

AFRICAN LEGAL STUDIES—A SURVEY OF THE FIELD AND THE ROLE OF THE UNITED STATES

DENIS V. COWEN*

INTRODUCTION

In the United States lawyers have been slow starters in the field of African studies. While American anthropologists and sociologists—and in more recent years, political scientists and economists—have been prolific in African research,¹ their legal colleagues have, with few exceptions,² remained silent. Perhaps this is attributable in some degree to the natural conservatism of the breed, or—as the less charitable may aver—to legal parochialism. More probably it is due to the pressing claims on time and money which are made in American law schools by less exotic and, it would seem, more immediately practical subjects; then, too, it must be borne in mind that the freedom of the United States from colonial commitments in Africa removed one of the incentives which induced lawyers in countries like Britain or France to devote themselves to this field. But perhaps the main reason for the late entry of American lawyers into this area is the fact that it is only in very recent years, with the upsurge of independence throughout Africa, that knowledge of African legal systems, and of their potential development, has become essential for the effective conduct of international relations and trade. The recently won freedom of African states has generated a new vitality, and has brought into focus new problems of world-wide importance.

But despite the comparative novelty in America of African legal studies, it would be a mistake to conclude that no work has been done in this field. While it is perhaps true that lawyers, as a class, have tended to be less prolific and, possibly, less influential in African studies than their colleagues in anthropology, sociology, political science, and history,³ they have not in the past neglected African problems

* B.A. 1937, LL.B. 1939, LL.D. 1962, University of Cape Town, South Africa. Professor of Law and Director of the Center for Legal Research (New Nations), University of Chicago. Author of several books and articles on constitutional problems of the new nations, the latest being *THE FOUNDATIONS OF FREEDOM* (1961).

¹ An impressive record of American achievement in these fields is to be found in Howard, *American Contributions to Social Science Research on Africa*, in U.S. NAT'L COMM'N FOR UNESCO, 8TH NATIONAL CONFERENCE, AFRICA AND THE UNITED STATES—IMAGES AND REALITIES III (1961).

² Particularization in these matters is invidious.

³ The contribution of anthropologists and sociologists in the field of African law and administration has, on the whole, been outstanding in quality and long-sustained. Colonel John Maclean, who had been appointed Chief Commissioner in British Kaffraria in 1852, published his *A Compendium of Kafir Laws and Customs* as far back as 1858. This consists of several valuable memoranda compiled, under Maclean's direction, by Messrs. Dugmore, Warner, Brownle, and Ayliff. Though not the work of professionally trained lawyers, Maclean's *Compendium* has long been regarded as an African legal classic. Extracts are to be found in ALBERT KOCOUREK & JOHN HENRY WIGMORE (EDS.), *SOURCES OF ANCIENT AND PRIMITIVE LAW*, reprinted in 1 *THE EVOLUTION OF LAW* SERIES 292-325 (1915). A great deal of the more recent legal writing by contemporary anthropologists and sociologists (for example, by Gluckman, Schapera, Bohannan, and many others) is indispensable to professional lawyers.

and institutions. On the contrary, pioneer work of the kind begun by an earlier generation of lawyers, like J. M. Sarbah and Casely Hayford in Ghana,⁴ has been carried steadily forward, until today the corpus of legal literature in the African field is very considerable.⁵

But whatever the achievements of the past may have been, new and exciting opportunities in the African field are now being offered to lawyers, as new problems come clearly into focus. If it be true that law is, in large measure, a framework within which a community's social, political, and economic life has its being, it is only within comparatively recent years that in many parts of Africa the problem of adjusting and adapting the framework itself has become urgent, due, primarily, to the dramatic development since World War II of modern urban and industrial life, and their impact on tribal mores. And what is perhaps more important, it is only since the advent of their independence that the new nations themselves have, in modern times, had the full responsibility and opportunity to use law and legal institutions consciously as instruments in nation-building.

The growth of African nationalism and the upsurge of independence throughout the Continent have, indeed, given a powerful new fillip to the development of African studies; and in law, no less than in other fields, this marks the beginning of a new epoch. Much of what was achieved in Africa during the last century and the first half of the twentieth century was achieved within a colonial context, and within the limits set by colonial policy. The possibilities and perspectives are now vastly different. A great opportunity is at hand for lawyers in Africa to do a major job of social engineering, such as Roscoe Pound advocated in the United States fifty years ago.

It would, of course, be egregiously naïve to assume that African legal development began in the colonial era. Long before European colonization, Africans had made their own contribution to law and its administration;⁶ and now they are free to do so again. But on this occasion the challenge is greater than ever before. For the first time African states are taking their place as adult members of an international society; and within their own borders, they are beginning to grapple with the formidable task of welding together what was good in the colonial heritage,

⁴J. M. SARBAH, *FANTI CUSTOMARY LAWS* (1st ed. 1897; 2d ed. 1904), and *FANTI NATIONAL CONSTITUTION* (1906); CASELY HAYFORD, *GOLD COAST NATIVE INSTITUTIONS* (1903).

⁵Here again, particularization is invidious, and a comprehensive bibliography is beyond the scope of this paper. Suffice it to say that the volume of authoritative writing by lawyers in African countries has in recent years grown enormously, especially in Nigeria (*e.g.*, Elias, Coker, and Ajayi), Ghana (*e.g.*, Branford Griffith, Redwar, Rattray, Danquah, and Ollennu), French-speaking West Africa (d'Arboussier), and South Africa; and that no bibliography of African studies would be adequate which did not take account of the contributions made, among English lawyers, by Professors Arthur Phillips and J. N. D. Anderson and Dr. A. N. Allott; among French lawyers, by Luchaire, Rolland, and Lampue; among Belgian lawyers, by Sohier and Solus; and among Dutch lawyers, by Kollwijn and Korn.

Valuable bibliographies are to be found in A. ARTHUR SCHILLER, *SYLLABUS IN AFRICAN LAW* (1961); P. J. IDENBURG (Ed.), *THE FUTURE OF CUSTOMARY LAW IN AFRICA* (1956); T. O. ELIAS, *THE NATURE OF AFRICAN CUSTOMARY LAW* (1956); A. N. ALLOTT, *ESSAYS IN AFRICAN LAW* (1960); and in the various issues of the *Journal of African Law* (vols. 1-5, 1957-1961), edited by Dr. A. N. Allott.

⁶See *infra* note 67 and accompanying text.

and indeed what they may find to be good anywhere, with what they deem worthy of preservation in their own indigenous institutions—so as to make a stable, healthy, and viable whole.

And so, it is perhaps worthwhile, as new vistas begin to open up, to take stock of the position and give some attention to the *why*, the *what*, and the *how* of legal work in this field.

A. Identifying the Legal Problem Areas in Africa

A comprehensive and systematic discussion of the subject matter of this study, even if confined to basic aspects, would require a treatise, rather than a single paper, and—more pertinently—it would call for range of knowledge, experience, and interest beyond the scope of most men, and certainly beyond mine.

A start may be made, however, by attempting to formulate some of the main legal problems that await solution in contemporary Africa; or, more accurately and also more modestly, one may begin by outlining the legal “problem areas.” And thereafter it may be helpful to discuss what can and should be done to help—both in Africa itself, and outside Africa.

Looking at the matter from the inside, so to speak, from within Africa itself, it is fair to say that the subjects within the lawyer’s province which are likely to hold the main interest of Africans throughout the continent for a substantial period of time—and which, I believe, should also hold the interest of American scholars—fall broadly under six heads. These may be specified briefly and in summary form as follows, reserving fuller explanation and discussion for later in this paper:

1. *The phenomenon of cultural and legal pluralism*, with particular reference to the nature and future of indigenous “customary law” and of other “personal” systems in Africa.
2. *The problems to which cultural and legal pluralism gives rise*, with particular reference to the evolution of national legal systems and their role in nation-building; the problem of interpersonal or internal conflict of laws; and the mutual interaction and accommodation of Romanistic and English common law systems within a single political unit.
3. *The reform of private law*, with particular reference to the accommodation in African legal systems of the facts of growing industrialization and urbanization; the development and improvement of the law relating to land-tenure, succession, the family, and the status of women; and with particular reference, also, to the provision of an adequate corpus of modern commercial and industrial law.
4. *Constitutional and administrative law*, with special reference to the technique of constitution-making; the adaptation of various forms of government—both foreign and indigenous—to accommodate local and contemporary needs; the status and future of chiefs; the status and organization of the Courts and the legal profession;

“the rule of law” and the protection of civil liberties; and the control of administrative agencies, especially in the light of the growth of state-controlled economic enterprises.

5. *International law and legal studies*, conceived in a broad context of international relations and organization; international banking, trade and investment; the amelioration of economic underdevelopment; and the relevance and future role in Africa of the European Common Market and of African organizations of a similar kind.
6. *Legal education*, with special reference to the role of comparative law and legal history; the teaching of the elements of Romanistic legal systems to students with a British or American background; the problem of interpreting the United States legal system in an English common law setting, and *vice versa*.

There are no doubt those who would prefer to group these topics under other, perhaps more suggestive and fruitful headings. Again, it is probable that there are important topics which have been omitted from this brief summary but which claim and will receive attention. Moreover, it must be borne in mind that emphases and priorities will vary from time to time in different parts of Africa. The priorities, for example, in Nigeria are not the same as those in the Cameroons or in Ethiopia, and these differ in turn from the priorities in, say, South Africa or in the Central African Federation. Differences of opinion on these matters do, in fact, exist and they are healthy; for they serve to focus attention on the old Aristotelian truth that at the beginning of any subject lies the problem of asking the right questions, and they may also induce a decent humility in any attempt to define the scope of African legal studies.

But, broadly speaking, it may, I think, be accepted that the “problem areas” enumerated above are, and will for some time remain, of compelling interest to the African continent as a whole. This may become more readily apparent when, presently, I deal more fully with each in turn.

B. Differences in the Potential Interest of Various Countries and Institutions, and in Their Capacity to Contribute

When we look to the contribution which various countries may have to make towards the solution of African problems, it appears helpful to draw certain distinctions.

