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Safeguarding African Customary Law: Judicial and Legislative Processes for its Adaptation and Integration (1968)

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**Safeguarding African Customary Law:
Judicial and Legislative Processes for its Adaptation
and Integration**

By Thierry Verhelst

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FOREWORD

This paper is responsive to the long-felt need for an introductory survey, for the use of university students, of the nature of the problem of adapting and modifying African customary law to meet the requirements and conditions of political independence, economic growth, and increased mobility in Africa. It is particularly valuable because it examines and compares such efforts in both Anglophonic and Franco-phonetic Africa.

It is the hope of the UCLA African Studies Center that this introduction will provide a base from which further reading and more intensive studies can proceed, so that more students can move to scholarship in this area and assist in discovering what the proper role of African customary law can and should be as it increasingly confronts "received" or "modern" norms that challenge its present-day relevancy.

Paul O. Proehl
November, 1968

Thierry Verhelst, Dr. juris, M.C.L., received the degree of Doctor of Law from the School of Law at the State University of Ghent, Belgium, 1966, and the Master in Comparative Law degree at Columbia School of Law, 1967. Born in Belgium, Mr. Verhelst has concerned himself with research on law and economic development. During 1968 Mr. Verhelst was a lecturer in Comparative Law at the School of Law, UCLA, and offered a seminar in Comparative Systems of Land Tenure in Africa.

INTRODUCTION

The basic concern of this paper is the future of African customary law. Under colonial rule, customary law was isolated from the law imported from Europe and relegated to a secondary position. Now that independence has been gained, its status must be reassessed.

In some of the new African states, outright abolition or gradual withering away is threatening customary law. A number of statesmen and legal scholars entertain a deliberately negative approach to customary law. Customs are viewed as hindrances to development and their re-placement by modern legislation or modern common law, on western patterns, is urged as a prerequisite to economic and social development. Such institutions as the extended family or the corporate possession of land are said to be bulwarks of the *status quo*. The preservation of customary law is even viewed in some quarters as something inspired by the colonialists and retarding the development of the masses. Those who hold this view advocate a policy that would permit customary law simply to disappear, either gradually or more rapidly, and would replace it with modern legal systems, borrowing heavily from foreign systems, especially those of the West.

Some African leaders, however, no less concerned with economic development, have pledged themselves to the elaboration of a genuine national and African body of law, which would require the retention, in varying degrees, of customary law.¹ This paper is based on the two-fold premise that customary law ought to be both retained and adapted.

¹ Dr. Kwame Nkrumah, for example, called for the Africanization of the law of Ghana. Address at the opening of the Ghana Law School, January 4, 1962, 6 *Journal of African Law* 103 (1962).

Customary law should be *retained* in a number of fields because it is .the body of law best suited to the African society.² Law, it is suggested, must be expressive of the value system of the society it seeks to serve. Customary law, which was generated by the African society and which developed within it, is just that type of *corpus juris*; it reflects the cultural and societal patterns of the population to which it applies. This is not the case with foreign law. The imposition of a foreign legal system may result either in failure of the law to receive acceptance and enforcement, or in unnecessary and harmful wrenching of the social fabric of the society concerned. This in turn might lead either to the undermining of the authority of the law, or to the disruption of society.

Customary law should at the same time be *adapted* to the requirements of a society in search of speedy economic and social development. This process may involve modification in its substantive rules or modernization of its form. The process of modification is not alien to the nature of customary law. Customary law is not a petrified body. It is a living organism which has shown its ability to evolve in relation to changing conditions.³ Customary law has been traditionally unwritten and passed down orally, and one consequence of this has been its adaptability.⁴ Before the arrival of Europeans there was usually no record either of the decisions of the courts or of the law which gave rise to

² The term "African society," as used here, refers in particular to the agrarian society of the "interior" (to which the majority of Africans belong), rather than to the industrial and commercial urban centers, or "economic enclaves" as they have usefully been called. In these "enclaves," customary law is not fully adapted to the local needs, nor is it as widely spread and enforced as in the countryside. Western-type law has been and will conceivably remain the prevailing system of law in these centers, for such law is better suited for application to the activities which characterize a modern city.

³ Cf. Professor Max Gluckman's works. The author reiterates his findings in "Legal Aspects of Development in Africa," *Les aspects juridiques du développement économique/Legal Aspects of Economic Development* 59 (Association Internationale des Sciences Juridiques/International Association of Legal Sciences, 1966).

⁴ Hence, the English definition of custom which requires it to have existed from "time immemorial" certainly has no application to modern African customary law.

these decisions. It has been argued that customary law has the same advantage of English common law, namely its fluidity.⁵

Some authors have cautioned against giving excessive attention to customary law. Professor R. Seidman calls it the law of the past and emphasizes the need for empirical studies in the law-in-action as op-posed to research in customary law. He warns the lawyers dealing with customary law against “stagnation and irrelevancy.”⁶ This paper is based on the assumption that far from there being a contradiction between the retention of customary law and the search for a legal system conducive to economic and social development, there is a useful dialectical relationship between the search for legal tools of social engineering, as is emphasized by the school of Legal Realism, and the quest for the adaptation of these tools to the value system of society, which admittedly is a Savignian concern for the law as expression of the *Volksgeist*.⁷

African states are now in the process of deciding what parts of the law received from the colonial period⁸ and what parts of the customary law should be retained, adapted to modern needs, and perhaps integrated in one single legal system. This paper takes a look at the various techniques used in dealing with these problems. Before turning to this, let us briefly recall the situation occupied by received law and customary law, respectively, under colonial rule.

⁵ H. H. Marshal, "The Changes and Adjustments Which Should Be Made to the Present Legal Systems of the Newly Independent Countries of Africa to Permit Them to Respond More Effectively to the New Requirements of the Development of Such Countries," *Les aspects juridiques du développement économique/Legal Aspects of Economic Development* 75, 99 (Ass. Int. Sciences Juridiques/Int. Ass. of Legal Sciences, 1966).

⁶ R. Seidman, *Research in African Law and the Processes of Change* 11 (Occasional Paper no. 3, African Studies Center, University of California, Los Angeles, 1967).

⁷ If von Savigny had written about contemporary Africa, he would have drawn our attention to *negritude* or the "African personality" as sources of law.

⁸ Hereinafter referred to as "received law."

It must be recalled at the outset that European law was in no case imposed in such a way as to oust customary law. Only in some fields had customary law been completely or partially replaced by western law: e.g., public law in general, including criminal law, some rules of marriage and land law, labor law, etc. In other areas of the law there was a dual legal system: European-type law on the one hand, customary law on the other. The overwhelming majority of the African population remained governed by its customary laws.⁹

The British brought with them the common law, the doctrines of equity, and the statutes of general application which were in force in England at a particular cut-off date.¹⁰ This body of law was made applicable in the colony as far as local conditions permitted. The French and Belgians exported their civil code and other sets of legislation to their respective territories.¹¹ In addition to the “imported law,” there was an important body of statutes promulgated or enacted by local colonial administrations.

Customary law was officially recognized by the colonial authorities. The British entrusted the application of customary law to native courts in all cases in which “natives” were parties and in so far as this law was not “repugnant to natural justice, equity and good conscience,”¹² or inconsistent with any received or locally enacted written law. The French recognized the applicability of customary laws to Africans who wished to retain their customary status. The Belgians considered the application of customary law to

⁹ The Africans to whom European-type law applies generally are found in the “economic enclaves.” See note 2 *supra*.

¹⁰ The applicable date, in the case of Ghana, is 1874; in Kenya, 1897; in Nigeria, 1900. See A. N. Allott, *Essays in African Law* 18 (1960).

¹¹ The Belgians did not merely export their civil code; they enacted a simplified version of it, the *Code civil du Congo*.

¹² This formula, hereinafter referred to as the repugnancy clause, was in use throughout British Africa. It is found, for example, in the High Court of Lagos Ordinance, s27 (1), 3 *Laws of the Federation of Nigeria and Lagos* 1576, 1585 (1958).

Africans as the general rule and admitted only a relatively small number of *immatriculés* to assume status under western law. Under the French and Belgian systems, a customary rule of law found to be contrary to “public order and morality” was to be denied applicability by the courts.¹³

Two different techniques have been used by various African countries to retain and adapt their customary laws: 1- Reliance on the processes of judicial interpretation and judicial development, i.e., the common law process; 2- Resort to legislation or codification, including restatement of the customary law.

It would serve little purpose to delve once more into the old controversy regarding the comparative advantages of a code and an unwritten system of law. As a matter of fact, those in charge of legal developments of African states are refreshingly devoid of sentimental attachment to one or the other system. One notices that, in their concern for adapting customary law, many common law jurists have gladly resorted to codification, while lawyers trained in the civil law system are found extolling the virtues of judge-made law.

Whatever the technique, judicial or legislative, various goals are still likely to be sought. One may favor the *unification* of all customary laws, within one ethnic group, or at the national level, with reduction or elimination of local variations. This process will usually go together with a *modernization* of the customary law, of greater or lesser importance. A different, although related, process is the *simplification* of the rules and the use of schemes devised to render the rules more certain and more accessible. Finally, a more ambitious option is to seek the unification of the received law and the customary

¹³ *Ordre public et bonnes moeurs* is a concept well known to continental lawyers. See, for example, Belgium's Code civil art. 6.

law; we shall call this *integration* to distinguish it from unification, which refers only to an inter-customary law process. Such integration may be sought in one or more branches of the law. It is favored by the most progressive advocates of the *Africanization* of the law. The purpose of integrating western and indigenous elements is to give a country its own general or common law, that is, a single body of law applicable to all persons without distinction as to race or status.

THE ROLE OF JUDICIAL INTERPRETATION

The history of the English common law is a source of inspiration to all those who are concerned with the adaptation and unification of customary law in Africa. Although originally faced with a large variety of different local laws, the King's courts were able to develop a body of law common to all of England. Not only has the English common law system proved to be a successful means of unification of different rules of law, it also has shown a remarkable ability to adapt and develop this body of law throughout history. Thanks to its great flexibility it has succeeded in molding the law of the land so as to meet increasingly changing socio-economic conditions.

One is tempted to argue that this is the kind of system that is best suited to the present needs of African law. While local judges may be expected to interpret creatively and to continuously adapt customary law, it may be hoped that superior court judges will achieve gradual unification of the various customary laws. (Admittedly, the eventual integration of customary law with received law will have to be the object of statutory intervention.) On the one hand, the repugnancy clause, or the concept of *ordre public et bonnes moeurs*, affords the judge a way to eradicate or restrict rules of customary law found inadequate; on the other hand, the judge is able to give judicial recognition to changes in practice which have been proved to him to have taken place through satisfactory evidence adduced in his court. A well-known example of this process is the judicial recognition of private ownership of land in West Africa (especially in Ghana and Nigeria.)

