The Encounter Between Traditional Law and Modern Law in French-Speaking Africa: A Personal Reflection

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At the conclusion of this conference, I have no intention to summarize the papers which have been presented here, any more than the discussions which have followed. They all have been too rich and, anyway, there is very little I could add to the comments already made by the various speakers. The most obvious lesson I draw from our debates is that there are many possible combinations of legal systems and many types of mixity—not only the ten ones identified by the Ottawa Law School,[1] but many more, since a number of national systems are already a composite (like, for example, the Roman-Dutch law, which is made up, if I understand correctly, of Roman, Dutch, English and Scottish laws). In all this, I would not dare to put my oar—especially here, in South Africa, among so many experts in the field.

So my only purpose will be to make a few remarks on the sole topic in which I gained some experience once, when I started my academic career in Africa—more exactly in Madagascar—that is the encounter between traditional (mostly customary [2]) law and modern law (mostly of

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1. *See* Jacques du Plessis, *Comparative Law and the Study of Mixed Legal Systems*, *in* MATHIAS REIMANN & REINHARD ZIMMERMANN, THE OXFORD HANDBOOK OF COMPARATIVE LAW 477, 482 (2006).

2. Customs, however, have sometimes been incorporated into written law, even before colonization, though already by imitation of European models. This was the case, for example, of the various "codes" enacted in Madagascar during the nineteenth century by the kings of the *Merina* people under the influence of the first French or English settlers, merchants, diplomats and missionaries. See the Codes (mostly in criminal matters) of 1828, 1862 and 1863.—More importantly, in civil matters, see the "Code of 101 articles" (1868) and the "Code of 305 articles", which was promulgated in 1881 by the Queen Ranavalona II, fourteen years before Madagascar became a French colony, and remained in use throughout the colonial period. All these instruments were, for the most part, the embodiment of existing customs, to which they however brought precisions, additions and modifications. As genuine pieces of legislation, they were very different from the mere compilations of customs which were drawn up later in some colonies

European origin). We all know that this type of mixity raises specific problems because of the gap existing between the systems concerned, in form (non-state law v. state law) as well as in substance (owing to the difference of culture). And I would like to put a special emphasis on the situation prevailing in French-speaking African countries—a situation which slightly differs from that in English-speaking Africa because of two peculiar features: the policy followed during the colonial period and the confrontation of traditional law with a civil rather than a common law system.

This allusion to the colonial period is not due to the fact that I was present in Africa precisely during the years of transition preceding independence. It simply results from the evidence that this period has left, in the legal field, a lasting imprint, which is still perceptible today. After all, is it not true that most cases of mixity in law are more or less a by-product of colonization? It seems therefore appropriate to consider in succession the relations between traditional and modern law in French-speaking Africa during the colonial era and since independence.

I. DURING THE COLONIAL PERIOD: A LEGAL PLURALISM

There were in theory notable differences between the policies followed in French and in English colonies, in close relation with the national character of the two countries—and this was supposed to have a significant impact on the prevailing attitude towards traditional and modern law.

On the English side, the goal (at least as proclaimed) was to lead the colonies towards some degree of autonomy or self-government and the method used was the so-called "indirect rule" with the consequence that the applicable law should be, as a matter of principle, the local law, that is, normally, customary law. Recourse to modern law should be only the exception—essentially for people of British or foreign origin.

On the French side, the trend was just the opposite. The official policy was that of "assimilation", at least since the last quarter of the nineteenth century (that is during the period of the great colonial expansion). This meant that the law in force should be, as a rule, modern law, either the law of the "mother country", applying equally to all residents, "natives" and settlers, or, at least, a special law, enacted by the colonial power and adapted to the local conditions.

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under the impetus given by the administration, like, for example, in Lesotho (former Basutoland), the "Laws of Lerotholi", published in 1903, which were simply a "declaration of Basuto law and custom", and thus close to a restatement.

