

Codifying Criminal Law in East Africa during the Interwar Period

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Abstract

By the time the East Africa Protectorate was proclaimed in 1895, Indian penal and criminal procedure codes had been in effect in the region for nearly 30 years, having first been introduced in Zanzibar. The codes had developed as a result of the difficulties faced by administrative officers in India of applying uncodified English law. Jurists responded by drafting codes that were more suited to local conditions. They were applied throughout East Africa until 1930 when the Colonial Office introduced new codes based on the Queensland Code of 1899. These became the basis of enactments applied in colonies throughout the Empire, such as The Gambia, Cyprus and Fiji. Based on primary sources housed in the Kenya National Archives, the article explores the wider implications of these streams of criminal codification as well as their impact on the administration of criminal justice in East Africa. The competing codes provide a clear example of the transfer of legal knowledge around the Empire, and the dominant position of the global over the local. In addition, the story of the replacement of the Indian codes provides an example of jurisdictional manoeuvring by competing authorities, which was a central characteristic of the colonial world.

Introduction

Codification – the process of collecting and arranging laws into a code – was a central feature of the British Empire. Although the famous English jurist Jeremy Bentham coined the term “codification”, its prospects proved far better in the colonies than in Britain. At the same time, codifiers in the colonies were informed by English attempts to codify as well as by other imperial projects. Within England, the failure of repeated attempts to codify English criminal law came to be known as “codiphobia” (Wright 2007: 40-44).

English codification efforts faced resistance from judges and lawyers who wished to preserve common law powers. By contrast, colonial governments relied on criminal law to maintain their authority and they supported codification. The colonial administration of justice was dominated by the executive to a greater extent than in Britain and codification was an important part of this process. In the colonies, codification was also a means of rationalising applicable English law and colonial legislation (Wright 2007: 45-46). One of the foremost achievements in law reform during the Victorian age was a series of codifications for India in the mid-nineteenth century. A wide range of subjects was included, such as criminal law, civil and criminal procedure, evidence, succession and contract (Morris/ Read 1972: 110).

Codified law was created by legislative bodies in Britain and the colonies, while case law was created by judges in the process of making decisions in court. With regard to codification in East Africa, there were three main periods: first was the large-scale application in East Africa of Indian codes and acts. The second period, which extended to 1930, was a period of consolidation, during which many Indian enactments were replaced by local ordinances that closely followed the Indian parent acts. The third phase, from about 1930, was characterised by an increasing reliance upon English law and the repeal of most of the Indian acts. This was initiated by the imposition of penal and criminal procedure codes by the secretary of state for the colonies upon unwilling East African governments (Morris 1972: 112). The new penal code was based on a draft prepared by the Colonial Office that was modelled on the Nigerian Code, which was in turn based on the Queensland Criminal Code of 1899, drafted by Sir Samuel Griffith QC, who later became the first chief justice of the High Court of Australia. He based it on the English Criminal Code Bill of 1880 and to a lesser extent on the Indian Penal Code of 1860 ("IPC"), drafted by Lord Thomas Macaulay between 1834 and 1838 (Collingwood 1967: 6). Thus, the new East African codes stood "in one of the main streams of criminal codification within the Commonwealth", and were later the basis of enactments in other territories, such as The Gambia, Cyprus, the Seychelles and Fiji (Read 1964: 165). The administration, judiciary, attorneys-general and local bar associations were united in opposition to the new code, arguing that the IPC was better suited to conditions in East Africa (Morris/ Read 1972: 89).

In 1999, the eminent historian Anthony G. Hopkins commented that "[c]olonial legal history is one topic that has been signalled (sic) but scarcely

explored" (Hopkins 1999: 222). During the course of the past two decades, this lack of attention to colonial legal history has progressively been addressed, with the result that the subject has now emerged as a sub-field in its own right. In particular, interest in the history of international law has risen markedly (Lesaffer 2006: 28). Scholars of international law, such as Anne Orford, have supported the development of a distinctively legal critique and a preference for the "juridical" over the historical (Purcell 2015: 4). Approaching the subject of colonial codification from either perspective, the story of the replacement of the Indian codes provide an excellent example of the transfer of legal knowledge around the Empire, and the dominant position of the global over the local. Lauren Benton has argued that:

"Jurisdictional jockeying by competing colonial authorities was a universal feature of the colonial order. It called up and altered cultural distinctions, as competing colonial authorities tied their jurisdictional claims to representations of their (special or superior) relationship to indigenous groups or sought to delegitimize other legal authorities by depicting them as tainted by indigenous cultures." (Benton 2002: 3)

She further stated the following: "[g]lobal legal regimes – defined for our purposes as *patterns of structuring multiple legal authorities* – provided a global institutional order even in the absence of cross-national authorities and before the formal recognition of international law" (Benton 2002: 3). This article continues in the same vein and explores the global colonial institutional order and the important role of codification within it.

