

Legal Literature in Small Jurisdictions

Edited by
William Twining and Jenny Uglow



Commonwealth Secretariat

Legal Literature in Small Jurisdictions

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Edited by
William Twining and Jenny Uglow
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LEGAL LITERATURE IN SMALL JURISDICTIONS

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PART I GENERAL ASPECTS

CHAPTER 1

INTRODUCTION

The Toronto seminar on Legal Literature in Small Jurisdictions marked the culmination of a pilot project which was initiated by the International Legal Center (I.L.C.) as part of a series of follow-up activities to the I.L.C. Report Legal Education in a Changing World (1975). One of the main purposes of that report was to draw attention to neglected but problematic aspects of legal education. Among the topics highlighted in this way were the problems of law and legal education in multi-lingual societies, the dissemination of information about law to non-lawyers and to the public at large and the difficulty of developing an adequate corpus of literature dealing with local laws.

The primary focus of the pilot project was the problem of localizing all kinds of legal literature in small jurisdictions. It was recognized from the outset that this relatively narrowly focused study had to be set in the context of more general studies of legal information, of legal pluralism, of multi-lingual societies and of changing ideas about strategies for "development" and the role of law in such strategies.

The primary purpose of the project was to obtain a broad conspectus of the problem in a variety of jurisdictions as a preliminary either to a broad comparative study or to some programmes for action. It was clear that a thorough study which would involve both a theoretical analysis of the role of legal literature in the development of legal culture and practical plans for action would have to be based on detailed field-work embracing such topics as the information needs and habits of lawyers in private practice and public service, the problems of law students and academic lawyers, the local publishing industry, the operation of subsidy schemes and the communication of legal information to the community at large.

The limited aim of the pilot project has been to attempt to diagnose a practical problem and, in particular, to concentrate on collecting mainly factual data on the existing situation, by commissioning a number of largely descriptive papers on selected jurisdictions and on particular topics, and by compiling profiles by questionnaire on a wider range of jurisdictions. In the event the working papers and other exploratory studies not only provided a useful corpus of descriptive material, but also suggested perspectives and questions which went well beyond the original aims of the pilot project.

The basic strategy adopted was to invite a number of individuals with first-hand experience of the problems on the ground to prepare working papers on particular jurisdictions in the English-speaking world. The authors were asked to provide some basic information and to address themselves to certain specific issues, but beyond that they were given a free hand. The seven country papers in this volume testify to the differences of perspectives and of emphasis that can be brought to bear on a study of legal literature in a particular jurisdiction.

Contemporaneously with the preparation of the working papers several other lines of enquiry were initiated either in conjunction with or independently of the pilot project. With the aid of the Commonwealth Legal Education Association and the Commonwealth Secretariat a questionnaire was circulated to a number of jurisdictions in the Commonwealth with a view to building up a series of basic profiles of the existing situation in countries not covered by the working papers. In 1977 Professor William Twining visited Papua New Guinea and prepared a report for the Law Reform Commission on problems of documenting Papua New Guinea Law, especially customary law and the operation of the lower courts, in connection with their proposals respecting the underlying law. This was published by the P.N.G. Law Reform Commission and is referred to in Dr. Paliwala's paper. Between 1976 and 1977 Professor Twining and Mrs. Uglov participated in informal seminars and consultations in several different jurisdictions; these were useful not only in obtaining information, views and impressions, but also in revealing the high degree of concern felt by lawyers and others about the implications of an inadequate local literature for the functioning and development of the legal system and of legal education.

During this period several other activities were going on which were relevant to but independent of the pilot project. Three warrant specific mention. Firstly, in 1975, the Society of Public Teachers of Law in the United Kingdom established a working party to consider the problems of academic law publishing in the U.K. at a time of rapid inflation. A striking feature of this exercise was the spontaneous interest expressed by individuals working in the smaller jurisdictions of the British Isles. The work and reports of the S.P.T.L. Working Party are described in chapter 3. Secondly, as a direct result of this project, it was decided to initiate a special study of the problems of localization of legal literature in the smaller jurisdictions of the British Isles and, with the support of a small grant from the Nuffield Foundation, it is hoped to report on

this in 1980-81 in the form of a companion volume to the present work. Thirdly, recent studies of the legal profession in the Third World, in the British Isles and elsewhere have begun to focus on the information habits of lawyers, especially private practitioners. Sometimes this interest has been specifically stimulated by concern about the possible applications of computers to legal practise, in other instances it has been part of a more general study of lawyers and their work. During the pilot project we maintained liaison with some researchers into the legal profession in several countries, but there is room for a much closer integration of studies of legal information and of the legal profession than has so far been achieved.

Against this background it can be seen that the Toronto seminar, and this report of its proceedings, represent only a stage in what is a continuing exploration of a complex subject with many ramifications. The pilot project was merely exploratory: in our view, this somewhat cautious approach has been vindicated. For, while these preliminary investigations have confirmed that there is indeed a widespread concern about improving and localising the provision of legal information in small jurisdictions it has also revealed that there is not one problem, but rather a complex variety of phenomena, problems and perspectives which need to be differentiated and which are not susceptible to treatment in a single project or programme. This complexity can be illustrated in a simple way by our experience of the different concerns of our different sponsors and informants during these early stages.

Different Perspectives on the Pilot Project

During the course of the pilot project it gradually became clear that the notion of a study of legal literature in small jurisdictions triggered a rather varied set of associations and expectations. We found that we were dealing with several constituencies with different, but overlapping concerns. For the sake of clarity it may be useful to differentiate between three sets of concerns and expectations about the possible scope and significance of such a study; these in turn suggest at least three different approaches to the subject.

The first approach which we encountered was concerned with solving a practical problem: how to develop a body of local legal literature that meets the main day-to-day needs of functionaries professionally associated with the legal system: in particular private practitioners, government lawyers, the judiciary, law students and to a lesser extent police officers, civil servants, businessmen, etc. From this point of view, systematic study is relevant only in so far as it helps to diagnose the nature and extent of the problem and points to practical ways and means of solving or at least mitigating it. Practicable recommendations and action were expected to flow directly from this preliminary study. By and large those who assumed that this was what the project was about tended also to assume what might be called an orthodox conception of legal literature - that is, its only, or at least its primary, function is to provide information about the law as it is for professional users and law students.

On this view legal literature consists mainly of five types of work: (a) the statute book (including subordinate legislation); (b) law reports confined to decisions having value as precedents within the jurisdiction; (c) secondary research tools such as indexes, digests and citators; (d) treatises and textbooks expounding the law as it is in a systematic way and (e) law journals, which might serve a variety of functions.

Holders of this view commonly made certain other assumptions, for example:

- (i) that the primary users of legal literature are practitioners (often equated with private practitioners) and law students;
- (ii) that the main, perhaps the only problem, is how to produce works in category (d) - viz, expository works on local law;
- (iii) that the two main obstacles to solving the problem are (a) finance (b) recruiting suitable authors;
- (iv) that the main responsibility lies with academics and commercial publishers, and
- (v) that the only kind of information needed by professional users is information about current rules of law (legal doctrine in a broad sense).

It is not surprising that we encountered a certain amount of scepticism about the exercise from this quarter, although it is fair to say that a very large proportion of our informants agreed that there is a problem. Two kinds of scepticism are worth mentioning explicitly, as they openly challenge the validity of the project. In extreme form they might be stated as follows:

(vi) the problem is easily stated and understood, therefore there is nothing to study; and

(vii) the problem is insoluble, at least in very small jurisdictions.

During the pilot project we have deliberately concentrated (a) on trying to diagnose the problem largely in terms of the orthodox model, which is set out at the end of William Twining's paper on "The Concept of a National Legal Literature" and (b) on identifying possible strategies and devices for trying to solve practical problems. However, even within this limited approach we are inclined to question each of the assumptions listed above. In addition it is evident that the orthodox model of legal literature underlying this view, and used as a basis for our own aspirational statement, makes rather vague assumptions about the uses to which legal literature is in fact put. For example it assumes it is "important" that law reports should come out quickly and that the statute book should be easy to use. Within certain narrow limits it is feasible to operate on the basis of such "common sense" assumptions. But there are a number of empirical questions centred around the global question "who uses what products in what circumstances, in what ways, for what purposes, at what cost in time and money, and with what effects?"

A second kind of approach assumes that a study of legal literature necessarily involves empirical research. Existing research, such as the studies in the United Kingdom by Campbell, Campbell and Kidd and Boyd have tended to concentrate on the habits and needs of private practitioners for information about existing law. While these path-breaking studies are undoubtedly illuminating, the systematic empirical study of legal literature and information is, as we shall see, potentially very much wider than that. During the course of the pilot project we did not undertake any detailed empirical research ourselves. We collected a miscellany of data, views and impressions but we stopped short of carefully structured fieldwork. There were two main reasons for this. First, we felt that it would be premature to launch into any detailed and systematic study before we had gained a broad overview of the various dimensions of the subject and its possible ramifications. Secondly, there is an inevitable tension between satisfying the exacting standard of systematic research and taking prompt action to deal with pressing practical problems. At least in respect of certain kinds of basic orthodox provision, it seemed to us that it did not need expensive and time-consuming research to establish that if copies of legislation in force are unobtainable or there are no educational materials on local law, there is a problem for specialist users. Research and reflection may lead us to modify our perceptions of problems and to readjust judgments of needs and priorities, but it was, and remains, our judgment that there are some matters that can and should be tackled with a sense of urgency.

A third approach which was suggested to us came from people who are interested in broader aspects of the general field of "law and development" and, in particular, questions about the role of law, lawyers and legal processes in promoting and hindering development goals. This approach, which has been articulated most clearly by Professor Paul, and is evident in his paper on Ethiopia, would concentrate on examining the strategies used to determine needs and to develop programmes relating to legal literature and legal information, in terms of the assumptions and models of legal development employed. It would explore the kinds of strategy required by divergent goals, for example, "What are the elements of a strategy if the goal is to strengthen and reform the existing legal system, legal profession, legal education and model of legal development or if the goal is to develop a model of legal development geared to alternative development strategies (eg. human needs, participation, etc.)?"

Among areas of study related to the pilot project which the holders of this approach feel deserve greater attention are the development of an historical perspective analysing the impact of legal literature and information systems on the character of legal and professional development and vice-versa, and of a comparative perspective examining models of legal literature in non common-law jurisdictions. In addition they draw attention to the contextual factors which affect the character of legal literature, such as markets for legal services and access to, and use of, the legal system by various groups. Related in a sense to the empirical approach discussed above are questions about who defines needs by what criteria, and the important issue of providing legal resources for various purposes outside the structure of existing legal services. Our position has been that such questions, though interesting and relevant, go far beyond the immediate objectives of the pilot project. However, some of these issues are explored in a preliminary way in some of the papers, especially in the paper on Ethiopia and the final chapter.

A Possible Aspirational Statement for the Orthodox Model

We feel that the problems, and especially the priorities for planning any changes or developments in the pattern of legal literature within a jurisdiction, can best be

identified by those who have to live and work with the materials within the legal system or legal education structure for which they are designed. We have, however, tried for our own purposes to develop a model against which to set such information. The skeleton of this can be found in William Twining's paper, "The Concept of a National Legal Literature". It is a model of orthodox provision and is intended only as a starting point. Furthermore, as is suggested in the paper, it is important to distinguish between long term aspirational goals and minimum standards for a healthy system.

During the course of the Toronto seminar we concentrated on three sets of questions in connection with it. Firstly, is this adequate as a general aspirational statement for orthodox provision (and a bit beyond), bearing in mind that assessment of needs and priorities in a particular jurisdiction will depend on local circumstances and on the concerns of those in a position to set priorities for action? Secondly, to what extent does each jurisdiction under consideration fall short of this statement (or a revised version of it)? Thirdly, with regard to each category of literature, what is the range of possible strategies and devices available for taking practical steps to improve local provision?

Legal Literature and Legal Information

The subject of both the pilot project and the Toronto seminar was designated by the label "Legal Literature in Small Jurisdictions". From the outset it was recognized that it would be artificial to define any of these terms too precisely. As is indicated in the first paper it is useful to interpret "legal" and "literature" fairly broadly. "Literature" can encompass almost anything which is written from conventionally published books and journals to unpublished court records and archival material. Similarly, "legal" in this context has not been confined to information about principles and rules of law, but is broad enough to include information about customs, processes, personnel and institutions. Nevertheless, it is fair to say that the project as originally conceived was focused primarily on unpublished literature about different aspects of the official legal system. The orthodox model is concerned mainly, but not exclusively with works which provide information about existing legal doctrine; since much of our original concern was with the economics of publishing, it was natural that the primary focus of attention should have been on conventional publications and on possible alternatives to them. However, during the course of the project, it became clear that this way of looking at things might help to sustain two questionable assumptions which seem to be quite widespread in discussions of legal information. First, it is wrong to assume in any jurisdiction, especially a small one, that writing is the main medium of communication about law. The telephone, formal lectures, informal lunches and even social occasions all feature frequently in most jurisdictions as channels for oral communication about law and, it seems, many professionals rely as much on oral as written sources for obtaining and updating the information they need. Second, our own impressions, confirmed specifically by the recent research of David Kidd into Scottish solicitors, suggests that it is wrong to assume that information about legal doctrine is the most important kind of information that certain classes of professional lawyers think that they need. Many Scottish solicitors, for example, spend only a very small proportion of their time looking up points of law, but they have a wide variety of information needs in order to perform the tasks they undertake. How far the concept of "legal information" should be expanded to accommodate all kinds of information that legal specialists seek to have access to is a debatable question that will not be pursued here. Suffice to say that while the primary focus of what follows is on published information about legal rules, it is important to bear in mind that the systematic study of legal literature in any jurisdiction needs to be set in the broader context of a realistic picture of all forms and channels of legal information and of the different types of information used or needed by a variety of types of users. Ultimately a systematic study of legal information in a given jurisdiction should attempt to give a comprehensive answer to questions of the kind: "Who seeks and who provides what information for what purposes in what forms at what cost?"

Different Perspectives on the 'Small Jurisdiction'

It should by now have become clear, in terms of the pilot project, what we mean by "legal literature" and if we continue to elucidate terms perhaps we should consider the "small jurisdiction". The first qualification that must be made is that there is no such thing as a standard "small jurisdiction", a point which becomes abundantly clear on reading the various country papers. The only common factor, and this was indeed the starting-point of the project, is one related to the economics of publishing; that in no case is there sufficient market for specialised legal works relating to the jurisdiction to support a commercial law publishing industry. A second linking factor is that all the countries covered by the papers and questionnaire have a varying degree of common

law inheritance and in most cases the language of legal literature, at least until recently, has been English.

If we survey the actual jurisdictions which have been examined so far they vary in a number of aspects, all of which are significant for the development of legal literature. If one takes different schematisations it becomes clear that there are no simple sets of contrasting "models", for the conditions described combine in different permutations in separate jurisdictions. First, to take straightforward physical size, most of the countries are by no means "small". At one extreme one has the tiny jurisdictions such as the Isle of Man, or Niue in the Pacific, and in these cases it appears that in a geographically small jurisdiction some of the main functions of legal literature can be performed by informal networks of oral communication, or by the use of a single centralized library which is physically accessible to nearly all professional users, but certain problems, such as the publication of case law or the provision of educational materials, become more severe. At the other end of the spectrum are countries like the Sudan, with far greater numbers of lawyers, but where the provincial courts may be up to 700 miles from the capital, communications are unreliable, and as foreign law books for the use of the judiciary are kept in the central Judiciary Library they may be described as "not readily available". In another case we have been asked whether we really consider New South Wales "small" and yet it does have a limited market for "local" legal works.

Grouping these two examples together highlights another level of variation, that between developing and developed countries. While the developed country may have similar market problems it usually has access to greater resources to alleviate these, in terms of finance, publishing outlets and expertise, long established law schools and libraries, better access to new technologies (such as computer retrieval systems) and so forth; yet some would argue that the high expectations these engender only complicate the publishing problem. Yet again there is obviously considerable variation between less developed countries in terms of their relative prosperity and the human and economic resources available.

Another frame which could be used is that of the constitutional or other relationship to other jurisdictions, which can affect the closeness of local law to that of an allied jurisdiction and consequently the level of reliance on foreign literature. Most of the jurisdictions in the papers are independent, yet independence has been achieved at different dates and official policy since has had different impacts on the development of the legal system, education and literature. Others, such as Hong Kong and the Isle of Man are dependencies with a considerable degree of autonomy, and others like the Australian states and Canadian provinces have legislatures within a federal system.

A further frame of reference is the legal system itself, which ranges from the single common law base of the United Kingdom (except Scotland), to systems which have a strong element of civil law tradition and pluralist systems where legal literature must take account of the operations of different kinds of law. Language provides another set of variations. Only the United Kingdom and Australia can claim that the language of the legislation, courts and legal texts is that of all the people (and even here a layman or Welsh nationalist might take exception). At the opposite end of the scale is a country like Papua New Guinea with 300 local languages; in between are jurisdictions where, to varying extents, even where a switch from English as the official language has been effected or is being attempted, the official legal language is not comprehensible to many of the people to whom the law actually applies. Some of the problems of multi-lingual societies in relation to legal literature are illustrated in Mark Cooray's paper on Sri Lanka. Legal education could offer yet more differences relating to the role of the law school in developing local legal works and doubtless there are other categories which could be used.

In a sense these rather crude perspectives are only of use in illustrating the complexity of the real situation in contrast to the abstract level of the aspirational statement. In this context, one final distinction may be made. This is the level of consciousness that there is in fact a problem. In most cases concern with the provision of legal literature is articulated from time to time by disparate groups - professionals, academics and so forth - but is not presented in a coherent way at the level of national concern; the result is that the system continues much as before, with small ad hoc attempts to improve different aspects, such as government intervention in law reporting, or a subsidy scheme for text-books. It is a common complaint that governments do not give a sufficiently high priority (especially in respect of resources and the schedules of government printers) to the development of local legal literature and yet rarely, if ever, has the case for such a claim been stated in a sustained and systematic way. In a few jurisdictions the government has been made aware of the general problem but this is usually as a consequence of action in a related field, such as the work of the Law Reform Commission in Papua New Guinea, the official language switch-over in Sri Lanka, an internationally funded aid project as in the Sudan or a specific government policy to "modernize" the state as in Ethiopia.

The papers which follow pick up these various themes in a variety of ways. William Twining's "The Concept of a National Legal Literature" was originally delivered as a public lecture in Lagos in the early days of the project. It attempts to explore some of the main dimensions of the subject from a broad perspective; it also contains some sceptical reflections on the suitability for export of some of the assumptions underlying two particular forms of English legal literature, viz. law reports and text-books. Similarly Jenny Uglow in describing and reflecting on the the lessons of the S.P.T.L. study of academic law publishing in the United Kingdom raises some general questions about the relationship between academic attitudes, traditions of scholarship and legal publication in a way which transcends national boundaries. The next seven papers deal with particular countries or jurisdictions. The papers on Hong Kong and Sudan, by Peter Wesley-Smith and Akolda Tier respectively, follow fairly closely and in detail the original questionnaire which was primarily directed to orthodox provision of published works. Michael Gaiger's account of the problems facing the widely dispersed Sudan judiciary in gaining access to basic materials graphically illustrates some of the realities which can easily be masked by high-minded aspirations. The account of the situation in the provinces of Canada, by Balfour Halevy and Paul Murphy, underlines inter alia the point that money alone cannot solve many of the problems of providing even basic research tools. Mark Cooray's account of the language changeover in Sri Lanka is part of a pioneering study of the problems of law in multi-lingual societies. Abdul Paliwala in his study of Papua New Guinea raises some broad issues about the relationship between colonialism, neo-colonialism and information about law. Similarly Rob Martin, in looking at the development of legal publications in the East African jurisdictions from a Marxist perspective, makes some points which deserve consideration in a broader context. James Paul in his study of Ethiopia also raises some fundamental general questions about the relationship of the provision of legal information to recent thinking about development, while at the same time giving a detailed account of what can be achieved by a few dedicated individuals attacking the problems in an energetic and determined way. In the final chapter the editors have attempted to draw together some of the main points that emerged during discussion at the seminar and to make some suggestions for further study and action.

CHAPTER 2

THE CONCEPT OF A NATIONAL LEGAL LITERATURE

*By William Twining**

When entering even a quite modest library, if one pauses to contemplate the contents as a whole, it requires a feat of imagination to envisage all the patience and learning, the obsession and the insight, the agony, the sweat and the love, which went into creating such a storehouse of wisdom, pleasure and knowledge - and so much dross. Even the most ardent book-lover can accept that almost any collection of books contains much that is trivial, foolish, out-dated, repetitious, or misleading; that libraries are monuments to human folly and absurdity as well as to human achievement; but it requires a considerable degree of philistinism or despair to conclude, after such an exercise, that overall the effort has not been worth the cost. One has to be a bit of a romantic to have a realistic vision of a library.

In modern times specialists in communication, librarians, sociologists, and computer experts are among those who have developed a variety of techniques for systematically analysing bodies of literature, both the products and the processes of creation and production, from a number of points of view. Lawyers can learn much from content analysis, from studies of information retrieval, from studying the economics of publishing and, more generally, from the sociology of knowledge. But analytical approaches and technological innovations have their limitations as well as their uses. However suggestive and illuminating they may be, they need not totally supplant our vision of literature as being the result of an untidy, largely unplanned, and conspicuously lavish expenditure of human effort.

To obtain a realistic and balanced picture of a nation's legal literature, actual and potential, similarly requires a combination of vision, hard-boiled scepticism, and informed analysis. It needs imagination to envisage the totality of the heritage of English or American legal literature; as it does to envision what Nigerian, Sudanese or Tanzanian legal literature might be like in twenty or thirty years time, if it realizes only half of its potential. But it will also require hard-headed, detailed, down-to-earth analysis of quite unromantic matters, if such aspirations are to have much hope of achievement.

In this paper I wish to discuss analytically, sometimes at a quite mundane level, the notion of a national legal literature and possible strategies and tactics for developing a corpus of work which can contribute to a healthy legal culture. My opening flight of fancy was intended to signal some of the limitations of this approach: literature is too fascinatingly complex to surrender to simple rationalism; it accumulates more by uncoordinated effort, serendipity and stubborn persistence than by planning and directives.

Yet analysis and an element of planning have their uses. In particular, there are a number of people involved in the creation, compilation and production of literature who could benefit both from seeing their own special problems in a broad context and from certain specific kinds of guidance: the postgraduate student looking for a thesis topic; the legal scholar mapping out his research plans for the next few years; a university appointments committee assessing the writings of candidates for a Chair or lectureship; the first Director of a Legal Research Institute; a Ministry of Justice preparing a budget; an international foundation considering its policies towards subsidies for publication; a Government printer handling law reports; a commercial publisher or a university press considering whether to accept a particular legal manuscript for publication, and a reviewer of a book on a legal topic, are all examples of people or bodies confronted with choices which have a bearing on legal literature. And, up to a point, such choices can and should be informed and reasoned and based on articulated standards and priorities.

The concept of a national legal literature provides one possible starting point for approaching a variety of issues. By setting a broad context for discussion of specific topics such as law reporting, the statute book, educational materials for law students, communication of research findings, the economics of publishing, and the needs of the ordinary citizen for access to information about the legal system, it may be easier to make a realistic and balanced appraisal of needs and priorities, of gaps and imbalances, of opportunities and constraints in a particular country and of possible strategies for improvement.

* Professor of Law, University of Warwick England.

The concept of legal literature is necessarily imprecise. For present purposes it is useful to interpret the terms "legal" and "literature" quite broadly to encompass any written material which contributes to the dissemination of information or ideas about matters "legal", in a broad sense. In this usage the term encompasses books about law as well as books of law, legal biographies, anthropological studies of customary law,¹ accounts of famous trials, and where appropriate, even legal novels, as well as law reports, digests, citators, text-books and the statutebook. Similarly under "literature" could be included not only printed books and journals, but also unpublished records, cyclo-styled educational material, judicial circulars and so on - and similar considerations apply to other media, such as recorded broadcasts, films, computer programmes and cassettes which are now increasingly used in continuing legal education in the United States. But the main focus here will be on published writings for relatively specialized audiences.

Literature, like scholarship, is of course international as well as national. It is hard to envisage a worthwhile study of land law in Tanzania or of sanctioning processes in Zambia which was not influenced by thinking from elsewhere and which would be of no interest in other African countries or the world at large. But scholarship can sometimes be too international. I intend to concentrate here on the localization of legal literature, that is to say on what is involved in developing a corpus of works which deal with local problems and phenomena in a manner which may contribute to the better understanding and functioning of the local legal system.

The creation, production, dissemination, use and evaluation of literature is clearly a complex process which can be viewed from a variety of perspectives. One can look, for instance, at the standpoints and the problems of each of the types of participants in this process; one can look at the original author (whether he be researcher, compiler or editor) and ask questions about his situation, his motives, his conception of what he is trying to do, the assumptions and skills and qualities he brings to the task, the kinds of decisions he has to make, the source material and methods of approach open to him, the constraints he is working under and so on. Again, one could look at the users or "consumers" of legal literature: who they are, their book buying and reading habits, the relationship between their conceptions of their role and their uses of legal literature and, a more elusive form of enquiry, the relationship between this and their efficiency in performing their roles. This is almost unknown territory so far as research related to law is concerned, but I suspect that it is potentially a very rich one. It merits a short digression.

There is a well-known English shaggy dog story about an elderly and highly respected local doctor who had a thriving practise. One year when he decided to go on holiday, his patients begged him to make sure that while he was away they would be adequately looked after. So he advertised for a locum and selected a highly qualified younger man. When the latter arrived, he showed him round his house and surgery in a most hospitable manner. At the end of the tour he said, "I wish to beg one favour of you: make yourself at home, do anything you like, but please do not open the cupboard under the stairs." The young doctor agreed, but after some days this strange request began to prey on his mind. What was his host's secret? Could there be a dead body under the stairs? Or a store of illegal drugs? In the end his curiosity got the better of him and he opened the cupboard door. He was swamped in an avalanche of paper: years of unopened copies of drug companies' circulars and medical journals. The much respected doctor had not kept up with medical literature for thirty years.

Our own profession has similar stories. You may have heard the one about the old-fashioned English solicitor who had a reputation for great erudition. His office was lined with impressive leather-bound books from floor to ceiling on every wall. Whenever a client came to see him with a problem, the solicitor would pause for a moment, and then say something that sounded like "2 Meeson and Welsby 369". He then called for his elderly and decrepit clerk who would fetch a ladder and with wheezing and puffing fetch down a heavy volume, usually from the top shelf. One client, more observant than the rest, noticed that on two separate occasions the same volume of the *English Reports* had been fetched to deal with two quite unconnected problems. He managed to sneak a look at the volume, to find that it was an out-dated edition of *Everyman's Own Lawyer*, bound up to look like a volume of the *English Reports*.²

Every reputedly learned profession probably has stories of this kind. They may be used by outsiders to suggest that members of the profession are quacks or hypocrites; but they may serve within the profession itself as a sort of counter-mythology. Sometimes the mythology of the common law presents an image of even quite humble practitioners as men who spend long hours poring over enormous ancient tomes and crumbling parchments. The counter-myth suggests that a man may be a successful practitioner even though he rarely, if ever, resorted to books. I hope that serious empirical investigations into the reading habits of private practitioners and other lawyers in my country, or yours, would not reveal the notion of a learned profession to be a hollow fiction; but such an investigation might reveal that some widely held

assumptions about lawyers' uses of literature are quite unrealistic. For instance, one wonders whether courses and literature on techniques of using a law library are based on a realistic picture of the habits, circumstances and needs of law students and legal practitioners. Certainly some recent research into undergraduate reading habits in England (not confined to law) suggests that there may often be a wide gap between teachers' expectations (and recommendations embodied in reading lists) on the one hand, and student practice, on the other.³

This kind of research is sometimes characterized as study of the "information needs" of lawyers. It has received some stimulus recently, partly because of interest in possible computer applications to law.⁴ But it might be more appropriate, especially in Africa, if a start were made by attempting to get a realistic picture of the actual use made of fairly standard kinds of books such as law reports, digests and treatises. Even elementary research of this kind is fraught with difficulties. Moreover, while description of existing practices is a good starting-point, by itself it will not take us very far. For the book habits of some lawyers and law students may be quite simply bad habits, judged by almost any standard. And, although relevant, it may not be adequate to accept unquestioningly individuals' assessments of their own "information needs". For example, as a teacher I am well aware that my students do not always accept my recommendations about reading: sometimes they are lazy; sometimes I have expected too much of them; sometimes they may have realistic notions about how to outwit the examiners or play the system, thereby possibly frustrating desirable learning objectives; but sometimes student mythology about teachers' and examiners' expectations and criteria is unrealistic or philistine, and ultimately self-disserving. In short neither teachers' nor students' impressions of their "information needs" are a substitute for a more detached analysis of educational objectives and efficient ways of achieving them.

Similar considerations apply to practising lawyers of various kinds: it would be interesting systematically to obtain lawyers' assessments of their information needs and the extent to which they are being met by existing arrangements; but this alone would not be enough: some individuals may be lazy or incompetent or unduly parsimonious about expenditure on books; legal literature is a rapidly changing and increasingly complex phenomenon; individual lawyers may not be aware of the range of possibilities or up-to-date in their knowledge of recent developments; attitudes to and uses of literature are often based on habit, inertia and assumptions which may be out-dated or irrational or dysfunctional in some way. Few individuals give much thought to such matters. But the rationalization of legal literature requires analytical approaches using techniques of a quite specialized kind. And to develop criteria of information needs of lawyers which are not based merely on impression and prejudice, requires complicated and detailed analysis of the actual and potential tasks which law-trained people do or might perform and the extent to which various kinds of written material may help or hinder the efficient performance of these tasks. Thus, as with legal education, so with legal literature, serious analysis quickly pushes the enquirer into studying the legal profession itself.⁵

A rather different approach to legal literature is through studying the economics of law publishing. The recent spiralling of publishing costs, which has been compounded by such matters as the world paper shortage and the cutback of university library budgets, especially in America, provoked a crisis in scholarly publishing. In the early seventies this crisis stimulated some re-thinking (or in some cases first-time thinking) in this general area. In the United Kingdom, the Society of Public Teachers of Law set up a working party to "investigate problems of legal publishing as they affect legal education and legal scholarship and to make recommendations".

One fact emerged clearly from the study: there are many desirable kinds of legal literature which are not commercially profitable, even in a large jurisdiction. To leave the publication of legal literature to the operation of market forces is likely to have a number of undesirable consequences; in small jurisdictions, with very limited markets, it is likely to be disastrous, yet small jurisdictions are often poor jurisdictions economically.

It would not be appropriate here to try to examine in detail the complex topic of the economics of law publishing and distribution. But one thing is clear: in most less developed countries there are in the coming years likely to be severe economic constraints on building up a satisfactory local legal literature. If progress is to be made in resolving these problems serious attention needs to be given to such matters as: ways of reducing costs of publication; ways of increasing and exploiting the market for law books and law journals and law reports; ways of ensuring that there are adequate and sensible provisions, policies and priorities for subsidizing, directly or indirectly, the publication of significant works and so on. This is an area in which law schools can make a significant contribution by studying and analysing the problems locally and informing themselves of the possibilities, for academic lawyers are well placed to form a link between the legal profession and the world of publishing. To make one specific

suggestion: an efficient international distribution mechanism for African legal publications, both governmental and other perhaps on a pan-African basis, could do much to relieve the economic pressures. There is an international market to be exploited for the benefit of local legal literature. At present such exploitation as there is appears to be of a reverse kind.

The whole problem of the economics of law publishing is in need of systematic study. From my own amateurish and preliminary enquiries three tentative general propositions have so far emerged. First, that it is an almost essential precondition for the development of a satisfactory system of publication of primary sources of law, such as statutes, law reports, and reports of other important tribunals, that the responsibility should as a matter of principle be accepted by governments: that their social importance should be assessed and given due recognition and that they should not necessarily be expected to be profit-making ventures. Second, that the economics of the market have had a much more profound, and often distorting, effect on legal scholarship and legal literature than has been appreciated in the past. Third, that the economic problems of *academic* law publishing are by and large shared with scholarly publishing in general; that the most obvious solutions, such as the development of subsidy schemes and university presses, belongs as much to the more general world of scholarship as to the specialized world of law.

So far we have looked briefly at legal literature mainly from the point of view of the information needs of users and the economics of publishing. There are, of course, other participants in the process of creation, distribution, and the use of legal literature: grant giving bodies; booksellers; wholesalers; librarians; editors; and of course, authors. Before proceeding to consider some particular types of product, it is worth pausing to comment briefly on one participant, the position and role of the critic of legal literature.

LEGAL LITERARY CRITICISM

A striking feature of legal literature in the western world is that there appears to be a total absence of any coherent theory or set of standards for legal literary criticism. Certain kinds of literary products are reviewed, others are not. Little connection is seen between the writing of case notes, the writing of notes on recent legislation and book reviews. The amount of space devoted to book reviewing in some legal journals appears to bear little relationship to the quality of this kind of writing or the trouble which is expected to be taken over it.

All too often, especially in respect of book reviews, criticism is conceived of as a mixture of praise and excoriation or ritual eulogy rather than in terms of the relatively dispassionate application of a set of articulated standards. Yet from the perspective of a concern to develop a national legal literature, serious criticism has an important role to perform. Of course, individual book reviews can serve one or more of a variety of functions, such as to disseminate information about a work, expose specific errors and faults, pass judgment on its usefulness for a particular purpose, provide feedback and encouragement (or the reverse) to authors and publishers and so on. Many book reviews in law journals do this kind of job quite adequately,⁶ but there is a more fundamental role for serious legal literary criticism. The professional theatre, film or literary critic is concerned not only with individual performances, productions or works, but also with general trends and the overall state of the art; there is an analogous function to be served by criticism in any academic field. Sustained and serious criticism can map ignorance, point to gaps and imbalances, expose and examine concealed assumptions in the context of some general picture of the state of the literature on a given subject at a particular moment of time. It seems that such a conception of criticism is not a particularly well developed aspect of our shared tradition of academic law. But it is a natural corollary of the approach to legal literature advocated in this paper.

In order to be able to carry out this role competently the critic needs certain qualifications: for instance, an awareness of the present state of the literature in the area, some conception of needs and priorities, of gaps and imbalances, and of markets and users; an informed appreciation of the values and limitations of various kinds of literary form and their suitability for different purposes; a realistic understanding of economic and other constraints on research, writing and publishing; a sympathetic awareness of the problems of authors and publishers; and a set of qualitative standards respecting scholarship and style, which he is prepared to articulate and to defend.

PRIMARY SOURCES, WITH PARTICULAR REFERENCE TO LAW REPORTING IN AFRICA

In what might be termed simple (as opposed to pluralistic) common law jurisdictions, such as England or the various jurisdictions of the United States, by far

the most important primary sources of law are traditionally considered to be: (a) legislation (superior and subordinate) and (b) judicial decisions. According to orthodox doctrine, these are supplemented to a relatively small degree by custom, academic writings and so on. In pluralistic common law jurisdictions, such as the majority of English speaking African countries, the situation is recognized to be more complicated. Legislation and judicial decisions remain very important, but account has to be taken of customary law, religious personal law and so on. The main criteria by which one would evaluate a nation's legal literature in relation to its primary sources are probably relatively uncontroversial: I would suggest they would require that they should be (i) as comprehensive as possible (ii) up-to-date (iii) reliable (iv) accessible to the main users, and (v) available in a form which takes into account the needs of the user in respect of efficiency and convenience.

It is a striking commentary on the state of legal technology in the modern world that it is doubtful whether many, indeed any, jurisdictions come very near to satisfying these criteria. Certainly my own country hardly provides a model: a series of reports by the Statute Law Society has highlighted the extraordinarily primitive state of the Statute Book in England⁷ and these criticisms have by and large been confirmed by the report of the Renton Committee on the Preparation of Legislation:⁸ indeed, criticisms have been made of it in respect of its comprehensibility, unnecessary bulk, and almost total disregard of the convenience of users. The system of law reporting in England is rather less primitive than our Statute Book. It is a strange feature of the English system that publication of this important kind of official document has been left largely to private enterprise in the shape first of individual entrepreneurs, and latterly of commercial publishing houses; since 1865 there has been a semi-official council set up, not by government, but by members of the legal profession. It was incorporated in 1870, but it was only in 1971 that the English Court of Appeal held that The Council of Law Reporting was entitled to register as a charity on the ground that the publication and dissemination of reports of judicial decisions was a purpose beneficial to the community in that it made a significant contribution to the sound development, administration and knowledge of the law; alternatively (with Russell L.J. dissenting) that the preparation of law reports could be regarded as being for the advancement of education.⁹

It is perhaps symbolic of the priority given until recently by successive British governments to the question of efficient documentation of primary sources of law that it has recently been estimated that "it would take approximately 60 years to complete consolidating legislation in force at the present time if work is carried on at the rate of the last few years,"¹⁰ without any new legislation being introduced in the meantime. A research project by the Queen's University, Ontario estimated in 1970 that the official list of treaties maintained by the British government underestimated by about 40% the treaties which in fact related to Great Britain.¹¹

I give these examples to make two points: Firstly, that as a legal system grows more complex, attention needs to be given to ways and means of ensuring that the system of publication of primary sources of law is technologically sophisticated enough to cope with the traffic it has to bear. Thus as many modern legal systems resort to computers and other modern technical devices is becoming increasingly a necessity.

Secondly, it should be axiomatic in the modern world that the primary responsibility for publication and dissemination of primary sources of law lies with governments, and that, if some of the most elementary criteria of a just and efficient legal system are to be taken seriously (such as that the law should be promulgated in a comprehensible form, and that citizens should have access to the legal system) then a reasonably high priority needs to be given to the development of an efficient system for disseminating information about primary sources.

Against this background I propose to make some rather general remarks about law reporting in common law African jurisdictions. During the colonial period, by and large, law reporting was not highly developed and was mainly a matter of individual initiative. It is not entirely surprising that colonial governments gave them a low priority: there was no great pressure to hasten the adjustment of common law doctrines to local conditions through judicial innovation; judges and the legal profession were to a large extent content to rely on English authority, such as law reports when they were available, or otherwise secondary sources such as *Halsbury*. Until the establishment of local law faculties, there was no demand for systematic local law reporting from law teachers or law students. It is perhaps not entirely a coincidence that the two most important commercially produced series of law reports during the colonial period, the *Eastern Africa Law Reports* and the *Rhodesia and Nyasaland Law Reports* (which ended in 1963) evolved in jurisdictions where there were relatively prosperous, expatriate dominated local bars.

That there were any law reports at all during the colonial period was largely thanks to the initiative of individuals. King-Farlow and Renner in the Gold Coast and

Nigeria, Stanley-Baker in the Sudan, Smith in Lagos and Murison in Zanzibar, are all examples of individual officials who appear to have taken private initiatives, sometimes with government support, in editing and arranging for publication of collections of cases. But, with a few notable exceptions, it is difficult to disagree with one commentator who, in referring to such law reports as there were in the colonial period in Africa, says "they were law reports in the classic English tradition: randomly selected, negligibly edited, atrociously indexed and sporadically published."¹³

With the coming of independence the situation changed: in some countries, such as the Sudan, systematic law reporting developed relatively rapidly after independence; in some jurisdictions it remained much as before and in a few it declined. Recently projects like the *African Law Reports* and initiatives by individual governments have led to a significant improvement in the overall situation - and it is encouraging to learn that law reporting was on the agenda of the meeting of the Commonwealth Law Ministers in Lagos in 1975 and has been the subject of two recent studies sponsored by the Commonwealth Secretariat.¹⁴

Perhaps two factors in particular created a climate more favourable to the introduction of systematic law reporting in the the post-independence period: firstly, the development of a legal system suited to local needs and conditions was perceived to be a part of nation building, and in common law jurisdictions the regular reporting of locally decided cases was seen to be one of the ways of developing a genuinely national legal system. Secondly, the establishment of local law faculties, which by and large coincided closely in time with the achievement of independence, created a new class of local user: if law students were to learn the law of their country they needed to have access to locally decided cases. The same was true of doctrinally-oriented scholars who wished to research into local law.

Although law faculties and individual academic lawyers may have helped to stimulate efforts to improve the systems of law reporting in Africa, there are some factors which suggest that it would not be appropriate for law faculties as institutions to take on primary long-term responsibility for this kind of work. First, the job, if it is to be done properly, requires specialised training and needs to be part of the regular duties of one or more persons who are specifically employed for the task. Full-time scholar-teachers of law may be unwise to commit all, or a very substantial proportion, of their research time to the kind of editorial work involved in editing law reports and digests. In terms of current criteria of academic advancement they would be unwise to undertake this kind of work for substantial periods of time, yet a period of apprenticeship is highly desirable. More important, however, is the point that law reporting should be a responsibility of government and while law faculties may constructively contribute to this at certain times (as law faculties have done in Sudan and Nigeria, for example), this should not obscure the point that this is a case where the job should be done where the responsibility lies.

If the foregoing analysis is correct, then it is clear that in order to achieve an orthodox system of law reporting which satisfies the criteria enumerated above, that is to say that it is comprehensive, reliable, up-to-date, and efficient and convenient from the point of view of the user, then governments need to be persuaded of the following points: (a) that law reports, like statutes, are a primary source of law and as such it is an important responsibility of government to ensure that an efficient system of law reporting is established and maintained; (b) that like many other forms of socially useful literature, law reports may not be a commercially profitable kind of publication. An element of subsidisation of both editorial and publication costs is likely to be necessary especially in smaller or poorer jurisdictions. In this respect it is interesting to note that in Ontario the annual license fee for practitioners has for many years included an element which is treated as a subscription to the *Ontario Reports*. Nevertheless the Ontario Law Reform Commission has recently recommended that some of the financial burden of publishing the *Ontario Reports* should be borne by the provincial government, because "the provision of proper law reporting is a function of the administration of justice".¹⁵ (c) Responsibility for editing is specialized work: it needs to be done by lawyers who have also had special training for the purpose and who are employed to do the work as part of their normal duties. (d) There is a not insignificant potential international market for national series of law reports, both in other African jurisdictions and in the world at large; some of the costs of preparing and publishing law reports in smaller jurisdictions could be reduced or possibly even covered if an efficient system of international distribution of such publications were developed, perhaps through an international consortium. (e) While help and advice with the establishment of an efficient national system of law reporting can be given through foreign aid projects, such as the *African Law Reports* in the long-run the continuation of such a system must be a local responsibility.

So far I have accepted as axiomatic one general assumption about law reporting in the common law world, viz. that the only reportable cases are cases of courts of superior jurisdiction whose decisions have precedent. Typically this means decisions of

High Courts and value appellate courts. But a system of legal literature which confines its attention to the decisions of such courts is in danger of re-inforcing an imbalanced, perhaps even a distorted picture of the legal system as it really is. We all know that not all significant law-regulated social behaviour leads to disputes; that only a small proportion of disputes reach any courts, as contested cases, that in most countries cases, dealt with by Superior Courts not only represent a small proportion of all cases decided by courts, but may well also only represent a small proportion of *types* of cases which reach courts or which are the subject matter of non-litigated disputes. Furthermore, if the cases of Superior Courts deemed worthy of reporting are selected by orthodox criteria, the sample of cases appearing in the law reports may be biased even more significantly, judged against cases reaching the courts or disputes in society in general.

Let me illustrate this by two examples from the Sudan. First, an anecdote: when editing the *Sudan Law Journal and Reports* I noticed that nearly all the criminal cases sent to me for reporting related to homicide. Hardly any cases relating to other offences, or even to certain other aspects of homicide which regularly posed problems for judges, ever reached the editor. I happened one day to be consulted by one of my former students, who was then a magistrate in one of the three towns in Khartoum, about the interpretation of a section of the Penal Code dealing with house trespass. Not only were we unable to find any reported or unreported case of this offence which had reached the High Court, but we also discovered on investigation that within the three towns many cases of house trespass were coming to the courts, yet different interpretations of the ingredients of the offence were being attached to this section by different courts. In one of the magistrates courts "building" was being interpreted, following Indian authorities, to be restricted to any covered building; but in courts in the other two towns it was being interpreted to mean the compound or 'hosh' - equivalent to the English close - so that anyone entering within the compound, whether or not he actually entered a covered place was held to be guilty of the offence. Although there was a system of judicial circulars, there was at that time no efficient institutionalised means of communication between court and court within the Sudan legal system for ensuring consistent interpretations of provisions concerning minor offences.

Another example of the way in which conventional law reporting may involve serious gaps and imbalances is to be found again in the *Sudan Law Reports*. A preliminary exercise in content analysis of the period 1956-1970, that is to say the first fifteen years of relatively contemporaneous law reporting, produced the following figures:

- (1) There are 447 sections in the Sudan Penal Code;
- (2) In a period of fifteen years, only 38 of these sections were referred to in reported cases;
- (3) Nearly half of the section references related to culpable homicide or attempts to commit culpable homicide or to other aspects of homicide.
- (4) 58% of the references were to offences affecting the human body; 13% to offences against property - the second largest category. Over a high proportion of offences there was not a single reported case.¹⁷

If these figures were set against criminal statistics (which has yet to be done), it is not improbable that it might give some support to the following cynical hypotheses: the more frequent the offence, the less likely that cases about it will be reported in the law reports; the more unusual the offence, the greater the likelihood that cases about it will be reported in the law reports. That is, of course, a simplification - but it does at least suggest that systematic content analysis of a nation's law reports might reveal some startling gaps and imbalances, judged by general, relatively uncontroversial criteria of social significance.

The problem of establishing an efficient system of communication between inferior courts has sometimes attracted spasmodic attention in relation to such matters as sentencing. On the whole the solution has not been seen in terms of reporting decisions, but in terms of informal communication at conferences and through judicial circulars and the like. It is obvious that there would be grave difficulties in trying to develop a regular system of even highly selective reporting of decisions of inferior courts in an African country, because of the form of the records, the quality of judgments (when reasoned judgments are given), and the total scale of the enterprise.¹⁸ But devising ways of monitoring the work of these courts over and above a system of appeals and review is of special importance in African jurisdictions for a number of reasons: Firstly, because of the importance of customary law and the limitations of systematizing and communicating customary law merely through codes and restatements; secondly, in so far as legal literature and academic study of law constitute a prism not only on the operation of the legal system, but as some people claim on important aspects of social life, if we are dependent on an orthodox system of law reporting as one of our main literary sources of information about the operation of the law in action within that system, the prism is likely to give a distorted picture.

It was the American jurist, Jerome Frank who, in diagnosing his sense of dissatisfaction with much of American academic law, gave currency to the term "appellate court-itis" to designate the disease which consists in concentrating unduly on decisions of appellate courts and neglecting other types of decision which were equally interesting and problematic, and furthermore allowing one's perception of the nature of a legal system and the problems it faces to be unduly influenced by reading the law reports. In short, a highly unrepresentative part of a legal system is treated as if it were the whole.¹⁹

Frank's analysis was developed in the context of his rather narrow concern with prediction of decisions of courts from the point of view of participants. But it has important implications for those who have broader concerns with the realities and the health of a legal system in its daily operation. Up to a point this concern is shared both by those with a social science orientation and by ordinary practising lawyers; it helps in part to explain not only their shared dissatisfaction with the expository tradition of academic law, but their shared interest in some of the subject matters which have been neglected by that tradition. Nevertheless, it is important to recognize that these concerns are not identical. Someone who is interested in understanding the legal system as a whole, or some part of it, will typically require a much greater variety of types of information than professional participants, such as private practitioners of law or the personnel of various kinds of tribunal. Clearly the information needs of the latter will depend on their roles in the system - for instance, detailed, regular and accurate reports of decisions of administrative tribunals or of lower courts only become of practical importance to practitioners, when they appear before them regularly and some sort of regular use of precedent has started to develop. It is probably unrealistic to expect that governments, in devising and developing systems of reporting decisions of courts and other tribunals, will do otherwise than to give the highest priority to reports which will have immediate utility to judges and practitioners. But even from this point of view, it is worth bearing in mind that many of the assumptions of orthodox discussions of law reporting are being increasingly challenged. This can be illustrated by one brief quotation from a report on the publication of administrative board decisions in Canada: the author, referring to the proliferation of administrative and quasi judicial tribunals of various kinds, observes that for the most part they lack an adequate or rational system of reporting. Yet he says: "an impartial observer who was not taken in by the pomp and circumstance surrounding the traditional courts of law would conclude that, measured on any realistic social or economic scale, boards today often have far greater influence than the civil courts".²⁰

Clearly the relative social and economic importance of different kinds of tribunal varies greatly from country to country. But it is far from obvious in the modern world that reports of decisions of the highest courts necessarily should represent the highest priority in a national system of law reporting. In short, while recent efforts to improve what might be called orthodox law reporting are greatly to be welcomed, the time is ripe to consider this problem in the broader context of the needs and problems for reporting decisions of tribunals of all types. For, as Kenneth Culp Davis has reminded us: "Secret law, whether in the form of precedents or in the form of rules, has no place in any decent system of justice".²¹

EXPOSITORY WORKS

The I.L.C. research report states:

"Legal research has traditionally been concerned with the development or elaboration of legal doctrine, and the raw materials of such research have been laws, regulations, rulings and cases. Doctrinal research, and associated activities like codifications and law reporting, has played an important role in the development and functioning of legal systems, and has produced much research of outstanding quality. Doctrinal research, however, is not the focus of our report. For this there are two reasons. First, we found that the nature and value of such efforts was well understood. There are well established traditions and techniques to which we had little to add. Second, most members of the Committee were convinced that the most interesting and intractable questions in the area we were examining could not be answered merely through doctrinal research."²²

The research report is concerned almost entirely with types of research and publication which "go beyond" doctrinal research or are alternatives to it. Although they are careful to acknowledge that such research and writing has an important role to perform, the tenor of the report not only suggests that there are other equally or even more valuable types of research and writing about law, but also that some of the assumptions of at least some doctrinal studies are questionable. Accordingly they put

in issue not only the matter of over-emphasis on doctrinal research, but also in some contexts its utility and possibly even its validity.

I am in sympathy with the thrust of much of the Committee's analysis. But I disagree with their conclusion that the nature and value of such efforts are well understood. For questions about the nature and value of expository works are rather more complex than appears on the surface, and there is a danger that those who are concerned to develop other types of research and writing about law should spoil their case through over simplification. Accordingly it is pertinent to sketch the basis for a balanced appraisal of the nature and functions of expository works and their potential place in a healthy national legal literature.²³

In this context the term "expository work" includes any work which sets out systematically to expound the legal doctrine prevailing at a particular moment of time in a given jurisdiction in respect of some topic or field of law. Typically such topics or areas or fields are designated by categories which themselves have a technical legal meaning, for example real property, contract, conflict of laws, trusts.

For the sake of brevity, and at the risk of some simplification, let us take as the basis for discussion the genus of leading English textbooks such as Cheshire, Winfield, Cheshire and Fifoot, and *Cross on Evidence*. Although the purposes of the authors, the interest of the publishers, and the actual uses to which they have been put by the "the consumers" have not been identical, we can nevertheless isolate three main functions of such works from the point of view of both producer and consumer: the function of systematization; a reference function; an educational function. Some of the virtues and the limitations of these works lie in the very fact that they have tried to kill three birds with one stone. When they have succeeded this has had the virtue of economy, but at other times failure to reconcile these functions has been one of the main sources of dissatisfaction.

The values by which these works have been judged have been fairly well settled: reliability, precision, comprehensiveness, order, clarity, succinctness, internal consistency, and up-to-dateness. These values are redolent of a rather pure form of classicism. They are central values of most forms of scholarship and it would be an eccentric scholar who rejected any one of them entirely. It would be a poor scholar who did not aspire to meet at least minimum standards in respect of nearly all of them. Where issue is taken with the values underlying the classic textbook it is on two grounds: either that there may be other values equally or, in some contexts, more important, or that where choices have to be made, a different ordering of priorities may be desirable.

This can be illustrated by looking a bit more closely at the three functions of expository works outline above and the compatibility between them.²⁴ One of the principal contributions of academic lawyers within the common law has been to assist in its systematization through attempts to mould the raw materials of legal doctrine into internally consistent bodies of rules and principles. It is now generally acknowledged that when the systematizing function has been done well an element of disciplined creativity has been involved through the process of selection, interpretation, choice of preferred alternatives and the reconciliation of seemingly contradictory authorities. I certainly do not wish to underestimate the utility or the difficulty of compiling such works. Within the framework of assumptions of the expository orthodoxy the most important kind of criticism that has regularly been made is directed against a tendency to hide behind confident, simple unqualified assertions some of the vagueness, complexity or internal inconsistency that should be revealed. But this tendency is not a necessary attribute of works within that tradition. The work of Corbin is perhaps the leading example of someone who tried to face this particular kind of difficulty; and, at a less weighty level, the preface to the most recent edition of *Maxwell on the Interpretation of Statutes* purports to make a virtue of the fact that many of the statements in the text appear to be pointing in different directions --this means, says the editor, that there is ammunition for both sides in every case involving a disputed interpretation of a statute.²⁵ Presumably the main question that the authors of the research report would wish to raise is the *priority* to be given to this kind of work in a developing country where legal scholars are a scarce resource and legal doctrine is changing rapidly.

With regard to the reference function we do not have sufficient information about the needs and habits of users of expository works in any single jurisdiction to know how well legal textbooks on the English model perform this function. I suspect that they may be under-valued as a reference tool for office lawyers, but are not sufficiently detailed to be reliable reference works for those who are engaged in litigation involving disputed points of law. If their main use for students was as reference works, it may well be the case that many of them perform the function admirably. In this respect, their main limitation is that it is difficult for works with an average life cycle of four or more years to satisfy efficiently the requirements of keeping

up-to-date, for even annual supplements are not entirely satisfactory for this purpose. The co-existence of students' works with purely reference works such as encyclopaedias suggests that the textbook is not generally regarded as ideal for performing the reference function.

It is in the educational sphere that the dominance of the legal textbook needs to be most severely challenged. For judged by either liberal or vocational criteria its over-use and abuse have often been deplorable. For the dominance of the textbook, whether because it has been imposed by teachers or because of the temptation it offers to the lazy, the timid or the unimaginative student, has led to the imposition of one implicit learning objective - the accurate recall of information within a short time - in some cases to the almost total exclusion of all other types of learning objective. Judged by the classical standards of liberal education, short-term recall of information takes a low priority in relation to such values as analytical ability, capacity for independent thought, and understanding in a broader sense. Judged by vocational standards, not only is it generally accepted and obvious that a textbook trained lawyer has hardly begun to learn to be a good practitioner, but there are certain other obvious limitations which are almost systematically overlooked: an expensive form of education has been a poor investment if the student has devoted his energies to learning facts the great majority of which he will have forgotten in six months, or, if remembered, may be overtaken by events, or, if not overtaken by events, may give the future practitioner a vested interest in retaining the rules unchanged whatever their merits.

Of course the case against expository legal education, as typified by most professional examinations and many university examinations, can be overstated: some basic knowledge of the details of some legal doctrine is a necessary foundation, and the difficulty of acquiring it can easily be underestimated; a capacious memory for detail may be a desirable quality for some types of lawyers; and certainly some forms of expository legal education may develop other qualities, such as analytical skill, respect for accuracy and specialised types of ability to apply rules to facts. Nevertheless, it is my personal judgment, based on teaching in jurisdictions where textbooks have been available and in jurisdictions where there have been no textbooks, that on the whole the absence of textbooks serves as often as not to enhance rather than detract from the quality of students' educational experience.

Let me conclude these remarks by making some general points:

- a) The influence of economic factors on expository literature can be very great. Cost may be the single most important influence on length. Often students provide a more attractive market than practitioners to a commercial publisher, but where a work can be sold as serving several markets simultaneously, there will be pressure to force works into that mould to the detriment of one function or another. One reason for the continued domination of the *textbook* in legal education is because, by virtue of its reference function and its claim to cover whole fields, it is typically more attractive commercially to law publishers than most other types of educational work.
- b) Economic factors tend to lead to bunching of expository literature, concentrating on those fields for which there is a reasonably assured educational market. Certain standard areas, such as contract and tort and land law, may suffer from over-concentration, other areas, such as industrial property, welfare law or consumer law may be neglected because the market for such works is restricted. Similarly innovation may be inhibited because publishers will wait for courses to develop and courses will wait for books. Content analysis of the spread of expository literature in a particular jurisdiction, even in terms of standard expository categories, might reveal some striking and unwholesome imbalances.
- c) There appears to be a number of factors mitigating against experimentation and innovation; thinking about appropriate forms of expository literature, modes of production, classification, and so on is often very primitive or non-existent. Unthinking imitation is often, quite unnecessarily, the order of the day. A little ingenuity, a little enterprise, and some questioning of the suitability of existing works as models may lead to solution of some of the problems even within existing constraints.

Nevertheless anyone concerned to develop alternative types of legal literature needs to be well aware of these constraints. Apart from the factors which have already been touched on, some others are worth mentioning. Whereas the values of the classic expository work are reasonably well-defined this is not necessarily true when one starts on a search for alternatives. Many matters are simultaneously put in issue and conflicts of priorities and values may arise, which were not present within the expository tradition. Even those who know what kind of book it is that they want to write may lack relevant skills or concepts, or equally important, may lack the confidence to embark on tackling such work. And, in an undeveloped field, the relevant

raw material may just not be available, whereas within the expository tradition the basic raw material of statutes and cases has been generated by someone else and are usually relatively accessible.

BOOKS ABOUT LAW

In an important article, which takes the form of a review of Max Rheinstein's *Marriage Stability, Divorce and the Law*, Richard Abel explores the distinction between books of law and books about law.²⁶ A law book says Abel, is a study which

"identifies, defines, organizes and criticizes the rules (which legal institutions apply) by means of criteria proper to the legal system, it *rationalizes* them in Weber's sense... By contrast, a book about law is a mode of *reflection* upon the legal system. Neither legal training nor professional competence is adequate qualification to write about the legal system, any more than an Olympic swimmer or leading opera singer is qualified to explain the hydrodynamics of swimming or the physiology of singing."²⁷

According to Abel, the legal scholarship which produces law books is a form of participant professional activity, which is as much a response to the demands of a functioning legal system as arguing a case or writing a judgment. Books about law, on the other hand, have objectives which lie outside the legal system: their primary objective is *understanding*.²⁸ Abel proceeds to argue plausibly, if rather harshly, that Rheinstein has failed in large part to achieve his self-imposed objective of writing a satisfactory book *about law* because he has not been able to make a sufficiently radical break from the habits of traditional (expository) legal scholarship.

"The book is therefore plagued by the perennial dilemma of inter-disciplinary research: in its attempt to satisfy the standards of two disciplines, it fails to satisfy either, and risks being disowned by both."²⁹

It is not possible here to do justice to Abel's very illuminating analysis nor to go into detail about all my reasons for thinking that his application of standards of scientific explanation to Rheinstein's book are misplaced. His article should be studied by anyone who is concerned to work out ways of developing alternative forms of scholarly legal writing which break away from the stereotype of the legal textbook. However, it is relevant for present purposes to question Abel's assumption that there are only two main competing models. In so doing, he seems to be making the common error of seeking for a single alternative to the expository tradition, and so is falling into the trap of seeking to replace one orthodoxy by another. He compounds this by being too readily seduced by yet one more version of the scientific analogy. To put the matter briefly, I believe that at this moment of time Abel's standards are unrealistic and his objective is undesirable. It would take at least another twenty years of work by many scholars before a comparative study of marriage stability and breakdown which satisfied his criteria could be produced; premature aspiration to meet such standards could well be counter-productive at this stage in legal scholarship and, most important, a healthy body of legal literature would need to have much greater diversity than doctrinal writings and works of scientific explanation. Scholarship is more varied than that.

All this amounts to relatively minor criticism. Abel is postulating a rather ambitious model of comparative research and writing about law and he does not give adequate recognition to the arguments for diversity in literature and to the constraints in developing broader approaches within legal scholarship. He represents one version of the view that legal scholarship must go beyond traditional doctrinal study and that the starting-point needs typically to be something other than existing legal doctrine such as social phenomena, social problems or particular policy goals. Despite its faults Abel's article provides an excellent example of what can be achieved by serious criticism of legal literature and a stimulating outline of one kind of worthwhile aspiration for legal research.

CONCLUSION

In this paper I have attempted to outline the kind of perspective and approach which might form the basis for a constructive and relatively systematic approach to the analysis and improvement of a nation's legal literature. The model can be refined and developed in a variety of ways for different purposes. It is based on a number of assumptions, which might be the subject of disagreement. For example, it seems to me to be a reasonable assumption (although in need of refinement) that the localisation of legal literature has a potentially significant role to play in the development of a healthy legal system - but there is obviously scope for disagreement about the social

utility of various kinds of literature, the relative importance of "localisation" and so on.

Implicit in much of what has gone before is a "liberal" belief in the values of diversity and tolerance, especially in the world of ideas - a belief which is neither universally shared nor respected. Moreover in many legal cultures there appears to be a number of quite deeply rooted stereotyped assumptions and fallacies which need to be exposed and critically examined.

It may be useful to end by sketching an aspirational model for a corpus of local legal literature in a developing country; but before doing so it is important to make some obvious caveats: quite clearly in most, if not all, developing countries in the post-colonial period there will be a number of important constraints to bear in mind: not only may money be short, the market small, and the number of legal scholars few, but also potential authors may be subject to many competing demands and diversions; source material may be inaccessible; there may be inhibitions on freedom of communication or other political constraints; and, less obviously, the pace of social, political and legal change may be so great that many works may be overtaken by events shortly after they are published or even earlier - witness the fate of many books on constitutional law in Africa. Indeed, the problem of ephemerality is one of the most acute problems facing those involved in the creation and production of legal literature in a rapidly changing society.

Given these constraints and problems, typically the situation in a developing country will require a careful ordering of priorities. The approach adopted here may provide some basis for doing this. Some important lessons may also be learned from the experience of countries with a longer history of legal writing. For instance, one does not have to look very far in the common law world to spot some of the major weaknesses to be looked for, such as over-concentration on some areas of no great social significance; neglect of areas of special social significance; duplication of effort; waste of talent on relatively trivial tasks; inefficient or otherwise unsatisfactory systems of publishing primary sources; inappropriate choices of forms of communication unsuited to their purposes; the predominance of one ideology or of a single approach to law; over-concentration on one legal standpoint, for instance that of appellate court judges, to the neglect of other important legal standpoints - and so on.

One final caveat: it is important to distinguish between long-term aspirational goals and minimum standards for a healthy system. What follows is essentially an aspirational statement of long-term objectives:

1. With regard to primary sources, that there should be:

1. a) A statute book (including subordinate legislation) which is comprehensive, up-to-date, flexible and convenient to use;
b) A system of amendment which suits the convenience of the main users;
c) A regular and comprehensive indexing service;
d) that in drafting 'the interest of the ultimate user should always have priority over the interest of the legislators';
e) 'That the jurisdiction should have a comprehensive interpretation act, which balances the need to reduce prolixity and ambiguity in statutes with the need to maintain comprehensibility for the non-specialist'.
2. a) A system of reporting decisions of courts (and other important tribunals), especially decisions with precedent value, which is comprehensive, up-to-date, flexible and convenient to use and which is also of manageable proportions; and
b) that primary responsibility for law reporting is recognized to lie with government;
c) that the number of decisions reported is not materially influenced by considerations of commercial necessity;
d) that the system of law reporting takes due account of the need for consistency of decisions in, and for public information about, the work of lower courts and tribunals;
e) that it also takes into account the need for consistency and equity in sentencing
f) that selection of cases for reporting is based on criteria which have a direct functional relationship with the uses of law reports (in addition to precedent value, these may include considerations of value with regard to localization, legal education, etc.)
3. a) An efficient system of supplementary intra-professional communication - for instance judicial circulars, magisterial circulars, practice directions, sentencing guidelines, court handbooks and so on, and
b) that these should be monitored so as to provide a regular flow of information.
4. a) A national legal archive (or series of archives) in which are preserved not only

documents which are of practical utility or interest to lawyers and legal researchers, but also as many as possible which may be of value to social scientists, historians and others; and

- b) that policies of preservation and destruction should be based on informed and reflective awareness of the long term needs of potential users, with interested groups having an opportunity to participate in the formulation of such policies.
5. a) that copies of primary sources are readily available in practice to all professional lawyers and officials involved in the administration of justice and, in particular,
- b) that legislation, including subordinate legislation, should remain in print,
 - c) that the needs of provincial lawyers and officials are adequately provided for.

II. With regard to secondary literature for specialist legal users that there be:

1. A body of specifically educational literature which furthers rather than frustrates desired learning objectives at different levels of legal education, (for example, if a learning objective is to develop certain analytical skills in students, lecture notes and condensed text-books which merely provide information to be learned by heart do not further this).
2. A body of reference works suited to the needs of the most important classes of users, in particular noters up, citator systems, encyclopedias, digests, practice treatises and procedural works - the functional equivalents of Stone's Justice's Manual, Archbold, and the 'White Book' in England.
3. a) A variety of periodical outlets which provide opportunities for communication of research findings, news, opinions, criticism and speculation,
b) that these should cater adequately for different categories of users and interest and
c) that where the need arises, periodical coverage should be able to fill some of the gaps left by the absence of standard services, such as bibliographies, law report information about current legislation.
4. A specifically legal bibliography and some form of regular bibliographical service.
5. In common law jurisdictions closely related to a parent jurisdiction an adequate system of local 'converters' or supplements.

III. Beyond the orthodox model

This section does not contain aspirations so much as suggestions of types of legal literature outside the purely functional scope of the primary and secondary sources noted above. These could include, among others:

1. A corpus of literature which adequately maps the legal system and depicts the law in action in the particular society in a reliable, realistic, comprehensive and comprehensible manner.
2. An efficient system of communicating important information about the legal system and particular laws to the public at large and to classes of persons, especially non-experts, whose interests are directly involved -- for example literature for intermediaries such as non-lawyer advisors, social workers, consumer organisations, and explanatory leaflets and posters.
3. A range of critical literature which covers the spectrum from literature devoted to official law reform, through analysis without a view to action, of particular aspects of the legal system or works of legal literature, to radical writing containing a more fundamental criticism of the legal system and society.

It should be pointed out that this is a theoretical model and that it is not intended to suggest that this is a level of provision which all jurisdictions can, or should, achieve -- indeed no jurisdiction we have yet encountered in any way measures up to this aspirational level. The statement also concentrates on products rather than their uses or users, and can doubtless be queried from some of the standpoints already mentioned. For example it is clearly more fitted to the "modernization" model described by Jim Paul where the legal system is under the direction of the central authorities and judiciary than to alternative development strategies. However, I suggest that it can be useful as a general framework and guide for those who are concerned with the provision of legal literature to service the existing legal system and who are facing practical problems. While we hope to discuss the potential of empirical research and of enquiry into the theoretical problems underlying the discussion of legal literature at the seminar it is with this primarily practical approach that the pilot project has been most concerned.