But, of course, these general propositions do not reflect the actual practice and it appears, in fact, that none of the two official schemes could be implemented as such. Like customary law, modern law could not be made applicable to *all* persons and in *all* cases. Regarding the French territories, it is clear that, not only have there been frequent and important fluctuations in our colonial policy throughout the last two centuries, but the very concept of assimilation has always appeared as an ideal rather than a reality (at least concerning civil matters).[3] No one ever thought it could be carried to its extreme consequences. It has always been admitted that a compromise was to be found in a combination of three types of law: traditional law, French law and a special law intended to fill the particular needs of the colony. But what is true is that these various systems, which coexisted during the colonial period, did interact to a large extent.

These are the two points on which I shall briefly comment—keeping in mind that, although I shall speak only about French colonies, I am not sure the situation was fundamentally very different in other areas of sub-Saharan Africa. This was due to the fact that the political environment was rather similar and there was the same practical necessity both to respect the local law and to import some amount of modern law.

A—The first and most obvious feature was the coexistence of several systems simultaneously applicable in the colony, each one in a separate domain, according to the persons concerned or the matters involved. There was indeed no attempt to set up a unified or mixed

3. The trend towards "assimilation" has indeed varied considerably with the political environment. It was clearly at the basis of the law of April 24, 1833, providing that, as a matter of principle, all inhabitants of the colonies would be given "French status" and become subject to French law. But this rule was soon construed by the courts as being applicable in each territory only in the absence of a special *décret* stating that the native population would retain its "local status" and remain governed by its traditional law. As such *décrets* were almost automatically enacted each time a new colony was established, the scope of the principle of assimilation was rather limited. Yet a sénatus-consulte of May 3, 1854 (during the Second Empire) provided for the possibility of enacting *décrets* extending French law or laying down a special legislation on particular subjects in the colonies. These two instruments remained in force for a long time and they have constituted the real foundation of our colonial policy throughout the Third Republic. After World War II, as it became clear that the evolution went in the direction of autonomy of the former colonies, the two questions of "citizenship" and "civil status" were dissociated. While the new Constitution of 1946 granted French citizenship to all inhabitants of the colonies (in the tradition of assimilation), it decided that "citizens who do not have French civil status retain their personal status as long as they do not renounce it" (thereby widening the application of traditional law). This was the last step before independence, granted in 1960, at the outset of the Fifth Republic.

system of law and the principle was that of legal pluralism.[4] Generally speaking and considering the situation at the end of the colonial era, that is on the eve of independence, I would sum it up in the form of three principles.

Firstly, French law was applicable *ratione personae* to a certain category of the population, that is persons of "French status", as opposed to those enjoying a "personal status", which left them subject to traditional law. Although the latter situation was the most frequent, concerning the great majority of the population, there were indeed several manifestations of the policy of assimilation. Not only had all "natives" been granted, in 1946, French citizenship, which gave them some political rights, but they were also allowed to request the benefit of French law, either generally, by renouncing their personal status and acquiring French status (which step was strongly encouraged, especially among the elites and in the urban areas) or, in a particular case, by opting in favor of French law for a specific operation, such as a marriage or a contract, for example (*option de législation*).[5] Moreover, in the case of "mixed relations" between persons of different status (a situation known as a "colonial conflict"), the principle devised by the courts was that of the prevalence of French law, which implied a sort of superiority of modern law over traditional law.

Secondly, modern law (either French law or a special law) was made applicable by statutes or regulations *ratione materiae* in areas where traditional law was clearly non-existent, insufficient or inadequate, and where some form of modernization appeared necessary, for social or economic reasons, such as in various aspects of land tenure or in commercial, employment or administrative matters. In criminal law, the principle had been for a long time the application of traditional law, although with many exceptions;[6] but it was abandoned in the latter stage

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4. We are not concerned here with the sort of pluralism resulting from the diversity of customs applicable in the same territory, because of the multiethnic composition of the population. It is indeed more appropriate to speak in this case of a "plurality" of customs.