The Indian Penal Code

Thomas Macaulay arrived in Calcutta in 1834 as a member of the Indian Law Commission with a mandate to draft a criminal code for India. His general methodology was to take the unwritten English law, remove its anachronisms and technicalities, and repackage it in a concise form for use by district commissioners in their capacity as lay magistrates. Unlike Sir Samuel Griffith's Criminal Code for Queensland, discussed later in this article, the IPC did not spread around the world to the same extent, but was implemented mainly in East Africa (Taylor 2012: 51). Macaulay's Code could not have succeeded in England as there was little desire there – unlike in India – to overhaul the existing body of criminal law. The IPC was in essence "an improved version of the English law of the 1830s" (Taylor 2012: 64). While

the IPC was certainly a great improvement linguistically, it was still unmistakably an outgrowth of English legal thought. Another reason for the relative neglect of the code within the Empire was that by its enactment in 1860 it was already 22 years old (Taylor 2012: 64). Prior to codification, Indian law consisted of parliamentary charters and acts; Indian legislation; East India Company regulations; English common law; as well as Hindu, Muslim and other bodies of customary law. Unlike codified law, customary law refers to the written and unwritten rules based on the traditions of particular communities. It is not static but flexible and is essentially local in application (Morris/ Read 1972: 170). There were no clear guidelines on how three sources of law should interact and judges were forced to rely on legal assistants, some of whom were of doubtful reputation. Often, three sources of law were applied in the same courtroom by the same judge (Skuy 1998: 518-521).

Macaulay's principle of uniformity required a single system of law and he adopted Jeremy Bentham's and John Stuart Mill's principles of codification and drafting techniques. When drafting the code, he adopted the following maxim: "[t]he principle is simply this; uniformity when you can have it; diversity when you must have it; but in all cases certainty" (Skuy 1998: 517-523). Significantly, England did not have a written, uniform set of criminal laws and principles either. The utilitarians supported English codification and the Benthamite practices adopted by Macaulay included drafting separate chapters for various classes of offences; the use of numbered paragraphs; the inclusion of precise definitions of terms followed by consistent use of those terms to the exclusion of any others; the allocation of separate paragraphs for each idea; and the use of third person masculine singular tense throughout (Skuy 1998: 520-524).

The IPC was characterised by illustrations (hypothetical fact situations that showed how a section applied). These were very helpful in India, which did not have a formal body of case law and it took about 15 years for a sufficient body of case law to develop. An example included the definition of murder:

"A lays sticks and turns over a pit, with the intention of thereby causing death, or with the knowledge that death is likely to be thereby caused. Z believing the ground to be firm, treads on it, falls in, and is killed. A has committed the offence of voluntary culpable homicide" (Skuy 1998: 541).

The IPC thus specified whether an omission to act under certain circumstances amounted to murder, negligence or no offence.

Ironically, the features of the IPC that impress scholars today, such as Macaulay's lucid and concise expression and use of illustrations, worked against its wider adoption because of the assumption that such an approach was inappropriate in more advanced, sophisticated settings with developed legal professions (Wright 2012: 48).

Introduction of the Indian Penal Code to East Africa

Colonial East Africa was made up of Kenya, Tanganyika, Uganda, and Zanzibar. Britain's formal involvement on the East African mainland began in 1888 when the Imperial British East Africa Company ("IBEAC") was granted a royal charter to administer the territory. Britain itself took control of the British East Africa Protectorate in 1895, which was re-named Kenya in 1920 (Bennett 1963: 1-4). Although a few European settlers moved to the protectorate before 1900, the first influx of settlers occurred from 1903 onwards. Most came from Britain and South Africa. The European population was never large and even at its height after World War Two, it did not exceed 60,000 (Tignor 1976: 22). The colonial history of the territory that later became Tanganyika began in November 1884 when German representatives concluded treaties with African headmen. Germany declared a protectorate over the area six years later (Bierwagen/ Peter 1989: 396). The territory subsequently became a League of Nations mandate governed by Britain after the Treaty of Versailles in 1919 (Callahan 1999: 49-50). British influence in Zanzibar increased in the nineteenth century and the ruling sultan placed the territory under British protection in 1890. A dual court system was established with a British High Court and subordinate courts as well as a parallel system of courts under the control of the sultan (Bierwagen/ Peter 1989: 399). In the case of Uganda, a British protectorate was established in 1894 and this was extended over most of the country two years later (Adimola 1963: 328). One of the aims of codification was to unify the way justice was administered across the different territories.

The IPC was introduced into Zanzibar in 1867. Later, the Zanzibar Order in Council of 1884 applied numerous Indian acts such as the Criminal Procedure Code, the Civil Procedure Code, the Evidence Act and the Succession Act (Morris/ Read 1972: 113-114). In respect of criminal jurisdiction, no provision was in force save that no act was to be regarded as criminal that was not considered as such in a British possession. Faced with such vague provisions, the consul of Zanzibar passed rules in 1867 providing that for those under his

jurisdiction, the IPC would be the prevailing criminal law. In fact, he had no power to make such rules and his exercise of criminal jurisdiction based on the IPC was not retroactively validated until 1882 (Ghai/ McAuslan 1970: 127).

