March 1981

The Resilience of Indigenous Law in Alaska and the New States of Africa South of the Sahara

James S. E. Opolot

Summary

Comparative analysis of not only criminal justice administration, but also efforts to modify existing legal systems, are informative to the extent that they allow readers to broaden their perspectives and to learn lessons from other countries. This paper seeks to elaborate on this statement by comparison of the ways in which customary law in Alaska and the young nations of sub-Saharan Africa has been become living law, that is, law which dominates life itself even though it has not been written into the official law of the state.

THE RESILIENCE OF INDIGENOUS LAW IN ALASKA AND THE NEW STATES OF AFRICA SOUTH OF THE SAHARA

by

James S. E. Opolot, Ph.D.
Visiting Scholar
Justice Center
University of Alaska
Anchorage, Alaska

Paper to be presented at the
26th Annual Southern Conference on
Corrections at Tallahassee, Florida,
March 2-4, 1981.

ABSTRACT

Comparative analysis of not only criminal justice administration, but also efforts to modify the existing legal systems are informative to the extent that they allow readers to broaden their perspectives and to learn lessons from other countries. This paper seeks to elaborate on this statement.

INTRODUCTION

Who would suspect that Alaska, the 49th state in the United States, and the new states of Africa South of the Sahara[1] have anything in common? At first glance, prospects of any common denominators appear unusually remote. Topographical variations, for example, are great. The thick, damp jungles, extended desert land, and open dry velds served as popular stereotypes of Africa in general and the new states of Africa South of the Sahara in particular. On the other hand, Alaska has been known as the territory of ice, igloos and Eskimos.

The antithesis of the two places in the world appears to go even further in relation to their resources. Alaska now is beaming with the new wealth derived from oil, whereas many of the new states of Africa south of the Sahara are faced with perennial problems of poverty, unemployment, inflation and high cost of energy.

But before students of criminal justice in Alaska and the new states of Africa South of the Sahara conclude that there is a basic incompatibility between the two places, they should look more closely. For there are likely to be some surprises. What on first glance appear to be grave fundamental differences in social institutions and traditions turn out to be common denominators in certain respects. For example, scattered and scarce records of early colonial Alaska and Africa South of the Sahara make analysis of their history difficult and in some instances impossible. Many questions, such as how and where the inhabitants in each place lived and why, cannot be answered adequately. For another thing, the

story of Alaska and those of the new states of Africa South of the Sahara must be told in several simultaneous and interacting versions. For one thing, it is the story of other nations. In the case of Alaska, this entails events in Russia, Britain and the United States which attracted these countries to the fur resources of Alaska; and that of the new states of Africa South of the Sahara entails events in European countries such as England, France, Belgium, Portugal, Italy, Holland and Germany and the United States.[2]

This paper is an attempt to elaborate on the above and related common denominators by focusing on one common denominator, namely the resilience of or the extent to which Native, customary or indigenous laws in Alaska and the new states of Africa South of the Sahara have been reduced to the status of living law as enunciated by Eugene Ehrlich.[3] That is to say, according to Ehrlich's observation of the peasants' behavior, the common laws (or "unofficial ones" or informal controls) followed differed from the official ones, that is formal control. In this way, Ehrlich introduced a second path for legal thought that regards law as the principles abstracted from the actual behavior of members of the society.[4] This kind of "living law" he constructed with "norms for decisions"--actually abstracts from actual court decisions[5]--and "legal propositions" (statutes). The latter he regarded as the basic principles abstracted from the norms for decisions, "couched in words, proclaimed authoritatively with a claim to universal validity."[6] Thus, to Ehrlich the "living law" was the "law which dominates

life itself even though it has not been posited in legal propositions."[7] Over and over again he stressed the behavioral attributes of his living law: "The living law is not the part of the content of the document that the courts recognize as binding when they decide a legal controversy, but only that part which the parties actually observe in life."[8] He suggested that to acquire the knowledge of this law one should study its provisions quite independently of the question whether they have already found expression in a judicial decision or in a statute or whether they will ever find it.[9] In short, Ehrlich aims to "describe methodologically and objectively, by a method apart from all technique, the integral and spontaneous reality of law in all levels of profundity."[10]

Since law, whether legislated (state law) or not (the living law) does not exist in a vacuum, it means that this paper will also deal with socio-cultural, economic, political and historical aspects of the societies in the two places. Within this framework, the paper seeks to explore and analyze the theoretical underpinnings of the imposition of law, the interaction between state law and the living law, and criminal justice reform within the broader sphere of social control.

