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Henry J. Richardson III

Indiana University School of Law - Bloomington

Paul O. Proehl

University of California, Los Angeles

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CROSSROADS FOR LAW IN AFRICA

Paul O. Proehl* and
Henry J. Richardson III**

I. INTRODUCTION

This *U.C.L.A. Law Review* symposium, discussing selected problems of law in Africa, arrives during a period in American history when both military and economic isolationism are being openly considered in the sharp reaction to the abuses of the Vietnam war. At the same time, probably more information is now reaching the general American reader and viewer about Africa than ever before. This growing American knowledge of Africa has been given a sharper focus in the last few years as a result of the emergence of a new pride among Afro-Americans who are more and more openly claiming their African heritage, and forging new ties to Africa's history, political dilemmas, economic problems, and current international role. What was more pejoratively known in the American media as the "dark continent" is now proudly acknowledged as "black Africa." At last, some headway has been made toward destroying the pervasive neo-Tarzanian myth that no "civilization" of consequence existed in Africa, and by implication no notable social or legal systems, before the coming of the Europeans.

Beginning with Ghana in 1957, Macmillan's "winds of change" ushered in an era in which nearly forty countries achieved independence based on majority rule in little more than a decade, a process not yet completed because of the desperate intransigence of South Africa, Portugal and white Rhodesia. Thus, forty new national legal systems have emerged, each dragging along its own pluralistic baggage comprised of both the customary and the colonial legal past combined with a host of urgent nation-building and development priorities. From this ferment some new concepts about law in Africa have gradually appeared in response to the tumultuous events and sudden demands of independent nationhood. These concepts will continue to emerge in the process of dealing with problems of domestic development, intensified by internal impera-

* A.B. 1942, J.D. 1948, M.A. 1949, University of Illinois. Professor of Law, University of California, Los Angeles; Member, Illinois Bar.

** A.B., Antioch College, 1963; LL.B., Yale University, 1966. LL.M. Fellow, School of Law & Faculty Africanist in Law, African Studies Center, University of California, Los Angeles; Member, Indiana Bar. Mr. Richardson served as International Legal Advisor to the Government of Malawi, 1966-68.

tives and enormous international pressures. These new concepts must pilot the developing law of Africa through waters whose charts inevitably borrow heavily from the customary and colonial legal heritages, toward destinations that are both contemporary and African. It is in the spirit of examining a variety of existing and emerging norms of law, thus contributing to the increasing—but still far from comprehensive—body of knowledge of what is loosely, but conveniently, termed “African law,” that the discussions of the legal crossroads in this symposium are greatly welcomed.

The arrival of independence for each state in sub-Saharan Africa had many significant symbolic meanings. The most important was the acquisition by Africans from Europeans of ultimate legislative and executive sovereignty within their own territories. This new legal situation was especially prized in certain countries because of the previous repressive abuse of legal process by the waning colonial powers in their last-ditch efforts to suppress African efforts to achieve freedom, usually resulting in the proclamation of “rebellions” and “emergencies,” such as the “Mau Mau Rebellion” in Kenya of 1952-53 and the “Emergency” in Nyasaland (Malawi) of 1959.

The formal receipt of legislative and executive authority by each of these governments did not occur in a legal vacuum. Professor Seidman has identified three sets of claims, interests and demands which struggle for recognition in an independent African state: one set predicated upon customary law; another seeking satisfaction under received law; and a third set making claims upon the national government in the name of national development.¹ Moreover, “Law”—by whatever definition and of whatever origin—is called upon to respond to the ideology of the independence or other ruling party,² and to respond to the need for national unity, to be done by integrating, with respect to the role of law, the various heritages of customary law and resolving the tension between received and customary law. Further, “Law” was being called upon not only to regulate the allocation of resources and the provision to the people of certain desired goods and services,³ but more significantly to confirm, and create conditions for the achievement of, those domestic priorities decided by the government as necessary

¹ Seidman, *Law and Economic Development in Independent, English-speaking Sub-Saharan Africa*, in *AFRICA AND LAW, DEVELOPING LEGAL SYSTEMS IN AFRICAN COMMONWEALTH NATIONS* 3, 20 (T. Hutchison ed. 1968) [hereinafter cited as Seidman].

² Kuper & Kuper, *Introduction*, in *AFRICAN LAW: ADOPTION AND DEVELOPMENT* 17-18 (1965) [hereinafter cited as Kuper & Kuper].

³ Seidman, *supra* note 1, at 22.

for the long-range development and viability of the state.⁴ Some priorities were dictated by the very need for survival: maintaining the constitutionality and the existence of the nation against military and personal ambitions or divisive tribal influences; overcoming the obstacles created by the artificial, colonially contrived borders and lines of communication of Africa; and surmounting the linguistic and administrative barriers that reinforce political frontiers.⁵ Other priorities were set as positive steps in future growth: procuring a rapid increase in the gross national product through capital investment; creating a social infrastructure including schools, medical facilities, and all the other desired features of a welfare society; eliminating pockets of social injustice based on racial, ethnic, sex or religious differences; and the speedy development of an experienced cadre of leaders at all levels, and a literate population in general.⁶

As a result, a post-independence African phenomenon was the felt need of the new governments to use law-as-legislation as the obvious tool of social engineering to meet the pressing problems of nationhood presented by independence and to reach development goals, achievements symbolized by the revolution leading to independence.⁷ The suddenness of independence dictated a resort to imperium as a source of law, especially relative to problems of economic development.⁸ Not only did the state intervene by means of legislation in the workings of the national economy, but in other areas as well, at times by fiat, sometimes successfully, at other times in failure. In many cases, although reform had had a bearing on economic development, incursions were made into areas of personal law in which the price of disruption of long-established customary ways exacted a high political price. Such attempts were made in the integration of laws of descent and marriage.⁹ In the same fashion, attempting to integrate different customary laws based on different systems of descent, the state intervened in family relations. The state attempted to adjust the status of individual persons, either by refusing or consenting to legitimate foreign legal provisions relating, for example, to marriage based on a different

⁴ See Allott, *The Future of African Law*, in *AFRICAN LAW: ADOPTION AND DEVELOPMENT* 216, 223-24 (1965).

⁵ Allott, *The Unification of Laws in Africa*, 16 *AM. J. COMP. L.* 51 (1968) [hereinafter cited as Allott].

⁶ *Id.* See P.-F. GONIDEC, *LES DROITS AFRICAINS: ÉVOLUTION ET SOURCES* 141-45, 155 (1968) [hereinafter cited as GONIDEC].

⁷ Allott, *supra* note 5, at 51; Seidman, *supra* note 1, at 19.

⁸ Kuper & Kuper, *supra* note 2, at 17.

⁹ See Roberts, *The Malawi Law of Succession: Another Attempt at Reform*, 12 *J. AFR. L.* 81, 88 (1968) [hereinafter cited as Roberts].

religious tradition. Moreover, the new government intervened into the power and influence patterns on the local level by allocating, or attempting to allocate, varying amounts of authority between newly-formed government and party institutions and customary sources of authority, thus juggling new doctrines of law regulating local behavior with customary doctrines.¹⁰ A primary concern of this symposium is the examination of some of these attempted interventions and the difficulties involved in doing so by legislative law.

The desire to accelerate the pace of development, the growth of national pride and the symbolic fulfillment of national independence were not the only factors producing this heavy reliance on statutory law. There has also been the inclination to use legislative power because it is available and easiest to use, a circumstance aided by the existence of a strong executive and a subordinate legislature in many African countries. Also, the making of laws is one of the things that happens and is supposed to happen in a capital city. The territory was centrally governed under colonial rule by legislation and executive decrees, usually from the city that is now the capital, and this heritage has lingered. The governmental apparatus is there, and the administrative facilities are stronger there than in rural areas. And there is a natural tendency to compensate for the lack of administrative capacity in outlying regions through the promulgation of still more laws.¹¹

On the popular level, the passage of legislation fulfills a symbolic need. Notification in the government gazette, accompanying ministerial and presidential speeches, and newspaper coverage provide a short-run illusion of national progress which redounds to the credit of the government. This new legislation generally tends to be elitist in that it is usually preconceived in the capital and may, with significant variations, not represent the declared wishes of the majority of citizens, but that which the leaders of the country thought was suitable for the people. The legislation tends to be a product of metropolitan thinking upon the data available, which is often inadequate, leading to a strong capital-city bias in the conception of what the legislation should accomplish. Policy-makers

¹⁰ Professor René David emphasized the importance of African legislators and administrators asking themselves on which human relationships they can act constructively through legislation and noted the common assumption "that legislation can be applied in the areas in which it is the will of the legislator to intervene . . ." R. David, *Critical Observations Regarding the Potentialities and the Limitations of Legislation in the Independent African States 2* (paper delivered at the Conference on Integration of Customary and Modern Legal Systems, Ibadan, Nigeria, August 29, 1964) [hereinafter cited as David].

