

LEGAL PLURALISM AND MODERNIZATION: AMERICAN LAW PROFESSORS IN ETHIOPIA AND THE DOWNFALL OF THE RESTATEMENTS OF AFRICAN CUSTOMARY LAW

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Introduction

In his otherwise insightful contribution, Peter H. Sand presents the history of foreign involvement in the Ethiopian law reform that began in the 1950s as simply a process of modernization and Westernization (Sand 2009).¹ The comprehensive legislative reform in the form of law codes and the establishment of a law school is portrayed as a success story of the ‘law and development’ movement. There is more to it than that. While Sand maintains that the aim of Western involvement in Ethiopia was the modernization of law in line with the age-old tradition of imposition of foreign law in Africa (Sand 2009: 754)², other ideas were presented and experimented with.

¹ While Sand’s article is nominally a book review, it addresses a much larger issue on the history Western involvement in the development of Ethiopian law.

² As attested by the recollections of his colleague from the Addis Ababa Faculty of Law, Professor Norman J. Singer, in Singer 2008: 137-145.

The purpose of this paper is to explore the involvement of American law professors such as A. Arthur Schiller in a little-known attempt to formulate restatements of indigenous Ethiopian customary law during the 1960s and 1970s to counteract the law reforms. While elsewhere in Africa efforts to improve the administration of law had involved drafting restatements of indigenous customary law, Ethiopia had opted for a wholesale modernization of its legal system through the introduction of codes. Because of claims that this modernization had led to the nullification of law outside the capital, Schiller's project attempted to demonstrate the viability of traditionalism through the revival of indigenous customary law. The article will first discuss the history of the restatement of customary law projects in Africa, before moving to Schiller and the situation in Ethiopia and finally to the wider discussion on law reform, pluralism, and modernization. In the process, the article will discuss changes in the concept of normative pluralism (Twining 2010) and its relationship to colonialism and the law and development movement.

There were two models of legal reform, namely, modernization and traditionalism, offered to Africa by the American law professors and their European colleagues involved in the reforms. Modernization or traditionalism as tools for reform were alternative modes of action embedded in Western legal traditions, with predecessors from the German nineteenth century struggle for law reform to the American 'restatement of law' movement. The aim of this article is to question the assumption of a single line of legal development in Africa and show variations by comparisons in which developments in Ethiopia are juxtaposed with developments in former British Africa, and the restatement project of Schiller is compared with the far larger British programs.

The story of Schiller and his project is important for the history of legal pluralism because it shows how modernization of law, legal education, and restatements of law coexisted with legal pluralism and the legacy of colonialism in Africa. The preservation of indigenous law was widely seen as a viable alternative to modernization and Westernizing legal reforms. Even though the project was not successful, and partly just because it was not, it reveals the complexity of intellectual developments, which are too often shown teleologically through the wisdom of hindsight.³

³ Numerous conferences on the matter were organized and their proceedings published: Rijksuniversiteit Te Leiden 1956. Schiller 1960, in a note in the 'Notes and News' section of the *Journal of African Law* mentions a colloquium in Brussels discussing the activities of Jacques Vanderlinden in the Belgian areas, J.

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As an alternative to the imposition of Western law, African nationalists argued that modernizing legal reforms in Africa should be complemented by the study of indigenous legal traditions such as customary law (Nkrumah 1962: 104). The plural legal systems in Africa were a product of the colonial period and operated either by recognizing the jurisdiction of traditional conflict resolution mechanisms or through courts which handled cases involving indigenous peoples. In order to make such a system more acceptable to judiciaries accustomed to written laws and proceedings, collections and restatements of indigenous law were made around the continent.⁴

The study relies on two sets of archival sources, the A. Arthur Schiller Papers at the Columbia University Rare Book and Manuscript Library⁵ and the collection of papers of the Restatement of African Law Project in the archives of the School of Oriental and African Studies in London.⁶

A. Arthur Schiller, African Customary Law, and Modernization

The wholesale modernization of the legal system undertaken by Ethiopia was an anomaly in the African context. The incorporation of indigenous law in the legal system was a concern all over Africa during the interwar years and continuing to the 1960s (Lewin 1938; Allott 1957; Haydon 1960: vii-xi.), but after independence African countries were often torn between the contradictory impulses of preserving the traditional African legal heritage and the demands of modernization, progress, and nation building.⁷

Poirier in the French areas, and A. N. Allott for the British and former British territories, while discussing also the American, Indian, Islamic and Indonesian restatements of law. Schiller 1960: 65.

⁴ For critical views of the process, see: Roberts and Mann 1991; Moore 1992; Chanock 1985, 2001. It should be noted that informal courts existed and continue to exist independently of state structures: see Burman and Schärf 1990.