FOOTNOTES

1. See R. Abel, "Law Books and Books About the Law," 26 Stanford Law Review 175 (1974), discussed later in this paper.
2. One version is related by Glanville Williams Learning the Law 9th. Ed. (London: Stevens and Sons, 1973), p. 47n.
3. P. Mann, Books and Students (London: National Book League, 1973). For further references on student reading habits see Margaret Mann's bibliography, The Role of Books in Higher Education (University of Sheffield, 1974).
4. See, for example, W.Aitken, C.M. Campbell, and R.S. Morgan, Computers for Lawyers (Scottish Computers Trust, 1972).
5. Research into legal literature may provide a stimulus for and a route into detailed analysis of lawyers operations, a subject which has been neglected to a remarkable extent so far in sociological studies of the legal profession.
6. But there are some bad habits. For example, in recent years an increasing number of books have footnotes relegated to the end of the chapter or the end of the book. This saves money, but can cause inconvenience. Reviewers all too often comment adversely on the practice without any reference to the cost factor. Another dubious habit is cluttering a review with lists of trivial errors, such as misprints, which would more appropriately be communicated directly to the author. On some common fallacies in reviewing law books for students, see 12 J.S.P.T.L. (N.S.) 267 (1972).
7. Statute Law Society, Statute Law Deficiencies, the Heap Report (London: Sweet and Maxwell, 1970).
Statute Law Society, Statute Law: the key to Clarity, the Stow Hill Report (London: Sweet and Maxwell, 1972).
Statute Law Society, Statute Law: A Radical Simplification, the Maxwell Report (London: Sweet and Maxwell, 1974).
8. The Preparation of Legislation, the Renton Report (London: HMSO, 1975), Cmnd. 6053.
9. The Incorporated Council of Law Reporting for England and Wales v. Attorney General (1971) 3 All E.R. 1029 (C.A.).
10. Statute Law Society, Statute Law: The Key to Clarity,
op. cit., para. 14. For a more complacent view see the Renton Committee Report Chapter XIV.
11. Colin Tapper, Computers and the Law (London: Weidenfield & Nicholson, 1973), p. 260.
12. There is a quite extensive literature on law reporting in common law Africa, see especially E. Kofi Tetteh, "Law Reporting in Anglophone Africa," 20 International and Comparative Law Quarterly 87 (1971); Alan Milner, "The African Law Reports" 11 Journal of African Law 151 (1967); 61 Law Library Journal 11 (1968); E. Guttman, "Law Reporting in the Sudan," 6 International and Comparative Law Quarterly 685 (1957); and Jill Cottrell, "Law Reports in Nigeria," 7 African Law Studies 63 (1972). I am indebted to information provided by Dr. Alan Milner and to A Study on Law Reporting in the Commonwealth by T. Gregory Kane (London: Commonwealth Secretariat, 1975).
13. Alan Milner, "The African Law Reports" (unpublished paper quoted with permission of the author).
14. Kane, *op. cit.*, and P. Niekirk, Law Reporting in the Commonwealth: A Consideration of Some Contemporary Problems (London: Commonwealth Secretariat, 1977).
15. Ontario. Law Reform Commission. Report on Administration of Ontario Courts, pt. 111 (Toronto: The Commission, 1973).
16. The Sudan Penal Code, s. 381. See A. Gledhill, The Penal Codes of Northern Nigeria and the Sudan (London: Sweet and Maxwell, 1963). It was subsequently held in *Sudan Govt. v. Father Silvano Gittardi* (1960) S.L.J.R. 245 that a 'hosh' is not a "building" for this purpose.
17. From a pilot project by Philip Boynton undertaken for the author. The figures are approximate.
18. See further, Law Reform Commission of Papua New Guinea, Law Information Centre, in Occasional Paper no. 6 (1977).

19. See especially, J. Frank, Courts on Trial (Princeton, N.J.: Princeton Univ. Press, 1949).
20. H.N. Janisch, "Introduction" to A. Janisch, Publication of Administrative Board Decisions in Canada (London, Ont.: Canadian Assoc. of Law Libraries, 1972).
21. K.C. Davis, Discretionary Justice (Baton Rouge: Louisiana State Univ. Press, 1969).
22. At p. 19.
23. This section represents a restatement of an argument previously put forward in a number of scattered writings, see especially 11 J.S.P.T.L. (N.S.) 81 (1970); 12 J.S.P.T.L. (N.S.) 167 (1972); 58 Cornell Law Review 275, 293-99 (1973).
24. I would include under the heading of "expository works" encyclopedias such as: Halsbury's Laws of England; monumental scholarly treatises such as Williston's and Corbin's great works on contract; practitioners' works such as Clark and Lindsell on Torts, Chitty on Contracts; legaltextbooks such as Cheshire and Fifoot on Contract; elementary learning aids such as nutshells and introductory texts; hybrids designed to meet special problems, such as the American Restatements and the Restatement of African Law.
25. Maxwell on the Interpretation of Statutes, 12th. ed., by P. St.J. Langan (London: Sweet & Maxwell, 1969), preface.
26. Abel, *op. cit.* Max Rheinstein, Marriage Stability, Divorce and the Law (Chicago: Univ. Chicago, 1972).
27. *ibid*, pp. 175-76.
28. *ibid*,
29. *ibid*, p. 228.

CHAPTER 3

LAW PUBLISHING AND LEGAL SCHOLARSHIP: A CASE STUDY

By Jenny Uglow*

This paper is based on the experience of the Society of Public Teachers of Law Working Party on Law Publishing.¹ It may seem ironic to present a study of a relatively wealthy and certainly not small jurisdiction in the present volume, but as will become clear, the economic pressures of recent years have forced legal academics in the UK to face many of the problems with which their colleagues in small jurisdictions have long been familiar. It will also, I hope offer not only a case-study of problems, but of the way in which academics themselves can be actively involved in diagnosing those problems and suggesting ways to resolve them. I was involved as Research Associate in this exercise, which explains the editorial 'we' which occurs spasmodically below.

The Working Party was established in May 1974 with the following terms of reference, "To investigate the problems of law publishing as they bear on legal scholarship and legal research and to make recommendations", and its aim was to represent the interests of teachers, students, researchers and authors concerned with all levels of academic law in the British Isles. It should be made clear that this study was not conceived of as a project of pure academic research into the British law book trade, but its purpose was rather to stimulate a greater awareness of the problems facing publishers, authors and educators and to define some possible strategies for the different groups concerned. The Working Party saw its role as twofold. Its first function was to investigate and analyse the current situation in law publishing in the light of the problem created by inflation. It was felt that rising costs and prices were likely to have a serious effect on publication of some important types of scholarly and educational material which were not immediately commercially attractive and also on levels of provision of books and other material in libraries and for students generally. Information was sought by questionnaire, correspondence and interview from different groups involved in the production and consumption of academic legal literature (publishers, periodical editors, librarians and lecturers) and from other bodies and individuals concerned with the general problems of academic publishing. In the course of our investigations it became apparent that the Working Party could perform a number of useful functions beyond that of pure research, and in the final year of its existence adopted a slightly more active policy. Its second function was seen as that of stimulating activity on the problems themselves, through advice to the academic legal community on the publication of their work, through encouragement of further research projects in specific areas² and through discussion with publishers, editors and others involved in the production of legal material. Its advisory role is reflected in the series of separate working papers on aspects of law publishing and production of materials.

Five papers are now available and the following is an outline of their contents:

1. *Book publishers*: the effect of economic constraints on editorial and marketing policies and production methods; the role of specialist, general, academic and university presses in law publishing; requirements for authors with regard to planning and presentation of proposals; listing of UK publishers expressing an interest in law.
2. *Legal periodicals*: the effect of economic constraints as above; publishing arrangements, history and editorial structures and procedures; factors governing acceptance of articles, rejection rates, time-lapse before publication; etc. Listing of journals with requirements for authors with regard to submission of articles.
3. *Semi-publishing*: the creation of teaching materials and short-run works within institutions; co-operative ventures on an inter-university basis; techniques of production, distribution and costing.
4. *New technologies*: the application of alternative media e.g., microform and on demand publication, to the provision of legal material; user resistance, implications for research, etc.
5. *Subsidies*: the possible application of subsidies to legal publishing: maximum effectiveness in reducing price and/or assuring the dissemination of information; policies of grant-giving bodies.

The Problem Stated 1974:1977

* Research Associate, S.P.T.L. Working Party and Co-Director, Small Jurisdictions Project.

It may be useful at this point to take a backward glance at the thoughts which prompted the Working Party's inception. These first impressions were in part confirmed and in part modified as the project proceeded. The idea of a Working Party on law publishing was born of a strongly felt but vaguely defined dissatisfaction and unease about the current state of British law publishing and the prospects for its future. The suggested starting point for our investigations was the curious position facing the scholar teacher of law, who, at least in universities, is paid approximately half his salary in order to advance his subject through research, writing and publication. Under present arrangements his activities as teacher and scholar are largely financed from public funds, but what gets communicated in printed form to his students, his fellow scholars and to a wider audience is largely left to the world of commerce. Commercial publishing thus seemed a vital subject for academic concern and in the early 1970's academic publishing in general appeared to be in a state of economic crisis, so that considerations of cost and profit were more and more dictating key decisions as to what was published, in what form and at what price. There were certain indications that during the next ten to fifteen years scholarly and educational publishing would be subjected to great financial pressures and that law publishing would, along with other disciplines, be faced with major difficulties. The first aim of the Working Party was to analyze the problem, to create a greater awareness of it, and to make suggestions for containing and palliating it, if not solving it completely.

Our initial impressions were based on a blend of common knowledge, personal experience and academic gossip. We knew that publishing costs were spiralling and that certain items in these costs, such as paper, might have particularly drastic effects on law publishing where a high proportion of books tended to be of substantial length. We heard that there were long queues for space in some law journals and that many young scholars were having difficulty in finding publishing outlets for their work. Some of us felt that the operation of market forces had been fundamental in less obvious ways in that scholars were accepting constraints, pressures and incentives which were not always healthy for the quality of their publications. We knew that it was particularly difficult to persuade publishers to venture into areas of minority interest, new or expanding or rapidly changing fields and so on.

In 1974 we did not have a reliable and balanced picture of the scale of the problem, the areas most severely affected and the major causes of genuine difficulties. We tried, therefore, from the outset to get as clear and accurate a view as we could of the problems facing law publishing and the ways in which these might affect education and research. Our concern throughout was with academic publishing and not with the provision of books for the practitioner since we believe that there is little threat to the publication of material for practising lawyers although prices will certainly continue to rise. Indeed this side of law publishing has become more attractive as the market is secure and is not undermined by the same loss of purchasing power experienced in the academic world.

Our first public statement of the central problem as we perceived it in 1974 was as follows:

"Rising costs are exacerbating an already unsatisfactory situation in which nearly all law publishing is run on commercial lines but much scholarly legal writing and the provision of source materials for students in a readily accessible form are commercially unprofitable. Market forces as perceived by the publishers appear to have a particularly inhibiting effect or distorting influence on specialized monographs, on educational works in new or neglected fields, and on law publishing generally in the smaller jurisdictions such as Scotland and Northern Ireland. In the field of information for students the Working Party believes that English and Commonwealth universities face a common difficulty in ensuring that their students have a ready access to the wide range of source material to which their teachers wish to refer them. The high and rising cost of books and the high and rising number of students, allied with various library problems (such as lack of funds, lack of security, and the conflict of reserve and loan policies), present problems of student access to information which are part of the wider aspects of law publishing with which the Working Party are concerned³."

Our diagnosis of the situation has not altered radically. Although some features of the publishing scene had changed for the better by 1978, the bulk of the evidence we received supported our early statement and we would also add three additional points for concern. Firstly, with regard to publication problems it appeared that the existing legal periodicals, themselves under pressure from commercial constraints, may not be able to provide sufficient space for the increasing number of research articles which would require publication in the next few years. Secondly, it was also our impression that because publishers are looking for quick returns on capital investment, they are choosing

shorter print runs. Some works may, therefore, not remain in print as long as they did formerly and second editions of background works as opposed to essential texts may not be issued until a considerable demand has built up. This effectively shortens the life of many useful books for teaching purposes as they are unlikely to be placed on reading lists if there is doubt as to their availability. Thirdly, with reference to educational needs it was drawn to our attention that the lack of provision of stimulating teaching works at non-degree level presents a particularly acute problem.

Although commercial publishers and university presses in Britain have adjusted their policies to suit the new commercial climate the central conflict between the requirements of commercial publication and those of scholarship and higher education remains. In particular the element of distortion persists, in that publications tend to be tailored to suit the publisher's perception of his market rather than the academic's perception of intellectual or teaching demands. The publisher must concentrate on achieving continued profitability while the academic desires continued and expanding channels of communication. Obviously the two interests can coincide to a large degree but the present inflation which has forced publishers into greater selectivity does threaten some academic interests. One correspondent put the dilemma very succinctly: "The basic problems are simple enough: too many worthy books cannot find a publisher at all, and those that are published are much too dear".

In the First Interim Report the likely consequences of economic stringency in the publishing industry were defined thus: "...the serious decline in the scholarly monograph, a sharp reduction in the number of books published, the drastic reduction in the variety of choice currently enjoyed by teachers, and the concentration of publishing activity in serving large and established markets, with the consequent refusal to experiment or invest in books which seek to create their own market and thus tie up capital for too long"⁴. When translated into consequences for potential authors it was felt that potential authors are "deterred from writing on certain subjects which have limited appeal; they are encouraged to write elementary rather than advanced books; there is concentration, indeed bunching, in a limited number of fields...and neglect of potentially important subjects of general appeal"⁵. Our findings suggested that these pressures and patterns do exist although we would make one modification. After the reduction in commissioned titles in 1974/75 the situation stabilized and there is unlikely to be a further large drop in the number of works published; indeed the major law publishers have maintained their previous rate of publication and some new companies have moved into law publishing. The principal effect will be on the type of work published and therefore on the type of teaching and research undertaken.

The Current Situation: Problems of Publication

By July 1975 the inflation in Britain was at its height. Production costs had outstripped the general inflation which had pushed up salaries, overheads and distribution costs. Binding and printing costs were rising twice as sharply as the cost of living index, paper costs three times. Figures produced in 1976 showed that production costs had risen by almost 70% in the four years to 1975⁶. Since then the rate of inflation has lessened, but not significantly for the publishing industry, where, for example, paper costs were still further increased by the fall in the value of sterling. Correspondence with publishers in 1977 suggested that costs for books and periodicals were still rising by approximately 25% per year. In addition publishers faced further pressure in terms of reduced markets due to restricted library funds and student finances, and were unable to spread increased costs over longer print runs. What has lessened is the sense of crisis as the industry has become accustomed to these conditions and has taken steps to reduce the accompanying risks. We are not now faced with the drastic measures of 1975 when the escalating costs were forcing publishers into a strong reaction against the publishing boom of the previous decade. As is now clear, this reaction involved cutting back lists even to the extent of cancelling some contracted titles and reducing overheads, occasionally by such severe means as redundancies among editorial staffs.

One far-reaching consequence was that the crisis led to a revision of policy on the time which can be allowed for a book to achieve profitability. In a period when borrowing rates have at times reached 14-16%, publishers need a quicker return on capital than can be expected of a slow-selling specialized study or an innovative book which takes time to establish a market. Borrowing costs, combined with rising warehousing and stocking charges, have cut the two or three years which used to be allowed before a new book moved into profit, to one year or less.

Financial pressure has had some positive effects, for example the increased effort devoted to the reduction of production costs. British publishers have for many years looked for cheaper printing in the UK, Europe, India, Hong Kong, Singapore, Japan, Canada and the USA and have also experimented with cheaper formats and cheaper techniques. In recent years this search has intensified. Cost cutting methods range from alterations of

detail, such as the placing of notes at ends of chapters or books instead of at the foot of the page, to different methods of composition and even to "direct editions" where the final version is reproduced directly from the author's typescript. These initiatives have not proved easy to establish, on one side meeting stiff reaction from the print unions and on the other encountering some suspicion from reviewers and potential authors. Economies of production are also unfortunately comparatively small when set against the rising cost of distribution and marketing.

Other means of reducing costs affect the authors themselves. In some cases we have found that authors are asked to forego royalties in favour of a small fee; elsewhere overall royalty rates have been reduced from 10% to 7 % or even 5% with higher limits being put on the scale of increasing royalties in proportion to sales and other publishers, particularly those carrying monographs, offer no payment at all beyond duplicating and typing expenses. Taking this a stage further, one small publisher starting a series of direct editions expects the author himself to pay for the typescript which will be used for reproduction, an expense which may amount to over 200. If we accept that such restrictions apply to marginal books which might otherwise not be published, such practices may have to be tolerated.

The publishers most severely affected by the inflation were the medium to large firms with relatively high overheads. In companies with a diverse list, general, academic and educational, it has generally been the academic list which has received the hardest scrutiny and which has been purged of low-profit works. But one interesting feature of the 1970's has been the growth of small companies which operate on relatively low budgets and take maximum advantage of cheap publishing techniques to specialize in precisely the type of work which has been jettisoned by larger firms. Although their output is small as yet and their marketing is less sophisticated than that of the established publishers, they are beginning to make a significant contribution to academic publishing. Several such companies have expressed an interest in law although so far there have been more statements of goodwill than demonstrations of faith.⁷ We also noticed that more continental publishers, particularly Dutch firms such as North Holland, Kluwer Harrop, Sijthoff and Nijhoff are keen to publish English language law-books in areas which cross national boundaries, for example urban legal studies or law and development.

Another factor which has affected the situation in the past few years has been the increased discussion about changes in approaches to legal education and research themselves, particularly the relation of law to other social sciences. These changing approaches have gradually affected the form and content of law publishing in the United Kingdom and the history illustrates the slow reactive nature of academic publishing. Experimentation and debate about the content of legal education was a feature of the mid-1960's but there was little reaction from the law publishers until the end of the decade when the first socio-legal and contextual works started to appear. At this point the discussion caught the interest of some general academic publishers such as Penguin, Weidenfeld and Martin Robertson and new series developed. When the Working Party first looked at the situation in late 1973 there were still relatively few publishers for such works, but the last few years have seen a sudden growth in outlets as more publishers, large and small, leapt on the bandwagon once they perceived that there was a true demand.

Legal academics have been very ready in the past to accept the publisher's dictat as to the form and even the content of a publication and with greater choice there may now be scope for greater independence on the part of the author. In one sense, therefore, the law publishing scene has never been so varied, although some problems still remain. Firstly, the publishers now expressing an interest in law are only beginning to develop their lists and test their markets. Secondly, although some of the small firms have been willing to consider scholarly works they are still looking for works which appeal to established markets preferably with an international dimension, and thirdly they have tended to concentrate on short expository works and only one or two firms have tackled the central teaching works, text-books, and case-books, which are still, on the whole, produced on traditional lines. Several interesting works have appeared recently and it seems safe to say that this variety of outlets is more than a mere temporary phenomenon.

Although one would like to be optimistic about this broadening base of law publishing, it is still too early to make definite prognostications. In essence the pruning of low profit works from editors' lists and the insistence on relatively secure markets for new books must make the publishing of scholarly and innovatory work more difficult.

In the *First Interim Report* the situation was summarized as follows: -

"there are certain kinds of academic legal publications which in our view are desirable and which need at least partial subsidisation if they are to be viable. Alternatively, such works will need to find alternative outlets to orthodox commercial publishers. In particular, the following classes of work appear generally to fall within this category:

- a) works dealing with the law of smaller jurisdictions;
- b) works dealing with relatively narrow topics as contrasted with whole fields of law;
- c) educational works, whether texts or anthologies, dealing with subjects which attract small numbers of students or with fields which are "new" in a sense that they have not previously featured in many curricula;
- d) ambitious scholarly projects (e.g. The Collected Works of Jeremy Bentham);
- e) works which whether rightly or wrongly are unpopular with commercial publishers, such as doctrinal dissertations, symposia, collection of essays, conference papers, etc.;
- f) works (described by a publisher who testified before us, as "think-books") which seek to change established ideas or ways of thinking so that textbooks and courses are themselves changed thereafter⁸.

We can now amplify this statement in the light of our subsequent work and explain some of the reasons why these works are put under pressure by the tighter policies of the publishing companies.

With reference to works dealing with the law of smaller jurisdictions, evidence from within the British Isles as well as from countries co-operating with the International Legal Center project on the legal literature of small jurisdictions, confirms the great difficulties which face the publication of work where the market is insufficient to attract commercial publishers. The absence of adequate literature has serious implications, not only for legal education, but for the practice and development of the law itself and all forms of publication, primary sources, educational works and periodicals are obvious candidates for subsidization by government, professional and educational bodies.

In the area of specialized studies it is clear that works dealing with relatively narrow topics cannot compete in library or students' budgets with basic course texts. Their reduced market renders them unattractive to most publishers. Academic monographs pose a serious problem to publishers in that they are intended for sales in small numbers over a long period of time. This means that not only does the revenue from monographs come back extremely slowly but even if the books do sell reasonably quickly the return is too little, after a few months of inflation, to finance new books of a similar type. The problem is seen especially clearly in the research institutes and one letter presented a sad picture of the result of publishing cutbacks: "In particular we have experienced difficulty in obtaining publication of monographs and small books which clearly deserve publication and would be of great value to the legal world but which are commercially not viable. As a result we have a number lying in our office here awaiting a publisher. The sad part is that the longer they lie here the more out-of-date they become and the less chances there are of publication even if favourable conditions should arise."

A dissertation, even more than a proposal for a specialized monograph, is likely to encounter a suspicious and adverse reaction from the publisher as the image is of a very narrow topic with limited appeal probably not extending beyond a small section of the library market, and the author is likely to be inexperienced, without an established reputation to boost his work. It used to be the case that publishers might accept a rewritten thesis, if they thought they were thus acquiring a good (and profitable) author for the future, but such indulgence is now something which can be afforded only in the most exceptional cases. Unless a thesis is substantially revised for publication (and even then it faces the difficulty of any specialized monograph) we feel authors must explore means of disseminating their work outside the professional publishing system or by communicating its essence in articles in periodicals. Background books dealing with particular aspects of an area should have a different sales pattern from monographs in that they are presumed to be of interest to students on a particular course, but reduced spending power has made such works a luxury since their price, while realistic to the publisher, seems to the purchaser out of proportion to both the length of the work and its value to his studies. With regard to innovative educational works and "think-books", both of which seek to establish a demand rather than meet an existing one, there is no doubt at the moment that publishers are unwilling to take the risks. One publisher blamed the problems of such books on "the total indifference of law teachers", which suggests that the academic community is not voicing its demands loudly enough. The publishers' attitude is wholly understandable but it does indicate that economic constraints can indeed affect the progress of legal education.

If we turn to ambitious scholarly projects we find that the high costs of production, increased by a need for meticulous editing and a desire for high quality presentation in keeping with traditional ideas of the appearance of scholarly work, make such ventures

unattractive to publishers. If a series is envisaged, inflation can result in the final volume being many times more expensive than the first, thus demanding a substantial commitment to investment. On the other hand some other categories of work which we described as unpopular with commercial publishers - symposia, essays, conference papers, may be relatively cheap to produce, but are notoriously difficult to sell. This is possibly because specialists feel that the interesting short papers in their field are likely to be found in the subject journals and they are unwilling to pay for a collection if they feel that only one or two of the contributions are of direct relevance to them.

Indeed it would be unrealistic to expect commercial publishers to undertake the publication of the above categories, where their role might be that of subsidizing an academic and educational service, rather than making a reasonable profit. Scholars may fairly ask them, however, to consider very carefully the long-term advantages as opposed to the immediate risks of publishing innovative educational and theoretical works. But on the whole we feel that the problems facing publication of these important types of work are ones which must be solved by the academic community, either by agitating for greater subsidization, or by employing and accepting alternative means of publication, for example the production of material by educational institutions or the greater use of microform publishing.

The Current Situation: Student Access to Material

The Working Party suspected that universities and other institutions of higher education were experiencing a common and increasing problem in ensuring that their students had access to the wide range of books and periodicals to which their teachers feel it desirable to refer them, and we still believe there is a pressing need for research in this area. This happens to be a serious problem and one which is likely to grow rather than to diminish. In the first place there can be no dispute that the price of law books is continuing to rise, and there is no doubt that the massive escalation in law book prices over the past few years has affected student textbooks as well as monographs, practitioners, works and periodicals. Rising prices have caused headaches for librarians whose spending power has been effectively curtailed by inflation and restricted budgets and in institutions with small or non-existent law libraries there has been no available money in recent years for substantial expansion of library holdings. These developments have coincided with the continued growth of the law student population doing degree work at the universities and polytechnics and of the very large numbers of students taking a range of law courses at the sub-degree level. In a 1975 survey of the law student population in universities and polytechnics the total number of students in England and Wales showed an increase of 68% on the previous survey of 1965/6 (7072:4204) and Scottish law schools have seen a similar growth in numbers of 53% (1934:1588), while the annual intake has been rising at a rate of around 200 students per annum⁹.

In response to a questionnaire organized for the Working Party by the British and Irish Association of Law Librarians, respondents were unanimous that these pressures would result in the purchase of fewer titles, particularly of "fringe" material, such as foreign law, the provision of fewer multiple copies and the cancellation of some journal subscriptions. Essential materials which must be kept up-to-date such as statutes, law reports, encyclopedias, reference works and journals were using a large proportion of available funds at the expense of monographs, background works and text-books. In libraries with a lending policy more stock would have to be put on reference or in short-loan collections and several libraries already have a separate text-book collection for reference or short-loan use. Some respondents justified limiting the provision of multiple copies of text-books on the grounds that students need to buy their own texts. We had doubts about this argument as such purchases are proving an increasingly heavy burden on the student grant.

Librarians are finding it especially hard, with competing demands on funds, to provide adequate material for special options and for post-graduate courses. It is ironic that the broadening base of law teaching, which had an encouraging effect upon publishers has caused difficulties for librarians. With increasing interdisciplinary work there is a need for materials which are not strictly legal and yet, in view of budget restrictions, these are the first works to be excluded. This provides a simple example of the way in which the economics of publishing, in terms of the sheer cost of material, can hamper developments in legal education.

It is important to note that there is a vast area of law teaching outside universities and polytechnics where not only is library provision pitifully inadequate but where photocopying resources may not be available and where lecturers lack the time, and sometimes the motivation, to prepare special materials for their students; instead they rely almost exclusively on unimaginative "potted" versions of basic texts. This is true of many, although not all, colleges of further education where law is taught at non-degree

level, often as a component in another course which may be anything from accountancy to hotel management and catering. The financial pressure on polytechnic libraries may not yet be fully appreciated in establishments which have recently founded law departments or divisions but collections in many technical colleges and colleges of further education will remain meagre or virtually non-existent. One worrying feature about the lack of provision at this level is the absence of good liaison between such colleges and nearby universities or polytechnics with relatively well-stocked libraries and other facilities.

Possible Strategies for Alleviating Current Problems

a) Within the Commercial publishing system

In the Final Report the Working Party offered a variety of suggestions for legal academics, and in some cases, to publishers. Most of the strategies we considered are discussed in the context of small jurisdictions in the final chapter of this book under the heading 'Strategies for Planning and Publishing' and I will only refer to them briefly here. They are, of course, dealt with in considerably more detail in the separate S.P.T.L. Working Papers. Following the Final Report the Society established a Standing Committee to keep the situation under review and to initiate action in certain areas, as indicated below. It had become clear, in the course of our work, that a first step must be to establish a better liaison between all those concerned with law publishing. This could assist in a noticeable improvement in the present unsatisfactory situation. For example, prospective authors would have less reason to complain of rejections if they were better informed about the policies, requirements and interests of publishers and journal editors. In the case of journal articles a piece rejected by a highly prestigious journal on grounds of space might well find a place in a less pressured periodical, and a book which does not fit the list of one of the major law publishers might suit a general academic publisher or university press.

On a practical level, as noted above, considerable efforts are being made by law publishers to find cheaper means of production. Although publishers complained about the conservative views of legal academics as illustrated by the complaints of book reviewers, we stated our belief that practitioners, law students and teachers, given a more informed climate of opinion about the problems of publishing, would not reject out-of-hand text-books produced with typewriters and unjustified lines, notes collected at the end of the book, less comprehensive tables of cases and statutes, etc. In fact, it was frequently suggested to us that the current experiments do not go far enough as people were beginning to realize that these may be the only methods which will allow a book to reach any sort of commercial viability. Similarly we found that several prospective authors were sufficiently aware of economic realities to accept restrictions on royalties for low-profit books.

There may also be room for more experimentation on the part of law publishers in methods of updating standard textbooks. As the cost of producing such large works increases, so the gap between editions lengthens, with the result that the lecturer has to draw the student's attention to a great deal of supplementary information. Supplements have not proved very successful commercially, but there may be a place for more loose-leaf works, or for a modular approach based on part-publishing.

A different problem is the need for reprints of works which are in constant demand but not in sufficient quantity to justify the publisher in undertaking a large reprint. The problem proved especially severe in the smaller jurisdictions of the British Isles and it was rumoured that in Scotland, where there is a gap of a good many years even between editions of basic texts, the price of secondhand books depends on the quantity of updating in the margins. There seems to be a need for a system of short-run reprints, and although in the future technological advances may help to solve the problem, we suggest that in the meantime the law publishers might consider entering into arrangements with companies who specialize in this kind of operation.

A major problem to which no really satisfactory solution has been suggested is the cost of distribution, which adds significantly to the price of a book. One or two companies have used direct selling techniques whereby the lecturer takes orders from his class and passes them straight to the publisher. Although these help students to purchase books at more reasonable prices, there has been a sharp reaction from booksellers, and this has had an inhibiting effect on this kind of experiment.

The greater difficulty in achieving book publication has undoubtedly led to an increased emphasis on periodical articles and the Working Party was offered a number of ideas for reducing pressure on space in law journals. On examination it appeared that this pressure is as yet more perceived than real, as there is still room for good articles to be published quickly in several specialist and in general journals. One suggestion was that more space be allocated to articles within existing journals, at the expense of other

sections, particularly book reviews, but this idea was strongly opposed by publishers and by some editors. Another idea, linked to the view that journal publishing might help monographic studies, was that periodicals should accept more doublebarrelled and long articles which might formerly have been conceived of as monographs. In fact at the beginning of 1979 two proposals on these lines were being considered; the first for a new journal and the second involving a remodelling of the J.S.P.T.L. We also believed that there was no real outlet for the best student work and one of the projects being explored by the new S.P.T.L. Standing Committee on law publishing is the establishment of a national scholarly journal in which all the contributions would be by students - undergraduate, postgraduate or professional. Experience suggests that student-run journals, based on a single institution, have a rather high mortality rate; on the other hand, there is a good deal of work done by students up and down the country which is of a high standard but which never sees the light of day. This is probably increasing in both quality and quantity as course work assessment is becoming established in law departments.

b) Subsidization of Legal Literature

Subsidized works have traditionally been unpopular with publishers although with rapidly rising costs there is evidence of some change in the climate of opinion. The very need for a subsidy indicates that the book is unlikely to support itself commercially and there is a natural reluctance to carry inevitably low-profit titles. But the subsidization of production costs is one way in which important works with limited markets have been published, and the Working Party felt that this is a pattern which is in the interests of all academics to support and press for, especially within their own institution. A subsidy is less useful in reducing the price of a work than in making a vital difference to the initial calculation to publish.

There are some obvious candidates for subsidization, notably the legal literature of the smaller jurisdictions of the British Isles and some schemes (mentioned in the final chapter) are already in operation in Scotland and the Republic of Ireland.

Another category is that of specialist studies, particularly those resulting from sponsored research projects. The Working Party urged prospective authors working on research grants to consult their funding bodies and their university about possible contributions to publishing costs. A further type of work which will almost definitely not be published in the traditional printed form without financial support, but which is important to the advancement of scholarship, is the ambitious scholarly undertaking, such as the Collected Works of Jeremy Bentham. Finally, among the written evidence submitted to the Working Party were suggestions that the Society should set itself up as a publisher, possibly financing its operations from a publishing fund element in the Society's subscription, assisted by a copyright bequest scheme. In this case legal works would effectively be subsidized by lawyers themselves. This idea was considered carefully and it was ultimately decided that it would be more useful to arrange publication less directly by, for example, establishing an S.P.T.L. series in conjunction with a publisher, and setting up a subsidy fund which could be used in connection with a variety of publications and with different publishers.

c) Alternative Methods to Conventional Publishing

One of the principal ways in which the problem of student access to book and source materials is being tackled is by the photocopying or duplicating of published work. Most libraries replying to the BIALL questionnaire had photocopying facilities and in some cases they were themselves making multiple copies of cases for deposit in short-loan collections. Copying is also heavily used by lecturers building up their own course materials either for distribution to individual class members or in sufficient numbers to put on reserve for the whole class.

Photocopying does, however, have several attendant problems including frequent breach of the copyright law. It is most unpopular with publishers and one publisher has stated: "We believe that photocopying must be contained and copyright safeguarded for the sake of all the constituents of the book - author, printer, publisher, bookseller, teacher, librarian. Nothing has contributed more to the rejection of worthy manuscripts than the unbridled use of the copying machine"¹⁰. It is hard to accept this judgment in toto, since copying is chiefly used at present in situations where there are insufficient funds to purchase copies, or where students would not be recommended to buy the whole book from which the extract is taken, and it does not therefore reduce the market.

It may be relevant to mention here the recent report of the Whitford Committee on Copyright and Designs Law¹¹. The Committee was unwilling to accept that education should be viewed as a special case entitled to free copying facilities and argued that "if copyright material is used in education then copyright owners are entitled to payment. They should not as a class, be expected to make some exceptional contribution to this field."

The Committee took the view that blanket licensing was the only possible solution to the photocopying problem and formulated ideas as to how this might work in practice. Put very simply, they suggested that provisions for such a scheme be written into a new Copyright Act. Reprographic reproduction should still be a restricted act, but within particular areas designated by regulation (including copying by libraries, educational establishments, government departments, industry and professional interests and even copying agencies) a period should be allowed in which copyright owners, acting through recognized collecting societies, could set up blanket licensing schemes. This would allow the collecting society to have considerable flexibility in making arrangements with different classes of users. The Committee also suggests that blanket licensing would involve provision for arbitration by a copyright tribunal, which would have regard to what is reasonable in the circumstances, having power to decide on rates of payment, terms and conditions. The Working Party welcomed these suggestions and in view of current problems of student access and of the central role of case, statute, law book and periodical in legal education stressed the desirability of a system which allows freedom of copying without considerable expense.

The issue is of particular interest since libraries gave as one of their reasons for limited provision of multiple copies of text and case-books, the preference of many lecturers to prepare their own source books for individual courses. This practice appears to be on the increase and it is a means of providing students with material when published works are either not available or do not coincide with the teacher's approach. But we have found that cuts in departmental budgets are likely to make this a luxury rather than common practice, unless extra funds are made available. At the moment most departments provide materials free but some have implemented systems of charging students at a cost per page. In one instance, the department passes on the charge made by the central print room, with each lecturer being responsible for distributing material and collecting the money for his own course. The cost to the student is not insubstantial, but at around 5 for a 1000-page book it compares well with current book prices. It is, of course, cheap only because of the considerable hidden subsidies in the form of departmental typists, overheads and so forth.

When taken to the lengths of providing almost all the material for a law course, one can see why this is a source of worry to publishers, particularly if they suspect that their copyright is being infringed at the same time. Arguments against wholesale home production of materials are also raised within the academic world. First, that the student's reading is too fully structured by his teacher (but is it any less so by the standard text-book?), and secondly, that too much of a lecturer's time is devoted to organizing, editing and updating his materials. In addition, with little exchange of information between law schools there must be considerable duplication of time, effort and expense, up and down the country, an ironical situation when one considers that this is only possible in the relatively privileged universities and polytechnics and that many colleges are unable to produce any of their own materials. There is certainly some truth in these arguments, and there is a strong case for greater co-operation and exchange of ideas about these problems within the academic community. One step might be for teachers to make their materials available to lecturers in other schools at cost, although we appreciate that there is some jealousy about personal source books, particularly where these are seen as a pilot for a work later designed for commercial publication. But a further move could be for teachers in the same field to pool their materials and co-operate in producing basic teaching texts around which they would build courses. This would be especially valuable in courses with few students where published works are not available; but in mainstream courses such works might catch the publishers' attention and proof of their wide use might lead to full publication. The one or two experiments in this sort of scheme in the UK have run into difficulties of cooperative editing among a group with different individual views and demands. The problems may, however, be overcome. Different individual approaches could be catered for by adopting the module approach described above where individual booklets, produced on institutional printing or duplicating facilities, could be combined to link varied approaches in a course series.

The use of institutional facilities could be extended beyond teaching materials to the "publication" of other commercially unattractive works, such as conference papers, monographs, occasional papers and journals. High quality production and binding are not of importance at this level. A more sophisticated scheme is practised by some institutions, such as the British Institute of International and Comparative Law which sets its own publications on IBM machines and then has them produced by a local printer. Departments engaging in production of works for sale should realize the problems of accounting, invoicing and distributing which they will have to face; but on a small scale, say 50 to 100 copies, this is not too great a problem. One fundamental need, if this activity is to be coordinated and if material is to be generally available to individuals and libraries, will be a good information system, starting for example with an annual listing of unpublished teaching works, occasional papers and special studies and the Working Party suggested that this might be undertaken by either the professional associations or by an enterprising law publisher.

d) New Technologies

The development of new technologies in printing and in photographic reproduction and advances in microform publishing may both be of benefit to law publishing. For example computer setting, where the main text is held on tape, and corrections and updating are keyed onto another tape which is then collated with the original, could help speedy updating of textbooks and is of obvious use for encyclopedias and reference books. At present, however, computer setting facilities in UK printers are limited and the initial investment for a book produced in this way is very high. The present application of micro-publishing in general to law is limited to publications such as statutes, official documents, law reports and some periodicals. Indispensable reference sets can absorb 70% or more of library shelf space and microform copies can obviously make a substantial saving in the use of such space, the costs of which at present makes British librarians reluctant to carry large sets of, say, EEC or foreign reports and periodicals. The use of microform could be extended. It would be valuable for libraries to have microform copies of old, rare or out-of-print books. Microfiche is cheap to produce and cheaper to copy and the same qualities apply to cassette microfilm. This method could apply equally to monographs, dissertations, symposia and conference papers. The great disadvantage is that microform is still unattractive to readers and its use is limited to libraries. But with the development of print-out machines which could be located in libraries and of cheaper hand readers, the pattern of use may change. In future it may be possible to loan students a copy of set texts and readings in microfiche together with a hand reader. The law of copyright precludes libraries preparing the microtext themselves but publishers could be approached to provide simultaneous publication in book form and in microform of all standard texts, law reports and periodicals.

CONCLUSIONS AND IMPRESSIONS

In conclusion it appears that the law publishers, like other academic publishers, have been forced in the present economic climate to exercise more stringent profit criteria in accepting books for publication. This is true also of the general academic firms who have recently moved into law publishing attracted by its closer links with other social science disciplines. This means that it is very difficult - and it was never easy - to achieve publication in book form for specialized studies, scholarly works and innovative books which will not have a large market at the moment of publication. Such work, in any subject, requires dissemination if a tradition of scholarship is to be maintained and advances in education are to be fostered. It is of special importance in legal education in the United Kingdom where the last decade has seen a considerable increase in legal research combined with the application of new ideas to law teaching, such as the contextual and socio-legal approaches. At the same time, rising book prices and reduced library budgets and grants threaten to limit even the availability of published works to the growing number of law students.

Although some specific initiatives have been taken by the Standing Committee, one can only hope that the situation will be eased in the future by the extended use of subsidies, the development of journals, the increasing application of new and cheaper publishing techniques and the growth of semi-publishing by law schools themselves.

But we cannot help feeling that the one thing which is going to have to change most is the academic's attitude towards publications. The Final Report argued the gravity of the current situation and suggested that, for academic lawyers, being well-informed and being prepared to adjust to publishing changes, for example, in format or technology, was an essential part of a professional approach to their work. I would think that the adjustment may have to be more profound than that. In the course of my research and writing for the Working Party, I was fascinated, as a non-lawyer with a publishing background, at the attitudes I encountered among law lecturers. Their diagnosis of what was wrong with law publishing varied, but one theme was the belief that publishers were villains driven solely by the profit-motive and were deliberately out to counter academics' desire to publish scholarly work (frequently this work was an unamended thesis dumped on a publisher's desk without thought of what the final form might be). On pressing further it often transpired that a rejected author had only approached one, or possibly two publishers who may have turned down the proposal because it did not fit in with their present publishing policies or lists. The author had tried no further and had not even done any elementary research, such as looking at his own bookshelves to see what the most appropriate publishing outlet might be. Similarly, complaints about queues for journals came from people who had not looked beyond two or three outlets.

A second pattern was the rejection of alternative forms of publication, such as microfiche, or xeroxed copies, (although attitudes became noticeably more flexible over the three year exercise) a certain resentment among authors involved with economical formats such as 'direct editions' that they had to do a lot of editorial work themselves. On the other hand, despite the generally disgruntled air, I had the impression that legal

academics were unwilling to tackle the publishers directly to persuade them to alter their policies with regard either to subject coverage or forms of presentation, but that many (including the thesis writers) tended to plan their writing to suit existing outlets, such as text-book or background series and effectively handed over much more power to the publishers than they themselves would have demanded, or even wished.

Perception of these attitudes led to the Working Party's emphasis on providing information, dispelling ignorance and creating a better understanding between publishers and prospective authors. But an important point is that the patterns I have indicated are, to a degree, institutionalized within the academic legal community. Again, I feel, attitudes may be changing but in the early and mid 1970's many appointments boards and promotion committees tended to judge the list of works on a curriculum vitae by looking at the publisher's name or by the quality of the presentation on the library shelf rather than by the content. Even though this might be unfair the vital point is that this is what was believed - no wonder a young academic shied away from being 'published' in an unorthodox way. Yet if one really cares about originality and scholarship it is patently ridiculous to judge by external attributes or prestige publishing traditions in the present economic conditions.

If one takes a different perspective on the way academic publications are judged by appointments boards, or by periodical reviewers, I believe one encounters a deeper and more problematic issue. The Working Party was concerned with the problems encountered by a single group of 'producers' and in the context even of educational legal literature this leads to a very one-sided emphasis. It has been suggested that in the rush to publish, (a growing pressure in the UK where the financial squeeze on academic budgets is already having an effect on promotion prospects), the needs of the audience are forgotten, or reduced, compared to the needs of the author. If one looked at academic law publishing from the viewpoint of the students one would have a different picture. Hence, it might be more or at least as, useful to produce interesting books for technical college students or for social workers than strive to get a tightly argued article into the Law Quarterly Review. Yet a publisher concentrating on developing the former kind of work commented at a recent conference that potential writers had to be 'wooed with large cash advances' because young academics felt that writing such books might actually endanger their future career prospects. There is a real conflict here between values of utility and of scholarship, or between commitment to personal aims and the desire for prestige, and although I do not think there is an easy answer it is a conflict which I believe needs to be aired and debated seriously among those concerned.

Many of the questions raised in this paper - the means of achieving publication, changes of attitude to presentation, the determination of criteria in judging writing in relation to scholarship or educational needs, are more immediately visible in smaller jurisdictions. But they may be just as acute, if better camouflaged, in a jurisdiction which one would assume had reserves of money, manpower and varied publishing outlets. In either case, at a time when it is unrealistic to expect commercial publishers to take unnecessary risks the only course must be for the academic community to ponder the problems and, to some degree, to start taking the risks itself.

1. It covers the main points in the S.P.T.L. Working Party Final Report, and a slightly fuller account can also be found in J. Uglow, "Law Publishing and Legal Scholarship in the United Kingdom", International Journal of Law Libraries, 5, (3) (November, 1977).

The Chairman of the Working Party was Professor W.L. Twining and the project received a grant from the Nuffield Foundation. Copies of the Report and the separate working papers are available from Professor P.F. Fairest, S.P.T.L. Executive, Department of Law, The University, Hull, U.K.

2. These included proposals for a general inquiry into the problems of academic publishing at a national level, a detailed research project on the information needs of law teachers and students, and a study of the problems of developing local legal literature. The pilot stage of this last project is represented by the present volume, and a specific study of the smaller jurisdictions of the British Isles has been sponsored by the Nuffield Foundation.
3. First Interim Report of the S.P.T.L. Working Party on Law Publishing, para 6.
4. *Ibid*, para. 9.
5. *Ibid*, para. 15.
6. Library Association Record, 78(2), February 1976.
7. The principal law publishers in the United Kingdom are Sweet and Maxwell Ltd. and Butterworth Law Publishers Ltd. However, Working Paper No. 1; Marketing Your Manuscript, lists an additional twenty-one companies who express an interest in carrying legal material.
8. First Interim Report, para. 16.
9. J.F. Wilson and S.B. Marsh, "Second Survey of Legal Education in the United Kingdom", Journal of the Society of Public Teachers of Law, xiii(4) (N.S.), July 1975.
10. The Law Librarian, 7(3), December 1976.
11. Report of the Whitford Committee on Copyright and Designs Law, (Command Paper 6732).

CHAPTER 4

SOME PROVOCATIVE PROPOSITIONS

These very tentative generalized conclusions, impressions and hypotheses were drawn up from our reading of the papers and other material collected during the course of the pilot project and of the S.P.T.L. Working Party on Academic Law Publishing. They were prepared as a working paper for the seminar with the intention of provoking discussion and criticism and they are presented here, with only minor textual amendments, with the same end in view.

The propositions represent an initial attempt to collect in a single place some of the more common themes that have been expressed, and their very generality, particularly in a relatively unsystematic form arouses some questioning. Points made at the seminar ranged from the doubt as to the appropriateness of the aspirational model to pluralistic, multi-lingual countries where precedent is less central to the development and application of law, to the effect of the educational system as a whole on the performance of legal academics, and to particular issues of economics and planning. We do not personally agree with all the propositions, still less do we feel that they are universally applicable to all the jurisdictions with which we are concerned. Rather they are presented as a convenient and, we hope, suggestive starting-point for considering a number of the general issues in relation to any particular jurisdiction.

A. In Relation to the Aspirational Model

1. (a) In all small jurisdictions existing legal literature, in terms of products, falls far short of the orthodox aspirational model (as stated in chapter 2).
- (b) This may have adverse, or in some instances positive, effects on the efficiency of legal services and legal education, but a direct relationship is difficult to document.
- (c) The aspirational criteria may need adjusting for different types of jurisdiction and for different models of legal development.

B. In Relation to Producers and Resources

2. (a) In most small jurisdictions there is a vacuum with regard to distribution of responsibility for the production of most classes of legal literature.
- (b) This is the biggest single factor in producing the ad hoc growth of legal literature as publications are produced in response to market demand or individual interest and not in response to perceived 'needs'.
- (c) Planning for local legal literature confronts an immediate problem due to the conflict of priorities and interests as perceived by different groups: government, private practitioners, academics, unions, advisory groups, foreign business enterprises etc.
- (d) In some cases, and for various reasons, institutions and groups may actually resist the publication of information about decisions, or about the area of law in which they operate.
3. (a) It is a common complaint that governments do not give a sufficiently high priority (especially in respect of resources) to the development of local legal literature.
- (b) Despite this general feeling very rarely, if ever, has the case for such a claim been stated in a sustained and systematic way.
4. (a) Where there is no local law school there is an almost total absence of expository and critical works.
- (b) Whether there is a law school or not the tradition of legal writing by officials, judges and practitioners in the 19 or early 20c has faded; reasons given include greater pressure of work and lack of incentive, but these do not constitute an adequate explanation.
5. (a) Where a law school exists it is assumed (by government, professionals etc.) that they will make a substantial contribution to the development of local literature.

- (b) In many jurisdictions it is assumed that this contribution will include documentation, law reporting, producing journals and books to meet practitioners' needs as well as academic and student interests and research.
- (c) Most local law schools appear to have made a contribution on both a smaller and less systematic scale than was potentially within their capacity.
- (d) The reasons for this vary from place to place and are related to such factors as the level and continuity of staffing; the lack of incentive to undertake work that is time consuming, not within the individual academic's real sphere of interest, lacks academic prestige and may demand specialized skills which an academic does not necessarily possess.
- (e) The potential contribution of postgraduate research students to the localization of legal literature has been almost entirely overlooked in most jurisdictions.
- (f) A centralized research scheme, particularly in countries with no commercial publishers, may help to ensure the availability of funds and also keep research in line with agreed national priorities.

C. In Relation to the Economics of Publishing

- 6. (a) The domination of much small jurisdiction publishing by multi-national publishing companies, often with bases far removed from the jurisdiction, has resulted not only in high prices for published works, but has also been a brake on local writing.
- (b) For career and prestige reasons local outlets are often by-passed in favour of publishing in international journals or with foreign publishing houses.
- (c) The desire for international recognition may lead writers to concentrate on topics which are not at all, or not exclusively, of local importance.
- 7. (a) But local outlets can generate legal literature as much as they service it.
- (b) If a journal is started, articles even if of variable quality will appear, and the same is true of books if a local publisher shows interest in publishing legal works.
- 8. (a) In most small jurisdictions little attention has been paid to the most economic and efficient means of publishing legal literature.
- (b) This may be due to the retention of set ideas as to what constitutes 'publication'.
- (c) In a very small jurisdiction xeroxing or duplicating essential material may be the sensible way of disseminating information about law as few copies will be required.
- (d) In a slightly larger market subsidy schemes for printed works may serve the purpose better, but economical production methods can still be used.
- 9. A carefully administered subsidy scheme can have considerable effect,
 - (a) in facilitating publication by cutting the publisher's risk,
 - (b) as a catalyst and stimulus to research.
- 10. (a) In the absence of formal, or systematic informal, pressures, such as compulsory subscription to law reports, it is likely that a high percentage of the potential professional customers for local legal literature will not in fact purchase it.
- (b) This seems to vary from place to place and empirical research is required before explanations can be advanced.
- (c) In most small jurisdictions the potential international market for local legal literature is not adequately exploited; a national, regional or international distribution agency for legal publications might go a long way to remedy this.
- 11. Little attention has been paid, either by individual jurisdictions or by international aid agencies, to creating schemes whereby jurisdictions with similar conditions and problems can exchange information and assistance.

D. In Relation to the General Context of Legal Information and Legal Development

12. (a) Most legal literature is produced on the 'orthodox model' which treats professional lawyers and law students as the primary users to the almost total exclusion of almost all other classes with an interest in local law and in the operation of the legal system.
- (b) Professional lawyers and students tend to operate regularly in only part of the total legal system and the degree of access to and penetration of the legal system within society as a whole varies very much from jurisdiction to jurisdiction.
- (c) The publication of law for the people is usually given a lower priority by the authorities unless there is a deliberate policy to the contrary.
13. (a) The better documented legal system always dominates over the less well documented (Paliwala).
- (b) A lack of local legal literature, particularly reports and expository works leads to reliance on foreign sources plus inhibiting the development of a local legal culture.
14. (a) The problem of developing a local legal literature is more acute and/or more complicated in a multilingual society.
- (b) This is especially so where the language of legal education, and therefore of academic writing is different from that of practice in the courts or from that of the general population.
- (c) An official language switch-over in the courts and in education can lead to literature related problems e.g., translation of sources of law, translation of legal terminology.
- (d) Among the wider implications is the threat of greater isolation of professional lawyers and law students from international legal developments.
15. (a) There may be dangers attendant on the unthinking adoption of the orthodox model.
- (b) For example in some instances there are strong arguments for avoiding a rigid literary formulation of existing customary law principles and procedures.
- (c) The creation of a technical legal literature designed solely for professional users may make understanding of, and access to the legal system more problematic for the general public.
16. (a) Some of the main functions performed by legal literature in large jurisdictions are replaced in small ones by;
 - i) informal networks of oral communication
 - ii) use of a single centralized library or centre which is physically accessible to nearly all professional users.
- (b) These factors operate less satisfactorily when there is geographical dispersal of users and/or increasing numbers of users.
- (c) In other words the absence of literature may be less problematic in a physically small jurisdiction than in a medium sized one (in market terms).
- (d) Informal networks of communication about law exist in all jurisdictions, but their nature, extent and functions vary considerably from jurisdiction to jurisdiction. This is almost a totally neglected topic in studies of the legal profession.
17. (a) In the colonial situation within the common law world the development of legal literature seems to follow a roughly similar pattern.
 - i) pre-literate (in terms of professional literature) - customary or religious law.
 - ii) official colonial phase - published legislation
 - iii) (ii) plus non-academic literature - ad hoc production of reports, digests, lower court handbooks, treatises by officials and lawyers.

- iv) (ii), (iii) plus academic phase - ad hoc production as above plus more critical literature.
- (b) Other currents, which may be separate or inter-related, may affect the development of legal literature and may lead to a 'planning phase'. Such factors may include:
 - i) changes in official ideology
 - ii) nationalist feeling (following independence) articulated in official policy with regard to law
 - iii) the development of a law school
 - iv) a programme of law reform
 - v) an official language switch-over
 - vi) an injection of aid for a planned programme
 - vii) a policy aimed at developing a sense of nationality in a plural society.
- 18. In very small jurisdictions, at this stage in their development, computers have no role to play in meeting the legal information needs of professional users.
- 19. In respect of secondary writings, even in small jurisdictions it is not uncommon to find:
 - (a) concentration on areas of no great social significance;
 - (b) neglect of areas of special social significance;
 - (c) duplication of effort;
 - (d) waste of talent on relatively trivial tasks;
 - (e) inefficient or otherwise unsatisfactory systems of publishing primary sources;
 - (f) inappropriate choices of forms of communication unsuited to their purposes;
 - (g) the predominance of one ideology or of a single approach to law;
 - (h) over-concentration on one legal standpoint, for instance that of appellate court judges, to the neglect of other important legal standpoints - and so on.
- 20. The influence of economic factors on expository literature can be very great. Cost may be the single most important influence on length. Often students provide a more attractive market than practitioners to a commercial publisher, but where a work can be sold as serving several markets simultaneously, there will be pressure to force works into that mould to the detriment of one function or another. One reason for the continued domination of the textbook in legal education is because, by virtue of its reference function and its claim to cover whole fields, it is typically more attractive commercially to law publishers than most other types of educational work.
- 21. In large jurisdictions and, *a fortiori* in small ones economic factors tend to lead to bunching of expository literature, concentrating on those fields for which there is a reasonably assured educational market. Certain standard areas, such as contract and tort and land law, may suffer from over-concentration, other areas, such as industrial property, welfare law or consumer law may be neglected because the market for such works is restricted. Similarly innovation may be inhibited because publishers will wait for courses to develop and courses will wait for books. Content analysis of the spread of expository literature in a particular jurisdiction, even in terms of standard expository categories, might reveal some striking and unwholesome imbalances.
- 22. Even more striking imbalances may be found in the kinds of subjects covered or not covered by a system of orthodox law reports - for example, only cases involving serious or exotic crimes are reported.

PART II COUNTRY STUDIES

CHAPTER 5

LEGAL LITERATURE IN HONG KONG

By Peter Wesley-Smith*

Introduction

"Legal literature" is probably incapable of precise definition. I take it to include published material by which one can discover what the law is (primary literature) and in which the law is described, discussed, analysed, criticized and so on (secondary literature).

I assume that the development of a local legal literature is a thing of value. It is much easier to assume this than to demonstrate it. But if such general notions as a government of laws and the rule of law are accepted, it necessarily follows that the citizen must be readily able to discover and understand what the rules governing his conduct are. And if emphasis is placed on the "art" of achieving "legality" and the creation and maintenance of a healthy legal system,¹ the importance of legal literature is even more obvious. At the level of the technical operation of the system, where such basic precepts as stare decisis and the supremacy of the legislature over common law are taken for granted, easy access to law reports and the statute book, and to commentaries upon these, is fundamental.

In formal terms, therefore, it is a simple matter to indicate why it is justified to assume the value of legal literature. Of course, it may be that in individual cases justice is not well served by a highly developed legal literature: "palm-tree justice" might be preferred, or the demands of an on-going social revolution might severely lessen the need for published materials on the law. Legal literature in a place like Hong Kong might even be deplored as contributing to the efficiency of a colonial legal system which should be weakened and destroyed, not strengthened. But these matters are not the concern of this paper.

If legal literature is important, it should reflect the social context of the law: it should be localized. The social and cultural environment of Hong Kong is in some respects far different from that in which the common law developed, and imported legal principles and rules may require constant, careful assessment and adjustment if they are to be appropriate. A transplanted common law will flourish, said Denning L.J. in Nyali Ltd v Attorney General,² but it needs careful tending

"It has many principles of manifest justice and good sense which can be applied with advantage to peoples of every race and colour all the world over: but it has also many refinements, subtleties and technicalities which are not suited to other folk. These off-shoots must be cut away. In these far-off lands the people must have a law which they understand and which they will respect. The common law cannot fulfil this role except with considerable qualifications. The task of making these qualifications is entrusted to the judges of these lands. It is a great task which calls for all their wisdom."

That wisdom can be crucially assisted by a literature devoted to critical analysis of English law in a local context.³

One question which was raised at the Toronto seminar related to the effect in functional terms of an abundance or an absence of legal literature in a particular legal system. I make no attempt to answer that question here. Neither do I discuss the suggested topic "information needs and present user habits".

Particular Features and Problems of the Jurisdiction

The Setting

The City-State of Hong Kong. The "city-state" of Hong Kong is actually twin cities with rapidly growing satellite towns in their rural hinterland. The total area is just over 400 square miles (1,049 square kilometres), consisting of mainland and numerous islands. Much of it is mountainous, and the vast proportion of Hong Kong people live in urban areas and depend on imports, mostly from China, for food. The population is estimated to be 4 million people (4,720,200 at the end of 1978). More than 98 per cent

* Lecturer in Law, University of Hong Kong

of these are Chinese, predominantly Cantonese, and they are culturally cohesive and conservative, in some ways remarkably little affected by Western influences.⁴ The economy of Hong Kong is primarily industrial, though commerce plays an important part. Historically, Hong Kong owes its economic survival to its port and its position on the south China coast: its traditional economy was entrepot trading and financing between China and other countries. But establishment of the People's Republic in 1949 and the United States embargo on trade with China after Chinese entry into the Korean war forced Hong Kong to switch rapidly to industry, based mainly on light manufacturing. The economy is adamantly capitalist and the government, in many areas, is content to let market forces prevail.

Acquisition of Hong Kong. Hong Kong is a British colony carved out of China in three stages: by cession, in 1842 and 1860, and by lease, in 1898. The lease agreement covers by far the greater land area of Hong Kong and is due to expire in 1997. The People's Republic of China does not recognize the validity of any of the nineteenth century Sino-British treaties and has declared Hong Kong to be part of Chinese territory occupied by the British authorities; the "question" of Hong Kong is to be "settled in an appropriate way when conditions are ripe".⁵

*Constitutional Structure*⁶. Constitutionally, Hong Kong is a colony of Great Britain. The principal administrator is a governor appointed by and responsible to the British government through the Foreign and Commonwealth Office. He is advised by an Executive Council, which is composed of unofficial, official and ex officio members. Of a similar composition is the Legislative Council, the principal legislative assembly in and for the colony. The governor is not obliged to sign into law bills which are presented for his assent, though he always does so. He is required to reserve some bills for the royal assent, and local ordinances may be disallowed or declared to be repugnant to an applicable Act of Parliament. In practice, however, there is little restriction on the local government's legislative power.

*Legal Sources of Hong Kong*⁷. These are:

1. Acts of the United Kingdom Parliament which apply by their own terms (express or implied) or are applied by prerogative Order in Council, imperial subsidiary legislation or ordinances of the Hong Kong legislature;
2. Orders in Council (under prerogative or statutory authority) and other prerogative legislative instruments made specially for Hong Kong or generally for dependent British territories;
3. local ordinances and subsidiary legislation not disallowed and not repugnant to superior legislation;
4. English common law, equity and practice and procedure not inapplicable to the circumstances of the colony (decisions of the House of Lords and of the Privy Council are considered binding by Hong Kong courts, and English Court of Appeal decisions are highly persuasive);
5. "Hong Kong common law" (a small category consisting of local judicial decisions applying rules not part of English common law, for example rules from the residue of Chinese law and custom which still applies).

The bulk of the statute law emanates from the local legislature, though much of it is modelled on British legislation, while the English common law applies virtually in toto. The law is administered by a court system at the apex of which is the Judicial Committee of the Privy Council (which hears about five appeals from Hong Kong per year). Within the colony, minor crime is dealt with by magistrates; middle-range crime goes before the District Court; indictable offences are usually heard before a judge and jury in the High Court. Small civil claims are the preserve of a special tribunal, and other civil matters are taken to the District Court or the High Court. The Court of Appeal is the highest court in Hong Kong, while at the lower end of the scale are the Labour Tribunal and the Tenancy Tribunal. The Lands Tribunal occupies an intermediate position.

General Remarks. The facts and factors mentioned above lead to the following generalizations which are relevant to any discussion of legal literature in Hong Kong - though they are rather speculative and research is needed to verify them:

1. Although the economic history of Hong Kong is one long success story there is a continual sense of impermanence and vulnerability: Hong Kong is largely dependent on trade with other countries for its raw materials, many finished products, and even for food and water. Politically the situation is the same: a British colony in an age of anti-imperialism, a territory regarded by the Communist regime in China as Chinese and of which the greater part reverts to China anyway in less than

twenty years' time. For the Western businessman, Hong Kong has always been a place in which to make large profits in a relatively short period before going home to enjoy them: the British have not "settled" their colony. For many of the Chinese, Hong Kong has been a place of refuge providing a temporary respite from less attractive social conditions in China; but the ultimate aim, or the ultimate destiny, is to return to the native soil. The argument here, therefore, is that there is less a sense of community, of permanence, or of national or local consciousness in Hong Kong than in many other jurisdictions in the common law world. Thus there is no real sense of a local culture. More specifically for our purposes, there is no cultural context in which a local legal literature could develop.

2. In addition, there is no fully developed "legal culture" in Hong Kong. Confucian concepts of social organization emphasized conciliation and mediation at the expense of confrontation and sought a solution to disputes which was least disruptive to society. This idea contrasts strongly with the Western idea of litigation and a government of laws. Thus resort to lawyers and the courts, in Hong Kong as in traditional China, has generally been undertaken reluctantly. Partly for this reason (a relative lack of demand), the legal profession in Hong Kong has always been small.
3. Given Hong Kong's economic situation, there is a market for legal practitioners who specialize in such areas as international trade, company law, taxation and shipping law. The financial rewards for the able practitioner in these areas of law are considerable, and this, combined with the small number of lawyers, has ensured an understandable concentration of expertise into a fairly narrow range of legal services. Accordingly, there may be a demand for legal literature which analyses the applicable rules in profitable areas of law, but market forces are intimidating to the aspiring publisher of works on, for example, Hong Kong's legal system, public law, or legal history.
4. In many areas of law the differences between English and Hong Kong law are non-existent or negligible: the statutes are virtually identical and the common law rules are the same. Thus, as far as doctrinal literature is concerned, reliance can be placed on English textbooks, articles in the learned journals, Halsbury's and so on. That is, there is no great demand for locally produced studies of this nature, which in any event are unlikely to improve on their English models. This is not to deny, however, that there are many areas of Hong Kong law for which English works are unsuitable and which deserve systematic exposition. Of course, "law and society" or "law in context" studies from outside Hong Kong do not have much relevance to the colony, and there is an open field for this kind of legal scholarship.

British Law in a Chinese Context

The Legal System. The Hong Kong legal system is, of course, inherited from England: there is a similar general structure of courts, the same general rules apply to judges and practitioners, the laws themselves are often virtually identical. The differences between the Hong Kong and English legal systems are quite minimal: there has been very little "adaptation of an inherited legal system to a new social or political situation" and thus no novel new system demanding study and provoking research. In addition, there has not been any clearly perceived need for a radical rethinking of the system as it works in Hong Kong. Thus the impetus for a local legal literature which analyses the system and studies its components has not existed. When the British commissions on the provision of legal services are concluded there may be pressure to investigate that topic in the specific context of Hong Kong; until then, the legal system will probably remain largely unexplored.⁸

Different Language Groups. Chinese and English are both official languages in Hong Kong; though English predominates at the higher levels of government and is used by the personnel of most courts of law. Most children learn English at school, but probably only a small proportion of Hong Kong's young people reach a high degree of fluency in the written and spoken English word. This means that the market for legal literature in English is reduced from what it could potentially be, while publication in English and Chinese adds significantly to the cost. Since the education of aspiring lawyers is in English, and since many of the system's personnel do not read Chinese, it is unlikely that serious works of law would be published in Chinese only. If a market could be found for legal literature in Chinese, however, the diversification of dialects would of course present no problem, since each dialect has the same written script.

General Problems

Rapid Legislative Change. As described below, the statute book in Hong Kong is a good one, and rapid changes in legislation can generally be easily followed by its users. Insofar as legislative change might rapidly outdate textbooks and other legal works, there is no such problem in Hong Kong owing to the general paucity of legal literature. In any event, however, in few areas of Hong Kong law is there any rapid legislative change. The government is normally reluctant to intervene in most areas of society, and the average legislative output is small. In the 1970s the annual number of ordinances has averaged about 85, many of them incorporating only minor amendments.

Conflicting Interests Between Professional and Academic Lawyers. There is so little legal publication of any sort in Hong Kong that anything of quality, unless particularly narrow in scope, is likely to appeal to all sectors of the legal world. In terms of sales, however, an author would be wise to write for the professional rather than the academic market. The Law Lectures for Practitioners series sells reasonably well (about 170 copies of each book) whereas one would imagine a similarly sized and priced book of general legal essays, for example, would scarcely sell at all. It is likely that many practitioners subscribe to the Hong Kong Law Journal for its personal injuries reports and sentencing section rather than for its academic articles.

Small Markets for Local Educational Material. The market in Hong Kong for any kind of legal literature is tiny. The education market occupies a large proportion of it, yet many students are studying for examinations in English law set by various English examining bodies and are not interested in Hong Kong variants of the rules they are required to know. With some specific exceptions, students likely to be interested in locally produced legal literature are those in the law department of the University of Hong Kong - and these students are much more likely to use library copies than to acquire their own.

Historical Evolution of Legal Literature in Hong Kong

Statute Law

Revised Editions of the Law. In 1864 an ordinance "for compiling a New Edition of the Ordinances of this Colony" was passed, empowering the governor to appoint two commissioners charged with the task of preparing, printing and publishing a revision of the ordinances.⁹ Eleven years later a similar measure, the Legislative Commissioners Ordinance,¹⁰ provided similar powers. Both ordinances were repealed in 1886 by the Statute Law Preservation Ordinance,¹¹ whose preamble referred to a collection of ordinances from the commencement of the colony down to and inclusive of Ordinance No. 30 of 1886. This collection was deposited with the registrar of the Supreme Court and was declared to be a true and authentic record of the ordinances comprised within it. The first specially printed and published edition of the ordinances of Hong Kong was that prepared by Mr. A.J. Leach and produced in four volumes in 1887. Since then there have been periodic revisions: in 1904 by the Chief Justice, Sir John Carrington (up to the end of 1901), in 1913 by C.G. Alabaster (up to the end of 1912), in 1924 by Arthur Dyer Ball (up to the end of 1923), in 1938 by J.A. Fraser (up to the end of 1931), in 1950 by Sir John Bowes Griffin and others (up to Ordinance No. 31 of 1950), and in 1966 by H.A. de Barros Botelho (up to December 31, 1964). (See para III.1 below.)