¹¹ Allott, *supra* note 5, at 52-53.

in the capital also tend to be more prepared to generalize regarding what may in fact be widely varying rural circumstances in their drive for national uniformity in the name of unity more than those exercising rural authority.¹² Often administrative cadres with primary responsibility for the success of the legislation are weak. There has been inadequate ascertainment of the wishes of the people or inadequate harmonization of their conflicting wishes, or both. There has been too little effort made to explain the legislation in English, or whatever the received language may be, or in the myriad tongues that abound in most African nations.¹³ This produces, in Professor Allot's memorable phrase, "phantom legislation"—the passing of laws which do not have, and most probably cannot have the desired effect.¹⁴ "Such legislation is an expression not of power, but of the impotence of power."¹⁵ In these circumstances, as noted by the Birmingham, law has little appeal because it is law, and, since it is "no longer usefully analogized to the rules of a game, becomes an instrument applied by a controlling minority, often in spite of significant internal recalcitrance, to transform a traditional society into an approximation of modern European nationhood."¹⁶

As discussed in this symposium, the above is illustrated in Ethiopia, with respect to effective land reform regulations and the attempt to unify the country by law around Amhara social ideology by the creation of a special local court system with limited jurisdiction. It is illustrated in Ghana with respect to attempts to stem migration from rural areas into the cities. And, in a somewhat different sense, it is illustrated for black people in South Africa relative to their access to counsel in a judicial system sharply biased against them. Disrespect for law does not prevent those in a position to do so from mobilizing and invoking legislative measures on their own behalf where possible to maximize certain preferences, as in land litigation in Ethiopia. But in these cases comprising primarily situations in which law-as-imperium was to establish the basic preconditions for development, the target audiences of the law (those intended to be regulated by the legislation)

¹² *Id.* Gunnar Myrdal, writing from a world-wide though Asian-centered perspective, believes that the dichotomy between government and rural population in most, if not all, developing countries is so great that disputes about policies and power within the government take place wholly within an elite group who in turn are watched with resigned detachment or are ignored by the masses of the people. See G. MYRDAL, *THE CHALLENGE OF WORLD POVERTY* 49-77 (1970) [hereinafter cited as *CHALLENGE*].

¹³ See GONDEC, *supra* note 6, at 141-45.

¹⁴ Allot, *supra* note 5, at 52.

¹⁵ *Id.*

¹⁶ Birmingham & Birmingham, *Legal Remedies for Overurbanization: the Ghanaian Experience*, 18 U.C.L.A. L. REV. 252, 261 (1970).

were not sufficiently impressed by the sanctity or attracted by the proffered incentives of the law to act in accordance with the underlying predictions which had defined the objectives of the legislation. Law-as-legislation in these contexts reveals governmental decisions lacking sufficient perceived authority and internalized consensus on the part of those on whom its implementation most depends. To a great extent, "Africa has become a continent of legalisms rather than legality."¹⁷

As Professor Seidman has noted, claims upon the national government and claims by the government on the people, in the name of national development, are novel to our epoch and are inseparable from social and political transformation.¹⁸ It is becoming increasingly apparent to African governments that despite elaborate legislative programs, much of the desired transformation is not occurring. There is a growing awareness among governments and legal advisers that law-as-legislation has been a very blunt tool for social engineering, and that much of the legislation designed to establish preconditions for planning and development has indeed been "phantom legislation."¹⁹ As this awareness of a present inability to effect social transformation in certain areas is confronted, African governments find themselves approaching or already standing at a crossroads—or more accurately, a fork in the road—posing the problem of the uses which can and should be made of future legislation to establish the requisites for development and progress. Therefore "law in Africa," speaking quite generally, is at a critical decision point as to the nature of its future configuration. The choices are basically two: (1) Law primarily as the enactment of

¹⁷ Seidman, *supra* note 1, at 27. An extreme example of this phenomenon was Nkrumah's Ghana. See Proehl, Book Review, 42 IND. L.J. 277, 279, 285-86 (1967) [hereinafter cited as Proehl].

¹⁸ Seidman, *supra* note 1, at 22.

¹⁹ Probably in the forefront of this awareness has been President Nyerere and the Government of Tanzania. See Allott, *supra* note 5, at 53 n.2. Another example is the return by the new Malawi law of succession to a reliance on customary law to produce a workable system of estate disposition, the government having rejected a previous plan to revise the whole customary law of succession applicable to Africans. See Roberts, *supra* note 9. Much of this reappraisal occurs in the form of government ministerial reconsideration of earlier legislation passed in the flush of independence after reports from rural areas have indicated its ineffectiveness. In this connection law facilities and legal advisers in Africa have become acutely aware of the ineffectiveness of legislative and constitutional measures in meeting their proclaimed objectives. See generally Obol-Ochola, *Elopement in Uganda*, 3 E. AFR. L.J. 117, 139 (1967) [hereinafter cited as Obol-Ochola]; Parnall, *Aliens and Real Property in Liberia*, 12 J. AFR. L. 64 (1968); Sawyerr, *Discriminatory Restrictions on Private Dispositions of Land in Tanganyika: A Second Look*, 13 J. AFR. L. 3, 27 (1969). For a theoretical Marxist approach identifying the same general problem, see Eorsi, *Some Problems of Making the Law*, 3 E. AFR. L.J. 272 (1967) [hereinafter cited as Eorsi].

legislation; or (2) principal reliance on other forms of law-making such as the development of new modes of locally-responsive law through quasi-legal institutions such as local development and land-loan banks, cooperatives with expanded powers of dispute-resolution, authoritative ethical statements by the party in power, the drafting of easily understood explanatory statements to supplement the statutes, active *en banc* interpretations by the judiciary of the relationship between law and local responsibilities, and a deliberate refusal to legislate by the central government in certain situations in favor of the playing out of previously ascertained trends in local behavior. These options will subsequently be discussed herein. The degree to which law can be useful to the development of each African nation in the future, and the degree to which truly national legal systems will emerge with writs effectively running in rural areas for questions of social transformation depends on the choice and how it is implemented. The fact of the crossroads is revealed by several factors: The inadequacy of commands from the state legislative machinery in effecting social change; the divergence between problem-oriented legislative provisions and the actual perception of the problem among the people to be regulated; the dilemma facing the central government posed by an increasing popular unwillingness to recognize the legal process as reflecting the agreed goals of the society; and the question of what additional or reworked measures are now needed to accomplish the government's social objectives.²⁰

²⁰ This is not to imply that African governments have been dormant in examining the effectiveness of their own legal systems. This is far from the case. The point here is that until recently the institutional problem of the utility of legislation to effect social transformation, and the philosophical problem of equating law with legislation at the expense of its qualities as a process extending down to the local level and involving a series of implementing decisions over time, have not been met. Much of the governmental attention to law reform has been to producing some kind of uniform legal system throughout the country in the face of wide variations of race, religion, customary and imported legal traditions, long-standing conflicting local practices, tribal rivalry, and the imperatives of national development. The attempts have generally been towards achieving national unification of the law. The primary factor within the context of this goal has generally been the task of integrating or reconciling the customary law(s) of the country with subsequent legislative law and colonial legal precedents. This factor forms a broad and recurring theme for all law in Africa. Within the context of this theme arise a multitude of problems, most of which are still unresolved by most African governments in any definitive manner but all currently the subject of much ferment and debate within and without governments. They include: (1) The basic question of whether customary law is to be ultimately abolished in favor of legislative law, or whether a system of mixed customary-centralized legislative law is to be retained; (2) the most effective methods of ascertaining the substantive content of customary law; (3) the wisdom of reducing customary law to writing in restatements for legislative enactment on either a temporary or permanent basis; and (4) the criteria by which conflicting custom is to be harmonized for the purposes of legal integration. For useful recent discussions, see T. VERHELST, SAFEGUARDING AFRICAN CUSTOMARY LAW: JUDICIAL AND

As has been implied, the general arrival of African governments at the crossroads occurs in what has been designated as the "present post-colonial phase" of African legal history.²¹ Different governments arrive at this stage at different times, according to their particular circumstances; a few have perhaps reached it, for example Tanzania, and are actively engaged in exploring the second choice.

Realistically facing up to the fact that African nations are at such a crossroads will produce a new genre of legal problems in Africa.²² Assuming, as it is to be hoped, that the second alternative is to be chosen, there will be the task of establishing new criteria to appraise legislation hitherto unsuccessful in producing the desired social transformation. The establishment of such criteria may lead to a second surge (the first being immediately post-independence), of a hopefully more informed desire to use law for social engineering and, in this connection, to use legislation as only one of several available strategies in the legal process to produce the social and political transformation needed for development.

LEGISLATIVE PROCESSES FOR ITS ADAPTATION AND INTEGRATION (Occasional Paper No. 7, African Studies Center, UCLA 1968); Allott, *supra* note 4; Seidman, *supra* note 1; Schiller, *Introduction*, in *AFRICA AND LAW: DEVELOPING LEGAL SYSTEMS IN AFRICAN COMMONWEALTH NATIONS* vii (T. Hutchison ed. 1968).

The crossroads in law discussed here manifestly does not obviate the above considerations, but presents the necessity for governments to consider them in a different light. It is further an historically more recent phenomenon than the general problem of legal integration which was recognized in the waning years of some colonial regimes and, in any case, became of immediate concern to the new government on the stroke of independence. The crossroads is an additional legal dilemma to which the questions above will relate in different ways according to local circumstances and policies. For instance, having decided that customary law shall be restated and incorporated into legislation, the government then remains faced with the problem of the effectiveness of that legislation-as-law reapplied to the local level of society.

