STUDYING THE LAWS: RESPECTING CUSTOMARY LAWS IN THE CURRICULUM

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INTRODUCTION

Customary law is discussed in this paper as an issue in the business of teaching law - or, preferably expressed, the business of enabling students to study law. It will be necessary to mention the varying views on the wider issue of how the state should act with regard to customary law, but they will not be fully examined. Certainly there are ethical and political issues of great import in the study of customary law. There is a great deal which could be said, and many arguments which remain to be thought through, analysed and ordered concerning the rightness or otherwise of the observance and enforcement of customary law by the vast and awesome apparatus of the modern state.[1] But those issues are not the subject of this paper, except when they affect the question of the appropriate place of customary law in the law school curriculum.

The legal academic universe is strangely unbalanced in its observance of one of the foremost ideals of scholarship - the ideal of receptiveness by each specialised part to theories and methods emanating from other parts of that universe. In this respect it reflects the varying degree of receptiveness to be found in the lawmakers of national legal systems, some of whom adopt the developments and changes of certain other systems with remarkable devotion, while others seem unaware that they might possibly learn anything of use from the innovations, ideas and experience of different systems.

On the one hand the colonised third world, consisting of the conquered and ceded colonies which were not settled by large numbers of colonising immigrants, was perforce exceedingly receptive to the legal ideas and methods of the colonising powers. Thus African territories colonised by the British have found themselves applying the Statutes of Marlbrige, of Uses, and of Limitations (with its distinction between trespass and the action on the case), the rule in Shelley's Case, and the Common Law Procedure Act 1852.

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1. See e.g. the discussion, both extensive and profound, in Report on the Recognition of Aboriginal Customary Law, Australian Law Reform Commission No. 31 (1986).

Papua New Guinea itself applying most of those, and a selection of Queensland Statutes. Today, up to 30 years after political independence, the picture is not much different. One could mention, for example, the speed with which some African common-law states changed their divorce law from the fault principle to the principle of irretrievable breakdown, when Britain made that change.

But this receptiveness is unidirectional. It is difficult to find an instance of the metropolitan or ex-metropolitan countries learning the smallest lesson from the vast and varied legal experience of their former colonies. Thus England still cannot draw and enact a criminal code, although the entire empire outside the UK had codes. The apparent success of that of India inspired the draftsman, James Stephen, to prepare a draft Penal Code for enactment in England; it was first enacted in certain of the (mistakenly, it emerged) that it was about to be enacted in England.[2]

It might be thought that modern Australia priovides an exception to this lack of receptiveness on the part of the industrialised states, one germane to the issue of customary law. The recent Law Reform Commission's Report on the Recognititon of Aboriginal Customary Law[3] cites the experience of Papua New Guinea, Africa and India. But it is noticeable that this experience is referred to for a limited purpose. The Commission decided that it was precluded from even considering the implications of the experience for Australia's nonaboriginal population. In reading the record of the Commission's inquiry, one repeatedly is prompted to ask critical questions about the appropriateness of the common law for any social group in the light of experience elsewhere.[4] The Commission shows its awareness of these issues, but always draws back from them on the ground that only the aboriginal subjects of Australian law are within its terms of reference.[5]

Legal education is one instance where this imbalance may be rectified. I propose to review, necessarily in very general terms, the debates on a particular matter in legal educational institutions in common-law Africa and Papua New Guinea, namely, the undergraduate and professional study of customary laws. It is hoped to contribute, in a very minor way, to the continuing debates on the matter in those states, but also to show their relevance to the

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2. A.H. Manchester, 'Simplifying the Sources of the Law: An Essay in Law Reform' (1973) 2 Anglo-Amer L.R. 527; Modern Legal History (1980), pp.44-48.

3. Above, note 1.

4. See e.g. op. cit., paras 565 (on police interogation of suspects who have difficulties of comprehension of their rights), 583 (on the treatment of persons found unfit to plead).

5. Ibid.; see also op. cit., paras 163, 363.

longer-established common-law states. It may be suggested that in the latter category, consisting of England, and the common-law former colonies which were settled by large numbers of immigrants who brought the common law with them, customary laws of various types are already or are likely soon to become officially parts of their state laws. The recommendations of the Australian Law Reform Commission will probably not be totally and perpetually ignored or rejected. The trend towards giving state recognition to customary law seems likely to continue in other states. It will be further argued, in the light of insights which the study of customary law provides, that in a sense we all live already under legal pluralism, since socially many bodies of customary law outside state law are observed and enforced through their own processes.[6] Hence there are strong grounds for arguing that law schools shold convert themselves into law schools.[7]

THE HISTORIAL AND PROFESSIONAL CONTEXT

Today we have a fund of experience of the study of customary law within the law school curriculum, built up in common-law Africa and Papua New Guinea. This development has been affected by three variable factors.