Increasing trade from India and increasing economic interests in Zanzibar and the East African coast more broadly resulted in increased work for the consul; accordingly, there was a need to define and expand his powers. These were set out in the Zanzibar Order in Council of 1884, which was one of the initial legal bases for the exercise of jurisdiction in Kenya. In terms of this statute, Zanzibar was deemed a district of Bombay, where court appeals from the territory lay (Ghai/ McAuslan 1970: 128).

Following the declaration of a protectorate on the East Africa mainland in 1895, administrative officers (often company agents who were kept on at their posts) were instructed to apply the IPC, pending more formal arrangements. This policy was difficult to implement as hardly any of the officers had a working knowledge of the IPC or would have had copies of it. (Ghai/ McAuslan 1970: 130) The jurisdiction of colonial courts in East Africa was exercised in terms of various Indian codes and local ordinances. Insofar as these did not apply, the courts were empowered to refer to the law then in force in England (Allott 1960: 8). The practice and procedure of the courts was governed by the Indian codes, but the basic procedural law was English (Ghai/ McAuslan 1970: 171).

The IBEAC and the early colonial administration that succeeded it looked to the Indian administration as an example in the methods of government. There were also direct contacts as a substantial number of British officers, both civil and military, who had seen service in India, were stationed in the East Africa Protectorate. Furthermore, there was an increasing influx of Indians into the territories. The Indian codes covered a wide range of subjects including criminal law, criminal and civil procedure, evidence, contract, and succession. In other words,

“much of English law [was] received by the African territories at one remove, through their adoption of Indian laws; though it must be remembered that sometimes the rules of English law have suffered a sea-change when passing through the hands of Lord Macaulay or other eminent draftsmen of the Indian Codes” (Allott 1960: 6).

The offences, defences and punishments set out in the codes were drafted with relatively little regard for their African contexts. As a result, it is difficult to find any provisions in the codes that resulted from a response to local conditions. This lends support to the argument that greater importance was placed on ensuring that the new codes were suitable for application in diverse territories throughout the Empire, rather than on tailoring them to suit local conditions (Morris/ Read 1972: 165).

On the mainland, the Africa Order in Council of 1892 empowered the secretary of state to declare that any Indian act should have effect in any British territories. In 1897, the East Africa Order in Council introduced certain Indian acts and by 1908, 30 Indian acts were in force in the East African Protectorate ranging from the Indian Penal Code, the Criminal Procedure Code and the Civil Procedure Code, to the Post Office Act and the Tramways Act (Morris/ Read 1972: 113-114).

By the early twentieth century, British East Africa had a body of Indian law that covered the most important areas of litigation. With the development of judicial departments, further legislation of the Indian "type" was drafted which, though based on Indian legislation, took local conditions into account.

Queensland Code of 1899

After the adoption of the IPC in 1860, it was overtaken by a series of English consolidations that formed the basis of Australian criminal legislation in the 1860s. In the 1870s in England, Sir J.F. Stephen made a fresh attempt at codification, over forty years after the Macaulay Code had first appeared. His efforts were unsuccessful in England, but they formed the basis of the codes of Canada and New Zealand (Taylor 2012: 64). Importantly, Samuel Griffith borrowed heavily from Stephens' work in drafting the Queensland Code, which was added to statute-based provisions derived from local consolidations. The Queensland Code was inspired by Signor Zanardelli's Italian Code and resulted in a code that transcended the common law. It also included the "imposed" imperial codifications, notably the IPC and R.S. Wright's Jamaica Code of 1877. Griffith's code represented a comprehensive idea of codification as originally conceived by Jeremy Bentham (Wright 2007: 39-48). In drafting his code, Griffith ventured beyond English law, drawing especially from Zanardelli's code. His unique contribution was his concise statement of the principles of criminal responsibility and clear statement of defences, avoiding reliance on examples and illustrations (Wright 2007: 57).

Importantly, there was a significant exchange of ideas between colonies that did not originate in London. The relationship between William MacGregor and Samuel Griffith is a good example. MacGregor, while serving as lieutenant-governor of British New Guinea, passed on a copy of the 1889 Italian Code to Griffith in 1896. He later took Griffith's Queensland Code to Lagos, with the Nigerian Code that developed out of it later becoming the basis of the Model Code (Wright 2007: 46).

Soon after the turn of the century, the government of the Protectorate of Northern Nigeria decided to codify its criminal law and procedure. The chief justice, Henry Gollan, proceeded to draft two codes: a penal code, based on the Queensland Criminal Code of 1899 and a criminal procedure code modelled on the Gold Coast Ordinance of 1876. They were enacted in 1904 and 1903 respectively. Around the same time, the high commissioner of Southern Nigeria proposed that a penal code based on the Straits Settlements Penal Code, an adaptation of the IPC, be introduced. However, the legal advisers in the Colonial Office, Hugh Bertram Cox and Sir John S. Risley, were strongly opposed to this and blocked the proposal. In 1914, the Protectorates of Northern and Southern Nigeria were amalgamated. The synthesising of criminal procedure codes was straightforward as both codes were based on that of the Gold Coast. Criminal law itself proved more difficult and a revised criminal code was only enacted in 1916 (Morris 1974: 9).