²¹ Allott, *supra* note 5, at 53.

²² It should be noted that the alternatives posed to an African government by this legal crossroads do not constitute totally an either-or proposition. The choice is basically between continuing the past over-reliance on legislative and executive commands from the capital to effect social transformation, or, realizing the inadequacy of these methods, to rely less heavily on legislative plans and principles and more on programs of education and persuasion coupled with national and local institution building, so that the total system is more consonant with the surrounding needs and attitudes in the population while still functioning to meet government goals. For instance, Professor McAuslan has noted that any remedies to be proposed in land law must accept a large measure of public administrative control as the framework within which reform is to be made. See McAuslan, *Control of Land and Agricultural Development in Kenya and Tanzania*, in *EAST AFRICAN LAW AND SOCIAL CHANGE* 172, 180 (Contemporary African Monograph Series, No. 6, G. Sawyerr ed., 1967) [hereinafter cited as *EAST AFRICAN LAW AND SOCIAL CHANGE*]. The question is not whether to abandon legislative law altogether as a tool of social engineering, but whether retaining the concept of law per se as such a tool, the mix between legislative and other strategies should be varied.

In the South African context, the other side of the coin, the situation is one of black people giving a last tired reappraisal by attempting to invoke a legislative right to see whether a miniscule amount of substantive and procedural justice can be wrung from an apartheid system. These circumstances are the reverse of those in countries to the north where governments and their legislation are judged by wide popular expectations of justice. The general fulfillment of such expectations is suggested here to be a necessary condition for the use of law over time to stimulate social transformation and therefore development.²³ For if not so fulfilled, all policies beyond the crossroads risk being passively or actively resisted by much of the population as adverse to or separated from their vital concerns. The appraisal of legislation in both the South African and independent African contexts must include criteria of the perceived justice of that legislation by various sectors of the people. Such criteria are required not only in gross contexts such as apartheid-repression, but also in more subtle situations such as beliefs among the people about the amount of corruption within the central government.²⁴

This new genre of problems will differ from those demands on the law already identified, such as national unity, legal integration and consistency, and provision of welfare services. One difference will be that the constituency to be immediately served by restoring the effectiveness of law will in many cases be the government, because establishing the preconditions of development, for instance the reversal of urban migration trends, often gives immediate benefits to no single group in the country but rather antagonizes or inconveniences many people. The realization of government objectives will be the measure of legislative success in achieving these preconditions, as opposed to the meeting of popular demands and the amelioration of local grievances. In that sense, this new genre of problems will be largely those of public regulation for the purposes of state planning. The legal and administrative roots of much of the present ineffectiveness of African governments in this area de-

²³ The problem of the role of law relative to the justice of the effective allocation of resources, especially economic resources, is by no means confined to the developing countries and South Africa. It is intensely present in both the United States and the international community, and presents a crisis for law in both arenas. See Richardson, *Speculations on the Relevance of International Law to the Needs of Black Southern Africa*, UFAHAMU, Spring 1970, at 22, 27-28 (African Studies Center, UCLA, 1970).

²⁴ Gunnar Myrdal has incisively discussed the effect of corruption on development, the distorted attitudes towards it by Western academics, and the necessity of its elimination to successfully use law as a tool of social engineering. See CHALLENGE, *supra* note 12, at 227-42; Myrdal, *The "Soft State" in Underdeveloped Countries*, 15 U.C.L.A. L. Rev. 1118 (1968).

rive from attempts to solve this category of African problems by applying principles of received European law. In English-speaking Africa there were few norms of public law received from England prior to independence, and few have since evolved relevant to planning functions; particularly missing are procedural statutes detailing planning functions. The ineffective implementation of plans is augmented by the failure of African governments to assimilate planning concepts to the ministerial system of government and public service.²⁵ Centralized regulation and planning enhances the already strong trends towards elitism in African governments. The monopoly of knowledge of the requirements of national development is held by expatriates and a handful of indigenous leaders, and those goals and objectives are usually as much imposed by the government as agreed upon between key sectors of the population and the government. In the absence of qualitative increases in literacy, the danger of such over-concentration will remain.²⁶ Missing in the future, however, will be the former empty assurance of law-as-imperium, hopefully to be replaced by a new awareness of the dangers of metropolitan elitism. Law will then hopefully be seen by those holding effective power as a process of decision-making that includes the lowest district officials and that rests on the perceptions and expectations of the target population as to the authority of those making the decisions. The continuing task will then be to adjust the necessities of public regulation for national purposes to the maintenance of the authority of the legislators and administrators, in the context of the expectations (hopefully informed) of the populace relative to both, by means which must in the long run be both extra-legislative and peacefully persuasive. In turn, that authority will scarcely be maintained without an awareness on the part of decision-makers at each stage of the sources and functions of law in simultaneously creating conditions for minimum public order and desired social change, of the values held by the people which sustain or alter it, and of its creative role in moving a society towards generally-approved goals by specific and graduated formulations.²⁷

²⁵ See Seidman, *supra* note 1, at 36. An additional problem is presented by the irrelevancy of the cornerstones of English contract law to contracts between government agencies, an integral part of the planning process. Some substitute system of administration between public enterprises controlled by altogether different norms is needed, such as has evolved in Senegal. The same general question of the adequacy of received contract norms arises in contractual relationships between public and private enterprises, where foreign private enterprises can often mobilize more bargaining leverage than can domestic public ones. *Id.* at 43-44.

²⁶ See Proehl, *supra* note 17, at 288.

²⁷ *Id.* at 291. See also M. McDUGAL & ASSOCIATES, *STUDIES IN WORLD PUBLIC ORDER* (1960).

The essays in this symposium well illustrate different pathways to the same crossroads, and portray situations for which solutions must be found: (1) The ineffectiveness of public law regulation to meet a national problem of overurbanization; (2) unsuccessful attempts, or even chronic inability, to diminish the influence of an aristocracy with vested interests in the status quo, in order to effectively institute land reform as a precondition of development; (3) an unsuccessful attempt by a ruling ethnic group to impose a dominant and potentially unifying ideology on other ethnic peoples through the establishment of local judicial institutions to transform local customary law; (4) an unsuccessful attempt by some whites, and implicitly all blacks in South Africa, to maintain the common-law principle of right to counsel with its underlying implication of equality before the law, in a political, economic, social, and therefore legal, context of inequality.

II. THE CROSSROADS IN CONTEXT

In their study of overurbanization in Ghana, the Birminghams point out that the concentration of the proletariat in urban areas (although economically productive in the short run) augments its power to threaten (in certain contexts) underlying development programs.²⁸ There are harsher methods available, of course, but one function of law is to provide persuasive methods of regulating the flow of primarily young men into the cities. The government has tried four responses to the problem: (1) Regulation of urban income, both in the government's capacity as the major urban employer and as holder of legislative authority to determine the national minimum wage, the savings from both measures to be used for rural development; (2) dispersion of industry by means of various incentives to rural areas, although there are demonstrable economic advantages in urban industrial concentration during the early stages of growth, but at political cost; (3) rural development financed additionally by savings from underpaying cocoa farmers for their crops, with the possibility of this measure having a countereffect, and accelerating the migration into the cities; and (4) discrimination against the Lebano-Syrian community by specifically-directed regulations to restrict their participation in business and employment, coupled with massive arrests and repatriation of aliens generally, including Africans, both of which gained urban popularity for the government.²⁹

²⁸ Birmingham & Birmingham, *Legal Remedies for Overurbanization: The Ghanaian Experience*, 18 U.C.L.A. L. REV. 252, 261 (1970).

²⁹ *Id.* at 261-69.

In drawing lessons from the experience of these basically unsuccessful government legal and quasi-legal measures, the Birminghams note that some of these difficulties can be traced to the decline in world cocoa prices.³⁰ In observing Ghana's approach to this crossroads of law, its experience would seem to serve as a portent of future difficulties for other African states, especially for those already showing signs of sustained urban migration, such as Nigeria, Kenya, Tanzania, Malawi and Zambia. In moving away from over-reliance on legislative regulation and general legal commands from the capital, it would seem necessary for the government to realize the truth of the authors' observations that (1) all claims on the country's resources cannot be simultaneously satisfied, yet none can be ignored; and (2) the ongoing process of urbanization is at the root of many developmental difficulties, and any solution at the expense of the already overburdened urban population will only contribute to the general instability.³¹ This dilemma would seem to call for an intensive process of popular education by the government on the nature of the crisis facing the country, especially as it threatens *both* urban and rural development, coupled with surveys of national attitudes by the most accurate means as a prelude to new legislative measures and the establishment of new institutions.