Law Reports

The Hong Kong Law Reports. For the first sixty years or so of the Supreme Court's existence there was no organized official system of law reporting, nor were regular professional reports published by any private concern. The daily newspapers, it seems, provided the only source of reports of previous cases until 1905, when the Hong Kong Law Reports series was established. This series was probably instigated by the new Chief Justice, Sir Francis Piggott, who referred on his retirement to the "scrapbook days" which had preceded the reports.¹² No other reports have ever emerged. J.W. Norton-Kyshe, who reported cases while in the Straits Settlements prior to his arrival in Hong Kong in 1896 as registrar of the Supreme Court, spent his time in Hong Kong writing a history and feuding with colleagues rather than carrying on the good work as a law reporter.¹³ The interim report of a working party on law reporting established by the Attorney General in 1978 noted:

"In the early years the work of editing and preparing of the Reports for publication was undertaken by members of the Judiciary. After World War II, barristers in private practice assisted by Mr. G.S. Edwards, Court Clerk to a

puisse judge and later Deputy Registrar of the District Court, took over the editorial work. For their efforts the editors were paid an honorarium, the amount of which was calculated on the basis of \$125 for a Supreme Court case and \$100 for a District Court case. The sum so paid was taken into account in fixing the price of each issue of the Reports. In the early sixties, with legislation and litigation on the increase law reporting became too heavy a burden on private practitioners undertaking the work and delay in publication resulted. The Attorney General offered assistance and in late 1966 the editorship of the Hong Kong Law Reports was transferred to a Crown Counsel. Since 1969 the holder of the post of Law Reform Draftsman in the Legal Department also took on the added responsibilities of Editor of the Hong Kong Law Reports."¹⁴

Since 1950 the reports have been printed and published by the Government Printer and sold and distributed by the Department of Information Services. Five hundred copies of each quarterly part are printed, of which 126 are distributed free to the judiciary and to some government departments and institutions and about 150 copies are sold to members of the public.

Secondary Material

The Early Development of University Education. There was no university education in Hong Kong until 1911, when the University of Hong Kong was established. The founders envisaged a high-minded role for their institution as a bridge between East and West which would assist in the modernization of China. A faculty of law was originally to be among the first three faculties in the university, and one of its main functions would have been, in Governor Lugard's words, the training of "sons of gentry who aim at official posts"¹⁵ - international law and treaties were mentioned as subjects of practical utility for this purpose. But when the university first opened its doors there was no provision for legal studies.

In Easter 1924, however, George W. Keeton arrived as Senior Lecturer in Political Science and Jurisprudence, and he began teaching these two subjects as well as commercial law. Keeton was an enthusiastic proponent of a school of comparative law: a scheme embodying this idea was apparently approved by the university senate in 1925,¹⁶ and the new governor Sir Cecil Clementi, himself a legal scholar who had become well-versed in aspects of Chinese land law, supported it.¹⁷ Alas, in his farewell address to the university's Law Society in April 1927, George Keeton admitted: "I myself am the only representative of what ought to be a great and flourishing School of Law..."¹⁸ Despite having been promoted to Reader in Law and Politics, Keeton was embarking for a distinguished academic career in England. Whilst he had been in Hong Kong, however, he said:

"...I have had a single object constantly before me - the extension of legal studies. Failing to accomplish that object through the existing University organization (since, as the Vice-Chancellor pointed out at the last degree congregation, we still lack the 'few paltry dollars' necessary to equip the required Professorships and Lectureships), I have sought to approach the same end through the Law Society and the Law Journal."¹⁹

A Law Journal. "The Law Journal" was a publication which began life in 1926 as the Hong Kong University Law Journal, though it apparently only managed three issues before falling "a victim to the tyranny of financial stress".¹⁹ Its aims were "to promote the scientific study of Chinese Law, and to help forward, in some measure, the process of legal regeneration in China".²⁰ In April 1928 it merged with a commerce journal, and Volume I, No. 1 of the Hong Kong University Journal of Law and Commerce was published. Volume II, No. 1 appeared a year later, and there were various issues during the 1930s. The last was probably in 1940.

Thus in the 1920s a beginning was made in the academic study of law in Hong Kong and in the development of a legal literature. But Keeton's ideas concerned far broader legal perspectives than the law of Hong Kong,²² and even when final year students in the Department of Commerce contributed notes on recent commercial law cases for the first issue of the law journal the cases they chose for commentary were all from the English courts. Further, the law journal and its successor published virtually nothing on local law: the overwhelming emphasis was on the law and jurisprudence of China.

The Development of University Law Teaching. It was some time before the University of Hong Kong abandoned its self-image as a standing contribution to the government and people of China: before World War II, for example, it had never been suggested that course of legal studies leading to a qualification for the practice of law in Hong Kong was at all appropriate. Thus when a plea was made in 1930 for legal education in Hong

Kong the only concern was that lawyers in China be properly trained - primarily in the interests of foreign businessmen:

"It would be a short-sighted policy not to establish a law school in Hong Kong, because of the fear of producing a superfluity of half-baked lawyers as in India, when the chief complaint of the business man is that the Chinese judges have neither the proper training, traditions or [sic] spirit. The more lawyers China has trained in British traditions the more satisfactory will be the position of foreign traders. Lawyers there will be anyway. Why not have well trained ones?"²³

But after 1945, and particularly after 1949, local concerns became paramount. In the post-war years, as Evans points out,

"it occurred both to the University and to the legal profession that Hong Kong needed to look again at its legal education, the University because Law was, perhaps, the only major discipline not represented in its curricula and the profession because it was becoming apparent that the existing system of qualification principally in England was not meeting entirely the needs of Hong Kong."²⁴

The Department of Extra-Mural Studies at the university hired teachers in the 1960s to prepare students for the University of London external LLB exams, and so, for perhaps the first time since Professor Keeton left Hong Kong, academic lawyers existed in the colony. The Department of Law, now the School of Law, was established in 1969 with a teaching staff of four. It has expanded during the 1970s, and is still expanding, while the Hong Kong Polytechnic has also recruited full-time law teachers. Thus it is only very recently that there has been a group of law-trained personnel who might be expected to contribute to legal scholarship. In addition, the primary teaching function of the university's academics relates to the law of Hong Kong, not of China, and their writings naturally reflect this.

Amount of Legal Literature. Until the Hong Kong Law Journal began publication there was only a minute collection of secondary material on Hong Kong law: occasional committee reports, sporadic articles, one book purporting to be a history of the laws and courts of Hong Kong (published in 1898) and another on taxation law by a tax consultant. Civil servants have never been encouraged to write for publication, legal practitioners never found the time, and judges and magistrates, if they were ever interested, were probably inhibited by a vague notion that extrajudicial legal commentary is improper. There has been, in relative terms, a veritable explosion in the realm of secondary legal literature since 1971.

Imported v Locally Produced Materials

The Use of English Materials. As mentioned above, English legal literature is often quite suitable for use in Hong Kong, in many areas needing only very minor qualification. In the field of mercantile law, for example, the statutes are virtually identical, the common law rules are the same, and there is no topic for which local variants have developed to any great degree. It is unlikely that a book on Hong Kong mercantile law could be produced cheaper than an English rival, and preparation of such a book would, in any event, have to be considered low on any order of priorities referring to local legal literature. The only advantage a local book might have is in the use of examples more related to a student's experience.

The Scope for Local Legal Literature. There are other areas, however, where the legal literature of another jurisdiction is not suitable. Obviously, the constitution of Hong Kong is sui generis and must be studied as such, however useful and valid it may be to consult works on other British colonies; Hong Kong family law contains its own special problems; landlord and tenant law is based on a complicated set of provisions designed in response to specific historical circumstances and social conditions. Particular topics, too, involve a legal situation unique to Hong Kong (for example, the law of corruption). There is ample room for lengthy studies on many aspects of Hong Kong law. In addition, of course, the constant review of legal developments, by means of notes and commentaries on recent cases and statutes, editorial comments and critical articles on the legal system, is a valuable locally-generated contribution to legal literature.

Existing Materials

Statutes

The Statute Book Described. The Laws of Hong Kong, 1964 edition, was published in 1966 and brought into operation on February 1, 1967.²⁵ Its characteristics are:

1. It originally contained every law enacted in the colony which was in force on December 31, 1964. The adoption of a loose-booklet format, and the imposition on the Attorney-General of a duty to publish an annual revision of amended ordinances, enables the laws to be kept up to date.
2. Each ordinance is given a chapter number and is placed in a volume together with its subsidiary legislation, if any. Ordinances on cognate subjects were originally grouped together, but as time goes by it is increasingly difficult to maintain that system. For example, the "Star" Ferry Company (Services) Ordinance is now between Third Parties (Rights Against Insurers) and Venereal Disease.
3. Each section or subsection, as appropriate, is annotated with its history, indicating origin and any repeal, replacement or amendment.
4. The contents of the 1964 edition, as it stands in 1979, are quite comprehensive:

Vol 1: Preface

Revised Edition of the Laws Ordinance (No. 53 of 1965)
 Table of Contents (chapters listed in numerical order with short title and subsidiary legislation, page designation and year of current edition)
 Chronological table of ordinances (year and original number, subject and remarks (e.g., whether disallowed, when repealed))
 Chapters 1 to 4

Vol 21: Chapters 1111 to 1129

Appendix I: Letters Patent, Royal Warrants, Regulations and Miscellaneous Instruments
 Appendix II: English Acts applicable to Hong Kong by virtue of terms thereof or made applicable by Order in Council or Ordinance (the Acts are merely listed, not reprinted)
 Appendix IIA: English Acts applicable to Hong Kong by virtue of the Application of English Law Ordinance (cap 88) (texts reproduced but for reference only)
 Appendix IIB: List of references to United Kingdom statutes

Vol 22: Appendix III: Her Majesty's Orders in Council, Rules etc which are applicable to Hong Kong

Vol 23: Appendix III (cont)

Appendix IV: A selection of constitutional documents, conventions and treaties

Vol 24: Minor amendments (amendments not sufficiently extensive to justify publication of a new revised edition of each relevant chapter are contained in this annual cumulative booklet)

Separate volume: Index: Part I (ordinances and subsidiary legislation) and Part II (Acts, Orders in Council etc)
 Lists of appointments (under various ordinances)
 List of previous editions extracted from the Laws of Hong Kong

In Praise of the Statute Book. Judged by the criteria suggested by William Twining in a lecture delivered in Lagos in 1975,²⁶ the statute book in Hong Kong merits considerable acclaim. It is:

1. comprehensive, in that it contains all ordinances and subsidiary legislation in force and constitutional documents, applicable Acts of Parliament, Orders in Council etc (that is, nearly all enacted law is reproduced therein; only some enacted law originating outside Hong Kong is not reproduced, but it is nevertheless listed);
2. up-to-date, if the user's noting-up system is efficiently administered;
3. reliable (indeed, authoritative);
4. accessible to main users in that, although very expensive, most practising lawyers have their own sets, government lawyers and the judiciary are given easy access to it, and at least three different law libraries situated near the main groups of users have up-to-date copies. It can also be consulted in public libraries;
5. efficient and convenient to use: by use of the Index, it is easy to find the chapter number and volume of any item of legislation, and the printing and paper quality are of a high order. Individual ordinances, which are stapled in booklet form, may be easily taken out and consulted separately from their bulky folders.

In the opinion of G.W. Bartholemew

"the revision undertaken in Hong Kong is incomparably the best which has appeared to date. It satisfies to the fullest extent possible the criteria of completeness, conciseness and up-to-dateness and will surely remain a model to which all other revisions will aspire."²⁷

Criticisms of the Statute Book. There are a few criticisms, however:

1. the index is very basic and provides scarcely any more information than the table of contents. It is probably usually adequate for the needs of practising lawyers but it is of little assistance to the academic researcher. Nevertheless the Rules of the Supreme Court and the merchant shipping legislation are separately indexed;
2. in practice there is often considerable delay in the issue of new booklets for ordinances which have been much amended.

The Government Gazette. In addition to the Laws of Hong Kong, the government Gazette is a useful source of legislation, and is essential for very recent ordinances or amendments and for earlier editions. Bills are published in one supplement to the Gazette, legal notices (dealing with the commencement of some ordinances, signification of non-disallowance, proclamations etc) are in another, the complete original texts of ordinances are in another, and subsidiary legislation is in a fourth. A good library has each supplement separately bound each year. There is no difficulty finding any item of legislation for any year, especially if the chronological list of ordinances from 1843 to date, found in Volume 1 of Laws of Hong Kong, is consulted.

Law Reports

The Hong Kong Law Reports Described. This series is edited in the Attorney General's department. It has been published without a break (except for the Second World War) since 1905 and comes out quarterly, usually between six and nine months after the period covered. Reports of selected cases before the Court of Appeal and the High Court and of cases before the Judicial Committee of the Privy Council on appeal from Hong Kong are published. In a supplement are reports of cases in the District Court. There are a separate loose-leaf volume of tax cases published by the Government Printer at the behest of the Inland Revenue authorities and a folder of printed practice directions. The law reports are not proper "reports" in the sense that a barrister attended in court and personally vouchsafed the accuracy of the printed proceedings; they consist solely of the written judgment as it emerged from the judges' chambers, supplemented by headnotes and index. Digests, consolidated indices, tables of cases and statutes and noters-up are also provided.

Assessment of the Hong Kong Law Reports. Again using the criteria suggested by Professor Twining, the Hong Kong Law Reports are:

1. reasonably comprehensive: most of the important cases in the District Court and above are reported; there are occasional omissions, of course, and some practitioners consider there is an over-emphasis on criminal cases;
2. not especially up-to-date, but the delay is not intolerable;
3. reliable;
4. accessible to main users: as for the Laws of Hong Kong, the reports are expensive but many practitioners have a full set and judiciary, law officers, university teachers and their students have easy access to library copies;
5. reasonably efficient and convenient to use. In the last couple of years there have been minor improvements in printing style and editing. Although the indexing is still insufficiently detailed, the semi-official digests and indices compiled by Frank Addison (formerly of the District Court, now a puisne judge) and other published aids are of considerable assistance in using the reports.

Reform of the Hong Kong Law Reports. It is not quite fair to place Hong Kong's law reports in what Alan Milner calls "the classic English tradition: randomly selected, negligibly edited, atrociously indexed and sporadically published".²⁸ Nevertheless, this in an area where improvements are needed. An editorial in the Hong Kong Law Journal in 1978²⁹ suggested the desirability of reform, and later in the year the Attorney General established a working party to consider proposals made in a separate memorandum which I submitted to the government.

The principal proposal was that there should be a three tiered structure consisting of an editorial board, an editor and an editorial committee. The working party considered that this proposed system would be an improvement. The editorial board would have a supervisory and advisory role, and the editor (who hitherto has had sole responsibility for producing the reports) would be able to consult the board on policy matters. The editorial committee would undertake the actual hard work of editing and this should enhance the quality of the reports.

For the purposes of law reporting the law would be broadly divided into five areas, viz: commercial and business law, constitutional law and legal system, criminal law and procedure, property law, miscellaneous (family law, labour law, civil practice and procedure etc).

The working party agreed that the committee should be made up initially of ten lawyers, two for each division and they should be 'specialists' (as far as possible) in that division of the law. To ensure reporting of high calibre it was suggested that an honorarium be paid to each member.

The working party at this point decided to submit an interim report to the government making two recommendations: that the three tier scheme be implemented and that the government should provide an annual fund for payment of honoraria to the editorial committee. The reasons in support of the second recommendation were: that without such funds, which only government could provide, the reform as envisaged could not be accomplished; that government as administrator of the law ought to be responsible for the proper service of law reporting; that the cost of the new system would be partially offset by the reduction in the level of editorial contribution by members of the Legal Department, at present only balanced by the fact that the government receives free copies of the report; and that new sales resulting from aggressive marketing locally and abroad for the improved law reports may reduce the recommended subsidy in future. The working party's recommendations have not yet been implemented and their fate is uncertain.

Unreported Judgments. In theory, all written decisions of the Supreme Court of Judicature since 1968 are available, in cyclostyped typescript, on file in the Supreme Court library; many of them are circulated by the registrar of the Supreme Court to the School of Law at the university, where they are also filed and spasmodically indexed. The Supreme Court library's system, similar in objective to the Bar Library transcripts scheme, is unfortunately not very efficiently run: the collection is incomplete, the cases are often out of order or borrowed by the judges, and xeroxing is inordinately expensive. If properly indexed, and if greater care is taken on their filing and preservation, these typescripts would be a much more useful supplementary source of "reports" (these are, in fact, what gets printed in the Hong Kong Law Reports, and when in the library file they are only lacking index headings and headnotes).

Hong Kong Law Journal Road Traffic Summaries and Sentencing Section. In addition to the official Hong Kong Reports, the Hong Kong Law Journal has since 1974 published summaries of cases involving claims for personal injuries and fatal accidents. Although not strictly reports, the courts are not accustomed to citing these cases according to their HKLJ reference and they even, it seems, sometimes rely on the journal summaries exclusively. Since 1978 a digest published in the journal has provided a brief guide to current sentencing practice in the colony's courts.

Circulated Headnotes. The editor of the Hong Kong Law Reports prepares each month draft headnotes of cases being considered for inclusion in the reports. These are circulated round the profession for comment. The Hong Kong Law Journal also publishes headnotes (prepared by its own contributors) of cases deemed worthy of a commentary.

Tribunal Decisions. Beginning in 1977, selected Lands Tribunal cases have been printed and published, but these are the only tribunal proceedings which are regularly reported. Application to the appropriate registrar, which would not invariably be successful, would be necessary for a practitioner or researcher to see written judgments emanating from a tenancy tribunal, the Small Claims Tribunal or the Labour Tribunal. Magistrates' decisions are not normally available.

Legal Archive

The Public Records Office. Hong Kong's historical documents have only recently begun to be treated with respect - too late, alas, for a great many of them. In particular, the loss of government records during the Japanese occupation 1941-45 was considerable yet, after the war, records continued to be haphazardly stored and indifferently preserved. In July 1972, however, the Public Records Office (PRO) was established. According to the Government Archivist:

"The main function of the Public Records Office is the conservation of all government records of permanent value for official reference and private research. More specifically, this means all documents which possess value for:

- (i) documenting the constitutional and legal basis of government;
- (ii) documenting the origin, development, organization, functions, policies and substantive activities of government departments;
- (iii) protecting the rights and privileges of private citizens and organizations; and
- (iv) research into political, social and economic affairs and the history of the community."²⁸

There are huge gaps in the material which has been collected so far and it will be a long time before all available records have been sent to the PRO and properly catalogued. Some useful documents have already appeared, however, and, with the recent acquisition on microfilm of the C0129 series of governor's despatches, the future legal historian of Hong Kong already has enough material with which to begin work. For example, files transferred from the Registrar General's department include Land (Crown Lease) Registers 1843-1975, Miscellaneous Maps, Plans and Charts of Hong Kong (1845-1954), Crown Rent Rolls 1843-1924, 1935-1958, and case files relating to dissolved local companies (1885- 1970). In general there is a thirty year rule applying to such materials, though government sensitivity on some matters might restrict access to particular files.

Secondary Materials

Rear's chapters on labour law in Chinese Labour under British Rule provide a comprehensive coverage amounting to a text, but otherwise there is no textbook for practitioners or students of Hong Kong law. Penlington's recent book Law in Hong Kong is too thoroughly mediocre to qualify and Newton's Hong Kong Taxation is aimed more at taxpayers than at students. There are no case-books, no lengthy monographs (other than O'Brien's articles on landlord and tenant law reprinted from the Hong Kong Law Journal), and no major reference works except a series of digests and indices prepared by Frank Addison. There are no full-length biographies of legal personages in Hong Kong and no primarily legal studies by anthropologists. Writings on Hong Kong law are largely restricted to journal articles, especially in the Hong Kong Law Journal.

The Hong Kong Law Journal. This journal is published by a private company financed by practising lawyers and is edited in the School of Law, University of Hong Kong. It began publication in 1971. It is published three times a year, in January, May and September. Each volume has about 400 pages and contains articles, notes and comments, notes of recent cases and statutes, summaries of personal injuries and fatal accident cases, book reviews and editorial comments. There are annual tables of cases and statutes cited and there is an annual index. Although material on the law of other countries in the Asian region is occasionally included, and a few articles have only a tenuous link with things legal, the bulk of the material is directly concerned with Hong Kong law. This journal is by far the single most important source of secondary legal literature in Hong Kong.

It is significant, however, that the Hong Kong Law Journal is not a viable commercial undertaking. Founded with an Asia Foundation subsidy, the publishing company does not lose money but is dependent upon the unpaid (or only nominally paid) services of a business manager and editors and sub-editors and upon the profits from the annual series of law lectures for practitioners. In the past it has relied on the occasional largesse of its shareholders, a source of finance which would no doubt be available again if need arose in the future.

The Hong Kong Law Journal Limited Publishing Company which is responsible for this journal has other achievements to its credit. It has published three annotated ordinances and has organized six highly successful annual two-day seminars for practitioners. The proceedings of these seminars have been published and are a significant contribution to the corpus of legal literature in Hong Kong. Hong Kong Law Journal Ltd would willingly sponsor other publications on Hong Kong law but is hampered by a lack of copy and by insufficient editorial and sub-editorial assistance.

Other Periodicals. Apart from the Hong Kong Law Journal, the only periodicals dealing with Hong Kong law are Obiter Dicta and Justitia. Obiter Dicta is the mimeographed newsletter of the Magistrates Association. First published in 1974, it provides comments on legal developments of particular interest to magistrates. It is an engagingly edited little periodical, but unfortunately its cheap format makes it

difficult to use as a reference tool. Justitia is an annual collection of essays on legal topics by students of the School of Law, University of Hong Kong. Each contributor has invariably rewritten the dissertation he was required to submit in the second year of the LLB programme. There are obvious limitations to the usefulness of student work (which is undertaken more as a training exercise in legal writing than in the hope of producing valuable original research), but the dissertations are written under staff supervision and some of them are very good. In 1977-78 the students completed a special study of the Small Claims Tribunal for publication in Justitia.

The Cost Factor. It has been noted above that it is only recently that full-time law teachers have been appointed in Hong Kong. That is one obvious reason for the paucity of secondary legal literature in the colony. Another is the tiny size of the potential market. A third is the condition which has affected legal publishing all over the world: rapid increases in costs.

Resources and Conditions

Personnel Resources

Potential Authors. Clearly, the personnel resources in Hong Kong for the development of a local secondary legal literature are very limited - in effect they are restricted to the university's law department. This is not to say that law officers of the Crown, barristers, solicitors, members of the judiciary or even students cannot make valuable contributions to legal literature; but for a sophisticated, sustained piece of research and writing only university academics are likely to have the time and opportunity. Polytechnic law teachers spend too much time teaching and do not have the facilities at their place of work for legal research. This means that the hope of a developed corpus of literature devoted to Hong Kong law primarily rests with the full-time teachers employed to teach law at the University of Hong Kong and whose duties include "contributing to scholarship."

The eight volumes of the Hong Kong Law Journal and the five booklets of law lectures for practitioners are testimony to the contribution already made by members of the teaching profession. Each item of literature thus contributed is, in the main, doctrinal (expository), quite short, and was researched and written over a relatively short period of time. This type of legal writing is likely to continue, for it (1) is necessary and useful, (2) is not especially difficult to produce, and (3) fills up the curriculum vitae. This last is not intended to be cynical: it merely recognizes that promotion boards in Hong Kong university are no less impressed than such bodies elsewhere by the length, rather than the quality, of lists of publications. The more detailed, thoughtful analysis and the long-term research project are not superficially as attractive on the record of a candidate for promotion. Nevertheless, long-term research has been undertaken and will no doubt continue.

The university provides vocational teaching for students who enrol for the one-year Post-graduate Certificate in Laws (PCLL). This type of teaching can, of course, best be carried out by teachers who are qualified, experienced practitioners of the law. It is reasonable to assume that staff members who fall into this category are less likely than their more "academic" colleagues to contribute to legal literature. In the first place, since they are usually permitted, indeed encouraged, to engage in private practice, they will usually do so, especially as private practice in Hong Kong is quite lucrative. Secondly, the School of Law operates its own legal aid and advice scheme, which relies heavily on the services of practising members of staff. The demands of teaching, practice on one's own account and participation in the legal aid scheme leave little time for research and writing.

The university teacher who wants to, however, can usually find a fair amount of time to devote to research, both in term-time and in vacations. Long leave (which in effect takes the place of sabbatical at the University of Hong Kong) can be used exclusively for this purpose. Facilities will usually be adequate, though of course this question depends on the type of research being conducted.

Financial Resources

Grants for Research and Publishing. The University of Hong Kong has funds allocated to assist those engaged in research, and in the past successful applications for grants have been made by members of the law department. Generally speaking, doctrinal legal research and writing do not need extensive financial support, so long as library services are adequate. When it comes to publishing, however, financial

resources are probably non-existent: if a worthwhile book could not find a publisher because of expected small returns from sales, there is no formal means by which money can be made available. It may be possible to find charitable sponsors for a particular publishing project, but this has not been truly tested. A serious work lacking in popular appeal could not, unfortunately, be guaranteed a publisher, however valuable a contribution it may be to legal scholarship. For example, in the early 1970s, a proposal made by John Rear for a book on Hong Kong's laws and legal system, upon which a number of academics were prepared to collaborate, foundered because of market factors: despite such a work's potential value for students, even the Hong Kong University Press was not prepared to risk capital on it.

Facilities for Research

Law Libraries. For doctrinal research, the three main law libraries in Hong Kong between them probably cover the Commonwealth common law world reasonably extensively. The main deficiency is in legislation from other areas, text-books and monographs, though if necessary the secondary materials can be obtained from overseas on interlibrary loan. As pointed out above, Hong Kong's law reports and statutes are readily available and generally easy to use. Secondary literature on Hong Kong law is, of course, so sparse that it is a simple matter for public and, indeed, private libraries to stock it all.

Non-doctrinal Research. For historical, sociological or anthropological legal studies the facilities are not impressive. But for the last fifteen years or so the collection and publication by the government of raw data on the economy and society of Hong Kong has been increasingly comprehensive, and the Public Records Office is processing fairly large quantities of historical documents. A start has been made, and in most areas it would be the faint-hearted scholar who gave up a research project for lack of material. For these types of research, however, law teachers are not well qualified, both because in fact only one of them (in 1979) can use Chinese materials and because few have any familiarity with or formal training in other disciplines.

Future Developments

The Size of the Market. The legal profession in Hong Kong is expanding quite rapidly and the number of students taking law courses has increased considerably over the last few years and will probably continue to increase. The potential market for legal publications can only grow, though it will never be very large.

Legal Research Unit. The School of Law at the University of Hong Kong is considering seeking funds for the establishment of a legal research unit. If established, the unit will encourage, promote, plan and facilitate research into legal topics in Hong Kong and, where possible, assist in the publication of data, research aids and individual studies. The success of the unit would mean a significant boost to the development of a local legal literature.

Computerization of Legal Material. A lecturer in the university's law school has begun a programme for the computerization of personal injuries and fatal accidents cases in Hong Kong. It is designed as an information storage and retrieval system, and it could be extended to cover other types of legal material and to perform other jobs (indexing, for example). Computerization could well render some species of legal literature redundant.

Hong Kong Law Journal Limited. The development of legal literature in Hong Kong is, almost certainly, largely dependent upon the company which has so far produced eight volumes of the Hong Kong Law Journal, five booklets of law lectures for practitioners, and three annotated ordinances. "The company" is, in reality, one part-time secretary: the "business manager" is a busy QC and the editors and sub-editors are lecturers. There is an obvious limit to the range of publications it can put out, and, indeed, even continual production of the Journal itself cannot be guaranteed, depending as it does on so much of the time, energy and commitment of unpaid personnel. If suitable works are submitted for publication, Hong Kong Law Journal Limited will do its best to publish them, but its limited resources are unlikely to improve dramatically in the near future.

Other Publishers. The Hong Kong University Press is a potential publisher of local legal materials, but in the past it has not been able to subsidize publications and has been very slow in producing its books. Commercial publishers are of course even more constrained than others by the need to show a profit, and it is unlikely that narrowly legal literature would appeal to them as a viable publishing proposition (fringe material, however, will be acceptable: Oxford University Press, for instance, have published England and Rear, Chinese Labour under British Rule, Hopkins (ed), Hong Kong:

The Industrial Colony and Miners, Government and Politics of Hong Kong). Yet some interest is currently being shown by commercial publishers in some types of legal material.

Needs. The first priority is to consolidate and secure what has already been achieved. The Hong Kong Law Journal must continue its good work; the annual seminar for practitioners and the resulting booklet of lectures must be retained; the series of annotated ordinances should be expanded by the addition of new titles. Secondly, resources must be provided, if and when necessary, for the publication of any worthwhile legal material which is seeking a publisher. Thirdly, the preparation of works on Hong Kong law should be actively encouraged. Priority here should be given to studies of those aspects of Hong Kong law which are unique - in particular, to studies of the legal system.

The Meeting of Needs. Legal literature in Hong Kong is characterized by part-time production: the editing of the Hong Kong Law Reports is an extra (and usually unwelcome) duty imposed on the law reform section of the Attorney General's chambers, the Hong Kong Law Journal emerges from a busy teaching department, practitioners or practising academics strive to keep the occasional weekend free to write a lecture or a note for publication. Some kind of funded institutional support is necessary. The proposed legal research unit could fulfil a role here. It could possibly provide an editor/sub-editor for the Hong Kong Law Journal, someone who would be free from the demands of teaching and researching on his own account. The unit might also, under some kind of arrangement with the government, assist in the editing and publishing of the Hong Kong Law Reports. In effect it would become a subsidized, non-profit-making publishing company. Alternatively, Hong Kong Law Journal could be supported to the extent that it could hire full-time staff to look after the journal and other publications.

Conclusion. Any kind of recommendation must be tentative, for there are many practical difficulties: securing a source of funds, co-ordinating legal research unit activities with Hong Kong Law Journal Ltd ventures, finding sub-editorial staff, and so on. A realistic assessment would probably admit that the near future of secondary legal literature in Hong Kong will be, at most, no different from its near past: a regular professional journal, an annual book of lectures, and the occasional booklet, Justice report or annotated ordinance and the rare book-length study. The output, however valuable, will be small, unco-ordinated and haphazard. Yet even this is insecure while there is no full-time staff to organize the publication of finished work. If the development of a secondary legal literature and the improvement of primary legal source-material are worthwhile, financial provision must be made for the support of a publisher undistracted by other duties.

FOOTNOTES

1. See, for example, Lon L. Fuller, The Morality of Law (New Haven and London: Yale University Press, rev. ed. 1969), and Joseph Raz, "The Rule of Law and its Virtue" (1977) 93 LQR 195.
2. [1956] 1 QB 1, 16-17.
3. See also the comments by Henry Litton QC in the Hong Kong Bar Association Annual Statement 1978/79, pp 7-8.
4. Details taken from Hong Kong 1979 (Hong Kong: Government Press, 1979) (the government's gloss annual report).
5. The phrase used in the letter of March 8, 1972, from the Permanent Representative of China to the United Nations to the Chairman of the Special Committee of 24.
6. The definitive account is by John Rear, "The Law of the Constitution" in Hopkins (ed), Hong Kong: The Industrial Colony (Hong Kong: Oxford UP, 1971). For a short introductory essay see the booklet on Hong Kong in Blaustein and Blaustein (eds), Constitutions of Dependencies and Special Sovereignities (New York: Oceana, 1976).
7. See the Application of English Law Ordinance (cap 88, LHK 1972 ed).
8. See, however, my editorial comment in (1977) 7 HKLJ 289.
9. No. 7 of 1864.
10. No. 10 of 1875.
11. No. 31 of 1886. Ordinance No. 10 of 1875 had the distinction of being repealed again, in No. 29 of 1901.
12. See the unpaginated note bound in with volume 7 of the Hong Kong Law Reports (1912).
13. See my description of his Hong Kong career in (1972) 2 HKLJ 278.
14. Working Party on Reform of Hong Kong Law Reports. Interim Report, 1978 (unpublished).
15. G.B. Endacott, "The Beginnings" in Brian Harrison (ed), The University of Hong Kong: The First 50 Years (Hong Kong: Hong Kong University Press, 1962) 29.
16. See the note in (1928) 1 Hong Kong University Journal of Law and Commerce 7.
17. Keeton, "Forty-five Years On" (1971) 1 HKLJ 6.
18. Printed in (1928) 1 Hong Kong University Journal of Law and Commerce 82.
19. *Ibid.*
20. See editorial comment in *ibid*, 2.
21. See editorial note in (1927) 1 Hong Kong University Law Journal 79.
22. See note 16 above.
23. W. Astor, in a memorandum sent to the Foreign Office in July 1930: F0371/14724, p 99 (Public Record Office, London).
24. D.M. Emrys Evans in Legal Education in Hong Kong (Hong Kong: Hong Kong University Press, 1974) 3.
25. See the Attorney General's first reading speech for the Revised Edition of the Laws Bill 1965 in LegCo Proc 1965 (Nov 24) 587.
26. "Statute Law Revision" (1971) 1 HKLJ 274, 287.
27. (1978) 8 HKLJ 142.
28. Ian Diamond, "The Paper Chase" (1974) 14 Journal of the Hong Kong Branch of the Royal Asiatic Society 12, 23.

CHAPTER 6

LEGAL PUBLISHING IN PAPUA NEW GUINEA: SEVERING

THE COLONIAL LINK

By Abdul Paliwala*

Introduction

It is the purpose of this article to examine the effectiveness of communication of the law to the people of Papua New Guinea through the device of law publishing. The primary emphasis, as in any discussion of law publishing, will be on the written form, by which law reports, statutes, and law texts are produced by established law publishers. However, a critical analysis of law publishing needs to have an ambit which includes other media - such as the radio, film and computer.¹ Another important point is that the audience of law publishing is not an undifferentiated whole. The main division is between the layman and the potential or actual law experts. Yet, even among law experts there are different needs among practitioners, academics, students and para-professionals. Changes in publishing to one group will necessarily affect the other.

The people are ultimately affected by law-publishing whether such publishing is directed to them or to professional lawyers. This may sound a little strange when one considers the turgidity of the typical law book. However, such turgidity is symptomatic of the mystifying role of law and lawyers in society. Such a role provides the context of, and restrains any changes in, law publishing. Thus, it is usually assumed that law involves highly technical skills which can only be utilized through the medium of the lawyer. The primary focus of traditional law publishing is the lawyer. Others, such as politicians and bureaucrats come a poor second, and the people of course, come last.

The Papua New Guinea Context: The Colony-Metropolis Link

The link between law publishing and the role of law and lawyers in society has a special significance in Papua New Guinea, as the country is in the process of de-colonization. Papua New Guinea shares with other under-developed countries the experience of poverty, illiteracy, the colonial past, the lack of a fully developed legal profession and interaction of customary and colonial laws. It has also some peculiar problems in that the country has a large geographical area (47,000 sq. km.), but a small population (about 3 million) fragmented into some 700 language groups. For many parts of the country, contact with colonialism and its concomitants of western style under-development, law, professions and education have come only in the last twenty years.

Thus at present there are just 80 national lawyers in Papua New Guinea, and 120 national magistrates. Of the lawyers there are only three academics. Many of the law graduates from the University of Papua New Guinea end up doing non-legal administrative work. Apart from the nationals there is a highly significant group of expatriate lawyers working for the government and in private practice. The law school at the University of Papua New Guinea is small and has been in existence for barely ten years, and until recently has been completely staffed by expatriates on short-term contracts.

The most important influence on the law and law publishing in Papua New Guinea has been the colony-metropolis link between Papua New Guinea and Australia. Australia is really a sub-metropolitan power - it had itself a colonial relationship with England. This latter factor has had a special influence on the law in that Papua New Guinea's "received" colonial law is a mixture of Australian and English laws. The legislative schemes, the judicial system, and the professions in Papua New Guinea differ very little from their Anglo-Australian counterparts. Statutes are framed in the same drafting language as in Australia or England. There is a high judiciary comprised of the Supreme and National Courts, before which English or Australian barristers and solicitors, or

* Lecturer in Law, University of Warwick; formerly Associate Professor, University of Papua New Guinea, and Secretary to the Law Reform Commission of Papua New Guinea. I am highly indebted to Professor William Twining for his comments and suggestions in the preparation of this paper.

Papua New Guineans, with an LL.B. from the University and one year practical training at the Legal Training Institute practice. The lower courts, however, are staffed by magistrates with varying degrees of para-professional training. The Village Courts are unusual in that they are being staffed by lay village magistrates chosen by the people.

The common law link produces the dependence of Papua New Guinea on metropolitan legal materials; for the most part Australian and English texts are used in the country. Moreover, even materials devoted particularly to Papua New Guinea, including the Law Reports, are published in Australia. Some years ago, it would not have been possible to detect much difference between the standard equipment of a Papua New Guinean lawyer, academic or student and that of his Australian counterpart. That is, available legal materials reflected the dominant legal culture, which was Anglo-Australian.

It can be said of the legal literature prior to 1973 that it was sparse, lacking in depth and mostly took the form of a Papua New Guinean gloss on the dominant Anglo-Australian legal culture.² The Melanesian Law Journal only commenced publication as a slim volume in 1971. Any information on characteristics of Papua New Guinea law which were peculiar to this society had to be gleaned from the work of anthropologists or through assiduous research into primary materials, including the odd cyclostyled paper written for limited purposes and audience by a government lawyer.

The colonial link has a great impact on the ideological level. The legal materials from England and Australia are abundant, have a long tradition, and are apparently certain. For example, the judges find it much easier and comforting to rely on Australian precedents than to take on the challenging task assigned them by the Constitution of developing an underlying law suitable to the circumstances of the country.³ This reinforces the belief that the common law is a superior and more sophisticated legal system whose diffusion into the former colony can be of great benefit to the new society.⁴ In the comments received on the Law Reform Commissions's working paper, it was often argued that the great disadvantage of customary law is its uncertainty as compared with the common law which is a 'certain' system. Consequently, it is argued that the needs of a country such as Papua New Guinea can be best met by "pruning the English oak".⁵ However, any objective examination of conditions in Papua New Guinea will reveal that the soil and climate are not suitable for English oaks. In fact, according to Bayne, it is doubtful whether the genuine common law was ever transplanted on Papua New Guinea soil.⁶ The received law of this country can at best be described as 'colonial law'.

One aspect of this colonial legal system was the merger of judicial and administrative powers in the hands of the *kiaps* (patrol officers). The substantive law itself had some special features, produced by a curious blend of racial discrimination against, and paternalistic protectionism of Papua New Guineans. At the same time, the interests of foreigners were safeguarded in the laws relating to land, labour, mining and contracts.⁷ Customary law survived to a limited extent in the lower courts, but the people's response to an alien legal culture was to settle disputes in their own unofficial courts.⁸

Yet, apart from the ideological factors involved, there are other influences which put into question the colony - metropolis link. These include communication problems, the cost factor and the time factor.

Communication Problems

Anglo-Australian materials are inadequate for Papua New Guineans in that they do not form an adequate tool of communication. This is mainly because English is usually the third language for Papua New Guinean people. Complicated words and long sentence style result in the meaning being lost, especially on the students and trainee magistrates. Moreover, slow reading speeds make large law books difficult hurdles.

Much in Anglo-Australian material, and particularly in cases, is lost on the people because they do not know about the society from which the case and the law emanate. I was brought to an abrupt halt in the middle of a "traffic lights" case in class by the realization that no such things existed (at that time) in Papua New Guinea. Cases involving complicated items of machinery, as in *Farr v Butters*⁹ can be extremely difficult for students. This does not mean that such cases are irrelevant. The point is intended to illustrate a difficulty. One way out of this difficulty in the classroom is to use cases more attuned to local circumstances, whether from Papua New Guinea or from similar jurisdictions. If this is not possible, then care has to be taken by the text writer in illustrating the case - by diagrams if necessary. The country's languages and culture also have special qualities which can be utilized to great advantage. The use of '*tok bokis*' (metaphor) and imagery are particularly important.¹⁰

But the problem should not be seen merely as one of improving text books, but of improvement in the whole range of legal materials. The most important area in which improvement is needed is in the drafting of legislation. Many Papua New Guineans, including lawyers, become baffled by the language of legislation. Again, written texts are not necessarily the best means of communicating information on customary law. The most important aspect of customary law is the dispute settlement *process* and not the norms. In the circumstances media such as film and slides become much more relevant.

Cost Factor

Imported law books are extremely expensive for people in under-developed countries. They constitute a drain on scarce foreign exchange reserves. For the student it means that his book allowance of K100 per year is not sufficient to adequately supply his needs for the eight different courses he may have to take.¹¹ For the practitioner it means an enormous outlay on books if he is going to have an adequate law practice. This does not put back the expatriate Port Moresby law firm, accustomed as it may be to high earnings. However, it does pose a considerable burden for the Papua New Guinean practitioner intending to set up a rural practice.¹² In the short term, as most Papua New Guineans can get easy bank loans, this may not appear to be a big problem. However, the easy finances may dry up in the future. Secondly, the high cost of books will contribute to a high fee structure, and together with other factors, make the lawyer even further out of reach of the ordinary Papua New Guinean than he is already.

Australian prices tend to be much higher than English ones. It might be considered that costs could be reduced by switching over to English works rather than Australian. Unfortunately, this way of reducing costs is blocked by the Australian "mark-up". Under this system Butterworths (UK), for example, will not sell directly to a Papua New Guinea distributor. Instead all book sales have to be made through Butterworths (Aus.). Consequently, Thornton's Legislative Drafting which costs K8.80 (\$A15.00) in England costs \$A28.00 in Australia and K29.00 in Papua New Guinea.¹³ It may be possible for Australian lawyers with their extremely high earnings to afford these luxuries. But in Papua New Guinea it becomes a prohibitive cost. The difference in price can only be explained on the basis of the existence of two profit centres.

The English Language Book Society provides a small range of cheaper text books. However, service is limited and the books do not seem to be bound for tropical conditions and tend to come apart in the heat.¹⁴ The only bookshop which makes any serious effort to stock law books is the University Bookshop (Port Moresby). However, for financial reasons the bookshop only stocks text books which have been prescribed for a particular course. That is, there is normally not even a choice between Winfield and Salmon! For those individuals who are able to afford it, direct purchasing from Australian, English or American book stores or publishers can increase the range of choice; for the rest there has to be heavy reliance on the resources of the library.

The Library at the University has not been lacking in money, and it has been possible to order books in multiple copies. Also the Australian Universities inter-library loan scheme and the (Australian) Commonwealth Attorney General's Office provide reasonable access to books. Nevertheless, all this still leaves lawyers in Papua New Guinea at a disadvantage in comparison with the vast resources available to lawyers in a developed country.

High cost of books means that the materials available to a lawyer in an underdeveloped country are very poor compared with those in western countries. In the circumstances, it is important to make rational use of available money. For example, there is no reason for any student to purchase new law books every year when these books are often out of date within the next two or three years. Book lending and exchanges would save money which could then be used to provide richer materials for the student or the lawyer. Libraries could obtain some of the benefits of these savings which could be used to supply the students and practitioners with much better research materials, particularly in areas where the lawyer has to deal with counterparts from Western countries.

The Time Factor

Ordering books, whether for practitioners or students, has the added hazard posed by time. Books take about six weeks to arrive from Australia. However, if you are ordering an English work and the Australian distributor is out of stock, it can take anywhere between six weeks and a year to have them delivered to Australia and several more weeks to transship. As a consequence, badly needed student texts often do not arrive until halfway through the semester, in spite of the fact that orders were placed several months ahead. An inefficient university bookshop (not uncommon in underdeveloped countries) does not assist in lessening the time lag.

The need for disengagement from the colony-metropolis link in legal literature arises from the desire of Papua New Guineans to fashion a new legal system. The old system finds hardly any proponents. As a former Minister for Justice put it:

"In this country the law was an instrument of colonialism and a means whereby the economic dominance of the white man was established over us."¹⁵

Perhaps the greatest need for change will emerge out of the Law Reform Commission's proposals on the Underlying Law.¹⁶ The basic proposal is that customary law which is being creatively developed by the courts should form the basis for the underlying law. The common law should only have a subsidiary role. This demands completely new legal thinking on the part of our lawyers. It is vitally important to establish a Papua New Guinean legal literature which is relatively independent of the colony-metropolis link.

There are four requirements for an independent legal literature. The first one is the availability of sufficient research resources for monitoring the life of the law in action. There is no use basing the legal system on customary law if there is no way of finding out, simply and efficiently, what this law is.¹⁷ Second, there is need to develop legal materials, both of a primary and secondary nature which are readily available to the different audiences which exist for the law. Third, it is obvious that standard western legal materials, whether for students or for practitioners, can be highly misleading in their static emphasis on the "law as it is" and on western legal concepts. The criteria for the suitability of legal materials in Papua New Guinea need to be different, and should include: (a) the understanding of law in its political-economic context; (b) the appreciation of changeability of law; (c) the integration of Melanesian norms and values into the law. Last, building from a customary base means utilising the peoples' own law. If the legal changes taking place are to be effective they should actively involve the people. Therefore, apart from the need to monitor the peoples' law, it becomes important for the government to communicate effectively to the people how it is shaping the new system.

Some changes have been taking place in legal publishing since self-government in 1973. It is now intended to discuss what the present situation is in relation to different aspects of communication of the law in relation to our four objectives. It is, however, important to bear in mind that the audience for the legal literature is not homogeneous. For our purposes the two main types of audience are the ordinary people and the law experts. Both can be further sub-divided. Among the ordinary people, the main division is between the literate and the non-and semi-literate. Among the 'legal experts' one finds four main classes. These include: (a) the fully qualified lawyer including the judges and practitioners; (b) the magistrates; (c) the bureaucrats, professionals and business people whose work involves the law; and (d) the law students.

This disparate audience needs different levels of communication. However, the practicalities of a small jurisdiction often dictate that one medium must suffice for many classes. This is apparent in publications undertaken by commercial publishers. As the market needs to be as wide as possible to be attractive, the publication is tailored towards a wide audience and may often lose in quality. An alternative approach is that of recent publications of the Law Reform Commission, which aim at three different levels at once. The summaries in Pidgin, Motu and English aim at the widest possible audience. The Report section aims at the educated public and some legal experts. The draft legislation, and particularly, the annotations aim at the legal expert.¹⁸

The following is a review of the different types of legal literature, highlighting some of the problems connected with each type.

A. PRIMARY SOURCES

1. Customary Law

As has been stated already, customary law is intended to be the basis of underlying law of Papua New Guinea. Yet, in terms of legal literature it is the least developed. There is hardly any primary source material on customary law. What little exists is in the form of works by anthropologists.¹⁹ Yet, the primary concern of anthropology, including legal anthropology, has been to study customary law from a western comparative perspective rather than from a law development perspective.

Primary source material of varying quality exists in the form of local and district court judgments in cases involving customary law. However, this is not recorded or kept in any systematic fashion. Village Courts are also an important potential source of information on customary law, but at present the recording of Village Court decisions is not sufficiently detailed to make them a good source of customary law literature. The National and Supreme Courts have had very little to do with customary law.

This dearth of information calls for a systematic approach to the compilation of primary source material. It is not the purpose in this paper to discuss the merits of different ways of recording customary law, such as legislation, restatements, or case studies.²⁰ For present purposes it is important that an organized study should be made and the information collected should be systematically recorded and be made available. A most important consideration in dealing with communication of customary law is that one is involved not merely with substantive norms, but such matters as procedures, sanctions and values. One is concerned with the law in action and not with formal rules.

Two recent developments need to be mentioned in this connection - the government has recently approved a project for the study of customary law by the Law Reform Commission. The Commission will appoint a co-ordinator who will be responsible for co-ordinating information from a wide variety of sources, including magistrates and student research assistants. Secondly, a recent study done for the Law Reform Commission by Professor Twining recommends the establishment of a Legal Information Centre.²¹ The centre will serve a wide need for co-ordinating the two-way processes of communication of information about law of all kinds. This will be of great benefit for the documentation and communication of customary law. However, the view is rightly taken that information about customary law cannot be isolated from information on other sources of law if we are to develop an integrated legal system.

2. Archives and Court Records

Archives and court records form a primary source from which research can take place. Yet, until recently, there has been no archival policy in relation to the keeping of legal records in Papua New Guinea. Legal materials contained in the National Archives are not kept separately.

Court records are not kept at the Archives, but are retained at the individual court houses. This did not pose a big problem for the Supreme and National Court because of the centralisation of the courts. The records are kept in a fairly organized form. Important published judgments are regularly indexed. This is very important for the legal researcher because there were no law reports prior to 1973, and because even now the Papua New Guinea Law Reports are limited in nature.

If the situation at the National court is generally fairly satisfactory, that at the lower courts is chaotic. Each court maintains its own records with no policy as to which records to maintain and which to dispose of. This poses a particular problem for collecting information on customary law, because it is the lower courts rather than the National Court, which tend to deal with customary law cases. The Land Titles Commission and the Land Courts, however, have a better organized system of documentation.²² This is important in an unregistered customary land system because judicial settlements are often not accepted by the public, and disputes on the same parcel of land can run for generations.

The situation is really difficult in the case of Village Court records.²³ The present system of keeping court records provides very inadequate information for a person intending to monitor the courts. There is more space on the record for the names of magistrates than for factual information about the case. A better system is now being devised. However, a more important problem is that most of the court clerks are at best semi-literate, and find it difficult to put down accurate and comprehensive information.

The proposed Legal Information Centre can fill an important gap in the collection of legal records.²⁴ Ideally all legal records which are more than five years old should be centralized. The primary need is not for centralization, however, but for co-ordination.²⁵ The Centre can help in establishing firm guidelines for the keeping of the records and for their manner of keeping. It can also organize the monitoring to the appropriate legal audience. In relation to the Village Courts, the Centre could establish links with the more articulate Village Court clerks to obtain deeper information on village case law. Similarly, Local and District Court magistrates could send a selection of their judgments to the centre.²⁶

Apart from the proposal to establish a Papua New Guinea Legal Information Centre, there was in 1975 a proposal by the British Government for the establishment of a Pacific Law Centre for the members of the South Pacific Forum countries.²⁷ Port Moresby was mooted as a base for the centre. However, a number of governments, including the Papua New Guinea government, opposed the centre on the basis that it would have long-term financial implications for them and that it was not a priority area. This was unfortunate because much could be gained by the pooling of resources and information in the South Pacific countries.

3. Law Reports

Formal law reporting only started in Papua New Guinea in 1963. The Papua New

Guinea Law Reports are produced in an annual volume of about 450 pages by the Council of Law Reporting which is chaired by the Chief Justice. However, the editing and printing is done in Australia by the Law Book Company. There is a commercial arrangement under which the government guarantees to purchase 300 copies, making the printing a financially viable proposition from the point of view of the Law Book Company. The Papua New Guinea Law Reports only report selected judgments. The resultant gaps are filled in two ways. First there is the practice of the courts under which most significant National and Supreme Court decisions are circulated in a cyclostyled form to selected members of the legal profession.

Secondly, since 1974, the University of Papua New Guinea Law Faculty has produced a digest called Papua New Guinea Law.²⁸ This attempts to digest all available National and Supreme Court decisions, and is sold at an inexpensive rate to the legal audience. Production of the digest has been heavily dependent on the availability of a qualified research assistant to do the work. Although the Editor of Papua New Guinea Law has recently decided that selected lower court cases will also be digested, this does not in itself solve the problem of communicating information on the crucial parts of the law which are dealt with by the lower courts.

The present system of publishing the Law Reports is not inefficient and is relatively economic and one would not wish to disturb it unless the alternative system was at least equally efficient. One difficulty is that of the limited availability of skilled manpower. At the present time, if the production of the Law Reports were to be localized, there would probably be a need to appoint an expatriate editor, as suitable qualified Papua New Guineans are all in other high status positions. However, if the law reporting unit was combined with the proposed Legal Information Centre, this would result in considerable rationalization and cost saving.²⁹ In particular, the centre could take over Papua New Guinea Law. There are serious gaps in law reporting from the perspective of precedent creation and law development. Judgments tend to concentrate on the normal 'fodder' of the national court work. The main areas are serious crime, particularly homicide, and commercial litigation between foreign firms. This is notable because apart from criminal cases very few cases concerning Papua New Guineans come before the National Court. As a result, precedent creation in civil cases is based on the concerns of an expatriate bourgeoisie.³⁰ This bodes ill for the development of an underlying law based on customary law.

A body of precedent which better reflects the concerns of the majority of the population could be established if there were more appeals, particularly in customary law cases, from the lower courts. This has not been the case until now because the limited resources of the Public Solicitor's Office have been concentrated on criminal work involving indictable offences.

The quality of the Law Reports needs to be questioned in another respect. The judgments reported reflect an overwhelming dependence on Australian and English precedents and a lack of imagination in adapting them to local conditions. For this to change there is need for a bench and a bar which is committed to legal transformation in accordance with the Constitution.³¹ This can take place either by appointment of committed national judges or of expatriate judges who have the appropriate experience in and commitment to the needs of a developing country such as Papua New Guinea.

The main change which has to be made in the policy of law reporting is for there to be a greater consciousness of the developmental role of law reports to Papua New Guinea. This means care in the selection of judgments for reporting. However, perhaps even more important, there may be need to make selective reports of lower court cases, including Village Court cases. The implementation of this policy does not in the short term demand 'localization' of law reporting. The Council for Law Reporting can make the appropriate arrangement with the Law Book Company. However, in the long term the operation could be better organized by the Legal Information Centre.³²

It may be argued that reports of lower court cases can be best dealt with by Papua New Guinea Law and the Law Reports should be reserved for the higher court cases. However, the number of areas in which the higher courts have no jurisdiction is increasing.³³ The function of the Law Reports should be to communicate to the different legal audiences the important landmarks in the case law during the year.

4. Legislation

The Statute Book can be divided into two basic parts. Until 1945, there were separate statute books for Papua and New Guinea. Since 1945 there is a merged set of the Laws of Papua New Guinea. This was in line with the administrative merger of the two territories. The pre-1945 statute books are in the form of complete editions in five volumes divided in chapters according to subject matter. Volume 5 is the index. The book contains both ordinances and statutory instruments. The post-1945 practice has been to produce annual volumes, printed in Queensland, containing both Acts and

Statutory Instruments, arranged chronologically. The last printed index to these laws goes only up to 1973. However, an unofficial table of all laws in force up to Independence Day (16 September 1975) has been produced by the Office of the Legislative Counsel. Current legislation is printed by the Government Printer, but sometimes appears up to one year late. The latest annual bound volume of Laws of Papua New Guinea is for 1973. This chaotic situation is soon going to be brought under some control by the printing of the Revised Laws. These will be printed by the Secretary for Justice under the Printing of Laws Act 1975 and will be comprehensive until January, 1976. The new statute book will be organized on a loose leaf basis and will be kept up to date by replacement pages. The printing is done by computer and the system of revision is therefore likely to be efficient.³⁴

No computerized information retrieval facility has been envisaged, but the system may be easily adaptable to such a facility. Setting up our own system of information retrieval may, however, be expensive. An alternative is to negotiate with the Australian government to use the facilities of the comprehensive retrieval system established by the Commonwealth Attorney-General. The Office of Legislative Counsel have recently obtained approval to use this facility. It may, however be that the demand for such a system will not be too great.

The main problem with our legislation, a problem which is shared by most common law countries is the complexity of drafting. Many useful changes have been made in the drafting by legislation providing for the simplification of form and interpretation. This is now contained in the Interpretation (Interim Provisions) Act 1975. However, the need to simplify drafting is greater in Papua New Guinea than in many other nations. Many politicians find it difficult to comprehend the complex language that they are enacting. Even the lawyers find the legislation difficult to understand. The problem of simpler preparation of legislation and drafting has been a very important concern in recent years. The proposals and initiatives made elsewhere should be a starting point for Papua New Guinea's legislators.³⁵

Apart from simplification of drafting, the question of the language of drafting needs to be considered. It is premature to propose drafting in a "national language". At present there is no consensus as to adoption of a national language, and English is going to continue to dominate by default. It is clear, however, that the two most important lingua francas, Pidgin and Motu, can be sufficiently developed in the future for drafting or translation.³⁶ In the short term it would be satisfactory to provide simple summaries in Pidgin and Motu of the legislation for communication to a wider public.³⁷

B. SECONDARY LITERATURE

It would seem from the foregoing that the organization of primary materials needs improvement. In the case of secondary materials, the problem can be said to be even greater. In the category of secondary materials it is intended to include intra-professional communication, bibliographies, educational literature, scholarly monographs, practitioners' works and government publications, such as reform documents. A healthy body of secondary literature is essential if a legal audience is to make an adequate use of the available primary materials. An over-reliance on foreign secondary sources can contribute to an over-reliance on foreign precedents. This can result in the ignoring of important legislative policies and a tendency to interpret legislation in accordance with prescriptions in Anglo-Australian texts.³⁸

1. Intra-Professional Communication

Intra-professional communication can be a primary source material if for example, it is in the form of practice directions. However, it is best to treat it as a secondary source as it comprises a broad range of things. It has already been mentioned that the National and Supreme Courts have the practice of circulating cyclostyled decisions. Practice directions on matters such as sentencing policy are circulated in the same manner in some places. However, this latter device has not been used much in Papua New Guinea.

Intra-professional communication is much more important for magistrates, as their access to primary materials is often limited. Also, the extent of their training does not fully equip them to deal with complicated legislation and case law. In the circumstances, much is done by way of instructions to magistrates on matters relevant to their work. The publication Magisterial Notes, which has had an intermittent life, can be a source of valuable information to magistrates. It is hoped that the establishment of a permanent Magisterial Services Commission under the Constitution will make Magisterial Notes more permanent as well.

2. Bibliographies

A good bibliography is essential for adequate law research. The only bibliography of law in Papua New Guinea in existence is that by Michele Potter on Traditional Law.³⁹ Unfortunately, this bibliography is limited in its source material. The law librarian at the University of Papua New Guinea has, however, recently undertaken to produce a comprehensive bibliography of legal materials.

3. Educational Literature

Educational literature is meant mainly to satisfy the needs of students. In the case of Papua New Guinea, at any one time, there are two categories of law students. Students for the LL.B degree are trained at the University, and total about 150. In addition there are about 40 magisterial students also in training at the University. Magisterial training was until recently at the Administrative College. Therefore the needs of these students were different from those of University students. This situation may be changed as a result of a recent incorporation of magisterial training in the Law Faculty programme.

The above figures serve to illustrate the important problem that the market is far too small to support overseas commercial publishing done especially for Papua New Guinean students, and consequently commercial publications of legal texts are designed to appeal to a wider audience, particularly magistrates, private practitioners, and interested laymen. Thus, the works which have been approved for publication have with one exception, been those directed either at a general audience or at practitioners. Chalmers and Paliwala's Introduction to Law in Papua New Guinea⁴⁰ is intended to satisfy the needs of the complete legal audience as well as being attractive to the educated reader in Papua New Guinea. This does not make authorship easy. Griffin's work on Criminal Procedure is a work of a different nature⁴¹ - it is a simple criminal procedure manual, and is used in the criminal procedure course at the University. Another work, Ottley's Criminal Law of Papua New Guinea is not ready yet.⁴² It is different in that it will be in the tradition of Anglo-American cases and materials books and was originally produced for internal circulation among students. Edward S. Hayes and R. O'Regan's work on the Criminal Code needs to be mentioned. It is also in the tradition of an Anglo-American cases and materials book. Yet, it is a strange experiment in attempting to bring under one umbrella the very different societies of Papua New Guinea, Queensland and Western Australia,⁴³ which share the Criminal Code devised by Sir Samuel Griffin. The work in preparation by Andrews, Chalmers and Weisbrot on an annotated criminal code⁴⁴ will again be a work of a mixed nature in being of use to both practitioners and students. Yet, it is difficult to achieve a policy-oriented approach through an annotated code.

A work appealing to an audience of a mixed nature in a rather different way is that being edited by Paliwala and Weisbrot on the Changing Legal System of Papua New Guinea.⁴⁵ This is a collection of essays from a developmental perspective which are intended both to provide a contextual approach to Law for students and to inform a wider national and international audience on legal transformation.

The real progress in developing a student-based legal literature has been made on a self reliance basis. This has been done by utilizing the University Printery and where necessary, commercial printers in Papua New Guinea. Editorial costs are absorbed by the work and typing being done by university staff. As the printing is done by photo-offset devices, there are no type-setting costs and printing is fairly cheap. The students are charged only for the printing, labour and material costs plus a distribution charge by the University Bookshop. Individual lecturers have now prepared relevant course books in Introduction to Law, Legal Writing, Customary Law, Land Law, Criminal Law, Law and Development, Legal Ethics, and Family Law.

4. Scholarly Monographs

Somewhat surprisingly, it has been easier to find publishers for scholarly works. This is probably because much of the writing is meant for a broader academic audience and has attraction for social scientists overseas. It is also to be noted here that many of the works are not by lawyers but about law by social scientists.

In the works by lawyers there is a marked contrast between those before 1973 and those after. The works before 1973 are either apologetic or mildly reformist. Thus, O'Regan's brief tract on the Common Law in Papua New Guinea had as its theme that the legal needs of this country could be served by a minor adaptation of the common law⁴⁶ a theme which has since been rejected by the country. The work edited by Bernard Brown on the Fashion of Law in Papua New Guinea is a selection of essays of varying quality.⁴⁷ The essays again represent a mild reformism starting from an Anglo-Australian base.

The Waigani seminar in 1973 indicated the beginning of an alternative tradition.⁴⁸ Among the papers delivered at the seminar were those by Papua New Guinean politicians, lawyers and students. An important theme of the seminar was that the Anglo-Australian legal culture needed to be fundamentally transformed in the period of independence. The seminar papers were published in two different ventures. The papers on Foreign Investment were published by Butterworths.⁴⁹ The papers represent an economic nationalist theme as compared with the laissez faire approach of the past administration and law. The work Lo Bilong ol Man Meri is on the subject of traditional law and popular justice.⁵⁰ It was published with a subsidy from the International Legal Centre, but was otherwise a local publishing venture by the University. It gives a clear indication of the aspirations of Papua New Guineans for de-colonizing their legal system. More recently, Butterworths (Aust.) have agreed to publish a work of essays on Papua New Guinea Law on the theme of legal development.⁵¹ The venture is important in that it would provide useful information for Papua New Guineans on an 'alternative' development approach to law. At the same time it should provide an analysis for both Papua New Guineans and outsiders of the attempted de-colonization of law in Papua New Guinea.

The works by non-lawyers have been of a varied nature but generally less imbued with respect for Anglo-Australian legal culture than earlier legal works. Peter Sack has been involved in the production of three works dealing mainly with customary land law and the administration's policy towards land from a historical perspective.⁵² Wolfers' work on Race Relations and Colonial Rule in Papua New Guinea is another historical work whose thesis is that colonial law was an instrument of racial domination.⁵³ Amirah Inglis' work Not a White Woman Safe deals with the history of the White Women's Protection Ordinance which provided the death penalty for Papua New Guineans who molested white women.⁵⁴

Legal Anthropology has made some contribution to the study of customary law. The emphasis has been on the dispute settlement process. This literature has had a salutary effect on preventing a rigid, rule-based approach to customary law. However, it has not given much insight into the substantive customary law.⁵⁵

Finally, it is important to mention here that much scholarly work is never published, but is privately distributed to interested lawyers. This often has an important law development role. However, distribution and ultimately storage tends to be haphazard.⁵⁶

5. Practitioners' Works

There is no work at the moment which can qualify as being a practitioner's work in the Anglo-Australian tradition. The only two works which could satisfy the needs of practitioners are Griffin's Criminal Procedure in Papua New Guinea and Chalmers' and Paliwala's Introduction to Law in Papua New Guinea.⁵⁷ As has been mentioned already, Griffin's is a simple manual and a practitioner can only use it as a starting point. It does not attempt to be imaginative or to point the direction in which our criminal procedure could move. The work by Chalmers and Paliwala, on the other hand, attempts to describe the existing legal system but at the same time discusses the way in which restructuring of the legal system can take place. However, once again the work is limited in its attempt to satisfy a wide audience.

The first practitioner's work for Papua New Guinea will be the newly annotated Criminal Code prepared by Chalmers and Weisbrot.⁵⁸ It will be a traditional practitioner's work in that it will describe the Criminal Code. However, the authors assure me that it will not stop at being descriptive and will raise some basic issues about the fundamental principles of the code!

6. Periodicals

The country has since 1971 been reasonably served by the Melanesian Law Journal which now comes out twice a year. Originally, the Journal was published and distributed by the Law Book Company in Australia. However, in 1974, the Law Faculty took over the publication but arranged for overseas distribution by the Law Book Company. The local publication was at a considerably reduced cost, because of the use of photo-offset printing and lower labour costs, and the journal showed a profit. Unfortunately, the University mandated that distribution be taken over by the University Bookshop. This proved a disaster because the bookshop lacked the competence and facilities to distribute adequately. This situation has only been rectified recently by the new editor who has taken over the business side of the Journal including distribution. Steps are now under way to restore the Law Book Company as our overseas distributors.

The Journal has emphasized a thinking approach to the law, rather than acting as a pure service to the practitioner, and has been used as the main instrument for analyzing the trends towards the transformation of the legal system. This emphasis is correct in

that in a changing legal system all lawyers need to be made aware of the changes taking place. However, it may be in order for the Journal to provide a practical service for the practitioner as well, by including shorter practical articles, more case-notes and commentaries on current legislation.

Apart from locally based periodicals, overseas periodicals have occasionally been venues for articles relevant to Papua New Guinea. However, few overseas periodicals tend to accept specialized work on Papua New Guinea law. Also, there is a conflict between the stylistic needs of a Papua New Guinea audience and those overseas. When one is writing for an overseas periodical, the intention is really to tell an overseas audience about the law in Papua New Guinea.

Other locally oriented periodicals sometimes contain articles relevant to law. These include Administration for Development, published by the Administrative College, and Yagl Ambu, a social science review. The Bulletins produced by the former New Guinea Research Unit of the Australian National University provided venue for law-oriented materials. The Institute for Applied Social and Economic Research, which has replaced the Unit, could also provide a similar service.