In addition to the Queensland Code, Gollan also used the Gold Coast Criminal Code, Stephen's Digest of Criminal Law, H.L. Stephen's draft Criminal Code, the Sudan Penal Code of 1889 and the IPC. He wrote that he had drawn from all of them but had decided to adopt the Queensland Code as his model. His main reason for doing so was that the code kept a balance "between over elaboration on the one hand and over compression on the other; and avoided...the relegation to definition sections of practically all the essential features of the offences constituted under its provisions". (Morris 1970: 144).

Introduction of the Model Code to East Africa

During the interwar period, a codified body of criminal law and procedure greatly appealed to administrators, law officers and judges alike. They believed in the advantages of codifying English law, the most important being overcoming the difficulties faced by large number of lay magistrates in

the Administrative Service in applying uncodified English law without the aid of legal books and English law reports. The legal advisers in the Colonial Office, Sir John Risley and Sir H. Grattan Bushe, were highly influential in determining which codes were adopted in individual territories. Risley, in particular, was firmly against the introduction of the IPC in the African territories and succeeded in preventing – against the views of the high commissioner and the secretary of state – the introduction of an Indian-type code into Southern Nigeria. Similarly, during the interwar period, Bushe insisted on the replacement of Indian-based criminal law, despite local opposition (Morris 1974: 6).

The preparation of the new codes was undertaken by Albert E. Ehrhardt KC, who had served as a puisne judge in Kenya between 1910 and 1914, and who subsequently served as an assistant in the Legal Adviser's Department.¹ Permanent legal staff in the Colonial Office were periodically assisted by judges who, like Ehrhardt, had previously served in the colonies and were able to use their wide experience and expertise when providing advice. Later advisers included Sir Alison Russell and Sir Sidney Abrahams, both of whom had served as chief justice of Tanganyika (Jeffries 1949: 170). Ehrhardt was paid an honorarium of £50 in respect of each code, which was paid equally by the governments of the East African territories in which the codes would be adopted. On completion, the draft codes were sent to the attorneys general in the East African territories.²

Views of the Colonial Judiciary

In June 1925, the secretary of state informed Kenya's governor that the preparation of the model Penal and Criminal Procedure Codes based on the principles of English law were to be drafted under the auspices of the Legal Department of the Colonial Office with a view to the replacement of the existing codes based upon Indian law.³ Following a discussion with the chief justice, Kenya's attorney general wished the following to be put to the secretary of state: "[t]he whole system of our laws is interwoven with ideas and phraseology derived from the Indian Codes. Emancipation from these Codes unless gradual will give a serious shock to the general administration

¹ Kenya National Archives (KNA) AP/1/1075 Secretary of State to Governor, Kenya, 6 June 1925. A puisne judge is inferior in status to a chief justice.

² KNA AP/1/1075 Secretary of State to Governor, Kenya, 6 June 1925.

³ KNA AP/1/1075 Secretary of State to Governor, Kenya, 6 June 1925.

of the laws”.⁴ He proposed repealing some parts of the IPC and “substituting provisions more in accordance with English law”.⁵

Kenya’s attorney general also recommended that the Criminal Procedure Ordinance be amended to bring it more into line with English procedure by following the amendments to the Ceylon Criminal Code. In his view, the main difficulty with the Criminal Procedure Ordinance was that it unduly restricted the powers of his office. The Ceylon Code restored powers possessed by the attorney general in England and would give “him the proper control which the Crown should possess in criminal proceedings”.⁶ As he was President of the Court of Appeal for Eastern Africa, Chief Justice Barth sent copies of the new Model Code to his counterparts in Uganda, Tanganyika, Nyasaland and Zanzibar. In an accompanying memorandum, he stated that the draft ordinance was inferior to the IPC, which was a “body of law which has to be construed largely by laymen”.⁷ In a letter to Kenya’s governor, Sir Edward Grigg, Barth referred with approval to one of Grigg’s books, *The Greatest Experiment in World History*, in which it was recorded that “Macaulay establishes the Indian Penal Code which is, I think, universally recognised as one of the world’s best bodies of law”.⁸ Barth further quoted from Halsbury’s Laws of England, which stated that “[l]ike other Indian Codes the Penal Code has for its basis the Law of England stripped of technicalities shortened and simplified but modified in some few particulars to suit the local circumstances”.⁹ Barth continued by arguing that “[t]here is no reason why the Indian Penal Code should not be adopted to the local circumstances of Kenya”.¹⁰ He concluded as follows:

“The effect of nearly 24 years experience of the Indian Penal Code has been yearly to increase my admiration for the simplicity and completeness of its definitions and provisions. It is a body of law which either designedly or not has been framed for administration by laymen and with which magistrates in Kenya are familiar. It has also been the subject of judicial interpretation for many years. It is

⁴ KNA AP/1/1075 Attorney General to Acting Colonial Secretary, 7 July 1925.

⁵ KNA AP/1/1075 Attorney General to Acting Colonial Secretary, 7 July 1925.

⁶ KNA AP/1/1075 Attorney General to Acting Colonial Secretary, 7 July 1925.