5. It has even been admitted sometimes (although not systematically) that such an option in favor of French law could result implicitly from an option exercised in favor of the jurisdiction of a modern court in case of litigation (*option de juridiction*). This matter has always remained unsettled. Conversely, it is clear that the "option of legislation" in favor of French law entailed an "option of jurisdiction" in favor of a modern court.

6. Most of these exceptions were intended to modernize a traditional law which was, in this respect, often archaic an ill-adapted (cruel penalties, outmoded rules of procedure, especially in the field of evidence, etc.). But we must also note the development of a sort of "unofficial" criminal law, which permitted the local administrative authorities to lay down rules and pronounce sanctions that could be as severe as internment, displacement, forced labor, collective work, etc. This was known under the name of *indigénat*.

and a *décret* of April 30, 1946, provided for the extension to all colonies of the French penal laws and laws concerning criminal procedure (here again with a few exceptions resulting from special legislation).

Thirdly, French law was commonly applied by the courts, with or without express authorization by the legislature,[7] to fill the gaps of existing customs when they were considered deficient or inappropriate on a particular point or in a particular case. Modern law then played the role of a subsidiary or a substitute to traditional law, as a sort of *ratio scripta*. Many illustrations of this process could be found in the case law of modern[8] as well as (more surprisingly) traditional[9] courts, not only in the fields of contracts and civil liability (where customs were often rudimentary), but even in property or family law (for example, in the matters of filiation or matrimonial property). This was, of course, perfectly justified (not to say inevitable, insofar as the judge cannot refuse to decide a case) when there were real lacunae in the customary law, but it still gave rise to serious abuses to the extent that it was left to the discretion of the judge, and experience shows that it often led, in fact, to a real distortion of traditional law.

B—This precisely leads us to our second point, which is the interaction between traditional and modern law. Although such a phenomenon, occurring between legal systems, is normally a two-way movement (and we often speak, in comparative law, of "cross-fertilization"), here, and for obvious reasons, both political and cultural, it has been reduced to a one-way influence of modern law on traditional law. Local customs have been largely altered and transformed during the colonial period by various combined actions. That of the legislature, first, through statutes or *décrets*, which expressly set aside (or endowed the judge with the power to disregard) customs deemed contrary to *ordre public* (a concept which can only approximately be translated by that of "public policy")—in fact, a special "colonial *ordre public*", leading, for example, to prohibit or restrict such practices as polygamy, repudiation,

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7. In Madagascar, for example, a *décret* of May 5, 1905, expressly provided that "French law shall be followed in all matters for which no rule can be derived from native legislation or custom" (art. 116). Such provisions, however, have been rather exceptional.

8. Although modern courts were primarily concerned with the application of modern law, they were also called upon occasionally to deal with traditional law, for example on appeal, in criminal matters or when a party had made an *option de juridiction* in their favor.

9. This was made possible by the fact that traditional courts were normally chaired by a French judge or administrative officer, surrounded by two native wingmen (customary assessors), so that, even there, the implicit recourse to French law, at least to its concepts and categories, was common practice.

bride-price[10] or corporal punishment. The action could also be that of the courts, both modern and traditional, often on the basis of the same *ordre public*, in their process of application or interpretation—amounting sometimes to a real denaturation—of a particular custom. There has also been the action of all those (administrative officers, academics, missionaries, etc.) who, whether officially or informally, undertook the task of reducing oral customs to writing or, at least, made them an object of scholarly studies and, in fact, in this process, often carried out a mix of modern law (in which they had been primarily educated) and traditional law.[11] Lastly, we should not underestimate the impact of the new political, economic, social, even ideological and religious environment ensuing from colonization, which brought considerable changes in the structure of the societies as well as in the ways of living of their people, their habits and their morals. It is clear that, through these various channels, a lot of modern law has been—more or less consciously—introduced into traditional law (concerning, for example, the dignity of the human being, the condition of women, the concept of individual ownership of the land, the proper performance of the contract, the principle of individual liability, a relative decline of magic and sorcery, etc.).