Reliance on the courts to achieve the required change in the law may prove more successful than reliance on the legislature. People in the countryside cling to their

customs and many may resent infringements on their laws brought about by legislation in the distant capital city. It often has been reported that there is no more acceptance of a change enacted by the national legislature after independence, than of those changes formerly imposed by the colonial ruler. The common law system, by contrast, achieves change through an evolutionary process on the local level, in a local situation with which the local population is conceivably fully familiar and in which they can see the logic of change. Change, therefore, is more acceptable.

And yet, the common law system may be inappropriate to the African scene. Its fitness to adapt to changes occurring over several centuries, as it did in England, will prove of little interest to states committed to speedy modernization. Gradual evolution of the law in the courts may prove too slow a process and result in extensive discrepancies between law and practice. Professor Allott, British jurist and Africanist, admits to the " ... increasingly unsatisfactory modes of ascertaining and applying the law by means of witnesses and isolated judicial decisions."¹⁴

Several countries have entrusted the fate of their customary law to their courts. But they face other problems. Should the court system be left in the condition in which it was found at the date of independence, allowing both received and customary law to develop on independent lines? Or should court structure now be unified into one single judiciary? No doubt the adjudication of both customary and "modern" law by a single court system will result in more rapid and thorough modernization of customary law and make possible its ultimate integration with the general law.

Where a dual system of courts is retained, mechanisms of appeal and review of

¹⁴ A. N. Allott, "Law and Social Anthropology," 17 *Sociologus* 1, 16 (1967).

judgments in customary cases have been devised to provide links between the two structures. This also will determine the pace of modernization, unification, and integration of customary law.

Together with the revision of the court system we shall touch upon the following related issues: (a) internal conflicts of law; (b) the curtailment of the application of customary law in the courts; (c) the rules of ascertainment of customary law by the courts.

Dual or Unified Court Systems — Among the countries that have maintained the dualistic court structure bequeathed to them by the colonial administration are some of the francophonic countries of West Africa. The major, and for our purpose the most significant, reform is the establishment of a supreme court at the top of their respective judicial systems, with the extension of their jurisdiction of review to all cases, involving either modern or customary law. This was not so under colonial rule; customary cases adjudicated in the various territories of the federations (French West Africa or French Equatorial Africa) could be heard in their last appeal not in one single superior court, but in a separate division of it, *la chambre d'annulation* in the Court of Appeals in Dakar or *la chambre d'homologation* similarly, in Brazzaville. Upper Volta, Tchad, and the Central African Republic have now bridged the gap between the two systems at the very highest level of jurisdiction.¹⁵

Togo, on the contrary, has provided for many more interrelationships between its

¹⁵ Loi No. 10-63, 6 *Juris-Classeur d'Outre-Mer*, 10 mai 1963 (Upper-Volta); Decret No. 140, 6 *Juris-Classeur d'Outre-Mer*, 25 juillet 1963 (Tchad); Loi No. 61-250, 4 *Juris-Classeur d'Outre-Mer*, 15 novembre 1961, and Loi No. 62-308, 5 *Juris-Classeur d'Outre-Mer*, 21 mai 1962 (Central African Republic.)

basically separated court systems.¹⁶ The presidency of all customary courts is held by a judge of a court of written law. Thus the *juge de paix* presides over the tribunal *coutmier de premiere instance*. The tribunal *coutmier d'appel* is presided over by the *president du tribunal de premiere instance de droit moderne*. The *chambre d'annulation* is maintained as supreme court in customary matters. Seven members sit on its bench—four are notables who share the custom of the parties, and three are judges of the court of appeals of modern law.¹⁷

The general policy in Nigeria has been to retain the legacy of the colonial administration. The Western Region's court system was transformed from a strictly parallel to a slightly unified structure in 1957.¹⁸ The statute abolished a system in which the separation of the courts was complete, under which the possibility of an appeal to an ordinary court was remote, where administrative officers had control and supervision of judicial functions of the "native" courts, and where the usual channel of appeals was through the Native Court of Appeals, thence to the district and provincial administrative officers, and finally to the governor. The new law eliminated the supervisory and review powers of administrative officers, established channels of appeal to superior courts, and provided for the appearance of legal practitioners before top-grade customary courts.

Thus, at least some links were established between both systems. Yet the continued

¹⁶ Loi No. 61-17, 4 *Juris-Classeur d'Outre-Mer*, 12 juin 1961.

¹⁷ There are other intermediate combinations, but to review them here would be pointless. Mauritania occupies a unique position among the various states of francophonic Africa. Its court system, while basically unified, is constituted in two sections. Each section is comprised of courts from the lowest level up to the appellate level, one with exclusive jurisdiction in modern law; the other in traditional law. See Loi No. 61-123, 4 *Juris-Classeur d'Outre-Mer*, 27 juin 1961, and Loi No. 65-123, 8 *Juris-Classeur d'Outre-Mer*, juillet 1965.

²⁰ See also Code de Procedure civile (1962) and Loi No. 62-052, 5 *Juris-Classeur d'Outre-Mer*, 2 fevrier 1962.

¹⁸ Customary Courts Law, 2 *Laws of the Western Region of Nigeria* 41 (1959.)

barring of professionally-trained lawyers from most of the customary courts certainly constitutes a not insignificant barrier between customary and modern law. The role of the practicing lawyer in the development of the law could hardly be overestimated.¹⁹ As a consequence of the present situation, customary law remains largely unwritten, judgments are more often than not unrecorded, and few appeals are made to higher courts.

The Congo (Kinshasa) has also retained a parallel judicial structure. It has, however, various techniques of control to check and, since independence, also to direct the operation of the customary courts. Overall control with regulatory and advisory powers lies with the prosecuting attorney (*le ministere public*) who thus is enabled to exert considerable influence on the decisions in customary matters. There are furthermore four different ways of reviewing judgments of customary courts: appeal, revision, transfer (*l'évocation*), and nullification. They constitute an impressive machinery of control, whose impact on customary law is potentially quite strong.²⁰

The majority of the countries of former French as well as British Africa have now unified their court systems. On the French-speaking side, Niger, Mali, and the Ivory Coast²¹ have gone furthest in the unification process. They have radically abolished all customary courts. Former *tribunaux de droit coutumier* and *tribunaux de droit écrit* have

¹⁹ See P. O. Proehl, *Foreign Enterprise in Nigeria* 49 (1965). The author also indicated that Nigerian solicitors and barristers not only show little interest but also lack training in customary law. *Id.*, at 65.

²⁰ Decret du 16 septembre 1959, discussed in J. Herbots, "Les techniques du recours en droit coutumier congolais," 20 *Revue Juridique et Politique* 203, 215-20 (1966).

²¹ Loi No. 62-11, 5 *Juris-Classeur d'Outre-Mer*, 16 mars 1962 (Niger); Loi No. 61-55, 4 *Juris-Classeur d'Outre-Mer*, 15 mai 1961 (Mali); Loi No. 64-227, 7 *Juris-Classeur d'Outre-Mer*, 14 juin 1964 (Ivory Coast). Similar developments have taken place in the Congo (Brazzaville), Ordonnance No. 63-10, 6 *Juris-Classeur d'Outre-Mer*, 6 novembre 1963; in Gabon, Loi No. 4-64, 7 *Juris-Classeur d'Outre-Mer*, 5 juin 1964; in Guinea, Ordonnance du 29 decembre 1960, 3 *Juris-Classeur d'Outre-Mer*; in Dahomey, Loi No. 64-28, 7 *Juris-Classeur d'Outre-Mer*, 9 decembre 1964; and in East Cameroon, Ordonnance No. 59-86, 2 *Juris-Classeur d'Outre-Mer*, 17 decembre 1959.

been replaced by a single hierarchy of courts. The single concession made to customary law is to allow lay advisers to sit on the bench of some of the courts when they deal with matters of customary law.²²

Senegal has also radically unified its court system. No special court is set apart for the adjudication of customary cases, but the same lower court has greater competence in the adjudication of customary law than modern law. Thus, the jurisdiction of the courts of the justices of the peace is limited to minor cases in modern law,²³ while it extends to all cases of customary law. Through this provision the court is brought as near as possible to the people who remain under the traditional status. The various tribunals are joined by two *assesseurs* in hearing a matter involving customary law. These *assesseurs* are chosen from among certain persons who have retained the traditional status and who share the same customs as the parties before the court, or from among persons known for their knowledge of the relevant customs. They have only advisory powers.²⁴

In Ghana, the judicial system has also been unified. All Native Courts were abolished in 1960.²⁵ At all levels the courts apply both general and customary law, as well as Islamic law.²⁶ These various systems of law have all been integrated, by the

²² Even this practice, however, has been abandoned by the Ivory Coast, where the courts "*statuent en matiere de droit civil non ecrit comme dans les autres matieres sans l'assistance d'assesseurs non magistrats.*" P. Lampue, *La Justice civile dans les Etats d'Afrique francophone et a Madagascar*, 20 *Revue Juridique et Politique* 155, 181 (1966).

²³ In the French judicial system, the *tribunaux d'instance* (formerly *justices de paix*) are competent in cases where the interests do not exceed a certain value. More important cases go to the *tribunal de grande instance* (formerly *tribunal de premiere instance*), which has ordinary jurisdiction.

²⁴ Ordonnance No. 60-56, 3 *Juris-Classeur d'Outre-Mer*, 14 novembre 1960; Decret No. 60-390, 3 *Juris-Classeur d'Outre-Mer*, 10 novembre 1960; Ordonnance No. 60-17, 3 *Juris-Classeur d'Outre-Mer*, 3 septembre 1960, as modified by Ordonnance No. 63-07, 6 *Juris-Classeur d'Outre-Mer*, 26 juin 1963.

²⁵ Local Courts (Establishment) Instrument, E.I. 118(1960), and Native Courts (Repeal) Proclamation, L.I. 37 (1960), both issued pursuant to Local Courts Act (1960), discussed in W. Harvey, *Law and Social Change in Ghana* 222-225 (1966).