The first is the place of customary laws in the national legal systems. From the inception of orderly colonial government in Africa the superior courts established by the British were required to apply native laws and customs (as they were called) in certain classes of cases. In Papua New Guinea this occured only at inde-

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6. See J. Griffiths, 'What is Legal Pluralism?' (1986) 24 <u>Journal of Legal Pluralism</u>, 1.

7. It is regretted that this would make the full title of the Australasian Universities Law Schools Association even more convoluted.

pendence, although even here customary titles to land were recognised from the state.[8]

The second is the character of the national legal professions, that is, the bodies of professional lawyers, including judges, of any race or nationality, who operate the legal systems of these states. Legal professions developed in some territories in the nineteenth century.[9] They existed in every country by Independence (although) they did not always have indigenous member at that

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8. This is discussed more fully in Gordon Woodman, 'The State and Customary Laws: the Case of Papua New Guinea' (1986) 11 Holdsworth L. Rev 132, althugh that paper is no more than a preliminary investigation. It is not possible to investigate the assertion in detail here, but three points for consideration may be mentioned. All are developed in the article cited.

   First, in New Guinea the Laws Repeal and Adopting Ordinance 1921 (re-enacted in 1924) and the Native Administration Regulations 1924 contained provisions for the continuance of tribal institutions, customs and usages, and their recognition in the Courts for Native Affairs. These were somewhat more favourable to the recognition of customary law than the corresponding enactments in Papua. However, it is difficult to discern any precise or practical effects, particularly in the superior courts.

   Secondly, two statutes in 1963 seem at first sight to have facilitated the application of customary law in state courts. The Local Courts Act, providing for the establishment of Local and District Courts, gave them power to certify the validity of divorces of customary marriages. But they were to apply primarily non-customary law, and were not authorised to grant divorces of customary marriages. The Native Customs (Recognition) Act seems, despite its positive-seeming title, to have had the effects of excluding the application of customary law in some cases, and leaving it with an uncertain scope of application in others: B.J. Brown, 'Legal Research in New Guinea: Custom and the Criminal Law in Conflict', in: D. Weisbrot, A. Paliwala and A. Sawyerr (eds.), Law and Social Change in Papua New Guinea (1982), 59.

   Thirdly, the movement in legislative policy which produced the provisions favourable to the recognition of customary law at the time of Independence was visible by the late 1960s: Adoption of Children (Customary Adoptions) Act 1969; Wills Probate and Administration (Amendment) Act 1970.

9. See e.g. A.N.E. Amissah, 'The Supreme Court One Hundred Years Ago', in W.C. Ekow Daniels and G.R. Woodman (eds.), Essays in Ghanaian Law; Supreme Court Centenary Publication 1876-1976, University of Ghana (1976), p.1.

time). Many of their members were unfamiliar with the societies in which customary laws were observed: sometimes they were foreigners; usually they were highly urbanised.

The third factor is the establishment of local law schools. This did not occur until around the time of Independence. Before it occured, every single member of every legal professon had recei-ved a legal education specifically related to a jurisdiction other than that where they practised. The staff of law schools in their early days were of necessity in the like situation.

In consequence, for up to a century any information or skills which were required by lawyers practising in these jurisdictions but not in England, Australia or wherever else they had studied, had to be absorbed in the course of practice, unsystematically and at the expense of their clients. These included every particle of information about customary law, and every gram of the skills requisite to presenting customary-law claims in the courts. It is remarkable that some of them learnt so much, and that in some juris -diction bodies of courtrecognised customary law grew so large.

A further consequence of these factors was that, when the introduction of local legal education, adapted to local needs, was first mooted, the established lawyers were mostly antipathetic. Their response was to say that their own experience showed local law schools to be unnecessary. Thereafter, if constrained to con-cede that, notwithstanding their antipathy, local law schools would in fact be set upaccording to some of them, just to satisfy some nationalist politicians cianshese, they argued, should just provide preparatory courses for further legal training overseas. Beyond this, if they conceded further that total localisation of legal education could not be avoided, they argued that every effort must be devoted to ensuring that it resembled as closely as possible that in the former metropolitan country. All of these views I have heard vehemently put in Africa at times during the past 25 years. They are essentially those of the arterior sclerotic old who say to their children: what served for me should be good enough for you; or, perhaps, as I suffered, so should you.