In the first place it should be emphasized that there are aspects of African legal studies which have jurisprudential interest of a more or less universal character. Among these may be cited the problems of “reception,” “infiltration,” and “hybridization,” and the respective roles of legislation, custom, the judicial process and professional opinion in legal development.⁷ In these fields familiarity with some African material may do much to stimulate jurisprudential studies in any major law

⁷ In regard to one specific but important aspect of the role of legislation, see *infra* at 552-53.

school anywhere.⁸ It adds materially to the interest of a course on the nature of the legal process in modern Western societies to call attention to differences in approach and emphasis obtaining in other societies in regard to such matters as, for example, the role of the judge or the legal practitioner in litigation or arbitration; and it is plainly valuable to try to account for the differences. Nor is there any longer much excuse for neglecting these and similar topics; for a substantial and relevant body of literature has begun to accumulate, especially in recent years, in regard to Africa.⁹

On the other hand there are many subjects of less universal and more localized interest, in regard to which it is by no means the case that all countries are equipped to make an effective contribution or, indeed, would be interested in trying to do so. Thus, to cite an example given by Professor Max Rheinstein,¹⁰ differences in school background, methods of instruction and examination, and—above all—in the length of time required to obtain a professional qualification, will no doubt continue to induce Africans from former British territories to study at British institutions of legal education rather than at American universities—at any rate at the first degree level. And in those parts of Africa where the legal system is Romanistic, it need hardly be said the basic legal training will continue to take place either in Africa or in Europe.

At the postgraduate level, however, the scope for African legal studies is plainly wider, though here again, the range of available facilities and probable specialization will differ from country to country, and indeed from university to university. It would, for example, seem quite natural for, say, a Canadian university to give particular attention to problems of legal pluralism, federalism, and closer association in West Africa, taking in both the areas which were formerly under British control and the French-speaking areas. Indeed certain Canadian universities may be in a peculiarly favorable position in this regard, not only because of language facilities, but also because of the psychological advantage which may derive from previous non-commitment in the colonial field.

In Africa itself interesting possibilities of potential specialization present themselves. South African and Rhodesian universities, for example, are potentially well placed to study and aid the growth of a legal system which aims not only at accommodating indigenous African and Islamic elements with non-indigenous (Western)

⁸ Compare Dr. A. L. Goodhart's foreword to MAX GLUCKMAN, *THE JUDICIAL PROCESS AMONG THE BAROTSE OF NORTHERN RHODESIA* (1955), and Dean Roscoe Pound's foreword to HUNTINGTON CAIRNS, *LAW AND THE SOCIAL SCIENCES* (1935).

⁹ See, for example, ARNOLD L. EPSTEIN, *JUDICIAL TECHNIQUES AND THE JUDICIAL PROCESS: A STUDY IN AFRICAN CUSTOMARY LAW* (1954); MAX GLUCKMAN, *THE JUDICIAL PROCESS AMONG THE BAROTSE OF NORTHERN RHODESIA* (1955); T. O. ELIAS, *THE NATURE OF AFRICAN CUSTOMARY LAW* (1956); ARTHUR PHILLIPS, *NATIVE TRIBUNALS IN KENYA* (1948); PAUL BOHANNAN, *JUSTICE AND JUDGMENT AMONG THE TIV* (1957); Hoebel, *Three Studies in African Law*, 13 *STAN. L. REV.* 418 (1961). Cf. KARL N. LEWELLYN & E. ADAMSON HOEBEL, *THE CHEYENNE WAY* (1941); E. ADAMSON HOEBEL, *THE POLITICAL ORGANIZATION AND LAW-WAYS OF THE COMANCHE INDIANS* (1940).

¹⁰ UNIVERSITY OF CHICAGO LAW SCHOOL, *HIGHER EDUCATION, LAW AND TRAINING FOR THE LAW IN AFRICA* (mimeo. 1961).

elements, but which may also achieve a fusion of Romanistic and Anglo-American legal thought. For the time being this exciting role may be played more actively in West Africa than in South Africa; but one day, when present racial preoccupations, stupidities, and digressions have passed away,¹¹ Southern Africa will, hopefully, contribute in full and great measure to a rich and distinctively African legal development.

Again, an undoubted need would be met by the early establishment in various parts of Africa of centers or institutes for comparative legal research of an advanced nature. That difficulties stand in the way of an undertaking of this kind is clear. There are, for example, delicate questions concerning location, and the relationship, if any, between such institutes and governments and other centers of higher learning. But these problems are not insuperable—as, for instance, the experience of the Indian Law Institute or (to give a different example) the Institute for Advanced Legal Studies (London) has shown; and the sooner they are grappled with in an African context the better for the future of African legal studies and indeed the future of Africa itself.

Such being the range of this subject, it is necessary to put on one side any pretensions to comprehensiveness, and to try to limit the field to what one may hope to manage in a single paper. To this end I shall try to elucidate the “problem areas” of contemporary Africa as effectively as I can, but in regard to what can and should be done in various countries to help in the “solution” of problems, or to advance research, I shall confine myself to what I think might usefully be attempted by American legal scholars.

I

THE PROBLEM AREAS

A. The Phenomenon of Cultural and Legal Pluralism

Basic to an understanding of contemporary Africa is the phenomenon of cultural and legal pluralism—that is to say, the present fact (whatever the future may hold) that in most parts of Africa peoples of different ethnic, cultural, and religious groups live within one and the same political unit under different systems of law.

To begin with, in most territories several different varieties of “customary,” or indigenous, African law operate side by side. Matrilineal systems, for example, differ significantly from patrilineal ones; and within each of these systems, in turn, there are tribal and regional variations.

Then, too, account must be taken of the fundamental role that has been played in the past in various regions of Africa, and which is still being played, by particular Western legal systems, such as the English common law, French law, Roman-Dutch

¹¹ There is a tendency among some scholars, and not a few institutions and foundations, to “write off” South Africa as hopeless or too hot to handle. This is both short-sighted and unnecessarily timorous. It is unsound to equate South Africa, her peoples—black, white, and brown—and her universities with the policies of any particular government or even sequence of governments.

law, and the laws of Belgium, Portugal, and Spain. These laws—the laws of colonizing or former colonizing powers—have in the past all played well-defined roles which bear re-examination. Each has, moreover, imprinted its distinctive character on many aspects of national life; and though the future of these laws may be somewhat more difficult to assess, it is unlikely that their influence will be obliterated. Nor—unless I much mistake the climate of opinion—would Africans wish this influence to be obliterated, for although the application of these Western legal systems may sometimes in the past have been confided to fallible, because human, hands, both the systems themselves—and, let it be added, their practitioners—have made great contributions. The entire eradication of the colonial legal system, even were it desired, would leave large and ragged gaps.

In this picture of legal and cultural pluralism, an added complication—or, as I prefer to say, a source of enrichment—arises in those areas where Islamic and Hindu groups are strong and where account must be taken of their laws.

However, to state the phenomenon of cultural and legal pluralism in this summary fashion is to give it a misleading clarity. It is one thing, for example, to say that various systems of “customary law” operate in Africa; it is quite another to ascertain with precision what rules these systems prescribe, and what are the similarities and differences between the systems themselves.¹² Precise groundwork of this kind is difficult and laborious, but essential. It is essential because where, as is often the case, it is sought to change or to build upon a customary institution, one should know exactly what one is dealing with. It is difficult work because—to mention two points only—customary law often lacks, or defies circumscription within, a formal or conceptual framework, and, further, what is called “customary law” in Africa is often in the process of rapid change—changing, in fact, while the work of recording goes on. Fortunately this work is now being undertaken, on a broad scale, under the able direction of Dr. A. N. Allott at the School of Oriental and African Studies in London.

In this regard, the compilation of comprehensive bibliographies should be regarded as complementary and equally essential groundwork. Masses of valuable legal material lie buried in rare and out-of-print “blue-books” and other official publications; and often, too, they are to be found, like flies in amber, in unexpected places—in the pages of journals which lawyers seldom read. Years of work lie ahead in making the currently existing material more generally known and readily available;¹³ and it is to be hoped that in this task the unusually rich resources of the South African and Rhodesian archives will not be neglected.

Again, it is one thing to say that peoples of various groups live in Africa under different laws, but this leaves out of account the fact, which anthropologists have stressed in recent years, that the line of demarcation between the groups is often

¹² See generally, A. N. ALLOTT, *The Unity of African Law*, in *ESSAYS IN AFRICAN LAW* 55-71 (1960).

¹³ Here, Dr. A. N. Allott of the School of Oriental and African Studies, University of London, and Professor A. Arthur Schiller of Columbia University, are to be congratulated on making a start with the compilation of accurate and scholarly bibliographies.

for from clear-cut. Especially in African urban communities, it is becoming increasingly blurred.

All this is not to deny that cultural and legal pluralism is still a basic fact in contemporary Africa. It does, however, call attention, at the very outset of African legal studies, to the need to examine the actual phenomenon itself, that is to say, its more precise details as well as its broad outlines, its future trends as well as its existing contours.

B. The Problems to Which Cultural and Legal Pluralism Gives Rise

Cultural and legal pluralism is, of course, by no means new, nor does the continent of Africa have any monopoly of it and of the problems to which it gives rise. Every student of legal history is familiar with the broad outlines of this phenomenon during what may be regarded as its heyday in Europe, from the decline of the Roman Empire until the rise of the principle of territoriality in the eleventh and twelfth centuries A.D.¹⁴ And, no doubt, equally familiar are the contemporary examples in the Middle East and in Indonesia.

Though the problems to which cultural and legal pluralism gives rise are manifold, there are among them at least three of major interest in contemporary Africa; and each will severely tax the lawyer's skill and the politician's wisdom.