If the task of the law in these circumstances is to provide measures for peacefully regulating the flow of young men into the cities, a consensus among a significant portion of these men as to what inducements would indeed motivate them to remain in rural areas must be established as a foundation for any further legal regulation, if such regulation is to escape the list of "phantom legislation." The Birminghams also note that legal institutions inherited from the colonial past apparently have a declining moral force, a factor in the decline of the respect given to law as law.³² This suggests that the second alternative may have a strong symbolic dimension. A reformation of certain legal institutions connected with the dilemmas leading to the crossroads to exorcise the colonial past by instituting procedures, personnel and legal doctrines that will be perceived as more independently African, might well have to be linked with the aforementioned process of popular education and consensus-building. Such a possibility seems more strongly indicated by the fact that the young men now crowding into urban areas are noted as constituting one of the most politically aware elements of the population. If strong feelings of anti-Euro-

³⁰ *Id.* at 269.

³¹ *Id.* at 269-70.

³² *Id.* at 261.

peanism, Pan-Africanism, or other deeply felt attitudes are present, these must be taken into account in building a consensus for the new forms of legal regulation that are required.

Although Professor Singer's discussion of the *Atbia Dagnia* of Ethiopia³³ relates to an entirely different factual context, a similar dilemma for the future effectiveness of law and legal institutions is presented. The establishment of the *Atbia Dagnia* (literally, local judge), deriving from its history as an Amhara institution, was an attempt to integrate customary law into the national legal system. It was part of an overall development scheme ultimately aimed at creating a unified society in which all persons assumed or submitted to Amhara social ideology, that of the Emperor. Professor Singer's empirical exploration of the *Atbia Dagnia* as one aspect of that program of legal integration is also a study of the effectiveness of an attempt at national institutionalization of Amhara legal ideology. The procedures for appointing the *Atbia Dagnia* were seemingly unsystematic and the post never generated much enthusiasm among potential appointees. The administrative line of authority up through the Ministry of Justice was unclear. More significantly, the legal status of the *Atbia Dagnia* was inconsistently defined by the government, especially as to the scope of its jurisdiction, and its functions as an on-going institution were scarcely, if at all, taken into account in drafting the Procedural Code. This latter produced conflicts of jurisdiction with other legal institutions and wide uncertainties of interpretation. Of the potential number of cases which could have been brought before it, the *Atbia Dagnia* heard a decided minority in comparison with other available legal institutions. Of those cases actually before it, *Atbia Dagnias* gave decisions resolving only a minority. These findings rightly lead Professor Singer to state that there was actually relatively little assumption of legal authority by the *Atbia Dagnia*.³⁴

The discussion concludes that the establishment of the *Atbia Dagnia* was a positive and thought-provoking attempt at legal integration. But it is a failure in terms of its actual functioning because it was an attempt to institutionalize legal values without first investigating the readiness of various segments of Ethiopian society to accept the corresponding shifts in local power structures.³⁵ Professor Singer ends by suggesting that an effective allocation of power and provision of new authority by the central government is

³³ Singer, *A Traditional Legal Institution in a Modern Legal Setting: The Atbia Dagnia of Ethiopia*, 18 U.C.L.A. L. REV. 308 (1970).

³⁴ *Id.* at 332.

³⁵ *Id.* at 333.

needed to make the *Atbia Dagnia* work.⁸⁶ In terms of the crossroads, it seems clear that for this institution to perform its proclaimed purpose, further allocations of power and authority must rest upon accurate knowledge of the attitudes of the local people directly affected who can determine the success or failure of the *Atbia Dagnia* by withholding their disputes or actively utilizing it as a dispute-resolving agency. On the basis of such a survey of attitudes, some program of local communication and education by the central government would seem necessary to resolve, where possible, conflicts between ascertained local attitudes and the purposes of the *Atbia Dagnia* and, where impossible, to re-evaluate the latter for alternative approaches—to ask whether the *Atbia Dagnia* is worth the inevitable conflicts and attempted circumvention of its jurisdiction. Also, crucial as a first task, of course, is the resolution of internal inconsistencies within existing legislation as to the exact role and jurisdiction of the *Atbia Dagnia*.

Although Ethiopia's history varies from that of most of sub-Saharan Africa in that it has never been colonized by an outside power, the position of the Amhara in emerging as internal conquerors of the national territory make this experience in ineffective legal integration highly relevant to states where independence-generated national unity is now being endangered by progressively emerging group conflicts and rivalries. The Kikuyu-Luo, Lozi-Bemba, Lango-Buganda conflicts in Kenya, Zambia and Uganda are significant examples, where dominant tribes generally controlling the government are responsible for developing the country and maintaining national unity. The tool of legal integration by legislation would seem to be a useful one, but available only where an adequate local consensus has first been established. Its ineffectiveness in such situations heralds not only the approach of this crossroads for national law but perhaps also a deeper crisis of development and the maintenance of national public order as a precursor of that development.

Mr. Ream's discussion of the existence of a right to counsel in South African law⁸⁷ presents South Africa as approaching this legal crossroads from an opposite direction than do the black-ruled states to the north. For the latter, the dilemma is, in the context of independence-derived development objectives, between a continuing over-use of the legislative power, which is now confronting the law of diminishing returns on significant policies, and the establishment

⁸⁶ *Id.* at 334.

⁸⁷ Ream, *The Right to Counsel in South Africa*, 18 U.C.L.A. L. Rev. 335 (1970) [hereinafter cited as Ream].

of new relationships between local attitudes, legal institutions and regulatory legislation. This dilemma most clearly exists relative to the creation of underlying requisites for national development. For black South Africa the dilemma is similar in form and is inextricably linked to the most fundamental precondition for development: the destruction of apartheid. Development cannot be value-neutral. One fork in the road is for black South Africans to continue to generally submit to the extensive white-controlled system of legislative regulation designed to propagate apartheid and stifle black dissent and development, in the weary hope of finding some shred of substantive justice in incorporated legal principles such as a right to counsel, at the risk of increasingly losing the latitude to protest or effect change through further restrictive legislation, especially as the judiciary seems increasingly circumscribed. The alternative is for black people to abandon existing law and take direct action on the local and national level in revolt in order to abolish the existing apartheid system, so that the subsequent rule of law and the establishment of legal institutions will at least have an equal chance of furthering the development of black South Africa. As is well known, passage down this second road is apparently blocked at present by white South Africa's capacity for overwhelming repression and extensive measures of internal security.³⁸

In this situation, law-as-legislative command has struck responsive chords among the great majority of white South Africans through its perpetuation of apartheid, in part to protect white economic benefits. In meeting this responsiveness, however, statutory regulation has set up profound contradictions, notably between the stated separatist beliefs of apartheid and the increasing economic necessity for black workers to be present in the cities. There is thus some resemblance to the dilemmas and contradictions occurring in the overurbanization problems of Ghana, the Ethiopian-Amhara attempt to use the device of legal integration to perpetuate a ruling ideology, and the lack of progress in Ethiopian land reform (in part from the opposition of a vested aristocracy). But the resemblance is mirrored, with the images completely reversed, because in the latter cases the dilemma in law has been produced by

³⁸ The rate of hangings in South Africa is higher than any other country in the world, with the overwhelming majority of the executed being Africans, as are the overwhelming majority of the prison population, the political prisoners, and those under banning orders. There are a variety of methods whereby the South African government may legally deprive a person of his liberties and subject him to a variety of pains and penalties without a formal charge and trial in open court in spite of some efforts to the contrary by the courts. See Legum & Drysdale, *A Report on the Republic of South Africa 1968-69*, in *AFRICAN CONTEMPORARY RECORD* 2-48 (1969).

a proclaimed march towards national development in fulfillment of mass aspirations, whereas in South Africa it is produced by admitted attempts to retain economic benefits and power for a restricted group within a legal structure supported by racist repression.

Mr. Ream's essay considers the effectiveness of a legislatively-granted (there is no written South African constitution) right to counsel and notes at the beginning that the two main constraints inhibiting the exercise of this right by black South Africans are lack of finances to retain counsel and the general limitations of the ruling apartheid ideology.³⁹ By way of useful comparison with the effectiveness of the analogous right in the law of the United States, the right is found to be less than absolute, effectively attaching only when the defendant is in jail. The real question, aptly stated, is the existence of the right in the face of legislation which is patently political, such as the Terrorism and Suppression of Communism Acts.⁴⁰ The courts have retained a degree of effectiveness in protecting the right by generally holding that the defendant must have counsel at trial if he requests it, can pay for it and counsel is ready and willing, and that he have counsel in capital cases without exception, to be provided by the state if necessary. There has been some slight judicial expansion of availability of counsel for detainees and witnesses, leading to the as yet untested implication that the courts might be willing to soften somewhat the provisions of internal security legislation. Legal aid programs, moreover, are currently government-dominated. The last such major independent program, the Defence and Aid Fund set up to defend those charged with political crimes, was disbanded in 1966 under heavy government attack.⁴¹ Mr. Ream concludes that this limited right is ineffectively protected and that most prosecutions are probably conducted without counsel available to the defendant.⁴²

The South African situation presents law in Africa and elsewhere with what is ultimately its most profound question: Can law be relevant in accomplishing revolutionary social change, or must there come a point when those participating in the legal process have to realize that their skills and systematic approach are irrelevant until some future time when more cataclysmic political and military forces have established a new public order that calls for regulation and institutionalization?

³⁹ Ream, *supra* note 37, at 335-37.