⁷ KNA AP/1/1075, Jacob Barth, Chief Justice, Kenya, to Governor, Kenya, 12 February 1926.

⁸ KNA AP/1/1075, Jacob Barth, Chief Justice, Kenya, to Governor, Kenya, 12 February 1926.

⁹ Halsbury’s Laws of England, Vol. X, p. 616; KNA AP/1/1075, Jacob Barth, Chief Justice, Kenya, to Governor, Kenya, 12 February 1926.

¹⁰ KNA AP/1/1075, Jacob Barth, Chief Justice, Kenya, to Governor, Kenya, 12 February 1926.

now sought to replace it by something new. The result will be to create confusion and uncertainty in the minds of those lay magistrates who have to administer the new Code with a consequential adverse effect on the administration of criminal justice. I cannot conjecture the reason underlying the attempt to impose a new Criminal Code on the East African dependencies. The Indian Penal Code is in force in Kenya, Uganda, Tanganyika and Zanzibar either as an applied Act or in the shape of an ordinance based on its provisions. It would seem far more reasonable to apply its provisions to Nyasaland if an attempt to satisfy a passion for uniformity which will be most difficult to achieve, is to be made than to upset the administration of justice in those Colonies where the Indian Penal Code forms the basis of the Criminal Law."¹¹

According to Barth, the Indian Penal Code and the Indian Criminal Procedure Code on which the Criminal Procedure Ordinance was based were "to the best of [his] knowledge and belief...free from any serious adverse criticism".¹²

The only other criticisms of the IPC that Barth was aware of were "(1) that it is so complete that it enmeshes most wrong doers and (2) that adultery is an offence!"¹³ He also pointed to the "illogical and archaic division of offences into felonies and misdemeanors for which I can see no reason..."¹⁴ In conclusion, he urged "that the Kenya Penal Code should be based on the Indian Penal Code with those alterations and additions which experience has shown should be made to adopt it to local conditions and consolidating it special legislation such as that in force in Kenya dealing with sexual offences".¹⁵

In respect of the Criminal Procedure Ordinance, Barth commented that it was not a complete draft. Together with the Criminal Procedure Ordinance of 1913, they formed "a sort of mosaic the composition of which must be left to

¹¹ KNA AP/1/1075, Jacob Barth, Chief Justice, Kenya, to Governor, Kenya, 12 February 1926.

¹² KNA AP/1/1075, Jacob Barth, Chief Justice, Kenya, to Governor, Kenya, 12 February 1926.

¹³ KNA AP/1/1075, Jacob Barth, Chief Justice, Kenya, to Governor, Kenya, 12 February 1926.

¹⁴ KNA AP/1/1075, Jacob Barth, Chief Justice, Kenya, to Governor, Kenya, 12 February 1926.

¹⁵ KNA AP/1/1075, Jacob Barth, Chief Justice, Kenya, to Governor, Kenya, 12 February 1926.

the courts".¹⁶ In particular, the provisions in the draft regarding pleas were not satisfactory. To the best of his knowledge there was "no word in any native language corresponding to 'guilty'". The existing Criminal Procedure Ordinance provided that the plea should be recorded in the words of the accused.¹⁷

Barth believed that the effect of the new code was to make the punishment for rape either death or imprisonment. This was not in line with English law. In the view of the chief justice, "many cases of rape among natives where punishment falling short of imprisonment for life would be adequate".¹⁸ In the Model Code, the scale of fines applied to Africans and non-Africans alike. The chief justice suggested that the previous scale was more satisfactory and that the proposed scale of fines was out of proportion to periods of imprisonment in the case of Africans.¹⁹

The chief justice of Tanganyika, Sir Joseph Sheridan, maintained that "procedure under the Indian Code was...simple and expeditious, and he could not fathom how the idea had grown up that it was technical" (Morris/Read 1972: 97). In Kenya, Judge George Pickering commented that the "Indian Penal Code has stood the test of scrutiny and experience. Though not perfect, the Indian Penal Code as a working system has justified the expectations aroused by the erudition of its author".²⁰ He pointed to the phraseology used in corresponding sections of the two new codes in order to show the superiority of the IPC. Like Barth, he also regretted the "archaic" words "felonies" and "misdemeanours".²¹ This division of crimes was introduced for the purpose of indicating differences in procedure. By contrast, the IPC referred to "warrants" and "summonses".²² He further commented that "[s]eeing that it is contemplated that this Code will be

¹⁶ KNA AP/1/1075, Jacob Barth, Chief Justice, Kenya, to Colonial Secretary, Kenya, 2 October 1926.

¹⁷ KNA AP/1/1075, Jacob Barth, Chief Justice, Kenya, to Colonial Secretary, Kenya, 2 October 1926.

¹⁸ KNA AP/1/1076, Acting Registrar to Attorney General, Kenya, 30 October 1930.

¹⁹ KNA AP/1/1077, Registrar, Supreme Court, to Acting Attorney General, Kenya, 18 January 1932.

²⁰ KNA AP/1/1075, George Pickering to Jacob Barth, Chief Justice, Kenya, Memorandum, 12 February 1926.