C. SOME SPECIAL PROBLEMS OF LEGAL LITERATURE

1. Human Resources: Research and Writing

The creation of a national legal literature demands human resources for such creation. Much legal writing is done by academic lawyers, although practitioners often contribute - particularly towards practitioners' works. In this country, the Law Faculty is relatively young and has only 14 full-time members of staff. The current financial crisis has led to the University employing fewer senior staff, and to an increasing amount of time being spent on teaching in place of research and writing. Library resources are limited and primary materials are difficult of access. In the past, the research situation was not helped by the many law school staff who were heavily engaged in private practice. The University now discourages such practice. A further problem has been that most overseas staff have been employed on short-term contracts, and they often leave the country before they have had time to make significant contributions to the legal literature.

An obvious answer to the problem of transiency is the development of a group of committed national academics. This would have the further advantage of creating a group of academics committed to national aspirations, and, hopefully, without the ethnocentric biases of western-trained academics. The law Faculty has vigorously pursued a policy of localization, and 6 of the present staff members are Papua New Guineans. Past experience has shown, however, that there are strong temptations for national staff to leave the University for positions in the public service or private enterprise, which offer more room for rapid advancement, are often far more lucrative, and appear to be more exciting. It is very important for the future of legal development that the University alter its present policy which over-emphasises teaching, and create an environment in which national academics will be encouraged to stay and contribute to research and writing.

2. Monitoring the Legal System: A Legal Information Centre

I have already discussed some of the problems involved in obtaining materials on customary law. Two proposals, one for research in customary law and one for a legal information centre have been mentioned. It is essential for a healthy national literature that means exist for the monitoring of the legal system in its various aspects. A legal information centre such as has been suggested by Professor Twining could provide a co-ordinated approach to such monitoring of the system.⁵⁹ Moreover, such a centre could include in its task the function of co-ordinating the communication of the law to various audiences.

3. Towards Local Publishing

The government has the responsibility for publishing the legislation; in the case of the Law Reports, however, responsibility lies with the Council for Law Reporting, although actual publication is done by arrangement with a commercial publisher. However, no responsibility is assumed by the government for secondary materials apart from reform documents. This leads to great inadequacies in the availability of material suitable to local needs and a consequent dependence on Anglo-Australian materials.

One approach to the problem is self-reliance publishing as has been attempted by the Law Faculty. This principle could be extended to practitioners' works and scholarly works, and even to the law reports. It is not necessary in an underdeveloped country such as Papua New Guinea for legal literature to be in the highly polished form favoured by commercial publishers. Where cheap technology exists such as photo-offset printing,

this should be used. A considerable improvement in quality of print can be gained by use of relatively cheap devices such as automatic typewriters. The main advantage of such self-reliance publishing would be a relative independence from the editorial policy and the market considerations of the Anglo-Australian publishing houses. Its disadvantage lies mainly for the authors, who may find that there is less status associated with such ventures.

In many ways, the localization of literature in this country would be greatly improved by a rationalisation and expansion of the publishing function of the University. As the University is a teaching and research institution, it is right that it should have a wider responsibility to the legal community. Financial considerations make such wider responsibility unlikely and may even bring into question existing responsibilities. It is important, therefore, that additional financial resources need to be made available either to the University, which would then be able to expand its present functions, or to a specialised law publishing body. Twining has proposed a law publication revolving fund on the Scottish or Irish model.⁶⁰ Such revolving funds operate by financing publishing ventures through commercial law publishers. Publication therefore becomes economically viable for the commercial publisher. The fund receives the receipts from sales. If administered efficiently, such a revolving fund would provide services without being a drain on the national resources.

The principle of a subsidy from official sources already exists in the case of the guaranteed purchase scheme for the Law reports. More recently, an important precedent has been created for institutional co-operation in the case of the arrangements for the publication of the work by Andrews, Chalmers and Weisbrot.⁶¹ A subsidy has been provided by the University and the government has agreed on a guaranteed purchase. The arrangement owes much to the personal initiative of the authors who have seen a publishing need. However the precedent set may help further developments in this area.

In the context of Papua New Guinea, it may be more relevant to utilize such a fund for self-reliance publishing rather than make the otherwise inevitable arrangement with Australian commercial publishers. If the University is willing to shoulder the responsibility, it may be appropriate to put it under the aegis of the Legal Information Centre.

4. Regionalism and Internationalism

On the surface, there appear to be great advantages in international co-operation between the developing countries, and particularly between the developing common law countries. A work which would be of common interest to lawyers in developing countries generally could get over the disadvantage of the lack of a market in small jurisdictions. A particular area in which there may be common concerns is the discussion of policy issues related to law, such as the role of law in development, the structure of the legal profession, the decolonisation of the law,⁶² the law relating to public enterprise,⁶³ and the control of foreign trade and foreign investment. The whole area of international law has problems in which developing countries which were left out of the formative stage of international law have common concerns.⁶⁴

Unfortunately, the emphasis to date has largely been on regional literature. For example, India is entirely self-sufficient in law materials. In Africa, apart from some works of a general nature on African law, most of the effort has been on the subregional or even on the individual country basis. This can be seen, for example, in the Law in Africa series produced by Sweet and Maxwell.⁶⁵ The African Law series provides an attempt at producing primary source materials. This regional or national bias in literature in developing countries makes it difficult for such works to be used as other than secondary reference works in Papua New Guinea.

There is need for materials which are more general in nature but attuned to the needs of developing countries. This is not easy, however, the main problem being that legal balkanization becomes an even greater reality after independence than during the period prior to it. For example, there is little interaction between lawyers or legal academics in African countries. Political developments also lead to different countries going in different legal directions. A change-oriented literature should, in fact, be able to capitalise on these differences. Yet, the task of the researcher attempting to produce such general works must be very heavy.

Thus, although it may be desirable to move towards producing legal literature of a general nature for developing countries, it is clear that the obstacles (in terms of both research and writing and publishing) are great.

5. Communication of the Law to the People

In western countries a growing, but still inadequate, amount of popular literature plus some radio and television programmes dealing with law are becoming a feature of

popular culture. Such developments are not easily achieved in places like Papua New Guinea where there is a general lack of resources. Non-literacy, and the fragmentation into several hundred language groups pose difficult problems. Lingua francas exist, such as Pidgin and Motu, but there is no universal medium of communication. In the circumstances the only relevance of popular writing on the law is for the better educated groups.⁶⁶ The University Extension Programme attempts to fulfil this need by producing simple pamphlets of general interest. These attempts, however, do not reach the majority of the rural and urban people. And yet, because of the important legal changes taking place in Papua New Guinea which are establishing the path toward development, the need for communication between the government and the masses is particularly great.

It is therefore interesting to note the efforts of the Law Reform Commission in involving the people in the task of Law Reform. The Commission is unusual in taking this task seriously. One reason for this is the great emphasis placed at national policy level on the transformation of the law.⁶⁸ Whatever, the seriousness of the governments's intentions the Commission probably and rightly feels that the greater the levels of public involvement and debate about its work the more chance there may be of the government taking its proposals seriously. Finally, the ideological commitment of members of the Commission, and particularly of the first chairman, to involving the masses goes beyond these pragmatic reasons.

The Commission uses various devices to involve the public. Members of the Commission visit different parts of the country to seek ideas on a subject and explain proposals. This does not apply uniformly to all commission projects. There has been a greater emphasis on this activity in relation to the adultery, sorcery and underlying law projects than in others. Audiences consisting of legal personnel have been involved through a series of seminars to discuss the transformation of the legal system. The Commission is very conscious of its relationship with the media. There are prompt and frequent press releases. Members regularly appear on the radio to explain proposals. Feedback is encouraged. Great attention is given to the Commission's documents to ensure that they do not appear to be too legalistic. The reports, for example have bright, eye-catching covers and are written in a way which will satisfy the needs of the different audiences concerned.

As a result there is a greater consciousness of law reform among all sections of the public than would normally be expected. Law reform proposals become matters for discussion in the media.

Yet, the success of the Law Reform Commission in involving the public is limited. The Commission's limited resources do not allow for as thorough an involvement with the people as might be wished. At best, only a slightly wider range of people comment in writing on proposals than would normally be the case in another country. Even if people are aware of law reform in general, this awareness may be shallow, particularly as awareness of existing laws may itself be extremely limited. At meetings to discuss proposals in the villages, one does not always get access to the masses but to the new rural leadership, consisting of 'big-men', businessmen, councillors, church and village court officials.

A government intent on involving the people in its strategies needs to pay great attention to general adult education and literacy. Unfortunately, there is no real drive in this direction at present. Experiments are being made with rural films, slide-shows, discussion groups and mobile and village libraries. Yet, these remain adventurous experiments. Generally, at present, the normal modes of mass communication are the radio and government officials talking to the people. Very little of the message of such information media can be getting to the people.⁶⁹

FOOTNOTES

1. Most developments in relation to the application of legal communication have taken place in the context of the developed and large jurisdiction countries. The main arguments against the use of a sophisticated medium such as the computer in a small underdeveloped country are cost, lack of skilled man-power and national priorities. The cost factor may not be as important as it seems. For example there is computer capacity in Papua New Guinea which is largely wasted. A rational use of computers could save costs. Skilled man-power is a more significant factor. Experience in Papua New Guinea shows the chaos that badly administered computer systems can produce. Finally, it may be against national priorities to put resources into sophisticated hardware and software at the expense of the more urgent national problems. Yet, a sophisticated medium may be relatively more effective in a developing country in many circumstances. Thus for example, the use of video-tape of other village courts in action may be a more effective means of training village magistrates in the total process than lectures by expatriate or local 'experts'.
2. Some works such as L.K. Young's, Outline of Law in Papua New Guinea (Sydney: Law Book Co., 1971) leave one with the impression that the subject is not law in a *developing* country.
3. However, see the recent statement by the then Deputy Chief Justice that our courts should rely more on Papua New Guinea judgments in criminal cases in *The State v. Laiam Kiala and Mairi Gomosi* (N. 118, unreported, 1977). As for the courts' law development role, see Schedule 2.2 and 2.3 of the Constitution. For more radical proposals see the Law Reform Commission of Papua New Guinea, The Role of Customary Law in the Legal System (LRC Report, no. 6, 1978).
4. For a discussion of this 'diffusionist' approach to law see: A. Paliwala, J. Zorn, and P. Bayne, "Economic Development and the Changing Legal System of Papua New Guinea," African Law Studies V.16 (1978), p.3.
5. R.S. O'Reagan, The Common law in Papua New Guinea (Sydney: Sweet & Maxwell, Aust., 1971).
6. P. Bayne, "Legal Development in Papua New Guinea; the Place of the Common Law," 3 Melanesian Law Journal 9 (1975). See also Paliwala, Zorn and Bayne, *op. cit.*, p. 21; Edward P. Wolfers, Race Relations and Colonial Rule in Papua New Guinea (Sydney: Aust. & New Zealand Book, 1975).
7. See Paliwala, Zorn and Bayne, *op. cit.*
8. See e.g. M. Strathern, "Official and Unofficial Courts; Legal Expectations in a Highlands Community," New Guinea Research Bulletin No. 47 (1972).
9. 1932 2 K.B. 602.
10. B. Narakobi, "We the People: We the Constitution," (Paper delivered at the 7th Waigani Seminar, Port Moresby, 1973) is an excellent example of this.
11. K1 = £0.70 (approximately, March 1979).
12. This has been mentioned to me by several Papua New Guinean lawyers.
13. The first reprint has an English price of £10.50. The Australian price is \$32.00. The second edition will have a price of £28. The exchange rate is approximately K1 = stg.£0.70 = \$Aust. 1.20 (March 1979).
14. The Book Society's offerings are used as a prescribed text for one course only. Fowler's Modern English Usage is used for Legislative Drafting.
15. J. Kaputin, Policy Statement Delivered as Minister of Justice, reprinted in "The Law: A Colonial Fraud?" 10 New Guinea no. 1 pt. 4 (1975).
16. Law Reform Commission of Papua New Guinea, *op. cit.*, Substantial legislative changes have occurred or are occurring in such areas as company law, land law, family law and succession, the criminal law, and the structure of the court system.
17. See text accompanying fn. 39, *infra*.
18. See e.g., Law Reform Commission of Papua New Guinea, *op. cit.*

19. See e.g. Strathern, *op. cit.*, A.L. Epstein, ed., Contention and Dispute (Canberra: Australian National Univ., 1974).
20. The Law Reform Commission's perspective on this issue can be seen in the discussion paper "Reference on Customary Law" (1975).
21. W. Twining, "Information About Law in Papua New Guinea" Law Reform Commission of Papua New Guinea, Legal Information Centre, Working Paper, no. 8 (1977). The Law Reform Commission has sought views on the Working Paper and are likely to issue a report favouring the setting up of such a centre. However, it will take several years before this is done.
22. The Commission dealt with all land disputes relating to customary land and to whether land was customary or government land. The Commission's functions in relation to proved customary land have now been taken over by the land courts, which consist of Local and District Court magistrates sitting with members of the community.
23. Village Courts are staffed by members of the village community. The magistrates are often illiterate.
24. See Twining, *op. cit.*
25. The Chief Magistrate has agreed to provide for the centralization of court records either at the National Archives or at the New Guinea Collection of the University of Papua New Guinea. This should commence in 1979.
26. This function is not a substitute for the statistical monitoring of court records, but is intended to provide law development information. This practice has already commenced with magistrates sending information to the Law Reform Commission. However, the response is not very good.
27. The countries comprise, apart from Papua New Guinea: the South Pacific territories of the United States, such as American Micronesia and Samoa; British territories, such as the Solomon Islands; French territories, such as New Caledonia; independent countries such as Fiji, Western Samoa, Tonga and Nauru.
28. The digest is prepared by a research assistant, whose salary is appropriated from the research funds of the University.
29. See Twining, *op. cit.*
30. See Paliwala, Zorn and Bayne, *op. cit.*, p. 55.
31. In this respect note the statement by the then Deputy Chief Justice, cited at fn. 3, *supra*.
32. See Twining, *op. cit.*
33. The Village Courts Act 1973, the Land Disputes Settlement Act 1975, and the Adultery and Enticement Bill 1977, all remove certain types of cases from higher courts.
34. The cost of the enterprise is, however, estimated to be approximately K300,000.
35. See for example, Statute Law Society, Statute Law Deficiencies, (London: Sweet & Maxwell, 1970); Statute Law Society, Statute Law: The Key to Clarity (London: Sweet & Maxwell, 1972); Sir David Renton, The Preparation of Legislation: Report of a Committee... (London: H.M.S.O., 1975), Cmnd. 6053; W.L. Dale, Legislative Drafting: A New Approach (London: Butterworths, 1977). The solutions proposed would result in improvement rather than revolutionary change.
36. This was indicated in an experiment conducted by myself and a legislative drafting class, which successfully translated the Land Groups Act 1974.
37. The work of the Law Reform Commission in this area could provide useful models.
38. See, however, the statement of the then Deputy Chief Justice, cited at fn. 3, *supra*.
39. M. Potter, Traditional Law in Papua New Guinea: An Annotated and Selected Bibliography (Canberra: Australian National University, 1973). For a review of the bibliography see P. Bayne, "The Future of Traditional Law," 2 Melanesian Law Journal 276 (1974).

40. D. Chalmers and A. Paliwala, An Introduction to Law in Papua New Guinea (Sydney: The Law Book Company, 1977).
41. J.G. Griffin, "Criminal Procedure in Papua New Guinea" (Sydney: The Law Book Co. 1977).
42. To be published by the Law Book Company, Sydney, N.S.W. Australia.
43. E. Edwards, R. Hayes, and R. O'Regan, Cases on the Criminal Code; Being Cases and Materials on the Criminal Codes of Queensland, Western Australia and Papua New Guinea, 2d ed., (Sydney: Law Book Co., 1976).
44. W. Andrews; D. Chalmers; D. Weisbrot. The Papua New Guinea Criminal Code (proposed title). To be published by the Law Book Company with the help of a subsidy from the University and a purchasing agreement with the Department of Justice in 1979.
45. A. Paliwala; D. Weisbrot. The Changing Legal System of Papua New Guinea (proposed title). To be published by Butterworths (Aust.) in 1979. It is useful to note that Jenny Uglow's Marketing Your Manuscript to a Commercial Publisher (S.P.T.L. Working Paper No. 3) has been of great help in organizing the publication of this work.
46. O'Regan, Common Law in Papua New Guinea, *op. cit.*
47. B. Brown, ed., The Fashion of Law in New Guinea: Being an Account of the Past, Present and Developing Systems of Law in Papua New Guinea (Sydney: Butterworths, 1969).
48. The seminar is normally held annually for one week. It provides a forum for international and national scholars to focus on a particular intellectual concern. The 7th Waigani Seminar in 1973 was on "Law and Development".
49. J. Zorn and P. Bayne, ed., Foreign Investment, International Law and National Development (Sydney: Butterworths, 1975).
50. J. Zorn and P. Bayne, ed., Lo Bilong Ol Man Meri: Crime, Compensation and Village Courts (University of Papua New Guinea, 1975).
51. A. Paliwala and D. Weisbrot,
52. P.G. Sack, Land Between Two Laws; Early European Land Acquisitions in New Guinea (Canberra: A.N.U. Press, 1973); P.G. Sack, ed., The Problem of Choice: Land in Papua New Guinea's Future (Canberra: A.N.U. Press, 1974); P.G. Sack and B. Sack, The Land Law of German New Guinea; Being a Collection of Documents (Canberra: A.N.U. Press, 1975).
53. Wolfers, *op. cit.*
54. A. Inglis, Not a White Woman Safe: Sexual Anxiety and Politics in Port Moresby 1920-1934 (Canberra: Aust. National Univ. Press, 1974).
55. E.g. works by Strathern and Epstein, *op. cit.*
56. C.J. Lynch, the former Legislative Counsel, has been one of the most prolific producers of unpublished works.
57. Chalmers and Paliwala, *op. cit.*
58. W. Andrews, D. Chalmers and D. Weisbrot, *op. cit.*
59. Twining, *op. cit.*
60. Twining, *op. cit.*
61. Andrews, Chalmers, Weisbrot, *op. cit.*
62. Note in this respect, the Studies of Law in Social Change and Development series published jointly by the Scandinavian African Studies Institute, Uppsala, and the International Legal Center, New York.
63. See, e.g., Y. Ghai, ed., Law in the Political Economy of Public Enterprise, Studies of Law in Social Change and Development no. 1 (New York and Uppsala: Scandinavian African Studies Institute and International Legal Center, 1977).

64. F. Okoye, International Law and the New African States (London: Sweet & Maxwell, 1972), again deals only with Africa.
65. Exceptions include: R.B. Seidman, A Sourcebook of the Criminal Law of Africa (London: Sweet & Maxwell, 1966) and Okoye, *op. cit.*, The series produced by the Scandinavian African Studies Institute may, on the otherhand, be deliberately aiming towards a pan-African audience.
66. School teachers, for example, may help the masses to understand the law.
67. Pamphlets have been produced, for example on the Constitution and making a will. There is no strategy on what subjects need to be covered.
68. Kaputin, *op. cit.*
69. This was the conclusion of a pilot study by H. Barnes and D. Turner, "Information Services in the Rural Areas" (unpublished paper, U.P.N.G., 1975).

CHAPTER 7

IDEOLOGICAL FUNCTIONS OF LEGAL LITERATURE IN EAST AFRICA¹

by

Robert Martin*

Introduction

Ideology and Law

Marxists have traditionally preferred their law simple. Which is to say that they have tended to view law largely, and often solely, in terms of its coercive aspect. The Leninist perception of law² as a straightforward instrument of oppression is certainly not incorrect, for no-one could deny that "the law has force at its back in every country however civilized".³ But, put in its most basic terms, this theory does not go far enough. Lenin's unvarnished restatement of classical positivism is not adequate as a means of fully understanding the role which law plays in a capitalist state. There has recently been a minor avalanche of work, more or less rooted in Marxian methodology, which has sought not so much to refute the traditional approach to law, but to broaden and expand it.⁴ To attempt to summarize such work in two sentences, one might say that it has been recognized that law performs two additional functions which serve both to complement and obscure its coercive function. It creates the mechanisms through which, at different historical periods, accumulation takes place⁵ and it also forms a central part of the ideological apparatus deployed on behalf of a dominant class. It is with the latter function that the present essay is concerned.

Napoleon, who had a certain amount of experience in such matters, once observed that: "You can do everything with bayonets except sit on them". He was stating two truths about politics. The first is obvious; that the basic political fact is violence. The second is probably obvious also, but is rather more subtle. While the ultimate sanction available to any political regime is violence, it must, if it hopes to endure, seek to legitimate itself. Although there can be no denying that repression works, a political system which depends wholly or predominantly on repression for its survival is inherently unstable. A system of beliefs, an ideology,⁶ must be created which functions to persuade both the ruled and their rulers that existing social relations are just, rational and finally, inevitable. An ideology is successful to the degree that it actually defines the limits and modes of thought of all members of society. Once an ideology has achieved dominance people find it difficult, if not impossible, to reflect on the way they experience society outside of the categories and definitions imposed by that ideology.⁷

Bourgeois law contains many significant ideological norms - separation of powers, the rule of law, natural justice, equality before the law, etc.⁸ By demonstrating its continued fidelity to these norms the legal system plays a central role in persuading members of all social classes that existing social relations are fair and just and, therefore, worthy of preservation. The law mediates between individual members of society and the underlying system of class domination. To the extent that the law reflects social relations in a manner that appears to be just it inhibits members of an oppressed class from developing a consciousness of the injustice which is inherent in those social relations.

The point can be illustrated through a brief analysis of "equality before the law". Equality was a central political goal of the bourgeois democratic revolutions in Europe. The material ambitions of an ascendant class were formulated at the level of theory as a demand for equality. With the political triumph of this class, equality as an idea was reified and became an ideological weapon used to mystify the true nature of capitalist relations of production. In this sense, equality as an idea functions to legitimate the continuation of bourgeois dominance. At the same time, however, equality as a component of the superstructure of the capitalist mode of production comes to take on a metahistorical character. Being divorced from its historical roots it becomes complete abstraction and forms a part of the cultural and intellectual equipment of every member of society. Each person within bourgeois society will then perceive equality as a desirable social goal in itself, forgetting, of course that formal equality before the law is, at best, meaningless in a society based upon objectively unequal relations of production.⁹

While some attention has been paid to the ideological exigencies which affect the development and administration of the law, little emphasis has been placed on the role

* Professor of Law, The University of Western Ontario

which ideology plays in conditioning how and what people write about law.¹⁰ Much legal writing consists, when it ventures beyond the exposition of doctrine, of unvarnished statements of pure ideology. Two illustrations will suffice. In his book A Theory of Justice,¹¹ John Rawls purports to derive the structure of the ideal society from certain principles which he states. One becomes immediately suspicious since these principles are assumed a priori to be good and desirable. The interesting thing, however, is that the ideal society which Rawls eventually postulates turns out to look very much like the contemporary U.S. Somewhat similar observations can be made about much of the work of the Law Reform Commission of Canada. Its efforts can be seen as an ongoing attempt both to justify a burgeoning neo-liberal ideology and to bring the law of Canada into conformity with the requirements of that ideology. In reading the Commission's reports and working papers one is struck by the degree to which its recommendations depend upon the acceptance of normative generalizations that are both idealistic and unprovable.¹²

The bulk of what follows will be taken up by an investigation of the ideological role which writing about law plays in class struggle in East Africa.¹³ It is necessary at this point to make some brief observations on that struggle.

Class Struggle in East Africa

While it is clear that the three states of Kenya, Tanzania, and Uganda cannot be analyzed as if they formed a homogeneous whole, there is, despite their varied histories and despite the uneven economic development of the region, sufficient shared experience to justify one in speaking about East Africa.

National bourgeoisies, finding their further development as classes thwarted by the racist superstructure of the colonial state, led the struggle for independence. Although this struggle was directed by national bourgeoisies and resulted in their achieving control of the machinery of their respective states, it was politically and ideologically a nationalist struggle.¹⁴ That is, it required the mobilization of all social strata in support of an ideology which explained the material dislocation wrought by colonialism in nationalist, rather than class terms. More specifically at the ideological level, this required the destruction of colonialist hegemony and its replacement by nationalist (i.e., national bourgeois) hegemony. This was relatively easy in national terms, since colonial rule had never achieved, and could not achieve, a significant degree of general legitimacy. It was more difficult, and more contradictory, in class terms, since national bourgeoisies had been thoroughly steeped in the ideologies of their colonial rulers. Furthermore, the class position of national bourgeoisies made the advocacy of a specifically revolutionary ideology impossible.

Two broad choices were open to national bourgeoisies at independence. First, they could have sought to transfer power to the mass of the people. This, as Amilcar Cabral has noted, would have amounted to class suicide.¹⁵ Since this choice has not been adopted anywhere in East Africa nothing remains to be said about it. Alternatively, national bourgeoisies could, as they have done, decide to remain in power. Here two possible courses of action have presented themselves. The first, which can succinctly be described as neo-colonialism, is the general policy approach adopted in Kenya. This involves maintaining the production relations established by colonialism, but ensuring, through control over the state machinery, that the national bourgeoisie consumes an ever expanding proportion of the national surplus.¹⁶ The second approach is to seek disengagement from imperialism through autarchy and the establishment of state capitalism.¹⁷ Tanzania has generally attempted to follow this course. In either case, the national bourgeoisie must seek sufficient hegemony to legitimate its position and role.¹⁸

At independence in East Africa, domestic class relations were in a highly fluid state. This was so because national bourgeoisies were not economically dominant classes nor had they fully developed ideologies. Considerable intellectual energy was devoted to the latter task. Although the overriding objective of such activity was the creation of a nationalist ideology, the process inevitably saw the expression of many contradictory tendencies. More recently, some attempts have been made to challenge national bourgeoisies to move away from pure ideology and create modes of analysis rooted in concrete conditions which address themselves to the interests of workers and peasants. The development of legal writing provides a clear illustration of this process.¹⁹

An Overview of Legal Writing

While statutes and law reports existed from the earliest days of colonialism, there was very little writing about law during the colonial period. What existed tended to be

anecdotal rather than analytical.²⁰ In 1961 legal education began in East Africa at what was then the University College, Dar es Salaam.²¹ Although there is far more to legal literature than the views of academics, the major ideological currents at work can be seen through a brief discussion of the development of writing about law in East Africa since independence. This development is arbitrarily divided into three periods.

The Early Period

Two features of the early period are immediately apparent. The people doing the writing are almost all foreigners and the writing they are doing is more or less aggressively anti-colonialist. The colonial bars in East Africa were composed of either Asians or Englishmen. Only a handful of Africans had been admitted to practice and all of these had been trained at the Inns of Court in London. Very few practitioners possessed university law degrees. It was, therefore, clear that if Africans were to be trained to staff the existing, English-based legal systems, they would have to be trained by persons from outside East Africa. The early staff members of the Faculty of Law of the University of East Africa came from England, with a certain number from other parts of the common law world, mainly North America. From my own, admittedly unscientific, observations of foreigners who have gone to work in East Africa, there is a significant number of people who did so because they felt estranged from their own societies. This phenomenon is particularly evident among expatriate university teachers. If one couples with this an understandable desire to justify their presence in East Africa, the anti-colonial orientation of their writing makes some sense. Nonetheless, one should not be misled. "Anti-colonial" is being used here in a limited sense. The writing under discussion did not present a systematic critical analysis of colonialism as a particular phase of capitalist development, nor did it question the legitimacy of the colonization of Africa. What it did do was criticize colonialism for the kind of legal systems it operated. The colonial legal systems of East Africa represented a denial in practice of the basic legal and political values which allegedly underlie all common law legal systems. These writers attacked the racism, the oppressiveness, and the arrogance of the administration of justice in colonial East Africa. Although they did not realize it, they were attacking colonial legal systems for being colonial legal systems.²² At the same time there was evinced an abstract fascination with traditional African legal matters. An attempt was made to legitimate customary law after its long colonial hiatus. The idea of synthesizing indigenous and imposed legal forms and ideas into distinctive national legal systems was eagerly pursued.²³

In terms of its form this legal writing presented a varied picture. The first problem was that the material necessary to teach law had to be created. In Nigeria, for example, this resulted in an effort to produce a range of basic textbooks.²⁴ These tended to be English texts, with references to Nigerian cases and statutes. In East Africa there was confusion as to whether English texts or U.S. casebooks were the preferable form. Much time was expended on a rather unrewarding debate over the relative merits of English and U.S. teaching techniques. The implicit aim, which was made explicit by the International Legal Center in its 1975 report on legal education,²⁵ was to get as much local material into circulation as possible. Explicit consideration of methodology and ideology was avoided.

The Middle Period

In the middle period, roughly from the mid-60's to the early 70's, three new factors obtruded into the process of legal education. First, gradually, East Africans, both Asians and Africans, who had studied law in East Africa began to teach law. Their orientation was strongly nationalistic. They wished to see a rejection of all things European. While this view was advanced with great vigor at an abstract, rhetorical level, its concrete application to legal writing was uncertain. Actual results seemed to depend more on whether the individual in question had gone to graduate school in England or the U.S. Still, this factor intensified the questioning of imposed English legal ideas. Second, questions began to be raised as to the aims of legal education. The realities of the post-independence era made it difficult to continue to see legal education as an end in itself. The increasingly evident failure of independence to deliver on its material promises raised questions about the utility of training replicas of English or U.S. lawyers. Development began to be seen as the only legitimate aim of political or public activity and lawyers began to perceive that their activities had little to do with achieving this aim. Similarly, the then fashionable North American infatuation with "relevance" impinged on East Africa. On the whole, these concerns had beneficial effects on legal education. It was recognized that legal education, and therefore legal writing, could not continue to deal largely in abstractions. Legal education had to address itself in some way to the concrete conditions of East Africa.

And further, legal education had to demonstrate a concern with changing these conditions. Finally, in 1970 the University of East Africa split up into three independent universities. It should not, however, be thought that by this time all law teaching was being carried on at Dar es Salaam. While the only Faculty of Law in East Africa was located there, law teaching was being conducted, although not to LL.B. students, at Makerere University College and the University College, Nairobi, and at the Kenya School of Law in Nairobi. In addition, law was being taught at various administrative training centres throughout East Africa. Still, with the creation of three Faculties of Law in East Africa in 1970, there was a tendency for the individual law faculties to become more involved in national, as opposed to regional issues.

The Recent Period

In the most recent phase, three additional factors have affected legal education. First, and most important, the staff of all three law faculties has become almost entirely localized. This has tended to remove many extraneous considerations from the agenda. Second, the amount of political repression has increased markedly. Today in East Africa one is much less free to write and talk about certain matters than in the earlier phases. This hardly requires comment in the instance of Amin's Uganda, but it is a noteworthy matter in Kenya.²⁶ Tanzania still permits a degree of freedom in academic discourse. Such a climate has had an inevitable effect on legal writing. The third factor has been the growth in Tanzania and among the Faculty of Law of the University of Dar es Salaam, of a strong and indigenous Marxist tradition. While the boundaries between Marxism and radical nationalism have not always been entirely clear, much creative legal writing has been produced which vigourously challenges the assumptions underlying the writing of the earlier two phases. It is interesting that these tendencies have had little effect on the way in which statutes are drafted or judgments written in East Africa.

This introduction is inevitably cursory. It has not dealt, for example, with the important questions of the ways in which the introduction of writing and, more important, printing have affected the development of law in East Africa.²⁷ Neither has it dealt directly with the broader phenomenon of imperialism, a phenomenon which has, of course, an important ideological dimension. We turn now to a description and analysis of East African legal literature.

The Materials

Statutes

Extensive statutory materials exist for all three states. One is struck by the bulk of statutory law available. For present purposes the main points with regard to statutes are their accessibility and their internal organization.

Accessibility

Copies of current statutes are available in institutions where law is studied formally. Sets of Kenyan, Ugandan, and Tanzanian statutes are provided in the libraries of the three East African universities, while in other institutions the usual practice appears to be to provide only the statutes of the state in question. Access to non-current statutes is not uniform. This is an important problem in legal research, as the opportunity to examine non-current material is often essential. The University of Dar es Salaam has a good collection of non-current East African statutes. In contrast, the situation at the University of Nairobi is deplorable. Historical research is almost impossible.

For the general public, access to the statutes is not easy. Copies of the statutes are normally available in government offices, public libraries, and advocates' chambers. However, there may be little practical access because public libraries are found only in major centers. Further, many bureaucrats tend to treat statutes as if they were confidential documents, and it costs money to see a lawyer. Even if a member of the public gains access to the statutes, what he reads therein, assuming he can read, will be unintelligible because statutes are drafted in the English language and in the highly technical English style.

It may be little more than a pious hope that statutes can become a means of communication between government and people.²⁸ If this is to occur, it will require a realization that legislative drafting is not a purely technical exercise. Drafting

clearly involves turning social or economic policies into a legal form which is politically and administratively workable.²⁹ This places heavy demands on the people responsible for drafting, demands which should be specifically addressed in legal education. Since East African statutes remain mystifying documents, one can assume that those exercising political power are content with the present situation.³⁰

It is a general characteristic of East African legislation that broad, often limitless, rule making powers are regularly delegated to officials.³¹ A minimal requirement of legality is that persons affected should have access to subsidiary legislation. Unfortunately, the systems for printing and distributing subsidiary legislation are not as effective as those developed for acts themselves. It is often extremely difficult for the researcher to feel confident that he has seen complete, current subsidiary legislation in a particular area. This problem emphasizes the extent to which the development of legal literature in East Africa depends on the efficiency of the government printers.

Internal Organizations

East African statutes are not easy to use. A similar system has been adopted in all three states. Periodically, all the statutory law is revised, consolidated, and published in multi-volume sets. This has been done roughly once a decade. The three revisions presently in force cover about ten substantial volumes each. Acts are assigned chapter numbers and are grouped together within the various volumes according to broad subject categories. New acts, bills, and subsidiary legislation are normally published from time to time as supplements to the government's gazette. New acts are numbered consecutively according to the year of their passage. Some of the difficulties involved may be appreciated by looking at the example of Tanzania. The last revision of the laws was carried out in 1965. This revision encompasses roughly 540 acts, plus a certain amount of subsidiary legislation. The general index to these consolidated statutes is good and it is a simple matter to discover all the acts which are relevant to a particular subject. However, one cannot always be sure that one has found all the subsidiary legislation or any U.K. legislation which may be in effect. The real difficulty arises in keeping up to date with subsequent legislation. Since 1965 the Tanzanian National Assembly has passed, on the average, fifty acts per year. There has also been a considerable amount of subsidiary legislation. Discovering the current legislation on a given topic can be very time consuming and often a hit-or-miss exercise. There are neither cumulative nor annual indexes to new statutes and subsidiary legislation. A certain amount of subsidiary legislation is not published in the Gazette. Amendments to existing statutes must be written by hand into the relevant chapter in the 1965 revision. The same thing applies where a statute has been repealed. This process of continuous updating should be done by a librarian. For the advocate or bureaucrat who does not have the services of a librarian the difficulties are obviously greater.

The point of all this is that the present system for publishing East African statutes is far from ideal. Statutes can be presented in such a way as to maximize their usefulness. The recent edition of the laws of Swaziland is an example of such a presentation. The question is whether the respective governments of East Africa would be willing to devote the necessary resources to put their statutory law into a form which would achieve this end.

Law Reports

Prior to 1957 there were five series of general law reports published in East Africa.³² These were the Kenya Law Reports (originally the East African Protectorate Law Reports), the Uganda Law Reports, the Tanganyika Law Reports, the Zanzibar Law Reports, and the Court of Appeal for Eastern Africa Law Reports. Beginning in 1957 all these reports were merged into the East Africa Law Reports.³³ The earlier reports were published by the relevant public authorities, while the East Africa Law Reports, were published by Butterworths in England. They were edited by an advocate in private practice in Nairobi. Since the 1975 volume the East Africa Law Reports have been in limbo. The East African Literature Bureau has reprinted the Court of Appeal Reports. Copies of the other older series are often difficult to locate.

The East Africa Law Reports were devoted solely to decisions of the East African superior courts -- the High Courts of Kenya, Uganda, Tanzania, and Zanzibar, and the former Court of Appeal for East Africa. Decisions of the Judicial Committee of the Privy Council in appeals from the Court of Appeal were also reported, but this ceased when the jurisdiction of the Judicial Committee to hear such appeals ended. The origin of reported cases in the early 1970's was as follows:

<u>Year</u>	<u>Court</u>	<u>No. of Cases Reported</u>
1971	Court of Appeal	40
	Kenya H.C.	38
	Tanzania H.C.	14
	Uganda H.C.	21
		113
1972	Court of Appeal	63
	Kenya H.C.	41
	Tanzania H.C.	21
	Uganda H.C.	24
		149
1973	Court of Appeal	50
	Kenya H.C.	44
	Tanzania H.C.	12
	Uganda H.C.	20
		126

Cases to be reported were submitted to the editor by the registrar of the particular court as directed by the appropriate Chief Justice. Not all cases submitted were reported. In 1972 forty cases submitted to the editor were not reported, and in 1973 twenty-eight were not. These cases were not reported since they were "concerned only with the facts".³⁴

Since 1972 the number of cases submitted for reporting had declined. The 1975 volume contained only 78 cases.

The purpose of the East Africa Law Reports was essentially informational. This purpose was achieved through the presentation of authoritative judicial pronouncements. This factor to some extent explained the preponderance, during its existence, of Court of Appeal decisions.

There were recently criticisms from all the High Courts that not enough of their decisions were being reported. Particularly strong criticism came from the Tanzania High Court. The former editor took the position that he could only report what he received and that if a particular High Court did not send its judgments to him he could not report them. In 1975, out of the first eighty cases submitted for reporting only eight were from Tanzania. There were part-time editorial personnel located in both Tanzania and Uganda who were responsible for local liaison.

A certain number of significant superior court decisions were not submitted and therefore were not reported. Citation of unreported cases is a fairly common matter in East Africa. It is difficult to generalize about the kinds of cases that go unreported. Still, it has happened that politically embarrassing cases have not found their way into the East Africa Law Reports. The best known of these is Ooko v. R.,³⁵ the leading case on preventive detention under Kenya's Preservation of Public Security Act. If a case has not been reported one must look for the judgment in the appropriate court registry. Finding cases is, for various reasons, not always easy. Today one is not permitted, to repeat the same example, even to look at the judgment in Ooko.³⁶

The East Africa Law Reports were handsomely produced on high quality paper and incorporated all the production extras normally found in English law reports. Four parts plus a single bound volume were produced each year.

There were suggestions in its later years that the East Africa Law Reports had got "behind schedule" or, at least, had become rather slow in making decisions available. These criticisms were probably without substance. Reported judgments were available in East Africa about fifteen months after a case had actually been decided.³⁷

Production of the Reports was handled by Butterworths in the U.K. This arrangement was difficult to justify. It is possible, in Nairobi at any rate, to produce printed material as quickly and as easily as in the U.K.

Financial matters, including marketing and distribution, were also handled entirely by Butterworths. In 1975, the circulation in Kenya was 188. Of these, fifty-five copies went to the judiciary, forty-three to the Commissioner of Police, twenty-five to the Attorney-General's Chambers, and the rest, presumably, to practitioners. Butterworths had experienced some difficulty in collecting payment for copies of reports which went to the governments of Tanzania and Uganda.

The editor was formally responsible only to Butterworths, although there was an editorial board and an annual report was submitted to the President of the Court of Appeal.

It seems beyond argument that the East Africa Law Reports performed a useful function. Still, there were and remain two areas of concern. First, the East Africa Law Reports did not cater adequately to specific national, as opposed to East African, interests, and, second, they did not report the decisions of lower courts.

The belief that Tanzanian decisions were not being accorded appropriate treatment led in 1973 to the creation of the Law Reports of Tanzania. These reports are produced in a modest cyclostyled format by the Faculty of Law of the University of Dar es Salaam. They are essentially a fuller version of the Tanzania High Court Digest which was first published in 1967. Decisions from the Court of Appeal, High Court and Resident Magistrate's Courts are reported. Judgments are selected for reporting by an elected editorial board at the Faculty of Law. Uganda also published some law reports through its Law Development Centre.

There is no reporting of lower court decisions in East Africa. There are a number of reasons for this. First, and most important, none of the three states possesses the resources necessary to collect, edit, and publish lower court decisions. Second, the utility of reporting such decisions is questionable. Judgments are usually very short, often containing little more than a few sentences outlining the facts of the case followed by the court's holding. One seldom finds clearly expressed legal reasoning. While researchers should not neglect lower court decisions, although it is often very difficult to gain access to them, it does not follow from this that any useful purpose would be served by their publication in law reports. Finally, it would be most difficult to establish consistent criteria to be used in selecting decisions for reporting.

There was one series of specialized law reports published, the East African Tax Cases. This series began publication in 1955 and was designed to meet the needs of people who paid income tax and "their professional advisers". It originally reported all tax cases. Four volumes were published. Since the common income tax has now disappeared and Tanzania, Kenya, and Uganda each has its own separate system, these reports have been discontinued.

Certain indexes and noters-up are available. Butterworth's has published an index to the East Africa Law Reports covering the years 1957 to 1967 and a further index for 1970 to 1972. Works prepared by Mr. Justice Spry, formerly of the Court of Appeal, and Philip Durand, formerly of the Kenya Institute of Administration, are also helpful. Nonetheless, finding East African case law is often a function of knowing what you are looking for.

Finally, various national series of digests of superior court decisions may be mentioned. In 1967 the Law Faculty of the University College, Dar es Salaam, began publishing the Tanzania High Court Digest. This consisted of condensed summaries of judgments. The Digest continued until 1973 when it was incorporated into the Law Reports of Tanzania. In 1971, the Faculty of Law of the University of Nairobi began publishing the Kenya High Court Digest. In 1974 the Kenya Digest expired. The Uganda Law Development Centre publishes a Monthly Bulletin of Judgements and Orders of the High Court. Digests of decisions of the Court of Appeal were published in the East African Law Journal.

Government Documents

This category is wide and embraces a range of publications which are of great significance in East African legal literature. It includes, for example, policy papers, annual reports, reports of special commissions or inquiries, various parliamentary documents, political speeches of leaders, and so on. A government printer which can produce material quickly, cheaply, and in a serviceable form is a basic component in the development of legal literature. The extent to which a government printer will be able to perform these functions is a political decision, depending on the extent of the resources, human and monetary, allocated to it. To put it another way, the operation of a government printer depends primarily on political forces and secondarily on market forces.

The Kenya Government Printer appears to be a good example of such an organization, and the publication of the Report of the Public Service Structure and Remuneration Commission is a useful case in point. The Commission completed its work in May 1971. Within a month the printed report of 295 pages, plus 100 pages of appendices, was available to the public. The printed report, although free from costly publication

extras, was competently presented. The cost of the Report was (Kenya Shillings) K Sh20.00 per copy. The Government Printer maintains a shop in Nairobi. The shop is not elegantly appointed, but the people who work in it are familiar with government publications and maintain an inventory adequate to satisfy public demands. Government printing and publishing in Tanzania are not up to the same standard. Publications are often poorly printed. There is a considerable delay involved in producing material and significant publications are often out of stock.

Textbooks and Monographs

This category is defined broadly to include all non-official books, as opposed to articles or pamphlets, which treat directly of law in East Africa. The most striking feature of this category is its unevenness in coverage, in quality, and in purpose.

A survey³⁸ of the writing in this category would suggest a number of conclusions. First, it is clear that there has never been a policy with regard to the writing and publishing of East African legal literature. Second, it would not appear that market forces have had a particularly significant effect. If market forces had played a major role in determining what was to be published and what was not, one would, it is suggested, find an emphasis on basic student textbooks and a corresponding absence of specialized monographs. But this has not been the case. Basic textbooks have not appeared in many areas until quite recently and, indeed, the coverage is still far from complete.³⁹ I am personally unaware of any instance where a legal manuscript dealing with an East African subject has been rejected by an East African publisher for commercial reasons. Third, there is a preponderance of non-East African authors. The reasons for this imbalance have already been suggested.⁴⁰ It is presently being corrected and one assumes that this process will continue. Still, while a number of very bad books have been published, one cannot but be impressed by the range and depth of what has been produced in less than two decades.

Journals

There was, until recently, a relatively wide range of legal periodicals being published in East Africa. Given the rather limited market for such publications, it could be argued that there were too many.

East African Law Journal

This journal was started in 1965 and was largely edited and written by the staff of the Faculty of Law at the University College, Dar es Salaam. It was published under the auspices of Legal Publications Limited, a company incorporated in Kenya. There was a close connection between this company and Oceana Publications, a U.S. company which handled overseas distribution for the East African Law Journal. In 1967, as a result of disagreements with Oceana and Legal Publications Limited, the Law Faculty in Dar es Salaam decided to sever its connections with the Journal and establish its own publication. Thenceforth the Journal was edited in Nairobi, since 1972 at the Faculty of Law of the University of Nairobi. In 1973 the East African Literature Bureau undertook publication. Overseas distribution, still handled by Oceana, was not satisfactory. Parts of the 1972 volume were never distributed, and the uncertain relationship between Oceana and the East African Literature Bureau gave rise to recriminations on both sides. Originally the Journal appeared four times per year, but this proved impossible to maintain because of delays in printing and the difficulty of finding sufficient material of acceptable quality. By the end of 1973 the Journal was also far behind in publication. For these reasons it was decided in 1974 to publish only two issues per year. Circulation of the East African Law Journal has been low by international standards, but reasonable for an East African academic periodical.

Eastern Africa Law Review

The Review was started by the Law Faculty in Dar es Salaam in 1968. The Review came into existence as a result of the opposition which members of that faculty felt towards financial, administrative, and ideological aspects of the East African Law Journal. It has attempted to be a socially, and socialist, oriented periodical. From 1968 to 1971, the Review was published by the Law Faculty in Dar es Salaam, but beginning with the 1972 volume it was published by the East African Literature Bureau. The Review appears three times a year and has a total circulation of about four

hundred. With the demise of The East African Literature Bureau, production was undertaken at the University of Dar es Salaam.

Makerere Law Journal; Uganda Law Focus

The first of these periodicals is published by the Faculty of Law at Makerere University and the second by the Uganda Law Development Centre. Both appeared sporadically and were of low editorial and production quality. In 1976 the Makerere Law Journal began to be published by the East African Literature Bureau. Its future is now uncertain.

Dar es Salaam University Law Journal

This is the oldest legal periodical in East Africa, having begun its life in 1964 as the Journal of the Denning Law Society. It has appeared at irregular intervals since then, having adopted its present name with volume three. The Journal is organized and edited, but not entirely written, by students.

Unpublished Material

A prodigious amount of work has been done in the East African universities, and other institutions of higher education, to produce materials for teaching law. Largely because of the high turnover of staff in these centers, much of this work has been wasted. The creation of a register and depository for unpublished legal material should be an urgent matter.

Printing and Publishing

Printing

The main printing center for East Africa, indeed for all of black Africa, is Nairobi. There are a large number of private printing firms in Nairobi and many of them possess modern and sophisticated equipment. There is a considerable demand for commercial printing services. This often results in substantial delay in non-commercial jobs. Printing facilities in Dar es Salaam and Kampala are much below the level of those in Nairobi. Production costs in Nairobi are about as high as in other parts of the world.

The absence of uniform production standards for East African legal publications raises an important consideration. Tables, running heads, textual footnotes, variable typefaces and other production formalities increase the costs of legal publication. The elimination of unnecessary formalities from the printing process could simplify legal publishing without detracting from the quality of the finished product.⁴¹ Today there is considerable variation among East African publishers on these matters. Little direction is coming from lawyers, academics, civil servants, students, and others who have an interest in legal publishing.

Publishing

East African Literature Bureau

The Bureau was until recently the largest specialist publisher in East Africa. It had approximately sixty titles in production at any one time in addition to publishing more than twenty academic, cultural, and profession periodicals. N.G. Ngulukulu, the director until 1977, acted with considerable foresight and expanded the academic publishing activities of the Bureau. The Literature Bureau became the de facto university press for East Africa. This development was not without difficulty. In addition to having a small editorial staff, the Bureau operated in a number of areas where it did not possess qualified editors.⁴² The Literature Bureau published an amazing range of legal titles. These varied from gigantic casebooks to highly specialized monographs. It is interesting that the best-selling title on the Bureau's list was a law book.

The Literature Bureau was not, of course, a commercial publisher. It was an agency of the East African Community and had its headquarters in Nairobi. It received its

funds from the Community and its director was responsible to the Communications Council of the Community. Given its relative freedom from financial worries, the Bureau was able to publish widely without being particularly concerned with sales.

In 1977, the East African Community collapsed. The Literature Bureau was one of the casualties. Many of its functions have been taken over by the Kenya Literature Bureau, but this organization will not, by its nature, be able to provide the services formerly available to scholars in Uganda and Tanzania.

Oxford University Press

Oxford is the most prestigious publisher in East Africa. It has produced some titles of high intellectual and production quality. It has done little legal publishing and will probably do less in the future.

Legal Publications Limited

This organization has been moribund for several years. The idea of having a specifically "legal" publishing house in East Africa appears, in the abstract, to be attractive. The experience of Legal Publications casts some doubt on its practicability. If a legal publishing house is to be workable at some future date, the experience of Legal Publications suggests some valuable lessons. First, ongoing subsidies from some source are essential. Second, a core of full-time editorial and production staff must be created and maintained. Third, there must be wide-spread involvement by persons connected with the legal system in the process of establishing publication needs and goals, editorial and production standards, and marketing criteria. Finally, such an organization must be local in character and not simply a branch plant of external interests. Legal Publications died largely because it was conceived as an East African satellite of Oceana Publications. Its management was left in the hands of a firm of commercial booksellers who could not be expected to take an interest in the development of East African legal literature.

Tanzania Publishing House

This company was established under the National Development Corporation to function as a national publisher. Its main work has been in the preparation of school texts. It has also produced a number of useful monographs on political economy. In the last few years these have been of a strongly ideological nature. Tanzania Publishing House has a small, non-specialized, editorial staff.

East African Publishing House

In the middle and late 60's it appeared that East African Publishing House might become the leading academic publisher in East Africa. Unfortunately the firm encountered serious financial problems. It is not likely that it will play a significant role in legal publishing in the foreseeable future.

It would appear that legal publishing has been a random business in East Africa. Although the East African Literature Bureau had become established as the dominant legal publisher, this appears to have been a function of the kinds of manuscripts submitted to it rather than the result of a clear policy choice. Legal publishing has not developed as a specialized field. In my view this explains the uneven quality of what has been published so far. The fate of Legal Publications Limited should not be taken to have established forever the impossibility of specialised legal publishing in East Africa. It does, however, make clear that if some form of specialized legal publishing is going to succeed it will have to be much better planned and co-ordinated than was Legal Publications.

Finance

Inflation

East Africa has not escaped current inflationary trends. This has affected, and will continue to affect, legal publishing in a number of ways.

First, paper costs have increased drastically in recent years. Until 1976 all the high quality paper used in book publishing had to be imported and there was no way in which its price could be controlled, except through internal subsidies. The paper mill at Webuye in Kenya began operations in 1976 and since then all books published in Kenya have been printed on local paper. The prices for Webuye paper are not, however, significantly below world prices.

Second, new printing equipment and spare parts must be imported. The prices of such items are subject to the same inflationary pressure as are the prices of other imported manufactured goods. As foreign exchange becomes scarcer and its expenditure more stringently controlled, it is unlikely that the importation of printing equipment will receive a high priority.

Third, rising prices lead to demands for higher wages. Although this is not a crucial factor in East Africa, where national bourgeoisies aggressively suppress union activity,⁴³ increased labour costs will lead to either higher book prices, reduced production, or both.

Finally, books are, in any economy, a marginal commodity. As prices rise generally, and particularly as the price of books rises, one can assume that sales will decline. This is especially true in East Africa where there is not a wide reading public. An exception is found in the school textbook market. The introduction of free primary education in Kenya (1974) and Tanzania (1978) has created a boom in this market.

The General Situation

Inflation serves only to compound the financial problems besetting legal publishing in East Africa. Prominent among these is the limited size of the market. Assuming a relatively sound product, an East African publisher can usually expect to sell 1,000 to 1,500 copies of a law book within East Africa. A book will normally be on the market at least three years before sales of this order are achieved. This suggests that if prices are not to become absurdly inflated, two complementary activities are called for. The first is an efficient and aggressive system of external marketing. Oxford University Press enjoys a great advantage in this regard. Its international organization permits it to promote and sell books all over the world. Going to the other extreme, the East African Literature Bureau had no system for overseas distribution. While it took part in book fairs in various foreign countries, it had no offices and only one agent outside East Africa. The book fairs yielded few benefits and the Bureau's agent in the U.K. was a constant source of trouble. The Bureau could only respond to direct orders for specific titles.

Assuming that an analysis of the problems of the Literature Bureau may be of benefit for the future, there would seem to have been two alternative approaches it might have tried. Either the Bureau could have made a general arrangement with an international firm to distribute all its titles overseas, or it could have entered into separate arrangements with specialized publishers for the distribution of specialized titles. The experience of Tanzania Publishing House with Macmillans helped to make the Literature Bureau wary of entering into relationships with foreign publishers. It was the view of T.P.H. that it received very little positive benefit from its connection with Macmillans, which appeared to see the venture as a device for dumping unsellable school texts in the Tanzanian market.⁴⁴ The Literature Bureau very correctly did not regard overseas distribution as an end in itself.

There is a further problem concerning overseas distribution. Until very recently, East African publishers could rely on selling three to four hundred copies of almost any academic title to university libraries in the United States and two to three hundred in Europe and the U.K. These guaranteed markets operated as a kind of built-in subsidy. Today, however, overseas universities are not in the same financial position. Their libraries have adopted more selective acquisitions policies. Sales in this market of the earlier volume can therefore no longer be seen as automatic.

Second, there is, as has been noted, a need for subsidizing legal publishing in a systematic fashion. In this regard the East African Literature Bureau was in an advantageous position. By the nature of its constitution it enjoyed continuous subsidization. In addition, since it was a public body, it could receive a certain amount of assistance from external sources. Commercial publishers are not so fortunate. Where they do receive publication subsidies, such subsidies will normally be arranged by the author of the work in question. Nothing along the lines of a social science research council exists in East Africa, so that subsidies will ordinarily have to be sought from external sources. As a final point, government printers, like the East African Literature Bureau, are automatically subsidized. This suggests that they

might be able to undertake a broader role in legal publishing beyond the production of statutes and other official documents.

Planning and Co-ordination

It should be clear from the foregoing that a systematic approach to the publication of legal literature in East Africa does not exist. Such an approach appears, in the abstract, to be desirable for the following reasons.

First, an attempt could be made to determine with some degree of precision the needs which an East African legal literature should be filling. This would not be an easy process since, for ideological reasons, many of the constituencies involved hold fundamentally different perceptions of these needs. Nonetheless, certain questions are susceptible of resolution. For example, it could be determined whether legal materials should be published in Swahili, and if so, what sorts of materials and in what form. Second, if it is possible to clarify the needs involved, it should then also be possible to articulate broad goals and to establish priorities with regard both to the content of what is to be published and the form in which it is to be produced. In this regard it would be useful to assign publication and content priorities with respect to four, more-or-less distinct groups of law book consumers -- practitioners, law students, non-law students, and the general public. Third, any degree of planning and co-ordination is bound to limit the effect of financial pressures. The possibility of publishing questionable material could be minimized, thereby avoiding a great deal of waste. Standardization of format and layout would permit savings on production costs. A co-ordinating body could receive and distribute subsidies and grants and develop a system for external distribution. Finally, an established system of co-ordination should contribute to the formulation of professional social, intellectual, and literary standards for East African legal publishing. Whether the creation of such a system under existing conditions is a practical possibility remains doubtful.

Law Libraries and Booksellers

To emphasize the point made above concerning access, it is self-evident that legal literature only has a value if it is available to be read and used. Significant collections of legal materials are found in East Africa in university libraries, High Court buildings, Attorney-Generals' chambers, and government administrative training institutes. For the legal practitioner the position is good. He will have little or no difficulty gaining access to any of these collections, although in fact few practitioners in East Africa read very widely outside the law reports and the statute book. The student will have to rely on the collection available in his own institution. He will find it difficult to gain admittance to the High Court library or the Attorney-General's library. A member of the general public will find it almost impossible to use any of these collections. Public and national libraries do make certain legal materials available, but their collections tend to be rather haphazard. It should be stressed that almost all the facilities described are to be found only in the capital city. Access to legal literature on the part of anyone living in the rural areas is limited.

The value of a relatively large collection of legal materials is, to a great extent, a function of the skill and energy of the librarians involved. The creation of a cadre of trained and service-oriented law librarians would be a major contribution to the development of national legal literature in East Africa. It would be idle to imagine that such a course of action is likely at present to receive a very high priority in the allocation of public resources.

Apart from one or two shops in Nairobi, the situation with regard to East African commercial booksellers is not encouraging. The great bulk of what is offered for sale in these shops comprises school texts, religious tracts, or tourist pap. One does often find legal literature in bookshops, but it is clear that ordering is random. There is no specialized legal bookseller in East Africa. If one of the aims of developing a national legal literature is to increase popular consciousness of the law, then serious efforts must be made to deliver this literature to the public. It would seem that a program to do this is also unlikely to merit a very high priority.

Conclusion

This essay has focused on the ideological, as opposed to professional doctrinal, aspects of legal literature. It has sought to indicate that legal writing in East

Africa today represents a process of groping towards an appropriate mode of expression, in terms of its form and content.⁴⁵ It has also suggested that this is not an ahistorical process, that the development of legal literature is only intelligible if seen in the context of the concrete historical conditions of East Africa. This requires an analysis of class struggle in East Africa which is directed specifically towards the question of ideology and which concentrates on the ideological functions of legal literature. Such an analysis arises from a perception that legal writing, and, for that matter, any category of writing, cannot be socially neutral. Indeed, legal literature has traditionally played a major ideological role by seeking to present itself as neutral.⁴⁶ An exclusive concern with doctrinal questions serves as a means of removing other broader, and more important, issues from the agenda. The case method of legal education, for example, operates to define political, social, and historical questions as irrelevant and, therefore, to prevent such matters from even being considered.⁴⁷

One must not exaggerate the significance of legal writing. It is both a minor feature of the legal system itself and of the wider intellectual, ideological system.⁴⁸ Legal writing is, and has been, directed towards a narrow and specialized audience. Nonetheless, the study of legal writing can be a useful vehicle for expanding understanding of the historical origins and social functions of legal systems.⁴⁹

FOOTNOTES

1. An earlier version of this essay appeared in (1978) 10 Case Western Reserve Journal of International Law 123.
2. One should, perhaps, call this the "Engelsian perception of Law". For Engels' early view, see "The Origin of the Family, Private Property, and the State", in Marx and Engels, Selected Works, vol. III, (Moscow, 1970) p. 191. Lenin's view is set out in his well-known essay "The State and Revolution", in Selected Works, vol. II, (Moscow, 1947) p. 144. A lesser known and blunter formulation is his essay, The State, (Peking, 1965). It should be added that, late in life, Engels qualified his earlier view. See "Letter to C. Schmidt (5 August 1890)", in Marx and Engels, *loc. cit.*, p. 489. For a contemporary defence of Lenin's analysis, see Boehringer, "The Law and Class Struggle", (1977) 46 Arena (Greensborough, Australia) 90.
3. F.D. Lugard, Political Memoranda, 3rd ed. (London, 1970), p. 249. It is of some interest that the architect of the colonial state in British-ruled Africa should share Lenin's view of the nature of law.
4. It would be impossible to cite all the work in question. Critique of Law Editorial Collective, Critique of Law: A Marxist Analysis, (Sydney, 1978) can be recommended. Not only does it succinctly set out the major contemporary currents in Marxist legal thought, it provides bibliographies which are truly awesome in their scope. Two essays are especially valuable: Fraser, "Legal Theory and Legal Practice", (1976) 44/45 Arena 123 and Holloway and Picciotto "Introduction" to J. Holloway and S. Picciotto, (eds.), State and Capital: A Marxist debate (London, 1978) p. 1.
5. This understanding was central to Pashukanis' work. For contemporary formulations see, Balbus, "Commodity Form and Legal Form", (1977) 11 Law and Society Review 571; Panitch, "The Role and Nature of the Canadian State", in L. Panitch, (ed.), The Canadian State (Toronto and Buffalo, 1977), p.3; and Blanke, Jurgens, and Kastendienk, "On the Current Marxist Discussion on the Analysis of Form and Function of the Bourgeois State", in Holloway and Picciotto, *op. cit.*, p. 108.
6. It is possible that "ideology" is the least understood of Marxist concepts. For a clear exposition of its meaning, see Alex Callinicos, Althusser's Marxism (London, 1976). The clarity, it should be added, comes from Callinicos, not from Althusser!
7. The point was first made by Marx and Engels in "The German Ideology", in Marx and Engels, *op. cit.*, vol I, p. 16. Its systematic development was left to Gramsci. See his Selections from the Prison Notebooks (London, 1971) especially the essay, "State and Civil Society", p. 210. For commentary, see Carl Boggs, Gramsci's Marxism, London, 1976 and James Joll, Gramsci (Glasgow, 1977). In his book The State in Capitalist Society (London, 1969) Ralph Miliband has attempted to apply many of Gramsci's ideas to the modern liberal-democratic state. Interesting critical analysis of Gramsci's thought is found in Perry Anderson, "The Antinomies of Antonio Gramsci", (1977) 100 New Left Review 5. Finally, it is worth noting that even as committed a Stalinist as Lukacs was willing to concede the importance of ideology in the maintenance of class rule. See History and Class Consciousness (London, 1971) especially "Legality and Illegality", p. 256.
8. On the ideological role of law, see Eugene Genovese, Roll, Jordan, Roll (New York, 1974) p. 25 ("The Hegemonic Function of the Law"); and Hay, "Property, Authority, and the Criminal Law", in D. Hay, P. Linebaugh, J. Rule, E.P. Thompson, and C. Winslow, Albion's Fatal Tree (London, 1975) p. 17. Yash Ghai has written on "Notes Towards a Theory of Law and Ideology: Tanzanian Perspectives", (1976) 13 African Law Studies 31. In fact, he discusses the extent to which official Tanzanian ideology is reflected, in an instrumental sense, in that country's legal system. He does not seek to analyze the ideological role of the Tanzanian legal system. For one of the very few judicial pronouncements on this question, see the speech of Viscount Simonds in Shaw v. D.P.P. [1962] A.C. 220, 260-269.
9. For discussions on equality", see Marx, "Critique of Hegel's Doctrine of the State" in Karl Marx, Early Writings (New York, 1975) p. 57; Colletti, "Introduction", in *ibid.*, p. 7; Marx, "Marginal Notes to the Programme of the German Workers' Party", in Marx and Engels, *op. cit.*, vol. III, p. 13; and F. Engels, Anti-Duhring (Moscow, 1975) pp. 123-125. A useful discussion of Jefferson's thoughts on equality is found in H. Aptheker, The Nature of Democracy, Freedom, and Revolution (New York, 1967) pp. 8-13.

10. On the ideological functions of academic writing generally, see Marx and Engels, "The German Ideology", *op. cit.*, at p. 48; and Yurick, "Introduction" to Christopher Caudwell, Studies and Further Studies in a Dying Culture (New York and London) 1971, p. 1. On legal writing, see Goode, "Law Reform Commission of Canada - Political Ideology of Criminal Process Reform", (1976) 54 Canadian Bar Review 653; and Martin, "Book Review", (1979) 57 *ibid.*, 137. For an extremely confused attempt at self-criticism by two legal writers, see Trubek and Galanter, "Scholars in Self- Estrangement", [1974] Wisconsin Law Review 1062.
11. New Haven, 1971.
12. See Goode, *op. cit.*
13. Five books suggest a methodology for applying class analysis to East Africa and, at the same time, make available a vast amount of data. They are: Giovanni Arrighi and John Saul, Essays on the Political Economy of Africa (New York and London, 1973); E.A. Brett, Colonialism and Underdevelopment in East Africa: The Politics of Economic Change: 1919-1939 (London, 1973); Colin Leys, Underdevelopment in Kenya: The Political Economy of Neo-Colonialism, 1964-1971 (London 1975); Mahmood Mamdani, Politics and Class Formation in Uganda (New York and London, 1976); and Issa Shivji, Class Struggles in Tanzania (London and Dar es Salaam, 1976).
14. It might appear in this passage that I am unsympathetic to nationalism in the abstract. I am merely unsympathetic to nationalism led and directed by the national bourgeoisie. See the thoughtful discussion in Horace B. Davis, Toward a Marxist Theory of Nationalism (New York and London, 1978).
15. Revolution in Guinea (London, 1969) pp. 57-58.
16. See the discussion in Wallerstein, "The State and Social Transformation", (1971) 1 Politics and Society 359.
17. The phraseology is borrowed from M. Kidron, Capitalism and Theory (London, 1974) p. 171.
18. With the proviso, of course, that if it fails to do so, it can always attempt to continue to rule through coercion. This is, evidently, the norm on the African continent today and goes a long way towards explaining the extreme instability of most regimes.
19. The reader will have noticed that there is in the preceding section no explicit reference to Uganda. President Obote, prior to this overthrow, appeared to be moving vaguely along the same path as Tanzania. It would be obscene to juxtapose a discussion of the Amin regime and an analysis of law. Suffice it to say that the form of rule which he developed does not fit within the typology outlined above. One suspects that Amin represented another aspect of class struggle in East Africa -- political rule by the national petite bourgeoisie. It is far too early (July 1979) to attempt an assessment of the post-Amin government. At the level of ideology, it might be observed that a number of commentators have a great deal to answer for in some of the apologies they wrote on behalf of Idi Amin. See, for example, Mazrui, "The Resurrection of the Warrior Tradition in African Political Culture", (1975) 13 Journal of Modern African Studies 67.
20. See, for example, Alison Russell, The Magistrate (London, 1945). For purely arbitrary reasons, I have not discussed colonial writing about customary law in this essay.
21. For a description of the early years, see Twining "Legal Education within East Africa", in East African Law Today (London, 1966), p. 115. For an overview see Ch. I of William Harvey, An Introduction to the Legal System in East Africa (Nairobi, 1975). A discussion of certain aspects of what follows, from a point of view somewhat different from mine, is found in J.S. Bainbridge, The Study and Teaching of Law in Africa (Hackensack, N.J., 1972).
22. The classic statement is undoubtedly Y.P. Ghai and J.P.W.B. McAuslan, Public Law and Political Change in Kenya (Nairobi, 1970).
23. See African Conference on Local Courts and Customary Law, Report (Dar es Salaam, 1963). More exhaustive discussions are found in A.N. Allott, Essays in African Law (London, 1960) and New Essays in African Law (London, 1970). Old ideas die hard. For a particularly egregious statement, see E.V. Mittlebeeler, African Custom and Western Law: The Development of the Rhodesian Criminal Law for Africans (New York and London, 1976).