The first of these views did not eventually prevail. Local law schools were established, offeirng legal education up to at least the level nneded to quality to practise. Today Papua New Guinea, and all common-law African countries except the Gambia, have their own law schools. Nigeria, always a country to act on the grand scale, has more than a score. The attitudes which had given rise to antipathy to local legal education remained, however, and were now manifested in the third position: that which seeks to build a Cambridge, Edinburgh or Sydney Law Faculty, or an Inns of Court Law School, in Africa or Papua New Guinea. This had a strong bearing on the question of the teaching of customary law.

THE POLITICS OF THE "RECOGNITION" OF CUSTOMARY LAW

Once local law schools were established, it became necessary to decide the place, if any, that customary law was to have in their curricula. Here it is necessary to digress briefly to mention the wider political attitudes to customary law in these jurisdictions.

First, and quite fundamental, is a common objectin to the recognition of customary law in any way, whether in legal education, in the legal system generally, or otherwise. It is an objection based upon an ideology.[10] It is conceivable that it lies behind much of the opposition in Australia to the recognition of Aboriginal customary Law. It is essentially the view that law by its nature must be unitary; that a pluralist system, including law from different sources, is self-contradictory and impractical. This monist ideology is strong in the common law. That law was built up in England slowly and painfully as a foundatinal pier of the centralised state, which was constructed through the destruction of local polities, local privileges, and local customary laws. Certainly it has been said that the royal justices forged the common law out of the customs of the people, and so it is in essence the common custom of the realm.[11] But "forged" is the significant term. Maitland described how the common law emerged from customs, but not from popular customary practices, so much as the customary practices of the clerks of the royal courts at Westminister.[12] As Edward Thompson and other English historians have shown, the subsequent development comprised several centuries of continuous, often brutal suppression of local customary rights.[13] By the nineteenth centry John Austin could present a unified, centralist view of law with overwhelming persuasive success. We can recall his propositions that every law, strictly so called, of any political society must emanate from a sovereign, and that the sovereign must be a determinate body, single, indivisible, and capable of imposing sanctins for any disobedience.[14] We may recall also his

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10. See Griffiths, op. cit. above note 6; also P.G. Sack, 'Legal Pluralism: Introductory Comments', in: P. Sack and E. Munchin (eds.), Legal Pluralism: Proceedings of the Canberra Workshop VII (1986).

11. Blackstone, Commentaries on the Laws of England (1809 ed.), p.66.

12. F. Pollock and F.W. Maitland, The History of English Law (3rd ed., 1968, ed. S.F.C. Milsom), pp.166, 183-184, 224-225.

13. There is no comprehensive account. Important contributions are: E.P. Thompson, Whigs and Hunters (1975); D. Hay & ors., Albion's Fatal Tree (1975).

14. J. Austin, The Province of Jurisprudence Determined (ed., H.L.A. Hart, 1954), pp.191-95

view that customary laws were not truly law. They became law only if and when the sovereign commanded that they be obyed in which case they were law by virtue of the sovereign's command, not by virtue of their customary observance.[15] For the existing lawyers, educated at the Inns of Court, to accept customary law as law was likely to appear bizarre, subversive, and disloyal to "our lady the common law" (as Frederick Pollock was wont to call it).[16] If customary law was not law, clearly it must be exluded from the legal system and legal study.

However, the Austinian, monist view of legal sourcews has not held the field exclusively in the past, any more than it dies today. Even in Austin's time, not all lawyers were satisfied with his designation of judge-made laws as circuitous commands of the sovereign. Again, there is evidence that even at the highest levels the British government's legal advisers had real doubts for a time about the extent of the British state's sovereignty as the sole source of legal authority in the African protectorates.[17] Austin's view was implicitly denied by those colonial statutes at the basis of the present issue, which required the courts to observe and enforce "native laws and customs". The wording of these enactments acknowledged that a non-state, indigenous law already existed antecedently to state law.