PRECOLONIAL LEGAL INSTITUTIONS AND TRADITIONS

Prior to Alaska's coming under the influences of Russia, Britain and the United States, there existed Native laws unique to each community; so was it true of Africa South of the Sahara before European colonization. In either place, the legal institutions and traditions reflected various forms of

social organizations. The Tlingit Indians of Alaska, for example, were organized into heredity clans, and according to Kalervo Oberg, the only punishable offenses within each clan were incest and witchcraft.[11] Many inter-clan offenses pertaining to life, property or honor were settled by payment of goods from one clan to another:

> Murder was generally punished by death - a man of equal rank being selected from the murderer's clan. In case the murderer was of much higher rank than the man murdered, his clan would offer restitution by a payment of goods. This would also be true if there were slight differences of rank between the murdered man and the man selected to pay for his loss. Equality was demanded and differences were always made up by payment of goods.[12]

In the case of Africa South of the Sahara, Green notes how the guilty one of two litigants among the Igbos of Nigeria was asked to take palm wine and oil beans to the other woman "so that they might eat together and thus make peace."[13] Or, according to some authorities, in the past it was Somali custom for the tribe of a person who killed a member of another tribe to turn over the culprit to the latter. This was eventually replaced by the payment of blood money (dia) as the price payable in lieu of the life of the offender.[14]

Thus, in both situations the mode of social interaction in traditional administration of justice was close to that of everyday life. People did not change clothes to go to attend a hearing, or engage in ritualistic self-preservation, and they used ordinary language to convey the facts, values and arguments of the case.

It must be noted here that in precolonial Alaska and non-

kingdom societies in Africa South of the Sahara there were no police forces nor facilities for incarceration. Only kingdoms in Africa South of the Sahara had rudiments of special functionaries in law enforcement--they had temporary detention facilities. For example, in the kingdom of Ankole (Uganda) a kind of stocks, reminiscent of medieval ages, was used on rare occasions to detain offenders, usually pending execution. An escaped suspect might be brought back from some distant place, and tied with a rope, but even that was considered to be too degrading to the accused. Stocks were also used in Buganda (Uganda), but prisons were introduced only after the advent of British rule, despite an early reference which suggests otherwise.[15]

In the eyes of the newcomer, however, the administration of justice as outlined above was looked upon with contempt. This is illustrated by Sir William MacGregor on his tour of the hinterland of Yorubaland in West Africa in March, 1903, when he said:

> The Bale's (ruler's) Council is also the Supreme Court of Justice for the town and province. There is not a single enlightened man, not a man of the new school, in the Council if there is one in Ibadan . . . Justice, it is to be feared, is too often sold to the highest bidder in cases that come before the native tribunals.[16]

Thus, the bale and members of his council were described as "utterly ignorant," and it was apparently no small concern of his that "cases of a judicial nature [which] begin to arise daily between European and Natives" were being brought before them. Indeed, European traders in Ibadan were complaining that they had to appear before the bale's court, resenting the very

idea of Europeans "being judged in the purely native court."[17]

Be that as it may, the precolonial administration of justice in Alaska and Africa South of the Sahara contained a number of desirable administrative elements for contemporary criminal justice reforms. For example, there was the "sense that knowledge of the legal subculture, explicitly and implicitly, is widely shared, as is appropriate in a system in which the litigant must be his own advocate.[18] Another sense was that language of the law is mostly everyday language, which facilitated communication between law-appliers and the litigants, or between law-appliers and the lay public.

Second, there was an element of accessibility in the sense that the machinery for its application is readily available to all; it was cheap--e.g., fees amounted to a few shillings in Uganda. It is only in the kingdoms in Africa South of the Sahara that, by virtue of the hierarchy of the courts, having to pay fees and traveling long distances, for example, that posed problems of accessibility and even then only in limited cases involving appeals and those of greatest threat to the territorial social order.

Third, there was the element of public participation that was promoted by the other two elements, among others. It was demonstrated in detection of or ferreting out illegality, bringing actions in court, and in the administration of sanctions. In all these respects, it involved volunteering of services, to a greater or lesser degree, out of a sense of responsibility, support, or urgency for re-equalibration of social relationships in a given community.