Above all, we must note that such an evolution has led, in practice, to a real split within the customs. While a number of them were, in a way, incorporated into the legal order as a sort of "official customary law",[12] others, especially in the rural areas, shielded from external influences, were so much ignored by the authorities that they remained purely oral and unchanged throughout the colonial period. They were more a form of behavior than a real customary law. In many respects, people continued to live according to their traditional ways and, in case of dispute, instead of submitting the matter to an "official" customary court, they kept going for conciliation or arbitration to the head of the family, the local chief or the village elder. There is little doubt that this

10. The bride-price is called "*dot*" in French, at the risk of creating a confusion with the dowry, which is a completely different institution.

11. This process of *rédaction des coutumes* started very early in some colonies (not in all). Although the materials so collected present some interest from an anthropological point of view, their impact has been rather limited in practice and the courts hardly relied on them in deciding cases. Their quality is uneven. They have often been criticized for misrepresenting customary law and freezing its development.

12. *See* Thomas W. Bennett, *Comparative Law and African Customary Law*, *in* REIMANN & ZIMMERMANN, *supra* note 1, at 641, 665.

coexistence of several strata of customs made it still more difficult to answer the eternal question of "the nature of customary law".[13]

In any case, the basic feature in all colonies was that of legal pluralism and, in this regard, there has not been too much difference between English and French (not to say Belgian, Spanish and Portuguese, even formerly German) African territories. The only difference may have lain in a certain state of mind. It is true that traditional law may have had a higher status in English than in French possessions—although there was much theoretical debate, in the common law world, on whether customary law was to be regarded as real law. In fact, it was an object of study for anthropologists rather than for lawyers, and not a part of comparative law, while in the civil law world the old roman principle tended to prevail: *Ubi societas, ibi ius*. But, beside this, the practical situation was largely similar, i.e., a juxtaposition of traditional and of modern law.

II. SINCE INDEPENDENCE: THE QUEST FOR MIXITY

The situation has naturally changed with the accession of former colonies to independence during the last fifty years. New states have emerged, for which legal pluralism is no longer acceptable. The trend is now towards a single and unified system of law, applicable to all categories of citizens. The principle is: one country, one people, one law.

This implies integration and mixity—indeed the elaboration of a new law, based on a real symbiosis between traditional and modern law.[14] But that is not an easy undertaking and it comes up against many obstacles, in particular, a strong resistance of African law to modernization. Here again, we may wonder what is peculiar to the situation in the French-speaking new African states.

A—There is no doubt that the development of a unified law is a necessity in all new countries, and that this law, because it must be adapted to the aspirations and the needs of the population, cannot result from a mere extension to all inhabitants of modern law or from a simple return to old customs.[15] In spite of some occasional pleas against "alienation" and in favor of "authenticity", everybody—notably those

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13. *See* TASLIM OLAWALE ELIAS, THE NATURE OF AFRICAN CUSTOMARY LAW (1956).

14. It also implies, of course, a new organization of the judiciary and, in particular, the creation of a single hierarchy of courts.

15. *See* THE LAW FACULTY, UNIVERSITY OF IFE, NIGERIA, INTEGRATION OF CUSTOMARY AND MODERN LEGAL SYSTEMS IN AFRICA, A CONFERENCE HELD AT IBADAN IN AUGUST 1964 (1971).

who are now in power—is perfectly aware of the fact that customs are too diverse and uncertain, even sometimes too archaic (whatever high values they may embody), to fit the needs of our present century. As is commonly said, the new law should not be an "anthropological museum" and it must bring a minimum of cohesion and unity in an often multiethnic society. At least a certain amount of modernity must be introduced into it, and it is remarkable that there has not been, after independence, the sort of reaction that could have been feared against such a legacy of colonization. Realism has prevailed. The only problem concerns precisely the compromises to be made, the proper balance to strike between conservatism and progress.

