

BRITISH COLONIAL LAW by T. Olawale Elias, Q.C., B.A., LL.M., Ph.D. [1962. London, Stevens & Sons. pp. xxvi + 323 inc. index. £3.10.0.]

Dr. Elias has now added to his numerous books on African law a book on what he calls British Colonial Law. It is a book that is both interesting and irritating. One of the major irritations of the book is that of trying to decide just what it is about. Ostensibly, it is about British colonial law. Precisely just what British colonial law is, however, and despite Dr. Elias' book, remains distinctly vague. Dr. Elias himself claims that the term "colonial law" is one "the precise meaning of which eludes us every time we try to pause to lay hold of it." There are, although Dr. Elias does not quote them, statutory definitions of the term "colonial law." Thus for the purpose of the Colonial Courts of Admiralty Act, 1890, the term is defined as meaning:

any Act, ordinance or other law, having the force of legislative enactment in a British Possession and made by any authority (other than the Imperial Parliament or Her Majesty in Council) competent to make laws for such possession.

An earlier, and slightly different definition of the term occurs in the Colonial Laws Validity Act, 1865, which provides that the expression "colonial law"

shall include laws made for any Colony either by such legislature as aforesaid or by Her Majesty in Council.

It is quite clear that Dr. Elias' own concept of the term "colonial law" is widely different from those quoted above. He distinguishes between the law of a colony (which would broadly correspond with colonial law as defined above) and colonial law, by which term he means (p. 6):

the body of principles consisting partly of Imperial legislation and colonial enactments and partly of all applicable English law and local customary law throughout the British colonies.

Dr. Elias assumes that there does exist such a body of principles which apply throughout the British colonies, although his book is very far from being conclusive on this point. It is from this constant feeling that Dr. Elias' assumption is unjustified that one's irritation springs: it is the constant feeling that the book has no real subject matter.

It is quite clear, however, that Dr. Elias does not succeed in justifying his assumption, for despite its title the book is based almost entirely upon English and African materials; its coverage of material from "colonies" other than those in Africa is very slight indeed. Of the 250 cases listed in the Table of Cases some two thirds are English and one third "colonial," but of this one third three quarters are African cases. Of the legislation cited some forty per cent. is English, whilst of the non-English legislation some fifty per cent. is African. The principles of "colonial law"—if they exist—have therefore been deduced from material which is very strongly biased towards Africa. This fact, by itself, lays the book open to the charge that the material selected is too limited to enable satisfactory generalisations to be made, for it does not follow, because certain common principles can be discovered in Africa that they are necessarily to be found in South East Asia or Oceania,

It may perhaps be mentioned that the Malaysian material utilised in this book is confined to some half dozen decided cases (*Adabi v. Hertogh*¹; *Carolis de Silva v.*

1. (1951) 2 Malayan L.R. 215.

*Tim Kim*²; *Jainah v. Mansor*³; *Leong v. Lim Beng Chye*⁴; *Penhas v. Tan Soo Eng*⁵; *Sambasivam v. P.P.*⁶ • *Woon Ngee Yew v. Ng Yoon Thai*⁷ and *Yeap Cheah Neo v. Ong Cheng Neo*⁸) and the same number of legislative provisions. This may surely reasonably be regarded as a somewhat inadequate basis upon which to discover the principles underlying the law of Malaya. It may be added that neither Sarawak nor Brunei are listed among the territories discussed although in fact the Sarawak Native Courts Ordinance is mentioned in the text. North Borneo is mentioned in the list of territories discussed although in fact there appears to be no discussion of any Borneo cases or legislation. The list of territories discussed in the book also, rather surprisingly includes Thailand!

Another source of irritation with the book arises from the fact that even with respect to African countries the discussion of the law is rarely other than rather superficial. Thus to take out one example, Dr. Elias in his discussion of the problem of family law in Africa makes no reference to cases such as *R. v. Daudi Odongo*⁹; *Mwakio Asani v. R.*¹⁰ (from East Africa) nor cases such as *Re the Estate of Frederick Akindede Somefun*¹¹; *Re the Estate of Samuel Heelas Macaulay*¹² or *Bamgbose v. Daniel*¹³ (from West Africa). These are surely rather surprising omissions in any discussion of marriage in East or West Africa.