⁵ A. Arthur Schiller Papers 1897-1977, MS#1125 Rare Book & Manuscript Library, Columbia University in the City of New York.

⁶ School of Oriental and African Studies: Restatement of African Law Project, reference code GB 0102 PP MS 74.

⁷ See, for example Nkrumah 1962; Woodman and Obilade 1995; Kuper and Kuper

The majority of states in Africa went through similar developments in their legal systems in which the law introduced by the Europeans was often adapted and retained even after independence.⁸ During the period under consideration, from the 1950s to the 1970s, two parallel developments took place throughout Africa bringing the indigenous native culture and the Westernized legal systems closer: first, restatements of indigenous law were made by legal scholars, and second, law schools were founded to educate the local population about the legal system.⁹

From the late 1950s, a group of mainly British scholars including Antony Allott and his team from the School of Oriental and African Studies in London compiled restatements of African customary law for the soon to be former British Africa. Allott's Restatement of African Law project (RALP, 1959-1977) was by far the largest and most systematic effort to collect the rules of traditional native law in writing. The outline of the project called for a standardized and scientific approach to restatements, with a bibliographical stage, the assembly of the material and the actual recording by field workers, for which a five-year period was reserved. The field workers took part in the meetings of law panels and attempted to reconstruct the social and legal framework.¹⁰ The aim of the project was to "record the law as currently applied", even if it varied from tradition.¹¹

1965. The role that customary law played after independence varied, often according to the level of integration and complicity of the native courts in the colonial system. In Zimbabwe, where the state structures had incorporated the customary law courts, they were to a large extent replaced, but in places like Mozambique, Malawi and Tanzania legal pluralism continued despite some attempts at instituting a national legal system: Chanock 1991: 60. On West Africa, see Woodman 1969.

⁸ Schiller 1966: 997. See Asante 1987 for an analysis of the issues encountered by Ghana in dealing with materials from British, customary and indigenous law.

⁹ There were also attempts at formulating an indigenous African legal theory: see Elias 1956.

¹⁰ Cotran 1987; Read 1987; Moore 1992: 23; The School of Oriental and African Studies (SOAS): Restatement of African Law Project Papers (RALP), PP MS 74, box 26a: Proceedings of the meeting of 3.10.61 to discuss future activities of the project; box 30: Bulambia, Misuku Law Panel meetings December 1-3, 1963 with J. O. Ibik, Customary Law Commissioner, SOAS, as chairman.

¹¹ SOAS: RALP, PP MS 74, box 26a: Minutes of RALP, March 2, 1965.

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From 1969 onwards several collections of restatements were published by RALP from Kenya (Cotran 1968, 1969), Malawi (Ibik 1970, 1971), Botswana (Roberts 1972), and Ghana (Kludze 1973), and work continued until 1977 concerning most of the British colonies and former colonies in Africa. Looking at the project's correspondence and research plans it is possible to follow the intellectual interest first rising in the 1960s and later turning against the project. The period of 1960 to 1970 was marked by the growth of the organization and its plans and optimism,¹² while the 1970s was a time of gradual withdrawal and abandonment. From the early '70s it is evident that many of the local partners began to lose interest in the restatements. Though the preparation of existing book projects and the planning of new ones continued, with at one point eleven writers working on separate projects, negative signals were appearing. For example, F. M. Ssekandi, the director of the Law Development Centre in Kampala, was planning to start a restatement of law project along the lines of the RALP restatements in 1972 and sought assistance, but the official government position was against any such project and nothing came of it. The RALP even began to organize events on the codification of laws in Africa.¹³

Columbia law professor A. Arthur Schiller (1902-1977) began a similar restatement of customary law project that focused on Ethiopia and Eritrea in co-operation with the law school in Addis Ababa. He was one of the undisputed pioneers of legal pluralism. A specialist in Roman law, Indonesian law, African law, and military law, he was a polyglot and interdisciplinary talent, rare traits for American law professors at the time. His early interest in indigenous customary law from the 1930s to the 1950s gave him a unique position when the study of African law became increasingly relevant in the early 1960s. Schiller founded the African Law Center at Columbia in 1965, which was the first institute of African Law in the US. *African Law Studies*, the center's journal, is now the *Journal of Legal Pluralism and Unofficial Law*. At Columbia Law School was also John Bainbridge, who directed the SAILER (Project on Staffing of African Institutions of Legal Education and Research, 1962-1972, included in 1965 in the International

¹² SOAS: RALP, PP MS 74, box 26a: Minutes of RALP, November 7, 1962.