24. See Ch. III of L.C.B. Gower, Independent Africa: The Challenge to the Legal Profession (Cambridge, Mass., 1967).
25. International Legal Center, Legal Education in a Changing World (New York, 1975) pp. 71-74. For my views on this report, see the review at (1976) 4 Melanesian Law Journal 270.
26. See the detailed discussion in Martin, "Teaching Law in Kenya", (1977) 14 African Law Studies 63.
27. See the extremely valuable discussion in Harold Innis, Empire and Communications, rev. ed. (Toronto and Buffalo, 1972). A great deal of the methodology confusion that surrounds analysis of customary law arises from a failure to deal with the impact of writing and printing on the substance of customary law. As an example of this confusion see S.M. Poulter, Family Law and Litigation in Basotho Society (Oxford, 1976). See also my review at (1977) 16 University of Western Ontario Law Review 268.
28. The problem is analyzed in R.B. Seidman, The State, Law and Development (London and New York, 1978) pp. 105-131. For a somewhat incoherent attempt to rework Seidman's earlier ideas on the subject, see Mutungi, "The Communication of the Law under Conditions of Development", (1973) 9 East African Law Journal 11.
29. See Rahim, "Legislative Implementation of the Arusha Declaration", (1968) 4 East African Law Journal 183; and Seidman, "Law and Development" (1975) 13 Journal of Modern African Studies 641.
30. In 1967 Kenya embarked upon a major exercise in law reform. The aim of this exercise was the admirable one of completely overhauling the law relating to marriage, divorce, and succession. Two lengthy reports were produced: Commission on the Law of Marriage and Divorce, Report, Nairobi, 1968 and Commission on the Law of Succession, Report, Nairobi, 1968. The purport of the reforms suggested was substantially frustrated by male members of the Kenyan national bourgeoisie who did not wish to see any of their privileges, particularly with respect to women, undermined. Nonetheless, two statutes, ostensibly embodying the reforms suggested by the commissions were drafted: the Law of Succession Act, 1972, No. 14 of 1972 and the Marriage Bill. In addition to being couched in language that was almost unintelligible, the two statutes were poorly drafted in a technical sense. See my comments at (1973) 9 East African Law Journal 77 and (1974) 10 *ibid.*, 120. The Commonwealth Secretariat has, for a number of years, been active in attempting to improve all aspects of drafting in the commonwealth. See, for example, Seminar on the Commonwealth Secretariat Programme for the Training of Legislative Draftsmen, London, 1975.
31. See R. Martin, Personal Freedom and the Law in Tanzania (Nairobi, 1974) pp. 110-115.
32. On law reports see generally the magisterial article, Macneil, "Research in East African Law", (1967) 3 East African Law Journal 47. See also T. Kane, A Study on Law Reporting in the Commonwealth (London, 1975); and the brief discussion by Slattery in a review at (1969) 2 Eastern Africa Law Review 279.
33. These were originally called the Eastern Africa Law Reports, but the name was changed in 1967, presumably in response to the formation of the East African Community.
34. Information reported to the author by the editor in 1975.
35. High Court of Kenya at Nairobi, Civil Case No. 1159 of 1966.
36. This is stated in Gilmore, "Organised Labour and Government Controls in Kenya", (1975) 11 East African Law Journal 1 at p.33, n. 136.
37. An example of such criticism is the following: "[T]o make matters worse, the production of the East Africa Law Reports is well over a year behind schedule ...". Hiller, "Case Note", (1975) 11 East African Law Journal 123 at p. 137, n. 47. This remark nearly gave rise to a lawsuit. A random survey of other series of law reports suggests the following average time periods between the giving of judgment in a case and a report of that judgment appearing in print in a law report: All England Reports -- 5.8 months, with 2 or 3 months for House of Lords' decisions; Dominion Law Reports -- 7.5 months; and Appeal Cases -- 11 months.
38. For a detailed survey see Martin, "Notes on Legal Literature in East Africa", *op. cit.*, pp. 141-146.

39. This may be a characteristic of a colonised culture. The same statement could have been made, until very recently, about Canadian legal literature. And, in any case, many of the basic text books that have appeared in recent years have been written by non-Canadians.
40. For insight into the place, if any, of foreign authors, see the acrimonious exchange between Okoth-Ogendo and Jackson at (1970) 6 East African Law Journal 307 and (1971) 184. See also the book review by Okoth-Ogendo at (1977) 14 African Law Studies 108.
41. See the useful discussion in Dowrick, "Law Book Publishing", (1974) 13 Journal of the Society of Public Teachers of Law.²⁷ In the United Kingdom discussions have been going on for a number of years between law teachers and law publishers over appropriate production standards. See Society of Public Teachers of Law Working Party on Law Publishing and Legal Scholarship, Interim Report, mimeo., 1975. For Canada, Butterworth's Canadian Legal Casebook Series is an interesting example of experimentation with new forms. While the results may be esthetically disappointing, the form developed is certainly adequate for teaching purposes.
42. One result of this was P.A. Oluyede, Administrative Law in East Africa (Nairobi, 1973). See the reviews by Nowrojee and Rembe in (1975) 11 East African Law Journal 107 and by Martin in (1975) 13 Journal of Modern African Studies 153.
43. See Gilmore, *op. cit.*, and Miho, "Labour Unrest and the Quest for Workers' Control in Tanzania", (1974) 7 Eastern Africa Law Review 1.
44. Hutchinson, "Neo-Colonial Tactics", (1973) 23 Africa 74.
45. A useful collection of writings describing a similar process in the early history of the United States is P. Miller, (ed.), The Legal Mind in America: From Independence to the Civil War (New York, 1962).
46. See the forceful expression of this point in Shivji, "From the Analysis of Forms to the Exposition of Substance", (1972) 5 Eastern Africa Law Review 1.
47. On casebooks in East Africa, see Huber, "Legal Education in Anglophonic Africa", [1969] Wisconsin Law Review 1188 and Okoth-Ogendo, "Book Review", (1977) 14 African Law Studies 108. A general discussion of the case method of study is found in Patterson, "The Case Method in American Legal Education", (1951) 4 Journal of Legal Education 1. On the ideological functions of the casebook form, see William Chambliss and Robert Seidman, Law, Order, and Power (Reading, Mass., 1971).
48. Although Blackstone's Commentaries, as an exceptional example, did play a major part in shaping the social and political thinking of several generations of bourgeois Englishmen and Americans.
49. I would like to thank David Broad, S. Goulborne, Roger Houghton, N.G. Ngulukulu, Jack Quinn, Michael Steinberg, and William Twining for their assistance in the preparation of this essay.

CHAPTER 8

LEGAL INFORMATION AND LEGAL DEVELOPMENT

SOME REFLECTIONS ON THE ETHIOPIAN EXPERIENCE

By James C.N. Paul*

This paper is an attempt to examine problems of creating information and methods of communicating it to facilitate legal development in third world polities.

By legal development, I mean conscious efforts to develop new legal structures ** as a part of a broader range of efforts to create other, new structures leading to social change. This task may often be especially difficult in polities characterized by absolute poverty on a large scale, pluralism, lack of infrastructure, extensive social stratification and social gaps, historic legacies of exploitation and economic (and other) kinds of dependency.

Information and communication systems may be necessary in order to create and disseminate knowledge and skills enabling both lawyers and "ordinary" people to develop and use legal structures. The development of legal information and communication systems -- as an aspect of legal development -- may also be especially difficult in those "third world" countries where there is a socio-linguistic and cultural diversity and a historic lack of political integration, no well developed lingua franca, massive illiteracy, an absence of a well established and widely known -- or shared -- official legal culture, an educational system which is distant from most people in social terms, weak institutions for mass communication and a lack of infrastructure to produce books and collect materials on law.

It is generally agreed among those interested in the subject, that the existing literature on legal development is a large but mixed bag. The same seems true of writing which focuses on needs for legal literature and other sources of information and modes of communication to aid legal development. There are works which show us why it is important to communicate laws to the appropriate addressees if the laws are to be implemented,¹ and there are some writings and bibliographical work which describe difficulties in achieving that objective, for example, linguistic problems, the absence of books needed to help judges and lawyers develop local law, the lack of resources to develop local legal literature.² But there are few case studies -- as opposed to aspirational claims -- which carefully analyze both experiences and issues to be confronted in developing legal information for purposes of legal development.³

This paper attempts to develop concepts of, and relationships between, legal information and legal development by focusing on experience in Ethiopia, a country which epitomizes the characteristics of "underdevelopment" described above. There were significant efforts directed towards "legal development" and the generation of legal information, and the "case study" is, perhaps, rich in suggesting questions about the assumptions and paradigms which underlay those efforts.

The first portion of this paper describes the development of legal structures in post-war, pre-revolutionary Ethiopia -- particularly during the 1960's, and to describe efforts to create a legal information (particularly a law-oriented literature) to further the kind of legal development apparently envisioned at that time.

The second portion consists of some observations which attempt to generalize from the Ethiopian experience. It reflects, in many ways, a classic example of attempts to create (albeit through the vehicle of an anachronistic regime) modern, western-style legal structures as a part of a larger process of social modernization -- to impose these structure in a polity characterized by conditions described above -- notably wide gaps between a privileged few and the mass of people.

* Professor of Law, Rutgers University and the International Center for Law in Development

** By "legal structures" I mean: law conceived as a body of officially sanctioned by rules and norms; institutions which play distinctive roles in regard to law, e.g., in making or administering it, in training people to use it; processes for administering law (e.g., in courts, government agencies, police stations); actors who are especially trained in regard to the above. Thus, the development of information and systems of communication to supply needed knowledge for these actors, and for people generally to help them cope with legal structures, is the focus of the paper.

The third is a critique of this approach, attempting to look at legal development from the perspectives of the rural poor.

The fourth offers some concluding observations about approaches to developing legal information.

Ethiopian Experience

To use Ethiopia as a "case study" of almost any kind of socio-legal phenomena is a formidable task and a dangerous one for a foreigner (like myself) who was an active participant in the history described. Many Ethiopia-oriented scholars have been going through a period of agonizing reappraisal of received wisdom: earlier assumptions about the history and social institutions of this amorphous polity are now questioned, and there have been "discoveries" of striking new social perspectives, e.g., the importance of understanding the variety of societies -- and historic sub-polities -- which make up greater Ethiopia; the centrifugal, as well as centripetal, social forces at work in the modern state; "bottom-up" and periphery-center-oriented perspectives of problems of agrarian development as opposed to studies which look at these problems from the "center" through the perceptions of the government and the dominant elites and groups who, despite revolution continue to manage (or attempt to influence) the social environment of these rural communities.⁴ Perhaps better understanding of present problems and historical continuities can be gained by focusing on relationships and interactions between the institutions and programs of the central government and the people in the various, quite diverse, rural sub-polities of the country.

The Ethnolinguistic Diversity of Ethiopia. Historic Ethiopia -- the Semitic kingdom founded in the Ethiopian highlands, at Axum, allegedly by descendants of the unions of Solomon and Sheba -- is one of the world's oldest, continuing polities.⁵ Modern, "greater Ethiopia" is this polity plus an aggregate of many, historic sub-nationalities and distinct polities which were incorporated by conquest or co-option into an empire by kings and warlords of the peoples who claimed descent from the Axumite rulers⁶. Greater Ethiopia, today, faces problems of political integration as difficult as any of the new nations of Africa.⁷

The arid far north of the country (Eritrea) jutting along the Red Sea into the Sudan, is occupied by many small tribes; many of these people are nomadic herdsmen of cattle and camels, loosely organized. The region is now in rebellion seeking its independence. The mountainous north central and northwest regions are historic Ethiopia -- the homelands of the Tigre and Amhara peoples. The central part -- Shoa province -- was long ago occupied by the Galla who migrated throughout much of the south and west. But Shoa was later taken by Amhara warlords and the sub-kingdom founded there became, following the political decay of the north, the home of a new line of Emperors and the base of a revived empire. The fertile southern and western provinces were inhabited primarily by the Galla who differ widely among themselves in religion, style of life and political organization, and who differ in political tradition from the Amhara-Tigrean peoples. Other groups, the Gurage and the Sidamo, agricultural peoples, live in the fertile regions of the south and west. A huge part of Ethiopia, the East, which becomes very arid as one moves into the Ogaden, is inhabited by Islamic peoples, notably the Afar and the Somalis -- staunchly self-sufficient, nomadic peoples who were never well integrated into the social and political structures of the imperial state.

The Political Economy of the Ethiopian Empire. The modern empire was built by the aggressive expansion in all directions of the Amhara-Tigrean polity -- by conquest, treaty and migration. The most notable expansion, southward and westward, occurred under Menelik II who annexed the fertile lands of Sidamo, Kefa, and other southern provinces and eastern arid lands such as the Ogaden -- and then negotiated the existing boundaries of the country with England, Italy and France.*⁸

The Amhara-Tigrean polity was "feudal" in various respects. The mass of people in the highland provinces (of historic Ethiopia) were cereal-producing peasants whose claims to their lands derived from membership in a clan and the right to share possession of lands held by a common (perhaps mythical) ancestor. Communities and regions of peasants were governed, through local headmen, by a hierarchy of "nobles" --

* Ethiopia was liberated from Italian fascist occupation in 1941 with the aid of British troops. Thereafter Eritrea, a former Italian colony, parts of which were once part of the historic (pre-Menelik) Amhara-Tigrean empire, was taken by the United Nations from Italy and, in 1950, "federated" with, or "restored" to, Ethiopia.

a fluid class, partly hereditary, partly recruited through service to other powerful chiefs or a king. The local nobility were given tax-tributary-type rights over particular lands and, thus, peasants by superiors. They in turn owed obligations to regional, baronial-type warlords to the "king of kings," the Emperor. Thus, much of the "state" was, for some purposes, a network of "governments" of feudal-type, landholding chiefs who operated through patron-client relationships and tributary obligations, with the Emperor in theory (but often less in fact) as the apex and, theoretically, the source of all rights and obligations.⁹ Most peripheral lands and peoples were governed rather like occupied territories.

A decisive third element in the more Amharized, highland areas was the Ethiopian Christian church -- a member of the Coptic branch. Loosely organized, the "church" (more accurately, churches and monasteries, in the aggregate) "owned" or enjoyed tithe rights in vast quantities of land. The church was a sizeable, if loose, organization of people, and churchmen played important roles as intermediaries between the feudal classes and the mass of people. Cut off from other Christian churches, lacking a "cultural capital", the twentieth-century Ethiopian church has often been seen as a decadent, conservative force. But its historic cultural role has been important: as legitimator of the monarchy and the feudal state; custodian of a shared religious heritage and a written language; transmitter of an ancient political and legal culture; to be the primary source of education and the source of the polity.¹⁰

The institutions of the Amhara-Tigrean polity, including the church, were used, along with methods of "indirect rule" and co-optation of local elites, to establish that polity's economic and political hegemony over the many, vast and very different kinds of lands and peoples incorporated into the nineteenth century empire. Menelik sequestered thousands of square miles of conquered country as his own and handed over much of it -- in the form of feudal-type tenures and appointments to govern -- to his chiefs, and to his supporters from among the occupied peoples.¹¹ Thus, there developed in southern and western Ethiopia a notoriously exploitive land tenure system. Since the south and the west are, in terms of historical experience, culture and political economy and the effects of feudalism, very different from the northern Ethiopian highlands, this adds to the regional and ethnic tensions of today.

The Modernization of Ethiopian Law and Government. Crowned regent in 1916 and king of kings in 1930, Haile Selassie came to power in a time of political turmoil and uncertainty following Menelik's death. First by battle, but then by using law (and co-opting the church to help to sanction his laws), the Emperor set about "centralizing" and "modernizing" the state.¹² In 1931 he promulgated Ethiopia's first constitution -- an interesting law patterned on Japan's Meiji Constitution. This was the first in a long series of steps to use imported structures to create a centralized, monarchical government which purported to rest on a basis of law rather than simple imperial fiat and patron-client relations. Of course the law was, often enough, simply a facade over old style political methods. But over time, with the introduction of a bureaucratic class, law became an increasingly important means of government. Thus, the constitution created a bicameral parliament -- with a "Lords-type" upper house into which the high nobility were, like it or not, recruited to advise and consent to laws proposed by the Emperor. The constitution revised the system of regional and local governance by creating a vast, hierarchical pyramid of offices -- all to be filled through the Emperor's patronage. Similarly with a system of courts. The constitution projected a cabinet and ministries -- creating institutions and processes virtually unknown before that time. It even included a watered-down version of Japan's rather vague bill of rights. Most of this was programmatic, and the Italian invasion slowed the implementation, but the constitution, though little known about the land, laid down the blueprint of structures -- institutions, norms, actors and processes -- which the Emperor followed, fairly faithfully, to create an apparatus of "modern" government.

In 1941, flushed with victory and armed with British troops and British advisors (schooling by colonial experience) the work of "political modernization" commenced in earnest. The next two decades were the formative years, and the influence of British and later American advisers on the language, form and content of law-making and administration -- and hence of secular education -- was profound.¹³

Almost immediately after the Emperor's restoration to power, there was established the Negarit Gazeta -- the first official, printed reporter of legislation in the country. Heretofore, royal decrees were published ad hoc and usually disseminated by word of mouth; there was no organized collection of earlier, written laws. "Negarit" refers to the drum beaten on occasions when the Emperor's oral orders were carried to the villages and countryside. "Gazeta" was the Italian term incorporated into Amharic; the term reflects the interesting problems of coinage of legal language. All legislation was to be published in both English and Amharic -- the latter "official". Courts were to take "judicial notice" of these laws, a concept which, itself, was difficult to translate.

There followed in rapid order legislation establishing: the Ministries and cabinet; and other major activities of government, e.g., taxation, a state bank, and various commodity boards; the centralized, broad-based court system (with five layers of courts and thousands of judges -- an important source of Haile Selassie's patronage); the prosecutorial offices; regulation of the legal profession though there was no "profession" (in the western sense) at that time; indeed there were no Ethiopian lawyers with any formal schooling in law for years thereafter; but there were hundreds of legal intermediaries and the licensing of them became a big business not always scrupulously conducted by the Ministry of Justice.

In 1955 a "Revised" Constitution (largely drafted by American advisors) was promulgated. It expanded powers of Parliament to approve the budget and all taxes, created the prime ministry and cabinet as constitutional institutions and implied some vague theory of separation of functions between the Emperor and a working government accountable to him (and Parliament). It also articulated new "constitutional" rights, and some (notably the right to "due process" and "equal protection of the laws") were drawn from the U.S. constitution.

Codification followed. Most foreign scholars (unfamiliar with Ethiopia) see these modern, esoteric books of law -- notably the Civil Code -- as the main feature of Ethiopia's legal development in the 1960s. In fact, they came long after the basic structures of legal administration had been developed and at a point when it was clear that English was the language of education, trade, and sophisticated transactions. Perhaps the most important codes -- in the terms of contact with people -- were those dealing with crimes and criminal procedure and civil procedure. The Penal Code was drafted by an eminent Swiss academic -- as a reformed version of Swiss law. The Criminal Procedure Code was written by an experienced, English colonial officer, who borrowed bits and pieces from Commonwealth sources. The Civil Code has fascinated many scholars who, perhaps, are blinded by the audacity and brilliance of its draftsman, Professor René David of Paris. Written in impeccable French, badly translated into English and even more carelessly into Amharic, the Civil (and the Commercial) Code introduced the need for the "complete lawyer" to know a lot about French legal culture (and thus the need to know another foreign language). On the other hand, the Civil Procedure Code was based on Indian law, and its immediate impact on judges and what courts did was probably more significant. Thus, by 1965 Ethiopia could be said to enjoy one of the world's most "mixed" (up?) legal systems.

Certainly if this legal history is recounted without reference to its social context one would have the impression of steady creation of a modern constitutionalized monarchy, civil and judicial service and legal system, and the complete expropriation of customary law into it. In some ways the Imperial government simply went further, faster than other colonial and post-colonial African governments in unification, modernization, and the imposition of European inspired legal structures and jurisprudence.¹⁴

But, of course, one must understand that this "legal repertoire" was highly programmatic, and for some purposes, a facade of modernization. It became a common phenomenon in Ethiopia to enact a law (often creating some theoretically important program and structure) and thereafter proceed to implement it in the most gradual, sometimes unsystematic -- or even illegal -- way; and, indeed, many laws fell on barren ground -- they were left ignored or unimplemented.¹⁵

Until 1963 there was no law-training institution and only a very small, UN-sponsored public administration center and before then there were only about a dozen people -- most of them young -- who had received university training in law somewhere abroad. Until 1960 the country lacked "high level" manpower to implement much of what was ordained; the upper levels of the bureaucracy at the courts were usually filled by older men who owed their position to imperial patronage rather than technical qualification, and often their commitment to modernization and any ideology of "development" was superficial and uninformed.¹⁷

Modernization and Linguistic and Ethnic Policies. Education and language were of course obstacles to implementation of the modern laws. Most lower level officials, nearly all judges and pleaders, were "illiterate" in English -- and many were not too literate in Amharic. The English or American or French-inspired laws would "read" one way to an Anglo-American-trained lawyer, perhaps another to a Continental jurist, and still another to the Amharic official who might often be highly puzzled by it, not the least because sometimes the translations into Amharic (from original English drafts) created a confusing message, ambiguous commands; all sorts of key words in key clauses were, per force, "coined" but there was, for lack of human resources, no effort to develop a new standard legal terminology.¹⁸ Further, the government lacked systematic and energetic policies for communicating law. It is one thing to print a law in a government shop, quite another to distribute it to officials and others to whom it is addressed and still another to explicate it to those who need to know. Not until the revolutionary land

reform decrees of 1975 did the government ever evince an interest in developing vigorous, systematic measures to communicate important laws to relevant addressees through programs of informing and educating.¹⁹

But there were general policies regarding languages and ethnic and cultural matters. Haile Selassie favored both Amharization of Ethiopia and the creation of bi-cultural (i.e., westernized and Amharized) elites as carriers of modernization.²⁰ Efforts were encouraged to develop teaching of Amharic, to revive classical scholarship and -- at a more mundane but important level -- to propagate history, myths and legends which would support the legitimacy of the monarchy and its government. Amharic and English were taught (theoretically) throughout most formal schooling beyond the lowest levels. Ethiopian history was taught as the history of the Solomonic monarchy -- which was depicted as the creative force which had forged the nation and, for centuries, had fought off invading barbarians, both European and African (e.g., the Somalis). Religious freedom was prescribed, but at the same time the symbiotic relationships between the Ethiopian church and the state were emphasized, and there was no de jure recognition of Sharia courts which had long existed in fact. All Ethiopians, it was often implied, were members of a unique, Semitic-speaking nation which occupied a unique place among Semitic peoples who, in that part of the world, were seen as God's chosen peoples.²¹

The Development of Legal Training, Legal Literature and Legal Language. Founded in 1963, initially staffed by foreigners -- Americans, Canadians and Europeans -- the law school launched ambitious efforts to help make the new legal system work in accordance with official legal premises -- the programmatic laws to be found in the books of Negarit Gazetas.

Some of the context for this awesome project has been described in a literature which is fairly extensive:²² there were virtually no trained lawyers; there were no books about law or the legal cultures, or legal history in Ethiopia; there was an increasingly extensive, sophisticated body of national laws, and English or French was the language and legal culture of the creators of those laws and English the language for teaching law, but Amharic was the language for communicating and administering law. All of this took place in a highly stratified, pluralistic society, over 95 per cent illiterate, and a political economy characterized by feudalism, exploitation, extensive stratification and segmentation, a small money sector and an even smaller "modern", westernized sector.²³

The educational context added to the problem. The university (of about 1500 full-time students) worked entirely in English. Accordingly, its students tended to come from the few schools (nearly all in Addis Ababa) where English was effectively taught and used successfully to put students through an Anglo-American-style curriculum. The student population was predominantly Amhara, Tigrean, or Amharized Galla and often elitist, but increasingly anti-government in outlook. Thus, many of the people who came to receive intensive professional education were, in some ways, less and less committed to the political and legal system in which they were being schooled.²⁴

While university students and degree-level training were a central part of the law school's program, the "founders" of it saw a wider set of objectives and a wider clientele: the judges, the advocates, the police prosecutors, government bureaucrats charged with law-oriented tasks (e.g., tax officials) who needed training quite urgently if they were to use the modern laws according to their terms. Many of these people had a shaky, formal educational formation, but many evinced a keen desire to take sub-professional training at one level or another in either English or Amharic (the latter classes were taught by a small cadre of the few available Ethiopian lawyers, who themselves were all in government). Several thousand officials were so "trained" in the decade that followed. Indeed, temporary training programs of this sort were later set up in provincial cities, and everywhere there was a great demand for them. One consequence was that the law school had a large "alumni" and thus a base of support which began to give it some influence in establishing working relationships with government officials for other purposes.

That was important when, with Ministry of Justice support and Imperial blessing and tremendous amounts of translation and other work by students, the Law School began publishing a bilingual Journal of Ethiopian Law²⁵ which, because it was bilingual, rapidly achieved a market of over two thousand purchasers. Selected court judgments (chosen because they were good models of legal reasoning) and descriptive, expository, doctrinal articles and, occasionally, "sermons" from the dean were its main fare. The goal of the Journal was to provide more learned judges, lawyers and other legal actors with a knowledge of the content of Ethiopian law -- and to encourage indigenous scholarship. It deliberately eschewed more academic, theoretical writing. This publication effort taught many lessons about making legal literature and communicating laws in Ethiopia, e.g., the serious difficulties one encountered in rendering foreign

concepts into Amharic, the time and people required for such efforts, the uneven effect of such writings as one came to realize that often the degree of literacy in Amharic necessary to understand law was problematic in many sectors of the empire, the difficulty of setting criteria for picking judgments to report.

Another major legal literature effort was a project to prepare a Consolidation of the laws in force in Ethiopia²⁶ -- in up-to-date organized compendiums of all the Negarit Gazeta legislation which spanned some twenty years, much of which was out of print or out of force (by virtue of amendments or other laws) or so badly translated into Amharic in the first place as to be unintelligible. That project was launched on a crash basis, but in fact it took years and vast amounts of money and painstaking efforts even to complete it partially.

Another effort was to prepare law books for professional training - textbooks and collections of legal source materials and commentary and problems: a tough job in view of the immense amount of faculty time involved, the eclectic sources and nature of Ethiopian law, the need for a Continental law background to deal intelligently with some codes and an English or American background to deal with laws, the "programmatic" character of the law, the lack of knowledge about even some rudimentary social facts and the sensitivity of some ideological issues. (Indeed, unofficial government censors at first wanted to screen these books; they relented on this issue when the university insisted (correctly) that the whole scheme of de facto censorship which the government tried to practice over book printers was totally illegal). All told, more than a dozen books (on, e.g., constitutional law, criminal and civil procedure, property and penal law, labor and administrative law) were printed. Many other "books" of this kind of legal literature were multilithed, and parts of some were hastily translated for teaching in Amharic.²⁷

A further research-publication project was to open up the subject of "land reform"²⁸ through a series of interdisciplinary monographs. One of these--which exposed landlord-tenant relations in southern Shoa was of some value in forcing establishment of a Ministry of Land Reform which then undertook, itself (as it was hoped) further empirical studies in this field and went on to publish much valuable material.

Another interesting project was the initiation of programs of "popular education" in law. Students were enlisted to give radio talks on legal subjects, and sometimes TV dramatizations of cases - in Amharic, of course.³⁰ I was told these programs enjoyed extraordinarily high "ratings" (and visits to bars around town, where TV existed, provided some empirical basis for this assessment). Sometimes these programs made the Ministry of Information (which sponsored them) a little edgy, but they did suggest the popularity of "popularization" of legal information. As law students grew more radical, they turned to other "extra legal" ways (e.g., crude political pamphlets) to communicate contradictions in the sociolegal order in Ethiopia to the mass of people.

Another group of projects dealt with legal history and tradition. A considerable amount of scholarly effort was expended to produce an annotated English translation of the "Fetha Neghast",³¹ an ancient compendium (dating back to the sixth century) of canon law and ideas about law and justice in general -- a book developed from historic times by scholars in the Ethiopian Church. The Fetha Neghast, supposedly at least, had historic, symbolic influence. It was written in Gheez (the Latin or northern Ethiopia) and even Amharic translations - let alone translations with the scholar's gloss - were rare.

Another project was to organize what came to be called the Ethiopian Archives³² - a collection of government legal and official documents, legislative history materials, court judgments, scholarly writings and other unpublished material on Ethiopian law and legal phenomena. Initially launched almost in a regime of secrecy - the archives notion was gradually accepted by more and more officials and materials of great value (or copies of it) were turned over with increasing liberality (though some were highly confidential). In view of the chaotic state of the Ethiopian national (archives) library and the government's penchant for secrecy, the law school collection became a very valuable information resource.³³

Another valuable source of information which went into the archives was student field study papers -- reports of various surveys, observations and other kinds of rough "law in action" type studies made by students during their senior year (as part of the established curriculum). Some of these provided valuable glimpses of "real" legal phenomena -- badly needed to complement pictures portrayed by pure doctrinal commentaries on the "law in books". A few of these were published - many were far too sensitive for that.

Another project - very important for purposes of attempting to develop standardized usages and terms of art in Amharic, and very difficult in terms of human resources - was the Amharic-English-French Law Lexicon.³⁴ Translation of French and English terms were laboriously compiled, analyzed and explained. This was a long slow effort - never

finished, though various, short, mimeographed, lexicon-type pamphlets were prepared to aid readers of particular materials, e.g., the Civil Code.

As a basic resource for all this, one needed, of course, a law library. Here again there were interesting problems in view of the diversity of sources of Ethiopian law. But beyond that, it seemed that Ethiopia (and other third world African countries) needed, on principle, both an "interdisciplinary" and a comparative law oriented library - if not in depth, at least in terms of basic materials dealing with the kinds of social phenomena which seemed relevant to a problem-centered approach to legal education - an approach which (in theory) was to emphasize comparative sociolegal perspectives on legal development. For example, materials on land reform, or bureaucracies or political modernization were at least equally important as heavy French tomes on esoteric points of civil law. Unfortunately, this kind of library development requires professional skills of a high order, difficult to obtain, or retain, in the Ethiopian setting.

The law school - as suggested above - became extensively involved in the publishing business - an activity which consumed much faculty and administrative time. While the publication program was heavily subsidized by a series of Ford Foundation grants (which included, and lumped, sums for both "research" and "publishing"), the idea (and promise) was that if the pump were sufficiently primed, we could do it on our own. Whether that could ever have been possible - and if so, how? - is a difficult question to answer. There were substantial markets for Amharic (for Amharic-English) law books - if they were aggressively cultivated. Thus, the Journal was sold by considerable proselytizing in the courts and the part-time programs. It was also subsidized by creating and publishing the names of "patrons" of the Journal - several hundred people ranging from the Emperor and Prime Minister to a great many police sergeants and modestly paid public officials - all of whom paid an extra Eth. \$10.00 over the subscription price to have their names listed alphabetically (under the Emperor) as a supporter of the venture.

Legal education books could only pay their own way over a long period of time - and by maximizing foreign sales on the theory (usually true) that they were valuable source materials. The consolidation project cost (I believe) around Eth. \$30,000 in direct printing costs, and much more in labor. Again, over time, much of this might have been recouped - but only if a substantial additional investment was made in the costs of running a publishing-distribution business, cultivating overseas markets (which proved very difficult.)

The production of these books required, of course, much faculty and student time. On precisely this theory, most regular law teachers were assigned only 50% teaching loads - a situation which aroused envy from other university quarters and continual suspicion from the university administration. Production also required a rather luxurious secretary-faculty ratio and a lot of time spent in trying to educate various printers in Addis to produce the type and quality of material (both in Amharic and English type) which we wanted. The whole effort sometimes also required a bit of decanal whip cracking to assure that when one man left his unfinished effort it would be completed by his (sometimes reluctant) successor(s) in interests.

All of this suggests that it is possible, given resources, to conceive of university institutions for legal education as centers for legal development. There is no reason in theory why tasks of legal development beyond degree-level education can't (in the setting of a smaller country) be assigned to - or simply (in a vacuum situation) be taken up by - the law school.³⁵ If it is to serve this function, the law school must, however, perceive of itself as an agency of legal development, prepared to work closely with professional colleagues in other institutions, mostly off the campus. And, of course, this concept of a law school requires money and manpower beyond an ordinary teaching faculty. It also requires some careful thought about the assumptions and goals which inform these legal development tasks.

Observation on the Ethiopian Experience

Strategies of legal development (and thus strategies for the planned creation of legal information) are frequently dependent on - and a product of - paradigms of development in a more general sense. The strategies of legal development pursued in Ethiopia from the early '50s till 1973 reflected a number of widely-shared assumptions about what "modernization" and "development" meant and how they could be induced.³⁶ The role of law and legal specialists in these strategies, though rarely articulated by non-lawyers, was significant. Just as other structures (e.g., bureaucracies, government institutions, schools, hospitals) were to be modelled along western lines, so with law, courts, legal professions and other legal phenomena.

With the ushering in of the "development decade" there emerged, in many professional and academic circles in the third world, a growing interest in the adaptation of all

kinds of professions as human resources of development.³⁷ Social "modernization", and "economic growth" seemed to call for "change agents," for "planning" and "institution building," for the creation or reform and rationalization of new social infrastructures conducive to changes which would make less developed countries more like developed ones. A modern political system (we were told) was one which enabled interest articulation by different groups in society ("inputs") and expert analyses of the problem and reasoned responses ("outputs") from rational, efficient, bureaucrats in public structures. A modern society was one which was socially integrated, de-tribalized. A modern economy was one which would encourage savings and investment, new forms of organizing economic activities -- from larger scale commercial farms and local entrepreneurial activities to forms enabling transfers of capital and technology and integration into the world economic system. A modern administrative system called for scientifically organized, efficient bureaucracies operating under the rule of rational law. A modern society was one which contained and diffused conflict by channelling claims and grievances into tribunals and rational modes of dispute resolution. The state's role was emphasized. "Development" and "modernization" were to be induced from the top -- they were dependent on the way the state controlled or directed production and allocation of resources, on "development administration" by new kinds of professionals. Thus, the '60s was a time of "educational" and "human resource" "planning" geared to a process of generating new skills, e.g., in problem and policy analysis, organizing, managing. Great importance was ascribed to higher education, particularly to development-oriented professional education. Within all "professions" there emerged a new "profession and development" literature.

The volume of writing about "law and development" was large but mostly aspirational, and was usually built around one or two themes.³⁸ First, it was asserted that modern legal structures would produce more rationality, due process, accountability and sensitivity to human rights in administration - qualities conducive to the rule of law. Second, it was asserted that legal frameworks and "legal skills" would contribute instrumentally to other ends of development: e.g., the facilitation of business organizations and transnational transactions; the unification of land tenure and family customs and the erosion of syncretic social forces. These benefits, it was usually assumed, could only come through creation of effective professionals and through effective professional work. Thus, implicit in the modernization model of legal development was a model of an autonomous, impersonal legal system and an independent, articulate legal profession. The creation of modern legal information was an important means of producing this kind of professional development; through legal education and through a national legal literature.³⁹

The modernization model (whether adapted to a post-colonial state or a country like Ethiopia) relied heavily on the use of foreign language and concepts, and the assumption that foreign legal notions could be transferred into the indigenous legal language. The model contemplated a system of legal information largely developed by and for professionals - information which was not aimed at ordinary people (but in fact tended to make it increasingly difficult for them to gain knowledge about law). The model assumed that professionals would take appropriate steps to produce timely official reports of the law, digests and commentary, educational and research materials, and libraries in which to store all these things.⁴⁰

This mode of creating legal information creates a dependency on professionals and (for a long time) on foreign material. In this way legal information, like professionalization, affects popular access to and participation in the development of legal structures. It may tend to make law a resource for those classes who have access to professionals and information, and to create an increasing social distance between official legal structures and the poor, the ill-educated, the mass of people who live on the "periphery" of modern social sectors. Professionalization of information strengthens the power of bureaucracies and other large organizations which have superior access to information. It may enhance possibilities for manipulation - and indeed for abuse - of legal structures by reducing possibilities of calling power-wielders to account.

There is evidence from Ethiopia in support of these generalizations, and to show the contradictions and diverse social impacts of this kind of strategy of legal development. On the one hand, the creation of a significant number of professional (in the western sense) lawyers led to increasing professionalization of some institutions (e.g., higher, urban courts) and of legal administration (e.g., in the Ministry of Justice and Foreign Affairs). The impact of the new legal professionals was made manifest in the early days of the Ethiopian revolution, the "liberal" stage. A new Constitution was initially promised, as a basic reform, by the military regime which had seized power, behind the throne, at that time. The Commission to draw it up was composed (in significant part) of many law graduates, and much of its work in fact was done by these people and other graduates and by law students who produced an exemplary liberal democratic constitution (with guarantees for cultural pluralism and local autonomy); one of the most interesting of this kind of constitution to appear on the African

scene.⁴¹ This reflects, I think, a growing status of the profession and of the ideas about law. It reflects the mobility and versatility of many law school graduates and their use of information to transform the structures of the central state.

On the other hand, there were other, very different perspectives. How did the official legal structures look from the view of the marginal or impoverished wage earner in Addis, or a tenant farmer in Sidamo whose existence was often virtually at the mercy of an absentee landlord, or a Tigrean peasant who was constantly caught up in litigation to defend his "rist" (i.e., possessory) rights in clan lands or the small merchant in a provincial town or a nomadic Galla herdsman in Bale? We have some empirical literature, studies of the social impacts of legal structures in various settings initiated in the late '60s.⁴² They suggest sharp discontinuities between law in books and law in action; a legal system more accessible to some than others; a judiciary often susceptible to corruption and manipulation by those with superior wealth and access at the lower (and sometimes upper) levels; a social distance between people and official law; bureaucracies (including the judiciary) administering various kinds of development-oriented laws who were often vested with wide discretion to initiate programs to bring resources to poor people - such as, water for farming, credit, health care; and which repeatedly failed to effectuate the objectives laid down in the law. For various reasons (rooted, in part, in the new political economy built around the latter day imperial period and in the sub-culture of the Ethiopian bureaucracy) these kinds of development laws were usually used (if they were used at all) to allocate resources to the more affluent, for example, to "progressive," better capitalized farmers or, indeed, to urban landlords who were often bureaucrats. These studies suggest that (despite the "crash programs") most legal intermediaries, still largely untrained, were often unscrupulous or incompetent; they monopolized roles of access to the courts and often made litigation a morass of confusion and frustration. We would see urban courts flooded with landlord-tenant disputes, debt collection and employment disputes - a system which probably pressed hardest on the poor. We would see widespread fear or contempt for courts in many rural regions, where judges were linked to local officials, to landlords, to corruption and to an exploitative modern kind of state-supported feudalism.

The fact of the matter, we are now told, was that the old feudal political economy was gradually being changed into a transitional feudal-capitalist agricultural economy. New elite groups were emerging - a bureaucratic and a commercial bourgeoisie, an urban-based class increasingly investing in land and capitalist-type modes of agricultural production. The contradictions in "development" were becoming more obvious; contradictions between the avowed aims of "modernization" and the reality. While the modernization of legal structures did not contemplate or ordain this kind of social change, they probably seemed to contribute to it in the eyes of many. Dissatisfaction with the legal system may have been one of major popular grievances which undermined the legitimacy of the Emperor's regime.⁴³

Today some of the underlying strategies of development of earlier decades are challenged. Modernization of social structures based on western experience and "top down" models of "development administration" - coupled with "growth-oriented" economic policies - are said to contribute to skewed development, continuing underdevelopment and enlargement of gaps between the relatively few who are affluent and the great mass of urban and rural poor whose condition grows worse and whose power to influence government through established institutions seems to grow weaker. New strategies and approaches to development, emphasizing the satisfaction of "basic human needs" and the creation of social structures which will foster more "self-reliance" and "participation" over the control and distribution of essential resources are being articulated.⁴⁴ These recent strategies may have important legal implications; and therefore important implications in respect to assumptions and goals which influence efforts to develop legal literature and information and communication systems. The third part of the paper introduces these questions.

Alternative Approaches to Legal Development

Studies of Ethiopian development during the decades of 1950- 1970 reflect increasing gaps in the distribution of land, wealth and other resources, increasing similar gaps in terms of access to political, administrative and legal institutions. Development failed to reach masses of urban and rural poor; whose needs for essential resources (such as land, food, health care, habitat) became more urgent as state structures increasingly affected their distribution. Deprivation of essential needs coupled with alienation from the political system gradually increased the possibilities of major social upheaval should the government begin to lose power over the forces it used to control the country, should a new regime emerge which could catalyze the widespread discontent.

The present "revolutionary" regime is committed to "scientific socialism" in the development of all sectors of life.⁴⁵ Precisely what this means in terms of legal development is still unclear. The most striking reform of the Dergue is the land reform in the erstwhile feudal areas.⁴⁶ The reform was achieved by organizing local Peasant

Associations and using them as a vehicle for redistribution of land. But the Peasant Association is also envisioned (and may be) a social structure for other redistributive purposes, and a means to mobilize the rural poor into participatory, self-help, self-governing bodies. While obviously the present socialists who are now trying to manipulate the Dergue and the bureaucracy may have a different view of the matter, I think Ethiopia presents a situation in which to think concretely about philosophies and strategies of development emerging in a new stream of international literature which focuses on the satisfaction of Basic Human Needs as a central objective. I have described these in another paper:⁴⁷

"Fads" in intellectual "development circles" often change with a rapidity equaling if not surpassing changes in clothing styles.

Basic Human Needs (BHN) approaches now have wide appeal among those who think about designs for development. But, like fashions on the drawing board, the approaches presently exist more as abstract conceptions than as finished models in use. There are dangers in underestimating problems and constraints and overestimating possibilities. Nevertheless, BHN concepts may have strong appeal because they force sharp issues (development of what? for who? by which means?); and they direct attention to concrete steps which might be taken to redress social injustices now so widely revealed. Precisely because these steps do entail conflict they pose questions about the role of law.

BHN approaches go further than "redistribution with growth" or "employment" strategies because they broaden the concept of development beyond more purely economic concerns to focus on dignitary interests and because they link satisfaction of material needs to realization of other kinds of social goals. Thus while one BHN concern is to provide greater and more equitable access to goods and services which enable people to realize some optimal level of nutrition, health care, habitat, education, and employment, a second concern is to provide for more self-reliant, popular participation in structures which define needs for these resources and which produce and allocate them; and the two objectives are seen as interdependent.

The concept of self-reliance emphasizes the need to reduce the dependency of the poor on the expertise and discretion of those who presently control these structures and to enhance capacities for effective, responsible participation in these structures by people affected by their activities. The concept of participation emphasizes the need for an optimal sharing of power through one mode or another, including direct participation -- or direct representation -- in decision-making, enhanced communication with, and access to, decision-makers, expanded, or new, structures to secure social accountability in resource allocation -- i.e., responsiveness to BHN concerns. The concept of human rights, in this context emphasizes not only the importance of developing doctrines of equity to govern allocation of essential resources but also of developing and facilitating rights which are crucial to realization of self-reliance and participation, including rights to organize groups which will articulate and advance the interests of the poor and historically excluded.

BHN strategies emphasize endogenous social transformation rather than social revolutions imposed by benign elitist or authoritarian rulers. BHN strategies do not call for repudiation of growth strategies, nor for autarchy; they call for a reordering of priorities; they are relative to time and place, to country specific situations; they envision different ways of achieving progress toward realization of people-grounded values which become articulated over time as different groups, hitherto, excluded, begin to mobilize and identify and advocate their shared interests; they envision social transformation through expansion of modes of participation and inclusion of new groups in decision-making and continuous redefinition of social goals and targets.

While BHN goals and approaches can be cast in utopian terms, perhaps their tangible value to law-oriented advocates is that they suggest immediate strategies to force attention to the use of some explicit criteria to examine existing legal phenomena. They provide a means of assessing the social accountability of structures which produce, regulate, manage or allocate resources essential to human well-being. They provide a means of evaluating the role of legal professions in these structures. They focus attention on needs for legal resources for groups hitherto deprived of them to secure the social accountability sought.

While BHN approaches may be criticized as unscientific, unrealistic and incomplete answers to the problems of poverty and social gaps, they do force attention to crucial problems in countries like Ethiopia: how to develop development both by and for the rural poor? How to create participatory structures to help people determine and satisfy their needs through their own action? How to address historic social gaps and prevent domination of rural life by centralized bureaucracies and the urbanized elites?⁴⁸

BHN approaches depend less in the first instance on benign, central government policies than on the ability of the rural poor to mobilize, organize and begin to make

demands to resources (land, knowledge, credit, health and other services) essential to improving the conditions of life. The organizations - if they are to succeed - must achieve a high degree of participation and self-reliance.

While it is obviously a matter which requires far more analysis than can be expended here, and far more research, there is evidence that legal resources may be important to the processes of mobilization and institutionalization of the kinds of participatory groups needed.⁴⁹ By legal resources I mean a functional knowledge of relevant laws and the skills to use them. Thus legal resources are important to help people develop an internal "constitution" for groups -- a means of facilitating and maintaining organizations. Legal resources are important to help articulation and legitimation of claims, and to develop new, participatory structures to allocate resources (e.g., credit, knowledge) and resolve disputes in a way which is understood.

The provision of legal resources to groups may call for both provision of legal assistance (through community organizers and others working with groups) and the provision of information. Crucial to the success of the Ethiopian land reform may have been the "Zemecha" effort⁵⁰ the deployment of thousands of students, teachers and others to peasant communities to explain the new law and the means of implementing it. Crucial to the vitality of future rural organization may be the provision of functional knowledge about other laws.⁵¹

All of this entails a very different system of legal information; and a very different focus of professional efforts. Legal literature like the knowledge and skills of legal specialists - can be seen as a resource which can be provided to people to help them use existing legal structures to articulate and advance interests which reflect their needs. Whether these kinds of legal resources can be provided to those most in need, to the different groups of historically impoverished, often exploited or disadvantaged groups which, in aggregate, make up the great mass of people in so many African countries depends on the initiation of more basic changes and strategies of development and legal development. One cannot, I believe, go very far in talking about "the problems" of developing legal literature without having some kinds of objectives and evaluative criteria in mind to assess experience.

Concluding Observations: Categories of Legal Information and the Ends of Means of Legal Developments

Legal information is a means of promoting different objectives of legal development. It comes in many different kinds and forms.

On the one hand, we may conclude that "modernization" of law is, for some purposes, inevitable; that the modern state, whatever its ideology, will need increasingly complex law to govern and act as states must in today's world. On the other hand, in countries like Ethiopia, if our concerns and perspectives focus on people - centered development, on poor and historically peripheralized people, it becomes important to focus on bottom-up legal development which helps people become self-reliant and capable of controlling, to an optimal extent, their own social environments.

The conventional approach to legal literature is "top down" and "profession-centered". It looks to the legal profession, often to private practitioners, as the clientele, and determines needs and modes of satisfying them accordingly. Too often, within this matrix, it only looks to more conventional categories of legal literature, such as the "need" for court reports, texts on conventional lawyer's subjects, professional legal educational materials. Even this approach may overlook less discussed, but - from a public perspective - far more important kinds of legal information, for instance the kinds of knowledge and materials which will enhance, from a third world perspective, transnational dealings, such as trade and investment transactions. These needs can only be discovered as one begins to learn about the problems which generate them, in a developmental context.

Certainly from a people-centered, Basic Human Needs, perspective, the problem of assaying legal information needs, as a part of the needs of the poor for legal resources, is an important task, and one which forces us to abandon conventional assumptions and models which so often dominate discussions of this subject. Whether, and the extent to which, attention is to be focused on these needs depends on what one perceives by way of paradigms and hopes for legal development.

DEVELOPMENT AND LEGAL DEVELOPMENT APPROACHES AND ADMINISTRATIVE STRUCTURES

Two Models (with due caveats on limits and value of models)

STRUCTURES AND LANGUAGE AND LEGAL INFORMATION POLICIES		Emphases on Development	
		"MODERNIZATION" MODEL	BASIC HUMAN NEEDS MODEL
INSTITUTIONS (for allocating essential resources)	Chief executive. Legislative organ Civil Service Ministerial departments Public corporations Government courts Local officials		Party, National Movement or Village, or local bodies as resource allocation units Local Popular Justice-type tribunals Worker councils. Peasant Associations.
ACTORS	Political executives "Technocrats" - Managers Civil servant - specialists Law-trained specialists and professional intermediaries		Community, group and party leaders Intermediaries or cadres of specialists working in groups as assistants Paraprofessional: (trained within groups)
NORMS Values emphasized	Legality - separation of law from politics Autonomy of legal actors Principled decision based on legal rationality and expertise Due process - procedural fairness Formal equality Hierarchical delegation of juris- diction Institutional loyalty/morality		Reintegration of law and political ideas Emphasis on equitable satisfaction of needs, self- reliance participation Affirmative obligations to redistribute or distribute to satisfy basic needs of all with priority on poor Expanded participation in both law-making and admin- istration Optimal local control of power over resource allocation

STRUCTURES AND LANGUAGE AND LEGAL INFORMATION POLICIES		Emphases on Development	"MODERNIZATION" MODEL	BASIC HUMAN NEEDS MODEL
NORMS Sources			Official state declared ideology State organs Concepts derived from foreign models used Books of law written for legal and administrative specialists	Ideology derived from BHN concepts and particular experience Synthesis of demands, grievances, needs of communities, groups Shared concepts of justice, Custom Education about fundamental concepts of justice General statements of principles to be followed
	PROCESSES Modes of decision-taking and dispute settling		Emphasis on importance of procedure Processes governed by written rules Access regulated by rules, rules of "standing", etc. Adversarial. Need for professional intermediaries	Informal. Problem-centered Access enlarged, "standing" relaxed Greater emphasis on social advocacy Intermediaries provided where necessary, but self- reliance encouraged.
LANGUAGE POLICIES			One "official" language for law, administration, education, and most mass communication. Specialized concepts, terms for legal purposes	Plurality of languages at regional/local level Encouragement of lingua francas for explicit purposes Encouragement of indigenous expression of fundamental concepts
LEGAL INFORMATION AND COMMUNICATION POLICIES			Geared to key actors Top-down Diffusion from Center Formal system of education Government media Specialized books of law	Geared to above institutions and norms Bottom-up Geared to "capacitation" of communities, particularly disadvantaged; obligation to communicate terms of law as part of official law Popular access to the media Books geared to enabling paraprofessionals within groups to use law

FOOTNOTES

1. R. Seidman, The State, Law and Development (1978), Chapter 7. See also O.K. Mutungi, "The Communication of Law Under Conditions of Development: the Kenya Case", 9 East African Law Journal 11 (1973); Brun-Otto Bryde, The Politics and Sociology of African Legal Development (1976), 180-189.
2. Cf. Y.P. Ghai, "Legal Education in Africa," I.L.C. (International Legal Center) Working Paper, (1973); ILC, Committee on Legal Education in the Developing Countries, Legal Education in a Changing World. (1975) 71-88, W.L. Twining, Academic Law and Legal Development (1976) Chapter 2.
3. Twining, *op. cit.*
4. J. Cohen, "Research Problems in Describing and Explaining Ethiopian Socio-Economic Development", African Studies Association (1976). (A critical, annotated bibliography).
5. A good overview of Ethiopian history is Margery Perham's The Government of Ethiopia (1969) Chapters 2 and 3.
6. H.G. Marcus, "Imperialism and Expansion in Ethiopia 1865-1900", in Gann and Dugan, Colonialism in Africa 1870-1960, Vol. 1 (1969).
7. D. Levine, Greater Ethiopia: the Evolution of a Multiethnic Society (1974) (on which the following text is based).
8. Marcus, *op. cit.*
9. On the governance of 19th century Ethiopia and struggles between the feudal nobility, Emperors and church see, e.g., Marcus, The Life and Times of Menelik II, 1844-1913 (1975); S. Rubemon, The Survival of Ethiopian Independence (1976).
10. See, e.g., D. Levine, Wax and Gold (1965).
11. See Marcus, *op. cit.*, note 9 at 190 and 195. See also Yohannes Noggo, "Agrarian Reform and Class Struggle in Ethiopia" (ENDA, Dakar, 1978).
12. See L. Mosley, Hailie Selassie: Conquering Lion (1964) for a sympathetic account of the early years of his reign.
13. This history of legal development is recounted in more detail in J.C.N. Paul, "Problems of Public Law and Political Development", in H. Marcus (ed.), Proceedings of First. U.S. Conference on Ethiopian Studies (1975).
14. See R.A. Sedler, "The Development of Legal Systems: The Ethiopian Experience", 53 Iowa Law Review 562 (1967).
15. See Brun-Otto Bryde, The Politics and Sociology of African Legal Development (1976).
16. Cf. J.C.N. Paul and C. Clapham, Ethiopian Constitutional Development, Vol II (1972), Chapter VI. Cf. C. Clapham, Haile Selassie's Government (1969).
17. See Clapham, *op. cit.*, note 16.
18. See Fasil Abebe and S.Z. Fisher, "Language and Law in Ethiopia", 5 Journal of Ethiopian Law 553 (1968).
19. See P. Brietzke, "Law, Development and the Ethiopian Revolution" (Ph.D. thesis, School of Oriental and African Studies, London Univ. 1979). Chapter 6.
20. Cf. Clapham, *op. cit.*
21. Cf. E. Ullendorff, The Ethiopians: An Introduction to the Country and the People (1973), p. 43.
22. See, e.g. Paul, *supra.*, note 13. N. Singer, "Modernization of Law in Ethiopia: a Study in Process and Personal Values", 11 Harvard International Law Journal 73 (1973); Sedler, *op. cit.*, note 14.
23. Cf. Brietzke, *op. cit.*, note 19.

24. On student problems, from the perspective of a President of the university, see Aklilu Habte, Haile Selassie University: A Forward Look (1970).
25. See the Emperor's remarks in the 1 Journal of Ethiopian Law v. (1964) ("The national character of Ethiopian law demands that Ethiopian commentary upon the law be developed....The publication of court decisions will serve to make the law more certain....")
26. Begun in 1967, completed in 1973. See Dean Thompson's Annual Report for that year.
27. See, e.g. S. Fisher, Ethiopian Criminal Procedure (1969); P. Grover, An Introduction to Ethiopian Penal Law (1964); G. Krzeczunowicz, The Law of Extra Contractual obligations (1969); Paul and Clapham, *op. cit.*, (2 vols); K. Redden, Ethiopian Legal Formbook (1965); R. Sedler, Ethiopian Civil Procedure (1967); J. Vanderlinden, Introduction to the Law of Persons (1968); S. Lowenstein, Materials for the Study of Ethiopian Penal Law (1965). See also bound mimeographed volumes, e.g., P. Brietzke, A Sourcebook of Ethiopian Law and Development (1974); J. Harrison, Cases and Notes on Ethiopian Civil Procedure (1974); H. Dunning, Property Law of Ethiopia (1967); P. Winship, Law and Economic Regulation (1973). These are only indicative of the range.
28. See, e.g., S. Mann, Land Tenure in Chore, Shoa (1967); R. Pankhurst, State and Land in Ethiopian History (1968); G.W.B. Huntingford, Land Charters of Northern Ethiopia (1967).
29. Mann, *op. cit.*
30. See Third Annual Report of the Dean, 3 Journal of Ethiopian Law 519 (1967).
31. See The Fetha Neghast, translated by Aba Paulos Tzadua, edited by Peter L. Strauss (1968).
32. See Vanderlinden, "Introducing the Ethiopian Archives", 4 Journal of Ethiopian Law 411 (1967).
33. As witnessed by extensive use of it by, e.g., Brietzke,
34. See Fasil Abebe and Fisher, *op. cit.*
35. See "Second Annual Report of the Dean" (1966), *op. cit.*
36. The four annual reports of Dean Paul (appearing in the Journal of Ethiopian Law) are full of such assertions. Cf. Sedler, *op. cit.*
37. The discussion which follows is taken from C. Dias and J. Paul, "Law and Lawyers in Modernization and Development" (a chapter in a forthcoming volume on legal professions in the Third World) to be published by the Scandinavian Institute of African Studies, Uppsala and the International Center for Law in Development, New York.
38. *Ibid.*
39. See Note 2, *supra*.
40. Cf. Twining, *op. cit.*, note 2.
41. See H. Scholler and P. Brietzke, Ethiopia: Revolution, Law and Politics (1976).
42. See, e.g., N. Singer, "The Use of Courts as a key to Legal Development: an Analysis of Legal Attitudes of the Canbata of Ethiopia", in Marcus, *op. cit.*, note 13; D. Bauer, "For Want of an Ox....: Land, Capital and Social Stratification in Tigre", in Marcus, *op. cit.*, Billidign Mandefro, "Agricultural Communities and the Civil Code", 6 Journal of Ethiopian Law 156 (1969); T. Geraghty, "People, Attitudes and Problems in the Lower Courts of Ethiopia," 6 Journal of Ethiopian Law 427 (1969); J. Cohen, "Ethiopian Provincial Elites and the Process of Social Change," 11 Journal of Ethiopian Studies 93 (1973). Cf. Brietzke, *op. cit.*, Chapter 6.
43. Cf. Brietzke, *op. cit.*
44. See, e.g., International Labour Organization, Employment, Growth and Basic Needs: A One World Problem (1976); ILO, Meeting Basic Needs (1978); IDS Bulletin (of the Institute of Development Studies, University of Sussex, Vol. 9, No.(4 June 1978); Dag Hammarskjold Foundation, What Now? Another Development (1975); J. and M. McHale, Meeting Basic Needs 442 Annals 13 (1979).

45. See Brietzke, *op. cit.*
46. See, e.g., J. Cohen and P. Koehn, "Land Reform in Ethiopia" 14 African Law Studies 3 (1977).
47. J.C.N. Paul, "Law, Modernization and the Satisfaction of Human Needs" forthcoming issue of Law and Development.
48. See Dias and Paul, *op. cit.*, C. Dias and J. Paul, "Law and Lawyers and Underdevelopment and the Satisfaction of Human Needs", *op. cit.*, note 37.
49. *Ibid.*
50. See, e.g., Brietzke, *op. cit.*
51. See Dias and Paul, *op. cit.*

CHAPTER 9

LEGAL LITERATURE IN THE SUDAN

By Akolda M. Tier*

Background: Conditions Affecting Legal Publishing

This brief introduction considers the potential market for legal literature and also some of the constraints which may affect its production.

The Legal Profession

The Judiciary in the Sudan is divided into two branches: the Civil Division and the Sharia Division. In December 1977 there were two hundred and seventy-one judges in the Civil Division and two hundred and three judges in the Sharia Division. The number of advocates during the same period was four hundred. The decline in the number of judges and the corresponding rise in the number of advocates has been noticeable in recent years. Between October 1974-January 1976 eighty-seven judges left the Judiciary. Thirty-seven of these resigned and the rest were either appointed to other government posts or were pensioned off.

Legal Education

As to academic lawyers the Faculty of Law, University of Khartoum had in December 1977 thirteen full-time lecturers, seven part-time lecturers and two teaching assistants. In addition three lecturers and eight teaching assistants were on study courses abroad and two lecturers were on secondment abroad. The number of lecturers will increase, it is hoped, when the teaching assistants studying abroad complete their courses. The Islamic University of Omdurman, Faculty of Law and Sharia, had in December 1977 twenty lecturers. Twelve of these were full-time and eight were part-time. The classification of academic staff in the University of Cairo, Khartoum Branch, is a little different. In 1976 there were five full-time lecturers; three lecturers were seconded to the Faculty for a year and seventeen were seconded to the Faculty for a period varying from ten days to three months.

Of the three universities, only the University of Khartoum has post graduate students. During the academic year 1977/78 there were twenty-five post graduate students. Ten of these were in the Department of Sharia and fifteen were in the Civil (i.e. non-Sharia) Departments.

The annual intake varies not only between the three universities but also within the same university. For the academic year 1977/78 the intake was eighty-six for the University of Khartoum and twenty-seven for the Islamic University of Omdurman. The intake for the University of Cairo, Khartoum Branch, during the academic year 1974/75, was one thousand and twenty-one. It is clear that in terms of intake the University of Cairo, Khartoum Branch, offers attractive choices to intending law students. Unfortunately many of these students do not pass the Bar examination or even attempt it.

Several articles on the legal system and the role of the legal profession have been published, but legal education has come under especially close scrutiny.¹ In particular one might mention the Report of the Committee on Unification of Legal Education, *Taqrir Lajnaht Tauhid Al-Talim Al-Qanuni*, produced by the National Council for Higher Education, Khartoum, 1976. This report covers the Faculties of Law in the University of Khartoum, Islamic University of Omdurman and the University of Cairo, Khartoum Branch. It sets out first data on legal education which includes: regulations governing admission; content and duration of courses; method and language of teaching; law libraries provisions; examinations and assessment of students; number of lecturers; and, lastly, the annual intake and number of graduates during the period 1966/67 - 1974/75 in the case of University of Khartoum and Islamic University of Omdurman, and 1955/56 - 1974/75 in the case of University of Cairo, Khartoum Branch. The three universities differ on practically all these points and as might be expected the Committee makes recommendations towards unification of certain aspects of legal education. Also, the Committee recommends a training programme for law graduates. A memorandum submitted by

* Akolda M. Tier, L.L.B. (Khartoum) LLB, PH.D. (Cantab) Lecturer, Faculty of Law, University of Khartoum.

Dr. Zaki Mustafa, then Attorney-General of the Sudan, is attached to the Report. Eight years earlier in an unpublished paper on legal education in the Sudan, Dr. Mustafa had argued that the research functions of the academic staff at the University of Khartoum could be widened to include not only more courses for graduates, members of the legal profession and members of local (i.e. Native and Chiefs) courts but also publication of a monthly bulletin containing legislation, case-law, news about research activities and the legal profession generally.

Law Publishing

Legislation and other official publications are produced by the government printer. A local firm, McCorquodale & Co. (Sudan Ltd.) published the Digests mentioned later in the paper in the 1950s but the most notable local publisher in recent years has been the University of Khartoum Press. On a non-commercial scale the Faculty of Law, University of Khartoum, has also made an important contribution. Several law books have been published by companies outside the jurisdiction, in Egypt, Lebanon, the U.K. and U.S.A. No local financial aid is available for the publication of legal works and no institution administers local or regional subsidy schemes for the writing or publication of legal material. It is true that the cost (i.e. of typists, stencils, paper and binding) of the series of monographs described later were paid either by the Faculty of Law, University of Khartoum, or the Ford Foundation. However, these are of limited circulation and are not on sale to the general public. Publishers may be deterred by the small local market, although the wide ranging list of overseas subscribers to the Sudan Law Journal and Reports would indicate that there is international interest in publications on Sudan law.

Other Factors

Two other factors are likely to affect the development of legal literature in the Sudan. These are the law reform and the language. Of course these are national problems but they also affect law publishing. The permanent Constitution of 1973 contains some provisions on both problems. Thus Art. 1 provides that "the Democratic Republic of the Sudan is a unitary, democratic, socialist and sovereign republic, and is part of both the Arab and African entities". The Constitution goes on to make two specific provisions for sources of legislation and language. Under Art. 9 "the Islamic Law and Custom shall be the main sources of legislation" and under Art. 10 "the Arabic language shall be the official language of the Democratic Republic of the Sudan". This article has to be read subject to Art. 5 of the Southern Provinces Regional Self-Government Act 1972, which under Art. 8 of the Permanent Constitution 1973 is an "organic law" establishing a Regional Self-Government in the Southern Region. Art. 5 reads: "Arabic shall be the official language for the Sudan and English shall be the principal language for the Southern Region without prejudice to the use of any other language or languages which may serve a practical necessity for the efficient and expeditious discharge of executive and administrative functions of the Region."

Both problems are interconnected, not least because they tend to take the Sudan away from the common law orbit and reduce the number of countries that might be interested in legal publications on or for the Sudan. A book in Arabic and dealing with a common law subject will hardly sell in common law countries because of the language difficulty. At the same time it will not sell in Arab Countries because of the differences in legal systems.

As to law reform, it has become apparent that in Sudan it is difficult to discuss law reform outside the context of Sharia Law. Thus at the time of writing there is a Law Revision Committee whose terms of reference are to bring all the Sudanese laws in conformity with the rules and principles of Sharia law. Yet, the Government is continuing with the publication of the current edition of the Laws of the Sudan and this will certainly be rendered out of date by the implementation of the Committee's recommendations. Also, since many countries do not have Islamic law in all areas of legal relationships, law reform will further reduce the market for books on or for the Sudan.

Current Provision of Legal Literature

Legislation

The publication of legislation in the Sudan is provided for in part by the Interpretation and General Clauses Act 1974, section 9 of which reads,

"Every law shall be published in the Gazette within two weeks of the date of its enactment and shall, unless another date is therein provided, come into force after the lapse of one month from the date of its publication."

The word "law" is defined in section 4 as meaning "any enactment other than the Constitution and includes Acts, Provisional Orders and any regulations, subsidiary enactments or orders issued under Acts."

At this stage two observations must be made. First, it is clear that subsidiary legislation is published in the same Gazette as primary legislation. The only exceptions are judicial circulars. The other observation is that there are no unofficial publications of legislation in the Sudan. The Gazette, the Laws of the Sudan and other publications mentioned below are official Sudan Government publications.

Any legislation, whether primary or subsidiary, is therefore first published in the monthly Legislative Supplement to the Sudan Gazette and subsequently in the Laws of the Sudan, which is now in its fifth edition. Before 1948, however, they have been published separately. The Supplements issued since the Laws of the Sudan, 2nd ed., were subsequently published in annual volumes known as the Annual Supplements to the Laws of the Sudan. Similarly, the third edition has Supplements, one for each volume, and containing the laws of 1940 to 1948 (inclusive). The Laws rearranged under the original Titles and Sub-Titles and any section in the Laws of the Sudan which has been amended is reprinted in full. Some laws which have been very much amended have been reprinted in full.

It is not possible to know much about the Laws of the Sudan, 1st ed., since it is not available in any of the libraries in Khartoum, including the Central Archives. In the later editions it is stated that the first edition was published in 1907-1908 and consisted of two volumes. Volume I contained legislation in chronological order and Volume II contained the Penal Code, the Code of Criminal Procedure and the Civil Justice Ordinance with their subordinate legislation together with the Mohammedan Law Courts Ordinance.

The remaining editions, which are available, will be noted briefly. The second edition Laws of the Sudan, Revised Edition 1926-28, is in three volumes. Volume I contains legislation from 1899-1922; volume II covers the period 1923-28 and volume III contains the Civil Justice Ordinance, Orders under the Civil Justice Ordinance; the Egyptian Judgments Ordinance 1901; the Bankruptcy Ordinance 1928; the Bankruptcy Forms Rules; the Wills and Administration Ordinance 1928; the Official Administrator Ordinance 1928; the Prescription and Limitation Ordinance 1928; and the Pre-emption Ordinance 1928. The Revised Edition was followed by eleven annual supplements until the publication of the third edition in 1940. The complexity of legislation increased the number of volumes to four and by 1954 when the fourth edition appeared the volumes reached eleven. The fifth edition is now in progress and only volumes I and II covering the periods 1901-1925 and 1926-1938 respectively have so far been published. The remaining six volumes have been edited and are now with the printers.