In this regard, we must note, once again, that the difference is, in practice, relatively small between former English and French territories. There are indeed some nuances in the general attitude towards customs. For example, in English-speaking Africa, the project of a *Restatement of African Law* was launched in the late 50s under the auspices of the London School of Oriental and African Studies, while, in France, there was already at the time much interest among the jurists in the building up of a new legal system.[16] Nevertheless the actual results have often been (and still are) very close. There is a clear prevalence of modern law over traditional law, largely because of the necessities of development in all economic, social and cultural fields. Of course, nobody ever thought that the new law should be copied from a European model and everyone agrees (at least in principle) that it should be a "national law" reflecting the "national character".[17] Still, modern law definitely enjoys a privileged position, in its form as well as in its substance. There is no way to retreat from the values of freedom and individualism on which it is founded and to which the people of these countries have gotten progressively accustomed. That would appear too much as a step back. The demand is growing for a further modernization of the society, especially on the part of an élite long educated and trained in Europe. International considerations—so important in a globalized world—also

16. In fact, this process of modernization of African law became very soon the subject of many academic studies. There was a real explosion of the literature in the matter, special courses were taught in French Universities and a great number of French scholars went to teach in newly created law schools in Africa.

17. Newly independent African countries were not yet ready at the time to adopt a unified legal system at the supranational level, in spite of some calls occasionally made in that direction (see, for example, René David, *A Civil Code for Ethiopia: Considerations on the Codification of the Civil Law in African Countries*, 37 TUL. L. REV. 187-204 (1963). Things have now started to change, at least in specific areas, as shown, in particular, by the creation of OHADA in 1993.

play in the same direction (as, for example, those deriving from the ideology of human rights).

If, however, a difference must be noted between English and French-speaking countries, it concerns mainly the technical means used to set up a new law, which is not surprising, indeed, if we consider their respective belonging to the civil or to the common law world. In the latter, this new law should normally result, not only from legislation, but also from case law, with the constant preoccupation for the judges to adapt the English common law in order to create a "national common law".[18] In a civil law system, the only real source of law is legislation, the highest form of which is codification. Providing itself with a Constitution and one or several codes (in fact one for each major discipline) is the first concern of any new country desirous to take on the attributes of sovereignty. And there has been, in fact, especially in the 60s and 70s of the last century, in the former French and Belgian colonies of Africa, a real frenzy of codification, which has raised a number of problems.

This is not the place to discuss at length how appropriate the process of codification may be in this context. It is undoubtedly two-sided and has obvious advantages. To the extent that codes present the law with clarity and precision, they make it accessible to the greatest number of people, even laymen, and they contain (or at least should contain), not only detailed rules, but also general principles from which the judges can deduce solutions to be applied in concrete cases; they facilitate the integration of customs into the law, their modernization (since a code is not a mere restatement or consolidation of the existing law: it is also an instrument of change[19]) and a certain degree of unification, compatible with the necessary diversity of local practices. But codification also has serious shortcomings, notably to the extent that it tends to freeze the customs and to slow down their indispensable evolution.

The truth is that the merit of a code depends largely on the way it is made and the procedure followed for its elaboration. In this regard and concerning the genesis of the draft (leaving aside the problem of its adoption by the legislature), it appears that there are various methods available, and I had the opportunity to experience two of them, very different from each other in every respect.

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18. It is true that, by nature, the common law has a capacity to "absorb" so to say the customary law and to integrate it, so that it finally becomes part of the system.

19. "Evolution" or "Revolution", according to the terms used by David (*supra* note 17)? After half-a-century, the question remains open.