¹³ SOAS: RALP, PP MS 74, box 26a, F. M. Ssekandi to A. N. Allott, letters 3rd and 30th August 1972, box 26b, A. N. Allott, memo on the projected conference on the Codification and Unification of Laws in Africa, June 19, 1973 and Proceedings of the Study Group on Unification and Codification of Laws in Africa.

Legal Center) project from 1962 to 1972.¹⁴

In 1951 Schiller became a United Nations legal consultant for Eritrea, drawing up a draft constitution for the state.¹⁵ That brief involvement led Schiller to take a wider interest in the development of African law and he began to teach African law at Columbia, according to himself the first to do so in a U.S. law school. In his teaching he presented his vision of legal pluralism as the future of African law in which law would be pluralistic, with at least two systems, indigenous and non-indigenous coexisting.¹⁶

Schiller's main African research project was the collection and translation of the customary laws of land tenure in Tigray, which he referred to as: "a project devoted to a survey of restatements of customary law on the part of the indigenous population." The Tigray area in Northern Ethiopia and Eritrea already had numerous restatements of customary law in existence. These restatements, called *fethas*, the earliest of which were from the nineteenth century, recorded the customary law of the plateau people, written in the Tigrinya language. The purpose of the project was to:

[C]all to the attention of Ethiopian judges a vital element of indigenous law, now wholly discounted. The last few years have shown that the enactment and attempted application of a Civil Code based on principles of western law (continental European and Anglo-American) has led to severe nullification of the law outside the bounds of Addis Ababa and a few other cities. The

¹⁴ A. Arthur Schiller folder, Historical Biographical Files Collection, Box 282, Folder 3, University Archives, Rare Book & Manuscript Library, Columbia University in the City of New York; NY Times, July 12, 1977.

¹⁵ A. Arthur Schiller Papers 1897-1977, MS#1125 Rare Book & Manuscript Library, Columbia University in the City of New York (Schiller papers), box 29, Eritrea - Correspondence and speeches, Letter of appointment, Consultant in the Secretariat of the United Nations, Asmara, Eritrea, July 6, 1951- Oct 5, 1951; Schiller papers, box 29, Eritrean II, 17 Aug 1951, To: His Excellency the United Nations Commissioner, Summary Report on Possible Conflict of Jurisdictions, Sep 7, 1951, Draft Constitution for Eritrea.

¹⁶ Schiller papers, box 31, African Law, file Seminar in African Law, proposal for a seminar in African law to be held 1959-1960.

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existence of a large mass of indigenous legal doctrine, capable of being modified to satisfy ever-changing needs, should do much to restore faith and respect for a deep cultural heritage, and at the same time provide a basis for sensible modernization of the law.¹⁷

The choice of Ethiopia was particularly apt. In its drive to modernization, Ethiopia had pursued a far-reaching legal reform program in a series of codifications. The Penal Code of 1957 was followed by the Civil Code of 1960 drafted with the help of the famous French expert in comparative law, René David. David described the ideas behind the reform of civil law:

While safeguarding certain traditional values to which she remains profoundly attached, Ethiopia wishes to modify her structures completely, even to the way of life of her people. Consequently Ethiopians do not expect the new Code to be a work of consolidation ... of actual customary rules. They wish it to be a program envisaging a total transformation of society and they demand that for the most part, it set out new rules appropriate for the society they wish to create. (David 1963: 193)

The Civil Code was in turn followed by the Commercial and Maritime Code of 1961 and the Civil Procedure Code of 1967. Among legal comparativists, the Ethiopian Civil Law codification stood as an example of the dangers of legislative hubris. Regardless of its merits as a codification, it was not applied in practice outside the cities (Brietzke 1975: 48). What attracted Schiller was that there were a number of areas in which the civil code left room for the application of customary law, one of them being the laws of land tenure in the northern provinces of Ethiopia.¹⁸

An essential part of the legal reforms was the foundation of a law school and a law journal. The tone of reform and progress was apparent in the Inaugural Statement of the Emperor Haile Selassie I in the first issue of the Journal of Ethiopian Law in

¹⁷ Schiller papers, box 29, African Law, file Fetha project, Summary Report to Dean Cordier on Summer 1966 travel and research by A. Arthur Schiller.

¹⁸ Schiller 1969: 2-3. Schiller noted that actually René David made a careful study of the Ethiopian customary laws and attempted to incorporate them into the code, but these adaptations were stricken from the code by the Ethiopian codification commission.