A third source of irritation with the book is that — despite its already extensive scope — Dr. Elias has rather arbitrarily limited its coverage. By the term “colonial,” he says “is to be understood, for our present purpose, a reference to all those dependent territories of the British Crown commonly described as colonies, protectorates and trust territories. The Dominions as self-governing members of the Commonwealth are accordingly excluded.” By the time that Dr. Elias’ book appeared, however, three of the former colonies in Africa, the Gold Coast, Nigeria and Sierra Leone had already become Dominions. This is not to suggest that Dr. Elias should have deleted all discussion of these countries just because they had ceased to be colonies, but rather to suggest that there is slight justification for the exclusion of the older Dominions. As Dr. Elias himself admits the laws of these Dominions was part of “colonial law” before they became Dominions. The almost total exclusion of any discussion of the Indian, South African and early Australian, Canadian and New Zealand cases is a serious omission: they would certainly have been of the utmost interest in any “comparative study of the interaction between English and local laws in British Dependencies” — which is the sub-title of Dr. Elias’ book. It may be objected that this is accusing Dr. Elias for not doing what he did not set out to do. On the other hand he has not ostensibly set out to write a book on African law but on British colonial law. He includes, for example, a paragraph on the

2. (1902) 9 S.S.L.R. App. 8.
3. (1951) 2 Malayan L.R. 51.
4. [1955] A.C. 684.
5. [1953] A.C. 304.
6. [1950] A.C. 458.
7. (1940) F.M.S.L.R. 128.
8. (1875) L.R. 6 P.C. 381.
9. (1926) 10 K.L.R. 49.
10. (1930) 14 K.L.R. 133.
11. (1941) 7 W.A.C.A. 166.
12. (1961) 13 W.A.C.A. 304.
13. [1954] 3 W.L.R. 561.

Colonial Laws Validity Act, 1865, but he does not even cite any of the Australian cases in which the meaning of the term "repugnancy" was discussed. Again, he mentions the decision in *Fatuma binti Mohammed bin Bakhshuwen v. Mohammed bin Salim Bakhshuwen*¹⁴ regarding the extent of the authority of Privy Council decisions but he does not refer to decisions such as *Hare v. Trustee of Health*¹⁵ (from South Africa); *Pesona v. Babonchi Baas*¹⁶ (from Ceylon) or *Sunderdas Vishendas v. Gov.-Gen.*¹⁷ (from India) which all take a different view on this question.

Dr. Elias' difficulty seems to be that he does not seem quite to have made up his mind just what is the subject matter of his book. Much of the book is concerned with the constitutional law governing British colonies, as for example his chapter on Judges in the Colonies. Other parts of the book are concerned with a generalised account of the main elements of the private law of colonies—based, as we have stated, in the main upon African sources—underlying which is the tacit assumption that the principles apply in all colonies. Yet a third objective of the book, as indicated by its sub-title is to give a comparative account of the extent to which English law has been modified when applied in the colonies. Any one of these three objectives would have provided material for a very extensive work indeed. By attempting all three objectives, and having in consequence severely to limit the materials relied upon he achieves none of his objectives.

In some cases Dr. Elias has to generalise to a most dangerous extent. He thus devotes but four pages to a discussion of contract and tort and he states: "English principles of the law of contract and of tort will be found to apply to more or less the same extent as they do in England." This totally overlooks the fact that in the Malay States, for example, there is a Contract Ordinance based upon the Indian Contract Act. Commercial and Mercantile law are dismissed in under two pages and nowhere is there even a mention of the problems arising in connection with the interpretation of a provision such as that found in the Civil Law Ordinance, section 5.

The chapter on Criminal Law in the Colonies is a somewhat desultory and disjointed discussion of a few crimes with cases selected on no very clear basis. A comparative study of colonial criminal law would be a most worthwhile, although mammoth, undertaking. The first pre-requisite of such a study, however, is a careful comparison of the various penal codes indicating exactly at what points they differ and in what way. Dr. Elias does not, understandably provide this, but he bases his discussion on the assertion that all the Penal Codes are vaguely similar: this is not a sufficient basis for any worthwhile discussion of colonial criminal law. The same remarks could be made in respect of most of the other chapters of the book.

It is impossible to say more than that this book is a brave attempt to write about law in British overseas territories. The attempt fails because the author has not sufficiently defined his aims. He attempts too much and therefore fails to achieve much more than awakening a general interest in the fate of the common law when exported overseas. The expansion of the common law is a fascinating story which deserves to be told, but the time is not yet ripe for any one man to attempt to cover everything. Many learned monographs must appear before all the facts are even available for the whole story to be pieced together.

G. W. BARTHOLOMEW.

14. [1952] A.C. 1.

15. (1884) 3 Cape S.C.R. 82.

16. (1948) 49 N.L.R. 442.

17. A.I.R. 1947 Sind. 154.