⁴⁰ Terrorism Act, No. 83 of 1967, 6 REP. S. AFR. STATS. 781 (1965); Suppression of Communism Act, No. 44 of 1950, 6 REP. S. AFR. STATS. 71 (1965).

⁴¹ Ream, *supra* note 37, at 352-53.

⁴² *Id.* 353-55, 357-58.

Professor Dunning's discussion of prospects for land reform in Ethiopia, and his conclusion that there really has been no land reform in practice,⁴³ again presents a similar crossroads for the continuing effectiveness of law. Added significance is given by the fact that land reform is considered a near-universal precondition for sustained development in most developing countries. As Myrdal points out, the core of this issue is the question of the degree of equality between the governing elites and the masses of the society.⁴⁴ Over time, the profound implications of the land issue in terms of needed social reform in perhaps the majority of African countries may approach those in South Africa.

After considering contemporary land tenure systems in different regions of the country, and the relationship of the traditional practices of tenure and tribute to land reform, Professor Dunning discusses recent legal and administrative developments within the government with respect to land reform as a general objective.⁴⁵ To be successful, land reform measures must be connected with tax reform and must include measures sensitive to regional and even provincial variations in traditional systems of land tenure, such as the payment of tribute traditionally confirming and protecting the rights over land in possession of the tribute payer. Until the present decade, land reform as a weapon for achieving economic development and social justice was not officially considered in Ethiopia. There were significant missed opportunities. The new Civil Code drafted in the late 1950's contained "only the mildest hint of reform" of one northern tenure system.⁴⁶ Otherwise during that period, nationally there was almost no attention paid to the subject, including the Five Year Development Plan for 1957-61.⁴⁷ However, the abortive *coup* of 1960 led to a more serious study of land reform measures, beginning with a Land Reform Committee which tackled, *inter alia*, the problem of agricultural tenancy.⁴⁸ The assumption in the Civil Code, contrary to Ethiopian reality, is that an agricultural tenant and the landlord are in a roughly equal bargaining position. The Committee made several very mild proposals for reform in favor of the tenant, but the requisite legislation was blocked from enactment by the landowner-dominated Senate.⁴⁹ The Second Five Year Development Plan was more pre-

⁴³ Dunning, *Land Reform in Ethiopia: A Case Study in Non-Development*, 18 U.C.L.A. L. REV. 271, 306 (1970) [hereinafter cited as Dunning].

⁴⁴ CHALLENGE, *supra* note 12, at 55, 105-09.

⁴⁵ Dunning, *supra* note 43, at 277-89.

⁴⁶ *Id.* at 278.

⁴⁷ *Id.*

⁴⁸ *Id.* at 279-80.

⁴⁹ *Id.* at 281.

cise on land reform policy than the first; specific goals and detailed suggestions were proposed.⁵⁰ Currently none of the goals have been achieved, but action has been taken on the recommendations on administration, principally the creation of a Ministry of Land Reform and Administration. Also some tax reform legislation was enacted; though of uncertain practical importance, the legislation did simplify some systems of land tenure and taxation. The elimination of the tax-in-lieu-of-tithe, a practice highly favorable to landlords, was potentially significant for land reform and was in fact a measure of tenancy reform. But with this one exception, land and income taxation in Ethiopia have not been particularly reformist in character.⁵¹

Professor Dunning notes that rights over land play an important part in maintaining the current political system, including the distribution of land grants to the political faithful, a practice the new Ministry, for political reasons, has been unable to control.⁵² Most of such grants have gone to non-farming military officers, civil servants and provincial and district governors, in spite of the official policy that *every*⁵³ landless Ethiopian who wishes to farm will receive half a *gasha* of land. The favored grantees then lease the granted land to impoverished cultivators. The former oppose any change in the status quo. It is no surprise that government land and tax policies have often been the focal point of armed rebellions by peasants. The *balabat's* local authority has been also somewhat undermined by the central government; land reform would further do so. The heavy representation of *balabats* in Parliament leads to the expectation that Parliament itself will impede land reform. The sovereignty of the Church over vast church lands is another on the list of substantial political obstacles to land reform.

The Third Five Year Plan of 1968-73 primarily restates the unachieved land reform objectives of the Second. The need for "vigorous policies of land reform" is regarded as evident if progress in agrarian reconstruction and development is to be made, and various measures are suggested.⁵⁴ "Disheartening results" were candidly admitted and attributed to "lack of policies" and "inadequate organization."⁵⁵ These seem to be off the mark: Professor Dunning concludes that the lack was in a failure of legislative approval, the

⁵⁰ *Id.*

⁵¹ *Id.* at 282-85.

⁵² *Id.* at 289.

⁵³ *Id.* at 290 (emphasis added).

⁵⁴ *Id.* at 286.

⁵⁵ *Id.* at 287.

requisite funds, and the requisite push at the top levels of government. The failure at the national level to make significant progress on land reform has also had an influence on other programs in which land reform might play an important part, especially the country's most promising regional development project.⁵⁶

Professor Dunning notes that land reform is related to national development in that modernization of the peasant agricultural sector is necessary for national economic development.⁵⁷ Such transformation requires at least some implementation of land reform measures, though the last, if not strictly proven, rests on highly plausible assumptions. Reform of the tenure system and tenancy reform are probably economically beneficial. Insecurity from lack of accurate land measurement and the prevalence of land litigation are also assumed to be subject to alleviation by certain policies, thus leading to greater modernization. Reform of the government land grant system may also have a bearing on peasant modernization, but it is politically unrealistic to hope that land not meeting development conditions could be reclaimed from present holders, such as military officers. The extent of large landholdings is unknown but relevant, and no economic case for redistribution has yet been made, nor even seriously considered. Generally, the Ethiopian leadership does not seem to have adopted, formally or informally, any clear set of social or political objectives regarding land toward which the nation can work, but rather limited isolated steps to modify past patterns have been taken.⁵⁸

As one cause of this sluggishness, Professor Dunning suggests that the government leadership simply misjudged its own effective constituency of landowners, who apparently have reacted more vigorously against the idea of even mild land reform measures than was anticipated.⁵⁹ Even mild land reform is a highly political act, and in Ethiopia today serious political pressure for such reform does not exist, especially not from peasant organizations or their representatives. The past and present work of the Ministry of Land Reform and Administration is useful to develop the knowledge of field conditions and trained, perceptive administrative manpower to plan, justify and implement measures of land reform; yet, all this is only preliminary. The Ministry is not in a position to take serious action on its own, as preference has been given to reforms requiring legislation, much of which is unlikely to be enacted, rather

⁵⁶ *Id.* at 287.

⁵⁷ *Id.* at 293.

⁵⁸ *Id.* at 304.

⁵⁹ *Id.* at 306.

than to other means of reform. Executive reforms, such as alteration of the government land grant system, are inhibited by substantial current or potential opposition within the executive itself. Intensive domestic political pressure, in turn contingent on a wider political evolutionary process not yet begun, must develop for progress to be made.⁶⁰

The resemblance of the Ethiopian example in land reform at the crossroads faced by law and legal institutions, to that in South Africa is significant. In both cases executive action has substantially prevented the occurrence of a precondition (almost absolute for South Africa, perhaps not quite so for Ethiopia) of long term development for the masses of society. In South Africa the legislature has cooperated in this prevention as may well that of Ethiopia. In both cases a pervasive controlling minority is using the existing allocations of power, wealth and other kinds of influence to prevent law, among other tools, from being used as an instrument of social reform and development. In Austinian terms, however, the South African government is relatively united for the moment on the legal commands it gives relative to the status of black people through both legislative and executive channels, whereas there is a conflict and apparent confusion on land reform in Ethiopia.⁶¹ In both cases, there is a distinct temptation to assume that this fork in the road may in fact be a trident, with the third alternative being to abandon hope of any legal solutions to such profound problems, leading those advising lawyers and others committed to legal process to counsel them to either await or to go out and organize the needed revolution. Subsequently law would re-enter the picture as the handmaiden of the expected new progressive public order.

The exhilaration of this tempting assumption is somewhat dampened by the realization that such a glorious but desperate remedy might be in fact recommended for a great many legal problems equally profound, and that it is rarely certain that the law and those committed to it, as a process of authoritative decision, have exhausted all of its remedies for a given problem until solutions have, in fact, been prescribed by recognized law-givers but found, after diligent effort, to be unrealizable. This is different than foregoing the prescription of legal remedies altogether, although the temptation to do so in the South African context is overwhelming. The question of when those committed to the law as a tool of development and justice in good faith can give up in favor of wholly justified but, in the domestic context, extra-legal

⁶⁰ *Id.* at 307.

⁶¹ See Kuper & Kuper, *supra* note 2, at 15.

measures is probably unanswerable by a sweeping rule. For our purposes here, however, we shall stubbornly assume that the time to do so, though probably close, has not yet arrived.