IMPOSITION OF FOREIGN LAW

Before we outline the nature of foreign law in Alaska and Africa South of the Sahara, three clarifications appear to be in order. First, it is pertinent to observe at the outset that although historians of Alaska and the new states of Africa South of the Sahara have not paid much attention to the importance of European law in the establishment and maintenance of colonial rule on the continent, there is nothing new about the role of law in imperial expansion. In Roman times, for instance, law occupied a crucial position in the administration of the Roman Empire. As the empire expanded "the sphere of application of Roman law grew correspondingly."[19] Between 150 B.C. and 150 A.D.,the metropolitan law of Rome expanded considerably to meet the growing needs of the empire. In the various parts the indigenous laws were never wholly replaced, but the ius gentium, an embodiment of Roman legal culture, stretched in all directions to embrace non-Roman peoples, thereby facilitating their incorporation within the Roman imperial orbit.[20]

Second, introduction of foreign spheres of interest in Alaska and the new states of Africa South of the Sahara involved treaty writing and/or the use of force. Take the Alaskan example. The American government negotiated a treaty with Russia in 1824. By this instrument it was agreed that Russian subjects would not push their activities in trade and settlement below the line of the parallel of 54°40', and that American citizens should not operate to the north of that

line. It was the treaty of 1825 between Russia and Great Britain that defined the boundary of Alaska on the land side, as it is today. Russia held the great peninsula west to the 141st meridian of longitude, and a coast strip 30 miles wide extending to latitude 54°40'. The United States finally bought Alaska from Russia in 1867, thereby becoming a full-fledged imperialist, at least in the eyes of Native Alaskans.

In the African situation coercion, for example, played a crucial role in the conquest and control of southern Nigeria by the British. Between 1902 and 1906, no less than 23 "punitive expeditions," besides numerous small scale patrols, were mounted against diverse indigenous communities, especially east of the Niger.[20]

The only new state in Africa South of the Sahara whose creation does not fit the treaty and/or use of force pattern is Liberia. In 1816, the American Colonization Society was founded for the expressed purpose of returning free American blacks to their "ancestral homeland" in Africa. This private "repatriation" organization was granted a charter by the government of the United States, which not only supported the scheme, but also helped the Society in negotiating with native African chieftains for land along the coast of what is now Liberia. Members of the Society included such prominent Americans as Bushro D. Washington, Henry Clay and John Randolph.

In 1822 the colony of Liberia was formally established, with its capital, Monrovia, named for American President James Monroe. The first group of "repatriated"

blacks arrived shortly thereafter, and although nearly one-third of this initial group succumbed to disease within a short time, the colony continued to grow. By 1830 the Society could boast of having settled over 1,400 blacks in Liberia. The majority of these had been "free Negroes," but after 1827 an increasing number of American slaves were being transported.

Finally, colonial powers differed in their style of administering the new territories and, thus, of administration of criminal justice. For example, in Africa South of the Sahara the British differed sharply from the other European powers. The British employed what has come to be popularly known as the doctrine of "indirect rule"--implying that rule was administered through the existing indigenous institutions.[21] While this is reasonably accurate, British policy varied in degree, depending upon the level of socio-political development of the Natives, and the number of white settlers in the area. Where the indigenous political and judicial organizations bore some relationship to those of the colonial power, as in those areas which are now known as Ghana, Nigeria, Sierra Leone, Zambia and Tanzania, attempts were made to make as much use of them as possible. In the areas where traditional social organizations seemed unadaptable--small scale societies or bands of hunting or pastoral Natives--greater external control was established.

The British reluctance to introduce Western ideas of law comprehensively into her African colonies, as in the rest

of her colonies, is underlined by the broad recognition of indigenous law (Islamic or customary). Under the system of indirect rule this was applied by traditional judicial authorities where they existed[22] or by Native courts created by the colonial power, somtimes drawing on traditional authorities, sometimes inventing them.[23] The application of indigenous law was restricted by the "repugnancy" clause[24] and the Native courts in most colonies were subject to appeal to the colonial court system.[25] But the real threat to indigenous laws came less from these restrictions and more from a social environment favoring the British legal institutions and traditions over the indigenous ones.[26]

The other European colonial powers in Africa outh of the Sahara, notably the French, believed in the creation in these regions of a civilization that was essentially non-indigenous. Thus, the French developed the doctrine of "assimilation." The ultimate object was "to integrate the overseas possessions with France, to assimilate the colonial people into the body of French political, social and cultural thought and practice."[27] In this situation, the introduction of the French law, more specifically the civil law, became not so much a goal in its own right or an instrument of development, but rather a political strategy which allowed the French authorities to pursue assimilation without unwelcome political consequences. The French colonial law made distinctions between French citizens and subjects, and citizenship was obtainable only to those who were in a position to

give up their personal status under indigenous or Islamic law and to switch into the new personal status under civil law.