These publications are either in English or Arabic or both. The first four editions of the Laws of the Sudan are in English and the fifth edition is in both languages. The Gazette, on the other hand, has always been published in English with parallel Arabic translations. As to the Supplements, these used to be published in English until 1961. From 1962-1971 they were published in both languages. When Babiker Awadalla, a former Chief Justice and a Pan-Arabist, was Minister of Justice, a further change occurred in August 1971 and continued until 1973. During this period the Supplement was published in Arabic only. Finally in 1973, after Dr. Zaki Mustafa had become Attorney-General of the Sudan, the Supplement started to be published in both English and Arabic and this practice is continued to the present day.

The only other collections of legislation are the three volumes of Ordinances Promulgated by the Governor-General of the Sudan, etc., which covers the period 1899 to 1908 (published 1907-8) and the Ordinances and Selected Proclamations (etc.) issued in two years 1909-1913 (published 1914). These are reprints of certain important laws, notices, rules, regulations and orders reprinted from the Gazette and published by the authority of the Governor-General.

Having reviewed these publications it remains to indicate briefly whether the system of publishing legislation is satisfactory. These publications have not necessarily made legislation readily available. The reason is that each of the five editions of the Laws of the Sudan has an average life cycle of fourteen years. The number of Supplements issued since the last edition is obviously great and a lawyer who wishes to know whether a particular enactment in the Laws of the Sudan has been repealed or amended has to consult all of them. This can be time consuming as was stated in the preface to the Laws of the Sudan, 3rd. edition:

"Volumes 1 to 4 of the Laws of the Sudan contain the ordinances and subsidiary legislation (regulations, rules and orders) in force on the 1st January 1940. Laws enacted since are printed in the monthly legislative supplements to the Sudan Government Gazette, all of which have to be consulted to make sure of

the present state of the law. This is now a laborious task, made the more made the difficult by the manner in which many amendments are made, i.e. after word ... insert words ... Amendments are drafted in this way so that they can easily be written into the original text but volumes 1 to 4 are set up in a way that does not admit of many insertions and few persons can find time to make them".

Further difficulties arise from other factors. First, there are many libraries in the Sudan with no complete set of Supplements. Secondly, the executive participates in legislation. In particular it legislates by means of a provisional order when Parliament is not sitting or the government business is urgent. This provisional order becomes law when assented to by the Head of State but is subsequently submitted to Parliament for confirmation or revocation.² Perhaps it is a mark of high competence of the legal profession in the Sudan that it has been able to cope with this scattered and often inaccessible legislation.

The problems are discussed in Michael Gaiger's paper and they are likely to remain so long as there are no means, comparable for example to the British System of Citators, for lawyers to check on amendments, repeals and case interpretations. Some assistance could be obtained from Cole, Guide to the Laws of the Sudan.³ This compilation indicated whether a particular enactment in the Laws of the Sudan, 4th edition, has been repealed or amended. Also it lists provisions of primary legislation judicially considered. The importance of this compilation is, of course, reduced by the publication of the 5th edition of the Laws of the Sudan. Two compilations by David L. Perrott can also be consulted with profit. One is An Index of Sudanese Cases on Personal Property and Workmen's Compensation 1899-1964⁴ and the other is An Index of Sudanese Cases on Agency and Contract.⁵ The former contains a table of Sudanese statutes cited together with the author's observation whether such a statute has been: "applied"; "not applied"; "interpreted"; interpreted and applied"; "considered"; "discussed"; "discussed generally"; "merely referred to"; and "referred to in argument". Likewise, the latter compilation contains a table of Sudanese statutes cited and, again, various words are used to describe the purpose of citation, namely: "applied"; "not applied"; "considered"; "interpreted"; and "referred to". But difficulties certainly arise from the lack of a regular and systematic service.

Judicial Circulars

Judicial circulars are of two types: Sharia and Civil (i.e. non-Sharia). As mentioned before judicial circulars are not published in the Gazette though undoubtedly Sharia circulars are a form of subsidiary legislation.

Sharia Circulars

Three collections of circulars were published in 1949, the first two being Sharia Judicial Circulars and Memorandums (re- issued photo-litho by the Central Archive, Khartoum in 1977), and Manshurat wa Muthekkirat Muhakim Al-Sharia, Hakumat Al-Sudan. These two publications are the same except that one is in English and the other in Arabic. Both are collections of circulars issued by the Grand Kadi up to 1949. A question of Sharia law is first governed by circulars and, in their absence, by the preponderant opinion of the Hanafiyya school of jurists. The collections are thus of practical value and though published in 1949 they are still very much in use; since 1949 only seven circulars have been issued.

The power of the Grand Kadi to issue circulars was based on the Sudan Mohammedan Law Courts Ordinance 1902, which later became the Sharia Courts Act 1967. A reading of these circulars conclusively shows that Sharia law as applied in the Sudan contains elements of different schools of Sharia law. The third collection, Nasharat wa Talimat Al-Mahakim Al-Shariya is not an important source of Sharia Law. It consists mainly of administrative instructions. This too was reissued by the Central Archives in 1977.

Civil Circulars

These were collected in, Criminal Court Circulars (New Series), a Sudan Government Publication, 1932. The collection consists of circulars and instructions, mostly on points of adjectival law, issued by the various Chief Justices since 1927. They are bound in loose-leaf volumes. There are also civil (i.e. in the narrower sense of non-criminal) circulars but these are not bound in a book form.

The power to issue civil (i.e. in the wider sense of non-Sharia) circulars is not derived from any legislative enactment. Probably it is a manifestation of the generalized control which the Chief Justice exercised over the Civil Branch of the Judiciary. It is not surprising that their authority is debatable. It was the view of Gorman, J., (as he then was) in Mohamed El Sayed El Barbari v Heirs of Yassin Ali Gablan that,

"Whatever form such circulars may have when used as vehicles of administrative instruction, and however weighty the private advice and suggestion they may contain, they have no legislative validity, and they could never have been intended to serve as authoritative enunciations of principles binding on the courts".

This view is not, however, the prevailing view. In many cases that have come before the courts, civil circulars, if relevant, have been applied. A few of these circulars like Criminal Court Circular No. 26 of 1953 which concerned sentence for murder and recommendation to mercy in cases of death sentences have been incorporated in the Code of Criminal Procedure 1974.

Law Reports

Law reporting in the Sudan can be divided into three periods: the period of the digests (1915-54); the post-independence period (1956 to date), and the pre-independence period (1900- 55). It is apparent that there has never been any systematic law reporting in the Sudan.⁷ The initial question was whether law reporting is appropriate for a country like the Sudan. It was the view of Lindsay, C.J., that law reporting was not appropriate. His alternatives to law reporting were judicial circulars, commentaries and a law journal. In his words,⁸

"From that point of view of the practical administration of justice, circulars and commentaries are the best medium for drawing attention of Judges and Magistrates to points of practice and established precedents arising out of the judicial interpretation of the codes. In addition, a quarterly journal for limited circulation to the more academic minded would probably be useful."

Of the three alternatives, only judicial circulars have been used.

Another alternative to law reporting was the Judges' Meetings. For example the question of correct interpretation of 'Custom' in section 5 of the Civil Justice Ordinance 1929 was referred to the Judges' Meeting of 1945.⁹ In that meeting Bennett, C.J., developed doubts which he entertained a year earlier in Marika Constantine Cambouris v Constantine Procos¹⁰ and concluded by proposing an amendment to section 5. Though the majority of the Judges rejected the proposed amendment, it is clear that most of the Judges must have become aware of the difficulties surrounding the word 'custom'. Moreover, Bennett, C.J.'s views can be traced in Lindsay, C.J.'s, decision in 1954 in the well-known case of Bamboulis v Bamboulis.¹¹

Another provision which was discussed in the Judges' Meeting of 1945 is section 8(I)(c) of the Native Courts Ordinance 1932. This section prohibited the local courts established thereunder from hearing any claim to the ownership of land. This provision has been interpreted to mean that the local courts have jurisdiction to decide claims relating to any right or interest in unregistered land short of ownership. Among these rights are the right of cultivation, grazing and cutting of timber. This interpretation not only conferred a concurrent jurisdiction in respect of such claims on the civil and local courts but it has given rise to confusion, uncertainty and conflict. The Judges, in their meeting of 1945, looked at the whole matter and their discussion brought out many anomalies of this interpretation.

While the necessary information upon which to formulate a decision might be acquired by means of circulars or judges' meetings, none of these methods proved a viable substitute for law reports. Consequently, some members of the profession prepared personal compilations of precedents. Clearly such compilations were of limited circulation but they enabled the compilers to invoke precedents for their decisions. For example, in Mohamed El Tahir El Tom v. Taha Mohamed Attiyah Atabani, J., relied on his compilation and stated¹²

"This is not the first case of its kind in this country and I am not trying to create a precedent. I believe that the principle has long been acted upon by the Sudan courts. Referring to my personal digest - and again regretting the absence of official case reporting which would at least secure uniformity - I come across the case of Singer Machine Co. v. Abdel Wahab Ibrahim and Sharif Ahmed Ghalib."

It is clear from this passage that Lindsay, C.J.'s view on this matter was not shared by all his contemporaries. Indeed, the editorials in the Sudan Law Journal and Reports and prefaces to the Digests, one by Chief Justice Lindsay himself, explain the absence of law reporting on the grounds of lack of funds and shortage of personnel. It is indicative of the acuteness of these problems that the Sudan could not afford a single series of reports.

Although financial difficulties still remain today, it could be argued that there is still a further obstacle. This is the paucity of reportable cases, for which two reasons could be suggested. First there is in recent years a noticeable decline in the art of writing judgments. Secondly, traditionally and historically, Sharia and Customary Law have no case-law and the courts which administer these laws - the Sharia and local courts - undertake the bulk of litigation in the Sudan.¹³ Thus, subject to a few exceptions to be indicated in appropriate places below, the reported cases referred to in any of the digests and the law reports mentioned below do not include decisions of Sharia and local courts. These digests and the law reports may now be looked at in greater detail.

The Period of the Digests 1915-55

The digests which are all in English are the only compilations of cases nearest to law reports in the Sudan before 1956, when law reporting was started with the post - 1956 cases. They were the results of the untiring efforts by private individuals. The decisions which have been noted are those of the Court of Appeal and the High Court. The digests are often brief and are thus not sufficient for a balanced view to be reached on whether the common law was being properly adopted. In many ways, however, the digests are useful. They contain important principles which must be considered in any decision. Moreover, they are used as teaching materials. The first of these publications was the Digest of the Decisions of the Court of Appeal of the Sudan, from May 15, 1915, to February 3, 1926, by R.H. Dun, Chief Justice of the Sudan 1917-26 and T.N. Francoudi, Advocate before the Sudan Civil Courts, 1926. This contains 93 civil (i.e. non- criminal) cases extending to 48 pages. The title is a little misleading as it suggests that only decisions of the Court of Appeal are noted whereas in fact a few decisions of the High Court are included. The digest was bound in loose-leaf form so that subsequent notes on decisions could be inserted. However, no subsequent decisions were inserted.

The second is the Law Reports: The Court of Criminal Appeal 1949-1953, by D.F. Hawley, Chief Registrar of the Judiciary, and W.E.D. Davies of the then University College of Khartoum (now University of Khartoum), 1954. This volume, popularly known to the legal profession as the Green Book, was intended to be a regular series of reports on cases decided in the Court of Criminal Appeal. The volume was in loose-leaf form so that subsequent decisions could be inserted. This aim was partially achieved. As originally published the volume contained 11 cases which, together with the Index of Subjects and Sections, extended to 60 printed pages. Later two cases decided in 1954 and 1955 were added thus bringing the printed pages to 86.

The final work is the Digest of Cases in the Court of Appeal and the High Court, by the Honourable Mr. Justice Stanley-Baker, 1955. This digest of civil (i.e. non-criminal) decisions is divided into two parts. Part 1 consists of 42 notes on decisions extending to 61 printed pages. Six of the cases noted in this Part are reported in full in Part II, which extends to 38 printed pages. The digest is the best known in the series not least because the important decision in Bamboulis v. Bamboulis, which excluded religious laws of the Sudanese Excepted Communities from the expression "any custom applicable to the parties" in section 5(a) of the Civil Justice Ordinance 1929, is reported fully at p.76.

The Post-Independence Cases

Cases decided since independence are reported in the Sudan Law Journal and Reports, a yearly series which at present covers the period 1936-72. The series became possible when in 1957, a year after Independence, the government accepted to meet the costs of publication of law reports and a law journal and the Faculty of Law, University of Khartoum, accepted to edit them. In this way, the reports and the journal were combined. The editors have included such eminent scholars as Professors Twining and Atiyah. The novelty of combining the reports and journal was continued even after 1961 when this series started to be edited by the Judiciary, first by the Law Reporting Office from 1961-70 (inclusive) and since 1971 by the Technical Bureau of the Supreme Court, as in Egypt.

Cases decided since Independence appeared to be an appropriate starting point. The first issue not only marked Independence but also contained the most recent cases. Before 1971 any reportable cases could be included, irrespective of the Court which rendered it. Thus the Court of Appeal, High Court, Province Courts, Major Courts, District Courts and Magistrates Courts are all covered. Since 1971, however, after the structure of the Judiciary had been modelled on the Egyptian system, the Technical Bureau has published only the decisions of the Supreme Court and the Court of Appeal. This is a slight modification of the system in Egypt, where the Technical Bureau publishes only the decisions of the Supreme Court. The 1971 and 1972 volumes are unique in that they contain cases decided in the Sharia circuits of the Supreme Court and the Court of Appeal. Exceptionally, the 1971 volume contains the Judge-Advocate's summing up in the Trial of F.E. Steiner: A Court Martial and the 1972 volume contains a case decided by a Sharia Province Court. The Sharia cases have no titles but are merely referred to under their subject-matter such as A Marriage Guardianship case, A Maintenance case, A Divorce case, etc.

Though it has always been the policy of the Sudan Law Journal and Reports to publish articles and notes in English and Arabic¹⁴ the 1956-69 volumes are all in English, except that in the 1961 volume the Editor has printed a correspondence in Arabic. In the 1970-72 volumes both English and Arabic are used. In the 1970 volume the English part (207 pp.) begins from left to right and it includes the whole of the journal. The Arabic part begins from right to left and extends to a mere 50 pages. The 1971 volume is rather odd in that the materials published in English and Arabic are mixed up and one starts reading from left to right even for judgments and materials in English. This mistake is not repeated in the 1972 volume, which has separate parts for both languages. The English part, which includes the whole of the journal, extends to 116 pages and the Arabic part extends to 277 pages.

There is no subscription to the Sudan Law Journal and Reports. It is sold simply to customers in Britain and other countries and the price of each volume varies according to its size. Inevitably there have been changes. However, one central fact runs through the entire series, namely, the combination of the reports and the law journal. Thus the series appeals at once to the practising and academic lawyer.

Pre-Independence Period 1900-1955

Cases decided before independence are reported in the Sudan Law Reports, which is financed from a series of Ford Foundation grants which began in 1961 to the University of Khartoum. The actual collection and editing of cases was undertaken by a team, mostly from the Faculty of Law, known as the Sudan Law Project.

Five volumes of Sudan Law Reports: Civil Cases, covering the period 1900-1949 have been published, the first two in 1969 by Oceana Publications, New York, and the remaining three by the Faculty of Law, University of Khartoum in 1975. A further three volumes are in the process of publication by the Faculty and should be out in 1979. Volume 1 of Sudan Law Reports: Criminal Cases, which is in two parts covering the period 1900-1969 was published by the Faculty in 1971, and another two volumes will appear shortly. The forthcoming volumes of both civil and criminal cases will bring the coverage of the reports up to 1955.

So far only the first two volumes of civil cases have been published in book form. The remaining volumes are monographs of a limited circulation. There are 200 copies of each monograph and these are intended for the use of the Faculty of Law and senior members of the Judiciary. The delay in publication is due in part to the fact that during the break in diplomatic relations between the Sudan and U.S.A. following the Six Day War, there was no follow-up with the Ford Foundation. Publication was also delayed because the change to the civil law system in 1971-1973 was the very opposite of the aims of the Sudan Law Project, which was to provide the legal profession with the rules of the common law evolved in decided cases.

The whole series is in English and the courts covered are, on the civil side, the Court of Judicial Commissioner (which ceased to function in 1915), Court of Appeal, High Court, District Courts and the Court of Jurisdiction. On the criminal side, the courts which are covered are the Mudir's Courts, Major Courts and the Chief Justice.

The cases are notable for their learning and comparative nature. This is particularly true of the cases decided under the quasi-legislative function of the courts to decide, in absence of legislation, according to "Justice, equity and good conscience".¹⁵ A fine example of the comparative nature of early Sudanese judgments comes in the following passage by Dun, C.J., in Yanni Krithany v. Mariam Bint Dasta:¹⁶

"There is no ordinance or proclamation dealing with the case, and it must therefore be decided on the principles of justice, equity and good conscience. Against the decree we have on the one side the Roman civil law and practically whole of modern European law and the Moslem law: in favour we find on the other side the Roman common law, the Dutch law, English and Scottish law, the law of most of the states of the U.S.A. and the greater part of the British Empire including some parts which were once French, Swiss law and the law of certain Hindu castes. There is therefore not any general consensus of opinion amongst the legislators of the world in favour of one view rather than the other. I know of no other previous decisions in the courts of this country to guide me."

The publication of the Sudan Law Reports leaves the Digests of little usefulness. The cases originally noted in the Digests are now reported in full in this series. The only cases one could find noted in the Digests but not reported in the Sudan Law Reports are the conflicts cases of Dello Strollogo & Co. v. The Khedivial Mail Line¹⁷ and Justice v. Mann.¹⁸ Preparation of Comprehensive Index to all volumes of Sudan Law Journal and Reports and Sudan Law Reports is mooted but the problem is finance.

Secondary Material

The only published bibliography of books and periodical literature is W. Twining, P. Twining and A.R. Nasri's "Bibliography of Sudan Law - I"¹⁹. This compilation is primarily of books and articles in English. Recently John Bruce has compiled (but not published) a Bibliography on Customary Law, which consists of books and articles on customary law written by lawyers, administrators and anthropologists.

The Sudan has only one manual of procedure for the jurisdiction. This is Awad, M. Mohy El Din. *Al Qanun Al-Jinaiy Ijra'at fi Al Tasna Al-Misri wa Al-Sudani, Al-Matba'at AL-Alamiya*, Cairo 1964. It deals with the law of criminal procedure in Egypt and the Sudan. Appendix 1 contains a list of other books on the law of the Sudan published since 1965. Eleven of the twenty-one authors are Sudanese and the rest are expatriates, and, out of the 24 books listed, 17 are in Arabic, the remainder in English. Most of the earlier books were published either in Cairo or in Beirut, but since 1971, publication has been undertaken by the University of Khartoum Press or by British publishers. It is interesting to note that although a comparatively large number of titles were published between 1968 and 1971 (14) only seven have appeared since then, one of these a pamphlet, and only one book, Vasdev's *Law of Homicide in the Sudan* has appeared since 1976.

In addition to the books a significant contribution to legal literature has been made by a series of monographs produced by the Faculty of Law, University of Khartoum, although these are not widely available (they are also listed in Appendix 1). Although the monographs are short they supplement the text-books in their respective fields of study.

Two of these works, by Kadouf, are *A Preliminary Survey of Customary Law in Qala El Nahal and El Hawata Area, Kassala Province, Sudan: Customary Law Memorandum No. 1* and *An Outline of Dinka Customary Law: Memorandum No. 2*. These monographs are the first in a series of restatements of customary law, a project financed by the Ford Foundation. Each describes and restates the prevailing customary law in that area. Not surprisingly there is close affinity between customary law and Sharia as a result of mutual borrowings.

On the other hand, the *Outline of Dinka Customary Law*, though it restates Dinka law, is concerned principally with the investigation of the rights, such as the right of grazing and cultivation, which will inevitably be affected by the proposed Jonglei Canal. The work is thus of assistance to people in many branches of study.

It may be appropriate to observe that customary law is a subject in which writers fall into routine and Mr. Kadouf is no exception. Certain features of these works are reminiscent of the School of Oriental and African Studies' Restatement of African Law series. In both works for example the estate of a deceased person is regarded as including widows.

Another work in the series is Salacuse, *The Constitutional and Administrative Law of the Sudan: Syllabus and Materials*. This is a collection of Sudanese constitutional documents and other materials from 1953 to the present day. The work is designed for the University students and is divided into two parts. Part A deals with constitutional law and Part B deals with Administrative Law. Since historical events have shaped constitutional developments in the Sudan there are numerous references to historical sources. The monograph contains also the author's useful notes and questions for class discussion.

The monograph series also includes four works by Faisal Abdel Rahman Taha, *Documents and Materials on the International Boundaries of the Sudan*; *Studies on the Southern International Boundaries of the Sudan*; *Documents and Materials on the Nile Waters* and (forthcoming), *The Sudan in International Law: Cases and Materials*, (published between 1975 and 1977).

The International Boundaries of the Sudan deals with the boundaries between the Sudan and each of its neighbouring states: Ethiopia; Egypt; Libya; Chad; Central African Republic; Zaire; Uganda and Kenya. The Sudan boundaries with the last-mentioned three states are dealt with again in the *Southern International Boundaries of the Sudan*. These boundaries follow geographical, not ethnic, lines and this has raised problems, not least the question of controlling the transfrontier movements between the ethnic groups. The monograph on the Nile Waters deals with the various attempts by the Sudan and Egypt to utilize the Nile waters and it includes treaties and other documents and the Sudan's succession to the Nile Waters Agreement 1929. All three publications were made for the Sudan Government.

The Sudan in International Law, on the other hand, is intended for use by the university students and is now being bound by the University of Khartoum Press.

The earliest of the monographs is Cliff Thompson's *The Land Law of the Sudan: Cases and Materials*, (published in 1965). This work holds a special place not only for the bulk of material but also for its pioneering efforts. It contains legislation, decisions and important documents relating to land law of the Sudan, particularly customary law of Northern Province. The author's notes and questions are very useful for class discussion. It must now be read subject to the Unregistered Land Act 1970 (amended 1971) which deems all unregistered land to be registered in the name of the Government. The Act thus renders materials on settlement of land disputes out of date and largely historical. A further work on land law is El Mahdi, *Essays on Land Law of the Sudan* (undated but Library stamp dates it as 1975). This includes three essays on restriction of the right of ownership of land and its public control; the concept of co-ownership in the Sudan land law; and leases, tenancies and licences.

A final book of cases and materials is Tier, *Private International Law in the Sudan: Cases and Materials*. This monograph is written primarily for the University students. Each chapter is introduced by a short note and the questions which follow the extracts are intended to aid the student in case and statute analysis.

At present only two periodicals publish legal materials. They are the *Sudan Law Journal and Reports* and the *Sudan Notes and Records*. Details of the *Sudan Law Journal and Reports* have already been considered under the heading of Law Reports. The *Sudan Notes and Records* (S.N.R.), incorporating proceedings of the Sudan Philosophical Society, is a yearly periodical which at present covers the period 1918-1974 and publishes any material about the Sudan. Its printers have changed over the years. For example, the 1974 volume was printed in England by A. Brown & Sons Ltd., Hull and London, while the 1974 volume is now being printed by the Khartoum University Press. Subsequent volumes will, it is hoped, be published by Khartoum University Press. Annual subscription is 12 dollars per volume for subscribers outside the Sudan and Ls. 2,500 per volume for subscribers inside the Sudan.

Proposals for starting a Khartoum Law Review have long been mooted, and although the Review has not yet been started the consensus is that it will eventually come out. In particular the return of members of staff studying abroad will, it is hoped, reduce the significance of shortage of staff which has led the Faculty of Law to emphasize teaching at the expense of research.

Appendix I

I Law Books Published Since 1965

Abdel Gouad, Mohamed, Sharh Qanun Al-Murafa'at Al-Madani Al-Sudani, Matba-at Gama-at Al-Qahira, Cairo, 1968.

Abdel Rahim, Muddathir, Imperialism and Nationalism in the Sudan: A Study in Constitutional and Political Development 1899-1956, Clarendon Press, Oxford, 1969.

Awad, M. Mohy El Din, Qanun Al-Uqubat Al-Sudani Muallagan aliehi, Al-Matba'a Al-Alamiya, Cairo, 1970.

Awad, M. Mohy El Din, Qanun Al-Ijra'at Al-Jinaiya Al-Sudani, Muallagan aliehi, Al-Matba'a Al-Alamiya, Cairo, 1971.

Beshir, Al-Shafia Mohamed, Al-Qanun Al-Dusturi wa Al-Nizam Al-Siyasi Al-Sudani: Dirasa Mugarana Bil-Dasstur wa Al-Nizam Al-Misri, Munsha'a Al-Ma'arif: Alexandria, 1970.

Deng, Francis M. Modernization and Tradition: A Challenge for the Law Among the Dinka of the Sudan, Yale University Press, New Haven, 1966.

El Dhariir, El Siddiq M. El Amin, Nizam Al-Ahwal Al-Shaksiyah, Ma'had Buhut Al-Dirasat Al-Arabiya, 1968.

El Dhariir, El Siddiq M. El Amin, Al-Mirath fi Al-Sharia Al-Islamia, Matba'at Dar Al-Jihad, Cairo, 1969.

El Mahdi, Saeed Mohamed Ahmed, Al-Jarima wa Al-Uqubat fi Al-Sudan, Gism Al-Ta'lif, Khartoum University Press, Khartoum, 1971.

El Mahdi, Saeed Mohamed Ahmed, Sharh Qanun Tagyid Al-Ijarat Al-Sudani wa Ta'dilat, Dar Al-Talif wa Al-Tarjama wa Al-Nasara, University of Khartoum Press, Khartoum, 1974.

Musa, Ibrahim El Hag, Al-Tajriba Al-Dimuqratiya wa Tatawwur Nizam Al-Hukm fi Al-Sudan, Matba'at Al-Ahram Al-Tijariya, Cairo, 1970.

Mustafa, Zaki, Al Qanun Al-Madani Al Sudani, Tarikhu wa Kasaisu, Ma'had Buhut Al-Dirasat Al-Arabiya, 1968.

Mustafa, Zaki, The Common Law in the Sudan: An Account of the 'Justice, Equity and Good Conscience' Provision, Clarendon Press, Oxford, 1971.

Omer, Mohamed Abdel Khaliq, Qanun Al-Murafa'at Al-Misri wa Al-Sudani, Ma'had Buhut Al-Dirasat Al-Arabiya, 1976.

Omer, Mohamed El Sheikh, Al-Qanun Al-Madani Al-Sudani, Matabia Sajal Al-Arab, Cairo, 1972.

Omer, Mohamed El Sheikh, Qanun Taqyid Al-Ijarat, University of Khartoum Press, Khartoum, 1975.

Riad, Henry (translator), Ashar Al-Ahkam Al-Sudaniya Ashara Ahkam Nagal Al-Ahkam min Al Injeliziya ila Al-Arbiya, Dar Al-Tagafa, Beirut, 1967.

Riad, Henry, Mujke Tarikh Al-Sulta Al-Tashriy'a fi Al-Sudan, Dar Al-thagafa, Beirut, 1967.

Riad, Henry, Uyub Al-Rida fil-Qanun Al-Sudani, Al-Injelizi, Dar Al-Tagafa, Beirut, 1968.

Taha, Faisal Abdel Rahman, The Settlement of the Sudan-Ethiopia Boundary Dispute, Khartoum University Press, Khartoum, 1975 (Pamphlet).

Tonido E. and Hill, R. (ed.) The Opening of the Nile Baisin, C. Hurst & Co. (Publishers) Ltd., London, 1974.

Vasdev, Krishna (forthcoming), Law of Homicide in the Sudan, Butterworths, London, 1978.

Dagbir, Yousif A. Al-Usool Al-Arabiya Lil-Dirasat Al-Sudaniya, Matba'at Al-Najwan, Beirut, 1968.

El Mahdi, Saeed Mohd. Ahmed, Guide to Land Settlement and Registration in the Sudan, Khartoum University Press, 1971.

II Monographs Produced By The Faculty of Law, University of Khartoum Since 1956

El Mahdi, Saeed Mohamed Ahmed, Essays on the Land Law of the Sudan (?1975)

Kadof, Hunud Abia, A Preliminary Survey of Customary Law in Qala El Nahal and El Hawata Area, Kassala Province, Sudan; Customary Law Memorandum No. 1. (1975).

An Outline of Dinka Customary Law; Memorandum No. 2. (1977).

Salacuse, Jeswald W. The Constitutional and Administrative Law of the Sudan: Syllabus and Materials (1976).

Taha, Faisal Abdel Rahman, Documents and Materials on the International Boundaries of the Sudan (1975).

Studies on the Southern International Boundaries of the Sudan (1976).

Documents and Materials on the Nile Waters (1977).

The Sudan in International Law: Cases and Materials.

Thompson, Cliff F. The Land Law of the Sudan: Cases and Materials (1965) 3 vols.

Tier, Akolda M. Private International Law in the Sudan: Cases and Materials (1977).

FOOTNOTES

1. Surveys include:
 "Guttman, E., "A Survey of the Sudan Legal System" (1956) S.L.J.R. 6, esp. pp. 45-46.
 Atiyah, P.S., "Legal Education in the Sudan" (1958) J.S.P.T.L., p. 137.
 Thompson, C.F., "The Formative Era in the Law of the Sudan" (1963) S.L.J.R., p. 474.
 Twining, W.L., "Legal Studies in the University of Khartoum" (1962) 6 J.A.L., p. 145.
 Khalil, M.I., "A Plea for Shorter LL.B. Course in Khartoum" (1963) 7 J.A.L., p. 125.
 Khalil, M.I., "The Legal System of the Sudan" (1971) 20 I.C.L.Q., p. 624.
 Mustafa, Z., "Opting out of the Common Law: Recent Developments in the Legal System of the Sudan" (1973) J.A.L., p. 133.
 Mustafa, Z., "Some Thought About Legal Education in the Sudan" (1968) unpublished m.s. intended for publication in the proposed Khartoum Law Review.
2. The Constitution of 1973 makes the President both the Executive and Head of State and thus disposes with this additional procedure.
3. (1962) S.L.J.R. p. 263.
4. (1965) S.L.J.R. p. 169.
5. (1965) S.L.J.R. p. 382.
6. (1900-1931) 1 S.L.R. 473, pp. 472-3.
7. For the early literature on law reports in the Sudan see Guttman, E. "Law Reporting in the Sudan" (1957) 6 I.C.L.Q. p. 685; Twining, W.L. "Law Reporting in the Sudan" (1959) 3 J.A.L. p. 176.
8. Cited in Thompson, "The Formative Era in the Law of the Sudan", (1965) S.L.J.R., p. 474 at p. 482 n. 43.
9. The Judges' Meeting, March 7th to 13th, 1945, Minutes, Sudan Law Project Archives.
10. AC-APP-5-1944.
11. (1953-1954) Digest of Cases in the Court of Appeal and the High Court, p. 38, at p. 76, where it is reported in full.
12. (1941-1945) 3 S.L.R., p. 159.
13. According to one view the local courts alone handle about 55% of the decided cases in the Sudan: see El Nur "The Role of the Native Courts in the Administration of Justice in the Sudan", Sudan Notes and Records (1960), Vol. 41, p. 78. According to another view their work constitutes between 55% and 75%, see Thompson op. cit. The present position is probably different as since 1969 the local courts are gradually being phased out.
14. Twining, W.L. "Editorial and Editorial Note" (1959) S.L.J.R. 97 at p. 99.
15. S.9 C.J.O. 1929.
16. (1900-1931) 1 S.L.R. p. 91 at p.93.
17. (1953-54) Digest of Cases in the Court of Appeal and the High Court p. 19.
18. *ibid* p. 21.
19. (1960) S.L.J.R. p. 313.

CHAPTER 10

Legal Literature in the Sudan and the Administration of Justice

*by Michael Gaiger**

Introduction

It is not intended in this paper to give a general account of the existing state of legal literature in the Sudan as that has been done by Akolda Tier. My intention is to discuss the legal literature that is available to members of the judiciary and the problems created either by a lack of different kinds of suitable legal literature or a lack of legal material at the time it is needed.

In 1975 I was asked by the President of the Supreme Court of the Sudan to undertake a study of the Judiciary to see how it was working and to make recommendations on improvements that might be required. I spent a period of approximately six months interviewing not only judges, but also lawyers in government and private practice, police officers and administrators and also inspecting court facilities including libraries. I interviewed over 120 persons in all parts of the country. The members of the judiciary that I saw ranged from the President of the Supreme Court to lay magistrates and chiefs. My terms of reference, and hence my report to the President, covered a very wide field. In the time available it was not therefore possible to cover any particular aspect of the workings of the judicial system in great depth. However, in the report which is at present under study by a committee I did discuss the question of availability of written legal material to the legal profession and in particular the judiciary and point out some apparent problems arising from the lack of suitable materials. This paper uses material gathered for that report.

The Court System is Highly Centralized

The Supreme Court and Court of Appeal are in Khartoum and the Judiciary is controlled from there. Moves have been made to de-centralize the Court of Appeal, but by 1976 the only place outside Khartoum where there was a permanent division of the Court of Appeal was Wad Medani, which is easily accessible to Khartoum by the longest metalled road out of Khartoum of approximately 110 miles. The senior non-Mohammedan courts in the provinces are the province courts manned by province judges, under which come: resident magistrate courts; courts of magistrates, grades 1 to 3; Town Benches of lay magistrates; and customary courts of sheikhs and chiefs. The Province judges are responsible for administrative matters and are, in effect, the chief justices in their provincial areas.

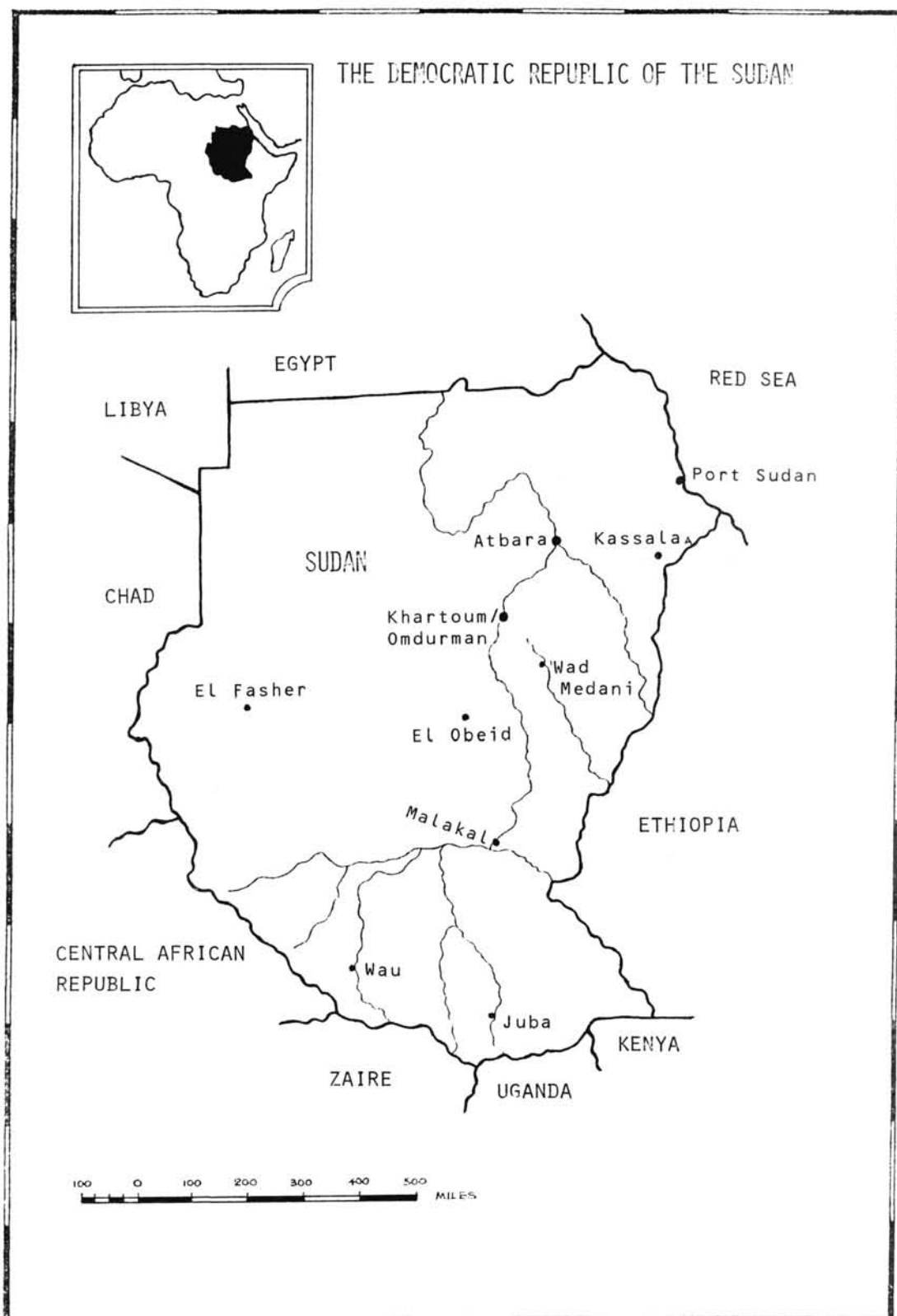
The Sharia court system runs parallel to the non-Muslim from the Supreme Court down. In the provinces, the province judge (personal) is the senior Sharia judge and a grade 3 judge the most junior, although in practice I doubt whether they have below grade 2. The Sharia courts, of course, only hear cases of Muslims relating to their personal matters and are governed by Islamic law.

The other courts hear all other cases both criminal and civil (including personal cases on non-Muslims) and this applies to Town Benches and customary courts as well. Although, one could say that the Town Benches hear mainly criminal cases and the customary courts mainly civil. Although I spoke to a number of Sharia judges, my main concern was with the other courts. This paper really concerns the non-Sharia courts. This does not mean that Sharia courts do not have their problems but, as their legal principles are revealed in the Koran and their writings are international, stemming from a world wide religion, the findings in this paper do not relate to them. This does not mean that they can be ignored. They cannot.

Physical Problems

By any standards, Sudan is a large country. It has a land area of approximately one million square miles. A large proportion of the northern area is desert inhabited, in part, by nomadic tribes. Travel throughout the country is by air, land (rail and road) and river and is often very difficult owing to weather conditions (sometimes seasonal), poor roads and the difficult terrain. Telephone, telegraphic and postal services are unreliable. For example, a cable warning of one's intended arrival by air Port Sudan from Khartoum may often not arrive, or will arrive well after one does oneself. Telephone services often break down making telephonic contact impossible.

* M.C.L. Gaiger, LLB., Solicitor.



It can therefore be appreciated that members of the judiciary, in common with other persons working in Sudan, have serious problems in travel and in communicating with colleagues and other persons for professional purposes. This is aggravated by the fact that members of the judiciary are, by reason of their work, scattered throughout Sudan's vast land. Again, as in most jurisdictions, the workload of the judiciary is increasing rapidly. For a number of reasons, I need not discuss in this article, the number of judges needed at the appropriate levels is not increasing fast enough to cope with the increasing quantity of cases.

As a result of the difficulties of travel and the increasing pressures of work the, judges, and in particular the middle level judges who bear a large brunt of day to day work, cannot meet colleagues off station to: discuss professional matters; developments in the law; have little or no time to chase scarce legal materials to assist them with their work; and similarly, have no time to ensure that primary legal materials are consistently made available by the central authorities in Khartoum.

Availability of Legal Material

Primary Sources

I propose to refer to three sources: legislation, case reports, and practice directions/manuals of procedure.

Legislation

As in many countries with a former British administration, statutes and subsidiary legislation are periodically printed in revised editions which are supplemented by individual prints of legislation; possibly collected in annual bindings, depending on the enthusiasm of the administration. The last complete revised edition of the Sudan was published during 1954/55 preparatory to independence, which was attained on 1st January 1956. As far as I can gather there was only one printing of the complete set. One volume was reprinted in a revised form, but the work does not appear to have been an authorized revision.

Most individual judges have neither the 1954/55 set, nor do they have access to it. Some courts have some volumes from the set. There are courts which either have not been issued any volumes from the set or have lost all they had. Individual judges have been obliged to borrow from one another where there are more than one judge per station. Many judges have to borrow volumes from government departments in order to carry out their work.

Not all the volumes of the 1954/55 edition are needed. Some volumes have been almost completely superseded by later legislation. After all, over twenty years have passed since the edition was published. Also, since independence in 1956 the pace of change and, inevitably, the amount of legislation has increased. Between 1956 and 1976 over 1300 statutes were passed. It can therefore be appreciated, that it is essential that judges have the supplements to the Official Gazette containing the statutes, or at least access to them, in order to satisfy themselves of the current position of the statute book.

It is rare to find a complete collection of laws. In an article in the 1965 Sudan Law Journal, Professor Cliff Thompson stated: "The rareness of a complete collection is indicated by the University of Khartoum's inability to accumulate one until 1966 after having spent a year of intensified effort to locate missing items".¹

Judges are certainly no better off than anyone else. It might be possible if one were to search carefully in the Supreme Court in Khartoum to find copies of all the laws passed since 1956, but outside Khartoum one is unlikely to find a complete set. An extremely small number of courts (not individual judges) had most of the supplements. I can only remember two courts I visited which were in that position. Most courts lacked a large number of supplements, particularly the older ones, and some courts had very few. Neither an annual "Noter-Up", nor annual list of legislation is published in either Arabic or English. From time to time individuals, on their own initiative, have made lists of legislation, but in January, 1976 there was no published comprehensive list of either legislation in force or of legislation enacted since the 1954/55 edition of the laws. As a general rule judges were therefore in a doubly difficult position. They had neither access to a complete set of the legislation of the Sudan, nor were they in a position to check and see which legislation they lacked.

The position has changed somewhat since I made my survey. A revision of the laws was started in 1974 but only two volumes (arranged chronologically) out of approximately eight had been published at the time I wrote this article.

The system of distribution of supplements is somewhat complicated. Consequently there are omissions and delays in distribution. One court I visited had not received supplements for 18 months. In other words, the judge was not less than 18 months behind with his legislation. The more fortunate courts received their supplements, but irregularly. Again there were delays of months before supplements arrived. For example, in one province court I visited in June 1975, the latest supplement they had received was for December 1974. Judges in other courts informed me that this was quite normal.

Another contributory factor to the delay in receipt of legislation by judges are delays in the printing of the laws. Laws are not usually printed as soon as they receive presidential assent. I was not able to go into the delays in publication of laws and work out, for example, the average delay in publication particularly those containing penalties. However, I was assured that there were delays and noted this from my own experience during my two years stay. One wonders how far the judiciary may be able to apply the principle of *ignorantia juris non excusat* in such a situation. This would appear to be of particular concern where unpublished laws create criminal offences with penalties.

Case Reports

From time to time collections of case reports have been made in Sudan. In March 1955 the Judiciary produced a digest entitled Cases in the Court of Appeal and High Court 1-1-53 to 30-6-54. A collection of civil case reports in two volumes (1900-1931 and 1932-1940) in the African Law Report Series has been published. A collection of criminal case reports has also been put together by the Law Faculty and printed in roneo form.

Annual case reports have been published in the Sudan Law Journal and Reports (SLJR) since 1956. It combines reports of cases and articles on legal matters in one annual volume. The 1968 volume, as an example, contained 48 case reports covering 163 pages, varying in length from less than half a page to twelve pages. The average report is two or three pages long. The volume also contained three articles covering a total of just under one hundred pages. Up to 1976, 16 issues of the SLJR had been published; the maximum number of reports being 93 in one issue and the minimum 13 in another. It is published by the judiciary, but articles are usually contributed by members of the Law Faculty in the University of Khartoum. The general view in Sudan is that what was a good publication has generally deteriorated over the last few years.

The reports concentrate on the Court of Appeal and the Supreme Court and are narrow in their subject matter. Judges complain that cases are frequently included in the reports that deal with points already covered in earlier reports. The proportion of criminal cases reported is much higher than that of civil cases and the majority of the former appear to be homicide cases. The selection thus has not improved since the late 50's when Professor Twining worked on the reports. Indeed, it was better then as High Court decisions were reported. Now province courts which appear to have a similar jurisdiction are rarely reported.

The reports in recent editions vary considerably in quality, format, and even in terminology. In some the facts are too brief and in some it is not easy to discover the *ratio decidendi*. What is of more concern, is that the SLJR is taking progressively longer to appear in print. In early 1976, the 1971 edition was the last in print and that contained only 13 reports. Again, as with legislation, there is no annual 'Noter-Up'. Judges and all other practising lawyers are obliged to search through all of the issues of the SLJR for all the cases on a specific point.

Practice Directions/Manuals of Procedure

The head of the judiciary does not issue practice directions, as such. For many years he has issued what are called court circulars. They appear to take two forms; there are those that appear to elucidate problems that arise in practice, and there are others that are in the form of directions.

There is some criticism of the circulars as it is not always clear as to what they are meant to be. Some judges rely on them, on the basis that if they state a view on a legal matter, that will be the view supported in the Supreme Court in cases that go there on appeal. Other judges are wary of what might be taken as an attempt to direct them in their work. Whatever the differences of opinion are on the circulars, generally some of them are followed by the majority of the judges. These usually relate to matters of procedure. For example, there is an important circular on how to try cases arising from "tribal fights" (where there are many persons in two or more groups charged with multiple offences, from homicide on down the scale).

The circulars have at times been bound together in collections for easy reference. Even in their bound form, they could not be classed as practice handbooks or procedure

manuals. They cover a variety of matters which are not necessarily related and do not give a comprehensive coverage of court procedure and practice. Most judges agree that the circulars do have a value, or a potential value as practice directions, but they are hard to come by and many are out of date and need revision.

Secondary Sources

I propose to refer to; journals and other outlets through which criticism, comment and research findings about Sudanese Law can be communicated; books covering Sudanese legal subjects; and foreign legal publications.

The Sudan Law Journal and Reports is the only regularly published Sudanese journal that provides a forum for articles on legal matters. I understand that the editor has difficulty in getting enough material for printing. This may be partly due to the deteriorating standards of the SLJR. However, the journal does provide a means through which those persons who have something to say can contribute. Over the years some excellent articles have appeared and they are read.

It is a pity that because of the delays in publication an article cannot be very topical. Comment on recent cases and legislation is often valuable. I gathered that there is a real desire by judges and practising lawyers in the Sudan for constructive comments on some of the legislation appearing from time to time. For example, when I was there a number of codifying Acts were enacted; published comment on them would have been useful to many of the judges. There was a time when the SLJR was issued to individual judges for free. This is no longer the case, although a number of copies do go to some courts. The free copies are insufficient in number to be distributed to the judges away from the province courts. It is true that judges may purchase copies of the journal, but not all judges, particularly the more junior, can necessarily afford them. There is now a set of 16 volumes some of which are out of print, but even then a young judge has to find a tidy sum in order to buy all that are in print.

Books Covering Sudanese Legal Subjects

There is no doubt that there is a lack of Sudanese books on legal subjects that can be used by practitioners. In 1976 the only books I came across were a treatise on the common law by Dr. Zaki Mustafa published by the Oxford University Press; a book on land law by Dr. Saeed el Mahdi, which, I believe, was published by the Khartoum University Press; and Gledhill's Penal Codes of Northern Nigeria and Sudan. Professor Cliff Thompson had produced an important three volume roneoed set of collected materials on the customary law relating to land, but it is doubtful whether a complete set now can be found outside the University of Khartoum.

Materials relevant to legal practice have been collected by persons in the Law Faculty and are available elsewhere. One valuable source of material is the Central Records Office, the repository of the national archives. It holds a great quantity of relevant matter, including reports by District Commissioners and the like. These, I am sure, would be of value to legal practice particularly in the area of land and tribal custom if they could be sifted through and collated by, or under the supervision of, experienced persons.

In short, there is a serious shortage of books by Sudanese writers and others about Sudanese law and practice. There is a certain amount of collected, but unpublished, material available and there is other uncollated material waiting to be put in a useful form.

Foreign Publications

As we have noted above, Sudan has a common law heritage. No one expects Sudan to slavishly follow what happens in the law courts of England, India or Egypt, to name three countries that do influence its legal thinking. However, there is a need for Sudan to seek guidance from other jurisdictions, just as all common law countries do. There is an interesting article on the subject in the Sudan Law Journal by Sayed Galal Ali Lutfi, in which he maintains that "English law will no doubt continue as the main guidance for our future development".² The judge in Sudan who disputes the need to study foreign case law and text books is a rare person indeed. I did not meet one.

Foreign law books kept for the use of judges are found mainly in the Judiciary library in Khartoum. If one takes four province courts as a sample, by air Juba is 751 miles from Khartoum; Wau via Malakal 707 miles; El Fasher via El Obeid 561 miles; and Port Sudan 564 miles. Taking into account the not overly reliable travel and postal communications, one can safely say that the judiciary library is not readily available to the bulk of judges outside the three towns (Khartoum, Khartoum North and Omdurman).³

Apart from this, the library is required to be improved. It is poorly stocked in some sections and overstocked in others. For example, it is, in my opinion poor in mercantile law, constitutional law, damages and forensic books and law reports other than from the United Kingdom. On the other hand, it is over-endowed with law journals from obscure sources and overlapping series of law reports from Britain. The contents of the library are not catalogued or classified. One cannot find what one wants without a physical search. They do not have foreign law reports. One province court had three odd volumes of the All England Law Reports. My guess was that some former judge there had borrowed them from Khartoum and had not returned them. Most courts have only one or two foreign books that are reasonably up to date. Some might have a set of Halsbury's Laws of England (3rd Edition) but without an up-to-date supplement. Some courts had no up-to-date, or nearly up-to-date, books of any kind. These were usually the courts that were also poorly equipped with Sudanese sources.

Individual judges often have small personal libraries, but many of the books they have were purchased as students and naturally have become out of date. I observed that practising advocates, on the other hand, usually had their own small libraries of reasonably up-to-date books. Indeed, the average competent lawyer had a better library than the best judicial library I saw in the provinces. The best province library I saw had about sixty books, of which perhaps a half dozen were not old editions and it was in the same town as the best advocate's library I saw. The advocate had several hundred books and was keeping up with new editions.

Effects of Non-Availability of Legal Materials

I do not consider it possible to quantify the effects, good or ill, of the non-availability of legal material to the Sudan Judiciary. I have no doubt that some persons might argue that good comes from lack of some material. Maybe some judges are more pragmatic; rely more on Sudanese customs; dispense swifter justice and so on, because they are not tied too much to their "books". On the other hand, one wonders how many persons may have received illegal prison sentences, or been wrongly convicted for crimes that have been removed from the statute book? How many have been convicted on inadmissible evidence?

What I can do is briefly give the general feeling of the judiciary in relation to each area where there is either a lack of needed material, or where judges lack existing material due to delays or failure of the system to make the materials available. I can also show what appears, to me, a general pattern that is emerging from reported cases and which, in my view, appears to show that Sudanese jurisprudence is being effectively hindered in its development by the shortage of basic legal materials.

Lack of Copies of Legislation

The most obvious result of judges lacking up-to-date copies of legislation is that cases have to be adjourned while the relevant legislation is being sought. I was told that this has happened not infrequently. In 1966, a Sudan case received headlines in the international press presumably because of the efficiency of customs officials in arresting a man on an international flight passing through Khartoum with a quantity of gold secreted in his baggage. When the case came up for hearing, the magistrate was obliged to adjourn it while the relevant exchange control legislation under which the man was being charged was sought. I was informed of another case which to the reader would appear apocryphal, but my informant was reliable. In that case, a junior judge made an order which was set aside by a senior judge on the grounds that the order conflicted with legislation amending the Act under which it was made. The second judge's decision was upset by the Court of Appeal as his decision was contrary to yet later legislation.

Province judges and resident magistrates complain that there are too many appeals to them which could have been avoided if the courts, at first instance, knew their law. No doubt there will always be some cases where ignorance of the law does not necessarily arise from lack of copies of relevant legislation, but in Sudan in 1976 this must have been the main reason. I was told, although I did not see records of actual cases, that some people had been fined or imprisoned under repealed legislation. Presumably their cases would have involved comparatively minor infringements of the law with light sentences, but if this has happened it does highlight the potential and actual dangers of lack of current legislative material in the judiciary.

Lack of Sudan Case Reports and Sudanese Secondary Sources

I find it difficult to separate these headings when discussing the effect of their scarcity on the work of the judiciary. It appears to me that the lack of Sudanese law reports has in particular, been a cause of (or has contributed along with legal training

and communication problems and other factors) to a lack of consistency in judicial decisions, particularly in matters such as statutory interpretation and sentencing by the judiciary throughout the country; and an increasing dependence on foreign text book writers by the judges.

One appreciates that lack of consistency in sentencing is a problem everywhere. However, I do consider the problem is aggravated in the Sudan by the lack of up-to-date case reports. It would seem that a disturbing situation is evolving where the development of a truly Sudanese common law and indeed jurisprudence is becoming more a vain hope than a practical reality as time goes on. Apart from a lawyer's hope that Sudan will make its own unique contribution to what Professor G.V.V. Nicholls called, "...one of the great collective achievements of man's intellect and spirit",⁴ there is also the worry that the quality of justice must suffer.

I mentioned above that in my view, a general pattern was emerging from reported Sudanese cases which I consider shows that Sudanese jurisprudence is being hindered in its development by the shortage of basic materials. The lack of Sudanese authorities has been evident for some years. In 1959 Professor Twining who was then at the Faculty of Law, University of Khartoum, was in a position to state:

"Undoubtedly the present unsatisfactory position of law reporting is holding up legal development in the Sudan. For instance in the 33 decisions reported in 1956 SLJR 57 foreign cases were cited, 56 English, 1 American and all were treated as authoritative. Yet only 4 Sudanese decisions were cited and one of those was overruled. In the 1957 SLJR 28 cases will be reported. In these 41 foreign cases were cited, all English, 2 of which were not followed whereas 7 Sudanese decisions were cited one thrice and one of these was distinguished. It is also significant that secondary sources especially English text books are still frequently referred to in judgments. Thus secondary sources, all foreign are cited in the 1956 volume for 11 and in the 1957 volume for 17 propositions of law.... Furthermore the lack of published reports encourages decisions per incuriam and 'pocket pistol law'. A collection might be made by appeal to advocates and ex-judges - beyond the Law Faculty - ways round problems are being considered but in the face of a long line of precedents it would be unwise to express any further pious hopes."⁵

What Professor Twining did not mention is that text books are often quoted in judgments uncritically as if they are authorities on the points of law to which the quotes relate. It is common practice to refer to a proposition of law and then to say "see Russell on Crime page so and so" or "Gour's Penal Law page so and so". It also is not uncommon to see "the authority for this is Ratanlal page so and so".

I perused the reports over a number of years and the following table emerged:

Year	No. of Cases Reported	Sudanese Cases Cited	Foreign Cases Cited	Text Books Cited
1900/1931	137	19	88	2
1932/1940	129	5	54	7
1956	33	4	56	8
1957	28	9	41	14
1958	27	4	70	13
1959	34	3	26	14
1960	79	26	52	29
1961	76	17	32	44
1962	93	66	52	75
1963	87	37	34	38
1964	62	21	40	19
1965	51	19	37	59
1966	64	44	28	45
1967	81	43	32	39
1968	46	41	27	49
1969	60	38	37	53
1970	46	17	21	41
1971	13	9	16	24

It will be noted that my figures for 1956 and 1957 are slightly different to Professor Twining's, but not so different as to be significant. The table shows a gradual increase in the number of Sudanese cases cited over the years, only to see them decrease in number progressively from 1968. On the other hand, foreign cases cited

tended to decrease in relation to Sudanese cases, unfortunately to increase again in recent years so that in 1971 foreign cases cited were nearly double the Sudanese cases at 16 to 9. Again, the position with regard to citation of text books is serious, particularly since 1968. In 1971 the text books cited at 24 to 9 were nearly three times the number of Sudanese cases cited and at 24 to 13 nearly 2 books cited per case reported. If this trend continues with regard to text books there is, in my view, a danger that Sudanese jurisprudence will be shaped more and more by the authors or editors of foreign text books like Ratanlal, Winfield on Tort and the like.

I discussed the figures in the table with many of the judges and the overall reaction was that text books tend to be quoted because original law reports, either Sudanese, English or Indian, are not as a rule available and so secondary sources, i.e. text books, albeit often old editions, are resorted to by the judges. They also maintained that foreign cases often have to be quoted because there is no available Sudan report. In my view the position is very serious indeed. If nothing is done to ensure that sufficient Sudan cases are reported and made available within a reasonably short time, judges will either resort more and more to foreign sources, particularly text books, or make their own individual law creating a very uncertain situation and as Allen put it bringing "the law into discredit".

Again as I see it, the smaller the number of Sudanese authorities there are to refer to the more foreign content there is likely to be in the Sudanese cases that do get reported. The legal spectrum will get narrower and narrower. It is a vicious circle.

Lack of Foreign Legal Publications

Many of the judges and other lawyers stressed the importance, as they saw it, of access to material on English and Indian law. One has to accept that the Sudanese common law has drawn largely on Britain and India for over seventy years. The Sudan rules of Civil and Criminal Procedure are inherited from the Indian Codes. Partnership law and bankruptcy law, as but two examples, come from England. It is therefore not unreasonable for the judges to want access to works like Mulla's Code of Civil Procedure and Sohoni Code of Criminal Procedure, Lindley on Partnership and Williams on Bankruptcy.

Likewise, as the doctrine of precedent has been accepted with the common law, although ideally precedents should be Sudanese, the judges look to English and Indian and, to a lesser extent, other common law reports for guidance when Sudanese precedents are either small in quantity or do not exist. Again, they must keep abreast of developments abroad in the fields in which they work whether or not those developments will be followed in the Sudan. The judges have a need for legal material even though foreign, just as a potter needs his clay. The hope is that they can mould the material available to them and progressively create something that can be seen as an indigenous jurisprudence.

The position now is that the majority of the young newly appointed judges, having not long left a university reasonably well provided with what Sudanese material there is and a comparative wealth of foreign material, find themselves starved of material of all kinds. Whatever their university background they have been trained to look for authority somewhere, be it in a code and commentaries or in law reports. They may not find Sudanese authorities and they normally cannot find the English or Indian reports they also need. If they have no text books available, they do the best they can. If they have books at all, they are often either old books or books they own and with the natural result being a habit of relying too much upon the few books they possess. My conclusion in seeing this happening was that the lack of access to a good selection of foreign materials, particularly law reports, perhaps paradoxically contributes to the stifling of a healthy growth of Sudanese jurisprudence. The judges see this themselves. It was clear from their evident concern over the scarcity of foreign materials that they felt they were missing the stimulus to be obtained from being able to use a diversity of materials to assist them in the gradual building up of a Sudanese common law.

The Needs of the Sudan Judiciary

The Judges' View

The majority of the judges, particularly at the lower levels, think in terms of what they need to get them through a working day. Some are overworked and many work under pressure. Therefore they cannot cope with more than the basic material needed to enable them to avoid errors through ignorance and to give reasonably well-informed judgments.

It was noticeable that as a general rule the judges outside Khartoum expressed concern over lack of legislative material, the SLJR and books on procedure and basic principles in matters of tort, contract, damages and evidence. Some in Khartoum, nearer the higher realm of the judiciary, expressed similar concern but were also interested in books on constitutional law, jurisprudence, sociology, political science and the learned journals.

An Outsider's View

My impression was that there is a crisis situation in the Sudan judiciary in relation to the non-availability of legal materials and that urgent short term measures need to be taken to provide as many judges as possible with convenient access to:

- a. current statutes;
- b. up to date case reports of some kind;
- c. some sort of manual and procedure including possibly practice directions;
- d. a small selection of foreign text books and source books.

I will deal later at a little more length with the items I have mentioned. In my view the judiciary's short term needs must be met before one can think in terms of what more sophisticated long term needs they may have.

What Is Being Done

Those responsible for the judiciary in the Sudan are aware of and worried about the problems outlined in this paper. The survey referred to in the Introduction was arranged because of the President of the Supreme Court's personal concern about a number of matters including a lack of accessible legal literature. No official paper has yet been published concerning the report, its recommendations and their implementation and so such measures as the judiciary intends to take to alleviate the present situation are not yet known.

The difficulties with regard to the publication and distribution of the Legal Supplements are not altogether in the hands of the judiciary, nor is the judiciary responsible for publication of the revised edition of the laws. Apart from bringing personal pressure to bear, the President of the Supreme Court (now the Chief Justice) is thus not able to take direct action to make improvements.

The publication of the Sudan Law Journal and Reports is under the control of the judiciary. In 1975 and 1976 moves were being made to improve the journal and to catch up with the backlog. However, if facilities and financial and other resources are not improved I cannot see that improvements will come quickly. Indeed there is a danger that the SLJR will get further behind schedule with no improvement in quality.

What Should Be Done

There is a need to investigate the methods of publication and distribution of the legal supplements in order to find why they take so long to get to the courts using them. Hopefully this would show why, for example, it takes so long for a law to come off the printing press. It would show whether it is really necessary, as happens now, for supplements to go from the printer to the Attorney General, from the Attorney General to the Supreme Court and from the Supreme Court to individual courts and judges in the provinces. Again, it should be possible to find why all the supplements do not get delivered. Are they misdirected or not even sent? These matters are obvious matters for investigation. The results of such an investigation will point the way to improvements which will require the joint co-operation of the Government Printer, the Attorney General and the Chief Justice.

It is stating the obvious to say something needs to be done to speed up publication of the SLJR. The report makes detailed recommendations about this and they cannot be discussed here. What I can say is that there is a need to get reports quickly to the judges.

Occasionally copies of important judgments are sent in roneoed form to some judges but this is not sufficient. There is a need for the judges to have monthly or quarterly collections of reports, albeit if only in digest form and roneoed and stapled together. Again, one needs to look at the SLJR and see whether it can be produced more cheaply and quickly and in another form if this will speed up publication. Ways of ensuring that it is made available to the largest possible number of judges must also be investigated.

The general attitude in the judiciary to the suggestion that there should be a procedure manual is one of enthusiasm, but there are some judges who feel that judges would depend too much on a manual. There is no doubt that there is a risk that this would happen with some judges: the advantage gained from producing a manual, which would hopefully encourage a uniform approach to sentencing and interpretation and would refer to and be a focus for Sudanese case law rather than foreign, would far outweigh the risk. Such a handbook or manual could be available to practitioners also. They would certainly buy it as they have no other comparable publication to which they can refer. It should contain a fairly wide range of subjects but not be so ambitious that it would never be printed. One could see in it such matters as civil and criminal procedure, damages and sentencing, evidence and interpretation. In addition it could include practice directions.

I would add that certain foreign manual type books like Odgers' Principles of Pleading and Practice in Civil Actions and Archbold's Pleading Evidence and Practice in Criminal Cases are already used in the Sudan when they can be obtained. The use of these is not necessarily bad but it would appear appropriate for them to be used only when a home-produced manual cannot help. The day to day practice and procedure in the courts should be much more susceptible to fairly rapid change than other aspects of the imported legal system.

Foreign legal material is becoming so expensive that the judiciary has some difficulty in keeping up with paying for periodicals, replacement volumes and annual supplements before it finds the money for such new works as it may need. The time has come for the judiciary to be ruthlessly selective in its purchasing policies in order that it provide within its limited budget for as wide a number of judges as possible. It is not practical, for example, to have a subscription to all the law reporting services of England or India or to more than a few learned journals. Even when the budget is tight it is usually possible to buy somewhere near the working requirement provided selection procedures are strict and are adhered to.

Putting Legal Literature in Context

It is impossible to consider legal literature in relation to the Sudan judiciary without considering other matters, some of which I have already mentioned. As Professor Twining has said: "Thus as with legal education, so with legal literature, serious analysis quickly pushes the enquirer into studying the legal profession itself".⁶

In Sudan's case, and I presume elsewhere, one has to go beyond the legal profession itself when studying the problems related to legal literature. The sheer size of Sudan combined with the scattered locations of courts and the poor communications all present difficulties. First, more copies of relevant material are needed than perhaps might appear at first necessary. Second, getting the material to its destination and getting it there quickly is difficult. The Sudan judiciary's methods of administration and its structure are also relevant. If more modern methods of administration are devised and if there are changes in the structure of the judiciary this would improve the chances of providing a uniform access to legal materials.

Then there is selection and training of judges. In Sudan persons are eligible for appointment to the judiciary if they have a University of Khartoum law degree or a degree from the University of Cairo, Khartoum branch. The former is similar in content and standard to degrees awarded in other common law countries. Indeed the university used to have an arrangement that students took the London LLB before their own degree was introduced and now they have external examiners from Britain. The Cairo degree is the degree of a Civil Law country with some Sudanese material but has no substantive common law content.

Potential judges in the Sudan are selected in much the same way as civil servants. They apply and provided there are vacancies, which there always are in the judiciary, most applicants are accepted. There is not at present any weeding out procedure after appointment, during training for example. It can be appreciated that legal material must therefore be in a form that can be readily used by judges with different levels of ability. One can envisage that there will be different approaches to the use of legal materials by graduates from the two legal systems. Consequently the way judges are trained may have an extremely important effect on how they use available legal materials or whether they use them at all.

There was no established training scheme in January 1976 although training was under review and during 1975 a course of lectures on matters of practice was undergone by new recruits. The course included matters like procedure, where to look for the law, interpretation and the doctrine of precedent.

The matter of training bears some relevance to the question of whether a procedure manual or handbook could be usefully produced. It is quite feasible for a manual to be produced for training purposes which continues as a useful practitioners aid for successful students. See the report by Eli Jarmal on a course held in New Jersey in 1964 where the students found the loose leaf material produced by their instructors "invaluable" in performing their daily duties in practice.⁷

It is also necessary to take university teaching methods into account. I have no personal knowledge of the methods of teaching in either the University of Khartoum or the University of Cairo. However, a significant number of judges put partial blame on the judges' addiction to foreign text books on the teaching methods at the University of Khartoum from which most judges graduated. They considered that the way that they were taught placed an undue emphasis on certain text books and not enough on case law.

Then there are available facilities. For example courts often lack serviceable typewriters if not both in English and Arabic, certainly in one language. Judgments are usually handwritten and there is only one copy. This causes problems when there is an appeal, particularly to the Court of Appeal or Supreme Court where not less than three judges sit.

Verbatim law reporting is unknown. Law reports are based on what can be found, either the available copy of the judgment or the court files, which may not be as helpful as they should be because of the lack of copying facilities. Judges record the evidence of witnesses in handwriting whether a trial lasts one day or one hundred and there is one witness or there are fifty.

