ALAN MILNER *

The Development of African Law

Mr. Chairman, ladies and gentlemen, I would like to thank you for the privilege you have extended to me in inviting me to address you today. It is a truly international gesture for an American society to invite an Englishman to address it on the subject of African law.

I would like to transport you from this rather chilly and blustery Washington day to the warmer climes of Africa. Africa, if I may place it for you geographically, is a fairly large island somewhere to the east of the United States. It is large enough to be more than three times the size of the United States and to have a population about one and a half times that of the United States. But in a vast physical range of conditions from massive deserts to steaming jungles and of economic conditions from untold luxury to abysmal poverty, it boasts only seven cities with populations of over half a million (whereas the United States has twenty) and 80 out of every 100 Africans live at subsistence level outside the urban areas. What were once English, French, Portuguese, Spanish, Dutch, and German Colonies have now developed into over thirty independent states and only a handful of dependent territories remain. More important for our present purpose of charting the development of African law, the 3,500 tribes of Africa, speaking between them some 1,000 different languages, have now been enclosed within the modern political boundaries of these states.

That linguistic problems may assume major importance in the development of African law is a proposition that I would like to state at the very beginning. The whole range of cultural factors—social problems, historical development, political structure, economic caste —that goes into the making of a political and legal system is to be found as a range of factors affecting the development of a language. Let me tell you a true legal-linguistic story about Africa. Before my

* An address given to the International & Comparative Law Section of The American Bar Association, Statler-Hilton Hotel, Washington, D.C., April 28, 1966, by Alan Milner, Fellow of Trinity College, Oxford, Visiting Professor at the University of Pennsylvania Law School, and formerly Professor of Law and Dean of the Faculty of Law, Ahmadu Bello University, Zaria, Northern Nigeria.

departure from Northern Nigeria last summer, I was invited to have my photograph taken with a group of sixty customary court judges, not one of whom spoke English. They greeted the photographer's instruction to "Say, cheese" with looks of frank bewilderment and asked me to translate for them. I told them that "cheese" was the English word for their own "chuku"—whereupon they all said "chuku" to the camera and produced a photograph which somehow fell short of the desired effect.

I would like to identify for you two stages in the development of African law. They are stages which follow the simple historical and political criteria of the period of colonial rule and the more recent and shorter period of independence. I shall be confining myself unless otherwise stated to those countries which were formerly British colonies.

When colonial rule was first set up, the British administration found traditional laws in full operation and, depending upon the political development of the community, a more or less sophisticated system of legal adjudication. Laws of some sort exist in every community, no matter how simple; courts do not necessarily exist in the form in which we understand them today but means exist for settling disputes, be they feuding, compromising, or other means. It was the British policy to retain the traditional forms of political organization as far as possible in their naturally-evolved state and to rule through them. Consequently, although the common practice was to introduce the common law and the doctrines of equity into these newly dependent territories and to apply them through the means of colonial judges and magistrates, the traditional laws and the traditional courts—where they existed—were recognized and allowed to stay functioning under British supervision, with their jurisdiction limited to Africans only.

Having done this, though, the policy of the era was then a confining one. The traditional law applied and the traditional courts operated entirely in the traditional area—the area of family disputes, of land quarrels, of chieftaincy succession, and customary wrongs. It was an era of leaving the customary institutions alone; of allowing them to apply laws which were never reduced to writing and handed down by an exclusively oral tradition; and of leaving the customary courts in the hands of largely untrained judges.

The major developments that did take place were mainly in the area of the introduced law and judicial system. This was the area of

the criminal law, of the commercial law, of European-type marriage and divorce systems to back up the introduction of Christianity, and of English real property law to provide the basic ground rules for the development of the new urban communities, be they settler communities or traditional African urban areas developing into modern towns on European lines.

Although the major policy was one of letting the traditional law develop, insofar as it developed at all, in the natural way of responding to changed social conditions, there were important ways in which traditional life and law were related to the introduced law. The first was, admittedly, a policy of limitation; the second a policy of providing a legal bridge between the two systems of law.

The limitation policy which threatened to strike deep into customary law was that which decreed that customary laws could only be recognized and enforced if they were not repugnant to ideas of "natural justice, equity and good conscience." I would not like you to think that this meant that the colonial administrations embarked upon any deep philosophical inquiry to implement this standard. "Natural justice" means no more than the American "due process of law"; it is a shorthand formula for a standard of fairness and, like its United States counterpart, was applied in Africa in both substantive and procedural contexts. The basic policy given life under this formula was not that customary laws should be struck down if contrary to English law: this was often explicitly denied in theory and implemented in practice. The policy appears to have been to take the English procedural standards as guidelines but to adopt an open mind on substantive law's issues—as open a mind, that is, as an English, or English-trained, common-law and Christianity-oriented mind could ever be in the African context.