²¹ KNA AP/1/1075, George Pickering to Jacob Barth, Chief Justice, Kenya, Memorandum, 12 February 1926.

²² KNA AP/1/1075, George Pickering to Jacob Barth, Chief Justice, Kenya, 12 February 1926.

administered by the ordinary man in the street, it seems to me that rather an exceptional knowledge of law is being assumed".²³ In his view, the IPC was fairly comprehensive and if administrative officers were supplied only with a copy of the New Code without other books, they would struggle to dispense justice.²⁴ Certain terms in the Model Code were regarded as problematic. For example, the word "dishonestly", which was carefully defined in the IPC, was dropped in the Model Code in favour of the term "fraudulently", which was more difficult to explain.²⁵ In summary, Pickering noted that:

"Generally one gets the impression that the Indian Code is wider in incidence and clearer in diction. Whilst fully recognizing that the value of a body of criminal law such as the Draft Code cannot be estimated with any degree of accuracy until years after its application, I have little doubt but that the repeal of the Indian Code and the introduction of the Model Draft would prove an unprofitable exchange."²⁶

Initially, Kenya's governor was in general agreement with the chief justice regarding the value of the IPC. He could see no reason why a new Criminal Act should be imposed on the East African territories and it was agreed that a conference of legal experts under the chairmanship of Kenya's attorney general would be set up to discuss the new code.²⁷

Judge Charles Belcher provided a perspective on the new codes from Nyasaland, one of the territories affected and the only one from central Africa. In his view, a complete code would be a great advantage to all concerned with the administration of criminal law. He justified this by pointing out that only two books on English Criminal Law were readily available to magistrates and legal training was required to understand one of them.²⁸ In his view, it was clear from the memoranda of Barth and Pickering that they were opposed to any considerable departure from the IPC. Belcher was very much, though not entirely, in agreement with Pickering. Belcher noted that the "criticism arising from the dislike of anything emanating from

²³ KNA AP/1/1075, George Pickering to Jacob Barth, Chief Justice, Kenya, 12 February 1926.

²⁴ KNA AP/1/1075, George Pickering to Jacob Barth, Chief Justice, Kenya, 12 February 1926.

²⁵ KNA AP/1/1075, George Pickering to Jacob Barth, Chief Justice, Kenya, 12 February 1926.

²⁶ KNA AP/1/1075, George Pickering to Jacob Barth, Chief Justice, Kenya, 12 February 1926.

²⁷ KNA AP/1/1075, Secretary, Office of the East African Governors, to Barth, Chief Justice, Kenya, 18 March 1926.

²⁸ KNA AP/1/1075, C.F. Belcher, Memorandum on the proposed Penal Code, 16 June 1926.

Kenya which is generally felt by European non-official communities in Africa would, as the Chief Justice of Kenya points out, be obviated by re-enacting the code, modified as appears necessary, as independent local legislation instead of applying the Indian enactment as such".²⁹ He also suggested that alterations in procedure were needed and suggested a new Criminal Procedure Code that was grounded on Indian procedure.³⁰

The Colonial Office considered the observations and criticisms on the draft codes contained in in the Report of the Conference of Law Officers of the East African Dependencies and noted that these had received careful consideration by legal advisers in London.³¹ The secretary of state later observed that:

"As regards the general question of policy involved in the introduction of these Codes, I am advised that Officers will find it easier to apply a code which employs the terms and principles with which they are familiar in England than one in which these term and principles have been discarded for others of doubtful import. It is for example somewhat surprising to learn that the terms 'felonies' and 'misdemeanors' should be regarded as archaic in a Code of English Criminal Law to be administered by English lawyers."³²

From the perspective of the Colonial Office, the points raised in the Report of the Conference of Law Officers of the East African Dependencies appeared to be of minor importance and capable of being adjusted by the colonial government concerned.³³ Where greater stringency was deemed desirable it was open to a particular government to suggest severer punishments.³⁴ The Colonial Office desired that that sections of the Penal Code be drafted in identical language in each territory "so that a decision in the Court of Appeal may be of real guidance to all the Territories concerned. Such a policy will also be of great advantage to legal officers transferred from one Territory to another".³⁵

²⁹ KNA AP/1/1075, C.F. Belcher, Memorandum on the proposed Penal Code, 16 June 1926.

³⁰ KNA AP/1/1075, C.F. Belcher, Memorandum on the proposed Penal Code, 16 June 1926.

³¹ KNA AP/1/1075, Secretary of State to Governor, Kenya, 10 May 1927.

³² KNA AP/1/1075, Secretary of State to Governor, Kenya, 10 May 1927.

³³ KNA AP/1/1075, Secretary of State to Governor, Kenya, 10 May 1927.

³⁴ KNA AP/1/1075, Secretary of State to Governor, Kenya, 10 May 1927.

³⁵ KNA AP/1/1075, Secretary of State to Governor, Kenya, 10 May 1927.