1964. The modernization of the legal system and Ethiopia's rapid progress demanded the services of a large number of legal experts, the emperor wrote:

Law is a unifying force in a nation: one of the goals sought to be attained by the enactment of modern codes and other legislation is that the law be uniform throughout the Empire. (Haile Sellassie I 1964: v)

The journal was meant to be the vehicle for the development and dissemination of an Ethiopian interpretation of the codes, just as the Addis Ababa University¹⁹ law school, founded in 1963, was meant to produce legal experts to serve as judges, advocates, administrators and police. The law school had by 1967 close to 700 students in its various programs in English and Amharic. Funding for the school came mostly from the Ford Foundation, and the professors were for the most part international, with Americans being the largest group. During the early years, the deans were all American, James C. N. Paul being the founding dean, followed by Quintin Johnstone and Cliff F. Thompson (Paul 1967).

The founding of the law school in Addis Ababa was part of a wider trend and the growing interest in law in Africa. From the early 1960s onwards, faculties of law were founded in African countries with the help of Western scholars and institutions. Projects like the SAILER program were used to bring Western law professors to teach for a few years in African universities while giving opportunities and scholarships to African teachers and students to study in North American and European law schools. Ford Foundation funding was crucial to many of the NGO projects, while the US government participated with the Peace Corps and USAID projects often interlinked with NGOs. While the projects had a development agenda of training lawyers and professors, who would then be able to teach the judges, lawyers and administrators that these newly independent countries needed after the colonial administration was removed, during the Cold War there was also political importance in the question, who would train the future ruling elites of Africa. However, one must not underestimate the spirit of optimism of the era and the belief in development.²⁰

¹⁹ Known at the time as 'Haile Sellassie I University'.

²⁰ Paul shows how already in 1962 American law professors were active in numerous African countries, with American deans heading law schools in Ghana (W. B. Harvey) and Nigeria (George Johnson) (Paul 1962-1963; see also: Johnstone 1971-1972: 657; Paul 1987: 20-21). A more somber tone is apparent in

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The intellectual climate in which any project of legal reform in Africa operated was marked by the contradictory relationship between tradition and progress. To some of the nationalist governments of Africa, the colonial heritage tainted indigenous customary law and the native courts, while there was also a need to reject any alien imposition in their legal system. There was simultaneously a will to validate indigenous law that would reflect African culture and values and to reform institutions in the name of progress and national unity. Traditional authorities such as tribal chiefs and the native courts system had often been the tools of colonial rule, which had supported and controlled them. Many of the independence movements were committed to the idea of development and modernization, and adhering to the tribal administration with its often hereditary traditional leaders and systems of ownership would have been an unnecessary hindrance to development (Bennett 2009; Bennett 2004: 17-18; Allott 1970, 13-14; Peters 2009: 1317-1325).

The Reanimation of a Lost Tradition, Pluralism and Colonialism

Even in Ethiopia, there was considerable interest in indigenous customary law. The professors of the law school, mainly relatively recent law graduates with some having advanced degrees, were active writers for the Ethiopian Law Journal. The majority of articles concerned the interpretation of the Ethiopian law codes, but the fact that customary law had been allowed some room was a matter of controversy among the professors of the law school (for example: Krzectunowicz 1966; Vanderlinden 1966; David 1967). Though there was interest in the content of customary law and the functioning of traditional courts, the foreign law school professors were behind a language barrier that prevented most of them from engaging with the customary legal material.

While the professors of the Addis Ababa law school were products of a modern Western legal training and taught the thoroughly modern official legal system of Ethiopia to their students, Schiller was from a very different background. Schiller's thinking on legal pluralism was a product of his rather unusual interests. In the field of Roman law, he specialized in Coptic legal texts, a small subfield studying mostly Egyptian materials. In comparative and indigenous law, he spent over a decade studying Indonesian indigenous *Adat* law, and after that over two decades involved in African law. All of these three fields included legal pluralism

the ILC volumes on law and development: ILC 1974, 1975.

of different kinds, starting from the situation in Roman Egypt, in which a number of competing legal systems had coexisted.

Schiller's method of inquiry was based on a combination of case law and legal tradition, comparing the decisions of local courts and tribal authorities (Schiller 1962). To Schiller, law was based on the culture of the people and it was the task of legal scholars to reduce it to universal rules. This essentialist view of law was based on nineteenth century German legal theory, which stressed the long connection between law and culture. It took centuries for laws to adapt to a culture and for the people to develop an affinity to them. Making rash changes via legislative reform or codification only served to alienate people from the laws, because one could not legislate tradition (Whitman 1990: 120-234).

As with Indonesia, Schiller's earlier interest, the future of African law would be determined by the policy chosen, there being essentially three options: 1) pluralism, 2) the abolition of the indigenous system and the institution of a Western-oriented one, or 3) "a national legal system" that "may be established by directed evolution of the law, fusing the plural legal systems into one, as in the British, French and Belgian areas." According to Schiller, the means available for this directed evolution were legislation, a restatement of indigenous law, judicial decisions by tribunals, native or otherwise, scientific anthropological studies, and a trained legal profession.²¹

While the first option, pluralism, had been the practice of colonial regimes and the second, legal imposition, the ultimate aim of colonialism, which option would the independent nations choose? Ethiopia had made a very strong move towards Westernization, while former colonies might continue as they had in pluralistic systems, to follow Ethiopia in wholesale modernization, or try to fuse the traditions together. On paper, it would appear that in all three options restatements of customary law were needed, even in the Ethiopian style modernization as Schiller had argued.