It is not possible to explore here the reasons why a colonial power, bent on exploitation, saw fit, so clearly and consistently, to admit into its legal system elements of an independent, possibly inimical culture - neither would it be possible, even if space were not a constraint, to provide a full explanation in the present state of our knowledge. But it is noteworthy that this provision could not even have been conceived had the legislators, the drafsmen, and the decision-makers in London been totally bound to that monist view of law. Admittedly in Papua New Guinea no such provision was enacted during the colonial period, and customary law was officially referred to here simply as "custom". But, as I already mentined, even here the colonial regimes did, from the start, expli -citly recognise and preserve the validity of natives' previously existing rights in land - and by viewing these rights as havig been valid at the arrival of the European law, the regimes showed that they were conscious of the existence of other systems of law, even if they did not admit it and chose to avert their eyes thereafter.

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15. Id., pp.163-64.

16. E.g. F. Pollock, The Genius of the Common Law (1912), pp.1-2. Cf. C.P. Harvey, The Advocate's Devil (1958), p.84: 'Sir Frederick Pollock while he lived was loaded with well-earned honours...' no one ever suggested that he should go and see a good man in Harley Street about our lady the Common Law.'

17. J. Mugambwa, 'The Legal Aspects of the 1900 Buganda Agreement Revisited' (1987) 24 Journal of Legal Pluralism. (forthcoming)

While considering political attitudes to customary law, it is necessary to mention some developments in the Independence and past -Independence periods. Here we pass to consider the policies of the citizens of these states, rather than those of the colonisers. The Independence movements included various political programmes and aspirations which differed in important respects from elements of colonial policies. Two themes in the Independence and past-Independence periods are important for the present purpose.

First, starting from the obsrvation that colonialism was destructive of indigenous culture, notwithstanding its partial recognition of customary law, there was a policy of reviving that culture. This resulted in some investigations of so-called "traditional society", the praise of indigenous culture as more appropriate locally than that of the west, and sometimes measures designed to increase the extent of observance of customary law in the legal systems. The most outstanding instance of this policy regarding customary law is Papua New Guinea, because here it contrasted so strongly with the exceptionally negative colonial policy. In 1975 under the Independence Constitution customary law acquired for the first time express recognition as part of the law application in all courts - even if it was still referred to in the statute-book as "custom".

But, secondly, there was during this period a policy of modernisation. Some proponents of this policy thought that customary law could be adapted to assist change; but many saw modernisation as entailing the replacement of customary law, both in the legal system and in daily life outside the courts, by a "modern" system, probably based upon a western model.

In the field of lawmaking the existence of these two, largely opposed policies resulted in little in action in Africa; and also in Papua New Guinea, after the initial recognition of customary law, little further development occured. In the field of legal education the modernising policy supported and gave a respectable ground to the cause of exclusionism, that is, to the view that customary law should be excluded from the curriculum.

THE EXCLUSIONIST CASE

I can now return to the debate on the place customary law in the law school curriculum. I suggested earlier that the exclusionist position originated from the view that, if local law schools were to provide a complete legal education, they should aim to be a alike as possible to the law schools of the ex-metropolitan states. I can add now that the exclusionist position was underpinned by the monist view of law and by policies of modernisation, both of which were antagonist to customary law.

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18. See further Woodman, op.cit. above, note 8.

There was, however, a fatal obstacle to the success of the exclusionist. The decision had been taken that the legal system of the state should "observe" customary law; and that decision was not in fact to be reversed. Now, even if local law schools were only to prepare students to engage in law practice - and this narrow view of the purpose of legal education has unfortunatley been widepread, perhaps under the illustion that it is hardheaded and "practical" their graduates must surely be prepared to engage in activities which state law itself required to be governed by customary law.

Exclusionists have sometimes said in rejoinder to this that customary law, although theoretically part of the law of the state, was not in practice applied in litigation or private transactions involving professional lawyers. There is a certain irony in lawyers, who have not studied customary law, and so cannot easily assist their clients to make use of it, arguing that it need not be studied because lawyers' clients do not make use of it. Moreover, the contention was not universally true. In some African states at Independence customary law was being applied in a high proportion of litigation - at a rought estimate, one half of private-law cases in the highest courts.[19] And in any case, there was considerable potential, even where it had not yet been realised, for the practitioner who was prepared to take the initiative in formulating claims under customary law and to plead and prove the terms of that customary law. So, in the light of the realities of legal practice, the exclusionist view was lacking in that attribute of realism on which in purported to be based, and was a hindrance to the profession through its subjection to ideology.