In Madagascar, in 1962, I was a foreign expert in a Commission in charge of presenting a draft law on marriage, that was to become part of the future Civil Code, and I sat together with a number of notables, representing most of the eighteen ethnic groups making up the nation. It is easy to imagine the debates which took place (after very serious inquiries had been conducted on the existing customs) on such a matter in a country where there was a great diversity of traditions as well as (especially on the part of the younger generation) a great aspiration to unity and progress. This was a genuine attempt to introduce mixity, often by proposing one and the same rule which applied to everybody, but expressly referred to local customs on precise points when full consensus was impossible to reach (such as, for example, the age for marriage or the requirement of parental authorization).[20] The result was an ordinance enacted in 1962, which is now about to be amended, but after having been in force for almost half-a-century, which is a remarkable longevity for a text of this sort.

Fifteen years later, I got involved in another project, this time in a small country in the heart of tropical Africa, to prepare the chapter of a planned Civil Code devoted to land law (still a very touchy subject). The suggested scheme was pretty similar to the one previously followed in Ethiopia, with a single expert responsible for drafting the new Code (or at least a whole part of it). This method is supposed to be more rapid and to give more coherence to the complete work. But I realized very soon that my task, already very delicate in itself, was, in this particular case, practically impossible because of a complex political situation, which was largely due to a quasi-feudal system and finally produced the most terrible results. As I was asking for some instructions from a Government official concerning the main lines of the reform (since, after all, I was only a technical expert), he just told me that the competent authorities had not yet decided on their future policy in this matter (public or private ownership, collective or individual rights, permanent or temporary tenure, etc.) and, faced with my embarrassment, he finally concluded with this advice: "Write several codes, we shall choose". Needless to say, that was the end of my venture.[21]

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20. After all, this technique was already used by the drafters of the French Civil Code of 1804, for example, in the field of land property. It gives to the code a certain amount of flexibility and to the custom a "status" as "custom *secundum legem*".

21. In a way, my lot was better than that of the distinguished expert of an international organization, who had drafted, for the same country, a very modern Labor Code, containing all the refinements necessary for an industrialized society, and finally saw his Code adopted, after a brief discussion before the National Assembly, with just the addition of a final article, providing:

Still, I would say that both experiences were for me very instructive and I could speak for hours about the lessons I drew from them. The main one is that codification may be useful as long as it is not a pretext for imposing, at least in civil matters, a law which is devoid of any relations with the old customs and the specific character of the people for whom it is intended. The Code must be rooted in the national culture and the traditional values. If this is not the case, the risk is great that it will be ignored and soon sink into oblivion.

B—For this is the other side of the picture. What we can observe, almost everywhere, is a wide phenomenon of resistance of African law to modernization, and this brings us back to the theme of the previous Colloquium of the International Association of Legal Science held in Dakar in 1977.[22] The problem arises, not at the level of the making of the law, but at that of its implementation. Its causes are as easy to determine as its consequences.

The causes are well-known. A good number of them are due to the manner in which the new laws are elaborated, and we have already hinted at that. We have seen that many of the codes enacted since independence have been drafted by foreign experts, excellent jurists, but without any field experience, knowing very little about the country and still less about its people (an eminent colleague, who is now in charge of drafting a code in a former French-speaking colony and to whom I said recently how fortunate he was to have an occasion to work in such a beautiful country and to admire its lakes, its volcanoes and its game reserves, just replied very candidly: "I have never been there". . . .). What would Savigny have thought of that, when he said that a code (he meant a Civil Code) should be the expression of the *Volksgeist*, the culture, the soul of the people? It is no surprise that such codes are often a mere transposition (or a clumsy adaptation) of European law, without any regard to the local situation: they seem to have been written only for the satisfaction of a few academics. A perfect example of this trend has been, some fifty years ago, the now famous Civil Code of Ethiopia, which did not take any account of the existing customs, by express will of the Emperor, for the sake of "modernization". Drafted by a well-known comparatist, René David, and enacted in 1960, this Code has

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"The present Code is not applicable to agricultural work"—although there was, in fact, practically no other work available.