The first and most fundamental problem may, perhaps, be stated as follows: to what extent should the condition of cultural and legal pluralism be allowed to continue? More specifically, if legal pluralism is severable from cultural pluralism, to what extent should legal pluralism be discouraged? That cultural pluralism may continue as a fact, for some time, is plain. But in several African states today there is a discernible tendency to foster the development of a single national legal system, and to play down the role of laws which are personal to religious, tribal, and ethnic groups. Various reasons may be given for this trend, but perhaps the most obvious ones are that a uniform national legal system may aid the development of national unity and sentiment, and, if conceived on modern lines, may at the same time contribute towards the "modernization" of a country previously regarded as "backward." It was partly for these reasons that in Turkey in 1926 Kemal Atatürk sought to eliminate pluralism at one stroke by the radical substitution of a modern law of Swiss origin for the then prevailing multiplicity of personal religious laws in the Ottoman Empire.¹⁵

Now, although in contemporary Africa the facts of urbanization and industrialization have already wrought big changes in customary law and sapped its strength, it remains true that there are obvious dangers in attempting to force the pace along the lines favored by Kemal Atatürk. Not only may such an attempt prove divisive

¹⁴The leading work in the field is probably still KARL NEUMEYER, *DIE GEMEINRECHTLICHE ENTWICKLUNG DES INTERNATIONALEN PRIVAT—UND STRAFRECHTS BIS BARTOLUS* (2 vols.) (1901 and 1906).

¹⁵See, generally, *Le Colloque d'Istanbul sur le Problème de la Réception des droits étrangers*, 6 *ANNALES DE LA FACULTÉ DE DROIT D'ISTANBUL* v-xii, 1-251 (1956).

rather than unifying, but it would seem that there are other more thorough-going and effective methods of encouraging the growth of a uniform legal system.

Some branches of law are more deeply and emotionally involved with the life and culture of a people than others and hence more resistant to sudden and radical change by legislative fiat. This is the case, for example, with family law and the law of succession as distinct from, say, the law relating to such impersonal transactions as negotiable instruments. For this reason, family law may well lend itself more easily, and ultimately, more effectively, to adaptation and development by the gradual process of judicial interpretation and the influence of professional opinion, rather than by radical legislative reform.¹⁶ However, even within the field of family law, generalizations of this kind should, in the present state of knowledge, be made with caution. It is, for example, being suggested in Ghana at the present time that polygamy may be discouraged by a statutory provision to the effect that only one "marriage" may be registered, and that only the spouse of a registered union shall be entitled to succeed on intestacy.¹⁷ The effect of the proposal, if it becomes law, and of the indirect sanction which it imposes, will be studied with interest. Another fruitful approach to the general problem, although limited in scope, would seem to be that favored by the late Hans Cory in Tanganyika, that is to say, the study at depth of a group of related (for example, matrilineal) customary systems, with a view to their recordation and gradual unification after full discussion with tribal elders.¹⁸

But whatever the course of wisdom may be in a particular case, or in regard to particular branches of law, the essential point to stress for present purposes is that the nationalization or "modernization" of legal systems and the eradication of pluralism, even where desirable, are delicate tasks that call for a high order of statesmanship, as well as considerable legal skill and knowledge, especially of a comparative and historical kind. It is partly for this reason that an early start in the comparative study of law and legal techniques should be encouraged in the currently developing African law schools. It would, for example, be very shortsighted for African governments and their advisers to ignore the lessons which countries like India, Turkey, and Japan have to offer in the process of developing and modernizing their legal systems.

Moreover, there should be added to the techniques of significant comparative study the illumination to be gained from legal history. Problems concerning the interaction of various legal systems, problems of "hybridization" and "infiltration"—now looming large in contemporary Africa¹⁹—are, indeed, the very staple of legal history; and they merit a place in any realistically planned African law curriculum

¹⁶ Compare the conclusions reached by the London Conference, in *THE LONDON CONFERENCE ON THE FUTURE OF LAW IN AFRICA, RECORD OF PROCEEDINGS* (Allott ed. 1960). See 4 *J. AFRICAN LAW* 1 (1960). And see JAMES BRYCE, *Roman Law and English Law*, in 1 *STUDIES IN HISTORY AND JURISPRUDENCE* 98, 124 *et seq.* (1901).

¹⁷ The Marriage, Divorce, and Succession bill of 1962, introduced by the Minister of Justice.

¹⁸ HANS CORY, *SEKUMA LAW AND CUSTOM* (1953).

¹⁹ See generally Twining, *Some Aspects of Reception*, 5 *SUDAN L. J. AND REPORTS* 229 (1960).

that purports to offer more than a severely practical vocational training. I do not, of course, underestimate the urgent need for practical "bread and butter" lawyers in contemporary Africa, but wish merely to emphasize that Africa demands, and deserves, more in addition.

A second great complex of problems to which legal pluralism gives rise is that which has generally come to be known under the heading of inter-personal conflict of laws, internal conflict of laws, or inter-gentile law (*inter-gentiel recht*).²⁰ How should one regulate disputes between members of different ethnic or religious groups living within the same political unit under different laws—for example, between a Yoruba and a Hausa in Nigeria, between a Zulu and a Xhosa in South Africa, or between a white settler and a Swazi in Swaziland?

African colonizing powers have approached this problem in various ways, which may, however, conveniently be grouped under two heads: (i) the approach in territories which are or have been under British or white South African influence; (ii) the approach in territories which are or have been under continental (*e.g.*, French or Belgian) influence. Within each group significant variations occur from territory to territory. For example, French and Belgian practice are distinguishable, as are Kenyan, Nigerian, and South African practice.²¹ But, for the purposes of the broad survey here being attempted, it is necessary to pass by the finer distinctions.

In territories which are or have been under British or white South African influence it is usual to distinguish between

- (a) inter-personal conflicts concerning transactions entered into between members of the white colonizing group, on the one hand, and members of the indigenous African or other groups, on the other hand; and
- (b) inter-personal conflicts in disputes which do not involve members of the white colonizing group.

In addition, one finds in these territories a dual and sometimes a multiple set of courts: "Native Courts" for disputes between the indigenous Africans; another set of courts—variously designated as Magistrates' Courts, Superior and High Courts—for litigation between white persons or between whites and others; and in places where, for example, Islamic influence is strong, Sharia Courts for the adherents of Islam.

In the territories which we are now discussing, both the law imported by the colonizing power, and the higher courts established by it, have hitherto enjoyed a special and superior status. To begin with, the law of the colonizing power performs a two-fold function. First, it serves in large measure as an overriding common law

²⁰ Various terminologies have been suggested: see Schiller, Book Review, 4 J. AFRICAN LAW 175 (1960). See generally, R. D. KOLLEWIJN, *INTERGENTIEL RECHT* (1955).

²¹ For a lucid introductory sketch, see ARTHUR PHILLIPS, *Recognition and Application of Native Law*, in *SURVEY OF AFRICAN MARRIAGE AND FAMILY LIFE* 176-89 (1953). That South African practice is more color-conscious than practice in most British colonies is plain, but it is equally plain that a color line has operated in these matters in British colonies generally.

for the entire territory, applicable to all persons whatever their ethnic or religious group may be, especially in cases of serious crime.²² Similarly, where in the view of the colonizing power, African law and custom is repugnant to natural justice and sound morality, cases may be decided in accordance with "natural justice," which in practice tends to be what is prescribed by the law of the colonizing power.²³

Secondly, the law of the colonizing power serves as the white man's own tribal law—a tribal law, however, of special status; for whereas Africans are compulsorily subject to certain branches of the colonizer's law, whites are not subject to any branch of African customary law to which they have not expressly or impliedly submitted themselves.

The assumption of superiority becomes even more apparent when one examines the jurisdiction of the courts. The general pattern is that whereas the jurisdiction of "Native Courts" is limited both as to subject matter and persons (they ordinarily have no jurisdiction over white persons who have not consented to their jurisdiction),²⁴ the courts possessing jurisdiction over whites not only enjoy much more extensive original and appellate jurisdiction (in the upper hierarchy, full jurisdiction), but also have supervisory and appellate jurisdiction over the "Native Courts."

The system outlined above has shortcomings. Not only does it perpetuate racial divisions in a hard and fast way, but it also not infrequently leads to anomalous and unjust results, especially in cases where Africans are denied the benefits, as distinct from the burdens, of the colonizing power's law.

The nature of these anomalies may, perhaps, be illustrated by a few South African cases. Whatever the technical justification may be, it is not easy to explain to the satisfaction of a fair-minded person why a man married according to African law and custom should be held liable for household necessities purchased by his "wife,"²⁵ but that when it comes to the privileges accorded to husband and wife by the law of evidence, a person married according to African law and custom is in the same position as an unmarried person.²⁶ Nor is it easy to explain why a white widow, who had married under Roman-Dutch common law, is entitled (despite contributory negligence on her husband's part) to damages against a person who negligently caused her husband's death, whereas an African widow, who had married under customary law, is denied a similar remedy where her husband's death is negligently caused by a white man.²⁷

²² For critical comment, see Holleman, *The Recognition of Bantu Customary Law in South Africa*, in P. J. IDENBURG (ED.), *THE FUTURE OF CUSTOMARY LAW IN AFRICA* 233 (1956).

²³ Practices varies from territory to territory.

²⁴ The extent to which whites may consent to the jurisdiction of "Native Courts" differs from territory to territory.

²⁵ *Zondani v. Maaske*, 18 E.D.C. 71.

²⁶ An Act to Consolidate the Laws Relating to Procedure and Evidence in Criminal Proceedings and Matters Incidental Thereto, Act No. 56 of 1955, § 226(3) (So. Africa).

²⁷ *Mokwena v. Laub*, [1943] W.L.D. 63. There are some startling statements in the judgment: ". . . native customs are not applicable to civilized people. . . . there is no suggestion that this legality is anything more than the legality which arises under native law and custom, and the defendant being a European, is not bound by legality of that kind." *Id.* at 67.

The pattern adopted in territories colonized by European continental powers has several distinctive features of its own. While it would be extravagant to suggest that continental European colonizers are innocent of the notion that the colonizer's law has inherent superiority, it would seem that the continental approach has avoided some of the defects which have manifested themselves in other regimes. The key idea is that by satisfying certain "*conditions d'assimilation*," that is to say, upon attaining a defined level of "civilization," an African might entirely change his legal status. For example, by being registered as an "immatriculated native" in the Congo, an African ceased to live under tribal law and became subject to localized Belgian law.²⁸

By allowing Africans to move more or less freely from one status to another, the continental approach has, in part, avoided the dangers of administering justice on racial lines.²⁹ But when this has been said, it must be owned that the whole subject of inter-personal conflict of laws is in need of reform throughout Africa. Significant reforms have already been effected in Ghana since Independence,³⁰ but the over-all task will be a long and delicate one. Here again, however, I would suggest that much of value may be contributed by the techniques of comparative law and the illumination of legal history. Let me now briefly state what I have in mind.