The administrative approaches used in Alaska under Russia and subsequently under America appeared to vaccilate between indirect rule and direct rule. Thus,during the Russian sphere of influence Zagoskin reported in his journal the Russian American Fur Company instructions to a certain Lukin, manager of the post on the Kuskowim:

> In the four villages nearest to the Khulitna, as I have designated, inform my friends and acquaintances that I wish them to be toyons [tribal elders, term brought from Siberia; elders from each village who were appointed overseers by Russian American Fur Company were called toyon] (Michael 1967:332) in those villages, and to have honor and fame from God and our beloved Commander-in-Chief. I beg you to receive them as trusted friends, diligent in the interests of the Company, with their loyal relations and close comrades, and to procure medals for them, and for them to be loyal subjects of our tsar Nicholas Pavlovich.[28]

For the Alaskan situation and similar situations in the United States, Monroe E. Price and his associates wrote:

> The history of Indian legal structure in the United States is a history of ambivalence in the attitude of the dominant government. The United States and the states themselves have frequently changed their own ideas of what the proper relationship should be between the reservations and non-reservation government. The pendulum has swung from encouraging tribal government to discouraging it, and then to encouraging of planning of substantial parcels; it has gone from using the reservation as a locus to "civilize" Indians to a place where farming or sheepherding can occur; and then on to economic development and industrial growth.[29]

The extent to which American presence has been in Alaska has been accounted for by Ernest Gruening[30] who uses

expressions such as "the era of total neglect," "the era of flagrant neglect," "the era of mild but unenlightened interest," "the era of growing interest," "war discovers Alaska," and "self-government: the quest for statehood."

THE NATURE OF FOREIGN LAW

Colonial legal institutions and traditions in Alaska, as in Africa South of the Sahara, developed along two lines. In Alaska under pre-revolutionary Russia and in the African colonies under European powers other than British, the law was known as civil or continental law. The law of Alaska under Britain and the United States, and of African colonies under British rule, was known as common law.

Elements of Civil Law and Common Law

Civil law, with its emphasis upon code law, provides little opportunity to the judiciary to make law. It can only interpret the law as found in the extensive codes of each nation. In addition, the courts do not follow the doctrine of stare decisis (decision based upon precedent) for fear of executive or legislative restriction upon their actions.

Common law, or nonlegislative law, is derived from the English people. As English courts were formed early in this millenium, the king and the magistrates he appointed to hear cases on his behalf based their legal judgments on what they believed most Englishmen considered was either right or wrong. They recorded these decisions. Other

judges became aware of them, and as more judges accepted these interpretations, the decisions became law. Judge-made law would change, however, as customs and beliefs changes.

Legal Institutions

Among the new legal institutions associated with colonialism in Alaska, as in Africa South of the Sahara, are the police, courts, and penal institutions/corrections, introduced piecemeal. These institutions tended to be introduced following successful experimentation of them back in the mother country and depending upon how deeply involved the colonial power was in the colony, meaning that there were variations in the imposition of legal institutions from one territory to another. Be that as it may, the colonial powers tended to share at least one denominator, namely the motivation to emphasize the prison as an institution. The prison was to house those who directly challenged the colonial authority or who violated the newly established criminal law. In other words, the aim was to create the good docile native--a willing source of raw material and cheap labor. And if he was not willing? One could always rely on the police and the army to do a little pacification. The penal institutions attempted to strengthen his faith in the status quo. The native was a clean slate on which anything could be inscribed. He was subjected to a constant barrage of suggestions that Western culture was all. France, through her policy of enculturation went further than Britain: she wanted to scribble on the

slate so that all the black surface would be covered with the white chalk of French culture, so the saying goes.

In their efforts to "cure" criminals, colonial prisons therefore resorted to another track towards the end of colonialism: the attempt to coerce the prisoner to conform to established authority. This became in practice, the central approach in most colonial prisons, and conformity to authority became the basic criterion for the eventual release on parole or aftercare. The resulting pattern is what is called "liberal totalitarianism."[31]

"Liberal totalitarianism" is explained in the sense that "there are institutions which, at least formally, have adopted the liberal goal of rehabilitation, while maintaining totalitarian control over the lives of prisoners." Moreover, they have adopted a variety of liberal programs (recreational programs, vocational training) which in practice often serve to further the totalitarian goal of changing prisoners into strict conformists to authority.