Under the banner of natural justice, the remnants of the slave trade were made unenforceable, the amputation of the hands of thieves and the stoning to death of adulterous women were discontinued, the exclusion of non-Moslem and female witnesses from Moslem proceedings was declared unlawful, and Islamic law procedures which denied the right of defense to men accused of certain types of murder were struck down.

The provisions which laid bridges between the traditional and the introduced law systems were important for the development of a unified corpus of law in each African jurisdiction and remain of

crucial importance today. They are bridges which recognize that the two systems of law co-existing in the same jurisdiction are not mutually exclusive and that there may be movement between them in many ways. The traditional courts, for example, were commonly allowed jurisdiction over Africans if their mode of life was that of the general native community—thereby envisaging the impact that European contact would and did have upon the way of life of many Africans. Once they left the hold of customary law by becoming "detribalized" or "westernized," they crossed the bridge to the common law system.

The African convert to Christianity found that he had to abandon polygamy and give up all his wives but one. If he married after conversion it would be in the Christian form under the introduced law and thereafter he would be liable to penalty if he attempted to sneak back into his customary marriage system by marrying again. The African who wanted to buy a bicycle on hire-purchase terms would find himself removed from the customary arena, not only because bicycles were a commodity unknown to customary law but because the form of the transaction was one patently European and so governed by the common law. Or a family, offered a good price for its land by a European commercial concern, soon saw the attractions of the English land-holding system, under which land was alienable, in contrast to the customary system in which it was usually not. Conversions of customary tenures into fee simples became a feature of urban land-holding in Africa.

The questions that remained unanswered at this stage were to remain troublesome until the present day. They were basically problems concerning the sensitivity of the introduced laws to the local ethos. The English common law and legislation, the courts, prisons, and other legal processes, were appropriate to England. They were, too, no doubt to all those colonies to which Englishmen had migrated and settled, with more or less disregard of the indigenous inhabitants. But how far were they suited to application to other peoples—peoples for whom they did not represent the "common custom of the realm," who regarded them not with enthusiastic support but with hostility or suspicion, and whose social, economic, and philosophical attitudes they did not represent? The traditional laws, developed by the people to meet the contingencies arising in their lives, were sensitive to their needs; the introduced laws, though they did not apply to the totality

of Africans' lives and often provided answers to new problems in the culture-conflicting colonial world, were often patently insensitive.

Sometimes the insensitivity was ludicrous—as in the case, for example, of the Tanganyikan legislation penalizing the African who was found outside at night in suspicious circumstances "with his face blackened"—a case of the inadvisability of copying English legislation verbatim without any cross-cultural modification. Slightly less ludicrous but no less insensitive was the British attitude towards witchcraft and the supernatural—belief in which could drive an African to kill in self-defense and disbelief in which led the British courts to convict of murder. Even the trappings of British forensic processes, the wigs, gowns, and high collars, admirable for wear in the draughty corridors of Westminster, were transported to the rather less suitable and infinitely more steamy courtrooms of Lagos and Lusaka.

Independence in the last decade for almost all the British territories in Africa has lead to a heightening, not a diminution of the problems. Each country has inherited the dualistic legal system, the bifurcated court structure, the unwritten laws and the inappropriate laws. And each, though assuming the title of nation in the international political arena, has been unable to conceal the fact that its nationhood is only nominal. The tribal and linguistic differences are still there, aggravated not merely by their own diversity but by the differential social, educational, and economic development within each country—forces which, far from fostering national unity, promote divisiveness.

The three dilemmas that have therefore faced the new nations have been these:

First, their concern to try to develop, in the fact of the divisive forces within them, laws which represent their national character.

Second, the major problem of trying to work towards the unification of the disparate law systems, it being recognized as wholly inappropriate for an independent country to have one law and one court for "natives" and one for others.

Third, a concern with international respectability—a desire not to appear barbaric, backward, and internally disordered when entering the international arena—a desire prompted not only by a sense of propriety but also by the more tangible economic motives of countries anxious to attract foreign aid and investment. How then, have these dilemmas been solved? Or rather, how are the African nations

trying to solve them because I do not think that final answers have yet been given and certainly there are not a large number of laws already on the books which represent the solutions to these problems.