Many years ago, in explaining the rationale of the subject of conflict of laws, Dicey pointed out that there were a limited number of courses theoretically open to a court when faced with a conflicts problem.³¹ In the first place, it might refuse to entertain the suit. Secondly, it might assume jurisdiction in an appropriate case, but apply exclusively the substantive rules of the *lex fori* in determining the rights of the parties. Thirdly, it might assume jurisdiction, and directly determine the rights of the parties in accordance with a specially developed body of substantive law—a kind of *jus gentium* or *lex communis*—which would be neither the *lex fori* nor any one of the conflicting systems involved in the litigation. And, finally, the court might assume jurisdiction in accordance with certain rules, and then apply rules of conflict of laws in the strict sense, that is to say, rules which do not directly determine the rights of the parties, but which point to the legal system best suited in the particular case to do so.

Each of these possibilities has well-authenticated historical precedents. Thus, the first was once the attitude adopted by the English courts,³² the second was the trend

²⁸ For a brief summary in English, with reference also to French and Portuguese practice, see ARTHUR PHILLIPS, *SURVEY OF AFRICAN MARRIAGE AND FAMILY LIFE* 181 *et seq.* (1953).

²⁹ It would, however, be a mistake to exaggerate its merits. Before 1948, the process of "immatriculation" in the Congo was simple and in several cases automatic; thereafter it became a more arduous and discretionary procedure, and the standard for admission to the status of immatriculation became that of "middle-class respectability in a typical Belgian city"—a phrase used by Dr. Phillip Whittaker, of Makere, at a seminar held in the Law School, University of Chicago.

³⁰ See, especially, the Courts Law of 21st June, 1960.

³¹ A. V. DICEY, *A DIGEST OF THE LAW OF ENGLAND WITH RESPECT TO THE CONFLICT OF LAWS* (1st ed. 1896).

³² Sack, *Conflicts of Laws in the History of the English Law*, in 3 *LAW: A CENTURY OF PROGRESS, 1835-1935*, at 342, 344 (1937).

of English decisions during the eighteenth century, and, in modern times, it has, in various forms, again found champions—notably in the United States;³³ the third was, in part, favored by the Romans; while the fourth is what may be called the currently orthodox approach of conflict of laws.

Putting the first possibility aside because, if uniformly adopted, it would result everywhere in a complete denial of justice, African communities have an opportunity, in this formative stage of their jurisprudence, to re-examine each of the three other alternatives, to look again at the foundations of the conflict of laws, and adapt to their own purposes what best suits their needs.

This is not the occasion to examine the possibilities of adaptation in detail. But it may be of some use to venture a few broad generalizations. In the first place, the exclusive application of the *lex lori* would often defeat the reasonable expectations of the parties, unless the rules of jurisdiction were elaborated so extensively as to embrace virtually all of what is now called “choice of law”—an objection stated by Dicey sixty-five years ago and, specifically, by the seventeenth century Dutch statisticians. Moreover, this objection would appear to hold good whether one exclusively applies the *lex fori* to conflicts between territorial legal systems, or intra-territorially to inter-personal conflicts adjudicated upon by dual sets of courts administering different “personal” legal systems.

The Roman idea of developing a *lex communis* or modern *jus gentium* may have more to offer in contemporary Africa—at any rate for intra-territorial disputes between members of various groups engaging in transactions of a particular kind. Increasingly, for example, there is a tendency especially in urban areas in several African states—and it would seem to be a healthy tendency—for certain transactions to be governed by a new body of law, a uniformly applicable *jus gentium*, which is neither traditional customary law nor Western imported law.³⁴

On the other hand, the same technique may not be suited to all cases. Indeed, in these matters, it would seem that African lawyers would be well advised to remain discriminatingly eclectic; and for some problems a more fruitful approach may be that of orthodox conflict of laws, which, of course, presupposes the existence and applicability of separate non-uniform laws.

In speaking of the approach of what has here been called “orthodox conflict of laws,” it is important to remember that most of its current doctrines were evolved in a comparatively few centuries subsequent to the age of the Glossators. Again, most of its principles were developed within an international context of “territorial” legal systems, that is to say, systems in which a single body of law is generally and *prima facie* applicable to all persons within a given territory. Plainly these principles

³³ This appears to be the trend of thought of Professor Albert Ehrenzweig in his recent and valuable treatise, *CONFLICT OF LAWS* (1962). Professor Brainerd Currie of Duke University, while favoring the application of the policy of the *lex fori* in the event of a genuine conflict, emphasizes the importance of giving substantive rather than formal definition to what is a conflict case. His stimulating essays are being published in collected form by the Duke University Press.

³⁴ Compare ARTHUR PHILLIPS, *SURVEY OF AFRICAN MARRIAGE AND FAMILY LIFE* 186 (1953).

have a role to play in conflict cases arising as between different territorial legal units in Africa (*Rechtsgebiete* or *territoria juris*); and it would seem, too, that they may have an analogical use in solving the kind of problem with which we are at present concerned, namely, intra-territorial conflicts of an inter-personal kind.

There is, however, another chapter in the early history of private international law which may also have a contribution to offer towards the solution of our problem, at any rate for the period during which legal pluralism remains an actual fact, which in some territories may be a long period. I refer to those centuries in Europe after the fall of Rome but before the rise of the modern principle of territoriality, during which there operated the so-called regime of personal laws.

In a famous passage quoted by Savigny, Agobard (Archbishop of Lyons) tells us how during the regime of personal laws it often happened "that five men, each living under a different law, might be found walking or sitting together."³⁶ The Visigoth, the Frank, the Burgundian, the Lombard, the Frisian, and so on, each lived under his own personal law.

It is usual nowadays for some writers on conflict of laws to make a polite but perfunctory bow to this branch of learning in a few paragraphs of elegant diversion under some such title as Historical Antecedents. It is also usual to discount the subject as being of mere antiquarian interest.³⁶ This, I submit, is a pity; for when the subject is studied more closely, and the operative rules examined, it becomes clear that in those early centuries a more flexible and sophisticated method of solving inter-personal conflicts was practiced than at present obtains in many African territories—more flexible, for example, than the following rule of thumb which obtains in South Africa:³⁷

In any suit or proceedings between Natives who do not belong to the same tribe, the Court shall not, in the absence of any agreement between them with regard to the particular system of Native law to be applied in such suit or proceedings, apply any system of Native law other than that which is in operation at the place where the defendant or respondent resides or carries on business or is employed, or if two or more different systems are in operation at that place, not being within a tribal area, the Court shall not apply any such system unless it is the law of the tribe (if any), to which the defendant or respondent belongs.

At the turn of the last century scholars like Neumeyer in Germany,³⁸ Stoff in France³⁹ and Catellani in Italy⁴⁰ did pioneer work in bringing to light the broad outlines and rationale of the rules which were applied during the era of personal laws; and much has been added to our knowledge of that period in recent years.

³⁶ "Es geschieht oft, dass fünf Menschen zusammen gehen oder sitzen, von welchen jeder nach einem andern Recht lebt." I FRIEDRICH KARL VON SAVIGNY, *GESCHICHTE DES RÖMISCHEN RECHTS IM MITTELALTER* 116 (1834).

³⁶ See, for example, ARTHUR NUSSBAUM, *PRINCIPLES OF PRIVATE INTERNATIONAL LAW* 6-7 (1943).

³⁷ Native Administration Act, Act No. 38 of 1927, § 11(2) (So. Africa).

³⁸ NEUMEYER, *op. cit. supra* note 14.

³⁹ *Étude sur le principe de la personnalité des lois depuis les invasions barbares jusqu' au XII^e Siècle*, *REVUE BOURGUIGNONNE* 1-65, 273-310 (1894).

⁴⁰ I ENRICO L. CATELLANI, *DIRITTO INTERNAZIONALE PRIVATO* 197-265 (1895).

The opportunity is now at hand to put this knowledge to use in contemporary Africa, not, of course, by slavish copying, but by conscious adaptation of principles in so far as they may be found to be useful and acceptable.

The third and last aspect of legal pluralism to which I would here refer is the question of the inter-action between, and the mutual accommodation of, Romanistic and English common law systems in a single political unit. In their more poetic moments comparative lawyers are wont to talk about the fusion of two great streams of legal thought—Anglo-American and Romanistic. I like to think that this may be more than an idle dream, and that one of the chief areas of fusion will be contemporary Africa;⁴¹ for it is perhaps not sufficiently realized how strong and widespread Romanistic legal elements are in Africa. The whole of Southern Africa, a major part of the Central African Federation, the Congo and the Portuguese territories, vast areas of West Africa, and parts of North Africa and Ethiopia—all have powerful infusions of Romanistic legal elements. And what is more to the point, there are several important areas in which English and Romanistic legal ideas are having to find a mutual *modus vivendi*, for example, in South Africa and in Southern Rhodesia where English ideas and an uncodified Romanistic system (Roman-Dutch law) have long co-existed and have tended either to fuse or complement each other. Interesting developments along similar lines may occur in the Cameroons, as between English law and a local codified French law, and, of course, in other parts of Africa, if Pan-African aspirations are fulfilled.

These considerations have a palpably close bearing on the subject of legal education, and especially on the role of comparative law, which will be discussed presently.

C. The Reform of Private Law

Passing on now to the subject of law reform, I shall be very brief. The priorities within the field of private law are reasonably clear: land-tenure, commercial and industrial transactions, marriage and succession. These are the subjects which increasingly claim the attention of the African law reformer.⁴²

The traditional patterns of land tenure and land use in Africa are not wholly adequate to cope with the need for big increases in the production of food and other wealth by the use of modern agricultural and industrial methods. Nor, as it seems to many, do the old systems give adequate security of title in communities rapidly converting to a full-scale money economy. And, perhaps more important still, there exist few accurate statements in legally precise language of the old customary systems themselves. Inadequacy of rule in this important field is unfortunate enough, but uncertainty is intolerable. At the same time reform of land tenure is an exceptionally difficult and delicate task; for powerful interests are almost invariably involved, and the ramifications of change are often more far-

⁴¹ If Britain joins the Common Market, Europe would, of course, be a focus of interest in this regard.