Critical Issues Associated with Foreign Law

Apart from the problem of introducing the prison, the colonial administrators were faced with numerous other problems. Among such problems was lack of personnel, from the quantitative as well as qualitative point of view, to administer various levels of the prison. There were problems of cultural conflict--lack of congruence between Western ideas, values, norms, mores, ideologies and beliefs and those of the Africans. To this end, European/American notions of "reasonable man," "beyond a reasonable doubt," "average man," "presumption

of innocence," "winner takes all," "punishment," "imprisonment" and "probation" run counter to those of Africans, namely "ceremonial celebration or cleansing," "compromise," "collective responsibility," "victim compensation," "fine," "ritual murder," and "institutionalized self-help." All these and other problems made penal proceedings, like other aspects of the administration of justice, more or less difficult in virtually all the colonies.

There is, however, another side, the side of the colonial power itself. If colonial rule is not to be pure exploitation--and normally it has not been--it must be justified by its success in changing the colonial society in ways in which it cannot change itself. If the British, for example, changed Ugandan society in such a way that Uganda produced more entrepreneurs or more democrats than it had before, that may have been some compensation to Ugandans for their loss of freedom. If they had left Ugandan society as it was before, then, however good the government the British provided may have been, it was still felt intolerable. Worst of all is the colonial power which attempts change without success. Thus, the British opposed tribalism enough to annoy the kingdoms (Buganda in particular on the issue of the lost counties), yet never took rigorous enough action to abolish it.

CONTEMPORARY CRIMINAL JUSTICE REFORMS

Two clarifications are in order before our analysis of the contemporary criminal justice reforms. The one has to do with the use of the word "contemporary." Ordinarily

the word "postcolonial" is used in the analysis of the criminal justice efforts in the new states of Africa South of the Sahara since they achieved such status following the departure of the European colonial powers. Since Alaska is one of the states in America, the use of the word "post-colonial" is inappropriate. Therefore we use the word "contemporary" in such a way as to include those political changes that occurred in Africa South of the Sahara and Alaska's status in the United States.

The other clarification is that in discussing the contemporary criminal justice reforms in Alaska and in the new states of Africa South of the Sahara, a distinction between innovations and failures must be made. The sections that follow are intended to elaborate on this statement.

Illustrations of Innovations

In seeking to illustrate various innovations which occurred, it is necessary to first understand what is meant by the term "innovation" within its context of criminal justice in Alaska and Africa South of the Sahara. In this case, it is difficult to use the term in a consistent manner. It is not always possible to make words mean what we want them to mean. To this end, there are criminal justice ideas or practices which are "new" in the sense that they have not been previously known. These are rare. Most criminal justice ideas have existed in one form or another for thousands of years, even though new terms are used in their applications to new situations. Second, there are adaptations or modifications of earlier ideas

which affect current practices. These are probably the most common forms of innovation. Third, there are revivals of former practices, which may occur for a number of reasons. This may occur as a result of a changed posture on the part of policy makers and administrators, or there may be a renewed emphasis on objectives to which these practices relate. In another case there may be changed conditions which give promise that ideas which were previously unsuccessful may now succeed. Finally, some things may be viewed as "new" simply because the individuals involved have never heard of them, understood them, or seen their importance. In light of all this, let us now look at three of the changes and innovations which took place in both Alaska and the new states of Africa south of the Sahara.

1. The Alaska Example

The 1960's and 1970's have been years of comprehensive criminal justice in the United States in general and in Alaska in particular. In the first case, several national as well as state study commissions were appointed to investigate the crime problem--adult crime and juvenile delinquency--and the functioning of the police, courts, and corrections following the successful work of the commission President Johnson empaneled in 1965.[32] In the case of criminal justice innovations in Alaska, what is contained in the excerpt below is indicative of some ambitious plans:

> In 1978 the State of Alaska committed itself to the development of a comprehensive master plan for its corrections system. . . . Although this plan cannot, and does not purport to, provide ultimate solutions to corrections problems, it does constitute a framework for action in its statement of goals and policy alternatives.[33]

2. The Somalia Example

The Republics of Somalia and Tanzania provide perhaps the best examples in Africa South of the Sahara of a real start in integrated criminal justice in general and integrated approaches to the treatment of offenders in particular. In the case of Somalia, shortly after it achieved independence, a special commission was appointed to prepare uniform criminal legislation. At one of its meetings the commission agreed to use the various existing legal systems as the basis for new criminal legislation. Those basic legal systems, modified to suit the Somalia situation, became the law currently in force in the Republic.