While the practice of the 'tribes and traditions' style of legal anthropological

²¹ Schiller papers, box 31, African Law, file Seminar in African Law, proposal for a seminar in African law to be held 1959-1960: "I call to your attention to the fact that this would be another Columbia first, with other law schools offering a similar seminar, I am certain, within a few years."

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scholarship²² had been to collect a priori sets of rules by interviewing informants such as tribal elders, Schiller opposed the study of customs and rules for their own sake and claimed that it was only with a determination such as a court judgment that one reached law. Schiller thought that the whole concept of customary law was misleading and should be abandoned because law revealed itself only in a judicial determination. Legal custom was turned into law, but it was not customary law, but judge-made law. According to Schiller, only by establishing a trained judiciary could African legal traditions be adapted with legislation to serve the changing circumstances of the present. Even though he did not concur with the claims of Indonesian nationalists, who argued that the system of *Adat* law was simply an artificial collection of ancient customs, he saw the argument as a suitable warning against fostering concepts such as customary law. His belief was that people should build up their own traditions, including law, and that labeling indigenous law archaic and primitive, which had been the meaning of the label 'customary law', was hardly helpful.²³

As interpretations of native law by Western or Western-educated lawyers, the restatement projects in Africa like those produced by the RALP were intended to be compatible with a Western or a Western-influenced legal system such as those set up by colonial administrations and operating in the cities of African countries. However, Ethiopia was a case of its own, having never been colonized despite the Italian occupation prior to and during the Second World War. Schiller's aim was to circumvent the problem of Western influence by using earlier material that would have been free of such influence. As Schiller well knew, the influence of foreign law in Ethiopia dates back to the seventeenth century and the translation of the canon law code *Fetha Nagast*, or the Law of the Kings, which incorporated material from the Byzantine law books (Sand 2009: 757-758). Whether there were any legal compilations that would not have contained some foreign influence is unclear, but the use of very old materials posed its own problems. The renewal of the old would have required a living tradition of interpretation to adapt to the modern world. As in the case of the attempt to formulate a law reform with the use of ancient Roman material in nineteenth-century Germany, the reanimation was

²² The classic of the scientific orientation of the rule centered approach was Schapera 1938.

²³ Schiller 1936: 259; Schiller 1966: 997; A. Arthur Schiller, 'Custom and Customary Law – Primitive Societies', Lecture at Aberdeen, May 1957, Schiller papers, box 31, African Law, file Correspondence and African Law Material, pages 7, 11, 13.

not successful because there was no living tradition and no effort to create one. The search for purity produced sterility (Whitman 1990: 221-228).

During his travels in Ethiopia during the late 1960s and early 1970s Schiller gathered a number of *fethas* and other Ethiopian customary law collections. His aim was to publish a compilation of the available restatements with an English translation and commentary, English being the main common language of legal scholars in Ethiopia. He was especially interested in the laws of land tenure, which were of utmost importance in a region marked by strife between nomadic and sedentary peoples. The translation process of the *fethas* revealed another fundamental error in Schiller's project. Because Schiller had sought to uncover the earliest and most authentic texts, they were in fact quite impossible for a modern Tigrinyan speaker to understand. Thus instead of recording a living tradition, Schiller was actually translating ancient texts. Locals undoubtedly referred to these as the source of law, but, as often happens in legal reasoning, the interpretation had long since left the original intent behind. Although the translations were made, the eventual publication of the *fethas* progressed very slowly and the deteriorating political situation in Ethiopia did little to help matters.²⁴

The extent of the institution building done by Schiller underlines how much he was also committed to the ideas of modernization and reform. Schiller's African Law Center at Columbia University, funded by Ford Foundation grants, handled the practical administration of the various Africa projects. The main task of the center was the publication of the *African Law Digest*, which followed legislation and case law in Africa, and the academic journal *African Law Studies*. At Columbia, the daily operation of the African Law Center was entrusted to a series of assistant directors, among them John Bruce, Cliff Thompson, and Jeswald Salacuse.²⁵

By 1970, time was working against Schiller because he had begun the project quite

²⁴ Schiller papers, box 36, Ethiopian Law, A-F, Customary Law Project, The Written law of HabSellus, GhebreKristos, DeKeteshum; Schiller papers, box 36, Ethiopian Law, A-F, Ethiopia project (Tsfazim), Schiller to Mr Tsfatsion Medhanie, Law School, Addis Feb 22, 1971; J. T. Harrison to Schiller May 10, 1972, of three compilations, Law of Logo and Chewa, Law of Seharti, and Lamza, Schiller to Jeremy T. Harrison, June 6, 1972. One of the main problems appeared to be the lack of translators from Tigrinya to English.

