with matters that lacked a deep historical standing, so that, whereas legislation required that "the law of contracts of England" be "generally applicable" throughout Kenya, "in practice the customary law of contracts is still recognized and enforced in African courts."[88] Not surprisingly, matters reached a point at which some jurists were alarmed that if judgments "are based upon principles dictated by the central government and at odds with well-established and recognized rules of the local customary law, there is good reason to expect less resorting to the state judiciary." "The nullification of the judicial process on the part of a substantial element of the rural population," concluded this particular jurist, "is a serious danger."[89]

This, however, is not to say that no meaningful legal reform took place with independence. It did, but the main tendency of the reform was not toward the democratization of the legal system inherited from colonialism, but toward its deracialization. Racial barriers were dismantled and a formal equality was observed. Often chiefs' and commissioners' courts were abolished, and their functions were transferred to magistrates' courts. All litigants were formally given a status of equality before the courts, and the debate on legal reform was restructured—in the erstwhile colony as in the metropolitan countries—around the question of access to justice. It was a reform that summed up progress in the first phase of African independence, as it did in the "independent" homelands of South Africa.

Deracialization meant that the social boundary between modern and customary justice was modified: the former was in theory open to all, not just to nonnatives; the latter governed the lives of all those natives for whom modern law was beyond reach. Although independence deracialized the state, it did not democratize it. Although it included indigenous middle and even working classes within the parameters of the modern state and therefore potentially in the ranks of rights-bearing citizens, thereby expanding the parameters of civil society, it did not dismantle the duality in how the state apparatus was organized: both as a modern power regulating the lives of citizens and as a despotic power that governed peasant subjects.

One needs to grasp fully both the general achievement of postindependence reform and its outer limit, and within those boundaries the different outcomes. Deracialization signified the general achievement; it was a tendency characteristic of all postindependence states, conservative and radical. The outer limit of postindependence reform was marked by detribalization, a tendency characteristic of only the radical states. Whereas customary law continued to be ethnically flavored in the conservative states, enforcing an ethnic identity on the subject population through ethnically organized Native Authorities, customary law in the radical states was reformed as a single law for the entire subject population, regardless of ethnic identity. The decentralized despotism characteristic of the conservative states was deracialized but ethnically organized, whereas the deracialized and detribalized power in the radical states tended toward a centralized despotism. We will see that the latter has turned out to be the more unstable of the two, generating a demand for decentralization which—if pursued in the absence of democratization—is likely to lead to a despotism as generalized and as decentralized as it was in the colonial period.

The situation of those subjected to customary law and indirect rule through the institution of chiefship cannot be grasped through a discourse structured around the question of legal access. Unlike the urban poor who live within the confines of the modern civic power—the law-defined boundary of civil society—whose predicament may be grasped as a de jure legal equality compromised by a de facto social inequality, a formal access to legal institutions rendered fictional in most cases by the absence of resources with which to reach these institutions, the situation of the rural poor is not that of lack of access or reach, but the actual law (customary law) and its implementing machinery (Native Authority) that confront them. Their problem can be grasped not through an absence or remoteness of institutions, but through institutions immediately and actually present. That ensemble of institutions, the deracialized regime of indirect rule, is best conceptualized as a subordinate but autonomous state apparatus.