⁴² See, generally, THE LONDON CONFERENCE ON THE FUTURE OF LAW IN AFRICA, RECORD OF THE PROCEEDINGS (Allott ed. 1960). See 4 J. AFRICAN LAW 1 (1960).

reaching than may appear at first sight. Years of arduous work lie ahead in this field.⁴³

The claim to attention of modern commercial and industrial law is no less compelling, as is evident, for example, from the recent scholarly reports and practical work undertaken in Ghana on company legislation and the law of insolvency—work in which Professor L. C. B. Gower, of the London School of Economics, has played so distinguished a part.⁴⁴ Nor should the welding force of a uniform commercial code be lost from sight in those areas where experiments in closer political association and nation-building are now taking place.⁴⁵

Again, in this time when economic and political changes are sweeping through Africa, family law, succession and the status of women must inevitably attract the attention of the law reformer. The increasingly important role which African women are playing in politics, the effect of urbanization, and the influence of religion are all leading to substantial modifications of the old mores.

D. Constitutional and Administrative Law

And now, having dealt at some length with topics of private law, it is time to pass on to the subject of constitutional and administrative law. The field is vast, so vast that it may seem almost an impertinence to attempt any kind of brief survey.⁴⁶ I propose, therefore, to pass rapidly and virtually without comment over many topics which, if space permitted, I would wish to deal with more adequately, both because of their importance and by reason of long sustained personal interest.

I can, for example, do no more here than mention as worthy of serious academic study and research in first-class law schools anywhere such subjects as the appropriateness and potential development of institutions of government when transplanted or grafted abroad;⁴⁷ the use that may be made of second chambers in a bicameral legislative system to accommodate a traditional chieftainship, or as one of the safeguards of a particular constitutional structure;⁴⁸ the relative merits of presidential and parliamentary "types" of executive government in contemporary Africa;

⁴³ There is a voluminous and ever-growing literature on the reform of land tenure. See, for example, *A BIBLIOGRAPHY OF PUBLISHED SOURCES RELATING TO AFRICAN LAND TENURE* (Colonial Office, London 1950); *FOOD AND AGRICULTURE ORGANIZATION OF THE UNITED NATIONS, A BIBLIOGRAPHY OF LAND TENURE* (1955); *U.N. DEP'T OF ECONOMIC AFFAIRS, LAND REFORMS: DEFECTS IN AGRARIAN STRUCTURE AS OBSTACLES TO ECONOMIC DEVELOPMENT (ST/ECA/11)* (U.N. Pub. Sales No. 1951.II.B.3.); *REPORT OF THE WORKING PARTY ON AFRICAN LAND TENURE IN KENYA* (1958).

⁴⁴ The relevant reports were published in Accra in 1961.

⁴⁵ As suggested by Professor Arthur Macmahon at the Symposium on Federalism in the New Nations, held under the auspices of the Center for Legal Research (New Nations), Chicago University Law School, in February, 1962: "It would be interesting to speculate what the history of the United States might have been had commercial law been a subject reserved to the federal legislature."

⁴⁶ For a short but valuable survey dealing with an important part of the field, see *INT'L COMM'N OF JURISTS, AFRICAN CONFERENCE ON THE RULE OF LAW* (1961).

⁴⁷ This is the subject of a study soon to be published by the Duke University Commonwealth Studies Center.

⁴⁸ A subject discussed at the Kenya Constitutional Conference held at Lancaster House, London, in February 1962, and of obvious interest in many other parts of Africa.

the potential role of hereditary Paramount Chiefs as Heads of State;⁴⁹ techniques of constitution-drafting and their suitability in particular situations—whether, for example, in drafting constitutional guarantees in African territories creative ambiguity is preferable to specific detail and definition; the advantages and disadvantages of the judicial review of legislation and governmental action by the ordinary courts or by special constitutional courts, and the various possible alternatives; the techniques and styles of constitutional interpretation; the meaning and significance of various conceptions of the separation of governmental powers; the drafting of criminal codes and penology, especially in areas where Islamic influence is strong, and so on.

These are matters some of which, no doubt, may best be dealt with in a university law school in collaboration with the department of government; but whatever the arrangement, they should not be ignored by lawyers, and especially not by those interested in African public law.

Now, while I must be content here with the bare enumeration of the above-mentioned topics, there are a few matters within the field of public law which I would like to discuss a little more specifically.

In the first place I think that it would be short-sighted for English-speaking law schools to concentrate on English and American ideas, admirable and relevant as they are, to the exclusion of all others in the study and exposition of constitutional, and especially administrative law. This practice, regrettably not infrequent, seems to derive in some quarters from a peculiar notion that all continental or Romanistically-based constitutional regimes are adverse to freedom.⁵⁰ Continental public law is, however, a storehouse of principle of considerable significance for contemporary Africa.

Consider, for example, ideas and practices like the modern continental alternatives to judicial review by the ordinary courts, or the German idea that, in the interests of freedom, legislation should apply generally⁵¹—especially legislative exceptions to constitutional guarantees—and that the need for protection should be focussed on administrative, rather than on legislative action. Not only are these ideas interesting in themselves, but they may well play an increasingly important role in Africa generally, by no means exclusively in areas where continental influence has in the past been strong.⁵² If, as I believe, there is always a strong case for teaching constitutional and administrative law comparatively, it is especially strong in regard to contemporary Africa, which seems healthily determined to remain flexible in the pursuit of precedent and example.

⁴⁹ A subject of considerable current interest and technical complexity in Uganda, Barotseland, Basutoland, and Swaziland.

⁵⁰ It seems hardly necessary to point out that continental systems are not necessarily enmeshed in maxims like *quod principi placuit vigorem legis habet*.

⁵¹ See, e.g., article 19 of the Basic Law of the West German Republic.

⁵² The influence of French ideas on the enforceability of constitutional guarantees has already made itself felt in the former British Cameroons; and the appointment of a Swiss constitutional lawyer to advise the KANU delegation at the recent Kenya Constitutional Conference (February 1962) is not without significance.

I turn now to more fundamental considerations which relate to what may be described as the challenge of contemporary Africa. Africa presents many challenges, two of which, however, are very relevant to our present subject. To begin with, there is a basic challenge to the Africans themselves; then there is an equally fundamental challenge which Africa presents to the rest of the world. I shall try to deal with each in turn.

The challenge to Africans is concerned very largely with the idea of freedom. Will the new African governments be equal to the challenge which freedom itself presents? Every African nationalist, in fact almost every articulate African, if asked what he means by freedom, in an African context, will tell you that part of the answer is that it means freedom from external control, freedom from colonialism. In other words, it means independence or self-determination—freedom to go one's own way, to learn by one's own efforts, and from one's own mistakes. When asked to pursue the analysis beyond mere freedom from external control, Africans usually, and very understandably, go on to include freedom from poverty, freedom from illiteracy and ignorance, freedom from ill-health, and freedom from the hardship and cruelty which exist when a society lacks a basic minimum of social security and social services.

And it is precisely at this point that Africa comes face to face with a fundamental challenge. The classic freedoms of the eighteenth and nineteenth centuries, among which the civil liberties and human rights enshrined in the United States Constitution and its amendments may be regarded as typical, all involve freedom from governmental action. They are in essence limitations upon what the state may legitimately do, statements of what governments may not do. But it has become increasingly clear in the twentieth century that there are essential services which the state not only can but also should undertake for its citizens. It is no longer sufficient to specify what may not be done; increasingly attention is being given to the state's positive duty to provide an environment in which the classic freedoms may be effectively enjoyed.⁵³

Writing on this point some ten years ago, an Indian philosopher and poet, Humayun Kabir, said.⁵⁴

The problem of the twentieth century is to reconcile the conflicting claims of liberty and security. A new charter of human rights must secure to each individual, irrespective of race, color, sex or creed, the minimum requirements for human existence, namely, (a) the food and clothing necessary for maintaining the individual in health, (b) the housing necessary for protection against the weather and for allowing space for relaxation and enjoyment of leisure, (c) the education necessary for developing the latent faculties, and (d) the medical and sanitary services necessary for checking and curing disease and for insuring the health of the individual and the community.

⁵³ The point was emphasized at the Conference on the Rule of Law sponsored by the International Commission of Jurists at New Delhi in 1959. For a report on this Conference, see *INT'L COMM'N OF JURISTS, THE RULE OF LAW IN A FREE SOCIETY* (1960).

⁵⁴ Kabir, *Human Rights: The Islamic Tradition and the Problems of the World Today*, in *HUMAN RIGHTS, COMMENTS AND INTERPRETATIONS—A SYMPOSIUM 191-94* (UNESCO, 1949).

Kabir is, no doubt, correct in seeing the problem as one of reconciling liberty and security. But how is this to be done; how is one to secure an adequate sufficiency of both interests?

The problem is difficult enough in the older countries of the West, which are already richly endowed with amenities, and where grinding poverty, illiteracy, and ill-health are, on the whole, more the exception than the rule. In these countries it is mainly the threat of global war which tends to arm the state with inflated power and threatens to erode both freedom and wealth. But in Africa today, for the majority of the people, hunger, illiteracy, and sickness are still a terrible scourge. Add to this the fact that communications and basic civic amenities remain rudimentary in vast areas of the continent, and take into account also the very understandable impatience of political leaders to effect a change, and the perennial problem of insuring human liberty takes on almost awesome proportions.

Democracy and human freedom will always have hard going where they are faced with grinding poverty, ill-health, and lack of education. The going will be even harder where, as is often the case in the new nations, it is sought to compress a century of gradual development into, say, ten years. And it is for this reason that many friends of Africa have asked sympathetically, but not without misgiving: can the independent African states take their place in the modern world as free democratic societies; can they provide the amenities and security which their people yearn for without resorting to dictatorship and the eradication of human freedom?