It must be emphasized, however, that the new Somali Penal Code's uniqueness and richness lies in inclusion of a considerable number of viable elements derived from customary law/Islamic law.

Another unique feature in the creation of the new Somali Penal Code is the diverse background of the members of the commission. To this end, Contini[34] wrote:

> The experience in Somalia of integrating two Western legal systems and customary law has taught us that the work can most effectively be done by teams of lawyers trained in different legal systems. In the beginning, there was common ground between the lawyers with British training and their Italian colleagues on only one point; both sides were convinced of superiority of their own systems. However, the constant exchange of ideas and experiences gradually broadened everyone's vision. In the end, mutual suspicions gave way to fruitful collaboration.

These scholarly excursions embracing theoretical concerns over the subject matter or scope of the work of the commission seem to have demonstrated theoretical concerns that were expounded by Ehrlich, as noted earlier.

3. Tanzanian Experiment with Cell Justice

Until World War I, Tanganyika (as the mainland portion of Tanzania used to be called) was a German colony. Following World War II, Tanganyika became a British colony under the terms of a League of Nations Trusteeship. Independence was received in 1961. In 1964, Tanganyika absorbed the formerly independent islands of Pemba and Zanzibar, after an uprising in which blacks of Zanzibar massacred the Arab population in those islands, and acquired its present name.

As a means of experimentation and, hopefully, of improving the local administrative-political structure, Tanzania introduced the so called cell system into its governmental structure in 1965. A cell is designated as a group of approximately 10 houses, grouped together as a basic organizational cell unit. Each cell is headed by a volunteer leader who is chosen by his fellow members. The leader is usually a long-time member of the national party, TANU. By doing this, Tanzania has strengthened relations between formal and informal controls.

Critical Issues Involved in Innovations

It is important to explore not only what has occurred in the criminal justice innovations in Alaska and the new states of Africa outh of the Sahara, but also to examine why many of these innovations have not yielded the intended results.

Though there are numerous reasons, we will cite six of the most prominent ones here. They are: (1) inadequate diagnoses of problems; (2) inadequate planning; (3) lack of resolve to anticipate implementation problems; (4) uncritical acceptance of innovations; (5) absence of monitoring and feedback mechanisms; and (6) skewedness of reform efforts.

1. Inadequate Diagnoses of Problems

As would be expected in the processes of innovation, a number of problems were identified; however, their solutions were offered without thorough diagnoses. Often, solutions offered were off-target in that they represented organizational responses to problems which had been superficially defined and poorly analyzed under the pressures of time and, perhaps, political expediency. Training of police cadet officers began to mushroom, particularly in Uganda and Nigeria, where little had been established by colonial police policy makers and administrators.

2. Inadequate Planning

From the inadequate diagnoses there naturally flowed inadequate planning. Ministries of the interior or justice or criminal justice planning agencies generally dealt with large-scale change efforts in an essentially ad hoc fashion. Their goals were usually fuzzy and incapable of being operationally defined. Policy makers failed to draw short-, intermediate- or long-range goals for their resolves and, thus, could not delineate strategies for implementing them. Without these strategies, alternatives and revisions were likewise impossible.

3. Lack of Resolve to Anticipate Implementation Problems

Missing from what planning was done was the recognition of the most critical phase--implementation--and all it would require. An assumption was made to the effect that once plans were drawn, the people would just naturally carry them out, financial requirements would be met, and facilities and equipment would appear. It was felt that should any resistance to change be encountered (and none was really expected, in spite of the knowledge that change is always resisted in some fashion), administrators had only to replace staff members who could not be expected to devote themselves wholly to the effort called for by the plans.

4. Uncritical Acceptance of Innovations

From the above attitude there resulted uncritical acceptance of innovations. From the four corners of the globe came ideas and suggestions, and apparently caution was thrown to the wind as resources were allocated for an assortment of relatively untested, ill-defined and poorly designed innovations which came devoid of operational procedures or guidelines. Little had been done in the way of pre-testing or pilot programming. In some cases in the new states of Africa South of the Sahara, for example, policy makers and administrators introduced changes which they themselves did not fully understand simply because they had been informed that such programs had "worked" overseas.

5. Absence of Monitoring and Feedback Mechanisms

The lack of monitoring and feedback mechanisms eliminated the ability to deal with problems promptly so as to allow criminal justice change processes to proceed in an orderly manner and with a sense of direction toward its aims and objectives. Through monitoring and feedback, mistakes, areas of stress and frustration, and causes for delays can be identified and alternative routes can be developed.