Settler Views

One of the reasons for the rejection of the IPC was possibly because of a bias held by the European population and shared by the Colonial Office in favour of an “English Code” (Taylor 2012: 65). From the start, British settlers “were quickly insistent that they were entitled as of right to the English legal system which they had brought with them from England as part of their heritage of the common law” (Ghai/ McAuslan 1970: 125). Tensions between the settler and Indian communities had developed early on. The settlers made every effort to exclude Indians from having any influence in policy and administration. These efforts were strongly opposed by the Indian community (Ghai/ McAuslan 1970: 49).

Chief Justice Barth noted that “[a] certain amount of uninformed criticism has been from time to time directed in Kenya to the Indian Penal Code on the ground that it is the “Indian” Code, a local adaptation would evade that criticism”.³⁶

Records exist of the settler community in East Africa protesting that the colonial government should not place “white men under laws intended for a coloured population despotically governed”, although the Colonial Office did not necessarily take such objections seriously, and they were likely the product of ignorance. Had the protesters been informed of the identity of the drafter of the IPC, some of their concerns might have dissipated (Taylor 2012: 65). However, it may be that their concern was not so much with the colour of the skin of the drafter, but rather with the degree of political freedom permitted to the subjects of any proposed code. There were also a number of topics – the avoidance of religious strife, for example – which were pressing in India, but hardly so in East Africa (Taylor 2012: 65).

Kikuyu Central Association and Local Press

The Kikuyu formed Kenya’s largest ethnic group during the colonial period and in Nairobi, around 55 per cent of the population were members of this group (Throup 1987: 52). The Kikuyu Central Association (KCA) played an important part in the struggle for direct African representation during this period (Ghai/ McAuslan 1970: 62-64). The KCA was founded in 1924 by educated young men disaffected from the missions who opposed local official chiefs. It was headquartered in Nairobi, which meant its members

³⁶ KNA AP/1/1075, Jacob Barth, Chief Justice, Kenya, to Governor, Kenya, 12 February 1926.

came into contact with Asian and British lawyers, some of whom assisted the association. By 1926, the body had an estimated membership of between 200 and 300. It brought a variety of demands to the colonial government such as expanded educational facilities, improved healthcare and expanded economic development in the Kikuyu reserves (Berman 1990: 230). The KCA was described as a nationalist body that opposed government and settler policy regarding agricultural land (Tignor 1979: 307). The body was also opposed to mission schools and its campaigns resulted in the closure of a number of such schools in the 1920s (Tignor 1979: 256).

In respect of the Model Code, the KCA provided a rare African perspective, stating as follows in 1934:

“The Criminal Law and the Code of Criminal Procedure recently introduced are very complicated and do not appear to be so simple as the Codes which have been superseded. In any case, in order that the largest section of the population, i.e. African, may be able to understand the law, it is highly desirable that all the laws be translated into Kiswahili. It is at the same time urged that the law should be simplified and the procedure made easily understandable by natives.”³⁷

The KCA's statement was made to the members of the Bushe Commission, which was set up in 1933 to conduct an investigation into the administration of justice in Kenya, Uganda and Tanganyika. The commissioners sympathised with the arguments put forward by the KCA but ultimately rejected them on the grounds that translating British law into Swahili would be an almost impossible task:

“While we have considerable sympathy with the arguments advanced by our witnesses, we are reluctantly compelled to reject the suggestion. The difficulties of bi-lingual legislation are too well known to need reiteration here. It would be almost impossible accurately to translate into Swahili many of the conceptions embodied in British legislation, but we trust that it will be possible, both by printing in Swahili a series of simple prohibitions and by other means of publicity, to make as widely known as possible what are legally forbidden acts and how the law regards those who

³⁷ Report of the Commission of Inquiry into the Administration of Justice in Kenya, Uganda and the Tanganyika Territory in Criminal Matters, Command Paper 4623 (London, 1934), para 250.

commit them. This especially applies to local government rules and regulations.”³⁸

Interestingly, the first newspaper in an African vernacular, known as *Muigwithania*, was edited by Jomo Kenyatta, later to become Kenya’s first president. The newspaper was an important channel used by the young members of the KCA, which was one of the earliest Kenyan anti-colonial opposition organisations (Frederiksen 2011: 156).

Prior to the Second World War, Colonial Kenya had a varied European print culture. It was characterised by a “well-consolidated European press, mostly controlled by white settlers, but strongly influenced by the government” (Frederiksen 2011: 163). From the perspective of the local press, the *Times of East Africa* recorded that by far the most important issue before the next session of the legislative council were the new Criminal and Criminal Procedure Codes. Reportedly there had long been an eager desire on the part of the country as a whole for the replacement of the IPC by a local law. The fact that the codes were drawn up in London was evidence that this desire was shared there as well. Both governments could rely upon the full support of the European public in creating an East African Code of common application throughout East Africa.³⁹ According to the newspaper, the motive behind the Codes was “wholly admirable” but it was not inconceivable that their terms could encroach on the liberties of the subject in a British Colony.⁴⁰ At the same time, the newspaper also expressed the view that the introduction of a new law was likely to widen existing liberties.⁴¹

Nairobi Chamber of Commerce

In a newspaper article entitled “Nairobi Chamber Prefers I.P.C.”, a member of the Nairobi Chamber of Commerce stated that 99 per cent of junior magistrates in the colony were unfamiliar with English law before their arrival in Kenya. Another pointed to the useful commentaries on every section in the IPC. The Model Code lacked such commentaries and, in his opinion, this would lead to misapplications of the law by inexperienced junior magistrates. The reason business people were against the new code

³⁸ Report of the Commission of Inquiry, para 250.