²⁵ Apparently the administration was relatively informal as some of the assistant directors had no recollection of the fact that they were assistant directors.

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late in his career. Even the institutional background was fading. As Schiller retired from Columbia in 1971, the direction of the African Law Center was given to Robert Hellawell. It was also decided that the center would be moved to Addis Ababa, along with its publications, as parts of the law school. After his retirement, Schiller continued to work on the *fetha* project, but began to concentrate his energy on writing a book on Roman law.²⁶

While Schiller was recognized by his contemporaries as a pioneer in the field of African law,²⁷ his work was too tied to current legal affairs to endure and Schiller has been largely forgotten. The publication of the customary law project was never completed, partly due to the fact that the 1974-1975 socialist revolution in Ethiopia removed both the need and the possibilities for research.²⁸ By the late 1970s the general enthusiasm of the law and development movement was evaporating and critical voices were appearing, for example accusing it of doing missionary work for legal liberalism.²⁹

While Schiller's project and the RALP had similar chronologies and phases of development, although the RALP began earlier and ended later, there were fundamental differences. In contrast to Schiller's work in independent Ethiopia, the RALP had both the advantage and the disadvantage of building on the foundation of the British colonial practice in the application of indigenous law. The indirect rule of the British was founded on certain basic principles, such as the judicial ascertainment of customary law and the personality principle. The judicial ascertainment was twofold, the courts would first ascertain the content of the native custom and then find out whether it could apply it. The rules were discovered from tribal practice, from evidence given by the tribal chiefs and

²⁶ Schiller papers, box 23, Learned Societies C-I, file International African Law Association, Encyclopaedia of African Law, letter to Jacques Vanderlinden July 19, 1975. The book on Roman law, Schiller 1978, appeared posthumously.

²⁷ Schiller papers, box 26 African Law Abel-African Law Material (1), file African Law, ALAA Correspondence, June 21, 1971, letter from David N. Smith to Schiller: "I am sorry that African legal studies is losing you. We Africanists are all indebted to you for your pioneering work."

²⁸ A similar project was completed recently through a collaboration of an Italian and an American legal scholar: Favali and Pateman 2003.

²⁹ See Paul 1987: 26 for references.

elders, and from case law.³⁰ In application, the rule was that courts should be guided by native law as far as the law was not repugnant to natural justice or morality or to any legislation, to use, for example, the 1898 decree in Southern Rhodesia (current Zimbabwe).³¹ The personality principle meant in the context of indirect rule that cases between natives were settled using indigenous law while cases between Europeans were subject to Western law. In matters like family law Islamic law was also applied.³²

Even between various British colonies, the approach taken by colonial administrators to customary law varied. In places like Kenya, where the native courts were under the administration, not the judiciary, it was a deeply held conviction that the best option would be to allow the law to remain flexible and

³⁰ Allott 1970: 258; Shadle 1999. See Lewin for a contemporary view on the various issues encountered by the British on the ascertainment of the content of indigenous law (Lewin 1938: 18-20). The case law for the use of customary law in British Africa was mainly from Southern and Western Africa. Application of Native Law permissible: *Cole v Cole*, 1898, *Nigerian Law Reports I*: 21; *Komo and Leboho v Holmes*, N.O., 1935, S. Rhodesia, 86; *Nqanoyi's case*, 1930, Native Appeal Court (Cape), vol. ii, p. 18. Contra, see *Vela v Mandinika and Magutsa*, 1936, S. Rhodesia, 171. The use of chiefs as sources of law: *Hermansberg Mission Society v Commissioner for Native Affairs and Darius Mogalie*, 1906, Transvaal Supreme Court, p. 135; *Lewis v Bankole*, 1909, *Nigerian Law Reports I*: 82; *Visram v Gwanombi*, East African Law Reports, vol. vi (1915-1916), p. 31. Custom as existing from time immemorial: *Angu v Attah* (1916) Gold Coast Privy Council Judgments (1874-1928), p. 43.

³¹ This *repugnancy test* was in different forms applied in all British colonies in Africa. It was confirmed by case law and legislation: Nigeria and the Gold Coast Supreme Court Ordinance, 1876, s. 19; Transvaal Law No 4 of 1885; Southern Rhodesia Order in Council, 1898, s. 50; Kenya Order in Council, 1921, s. 7; South African Native Administration Act, No 38, 1927, s. 11.