6. Skewedness of Reform Efforts

Most revolutionary and reformist movements in history have been led by members of privileged classes who "jumped class lines."[36] The same has been true in Alaska as well as in the new states of Africa South of the Sahara. A look at the list of participants in the Alaska Corrections Master Plan, or Somalia's legal team, or even Tanzania's socialist approach, for examples, reveals that the dominant figures were politicians, professors, researchers and practitioners rather than clients, practitioners, and representatives of the village communities. This happened withstanding the fact that, unlike the peasants in the new states of Africa South of the Sahara, by virtue of the Alaska Native Claims Settlement Act of 1971,[37] there were Native corporations. Thus, the forces working toward change in Alaska came, for the most part, from outside consumers of justice. In fact, there appears to have been deliberate reluctance to involve staff, community leaders and clients in the deliberations concerning various innovations or proposed changes. In Malawi, for example, the legal

establishment objected to the retribalization of the legal system.[38] Also, Allott[39] points out, in several African countries, such as Ethiopia and Ivory Coast, unification has worked mainly by suppressing what is most "African" in the laws, and its replacement by received laws.

What we have been confronted with, then, in Alaska and in many of these new states of Africa South of the Sahara is a cult of contemporaneity. We hear constantly of a generation gap. People are being driven apart by an ugly process of polarization which demands a choice between the past and the present. "That is backward" was an early slogan of the cult. The test of validity is relevance, and only the contemporary is relevant.

As any good student of psychology can tell you, lack of involvement leads to resistance to changes. In other words, for movement toward authentic legal reform there is need not only for experts in "justice," but also experts who can evaluate socioeconomic efforts of legal reform on various segments of the population.

Faced with the above mentioned and related issues, the average African peasant or Native Alaskan has taken to what he or she is used to in dispute settlement. For example, in Africa South of the Sahara Canter noted that one of the four reasons for a Zambian headman's rejecting a case in the village moot is either that it involves close relations between disputants who have had a long history of conflict or that it involves a headman from another village or a member of the (modern) political elite.[40]

Also found are tactics invented by local people to increase the possibilities for equity. Many years ago, R. F. Barton[41] described a system of fines among the Ifugao of the Philippines which was organized according to the ability of each class to pay. The Zapoteo required the powerful to be more responsible than the powerless, thus penalizing the rich who stole more severely than did the poor. Nader noted that weaker parties find avenues of redress which may be perceived as competitive with the disputing mechanisms controlled by the dominant parties.[42] In the Ghanian town of Koforidua, it has been found that there are varieties of access that people have, ranging from courts to supernatural processes.[43]

In the case of Alaskan villages, Angell recently alluded to the extent to which the Natives do their own thing in dispute settlements. He writes: "With exception of state enforcement agencies, over 30% of the village officials interviewed indicated the level of state justice services are either inadequate or not provided to their villages."[44]

SUMMARY AND CONCLUSIONS

This paper has sought not only to describe the general features of legal institutions and traditions which may be found in both Alaska and the new states of Africa South of the Sahara, but also to see what we can glean from a panoramic view. In the first case, beyond the misconceptions, stereotypes or bad imagery traditionally associated with both Alaska and Africa South of the Sahara, we find a rich reservoir of differences and similarities, as reflected in the efforts to bring about

meaningful criminal justice reform, as in much of everything else. In the second case, the challenge to Alaskan as well as African legislators, the judiciary and advocates of criminal justice integration is to promote the evolution of unified and effective modern criminal justice systems which, while serving economic and social needs of the people, will retain those vital elements of both customary and "received" laws which are part of their heritage. Such systems, which need not exclude patterns of principles of law from other sources which are felt to be appropriate, will above all be expanded and molded by original responses in these countries to the new situation and problems which they face.

Legal history has, of course, known plenty of parallels to the current Alaskan and African situations, and it is full of the fictions and strategies that adjustments have rendered necessary. If the role of customary law/Islamic law is not to suffer under this strain, we should take steps to prepare for it.

REFERENCES

1. This expression is used to exclude the Mediterranean belt which has felt strong influences from Europe and the Arab world and the Republic of South Africa where the man is deeply entrenched.

2. For example, Kenya, Uganda, Nigeria, Tanzania (formerly Tanganyika), Ghana (formerly Gold Coast) and Zambia (formerly Northern Rhodesia) came under their rule. Chad, Niger, Ivory Coast, Senegal and part of Cameroon, for example, came under French rule. Zaire (formerly Belgium Congo) came under the Belgians. Mozambique and Angola are classic Portuguese colonies. Somaliland was shared between the British, Italians and the French, and Liberia was founded by former American slaves.