22. The papers presented at this Conference (chaired by the late President Keba MBaye) have been published (in French) in a special issue of the REVUE SÉNÉGALAISE DE DROIT, vol. 21, 1-275 (1977). The discussions focused on the four main branches of *droit civil*: law of obligations, family law, land law and public law.

practically never been applied and it was definitively abandoned after the revolution of 1974; it just remains today as a nice piece of scholarly work.

This, however, is not the only reason and there are other factors which play in the same direction, such as the (often underestimated) attachment of the people to their traditional way of life and their old moral standards, often regarded as sacred and founded on religious beliefs. There is also the fact that a modernization of the law makes little sense as long as it is not accompanied by a change in its economic, social and cultural environment (which takes more time than the simple promulgation of a new code), as well as the lack of a proper administrative infrastructure (permitting, for example, the registration of persons or of land). Lastly, it appears that many concepts of modern law (and especially those of French law or of any system derived from Roman law as opposed to common law) are fully inadequate to convey African reality—particularly in the field of land tenure. The notion of "ownership" of land is largely meaningless for most Africans, whose peculiar relations with land make it difficult to accept the idea of an "absolute" right as defined by the famous (and, in truth, already outdated even in France) article 544 of our Civil Code.[23] The various efforts which have been made so far to reconcile the necessities of economic development with the respect of local traditions (which make, for example, the land inalienable and subject to collective rights) have not proved very successful[24] and it does not come as a surprise that the proposed reforms meet with a strong opposition on the part of the population.

As to the consequences of this situation, they are very clear: this new law remains largely ineffective in many sectors of the society.[25] Both inertia and plain opposition make its application very problematic—at least in civil matters, because the picture is naturally different in areas where traditional law is notably unfit and where state or economic pressure is stronger (like in public, criminal, labour or business law—as shown, for example, by the success of OHADA). Customs remain in force, especially in such fields as family, land tenure and small contracts of the "informal economy". I remember the prestigious President of an African Supreme Court who once told me about the difficulties he had

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23. "Ownership (propriété) is the right to enjoy and dispose of things in the most absolute way, provided that the use made of it is not prohibited by statutes or regulations".

24. Only a few countries have made a genuine attempt at defining new concepts in that area, such as Senegal, with the law of June 17, 1964, on the "national domain".

25. A distinction should be made, of course, in this regard, between urban and rural areas.

had to dissuade his future son-in-law from offering him the number of cows or goats required to marry his daughter. And many disputes continue to be brought before the village elders or the local chief for arbitration rather than to a court for adjudication. All this increases the gap existing between the black-letter law and the law in practice, the official law and the living law. This was already the situation when we held the Dakar colloquium and I am not sure it has changed a lot since then.

As a whole, it seems hard to say that, so far, this sort of mixity between traditional and modern law has been a success. In some cases, we can even speak of a plain failure. We are still closer to pluralism than to real integration. In spite of all appearances and official discourses, there has been, to this date, less rupture than continuity in the evolution of the law on this continent.

And now, what about the future? Certainly, the present situation is untenable in the long run and progress is necessary. New countries must not yield to either of the two myths of tradition and modernity. It is always absurd and futile to resist a change which is, in fact, inevitable, but it may be wrong and even dangerous to attempt to hasten it. What is needed today in Africa is not just a compromise between the old and the new (since such concepts are often ambiguous[26]), but rather a better understanding between two worlds. And this is why mixity appears so valuable, as in every society in transition, to the point that mixed systems come to be frequently regarded nowadays as "models" for other countries. Mixity may very well be the future of the law, but it takes time. It is indeed a slow and lengthy process. It requires caution and wisdom, as expressed by this old Basuto proverb, which gave its title to a novel that was in vogue in the years when I was discovering the beauties of Kenya:[27] "*If a man abandons his traditional way of living and throws away his good customs, he had better first make sure that he has something of value to replace them*".

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26. *See, e.g.*, Bennett, *supra* note 12, at 665.
27. ROBERT RUARK, SOMETHING OF VALUE (Doubleday & Co. 1955).