³² Sand 2009: 756-757; Lewin 1947; Salacuse 1975; Anderson 1954. For example in Southern Rhodesia the Native Law and Courts Act (1937) ruled that between natives the decision of the court shall be “in accordance with native law and custom”. This task was given to the native courts, while it was also recognized that unofficial courts would exist. A native was by definition “any person who is a native of South Africa or of Central Africa.” See Goldin and Gelfand 1975: 8-10, 21.

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fluid in order for it to be able to adapt to changing circumstances. In places where native courts were placed under the judiciary, there was a more concerted effort to reduce the rules of customary law to writing (Chanock 1985: 51; Shadle 1999).

According to Allott, the British had a number of reasons for supporting indigenous customary laws, ranging from a willingness to maintain tranquility to economy. In line with the idea of indirect rule, relatively few colonial officers were in charge of administering large areas and thus the administration of justice would have been too much of a burden. In many cases the British had explicitly agreed to recognize indigenous law when assuming jurisdiction. It was also claimed that British law would have been too sophisticated for the primitive native populations.³³

One of the motivations behind the RALP was concern for the future of customary law at the end of colonial indirect rule. With the 'protective barrier' of indirect rule and its separate systems of courts and administration gone, what would become of customary law (Read 1987: 5)? The new nations would need to develop state structures rapidly and with them, to reform their legal systems. By 1960 there were long standing efforts to make collections of rules or restatements of tribal law at least in the French and Belgian African colonies. While those projects, similar to the RALP, were commonly parts of the colonial administration or ethnographic studies, the RALP was conceived as a postcolonial program for the advancement of the administration of law.³⁴

The project of Schiller and the RALP also faced similar theoretical obstacles. At a seminar organized at the Haile Sellassie I University in January 1966, Allott and others noted that a restatement project normally encountered problems not only in finding but also in describing customary law. The first solution, as applied in the Natal Native Code of 1896, was to use the existing technical vocabulary of Western law. The ethnocentrism of this approach led Dutch scholars of Indonesian *Adat* law to adopt a neutral descriptive tone, while comparative lawyers tried to create a universal legal language, and anthropologists maintained that one should use indigenous terms in order not to destroy their meaning (Allott, Epstein and Gluckman 1969: 16). In the RALP restatements and other restatement projects the audience was always the judiciary and administration, who both worked in English. Though scholars were acutely aware of the conceptual problems that

³³ Allott 1970: 9-14; Schiller papers, box 31, file Jes Salacuse, Salacuse to Schiller, Nov 26, 1967.

³⁴ Schiller 1960: 65. Of the Belgian colonies, see Reyntjens 1992.

plagued the colonial usage of indigenous law, a satisfactory solution eluded them.

The Downfall and Survival of African Customary Law through Modernization and Legal Pluralism

In the eyes of modern observers, the colonial model of legal pluralism contained two fundamental errors that led to the downfall of many of the restatement projects: first, that the material they drew on was mainly the interpretation of Western-educated lawyers on indigenous law that would then be applied in practice by Western-style law courts and second, that it gave legal validity and permanence to the views of old tribal leaders and stifled progress. It was apparent in the beginning of the 1970s that the resurrection of traditional customary law systems was not high on the agenda for nationalist African leaders.³⁵

However, pluralistic legal systems continue to exist on a large scale, for example in South Africa legal pluralism in its various forms, from the British and Apartheid era state legal pluralism to the current deep legal pluralism, has been the rule for two centuries and there are detailed studies of the practice. As van Niekerk has pointed out, there is a distinct separation between state-law pluralism and deep legal pluralism. In state-law pluralism, the state recognizes customary or other legal rules of certain groups if they fulfill certain tests regulated by the state such as the repugnancy clause, while deep legal pluralism is based on the claim that the state legal system is irrelevant for the existence of unofficial laws (van Niekerk 2001, 2006: 5-10; Chanock 1996).

Lauren Benton has argued that in colonial situations the drafters of the system of indirect rule formulated their own version of legal pluralism in which indigenous systems of law were misrepresented and served as hierarchically lower appendages to state authority. This form of pluralism installed the colonial overlords as the ultimate authority with power to decide what is right and just (Benton 2002: 164-165). The state legal pluralism they practiced was, in effect, merely a category in a very universalistic system that had a clear hierarchy.

Martin Chanock has argued that the version of legal pluralism which was left and remained in Africa as a legacy of colonialism is a kind of dualism, or binary

³⁵ Bennett 2004: 17-18. See Brietzke (1975) for a contemporary view of law as an obstacle to development.