²⁶ Courts Act, C.A. 9 (1960) (passed in accordance with the republican Constitution), reproduced in part in W. Harvey, *supra* note 25, at 421-423.

constitution, into "the laws of Ghana." As in Senegal, the new local courts have more extensive jurisdiction in customary cases. They have unrestricted competence over persons, ownership of land, divorce, paternity and custody of children, and in some matters relating to succession so long as the law applicable in each case is exclusively customary law.²⁷

Turning to East Africa, we find that Tanzania has completed a similarly radical unification process. This country also had inherited a "parallel" court system from the colonial administration. After independence, it engaged in a gradual unification process. Only partial integration of the judicial structure was achieved in 1961 and 1962. The two systems of courts were kept on independent lines, but they were linked at the two highest levels of appeals. The Regional Local Courts Officer, who was charged with hearing appeals from Local Courts (dealing with customary law), was made a member of the magistracy, where-as his predecessor, the District Commissioner, was a civil servant.²⁸ Appeals from this officer lay, with the leave of another officer, to the High Courts, whereas under the former system a separate Central Court of Appeals dealt with customary matters.²⁹ By 1963, the Local Courts and the Subordinate Courts (the courts of written law) were replaced by a fully integrated three-tier system.³⁰ At the lowest level are found the Primary Courts, which are, broadly speaking, the successors of the former Local Courts but which now have jurisdiction over cases of customary, Islamic, and modern law alike. Again, they have broader competence in cases of customary law than

²⁷ Courts Act, C.A. 9 (1960), reproduced in part in W. Harvey, *supra* note 25, at 421-423; Courts (Amendment) Act, Act 130 (1962).

²⁸ The presence of civil servants in the judiciary was a remnant of both German and British administrations.

²⁹ Local Courts (Amendment) Ordinance, No. 38 (1961), discussed in E. Cotran, "Some Recent Developments in the Tanganyika Judicial System," 6 *Journal of African Law* 19, 22 (1962).

³⁰ Magistrates' Courts Act, No. 55 (1963) discussed in E. Cotran, "Integration of Courts and Application of Customary Law in Tanganyika," 1 *East African Law Journal* 108 (1965).

in those of modern law. The judges of these courts are joined by two lay advisers on customary law, whose advice, however, is not binding. The language of these courts is Swahili. Besides its regular appellate jurisdiction, the District Court has wide powers of supervision, inspection, and revision of Primary Court proceedings. From a District Court, appeal lies to the High Court, which in turn has general powers of revision and supervision over both District and Primary Courts. If in these cases a rule of customary law is in issue, the High Court may refer any question of customary law to a panel of experts, but is not bound to conform to their opinion. It must be added that customary law occupies a peculiar place in Tanzania's legal system, as it has been extensively codified. (cf. *infra*. p. 23ff.)

The Solution of Internal Conflicts of Law — The unification of the courts is often combined with the reorganization of the rules governing the application of customary law versus modern law. Because of the concurrent application of two legal systems, conflict of law problems indeed arise. Of necessity, the solution of the conflicts problems remains the status of the parties involved. Indeed, most of the countries that have unified their courts specifically so provide. This rule is then qualified by varying exceptions that generally tend to favor the application of modern law rather than customary law.

Ghana sought a solution in a statute that directs the courts to apply modern law unless the affected party can establish the propriety of applying a personal law from the indigenous system. Thus, the former presumption in favor of application of customary law in all cases where parties were "natives," and also in some "mixed cases,"³¹ has been

³¹ "Mixed cases" are those which involve at least one party governed by customary law and one governed by modern law.

re-versed in favor of the application of modern law.³²

In Tanzania the solution to the conflicts problem no longer depends upon the party's race. i.e., whether he is *African* or not.³³ The connotation of separate or inferior status has been eradicated. The application of customary law depends upon the party's membership in a particular community, whether it be traditional or modern. One may become a member of such a community by either of two methods: he may adopt its way of life, or the community may accept him as a member.³⁴ Theoretically, a European or an African from another country could acquire the traditional status and be governed by customary law; this would depend on his way of life and not on his racial identity. In Tanzania a larger place is given to customary law if a party is a member of a traditional community. In Ghana, on the contrary, the presumption always favors application of modern law, and the party concerned has the burden of challenging it. Both countries have in common their rejection of the old ethnic criterion, and their reliance instead on a mode of life within a community.

Former French territories have inherited from the colonial judicial administration a large set of rules enabling a person governed by the traditional laws to change over to the regime of written law. Senegal, for example, has retained this characteristic. After stating that those who were formerly governed by customary law may retain their status, the statute indicates several ways to resort to the application of the written law rather than to custom. Written law will be applied when the parties, although of traditional status, jointly so request. Written law will also become applicable if the parties have totally or

³² Courts Act, §66(1), Rules 1 to 6, C.A. 9 (1960), reproduced in part in W. Harvey, *supra* note 25, at 441-423.

³³ Cf. E. Cotran, "Integration of Courts and Application of Customary Law in Tanganyika," *I East African Law Journal* 108, 117(1965).

³⁴ For a detailed and critical discussion, see *id.* at 118-19.

partially rejected their traditional status. They can do so tacitly (e.g., through use of a will with written formulas derived from statutory law) or expressly. If parties of both modern and traditional status become involved in a particular case, the customary law will prevail, provided the latter party has not rejected his status. Finally, an article provides that a party who has not claimed the recognition of his status at the beginning of the proceedings will be estopped from challenging the judgment on the ground that the wrong legal system, either written or customary, has governed his case.³⁵ Other francophonic states are governed by substantially the same rules.³⁶

In Togo, the system is entirely different.³⁷ The customary court is competent only when all parties agree to its jurisdiction. If one of the parties opposes the jurisdiction of the customary court, the case must be dealt with by the court of written law. Thus, the application of modern law is favored considerably.

Methods of Curtailing the Application of Customary Laws — Let us touch on three means through which recent legislation has endeavored to limit the application of customary law in the courts.

First, some statutes have limited the application of customary law to certain fields of law, barring its general validity. Thus, customary law has been widely excluded from the domain of public law as a whole. It finds no place in such matters as constitutional and administrative law, nor, in some cases, in criminal law and procedure. It has been excluded from such realms as labor law, civil and commercial law, and contract and tort law. It would be impossible to enumerate the many provisions throughout Africa that

³⁵ Ordonnance No. 60-56, art. 9 to 20, 3 *Juris-Classeur d'Outre-Mer*, 14 novembre 1960.

³⁶ They are identical in Niger, Loi No. 62-11, 5 *Juris-Classeur d'Outre-Mer*, 16 mars 1962, and similar in Tchad, Upper Volta, Central African Republic, and Dahomey.

³⁷ Loi No. 61-17, 4 *Juris-Classeur d'Outre-Mer*, 12 juin 1961.

purport to expel customary law from particular fields of law. Let us take, as an example, a statute from Senegal, a country that plays a leading role in progressive law-making in Africa. Only the following subject-matters, enumerated in the statute, may be governed by customary law: the capacity to draw contracts and to sue and be sued, the status of persons, family, divorce, filiation, succession, gifts and testaments, as well as ownership and possession of real estate and the rights that flow therefrom.³⁸ It follows that only written law is applicable in all other branches of law, to the exclusion of the customary law.

Secondly, the courts may be directed to apply only certain bodies of customary laws. For instance, in Tanzania, the courts must apply only the customs that have been restated, since these texts have statutory force. The customary rules that have been excluded from the restatement must be ignored by the judiciary.³⁹ In Senegal also, only the officially recognized bodies of customs are applicable in the courts. There are 78 in all, chosen from 33 different ethnic groups.⁴⁰

Thirdly, the courts themselves are given the opportunity to restrict the application of a rule of customary law. This technique had already been used by the courts under colonial rule to eradicate objectionable elements from the customary laws. In Nigeria, the judge is still directed, as was the case earlier there and in other parts of British Africa, to deny enforceability to any rule of customary law that would be "repugnant to natural justice, equity and good conscience." The repugnancy clause, however, has been dropped in Tanzania and Ghana. Not only was it considered unfitting to the dignity of indigenous

³⁸ Ordonnance No. 60-56, art. 10 and 12, 3 *Juris-Classeur d'Outre-Mer*, 14 novembre 1960.

³⁹ To the extent that they are inconsistent with the rules included in the customary codes. Regarding the Tanzania restatement, *cf. infra.*, at 23ff.

⁴⁰ Arrête ministeriel No. 2591 M.J.-A.C.S., 28 février 1961. *Cf.* J. Hilaire, "Nos Ancêtres les Gaulois," *Annales Africaines* 1964, 41, note 122.

laws of the people of these countries to suggest that repugnancy might exist but also it was expected that the application of the repugnancy clause by the courts for several decades (actually more than one hundred years in the case of Ghana) had resulted in a satisfactory eradication of laws considered repugnant.

In Senegal, the ordinance previously mentioned stipulates that customary laws are subject to the "fundamental rules concerning public order and the liberty of persons."⁴¹

In Madagascar, the judges are required by statute to ensure respect for the general principles contained in the preamble of the constitution.⁴² East Cameroon has no such provision, but the supreme court is reported to have oftentimes restricted the application of the customary laws found contrary to the general principles of law derived from the Constitution.⁴³

The Congo (Kinshasa) has taken the most far-reaching measures regarding the enforceability of its customary laws in the courts. True to a doctrine that was more akin to the British "indirect rule" than to the French assimilationist policies, the colonial authority had maintained customary laws and institutions to a very large extent, providing mainly that those found *contrary* to public order would be made inapplicable.⁴⁴ The Constitution of the Democratic Republic of the Congo states on the other hand that "courts and tribunals apply the (written) law and the customs as far as the latter are *in accordance* with the statutes, public order and morality."⁴⁵ The present accordance

⁴¹ Ordonnance No. 60-56, art. 11, 3 *Juris-Classeur d'Outre-Mer*, 14 novembre 1960.

⁴² Ordonnance No. 62-041 du 19 septembre 1962, 5 *Juris-Classeur d'Outre-Mer*.

⁴³ P. Lampue, "Les sources du droit de la famille dans les Etats d'Afrique française," 21 *Revue Juridique et Politique* 20, 25-26 (1967). Cf. P. Lampue, "Note, Cour suprême du Cameroun oriental, 3 avril 1962," 73 *Penant* 230 (1963).

⁴⁴ Charte coloniale, art. 4 (18 octobre 1908).