Firstly, let me deal with the question of the African nation's concern with international respectability. As the nations enter the international arena they become aware that there are international standards of personal liberty, of the treatment of citizens, and of methods of ajudication which they should observe. One of the interesting developments in Africa is the fact that there is a growing awareness that individual liberty should be protected against state action in a formal way and a number of newly independent countries have therefore enacted constitutional guarantees of fundamental rights based on the European Convention on Human Rights. They have, perhaps unfortunately, retained the drastically qualified form of the original, so that the rights are only recognized insofar as they are "reasonably justifiable in a democratic society," whatever that may mean. But the effort has been made and a tradition has been established of setting down on paper the fact that a belief in fundamental rights is held in Africa.

Secondly, let me say something of the ways in which the African countries are approaching the problems of the unification of their laws and law-applying machinery. The one significant development that is taking place in many countries, consistent with the international respectability which I have already mentioned, is that written codes of criminal law and criminal procedure are beginning to supersede the customary criminal laws. They are codes which apply the international standards of the ascertainability of norms (in contrast to the largely unwritten customary laws) of fair trial procedures (I have already spoken about some of the more blatant unfairnesses which were struck down under colonial administration) and of non-discrimination between citizens.

I would like to elaborate upon this last point briefly. One of the consequences of a multiplicity of tribes and tribal law systems has been the independent development of each law system. A person whose personal law was that of one tribal group would not be governed by the law of another tribal group and, indeed, might even be legally discriminated against by members of that other group. It is a familiar social characteristic that the outsider is often treated differently from the insider. Sometimes, for example, an offense committed

by a member of the group would call for compensation or some other form of peaceful settlement. If the same offense were committed by a person outside the group the sanctions might be retaliatory and possibly even fatal. One of my favorite illustrations of this discriminatory process comes from Islamic law. It was laid down there that if a person were murdered the remedy lay entirely in the discretion of his blood relatives. They could have the offender put to death if they wished or instead could accept financial compensation for the death of their kinsman. The scales of compensation were strictly laid down. A male Muslim had a certain assigned value, let us say about $200. The rate to be paid on the death of a female Muslim woman being something of a debased currency, was half that of the male. If the person killed, on the other hand, were Christian his relatives could only be compensated at the same rate as a Muslim woman. And if the deceased were a Christian woman, the compensation would be reduced by half again. This was bad enough, but when the person killed was a pagan the compensation became payable at the rate of 1/15th of the original male Muslim rate and the pagan woman 1/30th of that rate. To me, this seems a classic example of the discriminatory values which members of the in-group placed on the heads of those who were not members of their group. It is a system which has fortunately now been committed to history.

Reverting for a moment to the question of how far the laws can be made sensitive to the African cultures, there are one or two interesting examples of the incorporation of customary laws and penalties into the criminal codes of Africa. Kenya, for instance, abolished its customary criminal laws but preserved as part of its penal code a small group of customary offenses relating to marriage which were apparently considered essential to the proper organization of a culturally sensitive code. Similarly, in Northern Nigeria, a Muslim country, Muslim criminal laws and procedures were abolished in 1960 in favor of a common law code but some Muslim law offenses such as drinking alcohol, unlawful sexual intercourse, and slandering the chastity of a woman were incorporated into the new code. And procedures peculiar to some of the local customary laws, such as a ceremonial public beating for persons found guilty of certain kinds of offences, and compromise procedures which allowed the private settlement of criminal charges were also for the first time given statutory form.

But not all of the new criminal laws are culturally sensitive. Bechuanaland adopted a new code for 1964 by simply copying that of Zambia which, in turn, had been based on a common law model. Ethiopia has adopted a whole complex of new criminal, civil, commercial, and procedural codes in the last ten years. Yet they were drafted by distinguished French and Swiss professors, based upon the French and Swiss codes, written in French and only later translated into Amharic, the official language of the country. With a court system only now for the first time being trained, one wonders how fair it is appropriate to apply the sophisticated civilian concepts of Western Europe to the wholly different context of Ethiopia. One cannot escape the feeling that perhaps something has been lost in translation.