3. E. Ehrlich, The Fundamental Principles of the Sociology of Law (Cambridge, MA, 1936).

4. Ibid.

5. Ibid.

6. Ibid.

7. Ibid.

8. Ibid.

9. Ibid.

10. Ibid.

11. K. Oberg, The Social Economy of the Tlingit Indians (Seattle: University of Washington Press, 1973), p. 10.

12. Ibid.

13. M. M. Green, Ibgo Village Affairs. 2nd ed. (London, 1964), p. 113.

14. E. Cerullil, "Somalia," vol. 1, A.F.I.S. Mogadiscio, 1957.

15. J. Roscoe, The Baganda (London: MacMillan, 1911).

16. NAI, CSO 1/3, V1, MacGregor to Colonial Office, 22 March 1903.

17. Ibid.

18. L. A. Fallers, Law Without Precedent (Chicago: University of Chicago Press, 1960), p. 313.

19. W. Kunkel, An Introduction to Roman Legal and Constitutional History (Oxford, 1966), p. 74.

20. Ibid.

21. T. N. Tamuno, The Evolution of the Nigerian State: The Southern Phase, 1898-1914 (London, 1972), p. 35.

22. Sir Andrew Cohen, British Policy in Changing Africa (London: Routledge, 1959), p. 22.

23. Ibid, pp. 22-25.

24. See M. Gluckman, The Judicial Process Among the Barotse of Northern Rhodesia (Manchester: University Press for the Rhodes-Livingstone Institute, 1955).

25. T. O. Elias, Groundwork of Nigerian Law (London: Routledge & Kegan Paul, 1954).

26. Ibid.

27. Ibid.

28. Quoted in T. W. Walbank, Contemporary Africa; Continent in Transition (Princeton, NJ: Van Nostrand, 1956), pp. 93-94.

29. H. N. Michael, Lieutenant Zagoskin's Travels in Russian America, 1842-1844: The First Ethnographic and Geographic Investigations in the Yukon and Kuskokwim Valleys of Alaska. Arctic Institute of North America, Anthropology of the North; Translations from Russian Sources No. 7 (Toronto: University of Toronto Press, 1967), p. 285.

30. M. E. Price et al., Native American Law Manual (California Indian Legal Services, 1970), p. 1.

31. E. Gruening, The State of Alaska (New York: Random House, 1954).

32. E. O. Wright, The Politics of Punishment (New York: Harper Torchbooks, 1972).

33. President's Commission on Law Enforcement and Administration of Justice, whose voluminous reports were published in 1967.

34. Alaska Corrections Master Plan: Executive Summary (Juneau: Criminal Justice Planning Agency, 1979), p. 1.

35. P. Contini,"Integration of Legal Systems in the Somali Republic," in Integration of Customary and Modern Legal Systems. Institute of African Studies (University of Ife Press, 1971).

36. Marx Engels, 1972, vol. 4, pp. 471. See D. Apter, 1971, p. 65.

37. The Alaska Native Claims Settlement Act contains, among other things, three basic elements: (1) entitlement of land to Alaska Natives; (2) money paid to Alaska Natives for the extinguishment of claims to lands taken; and (3) mechanisms determing how and to whom entitlements and monies shall be granted.

38. C. Legum, African Contemporary Record, vol. 5, 1972/73 (London, 1973), p. B141.

39. A. N. Allott, Judicial and Legal Systems in Africa (London: Butterworths, 1962).

40. R. S. Canter, "Dispute Settlement and Dispute Processing in Zambia: Individual Choice Versus Societal Restraints," in The Disputing Process--Law in Ten Societies, eds., L. Nader and H. F. Todd (New York: Columbia U. Press, 1978).

41. R. F. Barton, "Ifugao Law," University of California Publications in American Archaelogy and Ethnology, vol. 15, no. 1, 1919, reprinted 1969 (Berkeley: University of California Press), pp. 1-186.

42. L. Nader, "Styles of Court Procedure: To Make the Balance," in "The Ethnology of Law: A Bibliographic Survey," eds., L. Nader, K. F. Koch, and B. Cos, Current Anthropology 7 (March 1969):267-294.

43. M. Lowy, The Ethnography of Law in a Changing Ghanian Town, Ph.D. dissertation, University of California, Berkeley, 1971.

44. J. Angell, Alaskan Village Justice: An Exploratory Study (Anchorage, AK: Criminal Justice Center, 1979), p. 67.