⁴⁵ Constitution of June 24, 1967, art. 57. The same provision was found in the Constitution of August 1, 1964.

provision, *en conformite avec* in the French text, permits more severe restriction of customary law than did the old provision using the criterion of whether customs were *contrary* to public order. One Congolese author indicates that for the custom to be enforced by the courts, it must now conform to the general spirit of the legislation of the country, or, we might say, to its *ratio legis*.⁴⁶ The development of statutory law will serve as a guideline for the evolution of custom in the courts. As far as a new statute is the embodiment of a new option for the society—the expression of a new societal value concept—the customary law will have to be molded to conform to this new direction in which society has been oriented. The three-fold conformity test to which customary law is now submitted—written law, public order, and morality—may produce far-reaching effects indeed. It may even, if pursued to its logical end, undermine the validity of almost all customs on the basis that their underlying philosophical or sociological rationale is not in accordance with that which has nurtured Congo's written law. This may ultimately lead to the questioning of the very existence of the whole customary legal system. Fortunately, this perspective is a very long range one. At this time nine-tenths of the population of the country still cling to their customary status, and the customary courts remain numerous and active. They render 300,000 to 400,000 judgments per year, and many of the most interesting of these decisions are recorded.⁴⁷

The Constitution of the Congo (Kinshasa) provides some specific guidance as to some of the principles with which customary laws must come into accord, e.g., certain fundamental principles regarding the liberty of choice by future spouses concerning their marriage. These and other provisions indicate that the fathers of the Constitution intended

⁴⁶ C. Mafema, "Situation juridique du Congo et contenu des regles du droit coutumier," 20 *Revue Juridique et Politique* 134 (1966).

⁴⁷ J. Herbots, *supra* note 20, at 215.

to herald the western-type, "nuclear" family. Thus, even if the Constitution does not impose particular rules with regard to marriage, certain definite principles are put forward with which customary rules of marriage can hardly be said to be in accord, and it must be assumed that the courts are given the mission of modifying these rules in such a fashion as to make them conform to their constitutional and statutory example.

Whatever the long-term effects may be, application of the conformity test will allow, for the immediate future, a flexible and progressive interference with customary law. Courts are afforded a means of restricting customs in some cases, to redirect them in other cases, and to abolish them when necessary. The new Congolese judge is given a creative role. As Professor Herbots⁴⁸ puts it, each time a judge declares a rule not in accordance with written law, he actually creates a new rule of law. The innovative role will demand that he develop attitudes and techniques more akin to those of his Anglo-American colleagues than to those which are common to judges in a system governed by written statutes and codes.

Rules of Ascertainment of Customary Law—Ghana and Tanzania have enacted new rules for the ascertainment of customary law. They have done away with the former system in which customary law was put on an inferior level among the sources of law, and where a rule of customary law was regarded as a matter of fact to be established by proof.⁴⁹ This proof is still required in Nigeria where customary assessors advise the judge, who is not bound by their opinions. Only if the same rule of law has been acted upon by a superior court, or has frequently been before the same court, can the judge take judicial notice of it.

⁴⁸ *Id.*, at 221.

⁴⁹ *Angu v. Attah*, [19 15] *Gold Coast Privy Council Judgments* 43, 44.

The new Ghanaian legislation states that the question of the content or existence of a rule of customary law is a question of law for the court and not a question of fact.⁵⁰ This is in keeping with the integration of customary law into the general law of the country. The court may now determine the applicable customary rule from its own knowledge or assumed knowledge. It must have judicial notice of customary law as it does of any other of the laws of Ghana. It follows, *inter alia*, that the courts will hold that once a pronouncement has been made by a higher court on the existence or content of a particular rule, that pronouncement must be regarded as having the authority of the common law.⁵¹ If the court entertains a doubt as to the existence or content of a rule of customary law, it may conduct investigations. The methods of investigation are left very much to the court's discretion; submissions by parties, consultations of law reports and textbooks, and other sources may be resorted to. The court can even start a full-scale inquiry, after adjournment of the proceedings, by taking testimony of witnesses and by considering written opinions from houses of chiefs or from any other body possessing knowledge of the customary law in question.⁵² It is contemplated that this procedure will help to elucidate and place on record the detailed rules of customary law. If the courts produce clear and accurate enunciations of that law, they may build up a strong body of authority with far-reaching consequences for the future of the customary law in that country. It appears that in the process local variations will erode to the benefit of a national body of customary law, and hence to the benefit of the general common law of Ghana. Professor Harvey notes the striking similarity between the handling of customary

⁵⁰ Courts Act, §67(2), C.A. 9 (1960), reproduced in W. Harvey, *supra* note 25, at 422.

⁵¹ Cf. W. Harvey, *supra* note 25, at 267-269.

⁵² Courts Act, §67(2), C.A. 9 (1960), reproduced in W. Harvey, *supra* note 25, at 422-423.

law in the courts of Ghana and that of the common law of England. In Ghana, as in England, the judges are the "depositories of the laws, the living oracles who must decide in all cases of doubt." (Blackstone, *Commentaries*) When one considers how successful the English courts were in unifying the law of the land, one is allowed to make rather interesting conjectures as to the role that will be played by the "living oracles" now established in the new judicial system of Ghana.

Tanzania has adopted a very similar approach to the problem of ascertainment of its customary law. Its High Court is directed not to refuse recognition of a rule of customary law on the ground that it has not been established by evidence.⁵³ Judicial notice may be taken of any rule resulting from some kind of statement worthy of belief. The judge is thus given considerable discretion in modifying and developing customary law. These developments, however, will have less impact than those in Ghana, since customary law is being codified in Tanzania.

Silence or uncertainty in customary law has been expressly dealt with in a number of francophonic states. The legislature in Senegal and Niger, and the head of the Judiciary in East Cameroon, have provided that in such cases the judges must refer themselves to written law. Statutes and regulations are to be used as secondary sources of law in customary matters.⁵⁴ In the Central African Republic, by contrast, judges must render their decisions in equity where no customary law is found applicable.⁵⁵

What is the relevance to the future of customary law of all these re-forms in

⁵³ Magistrates' Courts Act §32. No. 55 (1963), and Local Courts (Amendment) Ordinance (1961), discussed in E. Cotran, *supra* note 30, at 112.

⁵⁴ Ordonnance No. 60-56, 3 *Juris-Classeur d'Outre-Mer*, 14 novembre 1960 (Senegal); Loi No. 62-11, 5 *Juris-Classeur d'Outre-Mer*, 16 mars 1962 (Niger); Circulaire du Garde des Sceaux, 22 septembre 1961 (East Cameroon).

⁵⁵ Loi No. 62-308, 5 *Juris-Classeur d'Outre-Mer*, 21 mai 1962.

judicial structure, competence, rules of ascertainment, and of these innovations in the solution of internal conflicts of law, in repugnancy and other similar clauses? It is too early to give an answer to this question. But there is little doubt that the unification of the court structure and the other reforms we encounter in the new African states will lead to a more or less rapid adaptation of customary law, with a greater or lesser amount or infusion into its rules and principles of western-type laws and legal doctrines. This infusion may be good or bad, depending on the viewpoint from which one looks at the future of customary law.⁵⁶ But that it will occur is certain now that professionally trained lawyers are called upon to play a role in the adjudication of the custom. All too often these lawyers have had no training in customary law and therefore, sometimes quite inadvertently, introduce elements of British or French legal thinking which are alien to traditional law.⁵⁷

Many judicial systems have been geared for the achievement of adaptation and modernization of the customary law. The extent to which they will fulfill the important role entrusted to them will depend on the quality of the members of the judiciary. The contribution which the African judiciary is able to make to the modernization, unification, and integration of customary law will constitute a milestone in the history of African legal development.

⁵⁶ Cf. this paper's conclusion.

⁵⁷ "No matter what law they are meant to apply, judges tend to apply the law they know." W. Twining, *The Place of Customary Law in the National Legal Systems of East Africa* 31 (1964) (lectures delivered at the University of Chicago Law School in April-May, 1963).

THE ROLE OF LEGISLATION, CODIFICATION AND THE RESTATEMENTS

The impact of legislation on customary law varies in scope as well as in manner. There are by-laws, authoritative declarations by tribal authorities, statutes, codes, and restatements, all of which deal with customs and their transformation.⁵⁸

Statutory Amendments to Customary Rules of Law — Perhaps the most elementary way in which legislation affects customary law is by simply pruning off some of its rules which, as a matter of policy, are considered to be suitable objects of legislative prohibition. This is a way of attuning the morality of customary law to that of a new age. Together with the application of the repugnancy clause (or the test of *ordre public et bonnes moeurs*) in the courts, it was the favorite approach of colonial administrations. In this fashion, trials by ordeal, and slavery, were abolished by statute.

At present, similar piecemeal legislation is often resorted to. There are a few examples in the realm of personal law. Many states have chosen to retain the customs of the various ethnic groups in this field, rather than make drastic changes that, because of the attachment of the local population of their personal law, might have resulted in fierce opposition and ultimate failure. Some amendments have been enacted to provisions of customary law that are considered either evil or archaic. Bride-price, one of the most delicate and serious problems of the law of marriage, has been subjected to important reforms. Greedy parents frequently demand very high prices for their daughters. The result in some places has been that young people do not marry, a circumstance which facilitates polygamy among rich, old men. Mali, however, has set by statutory provision a

⁵⁸ A restatement may or may not have statutory force.

maximum on the amount of bride-price that may be paid.⁵⁹ And in Gabon and the Central African Republic, bride-price has been abolished by law.⁶⁰

Another delicate problem is polygamy, which the French attempted to deal with in a way that has been retained in the law of some countries after they achieved independence. First, the *Decret Jacquinot* of 1951 provided for the possibility of a contract whereby the future husband could promise to remain monogamous.⁶¹ He could be prosecuted under the criminal law if he failed to live up to his contractual obligation. Mali has integrated this regulation in its new code on marriage and custody.⁶² The French colonial legislation had also stipulated that he who was married under customary law was prohibited, under penalty of prosecution for polygamy under the French penal code, from entering a marriage under written law until dissolution of the customary marriage or marriages.⁶³ This regulation has been retained by Mauritania, the Ivory Coast, Upper Volta, Togo, East Cameroon, Congo (Brazzaville) and Tchad.⁶⁴ Senegal has included a similar provision in its penal code and has added serious penalties for those who enter a new marriage against the rules of the particular customary law under which they were first married.⁶⁵ In Mali, polyandry is forbidden to women, whereas men are not allowed to have more than four women.⁶⁶ Polygamy has been altogether abolished in the Ivory

⁵⁹ The maximum is set at 20,000 CFA. Francs. Loi No. 62-17, 5 *Juris-Classeur d'Outre-Mer*, 3 fevrier 1962; Code sur le Manage et la Tutelle.

⁶⁰ Loi No. 20-63, 6 *Juris-Classeur d'Outre-Mer*, 31 mai 1963 (Gabon); Ordonnance No. 66-25, 31 mars 1966, 8 *Journal Officiel de la Republique Centrafricaine* 232 (1966).

⁶¹ Decret No. 51-1100, 13 *Juris-Classeur de la France d'Outre-Mer*, 14 septembre 1951.