THE MINIMALIST CASE

Once it became clear that sutdents at local law schools would need to study customary law, questions of quantity and method arose. The exclusionist view now was modified to support proposals which wold give to customary law the barest minimum of attention in the curriculum - the minimalist view. This view may well gain acceptance in the law schools of the older common-law states if their laws begin to recognise the customary laws of aboriginal or other ethnic minorities. The first suggestion of the minimalist is to provide for the study of the place of customary law in the legal system, with a view to enabling students to acquie the basis of the

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19. The law reports of such jurisdictions as Ghana and Nigeria provide some evidence of this. It might be replied that the cases which are reported are not typical of the range of cases which come before the courts. While that is undoubtedly true in many respects, my impression, after having read many volumes of record books and judgment books of the superior courts in Ghana in the periods immediately before and after Independence, is that in this particular respect, in this jurisdiction, they are.

technique for using it, but not to study directly the substance of customary law. The typical proposal would include a section on customary law in a course on the sources of law, or on legal method, or possibly on constitutional law should be all. In this section the student would examine the rules (express or implied) determining when customary law is to be applied to an issue, or an entire case; would possibly study the procedural steps necessary to ensure that customary law is considered for application (if, as often, it is necessary to displace a presumption in favour of the application of common law); and would possibly study the methods of establishing to the satisfaction of a court the particular customary laws in question. It might be expected that some attention would also be given to the problem of the ascertainment of customary law by the lawyer prior to the case, but it has often been assumed that the lawyer can simply ask the client for information on this - a method which any student of social-scientific research methods will find deeply disturbing.

The objection to the minimalist proposal is its disregard of the substance of customary law. In short, the counter-argument is that, since the rules and principles of customary law are part of state law, since they are actually or are likely to be applied in state courts, they required to be studied just as much as those of common law and statute.

In reply to this the minimalist may say that hitherto few of the rules of customary law have ever been established and applied in the legal system, so we have no authorities to study - a statement of some jurisdictions, although not of all. But beyond this the minimalist position may depend on a wider philosophy of legal education. his views legal education as the study of method and the acquisition of skills - it holds that, as the rules and principles which comprise the law at any particular moment are transitory, what the student must absorb are the skills of research and resoning. Admittedly there is in the law school curriculum a certain amount of contract law, real property, and so on. But these are, or should be, studied only as illustrations of method. Anything else would be the communication and memorisation of information, a process not worthy of a higher education.

This justification of the minimalist exclusion of substantive customary law is, I suggest, based on an important and valid educational principle. But the argument needs to be developed and refined. When that is done, it no longer supports the minimalist programme. Legal education may be primarily concerned with the acquisition of intellectual skills. But to give facility in these, it is necessary to study how they have been exercised in the past, and to practise their exercise in circumstances of a type likely to arise in the future. It is necessary to become familiar with the type of legal context in which they will probably be exercised in the future.

So, we study the common-law rules of land tenure, for example, because, though there is no guarantee that they will not soon be changed, it is clear that in the medium-term future legal skills will need to be exercised in relation to a body of laws with the same general character as those now existing. But then we have to add that there is, in the jurisdictions I now have in mind, a near certainty that issues will in the immediate future fall to be deter mined according to the customary laws of land tenure also. Now the rules and principles of these laws belong to a different conceptual structure, requiring the exercise of somewhat different skills, from those of the common law. so, if there is any justification for studying the substantive common law of land - and we obviously all believe that there is, however much we believe that process is more important than substantive law in legal education - there is a necessary to study the substantive customary law of land also. That conclusion raises even further questions of method: how does one discover the substantive customary law in order to study it, what sort of literature is to be used, and by what means is it to be understood for this purpose?

But before spending a moment on these question, I want to take a further look at the minimalist options. Can customary law be sufficiently accommodated by providing, in addition to the study of methods in a legal methods course, a further, distinct course on the content of customary law? This arrangement is not unattractive to the minimalist, because under it most of the curriculum remains almost exactly as it is in the metropolis. It has been adapted in a number of jurisdictions, and it is still accepted in some, If in Australia aboriginal customary law receives legal recognition, the initial response of law schools could well be to institute courses in Aboriginal customary law. One can envisage a Faculty saying to itself, that if an eccentric colleague with an interest in the subject gets obstreperous on the ground that it is now part of state law, he or she might as well be accommodated by being allowed to mount a course in the subject - an optional course, naturally.