³⁹ KNA AP/1/1076, *Times of East Africa*, 7 August 1929.

⁴⁰ KNA AP/1/1076, *Times of East Africa*, 7 August 1929.

⁴¹ KNA AP/1/1076, *Times of East Africa*, 17 August 1929.

was because they felt it was unnecessary and the necessary reference books to supplement it were not available.⁴² The following resolution was passed:

“In the opinion of this Chamber no good grounds have been shown for the repeal of the Indian Penal Code and that the operation of the proposed new Ordinance so far from simplifying the working of the criminal law will necessarily tend to confusion amongst junior inexperienced officers who have to administer it.”⁴³

In a letter to the secretary of the Law Society of Kenya, the colonial secretary in Nairobi passed on the views of the secretary of state, who “intimated his view that the objections raised afford no reason why the Bill should not be passed at an early date”.⁴⁴ He noted that the “fundamental issue is the substitution of English for Indian laws which his Lordship must regard as settled in principle”.⁴⁵ The secretary of state could not “see why difficulty should arise in a British Colony in the administration of English law by English judges [and]...the courts will have the benefit of English Case Law and of numerous commentaries”.⁴⁶

Post-1930

After the new codes were implemented in 1930, magistrates did not exercise a sufficient degree of care in Barth’s opinion, particularly when inflicting penalties. They did not understand that the new Penal and Criminal Procedure Codes did not reproduce the general provision which existed in the repealed Criminal Procedure Ordinance which empowered courts to impose, in the case of Africans, a sentence of whipping in addition to or in lieu of any other punishment authorised by law. This difference had not been fully appreciated as he found that various illegal sentences have been passed.⁴⁷

⁴² KNA AP/1/1076, *Times of East Africa*, 17 August 1929.

⁴³ KNA AP/1/1076, *Times of East Africa*, 17 August 1929.

⁴⁴ KNA AP/1/1076, Colonial Secretary, Kenya, to Secretary of the Law Society of Kenya, 15 February 1930.

⁴⁵ KNA AP/1/1076, Colonial Secretary, Kenya, to Secretary of the Law Society of Kenya, 15 February 1930.

⁴⁶ KNA AP/1/1076, Colonial Secretary, Kenya, to Secretary of the Law Society of Kenya, 15 February 1930.

⁴⁷ KNA AP/1/1077, Circular to Magistrates No. 3 of 1932.

In a circular dating from 1932 Barth revealed that “[m]agistrates do not exercise that precision in procedure which is essential”.⁴⁸ He also noted that certain Indian laws continued to be applied after the adoption of the Model Code. For example, provisions of the Evidence Act dealing with confessions made to police rendered “the provisions of the Indian Criminal Procedure Code relating to confessions more or less necessary”.⁴⁹ In 1933, he provided a further example stating that there was still confusion in the minds of magistrates as to whether the Indian Whipping Act of 1864 has been impliedly repealed by the whipping procedures of the Model Code.⁵⁰

Conclusion

The new Penal Code and Criminal Procedural Code were both enacted in Kenya in 1930. They were also passed into law the same year in Uganda, Tanganyika and Nyasaland. Zanzibar followed in 1934. There were some differences between the colonies, for example, the jury system only existed in Kenya and Nyasaland, and the death penalty for rape was only applicable in Kenya.⁵¹ After the commencement of the Model Code, the IPC ceased to be applied to the different territories. Any reference to any provision in the IPC was deemed to be a reference to the corresponding provision in the Penal Code of 1930.⁵² The IPC had been first introduced in East Africa in 1867 and was finally replaced by the Model Code in 1930, a period of 63 years. It is clear from the official correspondence that East Africa’s government, judiciary and civil society strongly supported it but the Colonial Office was determined to push through with a replacement. Kenya’s settlers did not, however, favour the IPC. Competing authorities acted within a global colonial institutional order before the development of an international legal order and debates surrounding codification occurred within this framework. The story of the replacement of one set of colonial codes for another provides a fresh perspective of the conflict between the metropole and the periphery that characterised the Empire during this period.

⁴⁸ KNA AP/1/1077, Circular to Magistrates No. 4 of 1932.

⁴⁹ KNA AP/1/1077, Jacob Barth, Chief Justice, Kenya, to Resident Magistrate, Eldoret, 17 November 1932.

⁵⁰ KNA AP/1/1077, Registrar, Supreme Court, to Attorney General, Kenya, 6 April 1933.

⁵¹ KNA AP/1/1076, Lord Passfield, Secretary of State, to Governor, Kenya, 7 February 1931.

⁵² The Penal Code: An Ordinance to Establish a Code of Criminal Law 10 of 1930. 1 August 1930.

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