III. THE PARAMETERS OF THE CROSSROADS

In reflecting on the dilemma of the crossroads presented to lawmakers in certain areas of African law suggested by these essays, all available predictive signposts must be located. One such signpost is that this crossroads is not solely a crisis in the effectiveness of statutory legislation per se, but also may encompass constitutional prohibitions and provisions as well. The public policy of Liberia has been consistently that aliens (non-Africans) should be absolutely prevented from owning real property within its borders, as expressed in article V, section 12 of the Liberian Constitution.⁶² Yet, despite this provision, aliens have been permitted and presently do enjoy significant interests in real property, primarily long-term leaseholds, that are pervasive even though they are called something other than "fee simple" estates. The constitutional prohibition as it is presently construed is ineffective for its intended purpose, since aliens in fact have the use of and control over large tracts of Liberian real estate.⁶³ If their activities are controlled at all, it is by means of government agencies enforcing sophisticated regulatory provisions. What the prohibition has prevented are small purchases of land for residential and for small business purposes.⁶⁴ In this way the constitutional provision may be a detriment to development, especially of the middle commercial sector of the economy. Further, the existence of this crossroads confronting an African government need not be strictly confined to the present historical moment. The anti-alien policy is long-standing in Liberia, a country independent for over a century. Yet, the ineffectiveness of the constitutional prohibition has evidently not led to pertinent reform of the legal process to achieve the social objective in actuality.

As previously defined, the two basic alternatives facing African governments are these: (1) To continue to attempt social and political transformation by means of additional policy-responsive legislation from the central government, at the risk of diminishing returns in accomplishing social objectives; or (2) to develop new relationships between "modern" central government-directed institutions and the national views of policy-makers, on the one hand,

⁶² 1 LIBERIAN CODE OF LAWS 3, 18 (1956).

⁶³ See Parnall, *Aliens and Real Property in Liberia*, 12 J. AFR. L. 64 (1968).

⁶⁴ *Id.*

and local institutions, customary law and practice, and the actual perspectives of that part of the population that is (according to the issue) the target of measures of social transformation on the other. These, in other words, represent alternatives as to the application, invocation, appraisal and termination of legally-expressed national policies. Both alternatives presuppose essentially consistent outcomes of recommendation and prescription of social policy by means of legislation or other legal expression, *i.e.*, that the government has resolved its internal conflicts in general terms and has decided upon the policy that should be followed except for problems of implementation and enforcement.

As it is hoped that governments will move in the direction of the second alternative, some possibilities for the necessary new relationships between policy-makers and popular perspectives can be suggested. These suggestions should not be taken as directives to African governments to remedy deficiencies in the capacity of their legal processes to effect social transformation, but rather as an indication of the range of possible options—the choice of the route out of the crossroads. Such options are by no means mutually exclusive, and their availability singly or in combination will depend upon the particular policies and circumstances of each government. The options, however, must all be considered in light of the previously suggested efforts by the government to use the most accurate possible techniques to ascertain the relevant attitudes among sectors of the population to be subjected to regulation for development purposes.

One such option, for a new relationship between central legislative and local administrative or judicial institutions, lies in increased government education of the population at the local level as to the aims, purposes, and strategies involved in building the nation.⁶⁵ Perhaps the outstanding example of this option in practice is the Arusha Declaration with the accompanying TANU documents on the meaning of socialism for national development issued in Tanzania.⁶⁶ Essentially party declarations, both written and inspired by President Nyerere, of ethics and goals lying somewhere between political exhortation and law, these documents are designed to educate all the people of the country as to the purposes and programs of the government within a general philosophical framework and to clarify national goals in easily understood terms. In doing so they aimed at, and evidently have created, a cer-

⁶⁵ See GONDEC, *supra* note 6, at 146, 156.

⁶⁶ The Arusha Declaration is reprinted in J. NYERERE, *FREEDOM AND SOCIALISM* 231-50 (1968).

tain receptivity to legislation, executive orders, and the establishment of local development institutions such as Ujamaa villages which were subsequently instituted.⁶⁷ A primary advantage of this form of communication and education is the visible coherency of social aims and strategies which give the population some idea of what to expect in the future and why. Certain principles of the Arusha Declaration have been incorporated into the Tanzanian Constitution, while the rest remain in the form of TANU documents widely disseminated throughout the country.⁶⁸ Similar government statements of an ideology of social, political and economic development exist in Zambia with the principles of Humanism and in Uganda with the Common Man's Charter.⁶⁹

As either a supplement or alternative to legislative regulation, party statements in an African one-party state may well be a prime factor in alleviating the tendencies towards alienation of the population from the government in times of stress brought on by rapid social change. The authority of the government is strengthened, seemingly, by the policies being set out at length and supported by arguments and information, while the prestige of the government is not directly called into question by making strict adherence to those principles a matter of law to which violation the State must react. Coherent explanatory party statements may serve a similar function outside of the context of a coherent social ideology. Such was the case in Malawi in 1967 when the government decided to ban mini-skirts. The communication of this ban was by means of a Party Directive signed by the President as Life Chairman of the Malawi Congress Party, with an explanatory statement, posted prominently in public places, warning that commercial establishments which did not ban mini-skirted women from entering would be closed under the President's standing legislative authority to do so "in the public interest," and that European women who did so would be subject to deportation under the President's standing powers to make such an unappealable decision under the Immigration Act.⁷⁰ The Party machinery throughout the country, especially the women's groups, declared their full support to the President

⁶⁷ Cf. *id.* at 249-50, 385-409; Rahim, *Legislative Implementation of the Arusha Declaration*, 4 E. AFR. L.J. 183 (1968); Tordoff, *Provincial & District Government in Zambia*, 7 J. ADMIN. OVERSEAS 538, 545 (1968). But for difficulties in this process and resistance to implementation, see Sawyer, *Discriminatory Restrictions on Private Dispositions of Land in Tanganyika: A Second Look*, 13 J. AFR. L. 2, 23-27.

⁶⁸ Rahim, *supra* note 67, at 183.

⁶⁹ See K. KAUNDA, *HUMANISM IN ZAMBIA AND GUIDE TO ITS IMPLEMENTATION* (1969). For an accurate summary of the Common Man's Charter, see 6 AFR. RESEARCH BULL. 1481-83 (1969).

⁷⁰ 3 LAWS OF MALAWI, ch. 15:03 (5)(1)(a)-(5)(4) (1968).

in his determination to eliminate the wearing of such clothing. The police, however, were in an ambiguous position, since one does not feel comfortable ignoring a party directive in a one-party state and yet police powers did not include statutory authorization to enforce the mini-skirt ban. A few arrests were made on vagrancy charges, but generally police contented themselves with taking names and addresses of offenders. The point is that this method of regulation was highly effective, though its substantive content may be debated, especially by men.

Social regulation by party statements and directives in a one-party state where, in contrast to the Eastern European or Chinese experience, the party is generally expected to play far less than an absolutely controlling role, would seem to suggest an original African contribution to producing a new jurisprudence based on alternative methods of communication between government and people for the greater understanding of both.⁷¹

In connection with the above, a second option presented is the wide dissemination of brochures, manuals and guidebooks clearly explaining to the people the purposes behind key development legislation. In other words, the drafting of complementary documents for a lay public as a needed adjunct to legislation. This technique is already in operation in Eastern Europe, and analogous "books of authority" have been used in England and "coutumiers" in Europe in the period preceding codification.⁷²

A third option is for the country's High Court to assume an active guiding role towards the judiciary by issuing interpretations, advisory opinions, and *en banc* memoranda which seek to harmonize judicial and executive policy. In other words, the High Court would act as more or less the authoritative intermediary between the courts and the government, interpreting the relationships between the broad social policies of the country and the law. This judicial leadership role is currently being played in Eastern European countries, and variants have been suggested for the African context to ensure that courts are responsive to national social policy

⁷¹ The Church in Catholic countries has often played a similar though more rigid role in defining "public morals." But despite its new liberalism in some countries, notably in Latin America, the similarity is tenuous. Its historic extranational ties to Rome, the growing uneasiness over its frequently pervasive behind-the-scenes influence on government policy while lacking public accountability, its uncertain commitment to national development, its frequent control of large amounts of property and alliance with defenders of the status quo, and the ongoing Western political tradition of separation between church and state would seem to weaken any historical analogies to the party in African one-party states.

⁷² David, *supra* note 10, at 10.

but within the rule of law.⁷³ The court would not be blindly legitimating executive policies but, to the extent that those policies come to be expressed in authoritative communications, would seek to convey their full implications to inferior courts and to anticipate possible legal questions involved in maintaining judicial interpretation as a process relevant to national development.