⁶² Code sur le Mariage et le Tutelle.

⁶³ Code penal, art. 340, and Decret No. 47-2248 du 19 novembre 1947, X *Juris-Classeur de la France d'Outre-Mer*.

⁶⁴ G. Mangin, "Le droit penal de la famille dans les Etats africains d'expression frangaise," 21 *Revue Juridique et Politique* 589, 591 (1967).

⁶⁵ Code penal, art. 333, al. 3.

⁶⁶ Code sur le Mariage et le Tutelle, art. 7.

Coast and the Central African Republic.⁶⁷

Similar reforms have been made in the law of succession. Malawi re-pealed its African Wills and Succession Ordinance and enacted a statute which corrected the inequitable position that married women and children occupied under customary law.⁶⁸ Whereas previously they inherited nothing under the patrilineal or matrilineal systems, the wife (or the wives) of the deceased and his surviving children are now entitled to fair shares, as in western succession laws. Today, only a minor part of the deceased's estate devolves according to customary rules.

Customary land law has been retained in many countries but pro-visions have been enacted to offset some of its economically harmful effects. The Western Region of Nigeria has enacted a law that vests in trustees certain customary rights in land. This law is intended to afford a solution to one of the problems related to the communal ownership of land. Under customary law, the chief is merely an executive of the family (or any other landholding group) and he cannot alienate the land without the express authorization of all members of the family. This procedure may involve several hundreds of persons. In order to maintain customary land ownership, but to facilitate and encourage the sale and conveyance of land, the Communal Land Rights (Vesting in Trustees) Law⁶⁹ provides that a limited number of executive heads of family may in law be recognized as the trustees of the group. The trustees have power to alienate or otherwise dispose of the land without the express consent of all the members of the landholding unit. Wide use is

⁶⁷ G. Mangin, *supra* note 64, at 592.

⁶⁸ Wills and Inheritance (Kamuzu's Mbumba's Protection) Ordinance, discussed in "Legislation, Malawi," 8 *Journal of African Law* 109 (1964). The term "Mbumba" (in Chinyanja) must be liberally translated as "women." the ordinance is thus a bill for the protection of women, or for the protection of Kamuzu's (the Prime Minister, Dr. H. Kamuzu Banda) sisters and nieces. *Id.*

⁶⁹ 1 *Laws of the Western Region of Nigeria* 409 (1959).

reported to have been made of this legislation.⁷⁰

In the field of registration of plots of land there are various types of statutory provisions designed to give more certainty to landowning individuals or groups who remain governed by customary law. After various unsuccessful attempts to induce the Africans to embrace the institution of absolute individual property as organized by the Code Napoleon,⁷¹ the French administration finally made allowance for registering customary interests of land as such. At first, only individual property held in the Roman tradition could be registered. Later on, some individually-held interests of customary nature were recorded. After the reform, not only individual customary rights but also collective customary rights in land received formal recognition in the land-registries. The interests thus recorded received full protection and could be enforced in the courts in the same way that the *immeubles du Code civil* had historically been treated. After independence, most of the countries of former French Africa retained this statute.⁷² In this way, customary law is retained and allowed to develop naturally, and the problem of uncertainty, one of the major disadvantages of customary land tenure,⁷³ is overcome.

East Cameroon entirely reorganized the procedure of registration of collective and

⁷⁰ B. O. Nwabueze, "Legal Aspects of Economic Development," *Les aspects juridiques du développement économique/Legal Aspects of Economic Development* 167 (Association Internationale des Sciences Juridiques/International Association of Legal Sciences, 1966).

⁷¹ After the Code Napoleon itself was introduced, a procedure of *immatriculation* (i.e., registration) of private property was organized on the pattern of the Australian Torrens system. It met with little success. This was followed in 1925 by an equally unsuccessful statute allowing for the registration of customary interests held by individuals separately, but providing nothing for the interests held by communities.

⁷² The French colonial statute is Decret-Loi No. 55-580, 14 *Juris-Classeur de la France d'Outre-Mer*, 20 mai 1955, applicable all over French and Equatorial Africa. Similar legislation applied in Cameroon and Togo. Cf. also Decret d'Application No. 56-704, 15 *Juris-Classeur de la France d'Outre-Mer*, 10 juillet 1956. Niger enacted a new law which is, however, substantially similar to the 1955 decree: Loi No. 61-30, 4 *Juris-Classeur d'Outre-Mer*, 19 juillet 1961.

⁷³ This uncertainty arises primarily in controversies which require the court to determine rights in land situated outside the community in which the court is located.

individual rights in land.⁷⁴ Land rights and the boundaries of each community first are officially ascertained. These rights are then publicized by decree and made enforceable by law. Collective lands are thus recognized and protected by statute, but the communities are pre-vented from later expanding their boundaries, as they traditionally had done. Communities which used to move from one area to another, expanding their landholdings, are now stabilized. Furthermore, the Cameroon statute provides that the customary laws that govern collective lands are to be unified and reorganized. As far as customary rights held by an individual are concerned, they are recognized also, but legislation encourages the individual to register his plot so as to become en-titled to absolute ownership under modern law.

Legislation by Traditional Authorities — Under the British system of indirect rule local "native" authorities were empowered to declare in writing the native law and custom—whether in the then existing or modified form—relating to any subject. This declaration would then be sanctioned by the governor.⁷⁵ This was devised to eradicate particularly harmful uncertainties in the customary laws. The power thus to declare and modify customary law was retained in Western Nigeria and conferred on local government councils.⁷⁶

Another means used in Nigeria was the issuance of adoptive by-laws. The Minister of Local Government was empowered to order by-laws which local government councils in the Region could, by resolution, adopt for enforcement in their respective

⁷⁴ Decret-Loi No. 63-2, 6 Juris-Classeur d'Outre-Mer, 9 janvier 1963.

⁷⁵ The Native Authority Ordinance of the Western Region of Nigeria is an example of such a law. Referred to by F. A. Ajayi, "The Interaction of English Law with Customary Law in Western Nigeria: II" 4 *Journal of African Law* 98, 105 (1960).

⁷⁶ Western Region Local Government Law Cap. 68 (1962). Cf. A. E. W. Park, *The Sources of Nigerian Law* 96-97.

areas of authority. The Marriage, Divorce and Custody of Children Adoptive Bye-Laws Order, 1958, was made in exercise of this power.⁷⁷

In the same manner, Ghana has entrusted to its traditional chiefs a role in the legislative adaptation of customary law. Reference was made earlier to an act⁷⁸ that included in Ghana's general law the rules of law known as the common law, the doctrine of equity, and also the rules of customary law included in the common law under any enactment providing for assimilation of such rules of customary law as are suitable for general application. The 1961 Chieftaincy Act commits to the traditional chiefs, subject to the ultimate discretion of the executive, the task of deciding what customary law should be assimilated by the common law. Chiefs of various regions are convened in a joint committee to consider whether a customary rule of law should be assimilated by the common law. A draft of assimilation is submitted to the competent minister who may effect the assimilation by legislative instrument.⁷⁹

A rule of customary law that has been assimilated by the common law takes precedence over customary law that has not been assimilated, even in cases where courts must apply the custom.⁸⁰ Professor Harvey notes that through this process traditional communities of Ghana will find themselves governed by the customary rules of law of another group because their customs happened to have become part of the national common law. "In view of the jealousies and historic differences among the indigenous people of Ghana, the nationalization of one tribal rule might be even less acceptable than

⁷⁷ W.R.L.N. 456, [1958] *Legislation of the Western Region of Nigeria*, B733.

⁷⁸ Interpretation Act, C.A. 4 (1960), reproduced in part in W. Harvey, *Supra*

⁷⁹ Chieftancy Act, §62(2), Act 81 (1961). The integration of custom is thus entrusted primarily to persons outside the conventional legislative and judicial structure.

⁸⁰ Courts Act, §66(2), C.A. 9, (1960), reproduced in part in W. Harvey, *supra* note 25, at 421-423.

similar treatment of an English doctrine," the author concludes.⁸¹ The role of the traditional authorities of Kenya and Tanzania concerning the legislative development of customary law is of a different nature, and is discussed under the next title.

Unification of Customary Law and the Restatements — "Restatement" of customary law has various meanings in Africa. It may merely record existing rules as they are found in one or more homeeconomic groups, without having ironed out any existing variations. On the other hand, the restatement may purport to unify the various customary rules into one or several national bodies of customary law. Such a project may then be accompanied by a series of reforms in the custom. Finally, the restatement might be the object of statutory enactment, whereby it then becomes a code. Several countries have engaged in some kind of a re-statement of their custom in order to integrate its rules or its principles into their new statutory law. Some countries have declared their intention to do so in their constitutions.⁸² Integration is discussed under the next two headings of this paper. We are now concerned with restatements proper, i.e., mere recordings of various laws, and restatements used as means of nation-wide unification of customary laws.

An intense movement for the recording, unification, and codification of customary law is found in East Africa, especially in Tanzania, Kenya, Zambia, and Malawi.⁸³ Restatement schemes exist also in Botswana and Swaziland.

Although many remarkable anthropological works are available on African law,⁸⁴

⁸¹ W. Harvey, *supra* note 25, at 265.

⁸² Dahomey, Upper Volta, Madagascar, Niger, Congo (Brazzaville), and others.

⁸³ The movement has not spread to Uganda, where hope was officially expressed that customary law would gradually wither away. See "Integration of the Courts Systems in Uganda," *African Conference on Local Courts and Customary Law* 94 (1963). (Background paper submitted by the Uganda Government.)

⁸⁴ Gutmann on the Chagga (as early as 1928), Schapera on the Tswana, Evans-Pritchard and Howell on the

only a few of them have found direct application as text-books for courts and practicing lawyers.⁸⁵ One anthropologist who had practical goals in mind was Cory. While working for the Tanganyika colonial administration, Cory developed a method of recording customary laws that was later extensively applied both in that country and elsewhere. Cory not only wrote down customary rules of law as he found them, he also modified them where possible, trying to achieve unification.⁸⁶

He first recorded the laws of the Sukuma, and later those of a great many other people of Tanganyika;⁸⁷ he produced a unified version of the customary personal law of all tribal peoples inhabiting the western half of the territory. The draft that he had composed was agreed upon by the large number of tribes in the area and only a few, comparatively minor, variations survived.