Apart from the area of criminal law what is being done about the remaining laws? In some ways, particularly in the fields of family law and property law, the customary laws are the classic examples of laws which are culturally sensitive. It is difficult to change them rapidly without impairing the fabric of the societies which have given birth to them. Nonetheless, if national unity is a dominant value, the multiplicity of personal laws cannot continue without modification. The most notable example of the struggle towards a homogeneous system of civil law is to be seen in East Africa at the present time. Kenya is attempting to write down for the first time the customary laws of all its different tribal and local residential units with a view, however, not to amalgamating them straight away but to preserving them until such time as changing social circumstances bring them closer together. Tanganyika proposes to take the next step. It is not only writing down its customary personal laws (under the auspices of a Restatement project which is, of course, wrongly named since there has never been any original statement) but then proposes to try to bring about a unification of all these laws so that a single code of customary personal law will be applied within the country. In effect, it is proposing to enact a new personal law which is at the present time the personal law of no tribe but which is sufficiently similar to many of them to obtain wide and uniform recognition as the law. How far the individual units within the scheme will be prepared to relinquish their own domestically-evolved customary laws in favor of this hybrid remains to be seen.

Fourthly, unification of law systems is not enough. There must also be unification of the court systems so that the stigma of separate-

ness does not carry through much longer in the new African nations. Here there are policy problems and manpower problems. No country can afford to abolish its customary courts because they are the only courts which are properly sensitive to the cultural problems and also because no nation is, as yet, so well supplied with qualified lawyers that it can replace all its customary judges. In Northern Nigeria, for example, we had over 750 customary courts with an average of 10 personnel—judges, registrars, clerks, court members, and so on—in each court. What we tried to do with these men represents one aspect of the development problem. It was our objective to impart to them as much knowledge of the new codes, which they were administering for the first time, as would make them efficient representatives of the state. You cannot teach much criminal law and procedure to a group of men who have never had any formal legal education, who are not accustomed to applying written laws strictly, and who probably have major language problems. But at least a beginning has been made in upgrading the basic qualifications of those working within the customary court system of that country. Indeed, this pattern has proved so attractive that several other countries of English-speaking Africa have followed it.

The other aspect of unification development has taken the form of appointing qualified lawyers as presidents of customary courts. Obviously, this needs an ample supply of trained lawyers and, as yet, probably only Ghana and the southern areas of Nigeria have the trained lawyers in sufficient numbers. It is worth note, however, that there are probably just as many difficulties associated with this way of attacking the problem as there are with the method I have just described. The legally qualified president of customary court is not a "customary" judge. He does not know the customary law, because he has not been trained in it but rather has received his legal education either abroad or in one of his country's new universities. If, therefore, he is called upon to decide a dispute at the local level where customary law is to be the determining norm he will probably find that, far from it being an easy problem to solve, he will have to go to those local people who are learned in the customary law and take their opinion as to the state of the law before he can even start applying it. No doubt, problems such as this and problems of familiarity with the local languages will die out in due course as the customary laws are unified and expressed in a common language. But at the present time

with multiplicity of laws and multiplicity of languages, it is extremely difficult for an outsider (and by that I mean not merely a non-African but also an African from another local area) to operate effectively.

The development of facilities for legal education and the bringing of new skills to the developing African legal professions are essential ideas for future development. At last the bonds tying Africa to an exclusively English legal education have been broken. The new African lawyer no longer has to wait until he is admitted to the bar before he discovers anything of Africa's legal problems, for he now discovers them as soon as he enters law school. The member of the African bar no longer has to depend entirely upon his education as an English barrister when, in fact, he is going to be practicing in a fused profession in his own country. Now he is able to obtain some of the skills and all of the sense of professional responsibility from a purely African education. But this does not mean that he is casting aside international standards, for those who have been entrusted with the development of African legal education and of the legal professions of Africa have been internationally selected and owe their allegiances to the international world of scholarship and professional responsibility.

Scholarship and professional responsibility are reaching towards Africa and Africa is eagerly reaching out towards them. A story was once told of a young African returning to his native country after qualifying as a member of the English bar. As he walked down the gangplank of the ship on arrival at his home port, his assembled relatives and friends saw that he was immaculately dressed in the uniform of the English city gentleman—a black jacket, striped trousers, carrying an umbrella and brief case, but having his bowler hat turned upside down on his head. "Surely, Joshua," they asked, "Englishmen wear their bowler hats the other way up." "Ah, yes," replied Joshua, "they do, but I am not an Englishman, I am an African and I am not wearing my bowler hat, I am carrying it." This is the spirit of innovation and adaptation that is strong in Africa. The development of its law is a challenge that is readily being met and though the work will not be completed for many generations, it is being approached in the true spirit of concern for international responsibility and the goal of human dignity under the law.