In Eastern Europe, subsequent to the adoption of various legal codes, court practice is seen as developing law to breathe life into the code by interpretation and analogy.⁷⁴ Supreme courts have the task of analyzing court practice throughout the country by a variety of techniques: advisory opinions (non-binding on lower courts), decisions on principal matters (binding), and directives of a politico-legal nature (binding).⁷⁵ The conflict between the twin social needs for stability and change is thus resolved. Such analysis by the high court could and should be done in close consultation with law faculties and legal research centers within the country.⁷⁶ But as Mr. Justice P.T. Georges of Tanzania points out, in contrast to Marxist doctrines animating a communist state, TANU doctrine does not seek to embrace and direct the whole range of human activity.⁷⁷ Therefore the scope of such advisory opinions that would be handed down by a high court in an African socialist state would almost certainly be less comprehensive. The courts generally must take the lead in making themselves more sensitive to national development policy in order that:

[A] public opinion will gradually be created, permeating throughout the party that the courts must be preserved because of the indispensable role which they play. The leaders at the top realise it and often stress it. But the task demands more than the occasional pronouncement. For these reasons I see no harm and much good in party membership by members of the judiciary and the use of opportunities which membership offers to show a positive interest in helping the process of rapid national development and to stress the importance of the courts in the achievement of that goal.⁷⁸

A fourth option consists of an increased frequency of deliberate government decisions to withhold legislative or executive action affecting public behavior in favor of an expanded effort to ascertain the relevant trends of belief and behavior in the society, and then, if possible, to rest future government action on the play-

⁷³ Eorsi, *supra* note 19, at 274-76.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ Georges, *The Court in the Tanzania One-Party State*, in EAST AFRICAN LAW AND SOCIAL CHANGE, *supra* note 22, at 26, 28.

⁷⁸ *Id.* at 45.

ing out of these trends and not on their manipulation by legislative enactment. This would seem especially applicable to criminal law situations. For instance, elopement in Uganda was disappearing as a social activity until, by making it a criminal offense in the Penal Code, it was revived to the accompaniment of manifestly increased conflicts and tensions. The situation was not aided by the apparent inaccuracy of the transcription of the offense from customary law into legislation and by the difficulty of distinguishing this offense in the Code from that of adultery.⁷⁹ In this connection, remnants of the repugnancy doctrine held over from colonial times in the legal systems of independent African states (where customary law is judged by constitutional law and legislation from the central government, instead of by received colonial law) and other internal conflicts rules must be reexamined to see whether their applications are useful or detrimental in the development process.⁸⁰ Also, reconsideration might be given to the expanding, and possibly over used, governmental practice of attempting to deter each violation of development related public regulatory statutes by attaching severe penalties usually reserved for strictly criminal offenses.

A consideration of the range of options available to governments which choose the second fork out of the crossroads raises the question of the characteristics of the body of law that will hopefully emerge in each country as a useful tool for its development. This question has often been posed in terms of legal integration: Will the country succeed in evolving a single unified legal system applicable to everyone, and if so, what will be its key features? This question has been referred to more generally by Professor René David, inquiring whether a national "common law" of African states will evolve along the lines of a "modern *jus gentium*."⁸¹ He concluded that such an evolution may well occur, similar to the development of Roman law, under the informed influence of national governments which would have to take account of current customary law and practices, modernize them, and thus create a new synthesis.⁸² It is unnecessary here to set out all the

⁷⁹ Obol-Ochola, *supra* note 19. In this connection Professor David has strongly recommended that African legislatures voluntarily and consciously ignore activities in certain institutions and areas of life where conflicts are worked out by formal or informal means. See David, *supra* note 10. This strongly implies a propensity to retain, not supersede, customary institutions. A related suggestion has been made to give local courts generally broader powers of conciliation and arbitration and even powers to decide disputes *ex aequo et bono* under broad legislative policies. See Eorsi, *supra* note 19, at 280.

⁸⁰ See Sawyerr, *Internal Conflict of Laws in East Africa*, in EAST AFRICAN LAW AND SOCIAL CHANGE, *supra* note 22, at 110, 134-38.

⁸¹ David, *supra* note 10, at 5.

⁸² *Id.* Perhaps the most useful discussion of national unification of laws in Africa is found in Allott, *supra* note 5, at 61.

considerations involved in modernizing customary law; some of these have been previously noted,⁸³ and much of the resolution of such problems depends upon the conditions and imperatives in each country. However, it is relevant to peer down this path from the crossroads to see whether the adoption by African governments of the second alternative to meet their dilemma in law may necessarily lead to the evolution of some kind of "common law."

In asking whether such a new common law will emerge in African nations, we must ask by what modalities and agencies it will emerge. Law is a process of authoritative decision by constitutive and public order decision-makers, and a new common law presupposes its arrival as an outcome of this process. Its arrival will be produced, if at all, by certain highly articulated strategies on the part of decision-makers who act on the basis of their own attitudes and perspectives to meet various objectives established by the government or otherwise arising out of the legal process or the values held by the people of the country. These strategies will be carried out using value-resources, such as power, wealth, respect and rectitude, within the context and procedures of various arenas. To establish the plausibility of the evolution of a new common law in African states, these factors must be briefly considered relative to background conditions there.

The common law in England emerged when the King's courts, in order to establish their independence of Parliament, undertook to interpret legislative enactments according to their own precedents and derived principles. *Jus gentium* emerged when the law applicable to relationships between people from different non-Roman communities in the Roman empire replaced the traditional Roman *jus civile* because it was more effective as legislation.⁸⁴ One condition in both instances for such an evolution was a consistent general philosophy and vantage point from which to interpret disputes and resolve questions of law as they arose. In other words, a body of perspectives shared by decision-makers in a form coherent enough to produce successive decisions over time, having a principled relationship to each other, was necessary. This precondition of arena, perspectives, and strategies was furnished in England by a strong local judiciary, whose judges were conscious of their role in developing a body of law, which they did in part by gradually eliminating a body of local custom as undesirable.⁸⁵ Do such conditions exist in Africa?

⁸³ See note 20 *supra*.

⁸⁴ *Id.* David, *supra* note 10, at 5.

⁸⁵ *Id.*

Able and trained local judges are still in very short supply. When competent judges do emerge on the local level, they are often transferred to the capital to work for the central government or promoted to a high appeals bench. Generally speaking, there are a slowly increasing number of capable magistrates filtering into judicial systems from overseas and local law schools, but their presence is not uniform throughout Africa nor throughout any one country, with the exception of Nigeria and two or three other countries with pre-independence traditions of Africans training for the bar. This difficulty is complemented by the lack of a strong national bar or, as is generally true in Southern Africa, expatriate domination of the bar.⁸⁶

The lack of a capable cadre of local magistrates and a strong bar raises doubts about the emergence of the necessary body of coherent principles and perspectives to be applied by the local judiciary. There is currently a serious problem in the relationship between precedent and the application of principles to disputes to produce over time a coherent body of judge-made law. First, most precedents, especially in areas of commercial law vital to the private enterprise sector, date back to the received colonial law in the form of antiquated statutes and decisions dictated by an arbitrary cut-off date. Customary law is generally limited in resolving many questions arising, and that will increasingly arise, out of the monetary sector of the economy, such as those concerning contracts for the sale and delivery of large quantities of goods on a commercial basis, though in many cases it continues to be invoked and locally preferred for small transactions between individuals. Enough time has not passed for an adequate body of local written precedent to emerge as available to local courts to apply to these and other kinds of disputes before them.⁸⁷ Moreover, oral precedent seems to be of limited nation-wide utility, relinquishing in repeatable precision over the long term that which it gains in flexibility over the short term. And even if sufficient time has elapsed, we have noted that the basic legal policy of the relationship between local customary law, received law and central government statutes has not yet been decided or clarified in most African states. The situation in this respect is one of ferment, and the judiciary does not have the

⁸⁶ See generally Allott, *Judicial Precedent in Africa Revisited*, 12 J. AFR. L. 3, 3-4 (1968); Carey, *The Law Society Seminar: A Forward Look*, 1 E. AFR. L. REV. 102 (1968); Hodgin, *Proposed Changes in Legal Education in Uganda*, 6 E. AFR. L.J. 152 (1970); Scotton, *Judicial Independence and Political Expression in East Africa—Two Colonial Legacies*, 6 E. AFR. L.J. 1 (1970); Twining, *Social Justice and the Law*, in EAST AFRICAN LAW AND SOCIAL CHANGE, *supra* note 22, at 278.

⁸⁷ See Seidman, *supra* note 1, at 32-33.

strength to act alone through its own decisions to resolve the dilemma by defining that relationship. Thus, without such a clarification of legal objectives, shared by the judiciary relative to that relationship, the vital consistent general philosophy and vantage point needed as a basis from which to interpret questions of law to provide principled precedent for similar questions would seem to be lacking. Likewise, if such a philosophy is agreed but the people continue to refer most of their disputes for resolution to alternative legal institutions that do not act under the same principles, the emergence of a new common law would seem thwarted by the refusal of the population to recognize as authoritative such decision-makers, philosophy and principles of dispute-resolution. This is the situation with the *Atbia Dagnia* in Ethiopia, where those local courts, though sharing a general philosophy and vantage point, are no more than institutionalized legalisms.

An additional consideration relating to strategies, objectives, arenas, and decision-makers and their perspectives, is that for several classes of local disputes on which authoritative decisions must be made, many African states are not committed to resolving them within a precedent-producing judicial framework. Rather, resolution is to be sought within an administrative context where the decision-maker is deliberately given wide discretion to solve problems and implement broad policies while being only lightly restricted by specific principles, past decisions, or the requirement to coherently justify in writing the reasons for his action. In this setting judicial review would tend to be limited to questions of fairness and to have increasingly restricted opportunities to reverse such a decision on substantive grounds. The comparative ineffectiveness of judicial review may well be due, in English-speaking African countries, to the adoption of a system of administrative law developed in a country without a written constitution that includes no requirement that administrative officers give reasons for their decisions, and that rests on a strong tradition of rectitude in public life.⁸⁸

The growth of such an administrative apparatus seems to be an inevitable concomitant of any land reform program, as illustrated by the experiences of Kenya and Tanganyika,⁸⁹ and by the still feeble tendencies in Ethiopia. Since most African states have already or must in the future confront the question of whether current patterns of land usage, tenure and tenancy are adequate

⁸⁸ *Id.* at 66-68.