A project of recording and unifying the customary laws of all the peoples of Tanzania in a set of codes was launched after independence. This constitutes the boldest project of retention and change of customary law in Africa. The then Chief Minister Nyerere stated that the codification of the customary laws had to become a cornerstone in the building of a modern nation. The government reorganized a procedure of recording very much along the lines drawn some years earlier by Cory and launched what was to be known as the Tanganyika Unification of Customary Law Project. The customary codes are formulated as follows:

1. Representatives from each tribal group, selected by the District Council of the

Nuer, Bohannon on the Tiv, Gluckman on the Barotse, Cory on the Haya and the Sukuma, Gulliver on the Arusha, Biebuyck on the Mitemba, Goldschmidt on the Sebei, etc.

⁸⁵ I. Schapera, *A Handbook on Tswana Law and Custom* (1955) and H. Cory, *Sukuma Law and Custom* (1953) were used as handbooks in the courts.

⁸⁶ Preface to H. Cory, *Supra* note 85.

⁸⁷ Included were such large groups as the Sukuma, the Nyamwezi, the Ha, the Gogo, and the Haya, as well as various smaller groups.

area concerned, are convened to discuss a particular topic of law. After discussing and composing their differences, the representatives attempt to find agreement on a particular text. New rules are formulated to deal with changing conditions, and antiquated rules are abolished.

2. When all the tribal groups of one region have accepted one unified version, the text is submitted to a "panel of Experts," consisting mainly of members of the National Assembly of the region concerned.⁸⁸ Suggestions are then made.

3. Final ratification lies with the District Council.

4. An Ordinance of Declaration provides for the publication of the unified version in the form of a textbook, giving it statutory recognition. The textbook becomes a code.

As has been indicated, the restatement not only thoroughly unifies various customs, it also introduces important changes and reforms. One may therefore question the adequacy of the term "restatement" to describe Tanzania's project. Yet the word must be retained for lack of a better one. "Codification," for example, would not be more appropriate, for this term as it is used to describe the Ethiopian project (cf. *infra*, at 31), implies a break with past social institutions and legal rules which is much greater than that which has been achieved in Tanzania.

Flexible machinery for making adjustments and amendments to the Declaration Orders has been provided for at both the regional and the national levels. The unification project was considered to be a continuing experiment.⁸⁹

In Kenya, the government has also been active in the field of recording customary

⁸⁸ Admittedly, many of them can hardly be said to be "experts" in customary law; the fact that persons with political mandates are chosen is characteristic of Tanzania's approach to its customary law. Cf. E. Cotran, *supra* note 33, at 28.

⁸⁹ W. Twining, *supra* note 57, at 51.

law and is associated with a project of major significance to the future of customary law, the Restatement of African Law Project, sponsored by the School of Oriental and African Studies (SOAS) of London.⁹⁰ This institution received a grant in 1959 to embark upon a comprehensive project for the systematic recording and restatement of African customary law. The project will eventually cover 16 countries in anglophonic Africa, encompassing the law of marriage, family, land tenure, and succession. It is particularly in Kenya that the project has made progress.⁹¹

The objective of the project is the complete restatement in English of the principles of customary law recognized within each ethnic group. The Restatements of the law that have been realized in the United States by the American Law Institute are to serve as models for the African project.

In Kenya, the first body of law to be restated was criminal law. Eugene Cotran set out to record all surviving criminal offenses in the country. His methods of investigation deserve special attention, as they differ from those used in Tanzania. The following procedure is used:

1. All available materials are studied and then a uniform format for restatement is devised. Draft statements are prepared in London on the basis of the preliminary studies accomplished in the field.
2. Each district of Kenya is visited and its local laws recorded, with the assistance

⁹⁰ The S.O.A.S. is under Professor A. N. Allott's directorship. Law panels had been set up in Kenya from 1950 onwards, but they produced little of value to a lawyer until they were reorganized in 1960. Cf. E. Cotran, *supra* note 33.

⁹¹ By 1966, the governments of Kenya, Malawi, Gambia, and Botswana had expressed their desire to collaborate with the Restatement of African Law Project. West African countries, however, generally have shown less interest in the project.

of local law panels."⁹² At this level and thanks to the use of the prearranged draft, the number of "superfluous local variations" is greatly reduced.⁹³

3. The restatements are submitted to the African District Councils and local councils. Few alterations are reported to have been made at this stage.

4. A few representatives from each law panel are called to provincial meetings, and, by a process of persuasion and compromise, restatements are produced with a minimum number of variations.

With respect to the effort to record criminal offenses, the next stage was the integration of the customary offenses into the existing written law. Cotran recommended that ten of these offenses be retained in the criminal code. These ten were recognized as criminal offenses by a majority of the Kenya tribes but not by the Kenya Penal Code.

Recording of civil law was subsequently begun when Cotran was invited to proceed with the restatement of the law of marriage, divorce, succession and family relations.⁹⁴ The project on civil customary law simply aims at a restatement proper. Cotran contends that no attempt at unification was made during the various steps of the restatement procedure.⁹⁵ Nor is it contemplated that the restatements will be enacted as statutes or codes. They are to be considered as persuasive guides to law. The courts will consult the restatements but will also be able to take notice of changes that take place in the customary law.

⁹² The members of the panels are local authorities on customary law. These panels, called District Law Panels, reflected administrative divisions corresponding to the districts that Cotran visited in the course of his work on criminal offenses. But since the remaining restatements were to be made on an ethnic basis, the Kenya law panels were reconstituted to reflect ethnic, rather than administrative, divisions. W. Twining, *supra* note 57, at 40-41.

⁹³ *Id.* at 40, 48, quoting Cotran.

⁹⁴ Land law was not included here because work on a project of consolidation and registration of land had virtually eradicated customary laws in large areas in Kenya.

⁹⁵ W. Twining, *supra* note 57, at 41.

Both the Kenyan and the Tanzanian projects have much in common; yet they differ in at least four marked respects. First, the Tanzania project is intended to produce a unified version of customary law for the whole country, whereas in Kenya each group is entitled to have its own body of laws recorded separately. Secondly, the restatement of the law is to become a code in Tanzania, while the civil customary law of Kenya is not to be codified. Thirdly, Tanzania's project includes many reforms of custom, partly because of the unification process, but also because modernization of the custom is sought as an end in itself; Kenya does not emphasize the reformatory role of its restatements. Finally, while the Tanzania text is in Swahili, the Kenya texts are written in English.

These differences notwithstanding, both projects have been subjected to similar criticisms. One criticism is directed to the very process of restating customary law; others are addressed to the methods of investigation of that law.

Can one write down customary law? Cotran does not think that the fact that customary law is now written makes it any the less customary. However, he thinks that its legislative enactment does change the very nature of customary law.⁹⁶ Furthermore, the use of language, legal categories and terminology alien to custom—a fact which characterizes the restatement projects in both Kenya and Tanzania—inevitably alters the nature of traditional law. The distortions resulting from the use of western legal terminology have been noted by some anthropologists, especially by Bohannon.

Anthropologists furthermore claim that it is both a mistaken and an unrealistic objective to try to mould customary law into a set of legal rules. These rules have little meaning, it is contended, outside of the social context which explains and supports them.

⁹⁶ Cf. among other statements, E. Cotran, *supra* note 33, at 27-28.

Just as the implementation of reforms in customary land law which disregard family relationships may prove a useless exercise having no impact on the local communities concerned, so it is with any attempt to establish categories and rules that are alien to the society. It is argued that the codes or restatements may prove to be rather esoteric or even, although comprehensive, irrelevant. The local communities for which they have been drawn up may simply fail or refuse to recognize that the texts submitted to them are their own laws and customs. The authors of the restatements are not unaware of these objections. They insist, however, that their concern is not the preservation of the customary law. We may also reasonably infer from their approach that they are not primarily concerned with the instant acceptance of the restatements by the local population. "On the contrary, the Project's establishment looks to the future when the status and mode of application of customary laws will have fundamentally changed. At that time, systematic, juristically satisfactory restatements of customary law will become vital for the administration and improvement of the local customary laws."⁹⁷ In other words, the emphasis lies on the effective administration of law. Allott contends that the restatements should consist of legal rules stated without an explanation of their social context. A manual written from a sociological point of view might be made available to the court in Africa, he says, "but this is not the sort of text which the court wishes to consult . . . The courts are accustomed both in Africa and elsewhere, to handle legal rules which are presented in this systematic form, and to that extent restatement programmes should assist the courts to do their jobs more effectively."⁹⁸

⁹⁷ A. N. Allott, *supra* note 14, at 12.

⁹⁸ *Id.*, at 13. Allott adds that, in preparing the restatements, full attention is being paid to the sociological viewpoint, and material not strictly legal is included in the restatements where this appears essential for a proper understanding of the law. *Id.*

Another pervasive question is whether it is proper to write down customary law at the present time. The restatement solidifies a legal system that would otherwise continue to develop and grow. This crystallization of customary law is imposed at an arbitrarily set period of its evolution. Now more than ever, customary law is involved in an intense process of change. Would it not be wiser to let it evolve its own way, adapting spontaneously to its new socio-economic context, and coming eventually to maturity in the new society it is called upon to reflect and serve? Furthermore, restatement of custom at the present level of its evolution may hamper its later integration with the general law, forming a single national body of law. The solidification of present rules may underline and perpetuate differences that might otherwise gradually disappear. For one who keeps in mind the unifying role of the King's courts in England, this line of argument has considerable weight. Yet, there is another face to the coin. Customary law is threatened with extinction or, at any rate, intensive corruption through contact with external influences. It may indeed be necessary to record customary law now so as to strengthen its cultural resistance to corrupting external influences. The danger of corruption and extinction is all the more obvious when one considers that the courts have no easy means to ascertain the content of customary laws. A convenient record of the rules of customary law may prevent judges from disregarding them and may furthermore help them to render decisions which will accurately reflect changes in custom.

The methods of investigation used in the drafting of the restatements have also been the target of criticism. Anthropologists point to the use of law panels. They say one cannot rely on what people say about the law, for when people are asked to engage in such an exercise they are invariably led to invent rules or to make inaccurate statements

or subjective interpretations. Field anthropologists look at the "law in action," that is to say, the law as it is actually practiced inside or outside the court. They rely on systematic and detailed analysis of "trouble cases." The lawyers on the restatement project do not question the soundness of the anthropological approach, but indicate that its application would have been technically impossible. A serious anthropological survey is very time-consuming. To cover the various fields of laws of more than 200 tribes of a country is a task that would take several hundreds of man-years if it were to be pursued according to classical anthropological research methods. Cotran also points out that he does not resort to theoretical question-and-answer sessions with the law panels. He reports that the panel meetings are held merely to make a detailed examination of trouble cases. Panel members are not asked to state all the rules of customary law concerning a particular topic; rather, they are presented with hypothetical cases which evoke practical and specific answers.

