CHAPTER 19

Conclusion

The preceding chapters have made an attempt to give an outline of the customary law among Khasis and Garos. The question may be raised whether a project such as the present possesses any practical utility. Perhaps a proper answer to such question would be to point out that such a study promotes the certainty of the law, if not anything else. In this connection, it may not be inappropriate to emphasise the utility of a written code of customary law—whether official or private—in the interest of preservation of a record of the rules on the subject and as aid to judges as well as to future generations of laymen and women. As J.P. Moffett put it in the foreword to Cory's book on *Sukuma Customary Law*,[1] "without a written record, there can be no certainty in the law, nor is it wise to bring about change in the law (the necessity of which arises with increasing frequency) without that sure knowledge of custom which only a written record can give". It is hoped that a study of the customary law in its salient features will help the cause of certainty in customary law and promote its better understanding.

Customs how far changing

Enough has been said above to indicate that customs do change with the times. The notion that customary laws are ancient and immutable may not be necessarily expressive of the total truth. The implication of the proposition that customary law is unchanging and static requires more detailed analysis, as has been elaborated by one writer.[2] In the first place, while a general principle of customary law (for example, the proper respect to be shown to elders) may be handed over from the past, the meaning

1. J P. Moffett, in Cory's *Sukuma Customary Law* (1953), Foreword, page 9, cited by A.L. Epstein, *Case Method in the Field of Law* in M.N. Srinivas (ed.), *Studies in Sociology and Social Anthropology* 205-209 (1978).
2. Antony Allott, *The Limits of Law* (1980).

of such a principle and consequent ramifications in a variety of circumstances and the specific norms of behaviour which flow from it can, and will, alter as the circumstances of the society alter, and as new ideas and practices develop. Secondly, customary laws have in the past changed, and will continue to change to meet new circumstances. The example of the fundamental changes in the property law of Arushah has been cited in this context.[3] Thirdly, in every society (excepting the most simple) there is usually a recognised authority or set of authorities, with institutional power to declare and amend the laws.

It has, in fact, been pointed out[4] that amongst certain tribes in Liberia, there is a saying that "the law is a chameleon". This shows the awareness amongst the tribals themselves of the changing character of laws. If the change so far has been gradual, it could be due to the closeness of social bonds binding tribal people. But the growth of industrialisation, increased mobility and contact with alien influences is bound to reduce the closeness of the bonds linking tribal people. Social identity will recede in the background and individual identity is bound to come in the forefront. In the meantime, it is believed that a study of tribal law should focus not only on what people say they do and feel, as expressed in legal rules, judicial sermons and the norms of kinship, but also on what people do when involved in actual disputes with their fellows.[5] Selected judicial decisions that have been referred to in the preceding chapters will, it is hoped, be useful on the second aspect.

Experience in other countries

According to several Western anthropologists,[6] the pre-industrial social order stresses the predominance of the strong identification by the individuals with group sentiments. The existence of an isolable "moral person" in a tribal society is essentially denied. Law, it is stated, functions here effectively within a village or camp, or between the residents of nearby camps, where everyone counts in one way or another as a kinsman and where multiple ties, related to economic support, defence needs and ritual obligations, link and cross-link the same individual, reiterating their dependence on one another in a variety of symbolic and practical ways. The ties are thus "multiplex". However, as the radius in which the parties to a dispute operate widens, these multiplex ties decrease

3. *Ibid.*
4. Paul Bohannon, "Law and Anthropology" in Sol Tax (ed.), *Horizons of Anthropology*, 194
5. Laura Nader, "The Anthropological study of Law", *67 American Anthropologist*, 3-32 (1965).
6. Barbara Yngvisson, "Law in Pre-Industrial Societies" in Harry M. Johnson (ed.), *Social System and Legal Process* 128-133 (1978), citing the views of several anthropologists.

and the moral obligation to settle disputes by conventional methods also decreases correspondingly. The term "multiplex", denoting a relationship that serves many interests, has been used by Gluckman[7]--

> With his kin a man holds land and chattels; he produces goods in cooperation with them and shares with them, in consuming these; he depends on them for insurance against famine, illness, and old age; he forms with them religious communities tending the same ancestors; they are responsible for the main part of his education; he seeks his recreation with them.

Thus, social developments themselves have, by their impact, been altering customary law in the past and will, in future, continue to do so—presumably at a quicker pace.

Legislative reform

At the same time, a comment may be offered that legislative interference with customary law should proceed cautiously if the change is to be effective. On the question as to how far legislation which goes against the customary system may be enforceable in practice, Allott cites the case of certain African countries[8] where the experience has been mixed. In the Ivory Coast, legislation in 1964 suppressed the customary law of marriage and family, but provoked resistance. The theme has been dealt with at much greater length in a long article by Roger Granger.[9]

In one of the preceding chapters, it was pointed out that the application of customary law has been expressly preserved in the areas in question. The significance of this approach may be reiterated at this stage. In this context, it is appropriate to refer to a judgment of Lord Denning in the Court of Appeal.[10] A provision in an East Africa statutory Instrument[11] said that the English common law was to apply in the Protectorate, "subject to such qualifications as local circumstances render necessary". Denning, L.J. (as he then was) commented on this provision as follows :--

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7. Gluckman, *The Judicial Process among the Barotses of Northern Rhodesia*, 18-19 (1967).
8. *Supra* note 2 at 185.
9. Roger Granger, "La tradition en tant que limite aux reformes du droit" I, 37. *Revu Internationale du droit compare*, (1979) See Antony Allott, *supra* note 2 at 294.
10. *Nyali Ltd.* v. *Attorney General*, (1956) 1 Q.B. 1, 16; (1955) 1 All E.R. 646, 653.
11. Article 15, East Africa Protectorate Order in Council, 1902, as amended.

This wise provision should, I think, be liberally construed. It is a recognition that the common law cannot be applied in a foreign land without considerable qualification. Just as with an English oak, so with the English common law—you cannot transplant it to the African continent and expect it to retain the tough character which it has in England. It will flourish indeed, but it needs careful tending. So with the common law.