⁸⁹ McAuslan, *Control of Land and Agricultural Development, in Kenya and Tanzania*, in *EAST AFRICAN LAW AND SOCIAL CHANGE*, *supra* note 22, at 180.

for rapid national development and since questions concerning rights in land touch the local peasant and the majority of the population most intimately, the removal of this category of disputes from judicial consideration, as the state assumes a greater degree of control over the land, would seem to be a major blow to the emergence of a new common law. Further, there is some indication of local distrust in some countries of lawyers' intrusion into land questions.⁹⁰ These questions have traditionally been regarded as economic or political problems, to be resolved as such, with the result that resistance occurs to the introduction of law as a basis of decision.⁹¹ Additionally, land in Africa has, with few exceptions in "white-settler" areas, traditionally never been a saleable commodity, but rather conceived of as belonging to all and generally available to those who need it and would use it.⁹² Rights of alienation and allocation accordingly vested generally in a central authority figure for the common good of the clan or tribe. This tradition is generally being perpetuated by African governments in vesting title by statute in the Head of State for the benefit of the people, precisely in order to retain state control over its occupancy, usage, consolidation and disposition, as opposed to allowing these factors to be controlled by market forces.⁹³ Such a sustained attempt to remove land from the commercial sector by means of administrative institutions denies a capable judiciary of an opportunity to develop a body of property law—perhaps the heart of the English common law—and indicates that needed authoritative decisions in key areas of national life are currently felt to be more responsive to the development needs of the state in statutory and administrative contexts.

The foregoing is stated not to argue that a common law or a *jus gentium* will never emerge in most African countries, but to argue that under present conditions there are substantial obstacles to such an evolution. However, the adoption by a given African government of all or some of the options previously discussed as comprising the alternative to over-reliance on legislation as a source of law could well improve conditions for the future evolution of some kind of flexible body of precedent-based national law. The adoption of intermediate methods of authoritative communication, symbolized by the Arusha Declaration, in conjunction with the superior courts adopting an active coordinating role, may in time

⁹⁰ *Id.* at 202.

⁹¹ *Id.*

⁹² See VERHELST, *supra* note 20, at 27. Cf. Mayer & Mayer, *Land Law in the Making*, in *AFRICAN LAW: ADOPTION AND DEVELOPMENT* 51, 59 (1965).

⁹³ VERHELST, *supra* note 20, at 26-27.

produce the necessary philosophy of law in society and the coherent body of principles necessary to establish precedents commanding the respect of judicial or legislative law-makers. Increasing opportunities in each country for legal education, promoted by most if not all African governments, currently aim to produce larger numbers of magistrates; and, this could well produce in time a judicial system competent down to the local level to derive legal principles from the resolution of similar questions. In the future, an equilibrium will hopefully be reached in each country as to the role of customary, received and legislative law that will produce a foundation on which further legal development can be based.⁹⁴ Presently, the English-speaking African countries have and acknowledge the received tradition of the English common law. Although its substantive and procedural doctrines are currently being severely questioned, that tradition provides a ready source of judicial strategies possibly applicable to the evolution of case-derived judicial precedent in each country. In any case, flat predictions about the future of law in Africa are outrageously dangerous, and none are attempted here.

The essays on Ethiopian land reform and the right to counsel in South Africa, while setting out elements of the same general legal dilemma, indicate further that on the way to that particular crossroads the bridge of coherent prescription must be crossed.

⁹⁴ T. O. Elias has argued that the judiciary is the most enduring part of the British heritage in English-speaking Africa, in that minimum innovation has been introduced since independence, and has noted specifically: "While the pattern of the West Coast has been the establishment of an integrated system between the customary courts and the British-established courts so that a system of appeals runs to the highest court, the East and Central African pattern has generally been one of parallel developments between the local or customary courts and the British-established ones, although integration has been carried far in recent years even in these areas. An integrated system has the virtue of promoting the gradual evolution of a common law for each territory." Elias, *The Commonwealth in Africa*, 31 MODERN L. REV. 284, 300-01 (1968). Further, an independent judiciary in the British sense remains a live ideal in the majority of these African states. *Id.* at 301.

It would seem that the success of judicial integration in promoting the evolution of a common law for each African state rests heavily on the sensitivities of the high court judges to what is or is not customary law in the area from which the case originates. If the members of the high bench in fact lack an accurate *au courant* knowledge of the customary legal expectations relative to the issues before them, even if these expectations must be modified in the ensuing decision, there is a great risk of the attempts to enforce the court judgments actually increasing the lack of respect for law generally, already noted as a serious problem in development-related areas, by being (1) basically incomprehensible while triggering demands upon the people by the State's administrative machinery and (2) irrelevant to the heritage of the citizens of that region or hostile to their interests (though perhaps of short-term benefit to a prevailing litigant), and therefore locally perceived as unjust. The success of judicial integration, in other words, would seem to largely depend on the fruition of many of the other prerequisites for the evolution of a common law discussed above.

That bridge is constructed of authoritative remedies prescribed to identify and meet head-on certain basic questions which are survival issues in that particular society. In Africa many of these issues relate directly to the maintenance of national unity. Continuing the metaphor, if that bridge is washed out or otherwise blocked, then it must be established that legal process can supply the materials, or at least be included in the building specifications, to cross the channel to arrive at the originally identified crossroads of effective implementation. It must be established that the existing legal system of Ethiopia has some relevance to the problem of circumventing the entrenched conservatism of Ethiopian landowners and military officers so that coherent land reform policies can be prescribed, a prospect that Professor Dunning concludes is unlikely. It must be established that the existing legal system dominated by white South Africa has some relevance, minimally through the judiciary's enforcement of an existing and perhaps expanded right to counsel vis-à-vis politically motivated pernicious internal security legislation, to the basic problems of financial and apartheid factors militating against black South Africans receiving counsel in the great majority of prosecutions, and ultimately to the even more basic problem of producing equality for black South Africans in all areas of life. This prospect is even more unlikely at the present given current trends in South Africa.⁹⁵ These are usually thought of as "political" problems, and indeed they are. But they are no less "legal" problems, if for no other reason than that law-makers committed to basic concepts of equality and national development, once they have identified the sources of these dilemmas, must wrestle with the fundamental question of what to do with their time and effort as people committed to the resolution of social problems by systematic, public, consistent and reasonably just authoritative principles and procedures. To paraphrase the old legal maxim, they may not forget as lawyers and law-makers what they know as African men. Whether they should even temporarily abdicate their legal role when faced with profound identifiable social conflicts is as much a legal as a political question. Our hope here is that abdication as such will not occur, though commitment to legal process in general in their minds or in the public mind may be weakened or submerged for periods of time by overwhelming political forces.

The importance of the essays in this symposium for governments and others concerned with effective legal process in Africa seems clear. The majority of black-ruled African states, on issues

⁹⁵ The profound extent of this unlikelihood is cogently demonstrated in L. MARQUARD, *THE PEOPLES AND POLICIES OF SOUTH AFRICA* 117-26 (4th ed. 1969).

analogous to overurbanization and legal integration relative to competing customary laws and practices, are evolving their own set of social goals, but with a substantial degree of implementation and enforcement difficulties, and thus face the crossroads discussed here. Tanzania might be the country with the most coherent policy objectives and the most complete public dialog as a basis for striking out down the second road, in terms of new directions in effective lawmaking. However, many of the same countries that have defined goals and policies on the above or other imperative issues of domestic law, stand before the bridge of coherent prescription relative to certain fundamental questions, such as land reform and the status of black people in an apartheid state, which in many cases is in sad disrepair or washed out altogether. Such bridges must be constructed from effective policies prescribed by those of popularly recognized authority, in fulfillment of generally accepted popular goals. The building of these bridges is stymied, in states where such bridges must be built before sustained mass development can occur, by combinations of vested interests, such as entrenched landowners allied with the military, in conjunction with the obstacles of underdevelopment, notably illiteracy. In such situations the government often finds itself whipsawed between the recognized grave need for reform and its inability under its own procedures to even agree on a policy for reform. Alternatively, the government, whose base of power is composed of political forces entrenched in the status quo and which coloration it willingly adopts, may be even more elitist than usual. South Africa and Ethiopia stand, respectively, as extreme and recalcitrant examples of vested interests utilizing power and the concomitants of underdevelopment to wash out the bridge. And while politically and historically they, along with the still-existing colonial territories, may be African anachronisms, their dilemmas of legal process and legal development contain valuable lessons for the rest of Africa.

The essays in this symposium well illustrate the bridge that must be crossed and locate the crossroads beyond that bridge where the correct choices must be made by African governments in order for their legal processes to play a constructive role in national development.