There is no doubt that *pure* legal scholarship would be served if the anthropologists' directions were to be followed, but the result might well be to lose track of the actual aims of the restatement projects. The point is simply that the results would be too meager and too slow in coming. African governments are concerned with practical goals, one of which is the rapid development of a modern national legal system. The projects in Kenya and Tanzania were launched to meet these felt needs. If these had been ignored, the final treatment of customary law might have been even less satisfactory than that which resulted from the more rapid and efficient, though admittedly less "orthodox" methods of the legal experts working on the restatement projects.

Integration of Rules of Customary Law into Written Law — Legislation in a particular field of the law is often intended to displace the customary law that preceded it.

Thus the enactment of a code of criminal law may be combined with a provision stipulating that no customary offenses will henceforth be recognized. In the Ivory Coast, the unification of the civil law through the enactment of a series of statutes (on status, marriage, succession, etc.) was accompanied by a radical suppression of the authority of the displaced law.⁹⁹

Some of these statutes, however, indicate that the legislators have simply transposed some of the rules of existing customary law into writ-ten law, thus giving them statutory authority. Thus, Mali has reorganized completely its laws on marriage. The statute expressly repeals the customary laws in this field but then adopts (integrates) a number of rules and institutions of the traditional system. For instance, bride-price has been retained. But a maximum is set on the amount to be paid. (*Cf. supra* note 59.)¹⁰⁰ We find in the modern and western-oriented code of civil and commercial obligations of Senegal some rules that are customary both in origin and in spirit.¹⁰¹ The commission on codification of the law of persons and obligations of Senegal actually started to record customary law, mainly in the preparation of the code of persons (which has not yet been enacted because of local Moslem opposition to its progressive nature) and of the special contracts section of the code of obligations.¹⁰² Thus, the obligations of the navetane contract, formerly a matter of customary law only, have been codified. Navetanes are

⁹⁹ Lois Nos. 64-375 to 64-382, 7 *Juris-Classeur d'Outre-Mer*, 7 octobre 1964.

¹⁰⁰ Loi No. 62-17, 5 *Juris-Classeur d'Outre-Mer*, 3 fevrier 1962.

¹⁰¹ The then Minister of Justice M. M. d'Arboussier said at the opening session of the commission on codification, "The codification embarked upon has as its aim to recognize the rules of customary common law ...It will tend to ascertain and promote the present evolution but in no way to operate a brutal revolution in the mores." (Translated by the author.)

¹⁰² Cf. A. Farnsworth, "Law Reform in a Developing Country: A New Code of Obligations for Senegal," 8 *Journal of African Law* 6 (1964).

agricultural workers who come from neighboring countries to help with the cultivation of groundnuts. Arriving well in advance of the harvest season, they receive from the landlord a plot of land to cultivate and a supply of seeds to plant, and they are entitled to retain the fruits of their labor. In consideration, they must pay for the seeds and help with the groundnut harvest of the landlord. This widespread institution still retains considerable economic and social significance in Senegal.

Another country that has entered the African legal scene with a new civil code is Ethiopia.¹⁰³ It gives very little place to customary law. Its drafter, Professor Rene David, has elsewhere written of the beauties of customary law and has advocated its retention.¹⁰⁴ Yet he reached the conclusion in Ethiopia that the draft of the code for this country should not be based on customary laws.¹⁰⁵ Respect for the *customs*, the distinguished author contends, should not be the exclusive nor even the primary concern in code-drafting. The idea that codification must be realized by adapting customary law is good in some circumstances; in other circumstances, however, customary law should be set aside. David advocated the second alternative in Ethiopia: customs were vague and contradictory and, worst of all, they constituted an obstacle to the necessary transformation of society. Thus, the Ethiopian code is basically a body of western-type legal rules and institutions. It is claimed, however, and it is stated by the Emperor in a prefatory note, that the code is in harmony with the *customs* as well as with the *needs* of the Ethiopian people. Although the code includes a general clause repealing all customary law otherwise applicable to matters covered by the code, there are various ways through

¹⁰³ Civil Code of Ethiopia (1960). This code stands as a monument of legal scholarship.

¹⁰⁴ R. Davis, *Les grands systemes de droit contemporains* 545-562 (1966).

¹⁰⁵ "Nous n'avons pas eu la preoccupation, en Ethiopie, d'elaborer un Code qui soit fonde sur les coutumes ethiopiennes." R. David, "La refonte du Code civil dans les Etats africains," [1962] *Annales Africaines* 160, 163.

which custom is allowed to remain applicable.¹⁰⁶

Custom may remain applicable, for example, through the outright integration of a rule of customary law. There are a number of examples of this procedure in book 1 of the code, concerning person and family law. Thus the contract of betrothal is extensively treated. This is a customary law contract regarding marriage, entered into by the representatives of the families to which the prospective spouses belong.¹⁰⁷ Another example is found under the paragraph regulating acquisition possession (usucaption). Acquisitive possession of immovables, such as it is set forth by the code, is made inapplicable to land which is still jointly owned by members of a family in accordance with custom. Usucaption is indeed unknown in most customary land law systems.¹⁰⁸

On the other hand, the code makes some reference to custom as the applicable law. For instance, marriages may be contracted before an officer of civil status or according to the religion of the parties or to local custom.¹⁰⁹ When they are performed according to local custom, customary law governs the conditions and the formalities concerning the marriage, provided only that some basic rules common to all marriages — such as those concerning age, consanguinity, and bigamy — be respected. Furthermore, the future spouses are free to determine their mutual rights and duties in personal as well as in pecuniary matters, as long as the basic duties of respect, support, and assistance as set out by the code are fully respected.¹¹⁰ All this leaves considerable leeway to the

¹⁰⁶ For a detailed discussion, see G. Krzeczunowicz, "A New Legislative Approach to Customary Law: The 'Repeals' Provision of the Ethiopian Civil Code of 1960," 1 *Journal of Ethiopian Studies* 57 (1963) and G. Krzeczunowicz, "Code and Custom in Ethiopia," 2 *Journal of Ethiopian Law* 425 (1965).

¹⁰⁷ Civil Code of Ethiopia, art. 560-576 (1960). This contract does not dispense with the necessity of consent to marriage by the future couple itself.

¹⁰⁸ *Id.*, art. 1168.

¹⁰⁹ *Id.*, art. 577.

¹¹⁰ *Id.*, art. 627 and 636.

parties to celebrate and regulate the marriage according to their own customary law. In such cases the code merely establishes certain broad boundaries inside which customary law is free to be applied without restriction. The few limitations that are imposed do not extend much further than those found elsewhere under the name *ordre public* or repugnancy to natural justice.

In the realm of land law, the code has an interesting series of provisions which allow agricultural communities such as tribes or villages to continue collective exploitation of their land according to their customary laws. These communities are given legal personality and are deemed the owners of the land that they occupy. Yet they are not permitted to exercise all of the rights of ownership. Restrictions on alienation and mortgage, for example, are imposed in order to protect the communities against their own inexperience in the administration of realty. Every such community must have its customary laws recorded. But — *in cauda venenum?* — revision of these customary laws is provided for and encouraged "so as to ensure the economic progress of such communities."¹¹¹

Except for such cases in which customary law is integrated or referred to, the Ethiopian Code is profoundly reformatory in nature. In fact, it is so modern, and in some cases so remote from the actual situation in the countryside, that the drafter himself has recognized that immediate and total application or enforcement is unlikely.¹¹² The code

¹¹¹ *Id.*, art. 1489 to 1500. This part of the Code has been little used up to now, a fact which was not unexpected, for these code articles were included in contemplation of later developments in the administration of rural areas. The use of this technique is evident elsewhere in the code, giving recognition to the principle that law is enacted for the future. Cf. note 112, *infra*.

¹¹² David favored only gradual application of the code in the local courts. However, the 1964 Code of Civil Procedure does not provide for any temporary adjustments. As is hardly surprising, there are still traditional courts functioning, although they are not recognized by the code governing the judicial system. These local courts (*atbia-dagna*) continue to apply customary law.

was seen by David as having in the first place a didactic role. The law embodied by the code thus represents a goal to be sought rather than a crystalization of social conditions that exist. Law thus is teleologic, not unlike the concept of law in socialist jurisprudence.

Integration of Principle of Customary Law — There is a growing category of statutory law that shows an admittedly remote yet definite relation to customary law. Strictly speaking, it has nothing in common with customary law and yet is indebted to it. Considering the deadly perils that surround customary law in African legislation, this category of statutes deserves mention in this survey of the various ways of safe-guarding the African legal patrimony.

The land reform act of Senegal is a foremost example of such a statute. It constitutes a bold and original combination of modern rules of law designed to promote the economic development of the rural areas while retaining some of the fundamental values of traditional Senegalese life and jurisprudence. It celebrates the wedding of custom and African socialism; in other words, it shows the *Voie Africaine du Socialisme*, as President Senghor puts it. The poet of *Négritude* introduced land reform in these words to his countrymen:

"What it is all about is simply this: to come back from the Roman law to Negro-African law, from the bourgeois concept of property to a socialistic concept of property, which actually is that of the black African tradition . . . The traditional Negro-African concepts have been condemned by written law which has introduced the notion originated in Rome, of individual property characterized by the right of usage (*usus*), but even more by a right of alienation (*abusus*). . . We must now come back to Negro-African law, and adapt it to the needs of our development ... "¹¹³

As can be seen from the President's address, the reform seeks a two-fold goal: to revert to traditional, communal, ownership and to adapt the traditional rules to modern

¹¹³ Address by President Leopold Sedar Senghor on the Senegalese national broadcasting system, May 1, 1964 (translated by the author from a mimeographed document).

needs.

The statute creates a new legal entity, the National Domain, which is to include the entire territory of the republic, except those few plots that have been registered in the land-registries as private property. (These plots do not include more than three per cent of the whole territory.) The National Domain is not to be confused with the Domain of the State, (*le Domaine de l'Etat*), an institution familiar to French lawyers. This is a new institution which embodies the concept of national, collective ownership of the land of Senegal. The Nation — that is, all the people of the past, the present, and the future¹¹⁴ — are entitled to that land. No private property can be acquired in the National Domain. The most one is entitled to is a right of usage. These rights are to be allotted by local communities to individuals or families according to their needs. The State has overall control over the proper use of the Domain and must see to it that it is used and improved according to the directions of the development plan. In the countryside, large areas of land are entrusted to rural communities (*les communes rurales*) which, under direction of an elected rural council (*conseil rural*), administers the area according to the development plan and other official directions (*Centre d'Expansion Rurale*). The members of the *conseil rural* are elected by the rural community; each village that constitutes the *commune rurale* is to be represented. Technicians of the ministry of agriculture and of the local cooperatives are members of the council *ex officio*. The communities are so organized as to include enough people, land, and villages to correspond to a profitable and self-sufficient rural cooperative.