Faced with the evils referred to above, it is not surprising that some African politicians tend to attach more importance to the provision of security than to the safeguarding of individual liberty. Indeed, a few have become openly impatient with the whole idea of civil liberty and the restraints it places upon state action. For the time being, they say, the classic nineteenth century freedoms, however desirable in themselves, may, alas, have to remain for them and their people a luxury which cannot be afforded. The active enforcement and more particularly the judicial enforcement of these liberties is seen by them, for the present at any rate, as an undesirable and often unpredictable fetter upon the ability of the state to provide essential amenities and security.

Often, too, in discussion with practical politicians, one finds that doubts concerning the constitutional guarantee of liberty are pressed to even more fundamental levels. I have known several African intellectuals raise the question whether, in essence, the classical constitutional limitations presuppose and, indeed, buttress economic individualism, which may or may not be acceptable in the particular new society with which one is concerned, however fundamental the concept may be in most Western democracies. In short, there is influential support for the view that "the demands of security must take precedence over the demands for liberty in respect of the minimum human needs," which, incidentally, is the conclusion that Humuyun Kabir himself reached.⁵⁵

⁵⁵ *Id.* at 193.

Here, then, is a fundamental issue, a great challenge, now being fought out with particular urgency in Africa. Can it be demonstrated that the democratic procedures, and the legal institutions which have protected civil liberty in the West, are in fact capable of adjustment so as to accommodate the clamant need of new nations for rapid economic growth without losing their essential character in the process of accommodation and adaptation?

While I do not for one moment deny the great importance of providing social and economic security, I do utterly repudiate the notion that the provision of these benefits should be given pride of place above all other freedoms. In fact, as I see it, we are faced here with one of the deepest issues between Russia and her satellites on the one hand, and the would-be free world on the other.

Under the Russian system the state claims to be the universal provider, with the result that the individual ceases to count at all. This, in my view, is deeply immoral; for though there are many services which the state should undertake for men, its prime duty is to create the conditions which permit its members to act freely within the law for themselves. Indeed a state which purports to be a universal provider actually wrongs men by treating them contrary to their nature; for a man's first duty is to fulfill his nature by assuming the responsibilities that are his.

But quite apart from the moral ground to which I have referred, there are two very practical reasons why individual men and women should, as far as possible, be allowed to work out their own destiny free from state control and interference. In the first place, once the state's claim to be a universal provider is acknowledged or encouraged, it is very difficult to resist a further claim on its part to regiment men, as indeed the history of communist Russia has proved. Moreover, human beings are fallible, and no man or group of men is good enough to be entrusted with absolute power over other men. Indeed, this is perhaps the decisive justification for reversible democratic government and for the freedom implicit in it to organize opposition.

At the same time it is not sufficient merely to reject totalitarianism and fulminate against communism. It is no less necessary to guard against the misuse of private enterprise. Otherwise, one merely avoids one kind of slavery to fall victim to another.

Under communism the means of production are controlled by the officers of the state, who are the masters of the workers (that is to say, the slaves of the state), and the wealth produced is distributed, at the discretion of state officials, among families and individuals. At the other extreme—which is in my view equally pernicious—you have unbridled private enterprise. This is the mark of what Hilaire Belloc, that stern foe of communism, called "The Servile State."

But we are not necessarily doomed to suffer either of these grim ways. Elsewhere I have argued that between the extremes of unbridled private enterprise, or economic license, on the one hand, and state despotism on the other, there is a

middle way, where it is possible to combine freedom for all with a necessary minimum of economic benefit, opportunity and security for all, especially within the fields of public health and education.⁵⁶ Elsewhere, too, I have ventured to give my reasons for believing that the basic human freedoms are not irreconcilable with rapid economic growth in underdeveloped countries.⁵⁷ I do not propose to elaborate these views here beyond saying two things.

In the first place, we should, I think, have no sympathy with those who would attempt to force African realities Procrustes-fashion into Western political and economic molds and who criticize newly independent African states on the ground that their polities are not exact replicas of Western systems. Let us remember that in trying to make an adjustment between welfare and personal freedom, the new nations of Africa are faced with what must always be a very delicate problem of balance, but which, currently in Africa, is exceptionally difficult. In their attempts to meet this challenge they need sympathy and help rather than too impatient criticism.

Secondly, there can be little doubt that in the difficult task of establishing and maintaining what I have called the middle way, the law has a big role. For example, laws preventing the abuse of economic power—among them, anti-monopoly laws—can do much to help. But in themselves, laws of this kind are not enough, for ultimately the institution of private property and free individual enterprise must rest, not on greed or the will to win a rat-race, or on some sloppy economic optimism that all happens for the best in the best of all possible worlds, but on a developed sense of moral responsibility among the general body of citizens.

Let us, however, pause on this idea of moral responsibility, for it brings us to the fundamental challenge which Africa presents to the rest of the world. Superficially, one might question whether a continent as underdeveloped as Africa has any challenge to offer to the old established nations, and especially to the West with its great heritage of accomplishment. But a moment's reflection should dissipate any such illusion.

The African challenge has, in the view of many, become highlighted by the East-West struggle, by the Cold War; but it is essential to realize that the New Africa does not wish to be a mere passive entity to be carved up between Russia and the Western Alliance in a new, more subtle, era of colonialism, a colonialism of economic influence and political ideology. The New Africa is determined, whatever the cost, to be itself, to win self-confidence, and to resolve its own problems in its own way.

A short while ago Mr. Tom Mboya of Kenya brought these points into very clear focus in a television interview in Chicago. He was asked where he, and African nationalists generally, stood in the great struggle now going on between Russia and the United States, more particularly between Russia and the Western

⁵⁶ D. V. COWEN, *LIBERTY, EQUALITY, FRATERNITY—TODAY* (The Hoernlé Memorial Lecture, Institute of Race Relations, Johannesburg, 1961); D. V. COWEN, *THE FOUNDATIONS OF FREEDOM* (1961).

⁵⁷ See the works cited *supra* note 56.

Alliance. He replied that African nationalists generally stood for a policy of non-alignment with either the Western or the Eastern bloc. Africans preferred, he said, to exercise an uncommitted and impartial judgment strictly in accordance with the merits of each issue, rather than by reference to who the contesting parties might be.

Reminded of the perplexity which many westerners feel when faced with this attitude of non-alignment or "positive neutralism"—a perplexity which has been summed up in the question "How can you be neutral in a conflict between good and evil"—Mr. Mboya began to develop a most powerful challenge.

Africans, he said, were by no means indifferent to moral issues. While in no way committed to Russian policies, particularly Russian communism, Africans, he suggested, could not accept that the West was a paragon of virtue to be followed blindly at all times on all issues. To expect Africans to judge international issues on an either-or basis, and solely in terms of the East-West conflict, was in his view not only arrogant but unreasonably limiting. By the same token, he would not expect Americans to fetter their judgment and limit their vision by choosing to be either "Western Alliance Firsters" or, alternatively, "Africa Firsters." Rather, he would expect an adult American, when asked the question (recently posed in an influential journal)⁵⁸ "Which friends come first—the New Africa or the Old Europe in NATO?" to answer "It depends on the issue." On fundamentals, like equal protection of the law regardless of color, the issue should, he felt, be decisive: there was a right and a wrong, and wrong could not become right because one's old or new friends espoused it.

Pressed a little harder, Mr. Mboya proceeded to throw out what I regard as the really fundamental challenge. In effect he said: "We Africans are often perplexed by the West's own confusion. Just what is it that you in the West do stand for?"

There is irony here and a most salutary lesson. Africa is sometimes viewed in the West as a "primitive" continent. Yet it is this continent which is demanding of the West that it rediscover itself, that it recall and rethink and re-apply its cultural, moral, and spiritual principles.

And indeed who can doubt that all is not well with the West. There is, in fact, an ominous parallel between the later years of the Roman Empire and our own times. To quote St. Gregory, while superficially the world flourished, "in men's hearts it had already withered—in *cordibus aruerat*." Similarly today, despite man's technical achievements, there is inner doubt and tension and a groping for values and meaningfulness which mock at the achievements themselves.

If the West believes that it has anything to offer other than technology and a high degree of material comfort, it is urgent that besides training engineers and doctors, it be able to interpret the ideals of good government which it professes to stand for, and unfold the heart of the philosophy on which those ideals rest. But before people can justify their beliefs to others, they must be able to justify them to themselves.

⁵⁸ White, *Which Friends Come First?*, Harper's Magazine, March 1962, p. 100.

We set much store upon safeguarding the rights of the individual human being, and very rightly so. But to talk about human rights and human dignity without comprehending human nature in its metaphysical dimension is meaningless, and so to comprehend it means to see that human rights must be related to that moral law which is rooted in being itself.

In a notable book, entitled "We Hold These Truths,"⁵⁹ Father John Courtney Murray has said that "the trouble is that even a damnable philosophy is more effective than no philosophy at all." The West, then, must rediscover itself. And those who value freedom, equality, and brotherhood, as opposed to communism or any other totalitarian system, must cleave to the heart of the philosophy on which these values depend. We must ask again the question which, of all questions, catalyzed the development of Western civilization: What is man, and what are the purposes which give meaning to his existence? And we must never lose sight of that question.

It is a vain and idle belief that all one has to do in order to build a stable and just society is to call in the right constitution-makers, economists, and sociologists. The finest constitutions, the most carefully devised Bills of Rights, are but scraps of paper in the wind if the people who work them, and for whom they are meant, are not worthy of them. No amount of economic aid, no program of social reform, can avail a society where the individuals who comprise it have lost sight of the nature of man and the function of society itself. Certainly constitutional guarantees and Bills of Rights (about which there is so much talk in contemporary Africa) are likely to be very shaky affairs unless men are agreed upon the philosophical basis on which these fundamental rights rest.

In this regard Jacques Maritain has observed that, from the point of view of philosophic doctrine, it may be said that in regard to human rights men are today divided into two groups: those who to a greater or lesser extent explicitly accept and those who to a greater or lesser extent explicitly reject natural law as the basis of those rights. In the eye of the first, the requirements of his being endow man with certain fundamental and inalienable rights antecedent in nature and superior to society. These are the source of social life itself and of the duties and rights which it implies. For the second school, man's rights are constantly variable and in a state of flux, being *entirely* the product of society as it advances with the forward march of history.⁶⁰

The consequences of accepting one of these points of view rather than the other are great; for it can, I think, be demonstrated that without the sense of direction given to a society by an understanding of the natural law, and man's place within its framework, power and expediency can become the highest arbiters of behavior and of the enactments of the state, leaving the way wide open for dictators and authoritarian governments on the premise that might is right.