But this possibility also comes under criticism. The study of customary law would take place at a distance, temporarily and intellectually, from the study of corresponding areas of common law. Customary land tenure would be discussed in this special course; common-law land tenure in the land law course, possibly in a different year of a student's progress. The benefits of comparative studies - an in herent possibility in legal study in any pluralist legal system would be largely lost. Perhaps more seriously, the separation out of customary law entails the omission of significant issues and their accompanying substantive law, namely the issues of internal conflicts, or choice of law. Clearly, if a legal system includes, for example, both customary land law and the common law of land, there will be rules, express or implied, answering the question, which system of land law is to govern a given plot of

land, or transaction, or person, or other category.[20] These issues often raise fundamental questions about the form or purposes of the legal system, which must be discussed at some stage. A realistic discussion of choice of law takes account of the consequences of choosing one law rather than the other.[21] So choice of law issues cannot be given a satisfactory consideration without a study of the substance of the laws between which choices are to be made. As a result most law schools have abandoned, if they ever started, courses devoted to customary law as such. Instead they aim to include the substance of customary law, and its relationship with other laws, within the courses on land law, family law, and suchlike.

This scheme does not result in the inclusion of customary law in every course. Land law, family and inheritance law courses always include it, as far as I know. Courses on evidence and procedure should - but do not always - include at least an examination of the procecces whereby customary -law claims re advanced and their bases proved in court. Customary-law rules may be included in tort and contract courses - although we often do not know a great deal about the content of these areas of customary law, and we still have difficulty constructing analyses which enable them to be understood in legal contexts.[22] But it does seem that customary laws usually are of importance in all these fields. It is generally agreed that there is no customary law relevant to modern and complex activities such as banking, companies, commercial transactions, or taxation. One may doubt the justification for this exclusion, but it seems unlikely that it can be successfully challenged at present. The field of constitutional law in modern states usually includes no substantive customary - law: if it does, say by giving a constitutional status to customary chiefs, this is apparent, and the need to study it unproblematic. And lastly criminal law: usually the rules of criminal law do not include any rules of customary law.

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20. The term 'internal conflicts' was coined by A.N. Allot, see Essays in African Law (1960), pp.154-55.

21. These considerations are well illustrated by O.D. Jessup, 'Customary Adoption of Children and the Law in Papua New Guinea', Lawasia, forthcoming.

22. The lack of information and past discussion on a customary law of contract is evidenced in the discussion of customary law in Roebuck, Srivastava and Nonggorr, Introduction to the Law of Contract in Papua New Guinea. Moreover, out of the many contract law books from Australasia and Africa, this is virtually the only to refer seriously to customary law.

There is nearly always a Criminal (or Penal) Code, and normally it is exclusive, not infrequently Bills of Rights provide that persons may be punished only for breaches of written laws. Customary law is relevant to criminal proceedings not in the possibility of coniction for customary offences, but rather because customary law is a social fact, and may be among the social facts which a court is required by the (totally non-customary) criminal code to take into account in a case. In determining the existence of a mistake, the degree of provocation, or the appropriateness of a prison sentence, a court may need to consider the customary norms followed in the society concerned, just as it may on occasion need to take account of the standard of living, degree of education, the prevailing superstitions, or extent of deprivation in the society. This I would not consider to require the study of customary law as part of the cirruculum. No doubt any study of any area of law should include discussion of the social circumstances within which the rules are applied, and which are relevant to its interpretation, or even its understanding. But when customary law is included in this discussion, it is included as a relevant social fact, to be taken into account in the application of some law, now as part of the law to be applied.[23]

So, if customary law is regarded as part of the law to be studied, and is for this purpose treated as an integral part of particular fields of law, it will receive, at present, significant attention in a quite limited selection of courses.

GIVING DUE RESPECT TO CUSTOMARY LAW

Where customary law is a substantial section of any particular course, it may be unsatisfactorily, in planning that course, to maintain the perspective which I have so far proposed, and which has historically been almost universal. Law teachers have tended to regard the common law as the basic law in every field, and the correct approach to customary law to be to accommodate it, to a greater or lesser degree according to the acceptance accorded to minimalist arguments, within that common-law framework. But within some fields land and family laws are the most obvious - there are strong grounds for regarding customary law as the basic law. It was historically the first, and it governs the majority of social relationships. I myself found it preferable, in conducting courses in these two subjects in two African jurisdictions, to start each course with an examination at some length of the central principles

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23. Cf. B. Narakobi, 'In Search of a Melanesian Jurisprudence', in Sack and Minchin, op. cit. above note 10, 215; Australian Law Reform Commission, op. cit. above note 1, Part IV (and see especially paras. 401-2). The argument mentioned here is presented more fully in B.W. Morse and G.R. Woodman, 'Introductory Essay: the State's Options', in Morse and Woodman (eds.), Indigenous Law and the State (1988).

of customary law, and after that to introduce the central principles of common law as a stranger, interpolated into the indigenous system; and then for the remainder of the course to treat elements of the two in combination or in rapid succession.