The national language of Sudan is Arabic but the working language in Southern Sudan is English. The language of most common law jurisdictions is English. Text books and law reports are seldom if ever translated into Arabic. Thus, one can have proceedings conducted in Arabic with some cases cited in English. Incidentally, English is the medium of teaching in the law faculty of the University of Khartoum and Arabic in the University of Cairo. Not all judges are fluent in English, particularly some of those graduating from the University of Cairo, although most are.

As I have stated above, there is a system of Sharia courts to hear personal cases of Muslims. There are also Town Benches and customary courts. The Town Benches in particular have expressed an urgent need for copies of legislation and for some sort of procedural handbook. Their needs are much simpler than those of qualified judges. Some Town Bench Judges are semi-literate and some are illiterate. They might even need summarized versions of legislation which can be assimilated easily when read out by colleagues. Likewise, the few cases they might have to know about may well have to be provided in digest form.

The Town Bench members, although laymen, have no qualified lawyer to guide them. Again, their training is relevant when considering what legal literature would be suitable for them. There is in fact no training scheme for lay magistrates although those resident magistrates who have time do try to show Town Benches where they go wrong. There is a danger of producing material that is too sophisticated for them. They need very simple material reminding them of key legislation and key sections in it, of a few important cases and giving them a simple guide to procedure. The importance of these people cannot be overlooked. There are 1,000 12 member panels i.e. 12,000 magistrates. They hear the bulk of the Sudan cases, at a guess about 70%. For example, in the year ending July 1973 they heard 191, 632 cases, 104,182 criminal and 87,450 civil.

What Help Is Needed And Can Be Given

There is no doubt that Sudan cannot rely on private enterprise of any kind to supply its legal literature needs. There is also no doubt that something has to be done urgently to provide the judiciary with basic requirements.

The speeding up of printing of legislation is outside the control of the judiciary but within government control. This is possibly an area where outside help could be given, both in helping with re-organization of the printery and in making available extra equipment that might be needed for printing the laws more expeditiously.

The SLJR could well be put back on its feet with outside help. Advice on re-organization and help with on the job training of staff and the provision of an inexpensive offset litho printer might well make all the difference. I would emphasize that on the job training is needed. Conditions vary so much in developing countries from those of the countries that can provide training that it is of more value for experts to work in the country with the persons being trained so that work methods can

be adapted to suit local conditions. It is little use having persons trained abroad, in comparatively ideal conditions, only to return and become disillusioned because they are unable to practise what they have been taught.

Help, not so much with the content but with the putting together of a handbook, is needed and can be given. Expertise in publishing of technical manuals is not always to be found in developing countries where the scope is so small. Again assistance with the provision of foreign books sometimes in multiple copies should and can be given.

General Comment and Some Suggestions

The great majority of the members of the Sudan judiciary, which is wholly Sudanese, are men of integrity working under difficult conditions. They make the most of the material they have but have no control over either the legislative process or the Treasury. Thus it is not easy for them to get what they may consider to be necessary changes in the judicial structure nor to persuade the authorities of the importance of their need for finance to improve the availability of legal material.

They are not unique in this respect. Indeed it would seem that there is need for the Commonwealth which encompasses the majority of common law jurisdictions to set up an agency to do a number of things. One of its objects should be education. It should enlighten lawyers to the dangers of their often complacent and wholesale acceptance of foreign legal systems and of apathetic attitudes which prevent the development of their own indigenous legal systems. It is not just enough to provide adequate basic legal literature. One has to ensure it is appreciated and used when it is available. Lawyers often will have to be taught to use their own indigenous materials.

Secondly, it would need to educate governments and not only those of the newly developing countries. There are a number of important statements in Legal Education in a Changing World - but I would like to quote two that are related:

"The law and the legal system of a country can be a major resource for development. There are countries that may, of course, adopt techniques of development that rely only marginally on law",

and

"In the majority of the countries within our review law has been chosen as an instrument of change and development. In such countries a heavy burden is placed on the legal system".⁸

A good many governments do not appreciate that support given in the field of law can make a vital contribution to development, I have had government aid donors inform me that law has a "low priority" and also "we do not give aid for purchase of multiple copies of books". If something can be done to make known the place law has in national development it may be hoped that more aid would be channelled into projects for the development of law and sound legal institutions.

As far as the Sudan is concerned, legal literature can only be financed from Government funds or funds donated from outside. The impetus for producing Sudanese legal literature must come from public institutions like the University, the Judiciary, the Attorney General's Chambers and the Bar Association.

There is also no doubt that help is needed from aid agencies in the provision of expertise in matters like law reporting, the publication of law reports as well as other legal material. The country is not at a stage of development where the techniques of sophisticated publishing are readily available. There is not a large enough market to support persons who could acquire the required expertise.

The East African Literature Bureau provides a model for the kind of organization that could possibly, under the sponsorship of the agency, be set up on a regional or Commonwealth scale to publish essential literature with a limited market. Whether any existing Commonwealth institutions could assist in the setting up and operation of publishing ventures of that kind, I do not know. However, such ventures are what I presume most of us who are concerned about legal literature and other professional and technical material consider what is needed.

I mentioned that one has to go beyond the legal profession when studying the problems related to legal literature. In seeking to make provision for the production of suitable legal literature one may need also to look beyond the legal world. It would possibly be of advantage for the resources of a number of disciplines to be combined possibly in any agency of the kind I have suggested above, to set up publishing

Bureaus. They are likely to have many similar problems and would benefit from the economies of a joint approach.

The agency would also need to help common law countries like Sudan by: carrying out studies of their facilities, materials and existing techniques of production and distribution of materials; as well as advising and assisting them in obtaining technical help from the right quarters. I would emphasize that part of the education of aid donors would be to show the ways in which they can help and those they can hinder. Help in the provision of legal literature is not, for example, necessarily given by the donating of unasked for and out of date legal tomes: something that still happens. If the agency could bring common law countries together to assist each other in solving their legal literature problems something constructive will surely be achieved to the general benefit of common law.

Before I finish I would raise a number of questions that I have not mentioned earlier, but which I consider may be relevant when considering legal literature and ways of improving its quality and availability.

First, would it be useful to look into the two way benefits that may be obtained from a more universal adoption of exchange of legal materials between legal institutions? This presupposes that the materials are of a reasonable standard and that the exchange is equitable. In these days of hard currency shortages an arrangement where material can be obtained without having to find currency should be welcome. Also the arrangement encourages a healthy exchange of ideas.

Would the production of reasonable law reports be achieved through the use of law students as reporters? This is a matter of seeing whether it is desirable for legal education or training to have a law reporting element and whether it is practical.

What has to be done to ensure the editorial freedom of those who produce law reports if they are directly employed by governments or the judiciary? I refer to the freedom to select cases for publication and, where necessary, to make comments in editorial notes.

Have any countries successfully used a postal or air freight library service for judges and practitioners?

Have any countries with geographical problems like Sudan provided a service of copying extracts from text books and law report volumes for use by judges and practitioners in the provinces? What have they done about copyright problems?

Have methods of recording proceedings with tape recorders and the like been tried for law reporting services in developing countries and have they been successful?

Have microfilm and microfiche been used successfully anywhere for the recording of judgments and making them available for reference purposes?

Have computers any significant role to play in the storage of legal material in underdeveloped and unsophisticated countries?

It is possible that information on the matters referred to in these questions could well be beneficially shared through the co-operation of all common law countries possibly under the auspices of an agency of the kind referred to above.

Summary and Concluding Comment

1. Sudan has a common law system but cases are also decided in accordance with Sharia law and custom.
2. There are serious problems relating to the production of and supply of legal literature to the judiciary which appear to adversely affect the growth of Sudanese Jurisprudence.
3. The problems do not only relate directly to the supply of the literature itself but also (inter alia): to the communications system of the Sudan; the facilities of the judiciary; the selection of judges; their education and training; and the structure of the judiciary.
4. The judiciary is aware of its problems and is trying to make improvements. However it needs financial assistance and foreign expertise. Private enterprise cannot assist.

5. On a general note it would seem that there is a need for an agency to be set up which can help countries like Sudan, with research and advice and possibly also by sponsoring regional literature bureaus which may serve other disciplines also.
6. Whatever steps are taken at an international level to assure the provision of adequate legal material to the professions in common law countries they must be taken soon.
7. One cannot over-emphasize the urgency of the problem in developing countries like Sudan. The matter is one for close co-operation between all common law countries.

FOOTNOTES

1. (1965) S.L.J.R. 474.
2. "The Future of the English Law in the Sudan" (1967) S.L.J.R. 219.
3. See the map attached to this paper which gives an idea of the distances involved.
4. "Migration of the common law" - 8" Canada 76 L.Q.R. 74 (1960).
5. (1959) J.A.L. 176, at 177.
6. The Concept of a National Legal Literature, Chapter 2 of this book.
7. Arden House II, Toward Excellence in Continuing Legal Education (1964).
8. Legal Education in a Changing World: Report of the Committee on Education in Developing Countries, International Legal Center, New York 1975. p. 37.

CHAPTER 11

WORKING PAPER ON CANADIAN LEGAL PUBLISHING FOR THE CONFERENCE ON

LEGAL LITERATURE IN SMALL JURISDICTIONS

By Paul Murphy and Balfour Halevy***

One suspects that at this Conference Canada is better off than many of the other jurisdictions represented but for all that we still have serious problems. We are a Federal System and the distribution of lawyers and thus of the market for legal literatures is very uneven. Thus our two Territories have 19 and 35 lawyers and our smallest province Prince Edward Island has approximately 70 lawyers. On the other hand Ontario has just over 11,500 lawyers on its Law Society rolls. (Appendix 1). The smaller jurisdictions have no local treatises even where their law differs in substantial respects from the other Canadian jurisdictions. Quebec has its own peculiar problem because of its different legal history and also of a different language than the rest of Canada.¹

Canadian legal publishing is mainly controlled by foreign companies² but the writers have no evidence that now this has any substantial influence on what is and is not published. We suspect this may have had influence in the past where there may have been a tendency to prefer to sell home country products than to encourage indigenous authors.

When one of the writers came to Canada 11 years ago there was no current Canadian treatise on contracts, torts, evidence, procedure or even a book on Canadian constitutional law. These horrendous gaps are now filled but the last only in 1977. Traditionally lawyers and legal academics relied on British legal literature and in more recent years on U.S. material.

The explanation for the above is not clear to the writers but some partial explanation may be found in the fact that as late as 1956 there were only 66 full time law teachers in all of Canada.³ For some reason there has not been a history of legal writing by the Canadian Bar; it is interesting to note that in Australia an entirely different tradition prevails.⁴

Recent work being carried out by a Committee of the Canadian Law Information Council suggests that there are still many areas of law where there are no current Canadian works.⁵ For instance Canada lacks an adequate Canadian legal dictionary in either French or English. In the Common Law provinces where there are treatises they tend to be heavily Ontario oriented because of the size of the Ontario law-book market.

There is no overall plan for soliciting works in areas where nothing is being written; however there is some hope that within the next year or two the work of the Canadian Law Information Council might lead in this direction, similar to the Scottish scheme or a variation thereof.

Periodical literature is adequate but again it should be noted that the Territories and two provinces Prince Edward Island and Newfoundland have no legal periodicals.

Canada is strong in its bibliographical control of the literature. There is a general current bibliography of both books and articles: Boulton, Reynald Bibliography of Canadian Law/Bibliographie du Droit Canadien, Ottawa, Canadian Law Information Council, 1977.

We also have an excellent bibliography directed to non-lawyers: Dykstra, Gail S. Bibliography of Canadian Legal Materials/Bibliographie de Documentation Juridique Canadienne, Toronto, Butterworths, 1977.

Notes on General Legal Tools and the Small Jurisdictions of Canada

Viewed in simple terms of subject accessibility and/or indexing, timeliness of publication and availability of a published item (which is cited elsewhere), the problems of bibliographic control of legal literature in the small jurisdictions of Canada centre around approaches to the primary literature: (1) statutes, (2) regulations, administrative directives and decisions, and (3) court reports.

* Law Librarian and Associate Professor, University of Windsor,

Faculty of Law

** Law Librarian and Professor of Law, Osgoode Hall, Law School,

York University

Statutes

Two major problems, subject accessibility and timeliness of publication, are apparent. Timeliness of publication for sessional statute volumes is easily documented.⁶ This has become an acute problem due to the volume of statutory legal reform introduced in the last five years. This phenomenon has its basis in the rate of social change and in the recent creation of permanent law reform bodies.⁷

This increasingly complex statute output has further exacerbated the problem of subject access to statute law.⁸ These two problems have abetted the proliferation of mainly commercial looseleaf compilations⁹ of statutes (with some indexing and little else) in recent years. The fragmentary subject grouping and expense of these publications provides a poor overall solution, especially for areas of lesser litigation.

Further, the general legal encyclopediae¹⁰ for Ontario and Western Canada provide relatively few direct statute references, although many direct case references, and are particularly weak in coverage of the Maritime Provinces.

Other problems related to statutes include readability,¹¹ current or periodic listing (or indexing) of private acts, and determination of the current status of bills¹² and current acts, which are passed but not proclaimed, particularly for the Maritimes and the Territories.

Regulations, Administrative Rules and Decisions

Where the administrative rule falls within the definition of "regulation" and thus must be published to be effective,¹³ problems regarding what falls outside the definition (and hence what is published and where) arise.¹⁴ Powers of exemption from the necessity of publishing are also broad.

In addition, the periodic consolidation or at least systematic frequent listing of regulations in force, is often lacking in the smaller jurisdictions. Subject indexing is nonexistent -- hence one must know the statute pursuant to which the regulation is made. This leads us back to the problem of poor statute indexing. Tardiness of publication is also a problem.

Publication of administrative board decisions is a great problem¹⁵ -- the listing or indexing of them and the availability of tables highlighting board decisions judicially considering prior board decisions, are nonexistent even in the largest Canadian jurisdictions. The lack of board reports in the smaller jurisdictions is a greater problem, unless one has short distances to travel and can consult the decisions in the board's office.

Court Reports

The issues of non-publication and timeliness of reporting of court decisions are the greatest problems for the smaller jurisdictions in Canada. The law reporters are selective, concentrating upon their 'largest market' jurisdictions. Please note Appendix I in this regard. Quebec, with its civil law system, is the 'large jurisdiction' exception: This phenomenon has recently been commented upon.¹⁶ Generally, all the lower courts are very unreported as well.

Since the time of the study which is the basis for Appendix I, a number of reporters have been started in the Maritimes¹⁷ and in Alberta and British Columbia.¹⁸ These have found their way into the national digest system, Canadian Abridgment, 2d.¹⁹ Similarly, the lack of reporting for the smaller jurisdictions means that they are not represented in Canadian Abridgment, 2d to as great an extent. In Western Canada, a series of precis unreported decisions, arranged by subject, grew up to meet this lack.²⁰ The most interesting recent development has been the introduction of a current digest system of all cases received by the publisher from across Canada, which ultimately may or may not be reported: All Canada Weekly Summaries and Weekly Criminal Bulletin.

The following are excerpts from a study compiled by Mr. Frank Winter of the Faculty of Law Library, University of Windsor, and published in the 1979 C.A.L.L. Newsletter.

- A. All Canada Weekly Summaries (Canada Law Bk.)
Sample: Issue No. 2 (week ending Jan. 14, 1977) to Issue No. 8 (week ending FEB 25, 1977)

No. of Cases: 662 cases. Average Issue: 94.5 cases

All geographic law reports and some specialized law reports up to May 19, 1977 checked.

Select Provinces/
All Courts Cited
(By Size of
Provincial Law
Society, 1974 -
smallest first)

	Number of Cases Digested	Number of Cases Subsequently Reported as of May 19, 1977
1. Yukon & N.W.T.	-	-
2. P.E.I. - Sup. Ct.	8	-
3. Newfoundland - Dist. Ct.	5	-
4. New Brunswick - Co. Ct. - C.A.	1 10	- 2
5. Saskatchewan - Q.B. - C.A.	22 6	1 1
6. Nova Scotia - Co. Ct. - S.C. - C.A.	5 26 15	- - 1
7. Quebec - C.A.	7	-

(Manitoba, Alberta
and B.C. have smaller
bars but more cases
digested & reported.)

B. Weekly Criminal Bulletin (Canada Law Bk.)

Sample: Bulletin No. 1 (week ending Oct. 22, 1976) to
Bulletin No. 8 (week ending Dec. 10, 1976) and
Bulletin No. 10 (week ending Dec. 31, 1976)

No. of Cases: 247 cases. Average Bulletin: 27.5 cases

All geographic law reports and some specialized law reports up to May 19, 1977 were checked.

Select Provinces/
All Courts Cites
(By Size of
provincial Law
Society, 1974 -
smallest first)

	Number of Cases Digested	Number of Cases Subsequently Reported as of May 19, 1977
1. Yukon & N.W.T.	-	-
2. P.E.I. - C.A.	2	2
3. Newfoundland - Prov. Ct. - Co. Ct.	2 6	- -
4. New Brunswick - Prov. Ct. - C.A.	1 13	- 1
5. Saskatchewan - Q.B. - C.A.	7 -	1 1

6. Nova Scotia		
- C.A.	2	-
7. Quebec		
- C.A.	23	-

It may be readily noted that the smaller jurisdictions and the lower courts are generally unreported, and the timeliness of reporting is a general problem.

Judicial consideration of statutes is also a problem outside of the federal, Ontario, and Quebec jurisdictions. For the western provinces there are a series of looseleaf volumes for Alberta, British Columbia, Manitoba and Saskatchewan published by Burroughs & Co. (of Carswell), although seemingly updated only annually. The Maritime Provinces (New Brunswick, Newfoundland, Nova Scotia and Prince Edward Island) must depend on inclusion of this information in tables contained in the various reporters of the Maritime Law Book Co. These tables are now being cumulated in the Digest and Index Volumes being produced:

1. N.B. Reports-Digest & Indexes for Vol. 1-9 (1969-1975) received by P.M. Law Library in May, 1976.
2. Nfld. & PEI Reports-Digest & Indexes for Vol. 1-7 (1971-1975) received by P.M. Law Library, July, 1976.
3. N.S. Reports-Digest & Indexes for Vol. 1-10 and N.S. Reports 1965-69, and therefore covering 1965 to 1975 received by P.M. Law Library, May, 1978.

FOOTNOTES

1. Much discussion took place at the Conference of efficient informal means of communication of legal information where lawyers are concentrated in a small area. This works in P.E.I. and the Territories. The latter are vast but the lawyers in each are concentrated in one town.

This informal information transfer does not work well in provinces such as Saskatchewan where lawyer population is small but scattered.

2. e.g. Commerce Clearing House, Carswell, Butterworths.
3. Report of the Committee on Legal Research (of the C.B.A.) 34 Can. Bar Rev. 999, at 1023 (1956).
4. See generally on legal research in Canada until the mid 1950's the report cited in footnote 3.

In the course of the Conference there was much discussion of the role of legal academics as producers of legal literature. It is fair to say that in Canada the academics are now doing their fair share of legal writing.

5. This report in a revised form should be available for general distribution in 1980.
6. Simple direct accessing of statute amendments to the statutes contained in the consolidation is another aspect of this problem. The larger jurisdictions (Canada and Ontario) have statute citators providing the text of such statute amendments.

The Paul Martin Law Library, University of Windsor, Ontario, received the following sessional statutes on the following dates. These would be indicative of the delay experienced.

<u>Latest Sessional Statute</u>	<u>Being the Session From</u>	<u>Received By the Library</u>
Statutes of Yukon, 1972	?	July 31/73
Statutes of Nfld., 1977	Feb. 2/77 to Nov. 24/77	June 2/78
Statutes of P.E.I. 1976	Mar. 4/76 to ?	June 24/77
Statutes of N.B., 1977	Mar. 1/77 to June 16/77	May 2/78
Statutes of N.S., 1977	Feb. 22/77 o May 19/77	Mar. 21/78
Statutes of Sask., 1976-77	Nov. 18/76 to May 10/77	Nov. 2/77
Statutes of B.C., 1976	Mar. 17/76 to June 30/76	Mar. 30/77
Statutes of Alta., 1977	Feb. 24/77 to Nov. 10/77	May 25/78
Statutes of Ont., 1977	Mar. 29/77 to Dec. 16/77	Mar. 21/78
Statutes of Que., 1976	Mar. 16/76 to Jul. 24/76	Aug. 11/77
& Dec. 14/76 to Dec. 23/76		

7. The various provincial law reform bodies (and first year of activity) are:
 Alberta - Institute of Law Research and Reform, 1968
 British Columbia - B.C. Law Reform Commission, 1969
 Manitoba - Manitoba Law Reform Commission, 1972
 New Brunswick - Law Reform Division of the N.B. Dept. of Justice, 1971
 Nova Scotia - Nova Scotia Law Reform Advisory Commission, 1972
 Ontario - Ontario Law Reform Commission, 1964
 Prince Edward Island - Law Reform Commission, 1970
 Quebec - Civil Code Revision Office (temporary), 1955-78
 Saskatchewan - Law Reform Commission of Saskatchewan, 1974
8. See: M.L. Friedland, P. Jewitt and L.J. Jewitt, Access to the Law: a study conducted for the Law Reform Commission of Canada. (Toronto: Carswell/Methuen, 1975), particularly Appendices 8 and 9.
9. Legal looseleaf publishers in Canada include the leading legal publishers: Butterworths of Toronto; Canada Law Book Ltd. of Toronto; Carswells Ltd. of Agincourt, Ontario; Commerce Clearing House (Canada) of Don Mills, Ontario; and Richard DeBoo Ltd. of Toronto. Other publishers are producing looseleaf compilations aimed in part at private and public law libraries -- Corpus Publications Ltd. of Toronto and Les Editions FM, à Feuilles Mobiles (a division of Formules Municipales Ltée, of Farnham; Quebec) to name just two.
10. Canadian Encyclopedic Digest (Ontario), 3d edition, published by Carswell Ltd., Agincourt, Ontario, and Canadian Encyclopedic Digest (Western), 2d edition, which

is to be revised and issued as the 3d edition in a new looseleaf format undoubtedly like the Ontario third edition. This latter publication is by Burroughs Ltd. of Calgary, a subsidiary of Carswell Ltd.

11. See Appendix 7 of Access to the Law *supra*.

This may be seen as an aspect of the lack of timeliness of publication for statutes. Yet it is a reasonable compromise to quick publication.

12. In this regard, note the new dead weekly (during the relevant session) publications, Current Legislative Digest-Ontario and Current Legislative Digest-Canada, published and edited by Professor G.L. Starr and former-Professor J.C. Paterson. The Canadian Law Information Council now publishes a status of bills table for the federal Parliament, but omits any digest of the bill and reference to background studies that were contained in the Current Legislative Digest publications. The Alberta Government periodically publishes a status of bills table in their debates.

The Current Bill Service attached only to the Ontario Statute Citator provides even more current information on acts. Also the Carswell Company's Canadian Current Law (monthly) provides a note of the federal and provincial bills, introduced, and when they have received second or third reading. C.C.L. also provides a table of statutes amended, repealed or proclaimed in force for the federal, provincial and territorial governments.

13. Provincial and Territorial regulations acts patterned on the Uniform Regulation Act of the Conference of Commissioners on Uniformity of Legislation in Canada, (Conf. of Com. on U. of Leg. in Canada, Proceedings, 25th Session, 1943) or sections in the Interpretation Act, Evidence Act or Queen's Printer Act (such as for Prince Edward Island).

14. See: Jane Baldock, "The Publication of Regulations in Ontario", C.A.L.L. Newsletter (May-June 1973), pp. 82-89. Alice Janisch, "Regulations in Nova Scotia: Status of Publication", C.A.L.L. Newsletter (Jan.-March 1973), pp. 23-30. David S.M. Huberman, "Searching for Delegated Legislation on How to Find Your 'Red Tape'", (1964-66) 2 U.B.C. Law Review 467-477.

15. See: Alice Janisch, Publications of Administrative Board Decisions in Canada (1972) A Report Compiled for the Canadian Association of Law Libraries. Also note the number of boards with decision-making power, (in Ontario for example, see: Ontario. Royal Commission Inquiry into Civil Rights -- Hon. J.C. McRuer -- in 5 volumes, 1971).

A few specialized administrative board reports produced commercially do, of course, develop in high litigation -- lucrative areas: Land Compensation Reports (Canada Law Bk.), Ontario Municipal Board Reports (Canada Law Bk.), and Labour Arbitration Cases (Canada Law Bk.).

The larger phenomenon of subject reports which contain both administrative board decisions and court decisions will be noted later.

16. Hon. Jules Deschenes (Chief Justice of Superior Ct. of Quebec), "On Legal Separatism in Canada" Law Society of Upper Canada Gazette Vol. XII (No. 1 March 1978), p.1.

17. Maritime Law Book Co. of Fredericton, N.B. publishes:

New Brunswick Reports, 1969

Nova Scotia Reports, 1970 - (and five retrospective volumes covering 1965-1969)

Nfld. & P.E.I. Reports, 1971

and coverage of the Federal Ct. and Sup. Ct. of Canada.

18. Burroughs Ltd., a subsidiary of Carswell Ltd., publishes:

B.C. Law Reports, 1977

Alberta Law Reports, 2d series, 1976

Also, Maritime Law Book Co. publishes a competing series for Alberta, Alberta Reports, 1976 - (see a comparison of the two reports by G.L. Starr in C.A.L.L. Newsletter, Vol. 2 N.S. (No. 3 Nov.-Feb. 1976/77) p.65.

19. Published by Carswell Ltd. and supplemented in the current year by a monthly digest, Canadian Current Law. These services provide the basic "Cases Judicially

Considered" tool and C.C.L. of late provides a cumulative status of bills for all the provinces, federal government and territories and a list of acts recently proclaimed or otherwise brought in force.

20. Western Legal Publications Ltd. of Vancouver, B.C. now publishes the following. Copies of the decisions are available at 50 cents per page from them.

Alberta Decisions (Civil and Criminal)

B.C. Decisions* (Civil/Criminal in separate series), 1972

Manitoba Decisions (Civil and Criminal), 1975

Saskatchewan Decisions (Civil and Criminal), 1976

* formerly B.C. Unreported Decisions

Province/Territory	Law Society Rolls, 1977	Law Offices*, 1977	Individuals*, 1977	% of Reported Civil Cases** 1956 - 1974 from Province	1974 Estimated Population of Province***	1971 Population Per Sq. Miles in Province ***
1. Prince Edward Island	70	30	71	1	117,000	51.11
2. Northwest Territories	100	15	35	1	38,000	.03
3. Yukon	103	10	19	-	19,000	.09
4. Newfoundland	214	82	197	1	542,000	3.65
5. Saskatchewan	730	355	672	10	907,000	4.21
6. New Brunswick (active)	739	282	630	2	662,000	22.80
7. Nova Scotia (active)	775	359	766	4	813,00	38.67
8. Manitoba (active)	1,122	429	1,013	10	1,011,000	4.66
9. Alberta	2,258	732	2,007	11	1,714,000	6.54
10. British Columbia	3,201	1,224	3,217	24	2,395,000	6.08
11. Quebec - Advocates - Notaries	4,939 1,582	2,094	4,458	3	6,134,000	22.80
12. Ontario	11,542	5,296	10,679	30	8,094,000	22.39

Sources: * Canadian Law List, 1977
** C.L.I.C. Draft Report on Law Reporting in Canada (1975?) p. 32
*** Canada Year Book 1975 (Statistics Canada)

CHAPTER 12

IMPLICATIONS FOR THE LEGAL LITERATURE OF SRI LANKA FROM THE CHANGE OF THE LANGUAGE OF THE LAW

By Mark Cooray*

The Official Language Act, 1956, the Language of the Courts Act 1961 and the Constitution of 1972 made provision for the replacement of English as the language of judicial administration by Sinhala, the language of about 70 per cent of the people of Sri Lanka. The place of the minority Tamil language is a subject of dispute, which has not been satisfactorily settled. The near exclusive language of the courts prior to the change, English continues to play an important part in the appeal courts. This paper analyses the implications for Sri Lanka's literature of the change of the language of judicial administration from English to Swabasha.

The word "swabasha" used in this paper means "native language" and could refer to Sinhala and/or Tamil the two indigenous languages spoken in Sri Lanka.

IS A SWABASHA LEGAL LITERATURE A PREREQUISITE FOR THE SWITCHOVER OR LEGAL EDUCATION INTO, AND ADMINISTRATION OF JUSTICE, IN SWABASHA?

Law teachers in Sri Lanka at the time when the switchover of the language of the law was mooted in the 1950's were virtually unanimous in expressing the view that the translations of the statute and other law and the availability of Swabasha text books, was at the very least a necessary prerequisite for the switchover of the language of the law. Memoranda were submitted stating the difficulties and near impossibilities of administering and teaching the law in Swabasha. A similar view was expressed by the majority of practitioners during the same period. The report of the Official Languages Commission in 1953 assumed that the presence of a legal literature was a necessary prerequisite for the switchover.¹

These reviews receive expression in a book written in 1971 by S. Nadesan Q.C.

A major part of the civil law is the Roman Dutch law. This includes the law of property, contract, tort, marriage and divorce etc. To some citizens Kandyan law, Thesawalami, Muslim law and Hindu law applies. Another large portion of our law is English law. This includes the law relating to partnership, companies, banking, agency, carriers by land, life and fire insurance and the all important prerogative writs.... On these matters the law we apply is the law in force at the relevant time in England. Even where there is a Ceylon enactment dealing with the subject, this is often a substantial reproduction of the English equivalent and so English judicial decisions are relevant when it comes to interpretation.

Such enactments also usually provide that any gap shall be filled by resort to the English law.

To find the law, our courts and our lawyers have therefore to look to a wide variety of sources, *all of which are in the English Language*. These sources include the following:

- a. legislative enactments, both of Ceylon and the U.K.
- b. judicial decisions of the Ceylon courts, the English courts, and the courts of South Africa (where the Roman Dutch law also prevails).
- c. the writing of Dutch jurists on the Roman Dutch law.
- d. legal text books including works on the English law, Roman Dutch law, Kandyan law, Muslim law, Thesawalami, Hindu law etc.
- e. decisions of the Indian courts are also of guidance in certain fields as our Evidence Act, Criminal and Civil Procedure Codes, and Penal Code, are in many respects identical with their Indian counterparts. Indian labour cases are also frequently cited in our courts.

It will therefore be clear that more publications in Sinhala with Tamil translations of some of the Sri Lanka enactments, will not suffice to enable all the courts to conduct all their work in Sinhala or Tamil. Before this can be done the laws must be codified and published as a restatement.²

* School of Law, MacQuarie University, N.S.W., Aust.

This represented the prevalent view among most law teachers and practitioners in the 1950's and 1960's. The Official Languages Act was enacted in 1956. But the language of the law continued to be English, while the language of administration and education in Arts and Social Science subjects, was gradually being changed. Nationalists and protagonists of Swabasha became increasingly impatient with the attitude of the lawyers. It was stated with a degree of justification that the difficulty of effecting a switchover in the absence of a legal literature was an excuse and device for indefinite postponement and retention of the status quo. On the other hand, it could be asserted with an equal degree of validity that it is only when the language of the law is officially declared to be the Sinhala language that a legal literature will emerge. The first argument is a sound theoretical one. The latter is a practical one. From the Sri Lanka experience it may be said that during the 1950's and 1960's very few steps were taken towards giving birth to a Sinhala legal literature. This was due partly to faulty planning and organization and partly to the fact that law teachers as well as many in the Legal Draughtsman's Department and the Ministry of Justice were not favourably disposed towards the Swabasha implementation policy.

But even if there was a committed and determined administration, wise forward planning and competent translators versed in English, Sinhala, law and translation techniques, there would still be a problem of preparing a glossary and writing books in the abstract. They were not conscious of it, but this was one of the problems which was faced by the planners, glossary makers and translators in the 1950's and 1960's. When legal enactments are not being drafted and passed in Swabasha and words and phrases are not being used either in teaching or in the courts, it is difficult to prepare glossaries and write books. The end product is artificial and divorced from realities. Many criticisms were levelled against the early glossaries and translations. But one of the root causes may be said to be the fact that they were prepared in the abstract.

There was a fairly long period of preparation during which little was done; prior to 1970, apart from the Rural Courts, English was the language of the courts. Between 1970 and 1972 a few courts commenced working in Swabasha. Then suddenly in 1972 constitutional provisions decreed that Sinhala be the official language of legislation and judicial administration. What the law decreed was that there was to be, virtually overnight, a complete switchover, but in practice, English continued to be resorted to, to a very great extent, in breach of constitutional provisions.

A policy which may be adopted by a country which is at an earlier stage in planning than Sri Lanka, is to effect a phased switchover in legal education and in the courts. A switchover in selected courts could be effected and some subjects in educational institutions could at the same time be taught in Swabasha. In this way, glossary making and textbook writing would go hand-in-hand with practical operation in narrow, defined target experimental areas which could help to ease the problems of transition and prepare the way for a complete switchover. The switchover could then be gradually extended.

IS A RE-STATEMENT OF THE LAWS FOLLOWED BY A CODIFICATION A PREREQUISITE FOR TRANSLATION?

The report of the Official Language Commission (1962) took the view that a restatement of the laws followed by a codification was a necessary prerequisite to the translation of the law. This reflects a view expressed by Professor T. Nadarajah that the law of Ceylon must be restated and then codified.³

A parallel may be drawn between the present situation in Sri Lanka and the situation in which the legal profession found itself during the early years of British rule when the judges were called upon to administer the Roman-Dutch law in this country. These judges were ignorant of the Roman-Dutch law. They and the lawyers who appeared before them did as best as they could to expand and apply the law. Individuals undertook the work of translating what they considered were relevant areas of the law. In this way there gradually evolved a body of Roman-Dutch law as applied in Sri Lanka. "Today we are in a more fortunate position because even if the entire legal process is changed to Swabasha there is an accessible body of law and lawyers and judges will not be cut off from this". See R.K.W. Goonesekere. Memorandum submitted to the Council of Legal Education (unpublished) (1970).

The view that a restatement of the law followed by codification is necessary in Sri Lanka is open to many objections. The work of restatement and codification would be time-consuming and would take at least ten to fifteen years. No government has shown much interest in proceeding with a restatement. It is a task for which Sri Lanka lacks the financial resources as well as the manpower. Over-burdened law teachers and busy legal practitioners just do not have the time to embark upon the task. The financial and the intellectual resources available could be better used in other fields. A further argument against restatement and codification is the trend of modern legislation

commencing from 1956. As a consequence of the movement towards a state-controlled economic and social system, legislation has become the predominant source of law. This trend was accelerated after 1970 when the United Front Government committed to transform the social and economic face of Sri Lanka was returned to power. Therefore the importance of the private law in non-statutory areas has greatly declined. The jurisdiction of the courts has been ousted by blanket provisions which in public law areas restrict the resort to the writs and injunctions.

In this situation the body of law which is most relevant is the statute law, particularly the recent statute law. The historic legal systems (Roman-Dutch law, English law, Sinhala law, Muslim law, Thesawalami) are likely to play an increasingly diminishing role in Sri Lanka in the future. Therefore the main task is to translate the recent statute law, and other statute law in order of their importance in terms of the extent to which they are likely to be resorted to in administration and the courts. In other areas governed by non-statute law if a question arises for determination, the task would devolve on the judge to refer the relevant materials, formulate a rule and then render it in Swabasha. It is submitted that it is not worth indulging in a monumental task of translation to save the judge's time and effort in this situation.

PREPARATION OF GLOSSARIES

The Official Language Division and the Official Language Department which succeeded it, conceived that one of the first necessary steps for the language change was the finding of Sinhala equivalents for English terms which were not part of the Sinhala language. This need was repeatedly stressed in the reports of the Official Language Commission and accordingly the administrative units that were set up regarded word-making as one of its most important and primary functions. In retrospect, when most of its translations are criticized and many especially in the legal field are being discarded, the most important achievement of the Official Language Department may be said to be the preparation of a glossary for the expansion and use of the language in a new age. The procedure adopted in regard to glossaries which were prepared separately for each technical subject and for each branch of public administration was to set up a committee.

In the early stages of glossary-making, the committee was composed of administrators and Sinhala scholars. The need for persons versed in the law and in both languages and in addition possessing linguistic and translating skills was not recognized. As a consequence, there were many anomalies, glaring inconsistencies and errors in the early glossaries. After a space of about five years, the need for co-opting lawyers and law teachers was recognized. But the need for persons with linguistic and special skill in the arts and techniques of translating was not recognized. It was significant that the early glossary committees did not contain law teachers. But in fairness to the administrators it must be noted that in the 1950's and even the 1960's the teachers were totally opposed to a switchover and in fact expressed the view that law could not be administered or taught in Sinhala.

It came to be accepted after some time that those who sit on glossary committees must be familiar with English, Sinhala, and also law, even though this had not been recognized during the early working of the glossary committees. But this alone is not sufficient. When a particular term is being discussed with a view to finding a Sinhala equivalent, it is essential that a person who is familiar with the branch of the law from which the particular term is taken is present. No lawyer can be expected to be familiar with every subject and with the background to every term that arises. Thus, to take an example, it may be that a competent lawyer is present but certain terms may arise in subjects with which he is not very familiar. Therefore it is necessary that in the preparation of glossaries, while there is a general committee, in relation to each subject, a specialist in that subject should sit in with the committee.

The Glossary committee published its findings at the outset in small parts. The Committee extracted the words from certain statutes and books and proceeded to find Sinhala equivalents. The decisions of the committee were first published in parts. The first edition ran into 12 parts, each part arranged alphabetically representing a chronological publication of the words coined by the committee. The second edition with slight modifications incorporated all the parts into one volume. A third revised edition is in the course of publication. This edition seeks to profit from the experience and mistakes which have been made in the fifteen years of glossary making and to reduce some of the anomalies which are present.

Thus far reference has been made to the glossary prepared by the Official Language Department. In 1966, an Educational Publications Department was set up which embarked upon the task of the preparation of a separate legal glossary. The original motivating factor for the second glossary was the telling criticism made by a lawyer who was a

Sinhala scholar of the work of the Official Language Department glossary. The Official Language Glossary (the early edition) suffered from the inadequacies and imperfections which any pioneering work must contain. Those who were in charge of it were not lawyers and, in addition though they may have been Sinhala Scholars, did not have an adequate knowledge of translation techniques and problems of translation. The new glossary committee thus was formed in order to correct some of the errors in the Official Language Department glossary. In time the Official Language Department accepted some of the criticisms which were made, particularly the criticism which referred to the absence of the lawyers and law teachers on the glossary committee and their involvement in the planning and administrative work.

Efforts to combine the work of the two committees have failed for many reasons. Bureaucratic procedures made difficult the co-ordination of the work of two different Government departments. Personality conflicts and significant differences in the approach of the two committees stemming from their theoretical attitudes to the Sinhala language complicated matters. It was the view of the Educational Publications committee that the Official Language committee had resorted too often to the use of foreign and colloquial words.

The consequence of the two separate glossaries is that there are many terms which are translated in different ways. The consequence is that law teachers, draughtsmen and translators of books and statutes pick the word which they prefer. Draughtsmen themselves do not agree and the same word may be translated in different ways in different statutes by the Legal Draughtsmen's Department. The Attorney-General's Department has directed State Counsel to use the Official Language glossary. No such direction has been given to the Legal Draughtsmen's Department. In this situation there are those who argue that there is a need for an authoritative body to prepare a glossary which will be binding on all concerned. On the other hand, there are those who feel that such a body may confer a stamp of authority on a word which is linguistically incorrect or is a bad translation or a mistranslation. Especially, in the period of preparation and planning a degree of flexibility is necessary. But when the move is made from planning and preparation to actual administration there is a need for a greater degree of certainty. It is not desirable, for instance, that in the drafting of statutes individual legal draughtsmen have a discretion as to which term to use.

The question which is often raised is whether the Sinhala language is sufficiently developed to be a medium through which to convey legal ideas. Language must not be equated with vocabulary. Structurally and grammatically Sinhala and Tamil are developed languages. But their vocabulary is still not adequate to cope with the rising needs and demands of scientific and legal literature which are not indigenous to the culture of the people. On the other hand in relation to agriculture and Buddhist philosophy, vocabularies of Western languages will prove to be inadequate to express the ideas which exist in Sinhala writings.

Unfortunately in Sri Lanka little thought has been given to translation techniques and to profiting from the experience of other countries. As far as I am aware no person has been sent abroad to acquire training in translating, though persons have been sent abroad for training in a variety of other disciplines.

Any country embarking upon a switchover of the law would be advised to initiate a preliminary study of the whole subject of translation and ensure that their translators have the advantage of obtaining information from the experiences of other nations and U.N. and scientific agencies which are involved in translation work.

Even at this late stage Sri Lanka could well think of sending persons abroad for translating and placing translation on the curriculum for study in the Universities and Technical Colleges. There is a translation course which is part of the Sinhala degree course at Vidyalankara University. But the ground covered in this course is very elementary and the basic text is "Teach Yourself Translating".

The two main components of the law of Sri Lanka are statute law and case law. In those areas of the law in which Roman-Dutch law applies the treatises of the old Roman-Dutch law writers would be relevant. However, case law which has interpreted and declared the Roman-Dutch law becomes the primary source of law and to that extent deprives the Roman-Dutch treatise of the authority it would otherwise have had. The modern sources of the indigenous laws are legislation and case law. Information about the above may be obtained from written works such as text books, monographs and articles in periodicals. The question therefore arises whether a change of the language of the law must necessarily involve a transfer of legislation, case law and legal writings into the new language. It is proposed to discuss the manner and extent to which (1) legal writings, (2) statutes and (3) case law have been transferred into Swabasha, the problems that arose and the lessons that can be learned from the Sri Lanka experience. It is proposed to discuss legal writings, first, because though it is not an authoritative source of law in the sense that legislation and case law are sources, yet

it is from legal writings that students learn about the law, and judges and lawyers gain information for the application of the law.

LEGAL WRITINGS

The responsibility for translation of legal writings was assumed in 1956 by the Publications Section of the Official Language Division which was converted into a department called the Educational Publications Department in 1966. The Publications Section, soon after it was established, decided to embark upon a project of translating books which would be required when law was taught at the University level in Swabasha. The Publications Section, as a preparatory step, attempted to list the books used by lecturers and students. The aim was to prepare a list of books students in the University and Law College would need in their first year of study, in their second year of study and in their third year of study. The policy was to translate two books for each subject. The Section was supplied with a list of books needed for reference by students by the Professor of the Law Faculty of the University. This list was provided with a tongue-in-the-cheek attitude. All the recommended books in the syllabus (text books and reference books) were put down as an indication of the magnitude of the task and thereby to demonstrate that the administration of justice and the teaching of law in Swabasha was an impossibility.

The administrators were perhaps unaware, and unfortunately the University Law Faculty at the outset did not in a persuasive manner attempt to point out to the administrators, that the list of recommended books could be misleading. The courses at the University were directed towards conveying to the students an understanding and knowledge of the rules of law applicable in Sri Lanka. But there were in 1967 hardly any legal text books about the law of Sri Lanka. The books on the recommended list were books about the laws of England and South Africa which were only partly relevant to the student seeking information about the law of Sri Lanka.

The department also did not appreciate that not only were those books only partly and at times marginally useful to law students, but that legal text books become outdated fairly soon because a new edition is published as a consequence of changing statute and case law. Thus books could become out of date even before the work of translation was completed.

The first twelve books which were translated and published were Local Government Law by Jennings, Company Law by Topham, Principles of the Law of Partnership by Underhill, The Law and the Constitution by Jennings, Government of the British Empire by Jenks, Introduction to Roman-Dutch Law by Lee, Classification and Uses of Fingerprints by Henry, Steven's Mercantile Law, Legislatures of Ceylon by Namasivayam, Constitutional Law by Wade and Phillips, Conflict of Law by Graveson, Elements of Roman Law by Lee, Outlines of Criminal Law by Kenny, Bills of Exchange by Jacobs, Kandyan Law by Hayley, Law of Contract by Anson, Law of Delict by McKerron. It is significant that some of those books are only marginally relevant for the local law student. Local Government Law, Government of the British Empire and Wade and Phillips' Constitutional Law are books which were hardly relevant for the local law student. It is also significant that in the entire list there is not one book which deals with the current local law. Hayley's Kandyan Law was a book written by an Englishman in 1921 and is out of date and is of relevance only as a historical source.

A great deal of money was spent on this entire project. Wade and Phillips' book on Constitutional Law was published at a cost of Rs. 88,000 and less than 10 copies of it were sold. The computation of the cost of Rs. 88,000 does not take account of the time and labour of the members at the Educational Publications Department who worked on it. It merely reflects the cost of obtaining copyright and payment to translators and printing.

Up to 1969 the Publications Section and the Educational Publications Department maintained a momentum of translation, planning and implementation. After 1969 no new book has been projected and the department is merely concentrating on the publication of books which were mooted before 1969. Due to delays in preparation and the notorious time taken by the Government Printer to print the books, the books which are now in the press are those which were prepared about six years ago.

The translation programme of the Educational Publication Department was confined to books and did not involve the translation of periodical articles or extracts from any journals. When I was on the University staff, I tried unsuccessfully to interest both the Educational Publications Department and the University of Ceylon in the task of making compilations on the law of Ceylon. The idea was to prepare on each subject a list of materials consisting of relevant extracts from statutes, case law, text books, legal

journals and other writings with, if possible, annotated comments by a specialist. The Department also has not published any work dealing with the laws of Sri Lanka.

The procedure adopted by the department at the outset was to farm out the translation to lawyers. No translations were given to law teachers probably because there were none who were willing and competent in Swabasha. Farming out of translation has its disadvantages. The work has to be done by a busy practitioner in his spare time. And a job done especially when one is tired and in a hurry does not necessarily produce the best results. Further, in some cases those who undertook the translation never completed it. In such a situation the entire project had to be abandoned. There were others who sub-farmed the translation which had been assigned to them on the basis of their qualifications to persons who were not always competent.

The farming out of translations proved to be not satisfactory and very expensive. Therefore the department then recruited persons to its permanent staff and entrusted the job of translating to them. The disadvantage was that the recruits who translated law books had sometimes little or no knowledge of law.

It has already been mentioned that the criteria for selection of books was very unsatisfactory and that the books were outdated even before they were translated. The translations were undertaken at the time when the glossary was being compiled. Thus words are used in the translations which were subsequently discarded or modified by later editions of the glossary. The tendency also has been to transliterate. The translations have been done by persons who did not know law or even if they had a knowledge of law did not have the "feel" for the subject and a deep understanding of it. As a consequence the books tend to be meaningless to a person who does not have some understanding of the English original or the subject which is being written about. This of course defeats the purpose of the entire exercise and makes the books relatively valueless for the law student for whose benefit they were primarily translated.

It has been said that a good translation requires of the translator a knowledge of English, a knowledge of Sinhala, a feel for and a deep understanding of the subject and some knowledge of linguistics and the techniques of translating. It appears that the translators did not have more than one of those requirements. Most of them were merely knowledgeable in the Sinhala language.

The Educational Publications Department did not seek to make a profit from its publications. The Prime Minister, Mr. S.W.R.D. Bandaranaike who was returned to power in 1956, on an election programme in which the speedy change-over of the language of administration and education into Sinhala was an important commitment, placed the Official Language Department under his Ministry. He recognized that for the implementation of the Swabasha policy a Government subsidy was essential for educational publications at the post-secondary level because there would not be a reading public to maintain the cost of the preparation and publication of Sinhala books. As regards law, it was decided that two text books be translated for every subject on the syllabus at the Law Faculty of the University and the Law College. There was need for a Government subsidy. But money was wantonly spent on glossary committees (whose proceedings went on interminably) and translations. Those taking part were paid on a fairly lavish scale. Administrative costs were considerable. Costing is not possible because Government regulations will not permit reference to files in order to obtain the necessary information. The only information available is the annual expenditure of the department concerned. As regards the Official Language Department the money spent on legal work cannot be separated from money spent in other fields. These departments were concerned solely with Swabasha work. No computation can be made as regards other Government departments, (notably the Government Printer) where swabasha work was only a part of the entire work of the department. Private publications were not unnaturally especially few prior to 1970. It is not likely that money will be invested by the private sector when there is no reading public. A Sinhala reading public would arise only when law was being administered and taught in Swabasha and when this happened a few books appeared.

The first Sinhala legal book which was printed was the Nithi Niganduwa. It was printed in 1880 but the date of its compilation and who was responsible for it has been a subject of controversy. It was probably compiled in the early nineteenth century (circa 1830-40) by a British Civil servant, who sought to state principles of the ancient Sinhala legal system, having consulted the Sinhala chieftains. It is a historical source and, as far as I am aware, was not consulted nor referred to by legal glossary makers or translators. It forms part of the dead wood of history and no longer attracts even controversy about its source.⁴

In 1927 A.B.C. Soyza wrote a book in Sinhala about the law of Sri Lanka. But apart from that, until the 1960s there were no significant Sinhala legal publications. Pino Moragoda wrote a pioneering work on the organization of the laws of Sri Lanka and also wrote books on the law of persons and law of property. W.S. Weerasooria published, in

1970, a book on commercial law. P.T.B. Kohona and L. Mendis, two young lawyers, produced a work in 1973 consisting of a series of essays on the legal system of Sri Lanka. These were pioneering works and of course must be judged as such. They are certainly of much more use than the translations put out at great cost by the Educational Publications Department. Weerasooria's and Kohona and Mendis' works are significant because the authors show that it is possible in fairly simple language to express legal ideas. Kottegoda has produced an adaptation of Sir Sydney Smith's Forensic Medicine. It is not a mere translation but it is an adaptation with deletions and modifications to suit local needs. M.J.A. Cooray has produced a very fine work on the Constitution of Sri Lanka (1975) which, in simple language, effectively expresses legal ideas. The Law College students have produced two volumes of a magazine consisting of legal articles. The University students have produced in mimeographed form extracts from relevant books and journals for the use of students.

There are signs that a local legal literature is beginning to appear. And those responsible for it are the young persons who have recently graduated and entered the legal profession or become university teachers, having studied in secondary school through the medium of Swabasha and obtained their legal education in the English language. When the post-1970 students who have in addition pursued their legal studies in Swabasha (at the Law Faculty of the University) or bilingually (at the Law Faculty of the University) or bilingually (at the Law College) are in a position to contribute to legal literature it may be expected that there would be a further impetus. It is true that the younger generation does not have the accumulated experience and knowledge of their elders - but due to the needs of the time, will find that it is their task and role to write articles and books in Swabasha.

From the little experience I have had correcting examination scripts in Sinhala and reading the books and articles that have been written which are of very uneven quality - my conclusion is that they provide hope of better things to come. I have little doubt that the Sinhala language over a period of time can develop and expand to convey legal ideas adequately.

There are two factors which may adversely affect the development of the law in Sinhala: first, if the lawyers and the courts in the future are cut away from the English language and the consequent opportunity to enrich the legal system from foreign sources; and second, if due to lack of financial resources a legal literature cannot develop. Looked at from the financial angle, the future of Swabasha legal writing appears to be bleak. At the outset the Government was willing to subsidize the production of Swabasha books. As a reaction against the vast expenditure of money, the entire project has now been scrapped. The Educational Publications department has been wound up. This means that there will be no subsidies in the future for legal writings and publishing and it is private individuals and firms which will in the future have to produce legal works.

In this context it must be remembered that the cost of paper has gone up considerably and import of paper has been restricted as a consequence of the fact that the Government does not have sufficient foreign exchange to import unlimited quantities of paper. Publishers are to a great extent dependent on paper produced locally, but the supply is limited because of restricted import of raw materials used for production of paper, again due to foreign exchange problems. As a consequence paper finds its way onto the black market and when publishers are forced to buy paper on the black market this is reflected in the cost of the book. Further there are only 8 million Sinhala speaking people in the world. The market for Sinhala books is therefore very limited. The legal reading public would of course constitute a minute fraction of the total population. The market for legal books is therefore very limited and coupled with the high cost of printing it is unlikely that private individuals or firms will with a few exceptions embark upon the production of legal books.

A continuing Government subsidy is essential. But the Government subsidy would have to be more selectively used than in the past. It is suggested that a Swabasha law Institute should be established and one of its tasks should be to concern itself with the publication of "compilations" of statutes, cases and materials on particular subjects and text books. Incentives should be given to selected individuals for the production of such works and the publications would have to be subsidized. Specialized academic works or works which are not of immediate practical relevance to students or to the profession may be subsidized if they are of a very high merit only. The prime need is to provide basic reading material. The production of specialized works could be undertaken at a later stage. The task of translation of books should not be commenced again unless the book is of practical relevance.

When a book or extracts from a book are being translated it is important to choose books or extracts that can "stand translation". This means several things. Firstly, having regard to the lexical, graphic and grammatical components it must be material which is capable of being translated into Swabasha. A book, for instance, where the

language is more didactic with legal principles is easier for translation than a book where the language is full of syntactical structure coupled with abstract and abstruse legal thinking. Simply, the difference is between a book on contracts dealing with fundamental principles and that of an abstract and involved jurisprudential work or one dealing with legal theory. If a book is being translated it should be able to stand without being soon outdated in its entirety or even partly as a consequence of changes in the law. A set of criteria to assess the utilitarian value of a book should depend primarily on the question of its utility in the legal system of Sri Lanka. A book which discusses the English law in its entirety and is not applicable to local needs should not be translated.

If a translation is attempted on a subject which is not strictly on all fours with our legal system, it must be adapted to suit local needs and circumstances with deletions and additions. In this connection, the translation of Sir Sydney Smith's book on forensic medicine by Professor Kottegoda referred to above should be commended as a pioneer venture in this field.

In regard to translation of law books, it is important to bear in mind that books are translated primarily for students who pursue law studies in Sinhala and also to facilitate the working of the courts in Sinhala. The other benefits accruing from such a venture would be to help legal thinking and theorizing in Sinhala. An absence of good legal literature in Sinhala is a bar to acclimatizing oneself with the correct Sinhala legal jargon in a transitional period. This is necessary for both the academic student and the busy practitioner, since thinking in Sinhala will not precipitate unless the necessary background is created. Therefore, a good Sinhala law book will also have the effect in a roundabout way of popularizing the legal studies in the mother tongue and will also facilitate the working of courts and the shift of the legal language.

The unfortunate conclusion is that the translations put out by the Educational Publications Department are virtually useless. They probably assisted in a marginal way the building up of a Sinhala legal vocabulary and helped the coining of terms, but the benefits thus accruing can in no way justify the tremendous expenditure. It is however unfortunate that the Educational Publications Department has been wound up as a consequence of complete loss of faith in it. But there exists an urgent need, in a situation where it is unlikely that private sources will publish the requisite number of legal books, for the state in some way to provide incentives and to encourage and subsidize the production of a local literature. The emphasis in the future should be on the production not of translations, but of compilations of relevant materials, adaptations and original writings which serve the basic needs of legal education and the legal profession.

STATUTES

Statutes were first translated during the colonial period. The statutes which were translated were those which affected, and a knowledge of which would be required by, the non-English speaking sections of the population, and statutes which were required in the process of administration, particularly local administration, industrial law and the rights of workers, land registration, births and deaths, marriage and maintenance. With the growth of a Swabasha speaking commercial sector it became necessary to translate statutory provisions affecting trade and commerce, such as patents and registration of companies.

Prior to 1948, translation of statutes and the rules and regulations made under them where necessary were undertaken by the department concerned. Thus, for example, a statute dealing with local government was translated by the department of local government. In 1948, consequent to a cabinet decision, all translations of statutes were entrusted to the Ministry of Justice and thereafter the task of translation of statutes devolved on the Legal Draughtsmen's Department. But the Official Language Department undertook the task of translating subsidiary legislation.

The Legal Draughtsmen's Department, after it assumed responsibility for all translations, proceeded very slowly. The reasons for this are not clear, but it appears to have been due to lethargy, excessive care and caution, the problems encountered in translating and the absence of a glossary. The officer in charge of the translation section of the Legal Draughtsmen's Department in the late 1950s and early 1960s said there was lethargy and lack of interest everywhere and he attributed this to the fact that the official language of the law was then English. He said he resigned in disgust. Up to 1956 none of the statutes which had been translated involved "lawyers' law". The Legal Draughtsmen's Department commenced translating the Penal Code, the Courts and their Powers Ordinance the Criminal Procedure Code and other statutes which were considered basic. These statutes involved the use of legal language. More complicated problems arose in the translation of the Penal Code as compared for example

to the translation of the Village Committees Ordinance, the Town Council Ordinance or even the provisions of the Companies Ordinance which deal with the procedure for the formation of a company. The former statutes deal primarily with the law which would have to be applied by the courts and the latter category deals primarily with laws which layman must refer to in the process of conducting public and private business.

R.K.W. Goonesekere states the problems that can arise in the course of translating of statutes:

The point I was trying to make is that law is not a body of knowledge (I do not know whether that is the correct word) which exists apart from language. It is so much bound by the language in which it is expressed that the transference to another language is a delicate operation. One has to take into account the possibility of a change on the context of law as a result of its expression in a different language, quite apart from other possibilities such as the incomprehensibility arising from a new terminology. These considerations are particularly important when dealing with statutes, and we must bear in mind that the bulk of our law is statute law. The style of legislation is so intimately connected with language that careful thought must be given to evolving a pattern for legislation in Sinhala which is suited to the language. It is unduly restrictive of what can and ought to be done. Perhaps it would be more accurate to speak of 're-writing' or 're-enacting' legislation.⁵

A person who reads a translation of the Penal Code, the Criminal Procedure Code, the Evidence Ordinance or the Courts and their Powers Ordinance and who is not familiar with the English original will find the translation difficult to understand. The statutes have been translated word for word, virtually phrase for phrase. It is translation at its worst. It amounts to a transliteration. These translations were the inevitable consequence of translating at a time when the English statute was the only valid source of law. Translators therefore sought to stick as closely as possible to the English original. If they had chosen to break up the English sentences, especially when the sentences were long and contained phrases and provisos and sought to convey the idea behind the particular sentence, the consequence may well have been that the Sinhala rendering might have varied in some small but material particular from the English. The translator prior to 1972 when the language of the law was in English had this problem. Law is tied to the language in which it is expressed (in this case English), which gave the translator very little scope for a free translation of the type which a translator in another subject could resort to.

A draughtsman of a bill after 1972 when Sinhala became the official language of law who would have to translate a bill, the prior work and preparation of which has been done in English, would not be in the same position. He could reconstruct the words of the bill as found in English and render them into Sinhala. If there is a slight conflict and variation between the English and the Sinhala, it will not matter because it will be the Sinhala version that will be authoritative. A changeover of language must in the long term involve a change of drafting techniques, though this has not yet taken place. The drafting techniques which draughtsmen in Sri Lanka are accustomed to were originally evolved for the English language and the English social environment. At the present these drafting techniques have been carried over for use in the process of translation. But in the future changes must take place as new techniques are evolved as a new generation of civil servants and legal draughtsmen arise who do the thinking and preparatory work in Sinhala.

Sections 9, 10 and 46 of the Republican Constitution of 1972 made a significant change in that Sinhala was deemed to be the language of legislation. The relevant constitutional provisions were as follows:

- Section 9 (1) All laws shall be enacted or made in Sinhala.
(2) There shall be a Tamil translation of every law so enacted or made.

- Section 10 (1) All written laws, including subordinate legislation in force immediately prior to the commencement of the Constitution, shall be published in the Gazette in Sinhala and in Tamil translation as expeditiously as possible under the authority of the Minister in charge of the subject of Justice.
(2) The laws so published shall be laid before the National State Assembly at the meeting next following the date of such publication.
(3) Unless the National State Assembly otherwise provides, the law published in Sinhala under the provisions of subsection (1) of this section, shall, as from the date of such publication, be deemed to be the law and supersede the corresponding law in English.

Section 46 (1) Every Bill for a law shall be published in the Gazette in Sinhala and in Tamil translation at least seven days before it is placed on the Agenda of the National State Assembly.

Section 23 of the Constitution of 1978 is worded differently, but the effect is substantially the same. Section 23 enacts:

- (1) All laws and subordinate legislation shall be enacted or made, and published, in both National Languages together with a translation in the English Language. In the event of any inconsistency between any two texts, the text in the Official Language shall prevail.
- (2) All laws and subordinate legislation in force immediately prior to the commencement of the Constitution, shall be published in the Gazette in both National Languages as expeditiously as possible.
- (3) The law published in Sinhala under the provisions of paragraph (2) of this Article, shall, as from the date of such publication, be deemed to be the law and supersede the corresponding law in English.

The former Secretary of the Ministry of Justice stated in "Legislative Drafting in Multilingual Countries", British Institute of International and Comparative Law 1973 (mimeographed):

At present all drafting is being done in the English language. The Department however has on its staff a number of Assistant Legal Draughtsmen who are lawyers and are proficient in either Sinhala or Tamil. The practice then is to Gazette the Bill in all three Languages although s.46(1) refers only to the Gazetting of Bills in Sinhala and Tamil. When the Bill is debated in the National State Assembly the Ministry which initiated the Law will be responsible for taking steps to have the new Law published by the Government Publications Bureau. As stated in section 9, Laws must be published in Sinhala with a Tamil translation. However, the practice so far has been to publish the new law in Sinhala, Tamil and English.⁶

The constitutional provisions require the translation of legislation and subsidiary legislation prior to 1972. This consists of twelve volumes of legislative enactments which are contained in the 1956 consolidation and also seven volumes of subsidiary legislation. There is a supplement to the 1956 consolidation published in 1965 consisting of two very bulky volumes. There is also the body of legislation consisting of individual statutes which have been passed, bound in annual volumes. In the period after the United Front Government was returned to power in 1970 there has been a large volume of legislation after 1956 which has to be collected from the Gazette in which they are published.

It is only a few of the pre-1972 enactments that have been published and translated and therefore a large number of pre-1972 enactments have not been translated and published. It should be noted however that after 1961 all bills which were tabled in Parliament have been tabled with a Sinhala and Tamil Translation. The translations were provided because in the course of debates, members spoke in Sinhala and Tamil. But the Act which was passed was not translated.

The question to which I attempted to find an answer was what portion of the legislative enactments have actually been translated (even though not published). This task is the responsibility of the Legal Draughtsmen's Department. It appears that the enactments up to 1956 and the subsidiary legislation up to 1956 have been translated. But most of the translations are not very satisfactory, some of them were translated at an earlier stage and bear the defects referred to above, associated with the early translations. They made use of terminology appearing in the earlier glossary, which have since been discarded. The terminology used is not uniform and the same term has been translated in different ways in different statutes. A special committee consisting of judges and members of the Legal Draughtsmen's Department was appointed to go through and modify these translations. The committee started its labours and on one particular statute spent about twenty hours analyzing the translation, arguing over it and correcting it. Subsequently the committee gave up the task for lack of time. There are few more difficult tasks than correcting a bad translation. Less time may be taken in doing the translations all over again. What is to be done with the translations that have been carried out? It is my view that these translations should be discarded.

It is preferable to indulge in a selective translation of the important statutes and those which are required for purposes of administration and in the day to

day working of the courts. The remaining statutes, some of which may be scarcely or seldom referred to or cited in the courts, need not be translated. If it becomes necessary to apply a statute which has not been translated, the judge hearing the case could translate the relevant portions of the statute into Sinhala for the purpose of the decision. Problems will only arise if a disputed question of construction arises, and in a particular litigation it is not likely that more than a few provisions or clauses will be the subject of controversy. So the task before the judge will not be a very difficult one.

There are many who advocate the translation of statutes and case reports and it is commonly recognized to be an urgent requirement for the administration of justice and legal education. There are many who say that the government has failed in not having translated legislation and case reports during the period from the 1950s to the present. It has been and is being repeatedly stated by law teachers that the minimum for effective legal education is the presence of the statute and case law in Swabasha. But law teachers have been saying this for many years. When the switchover was ultimately made in the absence of a legal literature, the staff got on with the task and by all accounts managed pretty well. The main problem which arose was as regards students who did not know English and the solution which may be suggested is to compulsorily teach students English language until they acquire a reasonable degree of proficiency during their legal studies. Whether in practical terms this is feasible may well be queried.

Therefore I express a contrary opinion to that which is so commonly stated. The translation and publication of the statute and case law in the 50s and 60s during the period of glossary making would in my view have been disastrous for the reasons stated above. Many of these translations would have become outdated by changing glossaries which are inevitable at an early state of planning for a switchover. But that argument is not maintainable in the present time, as regards the translations of statutes and cases prior to 1972 for use in the future. But, it is nonetheless my view that these should not be translated except very selectively. Translation of statutes and case law in bulk can only result in bad and inadequate translations. It may then be said that the solution is to use competent translators and provide adequate translations. But this is not feasible both in terms of the financial resources available and the manpower. And if there are persons who can provide effective translations, they may be profitably employed in other tasks. Further, the person who could make an ideal translation would probably not be willing to stagnate as a translator.

In this context the problems which can arise from bad translations must be remembered. A bad translation can result in reference back to the original English and a comparison between the two and discussion as to whether the translation is a correct rendering of the original. This would be a sheer waste of time. If a decision is taken that the break with the past is complete, and translations of statute would be final and conclusive, this may solve some problems. But it would create others in situations where (if there is translation in bulk this is very likely) there will be sections which are incomprehensible and meaningless or which will lead to absurd results.

From the point of view of the administration of justice a bad translation could create more problems than not having translations at all. From the angle of legal education it may be that bad translations may be better than no translation at all. In this situation it is my view that we should look at the question from another standpoint.

The monumental task of translating the legislative enactments has been entrusted to the Legal Draughtsmen's Department which also has the task of drafting and translating the current statutes. It is submitted that whether statutes are being translated in bulk or selectively, it is imposing too great a burden on the Legal Draughtsmen's Department to expect it to translate past statutes, when its primary obligation is the draughting of current law which itself may involve translation of a bill prepared in English into Sinhala and Tamil. It is submitted that the task of translating the past statutes should be entrusted to a special body. If a Swabasha Law Institute is set up this is one of the tasks which could be entrusted to it. In Israel a special Academy which consisted of draughtsmen, administrators and academics have been set up to tackle the task of translating early statute law.

In Malaysia, the English version of a statute continues to be the authoritative one until it is translated and officially promulgated. The Constitution of 1972 which provides that all legislation and subordinate legislation shall be translated and laid before Parliament as soon as possible, makes no reference to the legal status of statutes prior to 1972, until such time as they are translated and laid before Parliament. It appears that the statute enacted in English could be regarded as the authoritative source until the Sinhala translation becomes law. But the judge who writes his judgment in Sinhala generally attempts to render it in Sinhala.

Once the pre-1972 statutes have been translated another question which may arise is as to the extent to which (if at all) the earlier English original is relevant. If it is permissible to compare the earlier original against the translation and to show that the translation does not effectively or correctly convey the meaning in the former, it could lead to endless arguments. A field day would be provided for legal sophistry and lawyers arguing a lost case are likely to fall back on quibbling on the correctness of the translation. The alternative solution is not to provide any scope for reference to the original. The danger here is that if the translation has been hurriedly done there may be situations where the translation is patently erroneous or incomprehensible or will lead to absurd results. And this consequence is most likely to follow if the statutes have been translated in bulk and if the twelve volumes of the legislative enactments and the legislation between 1956 and 1972 are translated and presented to the National State Assembly. The solution which has been suggested above is that the more important statutes be selectively translated and done very carefully. In such a situation it will be possible to provide that the translation is authoritative. But it is submitted that such authority should not be accorded to translations which have been compiled in bulk.