⁵⁹ JOHN COURTNEY MURRAY, *WE HOLD THESE TRUTHS* 91 (1960).

⁶⁰ Jacques Maritain, *Introduction to HUMAN RIGHTS, COMMENTS AND INTERPRETATIONS—A SYMPOSIUM* 13 (UNESCO, 1949).

It is beyond the scope of this paper to attempt this demonstration;⁶¹ nor is it possible here to spell out what is meant by "natural law" in the Aristotelian-Thomistic tradition—the version which alone would seem to be clear in regard to basic principles, while giving full recognition to the importance of the actual experience of time and place.⁶²

I have raised the issue of natural law here, not to ride a hobbyhorse, but because it cleaves to the heart of the subject with which we are concerned. Sooner or later in any really serious discussion of human rights and their protection, the foundations of the subject will be probed, as anyone with any experience of lecturing to a critical African (or, indeed, any critical) audience knows well. At that point lawyers may perhaps be forgiven for not being adherents of natural law in the Aristotelian-Thomistic tradition, but it is less pardonable if their condition is based on an assured and glassy ignorance, on equating Rousseau with, say, St. Thomas, or John Locke with Hooker, or Descartes with Socrates (Karl Popper to the contrary notwithstanding).

E. International Legal Studies

The themes we are now discussing are, of course, related also to the fifth of the broad topics which I suggested earlier might be of dominant interest throughout the African continent, namely, international relations and legal studies. Here again, a generous and humane approach is needed. Apart from courses on what may be called international law in the traditional sense, that is to say, the subject which lawyers of my generation studied at some time in the pages of, say, Oppenheim or Hall, attention must plainly be given to the legal aspects of international banking, business, and investment; to international organization and agencies for cooperation; to the international aspects of various forms of constitutional structure (for example, international voting rights in various federal or quasi-federal associations); to the ramifications of the European Common Market; and to the emergence of comparable organizations in Africa.

Questions concerning the minimum legal requirements for the working of an effective common market, and more especially the minimum of "uniformity" or "harmonization" that may be required among the legal systems of the countries comprising a common market, are of ever-increasing importance not only in Europe but, in an intimately related way, in Africa and elsewhere.⁶³

But all this is familiar enough, and will not escape attention; it is necessary, however, to go deeper. The notion of state sovereignty, which has so often stood

⁶¹ For an admirably lucid statement of the essentials, see JOHN WILD, *PLATO'S MODERN ENEMIES AND THE THEORY OF NATURAL LAW* (1953). Professor Wild deals, *inter alia*, with the epistemological and the metaphysical foundations of the subject, with the significance of contingent propositions, and especially with the Aristotelian idea of nature as a process of becoming—essential topics which lawyers not infrequently overlook in discussions of natural law.

⁶² See generally, GEORGES RENARD, *LE DROIT, LA JUSTICE ET LA VOLONTÉ* (1924); GEORGES RENARD, *LE DROIT, L'ORDRE ET LA RAISON* (1927).

⁶³ Luchaire, *Le maintien et le renouvellement de l'association des États d'Afrique et de Madagascar au Marché Commun*, in Penant, April/May, 1961, pp. 185-99.

in the way of creating a world order of peace and justice among the older nations, is a source of perplexity, too, among the new African nations. All over the continent today political leaders are interested in plans for the closer association of states on a Pan-African basis—plans which hold out much of promise for future economic development and military defense. But always there lurks the danger of their coming to grief because of a reluctance on the part of states to surrender to a supranational organization any part of their newly-won sovereignty.⁶⁴

It is possible that the desired economic and military objectives may be achieved in Africa without resorting to federalism of the classical kind, that is to say, without any effective loss of sovereignty by the associating states, a contention put forward in a very interesting paper by M. Gabriel d'Arboussier, of Senegal, at the Symposium on Federalism in the New Nations held in the Law School of the University of Chicago in February 1962.⁶⁵ Others, however, are less sanguine about averting the sovereignty issue; and it is perhaps significant that in some African constitutions—notably that of Ghana—provision is made for the eventual surrender of sovereignty in the interests of Pan-African solidarity. Time alone will show how effective this may prove to be.

F. Legal Education

Africans are today deeply concerned with the kind of legal education which they should foster. That purely technical courses will miss the mark is evident. At the same time the need is urgent in several parts of Africa to train lawyers quickly for the day-to-day run of legal work. Years of neglect have, in some territories, resulted in a dearth of legally qualified Africans.⁶⁶ Several subjects of a more scholarly and reflective kind may therefore, for the time being, have to be excluded from curricula of comparatively short duration which may be deemed sufficient to qualify for junior professional work and even for junior judicial work. At the same time, African needs will not be sufficiently met by routine training of a purely technical kind.

As we have seen, African lawyers and statesmen are increasingly being called upon to make decisions on legal problems which have basic and most far-reaching social and economic significance; they cannot afford to make these decisions without a liberal education, including, in particular, acquaintance with the previous experience of other peoples who have had to face similar problems.

African lawyers will fail in the exacting tasks which lie before them unless their education is conceived in the grand manner and aims at being truly fundamental, truly philosophical. However short of the goal one might fall in legal education, one

⁶⁴ Compare the reluctance of the states of the Netherlands to enter into anything more than a loose confederation after winning liberation from the Spain of Phillip II, with the recent amendments of the Netherlands Constitution so as to give precedence to international agreements.

⁶⁵ I am at present editing the papers and proceedings; publication is expected in 1963.

⁶⁶ I understand that in Tanganyika today (May 1962) there are only four Africans who have professional legal qualifications. An African friend once remarked that this is partly attributable to the fact that students choosing, for example, agriculture and medicine were, in colonial days, given greater encouragement on the ground that lawyers were troublemakers rather than trouble-shooters.

must aim high. And nowhere is this more imperative than in the law schools of the new nations. It was for this reason that in a public lecture which I delivered at the University of Chicago in April 1959, I advocated the inclusion of comparative law, jurisprudence, and legal history in any realistically conceived curriculum of African legal studies. My colleague, Professor Max Rheinstein, was and still is receptive to the idea, but the general opinion at the time was that "first things should come first," and that the first need in Africa is basic legal training of a bread-and-butter kind.

However, elementary legal training of a more or less technical kind for the many is not incompatible with the concurrent provision of something more ambitious. The concurrent establishment of research institutes attached to the new African law schools would surely not weaken them. On the contrary, it might enhance their capacity to discharge essential teaching duties.

II

THE AMERICAN CONTRIBUTION

What can American institutions and American legal scholars usefully hope to contribute and achieve in the field of African studies? Perhaps the first and most essential fact to take into account is that African legal studies are at present, and for some considerable time are likely to remain, in a state of flux. Dramatic and rapid change is the dominant fact almost everywhere on the African continent; indeed in some places the much-publicized winds of change have now reached hurricane force. This naturally has an intimate bearing on the nature and possibilities of significant academic work in this field. Pieces of purely descriptive writing on, for example, the constitutional structure of particular African countries, and attempts at constitution-making, have a disquieting tendency to be out of date almost as soon as they are published or completed. Nevertheless, however frustrating it may be to be overtaken and left behind by the march of events, work of this descriptive and practical kind is important and must be undertaken.

Again, within the general field of legal education and research, it would seem that during this period of rapid change and growth, research projects, teaching methods, and especially the organization and content of courses and seminars, should remain flexible, and—for some time—largely exploratory and experimental. And for this reason, I have hesitated to put forward any ideas on the subject at all, especially as a newcomer in a country which has proved itself to be so fertile in resource. Nevertheless, I have ventured to put together a few tentative ideas, and these are here set forth briefly.

First, a note of warning against over-indulgence in missionary zeal. I would not dream of disparaging the present experiment of sending American legal scholars to African law schools to help build them up. On the contrary, it would seem that this endeavor is of considerable potential value and is being welcomed in Africa itself. Nor would I presume to suggest that the distinguished gentlemen who have volun-

teered to do this exacting work—among them Professor W. B. Harvey of the University of Michigan, now Dean of the University Law Department and Director of Legal Education of Ghana—are not fully aware of what I am about to say. But for the possible benefit of the less sophisticated I would make this plea: let us be careful to keep our feet on solid earth.

It has sometimes been suggested, almost in hushed tones, that there is mission-work for lawyers in this field, that lawyers imbued with Western values may carry the light, so to speak, into the darknesses of Africa, and save it from communism and other forms of totalitarianism. This is not only pathetically naïve but positively harmful. It is naïve because if any generalization about Africa, as a whole, can safely be made, it is this: Africans desire complete and unfettered freedom to be themselves; to build up their self-confidence and make their own distinctive contribution, in their own way, to the art of living and social organization. It is harmful, because they will reject anything savoring of what I have heard one of them describe as “cultural imperialism,” with no less vigor and angry contempt than that with which they have already rejected political and economic imperialism. And needless to say, they will deeply resent, and rightly resent, any hint of being patronized.

Let us be quite clear, then, that one will get absolutely nowhere in the new nations field if one embarks upon it after prejudging the issues and with inflexible preconceptions about the role of law and legal institutions. *Semper aliquid novi ex Africa* is likely to be as true in the field of law as it has been in other fields.

Rather than deceive ourselves with grandiose schemes about missionizing, we should be humble enough to remember, and this is my second point, that teaching is a two-way process, in which the teacher, if he is wise, is given an opportunity to learn as much as he teaches. For example, anyone teaching constitutional law in Africa would do well to remember that the idea of constitutionalism is no novelty among Africans, and that indigenous African institutions have much to teach in regard to the taming of power.⁶⁷ No one would seriously suggest that the old ways of disciplining tyrannous chiefs are fully applicable in a modern state, but modern techniques are often only means of achieving ancient objectives; and it helps greatly to give them vitality and acceptability if it can be shown that, despite their modern garb, they are really old friends.