One final objection might be made to this scheme of a curriculum. If customary law is examined initially as a source of law; and if then the elements of customary law are examined in their places in various courses; when will the elements be viewed together, and general, theoretical questions of customary law be considered? My answer to that - it represents a view which I believe is very gradually gaining ground, and to which there seems to be no very definite opposition would be: the course in Jurisprudence and legal theory. Almost all the vast body of literature in this field which we customarily study today is composed from the state-law, positive-law perspective, or at least, generally does not take account of customary law. It all every single theory and idea - needs to be reviewed to take account of the phenomenon of the incorporation of customary law into the legal systems of states.

THE PROBLEM OF ASCERTAINING CUSTOMARY LAW

That, it seems to me, is the place that customary law ought to have, and soon will have in the curricula of law schools in those common-law jurisdictions which have, or will soon have plural legal systems incorporating customary law. These suggestions raise a number of further issues. The most immediate is concerned with the means of study - how are we to discover the customary law? I believe that a consideration of this question will lead us to further issues in legal education more far-reaching and profound that those I have already mentioned.

Where then is the information on customary law which we should bring to the notice of our students? Where are the authoritative sources of customary law? We may look, following our common-law tradition, to the law reports. In some jurisdictions this will be helpful. If there has for a long time been a provision in state law requiring the courts to observe customary law; and if the provision has been used suspiously - then there will be cases in the reports or unreported cases, in which the judges have declared rules of customary law. Where that is the case, it will be possible to regard these declarations as not merely evidenciary, but as authoritative, because experience shows that courts in common-law countries tend to regard their decisions on customary law as precedents to be followed. (This is their practice whether or not they are justified on strict legal grounds to treat decisions on customary law in this way.[24] But these decisions, even in the states where they are most plentiful, meet relatively few of the total

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24. The tendency is documented for two jursidcitions in Woodman, 'Some Realism About Customary Law: The West African Experience' (1969) Wisconsin Law Review 129.

number of issues which can be expected to arise in the various fields to which customary law applies, in the various systems of customary law applicable within each state. Argument by analogy, or through the discovery of general underlying principles is possible, but still there will remain a far less complete coverage than is provided by common law within its sphere. As the minimalist has already pointed out, there is a relative shortage of legal authority on the substance of customary law. But of course, we are now looking for evidence, not for authority.

So we have to resort to a different type of literature for information about customary law. The lawyer has to enter the mysterious, disturbing and not very comprehensible world of the anthropologist. Of course, the lawyer may decide to go direct to the factual material, and do his or her own social research. This is not to be recommended, unless the lawyer has the time, resources and innate capacity needed to acquire the considerable methodological skill which is essential, and then the time, resources and disposition for sufficiently lengthy field work. And then he or she will have to recognise that the results are of limited application on a national scale. The work has been attempted without observing those conditions. The results have excited various reactions, none particularly complimentary to the researchers. So we must look to the literature written by the experts to discover, for example, what acts constitute a marriage, what are the rights of a licensor of a farming plot, and who inherits the house of a deceased man survived by a wife, children and other relatives.

It is not easy to find answers to such apparently straightforward questions. I believe that one can gain great assistance from the anthropological literature, but a number of obstacles must be recognised. Anthropologists do not carry out their arduous research with the primary purpose of providing succinct, unequivocal answers to the lawyers' questions - why should they? But this means that the lawyer often must study the anthropologist's writing long and comprehensively, try to develop an understanding of the social order and its associated view of life which is described, and then seek to deduce the answer to the particular question, not so much by plain logic, as by the development of sympathetic feeling. One must cope with the further difficulty that the society in question may not - probably will not - have the same categories of thought about social relations as the common law, and so will probably not give a simple answer to the common lawyer's question. For example, in reply to the question, who inherits the property of a man survived by his wife and children, few if any of these societies will give a simple list of entitled beneficiaries. There will be multiple rules, with many qualifying - clauses: if the window bore the deceased children, the...; if his daughters are already married, if his sons have been initiated...; if an elder brother survives him... But even these will often not of themselves provide the answers. Very often customary law replies to the question by laying down a procedure to be followed in idstributing the property, without saying who are to be the recipients. This instance indicates another possible obstacle. After studying the anthropo-

logist's account, the lawyer may be tempted to conclude that it shows there is no substantive customary law, that customary law is nothing but procedures. I think the answer to that suggestion is to investigate further the manner in which the procedure is customarily implemented. I think it will generally be found that not only is the observance of the procedure necessary, as a condition precedent to the establishment of a claim; but also that those who reach a decision within the procedure are obliged, according to the various possible circumstances, to reach particular decisions. The difficulty for the lawyer is that an ordered enumeration of the various possible circumstanes and corresponding decisions may be enormously complicated. However, there is usually a possibility of extracting a body of customary-law rules.