A question which arises is the relevance of and binding effect of case law interpreting a statute enacted in the English language before 1972, after the statute itself has been translated into Sinhala. A similar question regarding the relevance of case law could be raised as regards statutes enacted after 1972 which constitute a consolidation or re-enactment with modifications of a statute prior to 1972, enacted in English, or where a statute enacted in Sinhala contains a word or phrase in a similar context to which it is used in an enactment in English. To give an example, the word "building" may be translated in the statute in Sinhala. The Sinhala equivalent used for the English word may carry a slightly different connotation than the English word because it will be seldom possible to find an exact equivalent. One view is that as far as possible the cases in the English language should be followed especially where a phrase carrying a particular meaning is involved. But if the Sinhala word or phrase is to be interpreted in the light of English it may do violence to the Sinhala word or phrase. More involved problems may be encountered with words such as "possession", "occupation", "title".

On the other hand, a phrase like "in furtherance of the common intention" which occurs in section 32 of the Penal Code raises slightly different issues. It may be argued that as regards such a phrase the English cases should continue to be relevant even to a limited extent. But in the case of the earlier examples it would be necessary to make a complete break with English case law, and construe the word in the statute in Sinhala without reference to case law.

It is desirable that policy guidelines be laid down by the legislature in the form of an interpretation statute. The rules themselves cannot be definitive, but broad guidelines must be laid down stating that in certain circumstances a break with the English case law must be made. The judges and lawyers, as a consequence of their legal training and the way the courts have operated in the past, have a degree of reverence for the doctrine of precedent. Thus there may be a tendency to refer to cases in the English language in the interpretation of a translated statute in such a way as to do violence to its language. The above are some questions on statutory interpretation and construction which are likely to arise in the future and they are raised to provide scope for thinking and planning in order that remedial measures can be taken before the problems arise.

The promulgation of the Constitution in 1972 and the enactment of the Administration of Justice Law 1973 and addition to it in 1975 dealing with civil procedure were preceded by consultation with the general public and lawyers. In the case of the latter various drafts were circulated and comments invited. Most of the comments on the Constitution and all the comments on the amendment dealing with civil procedure were directed towards drafts in the English language. The debate in the Constituent Assembly, in the case of the Constitution, and the National State Assembly, in the case of the Procedure Law, were in all three languages. The final enactment was in all three languages, but it is the Sinhala draft which is the sole authoritative one.

The statement of the Ministry of Justice quoted above illustrated the extent to which in the drafting of statutes English was being resorted to in 1973. In 1979, the practice is not much different. In this context the quotation from an educationist examining the problem in 1974 may be quoted.

With education and legislation and particularly the latter, we are entering the most sophisticated and difficult area of change, and the need for a clear sense of direction is greatest. While a great many people are engaged in sorting out all kinds of problems which they are faced with as a result of their accustomed language, English, being replaced with the not-so-familiar Sinhala, the law-giver and the creator of this major change, is unaffected in

his day-to-day work and for that reason indifferent to the difficulties which have arisen. Is the legal thinking before legislation done in Sinhala, is the legislation prepared in Sinhala, and is there any discussion of its provisions in Sinhala? Whether it is existing legislation, case law or text books, there is a simple solution - put as many people on the job with a single word - 'translate'. There is a bee-hive of activity in legal Sinhala but what proportion of honey and wax is produced must remain a matter of doubt.

But it must be noted the original thinking and working in Sinhala is only possible when there are original Sinhala legal concepts and ideas. The critics who point out that most of the thinking is still being done in English and then a translation is being effected, forget that this is to some extent inevitable because what is being attempted is to convey into the Sinhala language legal rules and concepts which are in the English language and related to English culture. The critics who say that the thinking must be done in Sinhala seem to overlook this fact. Thinking in Sinhala can be done as a Sinhala legal culture begins to arise and the links with English become less. Some of the critics say that they think their law in Sinhala. But all this means is that having imbibed legal concepts in English at an earlier stage, they are now thinking in Sinhala.

Thinking and working in English and translating is inevitable in a period of transition until a Sinhala legal language, idiom and culture emerge and the links with the English system become less tenuous. It is also inevitable in a situation where many who have been educated in the English language, have studied and worked with law in the English language, continue to be involved in the administration of law.

CASE LAW

The Ceylon Law Recorder (New Series), an English language legal periodical (published privately between 1959 and 1961) contained a section with translations of judgments in Sinhala. This was a pioneering venture in the field of law reporting in Sinhala. The journal however had only a short life. Subsequently, The Ceylon Law Weekly, an established private law report, commenced in 1960 devoting a part of each volume for the reporting of Sinhala translations of judgments rendered in English. In 1971 a few translated judgments in Tamil were reported. In 1971 the journal stopped publication. The New Law Reports, the official law reports, commenced in 1977 publishing in Sinhala.

Prior to 1972 the judgments of all Appeal Courts were rendered in English. Subsequent to 1972 the constitutional provisions decree that Sinhala is the official language of the law and therefore judgments should be rendered in Sinhala. But since most judges in the appellate courts, with a few exceptions, are more familiar with administering the law in the English language, judgments continue to be written in English and entrusted to legal assistants, who are young law graduates, for translation. Since it is now some years since Sinhala became the language of record, it could be expected that appellate court judgments in Sinhala should by now have appeared. But this has not happened. The Ceylon Law Weekly has stopped publication following the death of the Managing Editor. The Bar Association of Sri Lanka formed in 1974 is assuming the responsibility for law reporting in the future.

It was suggested during the 1960s that the New Law Reports while being published in English should be contemporaneously translated and published in Sinhala. It was asserted that if this had been done the problems of the switchover would be less. From the point of view of legal education it would have had its advantages. But the same arguments stated against bulk translation of statutes would likewise apply to bulk translation of case law reports.

If the pre-1972 judgments remain in English, it is hoped the courts will permit the reference to such authorities where relevant. There is every indication that the courts would do so. The problem, of course, would be if a new generation of Sinhala only educated lawyers arises who would not therefore cite in court the pre-1972 English language decisions. It is hoped that this situation will not arise. It is envisaged that when a pre-1972 case is referred to, the court would be sufficiently flexible to listen to the case quoted in English and if it considered the case to be relevant, then it will be the task of the counsel and judge to render the relevant principle stated therein in Sinhala, for the purpose of the decision. It is admitted that the translation of the entire case reports is not desirable. But compilations would include extracts from important pre-1972 cases. If translations of case reports are to be attempted, it is desirable that selected cases be translated and the translation be not report-wide, but in relation to a particular subject, i.e. a compilation of cases on a statute (e.g. Penal Code) or on certain branches of the law (e.g. law of taxation).

THE FUTURE

The view was frequently expressed in the 1940's and 1950's whenever the question of the change in the language of judicial administration and legal education was mooted, that a prerequisite was the existence in Swabasha of a legal literature. The term "legal literature" includes statutes, law reports, legal textbooks, legal periodicals and any other written work containing a statement, discussion or analysis of legal rules, concepts of ideas. In addition, there were those who expressed the view that a restatement of the law followed by codification was an essential prerequisite to any attempt to translate the law. The argument regarding restatement and codification could be rebutted on the following grounds: no government has ever shown any enthusiasm for the project; the great part of the law which would be restated is contained in the "historic" systems of law which seem destined to play an increasingly diminishing role in Sri Lanka in the future, in the context of a movement towards a state-directed and controlled economic and social system in which the predominant sources of law are statutes and delegated legislation; the expenditure involved; the time which such a project would take; and finally, the fact that overburdened law teachers and busy legal practitioners neither have the time nor the inclination to embark upon such a project, even if they were provided with the financial expenditure and the research and secretarial staff.

The need for a legal literature as a prerequisite for a switchover appears on the surface to be a very sound argument. But it is equally true that until legal education and judicial administration are being conducted in Swabasha, it is unlikely that legal writings will appear. It is only when an actual language change takes place that authors would feel moved to write and publishers would find it financially lucrative to publish.

The protagonists for Swabasha argued (with a degree of justification) that the stated difficulty of effecting a switchover in the absence of a legal literature was an excuse and device for indefinite postponement and retention of the status quo. But on the other hand, viewing the question merely from the standpoint of legal education, a switchover in the absence of a legal literature must inevitably (at the very least in the short run) lead to a decline in the high standards which had been built up.

While legal educationists prior to 1970 took scarcely any meaningful steps towards preparation for an eventual switchover, government authorities after the enactment of the Official Language Act of 1956, made slow, uncertain and at times, self-defeating preparations for the switchover. Work on the compilation of a glossary of legal terms and concepts was commenced. A glossary committee proceeded very slowly and at great cost to prepare a glossary of legal terms. This committee, which has been severely criticised, must however be judged on the basis that it was embarking on a pioneering venture and in the light of the fact that a coined word cannot satisfy linguistic purists, and lawyers who use it, many of whom have differing approaches and viewpoints. The glossary committee suffered from certain inbuilt deficiencies. At the outset the committee consisted of language scholars and only after some years was it realized that persons knowledgeable in the law should be appointed. The committee never realized the need to co-opt linguists, persons with special knowledge and training in the techniques of translation and specialists in relation to particular subjects in which terms were being coined. The committee also had the disadvantage that they worked for a long time in the abstract when all legal thinking and work was in English. Word-making in the context of legal writing, law teaching and judicial administration would have been very much easier and more productive.

The books which were translated had many defects. The books chosen for translation were those dealing with foreign laws and only parts of the books were relevant in the local context. The books themselves became outdated due to the appearance of a new edition, even prior to their being published. No books dealing with the laws of Sri Lanka were translated. Some of the books used terms contained in the earlier edition of the glossary, which terms had been replaced in subsequent editions. The books attempted to translate very closely the language of the original, even reproducing clauses in the same order. There was no attempt to reconstruct clauses and sentences and express the meaning. Many of the books are therefore very difficult to read and understand, if one does not have a knowledge of the English original. The books perhaps assisted in a marginal way the building up of a Swabasha legal literature and in the coining of new words. But such benefit cannot justify the expenditure incurred.

The Government in 1956 decided that two books should be translated for each subject which was being taught in the University and the Law College and provided a subsidy for this purpose. The tragedy is that the books which were translated are virtually useless, and the government now having lost faith in the translation programme, at a time of grave financial crisis decided in 1975 to abandon the entire project. There is now, in 1978, rethinking on this matter.

The continuing government subsidy at a time of spiralling printing costs is essential if books are to appear. A few books published recently give promise of better things to come. There are indications that the teething period is over - and that creative and original legal works in Sinhala (as distinct from translations) will be provided, but the financial implications will deter writers and publishers. Thus the sad conclusion is that unless the government intervenes, the legal literature which is essential for legal education and judicial administration will just not appear.

FOOTNOTES

1. See Sessional Paper XXII of 1953, paras. 31-33.
2. S. Nadesan, Some Comments on the Constituent Assembly and Draft Basic Resolutions. (1971), pp. 37-38.
3. See T. Nadarajah "The Legal Systems of Ceylon", University of Ceylon Review (1952), p.31.
4. See further, L.J.M. Cooray, An Introduction to the Legal System of Ceylon (Colombo: Lake House Investments, 1973), pp. 118-119.
5. R.K.W. Goonesekere, "Law in Sinhala, Questions of Direction" unpublished (1974).
6. N.M.S. Jayewickreme, "Legislative Drafting in Multi-lingual Countries", (British Institute of International and Comparative Law, 1973), mimeographed.
7. Goonesekere, *op. cit.*

PART III LOCALIZING LEGAL LITERATURE

CHAPTER 13

LOCALIZING LEGAL LITERATURE: CONCLUSIONS AND FUTURE DIRECTIONS

The Toronto seminar out of which this volume has emerged took place at Osgoode Hall Law School, York University on November 3rd-5th, 1978. It was attended by nineteen people, who between them could claim substantial first-hand experience of the problems of legal literature in over forty jurisdictions. The participants were academic and practising lawyers (including one former judge), law librarians, government lawyers, including two parliamentary draftsmen and two specialist law reporters, a sociologist and a publisher. By far the largest group were law teachers; it is probably fair to say that private practitioners, publishers and information scientists were under-represented.

The main objectives of the seminar were as follows: first, to report on and evaluate the pilot project, especially by discussion of the papers and other material presented at the seminar; secondly, to exchange information and ideas about problems and how they had been tackled in the jurisdictions of which members had first-hand experience; thirdly, to explore how far there was a shared general problem of localizing legal literature and information and fourthly, to consider suggestions for future research and action. Since this was an informal seminar attended by individuals in a personal rather than a representative capacity it was not considered appropriate to make a series of formal recommendations. The purpose of this concluding chapter is to try to draw together some of the general themes which emerged from the seminar and to put forward some suggestions for future activities. Although what follows draws heavily on both the working papers and the notes of the proceedings, the interpretation and the specific suggestions are the responsibility of the editors and do not necessarily represent the views of all those who attended, unless this is specifically indicated. However, it is fair to say that there was general agreement on two points: first, that there is a genuine problem of localization of legal literature and information and that this problem had not received sufficient attention in the past, particularly from governments and the law school community. Secondly, it was unanimously agreed that there should be some co-ordinated follow up to the pilot project. While it was recognized that the main task of confronting problems of localization must be undertaken by local people, it was the general feeling of the meeting that some useful purposes could be served through internationally co-ordinated activities by bodies such as the Commonwealth Legal Education Association and I.C.L.D.

What follows then is an attempt to distill some of the more general lessons of the pilot project and the seminar, with particular emphasis on practical steps which can be taken both locally and internationally. After a brief consideration of the what and why of localization, we consider how a group of local people might set about diagnosing and tackling the problem of improving local provision of information about law in a systematic way. We consider in turn problems of establishing priorities; creating awareness; allocating responsibilities; mobilizing and providing incentives for various kinds of producers; questioning stereotyped assumptions about types of publication; different approaches to publication and the potential significance of new technologies; problems of distribution and finance and ways in which local efforts may be co-ordinated and possibly institutionalized by, for example, a Law Information Council or Information Centre. In the final section we consider possible directions for future research and some suggestions for initiatives at the international level.

STRATEGIES FOR PLANNING AND PUBLISHING

Approaches to Localization

In the papers, and in the discussions, the value of practical attempts to 'localize' was assumed, although it did not go unquestioned. Certain difficulties accompany the attempt to define 'local' in relation to legal literature; it is obviously a more flexible term than 'national' and it could be equally desirable, in different cases, to be very local, for example in creating literature for a people with a separate language in a remote part of Papua New Guinea, or to extend the concept right up to regional level, such as examining the possibility of co-operation in legal literature projects among the island nations of the Pacific. It was not the task of the pilot project to make assumptions about the desirability or extent of localization, as this is a matter best discussed within, or between, jurisdictions, but there are some points which one might expect to take into account in considering why and when it is important to localize.

The 'why' question can be connected with a number of factors; it may be linked to nationalist feelings and to the desire to establish, or maintain a separate legal culture. It follows from the understandable assumption that a legal system, and therefore legal literature, should take account of local conditions, values and cultural traditions. The point was made at the seminar, in connection with the paper on East Africa, that there are dangers in viewing different jurisdictions as having homogeneous needs; the kind of constitution the country adopts, the prevailing ideology, the kind of law it opts for, the extent of foreign influence are going to affect the legal literature it seeks to develop. Linked to these are the political and social goals of the country, which involve questions about the roles of lawyers and the appropriate legal education for those roles. It is also clear, and is illustrated by the papers on Sri Lanka, the Sudan, Papua New Guinea and Ethiopia that localization is related to the issue of language, which is important in the operation of the legal system on the ground and in legal education where students need, at least, to have command of the language in which sources and texts are written. Also in the educational sphere, there is the point that legal situations should be comprehensible to local students in the cases and texts they are reading. Local legal literature is also central to the operation of the legal system in the straightforward sense that if judges are not aware of the details of applicable legislation and decisions they are not going to administer current law, and Michael Gaiger's paper on the Sudan suggests some of the implications of this.

There is no general answer to the question 'when is localization important?'. It is true that to some extent the common law world has a unity and that one can, to a degree, get by with foreign sources, but this is an inherently unsatisfactory position. Equally, it may be foolish to pursue an extreme of cultural isolationism, just as it is foolish to think of law as 'pure' and divorced from society. At the root of the debate over this issue are differences of emphasis on the value of local traditions and culture on the one hand and the use of highly developed legal technology on the other. Professor Paul's paper on Ethiopia draws our attention to the problems attendant on adopting a single, centralized model for localization and suggests alternative viewpoints. Within this balance it is clearly sensible to localize, for example, areas of law affected by local custom, or, within a multi-lingual society those aspects of the legal system, law and administration of justice which directly affect people who know only the local language, or areas in which local economic and social conditions, prevailing ideas or government policies are peculiar to the jurisdiction.

Problems of Establishing Priorities

It we imagine some brave group of people who have decided to tackle the task of planning for legal literature, their first hurdle would be to establish a set of priorities, an issue which can only be confronted in the jurisdiction itself. On a fundamental level this might involve consideration of the current structure of the legal system and the role of legal literature and information within it, and a prime difficulty could be establishing who sets the priorities and whose definition of 'need' they are designed to meet.

The orthodox model assumes that legal literature should provide for the day-to-day needs of private practitioners, the judiciary and all other participants in the legal process, for the learning needs of law students and for the general legal interests of professional lawyers. A caveat should be entered here concerning the obvious dangers in an unthinking approach to planning; for example in some instances there are strong arguments for avoiding a rigid formulation of existing customary law principles and procedures, while the creation of a technical legal literature designed solely for professional users may make understanding of, and access to the legal system more difficult for the general public. Beyond the orthodox model priorities can be defined in relation to the need to inform the non-lawyer specialist or intermediary, and ordinary citizens, and to forward communication between legal scholars both internally and internationally and between lawyers and scholars in other disciplines. In addition to the importance which can be attached to the provision of particular types of work, some qualitative standards can help to define priorities; coverage and comprehensiveness, comprehensibility and accessibility to users, efficiency and utility, up-to-datedness, cost-efficiency and so forth.

A preliminary step in any jurisdiction, we suggest, should be to take a cool, hard look at the existing provision of literature and information, and not only to measure this against the ideal, but, perhaps more significantly, to diagnose those deficiencies which really matter. But here is an immediate difficulty - 'matter' to whom? A problem arises when any thought is given to an overall programme, or a 'national plan', as the interests and priorities of different groups - government, profession, law school - frequently clash; the books the academics want to write are not the books which the profession feel are needed and so forth. The implications of this divergence of views are considerable, as it prevents the full mobilization of resources; the government may

have the money, the law society may have a ready distribution network, the academics may have the expertise and time to write, but these capabilities are rarely pooled. Different perceptions of need may not only complicate planning, but also block initiatives when they are made. In the course of the seminar we heard accounts from at least three jurisdictions of resistance from the judiciary and bar to new arrangements for law reporting, and from as many as six of the low importance given by private practitioners to improving, or even using legal literature.

On the level of implementation, assuming a consensus about aims is reached, the location of available resources - human, technical and financial - involves examining processes and participants in all stages of the creation, distribution and use of legal literature. Who and where are the potential authors, editors, law reporters, compilers of reference works? What means are available to produce the required works? How much does, or could, the government printer undertake? Are local publishers and printers able or interested in publishing legal works and how efficient would this be in terms of cost? Are other facilities available such as government or university reprographic units? Are there publishers, printers and bookshops who could handle distribution?

Lastly, and perhaps most significantly, in view of the influence they are likely to exert, is the question of who pays the bills? How many potential purchasers are there? Do they have the money or inclination to pay for the literature produced? How much does, or could, the government contribute? Are there existing subsidy schemes for legal literature - if so, could they be better used, and if not, could they be established?

All of these factors, and the way they interrelate, can determine feasibility with regard to priorities; for example a good subsidy fund may be established, but this is not very useful unless the authors can be found to write the books. In a sense to talk of constraints is partly to view one's resources from a different standpoint, but apart from these practical considerations some jurisdictions may face problems both in the choice of language(s) to be used and in the lack of translators trained in legal terminology. In many developing countries the rapidity of change and the constant appearance of new legislation may create major problems in respect of legal material; first there is the simple difficulty of keeping up-to-date and, second, legislative change may make nonsense of the production of detailed scholarly works since as soon as they are published they may be rendered virtually obsolescent or only of historical interest - the gestation period of such a work may be longer than its 'useful' published life. Finally one must recognize that in some jurisdictions there may be inhibitions on the freedom of communication and the predominance of a particular political or legal ideology may be inimical to standards of comprehensive coverage or critical evaluation of the law and the legal system. To inject a further note of pessimism in connection with planning, one of the participants noted gloomily 'Even if you have a national plan and build high hopes, if the government changes all the work goes down the drain'.

EXPLORING PRACTICAL INITIATIVES

Creating Awareness

A precondition of action, even in terms of planning, is the recognition that there is indeed a problem, or set of problems, to be solved, and it may be worth at this point examining some of the ways this awareness is reached. It was suggested at the seminar that certain developments (which may overlap) can draw the provision of legal literature into the forum of public debate. Such factors may include changes in official ideology, a surge of nationalist feeling articulated in official policy with regard to law, a programme of law reform, an official language switch-over, the development of a law school or the rejection of foreign aid for a planned programme. On a more detailed level awareness can be provoked, or a start in this direction can be made through the initiative of individuals or particular groups: the example of the editorial in the Hong Kong Law Journal which led to the formation of a working party on law reporting drawing in government and professional bodies; the efforts of Scottish academics in founding the Scottish Universities Law Institute, whose board also includes representatives of different branches of the profession; the efforts of the Law Reform Commission in Papua New Guinea to popularize the discussion of issues relating to law; the work of the S.P.T.L. Working Party in the U.K. which has stimulated activity among publishers as well as academics. It is interesting that when a 'pressure group' is 'institutionalized' as in the case of the Canadian Law Information Council, it can continue to draw more new issues into the debate, while provoking action on those already under consideration: indexing law reporting, the applications of computers, gaps in secondary literature, law for the layman, law in schools and so forth. A prime strategy must be to initiate and support projects which involve detailed discussion and enquiry of the local situation with regard to all aspects of legal literature.

Almost all the papers, and certainly the discussions at the seminar suggested that as soon as a problem was diagnosed, one quickly had to confront the issue of allocation of responsibility. Abdul Paliwala says in the introduction to his paper on Papua New Guinea that 'Documentation is power: the better documented legal system always dominates over the less well documented'. It was, however, argued at several points in the seminar, that power can reside equally in silence. It may well be in the interest of certain groups to resist full documentation and wider publication; for example a government may wish to avoid the public accountability attendant on the reporting of tribunals, or powerful specialists at the Bar may wish to keep their expertise and knowledge of recent cases to themselves in the interest of their practice. The problem posed by such vested interests may have to be confronted at the outset.

There is no doubt that one of the factors which appear to have inhibited the development of local legal literature is the absence of any agreed distribution of responsibility for the production of different classes of material. This is the biggest single factor in producing the ad hoc growth of legal literature as publications are produced in response to market demand or individual interest and not in response to perceived 'need'. Solving this problem obviously involves uniting, to some degree, the diverse interest groups mentioned earlier. One strong recommendation improving current provision may be the simple recognition by all groups concerned with the production and use of legal literature that there is a problem and that the case for improvement should be made at national level. That the provision of legal information deserves a reasonably high priority in allocation of government resources and that there should be a clear allocation of responsibility for these matters within the public sector. That regular, up-to-date and efficient publication of primary sources of law, in particular, together with proper digests and indexes, is an important matter which should be a function of government, with responsibility precisely designated, adequate resources provided and the need for speed and accuracy emphasized to those charged with editing, printing and publication - including in respect of Government Printers' schedules. To minimize difficulties of reprinting copyright, wherever possible, should also rest with government.

It was interesting that there was general agreement that government responsibility should extend to law reporting where reports were considered to be an essential source of law. The idea that law reporting can safely be left to commercial publishers has proved to be incorrect simply on economic grounds, in jurisdictions with very small markets, and the examples of Ghana and Northern Ireland where there are statutorily established law reporting bodies funded by government, suggests that centralized law reporting systems can operate on this basis without executive interference.

It was not suggested that the government should bear the whole responsibility for financing and publishing legal information. Other institutions involved with legal system and legal education can, and indeed should, take some of the burden of financing and implementing programmes in this field. For example the provision of reports could be assigned to the Bar where the local Bar is well developed. This would take the strain off Government departments and printers. Professional and educational bodies are already contributors to a varying extent in different jurisdictions but in terms of strategies it is worth considering whether the current ad hoc and unsystematic patterns are the most effective, or whether more formal arrangements might be more productive.

Motivating Producers of Legal Literature

One helpful perspective at this stage may be given by thinking in terms of different kinds of general strategy - the need to maximize resources by providing incentives for potential producers of legal literature, and, where appropriate, providing training in certain skills.

Primary Sources

If we look at 'producers' in relation to primary sources it is clear that in many jurisdictions there are no professionally trained draftsmen or law reporters and that where they do operate their task is already difficult, their work is behind schedule and they lack sufficient personnel and time to clear the backlog of work, let alone take on substantial extra tasks such as preparing a revised edition of the statutes, compiling collections or restatements of customary law, preparing indexes or extending the coverage of law reports. The session on legislation, led by Barney Young, that on law reporting presented in the light of the Ghana experience by Kofi Tetteh and Greg Kane, with the latter's paper on Law Reporting in the Commonwealth (Commonwealth Secretariat 1975) illustrated vividly some of the constraints which affect these fields.

The workshop held on publishing strategies suggested several points. Firstly that this is one area where international co-operation could be effective, although there was a strong feeling that the aid or support given should be appropriate, for example it would be more useful for a proposed editor of law reports to be sent to a country with similar resources to his own to see how the task is tackled, rather than to a mammoth organization in the U.S. whose manpower, finance and technological support was virtually unlimited. However international co-operative schemes could be supported and extended, such as the proposal put to the meeting of Commonwealth Attorneys General that a post-graduate diploma course in legal drafting and theory be established in the West Indies by the Council of Legal Education. Such regional centres could be used by other jurisdictions which are unable to set up their own courses and perhaps similar ventures could be developed for law reporting. Secondly, in considering the need to find and train people for drafting or law reporting, it was felt that young lawyers were deterred from this kind of work because it affected their future hopes for practice and could be a 'dead-end'. In planning for such publications thought should be given to earning and career possibilities for those involved, and this might involve diversifying their work by incorporating it with other ventures such as a legal aid office or more general legal information centre.

Secondary Literature: The Role of the Law School

It should not be assumed that the personnel involved with the production of primary and secondary literature are necessarily different, but this may be a useful distinction in terms of strategies. For example if we turn to professional lawyers as potential authors of reference and secondary works, while their contribution has been significant in some cases, they tend to lack the time and financial or prestige incentives to devote themselves to generating legal literature. Yet in jurisdictions without a law school they may be the sole resource and it has been suggested that they may be prepared to write if a local law journal exists, or is created, and might be attracted to do so if they felt this enhances their own, or their partnership's reputation.

It has been commonly assumed that the existence of a law school will largely solve the problem of producers, and indeed the papers on Hong Kong, Ethiopia, Sudan and East Africa demonstrate that some law schools have made this assumption themselves, partly prompted by frustration at the lack of material for legal education. However it is clear that having a local law school does not necessarily offer an easy solution, and it may be worth expanding on this theme as it does illustrate the complexity of planning, implementation and motivation.

The theory is that because academic lawyers have more 'leisure' than private practitioners and judges the main burden of performing certain tasks should and will be borne by them. These tasks include editing law reports, editing digests and secondary reference works, writing student textbooks, systematically acting as sympathetic critics of the legal system, participating in law reform, writing works of original scholarship and editing periodicals. Our impression is that there is immense variation in the extent to which local law schools make a contribution to this work, and that practitioners often express disappointment or are critical of the performance of academics in this respect.

A preliminary question is how realistic is it to expect a law school to make such a contribution. There are, in fact a number of reasons why a particular law school may not fulfill its expected role, and these are underlined if one imagines a small, fairly recently established law department in a developing country. First there may be a few full-time academics, and the total amount of 'leisure time' within the institution may be really rather small - it may be understaffed, facing heavy teaching demands, with senior members also carrying administrative burdens within the university. If there are expatriate staff they may have prior commitments not related in any way to the jurisdiction, while local lecturers may be under pressure to complete research degrees. A high turnover of staff may militate against continuity in major projects. Secondly there are few incentives to academics to undertake the tasks listed above; typically, they are unpaid and the individual academic may feel there are other activities which will either be better remunerated or will further his career or will be more intellectually interesting. Not only are such tasks as law reporting, compiling indexes and citators etc. not considered prestigious within the academic world, but they may require skills which the academic would not necessarily possess or, alternatively, the academic may be considered overqualified for the job. In some cases, of course, potential authors may not only be frustrated by lack of reward but actually deterred from writing on certain subjects for fear of repression.

Thirdly, the choice of research topic is generally considered to be part of the individual's academic freedom. There is no traditional connection between individual research priorities and conceptions of national or local professional needs. In addi-

tion most academics like to maintain a fairly close connection between the subjects they teach and their research. Apart from the writing of scholarly or educational works none of the tasks mentioned is a recognized part of the accepted obligations of academics and, when undertaken, are done in the spirit of the 'volunteer' rather than through a sense of duty. Moreover it must be admitted that few academics plan their research time systematically and it is often the case that they become involved in commitments and undertakings on a fairly random basis.

There are other points related to local research: often post-graduate work is done abroad where the facilities are not suitable for researching into the legal problems of the student's own jurisdiction, and some of the research required locally may not, in any case, fit into the format of orthodox qualifications. There is often a tension between local need and international academic prestige, and the desire to reach a wider audience may prompt an author to by-pass both local outlets and local topics. Those interested in pursuing local research may face problems in terms of the accessibility of their data and source materials - there may be no official archives, or incomplete and badly catalogued ones, or the sources they need may be in a different language or languages. This is mentioned in the paper on Hong Kong where the holdings of the Public Record Office are extensive and well-indexed yet the material is chiefly in Chinese (a language which only one person in the law department can read with ease). Empirical researchers may encounter yet further difficulties of access and communication.

If some formal institutional commitment were worked out in liaison with the government and the profession, whereby the law school took direct responsibility for producing certain kinds of legal literature, or committed itself to specific involvement with a centre dealing with legal information some of these problems might be resolved and the contribution of academics might be improved and regularized. This would be helped by the harmonization of the structure of incentives and prestige for local academics with perceived national needs, and by the provision of resources to allow for release from heavy teaching loads, research and secretarial assistance for the accomplishment of the agreed tasks. Possibly there could be specific financial incentives for authors in so far as the work is not part of their formal duties, or post-graduate research could be diverted to local needs by means of special scholarships, providing the requirements of the desired qualifications could be met. In some countries a high preference for scholarships is placed on topics related to national development, but such policies, usually relating to the sciences or social sciences have not often been applied to law. Interestingly, the Isle of Man, which has no law school, encourages local writing by offering an annual prize for the best monograph on local law submitted by those studying for the Bar examinations.

Revising Notions of Types of Publication

At this juncture it might be pointed out that conventional views as to who are the producers of legal literature are worth revising. In some jurisdictions we have found that the secondary works being used by students and professional lawyers do not always emanate from 'academic' writers as usually perceived and the works themselves exist on rather an informal level. One thinks of law reform commission reports, booklets produced by pressure groups and advisory bodies, which may be the only review of the law available in a particular area, works produced with the general public rather than the professional users in mind such as the very comprehensive and successful Legal Resources Book 1977 published by Fitzroy Legal Services in Victoria, Australia, or the duplicated copies of lectures, not only those given at universities, but by local Law Societies and Magistrates Associations.

In the context of motivating producers efforts should be made to see that such coverage is not wasted, both by collecting all informal publications centrally and by persuading the people involved to see their activities as part of the legal literature spectrum, presenting reports in readable formats, putting lectures into some permanent form (even if only duplicated notes) and making their availability known.

This brings one to consider a further general strategy, or approach, which is the need in certain cases to revise one's attitude to what constitutes 'proper' types - and as discussed in the next section - forms of legal literature. This may also be linked to exploiting or making better use of the existing outlets. One can give examples of adjusting preconceptions at all stages of the 'orthodox model'. For example in connection with legislation it is assumed that a continually up-dated index is required, but it has been suggested that for all small jurisdictions subject guides and chronological tables, such as those compiled for the Isle of Man, could be compiled more easily, and would provide an efficient means of ascertaining the position of every act, and could be used by administrators, legal profession and draftsmen. With regard to law reporting, a jurisdiction which cannot afford a sophisticated series of fully edited reports can at least make judgments available to the profession and public by adopting

the device such as the Northern Ireland 'Blue Book' where the printed judgments are simply photocopied with subject matter reference and full introductory notes, staple bound and are sold as quarterly instalments.

If a series of textbooks covering the whole spectrum of the law appears impracticable or unattainable, attention could be paid to short explanatory annotations of recent legislation, a local journal could commission series of articles on cognate aspects which could be re-issued in booklet form, lecture handouts and teaching materials could be bound in a permanent form, local journals can combine topical and academic articles with an information service for the practitioner, on the lines of the Hong Kong Law Journal or Northern Ireland Legal Quarterly. In view of problems of ephemerality where there is rapid legislative change, alternative formats for text books, such as loose-leaf, or part publication may be appropriate, and other expedients can be reviewed. There are real problems, with both intellectual and financial aspects, in balancing the requirements of author and publishers against goals of localization in view of the need to appeal to local markets, to satisfy the customers' particular interests, and to maximize sales. One position, put quite strongly at the conference was 'if you want literature that is responsive to local needs you have to ignore international markets even if it cuts your sales by 50%' - hard words for a journal editor trying to build up subscriptions. This position also implies putting aside considerations of status and, to some extent, compromising on content. As one author put it 'you have to respond to local expectations. You have to create values but you must also relate to the existing situation. You must not write merely what they want, but give something of what they want and then stimulate them further'. This does involve accepting, not only different types of work, but different forms and standards of presentation.

Different Approaches to Publication

Common perceptions of the standard of publication acceptable to users of law books have been formed by the high quality of production of law publishing houses. We are not suggesting that aspirations should be dropped, but it may be that making the literature available is more important than making it beautiful, and that need, plus restrictions on cost, will determine priorities and necessitate economies. It could also be that some jurisdictions see localization of their legal literature as involving local production, particularly if financed by government, and this means adjusting to existing publishing conditions. This can mean radically altering expectations as to the appearance of the work. Publishers trying to publish books that would not be commercially viable in traditional formats often feel they are fighting a double battle against cost and against readers' attitudes. As one U.K. editor said 'A good deal can be achieved by taking a more flexible attitude towards format and appearance, but academics are very conservative. They often suffer from a kind of 'print snobbery' which does not recognize the circulation of, say 500 duplicated copies as 'proper publication', even though that is the most appropriate form for the material'.

In the past many works relating to overseas jurisdictions were published by 'trans-national' specialist legal publishers, based in the U.K. and North America or publishers such as the Australian and New Zealand firms who have produced material on the South Pacific region. This applied to reports such as the African Law Reports, and PNG Law Reports as well as to texts and monographs. The constraints here are several; first these firms have been affected by the inflation of the past decade and have cut back on 'fringe' areas of which overseas publishing is one; they may now be reluctant to accept books which do not have a wide international market unless they receive a subsidy; even then, by the time the works have been exported their price in the original jurisdiction may be high, orders are very slow coming through and so on. In addition it may be felt that publishing overseas inhibits a wholly local development.

For career and prestige reasons local outlets may be by-passed in favour of publishing in international journals or with foreign publishing houses and the desire for international recognition may lead writers to concentrate on topics which are not at all, or not exclusively, of local importance. But there are obviously ways in which the larger publishers can be useful to small jurisdictions; one advantage is their wide distribution network, and if they can be persuaded to accept the priorities of local needs as well as international sales they can help to generate interest in particular aspects of local law. The example given in Abdul Paliwala's paper of the role now being played by the Australian Law Book Company in Papua New Guinea illustrates one line of possibilities. Such publishers may be more helpful with regional series. Where a publisher does begin to express interest in local or regional works it is important to feed that interest by submitting proposals and manuscripts.

It may be, however, that locally oriented material proves unacceptable to international publishers, even with a subsidy. If one moves on to explore other means of publication, which involves examining the local publishing infrastructure, the problems

are usually so familiar to those concerned with legal literature that the mere mention elicits an immediate groan. The government printer should be an immediate and obvious resource, but experience suggests that in many places he is overburdened with small tasks designated 'urgent' which can be even the printing of stationery, and that the printing of acts, or statutory instruments, is put well down the schedule with the result that published legislation is slow to appear. In addition the government printer may lack the sales expertise of a commercial publisher. But it is worth examining ways of alleviating these problems. It has been found that if the printer is on the editorial or management committee of, say, the law reports, he feels more accountable and is prepared to alter schedules. In some places the government printer may produce the material and marketing and distribution is then taken over by the central government library or done on a commission basis by a local publishing house. A further arrangement could be for the government to contract out official legal publications to a local publisher.

Commercial publishers are usually expected to produce most types of work outside the official gazette and different forms of legislation, but local publishers and printers may lack the necessary skills of editing, laying out and printing complicated legal material. They may also be slow, and, if law books are outside their usual work, local printing may prove more costly than printing overseas. Publishers may also face particular problems in some countries with regard to basic materials. Furthermore individual local firms do not have access to a good international distribution mechanism and potential sales are reduced. The producers may have to help the printer by simplifying their format, accepting economical production techniques like IBM composition, or type-written 'direct editions' which can then be reproduced by off-set litho, and which will involve limiting footnotes, providing good copy so that corrections do not have to be made at proof-stage. The author may have to take responsibility for editing the book himself; it may also involve financial arrangements such as risk-sharing with a local publisher, or, if a university, law society or individual is publishing themselves, obtaining long-term credit arrangements with the printer so that less immediate capital is required to launch a publication.

Those who are concerned with producing material quickly and cheaply may feel that it is sensible to 'do-it-themselves' using xerox or offprint facilities in government offices or in universities. These methods have long been used for teaching materials and can be employed for journals, reports, pamphlets and short texts. Although it is easy to overlook the cost of secretarial and clerical time, or the loss of valuable time spent (by people who could be researching and writing) on the actual production of material, and one encounters prejudices against such material on the grounds of presentation, there are many positive advantages in such a strategy, including stimulating writing by providing an accessible outlet, and putting into permanent form some valuable material or analysis that would otherwise be lost. In a very small jurisdiction, such as some of the Pacific Islands, xeroxing or duplicating essential material may be the only sensible way of disseminating information. The subject of institutional production is covered in S.P.T.L. Working Paper No. 3.

At the opposite end of the spectrum some of the new technologies of publishing and information dissemination may offer possibilities for small jurisdictions in the future, although the application of sophisticated computer systems, whether for publications or for information retrieval seems dubious in very small jurisdictions. On a simpler level developments in xerox processes may help small market publications. It is now possible to install a machine on the lines of a superior photocopier which makes a complete copy of book or manuscript, collates and binds it. The technique could also provide one answer to the problem of reprint where a complete run would not be economical. With such a machine reprints could be sent out individually, as the requests came in, without involving the publisher in the capital outlay and high storage costs of a large run. At present the expenditure may be too high for the limited use which one firm would make of this technique - a possible case for international co-operation or government sponsorship?

International micro-publishers may also be of assistance to small jurisdictions in providing printed reprints in small numbers from a master fiche or film, and micro publishing may be increasingly acceptable with the development of print-out machines and hand readers. It may be particularly applicable to reference material, but it could also be used for 'publishing' monographs and specialist works relatively inexpensively as a master-fiche of the typescript can be made and copies produced when required, at very low cost.

At many points in the seminar one became aware of the value of sharing experience of such problems and their possible solutions and one recommendation of the workshop on publishing techniques was that those involved in the production of local literature should describe the mechanisms that bring their ideas into production; and should pool information on very concrete subjects such as costs. Although some costs like paper and labour will vary, it was suggested that a structural model particularly relating to

'success stories' where factors involved in cost for example of producing legislation - people, accommodation, overheads, materials, production could be noted, so that local people could use the appropriate figures and compare different approaches, would be very useful.

Distribution

Another central theme was the problem of distribution. First one must say that a first step in expanding the market can simply be a matter of persuading local lawyers to buy more. One feels that mere exhortations often fall on deaf ears and that in the absence of formal, or systematic informal, pressures such as compulsory subscriptions to law reports it is likely that a high percentage of the potential professional customers for local legal literature will not in fact purchase it. Perhaps strategies could be considered like the incorporation of a subscription to the law reports into the professional practice fee.

Existing formal networks can be used for distribution of local works - the Bar Association or Law Society can stock copies of books, publicize and sell direct to their members thus cutting out warehousing and booksellers' discounts. Whether one is working through commercial publishers or publishing direct from an institution, it is certainly worth selling directly wherever possible - a typical breakdown of the trade price of a book in the U.K. (although it may not be transferable elsewhere) is production 35%, royalties 7 1/2-10%, publicity 7 1/2%, distribution costs and overheads 20%, editorial overheads 15%, publishers profit 12-15%. To reach retail price one must add 30% booksellers' discount. Turning to buyers of books at this point, it is an idea to see if publishers will sell direct to consumers like law departments, law societies and so on rather than through agents, although one does not want the responsibility of putting the valuable local bookseller out of business. It is also worth supporting local second hand bookshops which again can be organized in law schools and by professional bodies.

In most small jurisdictions the potential international market for local legal literature is not adequately exploited, as local publishers, whether government, commercial or institutional do not have access to worldwide marketing networks. A national, regional or international distribution agency for legal publications might go a long way to remedy this. Wider markets can be reached by, for example, extending the coverage of a book or journal to a regional rather than national level. It would also be worth exploring the possibility of an international body such as the CLEA or some other international agency collecting and distributing regular information about new publications, primary and secondary, with details of price, availability, ordering procedures etc. Here again the existing resources, such as the Commonwealth Law Bulletin, and Technical Co-operation (which lists recent statute law) are not fully exploited. In the absence of such arrangements small jurisdictions would, quite straightforwardly, benefit from more information about the marketing scene. It was felt that this was another area where international co-operation could be effective; as a preliminary step a Canadian sub-group of the seminar agreed to compile a short manual on ways of getting publicity on sales in the North American market.

Paying the Bill

Supposing one has designed a list of priorities, selected authors and found a means of publication, the largest question of all still remains - who will pay the cost? The primary constraint assumed throughout is that very few local works will be profitable, or even self-financing, although several will and may, if part of a local publisher's list, help to subsidize others. One may assume that the principal responsibility for providing legal information should lie with government, but even if this is accepted one has to recognize the possible difficulties imposed by competing demands on public expenditure, the complexities of bureaucratic accounting, the threat, real or assumed, of executive interference with the legal system and so forth. It would be natural to assume that the profession and those concerned in education would gladly pay a realistic price for much needed material, but the 'economic price' in some cases would be unacceptably high and we have available statistics which show that the full market potential (in terms of assumed users of a work) is rarely realized in sales.

In such cases carefully administered subsidy schemes can have considerable effect, both in effecting publication through reducing the publisher's risk and in acting as a stimulus to writing and research. The sources can be various: in the Republic of Ireland the Department of Justice allocates a specific sum annually (rarely used) for supporting legal textbooks; in the same jurisdiction the Arthur Cox Foundation raised initial capital by an appeal to professional lawyers and has now aided a number of publications; in Scotland the Scottish Universities Law Institute, in conjunction with

W. Green Ltd., has published twelve substantial volumes on different aspects of local law backed by a guarantee from the Carnegie Foundation. These examples from the British Isles are described in detail in S.P.T.L. Working Paper 4, and can be set against the experience of other countries, for example that of the East African Literature Bureau, which also drew on public funds. Subsidies need not necessarily be formally organized, and at the seminar interesting examples were given of substantial legal works in the West Indies (Guyana and Jamaica) which had been largely financed through the energetic efforts of the authors in obtaining donations from banks and large businesses.

It is possible, (and has recently been tried in Scotland) to impose a levy on all members of the Law Society or Bar Association of a specific sum for the funding of legal literature; and in Canada the various provincial law foundations, which distribute interest on monies deposited on behalf of clients by lawyers to legal aid programmes and libraries, aid legal research often resulting in publication. With regard to academic publications it may be worth repeating a point which was made very sharply in the S.P.T.L. Working Party Final Report, viz. that it no longer makes sense, if it ever did, for bodies funding research to stop short, as a matter of principle, from subsidizing publication of the results. This policy has been based on a belief, which is certainly not tenable in small markets, that commercial publishers could be relied upon to publish all research of real merit. One approach to funding would be for post-graduates and other researchers doing sponsored work on local law, whether they are based at home or abroad to tackle their funding bodies and universities, with a view to eliciting contributions to publication costs. In the West Indies the Institute of Social and Educational Research, and the Council for Legal Education provide an example of the way research papers and books may be supported.

Although subsidies can undoubtedly help it is important to recognize that there are constraints which do not relate solely to the size of the fund. First the very need for a subsidy implies that a work is not likely to be profitable and the loan given unlikely to be paid in full, or, if it is repaid, the money will come in over a long period of time so that one cannot indulge in a large capital outlay at one time. Schemes based on guarantees still mean that capital is needed for the initial production and the guarantee cannot be called upon until some time has elapsed. More complicated problems attend the administration of the subsidy - who will select the works and on what basis will they be chosen? Some schemes, such as those of the East African Literature Bureau have been criticized for their very generosity, in that books have not been stringently reviewed. In a small jurisdiction where there is little room for competing works evaluation of intellectual quality and practical utility is vital as one bad book in an area may pre-empt the publication of a better one; on the other hand, it may be argued a second-rate book on the local legal system is better than none at all. Schemes such as that described in the Sri Lanka paper for translation of legal literature faced particular difficulties. Although fuller information cannot stave off disaster it would seem valuable for details of different models and experience of subsidy schemes to be collected and shared.

Other devices can be explored which make the financing of publishing projects easier, and some of these have already been mentioned, or implied; for example getting good credit terms with printers, or obtaining as many pre-publication orders as possible at a lower price than the published price, so that the printing bill can be paid at least in part at the time of publication. Another suggestion is linking publishing programmes to more profitable ventures; The Hong Kong Law Journal for instance gets quite substantial income from releasing articles as pamphlets and organizing conventions and seminars for the profession and for local businessmen.

A number of factors already covered such as doing without royalties, selling direct rather than through booksellers, expanding the market, using the cheaper means of production and so forth all help to reduce the bill and if not actually paying it, at least make it easier to face. A specific point may be made here with reference to informal institutional publications, such as teaching materials. In the U.K. it was found that while this activity was expanding it was threatened by tighter departmental budgets. In small jurisdictions it would seem necessary to emphasize the importance of financing such work, but where this is impossible one can investigate the possibilities of institutional and private funding, reducing costs and gaining extra income, although as the paper on Canada illustrates money is not a panacea, and legal literature problems exist even in the wealthiest jurisdictions.

Institutionalizing the Effort

Although a good liaison between the various relevant bodies can help to stimulate and systematize the production of legal literature there may be arguments in certain cases for providing an institutional base, however informal. This has the advantage of disentangling such work from, say, the ordinary workload of the Ministry of Justice or

Attorney General's Office, or from the teaching and private research activities of a university department. We cannot suggest a universally transferable model but it may help to illustrate this with a couple of examples, one actual, the other proposed.

The first is the Canadian Law Information Council whose devotion to the cause is seen in the fact that they are publishing this volume. CLIC is a federally chartered non-profit body with representatives from the profession, legal education and federal and central government. It is described in detail in Halevy and Murphy's paper, and although largely dependent on voluntary effort and specially commissioned projects it both researches and initiates activity (newsletters, subsidy schemes, indexes etc.) on legal information for the professional user and the layman, and its influence on lawyers and law publishers is very apparent. Some part of this mixed planning body, pressure group and publisher might be appropriate in other jurisdictions.

The second model was proposed by Professor Twining in a working paper for the Papua New Guinea Law Reform Commission, and was conceived initially in the context of documenting customary law. Identifying a need for co-ordination of the scattered groups involved in the collection, storage and dissemination of information about law the paper suggests the establishment of a small unit which could act as a clearing house, documentation centre and publishing unit, as well as initiating specific projects. Some of the tasks such a unit could undertake are referred to in Abdul Paliwala's paper on Papua New Guinea. This kind of unit might be of value even in very small jurisdictions and its work, and staff, could be varied according to local needs.

Both these suggestions are concerned with single countries although CLIC deals with eleven jurisdictions, some large, some very small with different problems and resources and a similar scheme might be modified on a regional basis. At various points in this paper the need for regional and international co-operation has been stressed and it is worth examining how this might be formalized to some degree. The conference as a whole made a strong recommendation that work should be continued, or initiated, collecting information from as many small jurisdictions as possible, producing advisory works on markets, production, subsidies, identifying resources of aid and information, and actively assisting those who wish to expand local law publishing and information systems.

FUTURE RESEARCH AND ACTION

It is a truism that no academic conference or monograph is complete without recommendations for future research. Like bureaucrats and other animals, research tends to be self-perpetuating. After days of friendly or bitter disagreement, academics can usually be relied on to unite behind the banner that there is still more work for them to do. An unusual feature of the Toronto seminar was that while there appeared to be general agreement that the problems of localizing legal literature and information in small jurisdictions are real enough, there was almost total lack of agreement about what, if anything, was worthy of further systematic study. As a result few specific recommendations for further research emerged from the seminar.

This reaction deserves to be taken seriously. In the first chapter, we reported an attitude which can be expressed in such terms as: "The problem is easily stated and understood, therefore there is nothing to study". It must be apparent from what has gone before that we have ourselves adopted a posture of scepticism about such scepticism. However, it is important to try to tease out the core of truth behind such attitudes, not least because they are widely held by people who have played a leading part in attempts to stimulate the development of local literature in their own jurisdictions.

There are, perhaps, three points on which there is no need for serious disagreement. First, we wholeheartedly accept the proposition that there are many contexts in which practical initiatives need not and should not wait on systematic research. This is particularly the case in respect of orthodox provision. As we acknowledged in the Introduction, if copies of current legislation are unobtainable or there are no educational materials on local law, the first priority is to try to take practical steps to remedy the deficiency with some sense of urgency. Similarly, enough information is already available about such matters as the uses and limitations of new technologies, subsidy schemes and the like, to provide an adequate basis for even quite ambitious schemes for relatively systematic development of local provision.

Secondly, we would also agree that in this sphere practical experience is likely to be at least as illuminating as the findings of even the most rigorously designed and executed research project. This is particularly important in respect of the sobering effect of working in conditions where resources are limited, people are overworked, and numerous other obstacles and constraints prevent the attainment of even quite modest objectives. It is a striking feature of legal information as a field of enquiry that nearly all of the systematic studies undertaken to date have been stimulated by interest

in potential computer applications to law. Such research has thrown some interesting light on lawyers' information habits (see below) and has raised many interesting questions about what precisely lawyers do and how they go about it. Yet most of this body of research is remote from the real problems and experience of people working in small jurisdictions. This is not merely because computers may have a limited role to play in poor or small countries (an assumption that is itself questionable), but more particularly because the great bulk of this research has concentrated almost exclusively on the (often idealized) needs of private practitioners for retrieving information about decided cases and even from the perspective of the orthodox model, tends to make some rather simplistic assumptions about legal information. Similarly, much of the research that has been done by law librarians relates to a world which seems rather remote from the kinds of situation depicted in the papers by Gaiger, Cooray and Paliwala.

A third point, which might bolster scepticism about the value of systematic research in this context, concerns feasibility. One lesson of the pilot project has been that it is relatively easy to build up a fairly reliable overview of the state of orthodox provision in a given jurisdiction, but that it is all too easy to underestimate the difficulties of penetrating much beyond that. It is usually relatively simple to acquire or compile a bibliography of published sources, to collect information about numbers of lawyers, law students and other potential specialist users, to plot the location of law libraries and law offices and to identify the main producers of local literature. Most of this information is known locally or can be gathered quite easily even by an outsider during the course of a brief visit. But as soon as one starts asking about such matters as the reading and purchasing habits of particular classes of users or details of the economics of publication or networks of informal communication among professionals, one finds that the information is not readily accessible and is likely to be very difficult to obtain in a systematic way. As the enquiry broadens out into such matters as communication about law to, and the information needs of, non-specialists or the public at large it becomes more and more elusive and further questions begin to emerge about the appropriateness of "legal literature" or "legal information" as concepts which can meaningfully provide a sensible or fruitful focus of attention. There is something artificial about restricting one's enquiry to the legal information needs and habits of, for example, a community action group or even a local advice centre, without reference to questions about the place of such phenomena in some broader social and political context. Thus as one pushes beyond obvious questions about orthodox provision, one is confronted not only with questions about the feasibility of the enterprise, but also about its significance. As with most research which starts with a narrow focus, it is not at all easy to keep the lid on Pandora's box.

In the present context, the elusiveness of such further lines of enquiry provides some support for the scepticism of those who are concerned to get on with the job. Our personal view is that there are some obvious and worthwhile tasks that can be tackled at once and that it would be foolish to delay action until legal information as a field of study has grown out of its infancy. But we are also convinced that even in respect of immediate action some widely held assumptions about legal literature need to be questioned along lines suggested above. For example, in deciding on priorities it should not be taken for granted that the most pressing need of private practitioners is for a better statute book or more regular orthodox law reports or that the most important users of legal materials are private practitioners or that the printed word is the most efficient way of providing needed information. In some jurisdictions such common sense assumptions may indeed prove to be sensible; in others merely to pause to ask the question before plunging in may suggest other priorities or alternative ways of meeting them.

We hope that, at the very least, some of the contributions to this volume may be of immediate value in suggesting ways of tackling practical problems that confront people working in small jurisdictions. But we also hope that the pilot project will stimulate a variety of types of reflection and study. All that we shall try to do here is to try to identify and differentiate a few rather different lines of enquiry which might be fruitfully pursued at the next stage.

One point which was brought out clearly during discussion is the need to locate more precisely than has been done to date the relationship between research into legal information and other cognate areas. Three specific areas immediately come to mind. Firstly, a fair amount of data is to be found in the literature on the legal profession. It is both scattered and fragmentary, but there is a good deal of material which could be usefully gathered and analyzed in one place. Conversely it is our impression that students of the legal profession might profitably pay more attention to such matters as the book-buying and book-using habits of lawyers, informal networks of communication, and the kinds of information which they in fact need or think they need. Similarly law teachers might do well to look closely at the actual reading habits of their students - they are after all a particular kind of specialist in information.

A second focus of attention, closely related to but broader than the legal profession, is that of "access" - by which is meant the access of individuals in the society to legal expertise, legal services and practical knowledge on how to use the law. This is particularly, but not exclusively, relevant to the third world countries and provides a possible way of looking at legal information within a broader context. Thirdly, the bearing of perspectives and techniques developed within the so-called "information sciences" remains to be explored.

Several specific, but rather different, lines of enquiry concerning legal literature and information were identified in the papers and during the course of the seminar. Some have already been mentioned, such as detailed studies of the information habits and needs of different classes of users, the system of incentives and disincentives affecting the research and writing habits of academics, the legal information requirements of grass roots organizations and community ventures and the elusive topic of communication about law to and from the public at large.

More generally we feel that two dimensions need more emphasis than it was possible to give them during the pilot project: the historical and the theoretical. Hardly any detailed work has been done to date on the historical development of particular bodies of legal literature and their relationship to such matters as the state of the local publishing industry and the organization, workloads, prevailing ideas or self-images of academic and practising lawyers - a subject which is currently being explored by Jenny Uglow in respect of England and Wales.

As regards theoretical work, a start has been made in William Twining's "The Concept of a National Legal Literature", in the collection of hypotheses and provocative propositions and in some of the more general remarks in the papers by Paul, Martin and Paliwala. However, it was suggested at the seminar with some justification that as a preliminary to research it would be important to clarify further the primary underlying concerns (why study legal literature?) and the actual and potential functions of legal literature and legal information (who uses which tools for what purposes?). For example, the purpose of a particular study may be to advance some particular strategy of "legal development" or to show some of the social effects of existing patterns of development or to deal with certain specific pragmatic problems or to further the efficient and orderly administration of an existing legal system or to promote legal scholarship or legal education on some particular model.

Similarly, if legal literature and other vehicles for communicating information about law are to be viewed as tools to serve one or more specific functions, it is important to differentiate between such functions as communicating information to particular audiences, assisting officials in implementing or administering or developing governmental policies, programmes or laws, assisting different types of individuals or groups to use law to protect or advance their own interests, evaluating critically elements in the legal system or training various kinds of participants.*

The questions raised in the preceding paragraphs suggest at least one reason why the seminar did not produce many specific suggestions for research: it was felt that it would be premature to embark on a major research project or programme without first clarifying a number of theoretical issues. This confirms our own opinion that the pilot project has been useful and illuminating in a number of respects, but some theoretical groundwork remains to be done.

There were, of course, other reasons for the lack of consensus about the next stage in research. The diversity of the participants reflected a diversity of concerns and perspectives. Indeed, all three approaches that we described in the Introduction were represented at the seminar: those who were interested in taking immediate practical steps to improve orthodox provision; those who were interested in detailed empirical research into specific areas and those who wished to adopt a broader, and generally more critical, perspective and to set the study of legal information and legal literature in the context of debates about "development", "basic human needs" or "law and economy".

Despite this diversity of views, there was general agreement on the specific point that study of the problems of legal information in multi-lingual societies is a neglected topic which deserves to be given a high priority. It was agreed that this should be drawn to the attention of the sponsoring bodies and of organizations such as UNESCO.

There was also agreement that immediate steps should be taken, initially under the auspices of the Commonwealth Legal Education Association, to follow up the pilot project and the seminar. Apart from making arrangements to publish the proceedings of the seminar, a strong recommendation was passed to the effect that international co-operation should be continued or initiated on a number of fronts, such as collecting information from as many small jurisdictions as possible, producing advisory working papers on

* The preceding two paragraphs are based on notes prepared by James Paul.

markets, production and subsidies, and exploring ways and means of actively assisting those who wish to expand local law publishing and information systems in their own jurisdictions. William Twining, Balfour Halevy and Jenny Uglow undertook to take responsibility for putting forward suggestions for follow up to the Commonwealth Legal Education Association and other bodies. Since then preliminary consideration has been given to a number of specific proposals, including a Commonwealth Law Information Advisory Centre, an international subsidy scheme, regional workshops and an action-research project in the West Indies. At the time of writing these are still only at the stage of preliminary informal discussion.

While such possibilities for international co-operation were considered to be worth exploring, it was the general feeling of the meeting that most work has to be done at the local level, primarily by local people. As has been suggested more than once in the preceding pages, perhaps the key to this lies in conscious recognition of the existence of a problem, clarifying local needs and priorities and keeping in mind the whole range of strategies and techniques which are in fact available for developing a satisfactory system of legal information. Despite the fact that this quite varied group had practical and often dispiriting experience of the difficulties, the seminar ended on a note of optimism, cheered by the action of the delegate of the Isle of Man, who distributed badges symbolizing the advent of the Millenium in 1979.

CONCLUSIONS

Although the main purpose of the seminar was to exchange information and not to make recommendations we felt that it might be useful to close this volume by summarizing some of the main suggestions that emerged from the discussions.

General conclusions

- 1.1 The feeling of all those attending the seminar was that the localization of legal literature in small jurisdictions is an important matter which presents a widespread and urgent problem, which should be the focus of immediate and continuing attention.
- 1.2 Improvement in the provision of legal literature should be the object of concerted action locally on the part of government, legal profession, legal educators and other interested groups.
- 1.3 The matter is one for co-operation between all common law countries.

Suggestions For Individual Jurisdictions

- 2.1 The seminar agreed that a number of devices, listed in 2.2 - 2.15 below, could be usefully considered and adapted to local needs by particular jurisdictions (for a more detailed survey see Ch. 13). The strategies suggested included:
- 2.2 The establishment of a national set of priorities for local legal literature, or a legal literature localization programme.
- 2.3 The clear allocation of responsibility for the production of various kinds of legal literature. A formal recommendation was proposed with regard to the provision of primary sources by the workshop on publishing strategies and economics:

"It is recommended that the responsibility for the publication of primary legal sources, i.e. legislation, primary and subordinate, and law reports, and with these, appropriate finding tools, digests, appendices, etc. rests with the government. Copyright, wherever possible, should also rest with the government, where the responsibility may be delegated."

This was modified in plenary session to a broader recommendation that it is the responsibility of governments to communicate basic legal information to those who need it.

- 2.4 The drawing up of a formal institutional commitment on behalf of a law school, where such a school is a potential major contributor, for the production of certain types of legal literature, worked out in consultation with government and the legal profession, and backed by adequate facilities and resources.
- 2.5 The establishment of working parties to investigate and make practical recommendations on specific current problems; examples include the S.P.T.L. Working Party on Academic Law Publishing (Ch. 3), Papua New Guinea Law Reform Commission Working Paper No. 8 (Ch. 6), Working Party on Hong Kong Law Reports (Ch. 5).
- 2.6 The establishment of information and documentation centres to co-ordinate local literature projects; examples: proposed Papua New Guinea Law Information Centre (Ch. 6), Canadian Law Information Council (Ch. 11).
- 2.7 The establishment of a national subsidy scheme for legal publications; examples: Scottish Universities Law Institute (Ch. 13 ii), East Africa Literature Bureau (Chs. 7,10).
- 2.8 The adoption by central research bodies of grant-award policies designed to link local research with a programme of national priorities for legal study and publications.
- 2.9 The adoption of policies by bodies funding research to include funds or arrangements for the publication of the resulting work.

- 2.10 The creation of incentives for law reporters etc. such as clearly defined career structures, financial reward, possibility of mobility to allied activities such as a legal information service.
- 2.11 The use of low-cost alternatives to conventional publishing where appropriate (xeroxing, duplicating, microfiche), for example the Northern Ireland Blue Book (Ch. 13).
- 2.12 The introduction of levies on the profession to support legal publications, or of compulsory purchase schemes; for example, subscriptions to law reports as part of professional practice fee (Ch. 11).
- 2.13 The utilization of existing networks for cheaper distribution, e.g. the local Law Society (Ch. 13).
- 2.14 The establishment of a national legal archive (where lacking) and provision of adequate catalogues and bibliographic services covering local legal material.
- 2.15 The collection of information, and provision of wider availability of, unpublished 'legal literature', such as research studies, xeroxed case-books etc.

Suggestions for International Aid Agencies

- 3.1 The experience of several jurisdictions (see e.g. Ch. 10) suggests that aid provided from outside has often been misconceived and misdirected, and the following suggestions were made;
- 3.2 Major international agencies such as UNESCO and the commonwealth Foundation should give serious consideration to supporting research projects and localization programmes in relation to local legal literature and information.
- 3.3 Where aid is given its form should be appropriate; for example the proposed editor of law reports in a developing country might be sent for training to a jurisdiction with comparable social conditions and resources rather than to a wealthy organization in a highly developed country.
- 3.4 Aid could sometimes be more usefully diverted to capital grants, for example the provision of an off-set litho press with on-the-job training, or the initial capital for a revolving subsidy fund, than to the provision of temporary specialist advice or research.
- 3.5 Existing schemes of international co-operation (such as training schools for legislative draftsmen) could be extended to cover other skills (reporting, legal archives, etc.) and expanded on a regional basis.

Suggestions For Future Research

- 4.1 Although the research group did not arrive at a consensus on priorities the following points were made.
- 4.2 Research into the problems of legal information in multi-lingual societies should be given a high priority.
- 4.3 Future research into legal literature in small jurisdictions needs to be related to work on access, studies of the legal profession and legal services, and information studies, especially in third world countries.

Possible lines of future research include:

- 4.4 The study of oral communication of legal information, and of informal networks of communication.
- 4.5 The information habits and needs of different classes of users including private practitioners, lawyers in the public service, other public servants, other non-lawyer specialists, law students and providers of information to the general public or special interest groups, e.g. advice centres and community action groups.
- 4.6 The role of legal information in creating and implementing alternative strategies for development in the third world.

4.7 The role of librarians as providers of legal information in small countries.

Follow-up Activities

5.1 The seminar unanimously recommended that the activities started during the pilot project should be continued and that for the time being a small working group should take responsibility for follow-up.

5.2 The following recommendation was passed at the final session: 'This group ... recommends that funds be sought to create a continuing group to act as a clearing house to co-ordinate and communicate the results of the various studies and to facilitate studies suggested at the seminar.'

It was agreed that the following possibilities should be explored:

5.3 The establishment of an international advisory centre and clearing house on legal information.

5.4 A series of specialist regional workshops on aspects of the localization of legal literature.

5.5 The regular provision of information on local legal publishing in established outlets.

5.6 The establishment of an international/commonwealth subsidy scheme.

5.7 The establishment of a commonwealth law monograph series.

Appendix A

Osgoode Hall Law School, York University, Toronto

November 3rd - 5th, 1978

List of Participants

Dr. Mark COORAY	School of Law, Macquarie University, New South Wales, Australia
Ms. Gail DYKSTRA	Canadian Legal Information Council
H. Aubrey FRASER	Director of Legal Education, Council of Legal Education, University of the West Indies, Jamaica
Professor Balfour HALEVY	Law Librarian, Osgoode Hall Law School, York University
Professor Shih-Shen HU	Law Librarian, University of Toronto
Mrs. Alice JANISCH	Free-lance librarian, Toronto
T. Gregory KANE	Legal Division, Canadian Radio and Television Commission; author, <u>Law Reporting in the Commonwealth</u>
Professor Robert MARTIN	Faculty of Law, University of Western Ontario, London, Ontario
Professor Paul T. MURPHY	Law Librarian, University of Windsor, Windsor, Ontario
Ms. Meena NADKARNI	Law Librarian, Osgoode Hall Law School, York University
Dr. Amos ODENYO	Department of Sociology, York College, City University, Jamaica, New York
Professor James PAUL	International Center for Law in Development, New York
Medard RWELAMIRA	The Law School, Yale University, New Haven, Connecticut
Professor Gail STARR	Law Librarian, University of Calgary, Alberta
Kofi TETTEH	Council for Law Reporting, Ghana
Professor Cliff THOMPSON	College of Law, University of Idaho
Akolda TIER	Faculty of Law, University of Khartoum, Sudan
Professor William TWINING	Faculty of Law, Warwick University, England
Mrs. Jenny UGLOW	Chief Researcher, Small Jurisdictions Project
Peter WESLEY-SMITH	Lecturer, Faculty of Law, University of Hong Kong
G.V.C. YOUNG	Attorney-General's Office, Isle of Man, U.K.

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