The major task of the *conseil rural* is to allot plots of land to the members of the

¹¹⁴ This corresponds to a famous statement made by a Nigerian chief to the West African Lands Committee in 1912: "I conceive that land belongs to a large family, of which many are dead, few are living and countless numbers are unborn." See P. O. Proehl, *supra* note 19, at 137.

community, according to their needs and their ability to work the land productively. For the first allocation, preference is given to present occupants, provided they have previously used their land beneficially. Although the allotment is not a cession of a right of ownership, it does confer stable and certain rights. The undisturbed occupancy of the plots is guaranteed on condition that the occupant works according to the directives he is given. If he does not, the *conseil rural* is empowered to take the plot away from him and allot it to someone else.

This land reform seeks to produce radical changes in the existing land tenure situation of Senegal. Although an entirely new system has been established, its underlying principles find their origin in customary law, or more precisely, in strictly local law, and not in the Islamic law that was recently introduced and that superseded tribal laws in many places. This customary land law recognizes no private appropriation of land. Land has no market value in African customary law; it is a gift of the gods. It is occupied communally by the group. The National Domain is no more than the embodiment in modern legal language of these traditional rules. So are the *communautes rurales*. The modern elements in the reform, however, pervade every institution. Thus, these communities, although individually maintained, are to be knitted together according to the needs of a modern cooperative. Under customary law, plots were allocated by the chief of the land to the members of the group according to their needs, and the allottee's right of usage was guaranteed by the group so long as he worked his plot. The same principles are incorporated into the new system, although greater emphasis is placed on the necessity of working the land beneficially in order to deserve its occupancy. Under traditional law there was a democratic decision-making process within the group; the new

system retains this element by providing for an elected council. The council itself is the successor of the age-old council of elders that used to decide questions of collective interest, such as those concerning land use. Yet modern needs are served by the inclusion of agronomists and state officials on the council. These common characteristics are only a few of the many which could be listed.

Many other countries have enacted statutes with similar principles. Thus, there is a *Patrimoine collectif national* in East Cameroon¹¹⁵ while in Guinea there is mention of the *Patrimoine domanial des citoyens guineens*.¹¹⁶ Other legislation in this country implies that the land has no mercantile value.¹¹⁷ In Northern Nigeria almost all of the land is declared to be native land. It can be subjected only to occupancy rights and is held and administered for the use and common benefit of the natives, i.e., persons whose fathers were members of any tribe indigenous to Northern Nigeria. A right of occupancy may be revoked by reason of abandonment or non-use of the land for a period of two years.¹¹⁸ The African Law Digest cites a bill in Malawi which provides that all land shall be vested in the government and held in trust for the nation by the Head of State.¹¹⁹ A 1963 act of Tanzania similarly vests all land in the President. It converts all freehold land (remnants of the German administration) into government leaseholds, expressing the idea that there can be no freehold since the land is a gift of God. Improperly used land is taken away

¹¹⁵ Decret-Loi No. 63-2, 9 janvier 1963, *Journal Officiel de l'Etat Federe du Cameroun Oriental*, 15 janvier 1963.

¹¹⁶ Decret No. 027 P.R.F., 20 fevrier 1961, *Journal Officiel de la Republique du Guinee*, 1 mars 1961.

¹¹⁷ Guinea has adopted a statute providing that the sale of real estate transfers only the buildings that may have been constructed on the land, but not the land itself. The sales price pertains solely to the buildings. The land escheats to the state, which is considered as the *de jure* owner of it. Decr du 10 janvier 1962. *Sed quaerae* whether the origin of much of Guinea's legislation is not more Marxism-Leninism than customary law.

¹¹⁸ Land Tenure Law, N.R.L.N. 186, 2 Laws of Northern Nigeria 1069 (1963). The exceptions apply to lands granted or acquired during the first decades of the colonization of Northern Nigeria.

¹¹⁹ 3 *African Law Digest* 460 (1967).

from the occupant and allotted to another.¹²⁰

The obligation of personal and beneficial exploitation of one's plot, which is part of a God-given communal holding, is incorporated in the modern statutory law of many West-African countries. We find it in Mauritania, Mali, and Upper-Volta, to name only a few.¹²¹

¹²⁰ The Freehold Title (Conversion and Government Leases) Act (1963). Cf. P. J. Nkambo Mugerwa, "Land Tenure in East Africa—Some Contrasts," *East African Law Today* (British Institute of International and Comparative Law, Commonwealth Law Series No. 5, 1966).

¹²¹ P. Blanc, "La reforme mauritanienne," 71 *Penant* 312 (1961); P. Blanc, "Quelques lois guineenes et maliennes recentes," 72 *Penant* 297 (1962); Loi No. 36-63. 6 *Juris-Classeur d'Outre-Mer*, 24 juillet 1963 (Upper Volta).

SUMMARY AND CONCLUSION

On their day of independence, African states were confronted with the challenge presented by the simultaneous application and administration of differing systems of law, namely the law of European origin (be it British, French or Belgian), Islamic law, and the multiple varieties of African customary law.

A few countries, among them Uganda and the Ivory Coast, opted for the gradual withering away of customary law and for the ultimate general application of a western-oriented legal system. Most of the new African states, however, decided to look for ways to retain their customary laws, while at the same time adapting them to the needs of a society in search of rapid socio-economic development. Today, techniques are being sought for the modernization of the substance, the form, and the application of customary law. Some countries, among which Tanzania is prominent, are seeking the unification of some or all customary laws into a single, national body of traditional law. Many countries are looking forward to the ultimate integration of either rules or principles of customary law with those of modern law. Senegal and Kenya have already made some progress in this field.

The techniques employed to achieve modernization, unification, and integration have been categorized as follows: (a) judicial interpretation and (b) legislation, codification, and restatement of customary law.

Bearing in mind the role of the courts in the development of the English common law, many states have entrusted to their judiciary the task of unifying and modernizing their customary laws. Some states have retained the strictly parallel and separate court structure inherited from colonial rule, allowing its two systems of law to develop on

independent lines; others have maintained separate courts at the lower level of judicial hierarchy, integrating them in general laws courts at the appellate level. A great many other countries have integrated their court system into a single hierarchy of courts which deal with matters of customary as well as of modern law. To the first two groups of countries belong, inter alia, Nigeria, Congo (Kinshasa), Upper Volta, Tchad; to the second, Senegal, Mali, Ghana, Tanzania and others.

New rules for the solution of internal conflicts of law and for the ascertainment of customary law have been devised in many countries. Judges, in some places, are competent to restrict the application of customary law or to modernize and unify it. The Congolese system offers a striking example of the importance of the role to be played by the judiciary to curtail and adapt customary law.

Legislation has dealt with customary law in various ways. Some statutes have abolished or amended particular rules of customary law while allowing the field of law of which they are a part to remain in force. Nigeria and Ghana have both continued to entrust to their traditional authorities the task of officially ascertaining and declaring the law in certain designated fields. Their declarations, which frequently modify customary rules, are of statutory force. Restatements of the customary law are being compiled in several countries, particularly in East-Africa. Restatement projects aim at recording in a systematic fashion the various rules of customary law found in different homeonomic groups. Yet, more often than not, the restatement authors do not merely write down the law as it is found but actually reduce local variations. In the case of Tanzania, the customary laws of all the tribes of the territory were boldly unified and subjected to a thorough process of modernization. The texts that were agreed upon have been enacted in

the form of codes, having statutory force.

Finally, some statutes and codes abolish the application of customary law in the fields which they cover, while at the same time incorporating rules or principles of this customary law. The Civil Code of Ethiopia follows this pattern, while the statute on land reform in Senegal offers an interesting example of how to preserve age-old traditions of the black African legal heritage within a piece of progressive legislation.

Anyone who is concerned with the retention of African customary law — either because he thinks that it is an invaluable part of the universal legal heritage or because he believes that it allows African states to develop genuine national institutions — may feel skeptical about its future. Custom has been expelled from many areas; several countries show little or no interest in building a legal system on the basis of their traditional laws.

Yet, the general picture is not too dim. In most countries, customary law is not threatened with outright disappearance in the foreseeable future. It may even conceivably come to new life in many African states and develop into an original institution, although admittedly different from traditional customary law. The desirability of such adaptation varies according to the way one looks at the problem. Some might call the recording in writing, the modernization, or the unification of customary law its "corruption." It seems more realistic to view these phenomena as a necessary development, providing the only workable alternatives either to the outright abolition of customary law or to its retention at the cost of handicapping a modern state with a system of law that hampers its progress.

Customary law is called upon, as is any other body of law, to be both the mirror and servant of society. The adaptation of a body of law to changing conditions is usually considered as a natural development. No one would argue that the development of the

English common law has resulted in its "corruption." Admittedly, the process of adaptation and development is very considerably accelerated in the case of customary law. But can one not argue that, generally speaking, the modernization of customary law is also a natural process?

Some areas of traditional law are more subject to change, restriction, or abolition than others. Law pertaining to economic activities is bound to change more profoundly than law in other fields. Thus, customary law is being transformed or is disappearing entirely in the domain of commerce, contracts, and torts relating to business relations, labor, credit practices, etc. This process is a response to the felt need to abolish the legal rules which hinder the development of industry and commerce.¹²² The process is facilitated by the fact that customary law was never well-developed in these areas. Furthermore, the local population is not as deeply attached to these parts of their traditional law as they are to the legal rules pertaining to status, family, and land tenure. This is so because personal law and land law embody most of the cultural values of society.

Consequently, customary law is more likely to be retained to regulate matters concerning personal status, marriage, filiation, inheritance, and land relations. Except for some restrictions drawn from the concept of public order, these laws will remain in existence for a long time, partly because they do not directly hinder economic development, and partly because it would be politically and practically difficult to change them.

The law of land tenure occupies a peculiar place. This, too, is a body of law to

¹²² Pressure for the development or abolition of customary laws generally originates in the "economic enclaves."

which local people are closely attached, but it is also a factor with which economic development is intimately connected. The disturbance of the communal relations of families or tribes with their land is most often deeply resented. Yet, the development of the African economy is based to a large extent on progress in the agricultural sector, which in turn is very much dependent upon land tenure reform. It is therefore the task of the lawyer to devise systems which render customary law and economic development policies compatible with each other. Thus, the formulation of land laws provides one of the most challenging problems of legal development in Africa.