The illustration which has just been used will serve to illustrate another difficulty in the way of the lawyer who seeks to ascertain rules of customary law from the anthropologist's account. Being a lawyer, the inquirer seeks the rules which will be applied in the state courts. But obviously the rules followed in customary practice outside the courts cannot be simply transferred unchanged to the state legal system. Thus, in the inheritance case the state court cannot replicate the customary procedure whereby the property is distributed: and if the state seeks to enforce the observance of that procedure, or if it shows a readiness to enforce the decisions which emerge from that procedure, it will thereby introduce into the customary process a new element of compulsion from a new source This is likely to distort the procedure, and may well lead to a different decision being reached under it.[25] This, however, is only to say that the rules enforced by the courts (lawyers', or state customary law) are bound to differ in some measure from those socially observed (practised, or people's, or sociologists' customary law). The student may wish to criticise this. But there is no reason why the student should not also observe and analyse. The illustration shows merely that what needs study is not only the rules of practised customary law, but also the processes by which there emerges from those rules a body of lawyers' customary law.

CONCLUSIONS

Thus the inclusion of customary law in the curriculum, to the extent and in the manner I have suggested, gives rise to formidable, but fascinating tasks. I want finally to suggest that this inquiry may lead on to more fundamental issues in legal education.

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25. This has been argued at length in Woodman, 'How State Courts Create Customary Law in Ghana and Nigeria' in B.W. Morse and G.R. Woodman (eds.) op. cit. above note 23).

I have thus far advanced my argument from the Austinian, monist, state-law position. I have argued that the recognition by many states, however reluctantly, of customary law, compels us, however reluctantly, to concede a place to customary law in the law school curriculum, and, with the realisatiion of the implications of what is happening to state law, to enlarge that place. But what if we were instead to give an enthusiastic welcome to customary law, and to ask rather how we could benefit to the full from the new perceptions which it offers? What if we read those anthropological texts not in hesitant and resentful serach for rules, but eagerly, as an opportunity to enlarge our horizons? I would make, in the barest outline, just two suggestions.

First still within the boundaries of state law, the study of customary law requires us to consider with critical care some instances of the emergence of state law. We are bound to try to analyse how, given a category of social facts outside and relatively independent of the state, and given various demands within the state legal system, institutions of that legal system add new rules to the corpus of state law. It seems to me that this process is not totally diferent from those by which much other state law is made: the common law already embodies rules derived from other types of customs, from positive moralities, from social understandings; statute often expresses rules which have had a prior social existence before they appeared in legislation.

We might make use of this observation. For nearly a century now there has been a movement to broaden the study of law beyond the analysis of black-letter doctrine to incorporate some social fact. But the drive to encourage students to understand the social effects of laws has been disappoiting: it is often extraordinarily difficult to differentiate a law's effects from instances of social change or social stability which would have happened without the law; and, when identified with certainty, law's effects are often a mouse of a result.[26] If we were to examine, fully, systematically and critically, the social origins of laws, perhaps we would discover more. And we might at least induce our students to abandon notions of the necessity and so the unproblematic nature of the existing law.

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26. See John Griffiths, 'Is Law Important?' (1979) 54 New York University Law Review 339.

Secondly, the search for customary law prior to state recognition is a search for law outside the boundaries of state law. It may suggest to us that there is more law in the world than state law. The anthropological literature will certainly confirm that. And if customary law is law independently of the state, why should not other bodies of socially accepted rules be regarded as laws: rules of religious, of professional communities, of social castes and classes and organisations of various types? And why should not the lawyer learn to exercise his or her skills in relation to these rules also, by assisting those who give them respect - and for whom they are often more important than the remote law of the state - to understand, interpret, develop, rationalise them? Thereby we and our students may finally escape from the constraints of the legal ideology which pretends that only the state may generate law.