In a deep sense, of course—a very deep sense—there is mission work to do, namely, the work of rediscovering and articulating, right here among established Western communities, the real foundations of our own most cherished values. In the long run, the values which are sometimes described as the “Western” way of life, the values of human dignity and limited government in a free society, can only survive *anywhere* if those who subscribe to them are able to give sound and convincing reasons as to why they do so; as to why these values are good and right.

⁶⁷ The point has been emphasized by almost every informed writer on African institutions. See, for example, JOHN MACLEAN, *A COMPENDIUM OF KAFIR LAWS AND CUSTOMS* 24 (1858); and among more recent writings, I. SCHAPER, *GOVERNMENT AND POLITICS IN TRIBAL SOCIETIES* 135 (1956).

And this is precisely what scholars in the new nations field, especially in Africa, are so often challenged to do.

Let it be remembered, too, that in working back from contemporary needs and application in the new nations to the relevance of established Western and other institutions as potential sources of guidance, and in explaining established institutions to the peoples of new nations, who may desire, where practicable, to imitate successes and avoid mistakes, the scholar in the new nations field is given a golden opportunity to learn afresh, and with the stimulus of actuality, the true inwardness of much that we take for granted and allow, at our peril, to go unanalyzed. In short, the virtue of the exercise lies as much in what may be gained by the established nations, through looking again at the foundations of their own life, as in what may be given to the new nations. In this regard, the potential fillip that may be given to such subjects as constitutional law and government, general jurisprudence, public international law, and conflict of laws, can hardly be exaggerated.

Thirdly, I would like to elaborate a little on possible American programs within the field of African legal studies. At the outset, I would stress again the importance of remaining flexible and experimental; for there is very little experience anywhere to guide us, and over-elaborate, long-term commitments in particular schools may prove both costly and abortive. At the same time there are certain minimum requirements which, it is submitted, should be satisfied before any law school may fairly be said to be seriously interested in African legal studies, and presently I shall try to indicate what these requirements are.

Several possible approaches to African legal studies suggest themselves:

1. Some schools may prefer to confine themselves to introducing a little African material by way of illustration or illumination in subjects such as jurisprudence, constitutional law, administrative law, land-use, and problems of international commerce and investment—all of these courses continuing to be offered as part of the established curriculum for an ordinary American degree (probably on an elective basis). There would certainly be nothing novel about this procedure. It would not necessarily involve additions of staff, though perhaps a few seemingly strange tomes may have to be added in those sections of law libraries which are sometimes imperially reserved for "Anglo-American legal treatises." Possibly the librarian might be persuaded to set aside a section of the shelf space for a small collection of books on African law. But, however one looks at this first approach, it could hardly be described as a serious venture in African legal studies.
2. Other schools may choose to edge warily somewhat further into the field. They may do this by the recruitment to their staff of one or more persons with some special knowledge of African legal studies; by organizing one or more courses of instruction with an African focus; by encouraging African graduate students to pursue a course of study in the law school; by sponsoring African research projects; and by a serious attempt to build up comprehensive library facilities in African law.

For example, in the Law School of the University of Chicago the first steps have been taken to offer a seminar or course on African legal problems, the focus of the exercise being (a) to identify and discuss some of the main legal "problem areas" in Africa; and (b) to consider how much of American legal experience is relevant and capable of adaptation in Africa. A not dissimilar course had for some time been offered by Professor Arthur Schiller at the Columbia Law School.

Work of this kind is, in my view, a high priority. Thus, apart from its intrinsic interest, it may help to throw light on what is actually needed, as well as on what one may hope to accomplish, in the field of African legal studies.⁶⁸ Moreover, it may not be without relevance to the work of directors of graduate studies in the United States, for there is a risk that African students in America may miss taking courses which are of value in their own country and, conversely, give time to those which prove to be of purely domestic interest.

It hardly needs demonstration that American ideas in the field of constitutional law, to give a clear example, are of great interest in contemporary Africa. It would therefore seem logical to offer, as at Chicago, a course or courses on comparative constitutional and administrative law, with a substantial but by no means exclusively African focus. In addition, courses on such subjects as international law, international trade and investment, and the Common Market, could easily be adapted to take in or emphasize topics of particular African interest.

While instruction of this kind plainly has something to offer to postgraduate students from Africa, it should perhaps be emphasized that equal benefit may accrue to American students, especially those contemplating work in the new nations.

Assume the presence of four or five good postgraduate students from African countries in a law school offering such a program,⁶⁹ and one has what I would describe as "the beginnings of a center of African legal studies." But courses and seminars of this kind are only the beginnings. Much more is needed if the "center" is to survive and make the kind of contribution which should be made. Among these additional requirements, I would enumerate specifically the following:

- (a) building up a library containing the major African legal materials. This is, of course, a very costly and difficult undertaking, for many items other than strictly legal ones should be made easily accessible, and the whole collection should be brought together in a special section of the library. Again, quite apart from the questions of cost and library organization, much of the essential material is out of print. But the difficulties are not insuperable, and it is still possible over a period of, say, five to ten years, to build up major collections of African legal (and complementary) materials in perhaps four or five big

⁶⁸ Thanks largely to the enthusiasm and dedicated work of a fine body of students, this was made manifest to the present author in the first seminar course of this kind offered by the University of Chicago during the winter of 1962.

⁶⁹ Again, it is at present the policy of the Law School in the University of Chicago to assist good African students at the post graduate level.

centers in the United States. Indeed, substantial collections are already in existence in the libraries of several American law schools, and some of them could with little trouble be developed so as to become really great collections;⁷⁰

- (b) provision of facilities for uninterrupted research and publication. In due course African universities and African research institutes will, one hopes, have the library and other resources to embark in full measure on major research in African legal studies. And in due course, too, one hopes, they will play—and certainly they should be encouraged to play—the leading role in this field. But there are at present few such institutions,⁷¹ though the need for them grows daily more urgent. It is here, I think, that the bigger centers of learning in America might make one of their more important contributions. A comparatively small staff of academic collaborators, say, four men well acquainted with African conditions,⁷² who are given time and favorable conditions to do basic research, could do work which might not only be an addition to scholarship, but which might also be esteemed in Africa as as contribution towards the solution of the many problems which there present themselves. Indeed, in this latter regard, it should not be overlooked that in the formative years, while centers of higher legal learning and research are finding their feet among the new nations of Africa, research projects which are based abroad may have a certain advantage by the very fact of detachment.
3. A far more elaborate venture would be the establishment of a school of African and Oriental Studies along the lines of the London prototype, in which law would be one part of the program, the whole being affiliated, more or less closely, to a university. It is possible that one or more of those American universities which already have well-established centers of African studies in the fields of anthropology or political science may wish to develop along these lines.⁷³
4. Some of the major centers may prefer to integrate African legal studies into the work of large Institutes of Comparative Law, or centers of International Legal Studies, associated with the law school, and indeed with the university as a whole, but separately housed and with some measure of financial and other autonomy. This approach could be very fruitful indeed, but it is, of course, far more ambitious and costly than the kind of “step-by-step” venture discussed above.

Fourthly, I would suggest that in developing the American contribution, one should not become bogged down by attempts to force “African legal studies” into fixed categories, such as “area studies,” or “comparative and foreign law,” or “international legal studies,” and so on. Discussions along these lines seem to engender

⁷⁰ The collection at Harvard is probably already in this category, or very near it.

⁷¹ South Africa with its comparatively long and diversified university experience is, perhaps, in a special category.

⁷² Including an expert on the various Islamic rites in Africa. See, generally, J. N. D. ANDERSON, *THE FUTURE OF ISLAMIC LAW IN AFRICA* (1954).

⁷³ There are already a substantial number of such centers in the United States, among them Northwestern University, Johns Hopkins, the University of California, Boston University, and the Massachusetts Institute of Technology.

more heat than light, however useful a particular label may be for fund-raising. In a sense, African legal studies may be embraced under any of these rubrics, though in my view the great range of legal systems involved in Africa and the diversity of that enormous Continent make "African law" far less of a unified and manageable "area study" than, say, Chinese, Japanese, or Russian legal studies. No doubt, when the legal problem areas of Africa have been properly identified, various institutions may be depended upon to choose their own categorizations to suit their own purposes. Meanwhile it appears to be more important to obtain clarity about what one means by "African legal studies," and to get on with the actual and pressing job of doing work in the field.

Fifthly, I would like to call attention to the very special importance which attaches to interdisciplinary cooperation. For example, a lawyer embarking on a project for the improvement of land tenure without the assistance of a competent social anthropologist to explain the ramifications of various legislative proposals on, say, the position of the chieftainship (which may rest on power to allocate land), is likely to find that his carefully devised plans will never reach the point of "take-off." Then, again, even a potentially workable plan has to be popularized. In this regard, in addition to the skills of the social anthropologist and perhaps the social psychologist, one cannot afford to ignore the contribution which may be made by the practical administrator who is in touch with day-to-day realities.

In the African field it is particularly important to learn the idiom—not necessarily the language (desirable as this may be)—of the people with whom one is dealing. One must make an effort to grasp the concepts and images with which they are familiar. If one is, for example, to explain American realities to Africans, this must be done in language, and with the help of concepts and idiom, which is meaningful to Africans, and *vice versa*. The "judicial process," for example, among the Lozi in Barotseland is not the same phenomenon as the judicial process in the state of Illinois, and it may not be helpful to expound either in terms of the other. Greater facility in communication is one of the many advantages which interdisciplinary cooperation, especially between lawyers, social anthropologists, economists, and political scientists, may bring in its train.

But most of this is familiar to all but the veriest tyro and is not likely to be forgotten. And so I come to my sixth and last point, one which is no less obvious, perhaps, than the need for interdisciplinary cooperation, but which in the excitement of new ventures might sometimes tend to be forgotten. I refer to the need for law teachers in the various universities working in the new nations field to cooperate among themselves as scholars whose first allegiance should be to the task of expanding the frontiers of knowledge and usefulness, and helping each other to do so. This applies not only to relations between American universities, but also, and perhaps particularly, to Anglo-American, Franco-American, and Afro-American relations in this field.

The subject is worthwhile, potentially even great. It behooves us to be worthy of it.