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system, in which the main part of the population is in a subordinate position under a legal system that guarantees them inferior legal rights. Colonial and post-colonial legal systems in Africa have been marked by an extreme legal formalism untempered by the influence of civil society (Chanock 2001: 32). The contrast between the rigid formalism of the state legal system and the informality of customary law made the meeting of the two problematic. The colonial system of indirect rule depended on the conception of well-defined groups which were defined by their immutable legal customs. What the colonial officers and the makers of the restatements after them attempted to do was to put this custom in writing by selecting the cases and rules which would best describe the essence of the custom. The result was that what had once been a living tradition of solving conflicts was now petrified into a set of rules which in themselves were the product of selection and competing claims.³⁶

Schiller's view of legal pluralism could best be described as one inspired by comparative law scholarship. In legal pluralism the task of the jurist was to ensure that the indigenous law could be presented in such a form that it could be applied by the courts. Even though it would appear that Schiller advocated state legal pluralism, matters are not that simple. The idea was that indigenous law existed independently of state structures. Schiller brought legal pluralism developed in the Dutch *Adat* school to replace the concept of customary law with pluralism to erase the assumption of the subjection of native law to state law. In such a system, not only legal scholars but also state courts should have the expertise to apply indigenous law.

Like many of his contemporaries, Schiller overlooked the adverse effects of Western colonialism on indigenous law and did not question the authenticity of the indigenous law that was applied by the state legal system. As Shadle has argued, the aim of most of the projects in putting native law in writing was to make them reproducible. Thus they would provide guidance for the administration and satisfy the need for certainty in the law. Even in the 1940s, the British Colonial Office recognized the dangers of codifying customary law, namely, that it would fundamentally alter the fluid operation of changing tradition to adapt to altering conditions by crystallizing customs to a rigid set of rules (Shadle 1999: 411-413; Read 1987: 10).

³⁶ Chanock 1985: 9. See Asante 1987: 86-87, for the practical problems posed by the demands of judicial notice.

Even during the colonial period it was recognized that observers such as lawyers or anthropologists studying customary law had a tendency to force the logic of Western law on to native law and thus to discover customary law comparable with the legal system known to the researcher. Simply defining customary law in terms of a European system of law led to inaccuracies because of the considerable baggage legal concepts brought along from one legal system to another. A further development removing the indigenous population from their supposed laws was that instead of relying on often contradictory native informants, colonial courts tended to prefer judicial practice as precedent and were allowed to make law when precedent was not found. Furthermore, in urbanized and industrialized areas like regions of South Africa there was the issue of detribalization, or whether one should apply customary law to urbanized people who lived outside any tribal areas and not under any customary authority. The issue of detribalization was accentuated by the fact that tribes as administrative entities were often constructed artificially by colonial administrators, a policy taken furthest in South Africa.³⁷

Allott's response in 1987 to these criticisms, that customary law was either a colonial relic and hindrance to development or that the very act of recording would radically alter it by petrification was an argument for realism. First, that legal development should be internal, and that alien impositions, as shown by so many examples, are doomed to fail. Second, that customary law was an existing fact within African legal systems and to be effectively and justly administered there had to be full analytical understanding of them (Allott 1987: 17).

Though he supported the same arguments of tradition and rule of law, Schiller's pluralism followed the model of the Indonesian *Adat* law in which several independent and indigenous systems of law coexisted.³⁸ Furthermore, Schiller's work on legal pluralism cannot be separated from his studies on Roman law. Schiller did not study Roman law as it is traditionally studied, as the foundation of the civilian tradition of law and a collection of legal rules and institutions. Rather, he studied Roman law as it was applied in practice, drawing from the ideas of

³⁷ Goldin and Gelfand 1975; Quinlan 1988; Moore 1992. For a contemporary view, see Bennett 2004. The most extreme form of transformation of customary law was the South African codification contained in the Natal Native Code of 1891.

³⁸ Hoebel and Schiller 1948: 13. On *Adat* law and van Vollenhoven, see Fasseur 1992. On the later studies on *Adat*, see von Benda-Beckmann and Vermeulen 2001.

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legal realism which surrounded him at Columbia law school. Schiller was a specialist in legal papyrology and Coptic law, a field which studies the culturally complex and legally pluralistic Egypt in the Roman period.³⁹

As in Indonesia, the main source of controversy in Africa was not customary law in itself, but rather the struggle between traditionalism and modernization.⁴⁰ The main reason why many of the restatement projects in Africa failed was that Western scholars were producing something that was of little interest to the new African leaders. The issue for the new cadre of leaders was modernization and development. What projects like Schiller's collection of ancient laws provided was a turn to the past, a past with unchangeable rules.

Modernization projects such as the law school in Addis Ababa were some of the battlegrounds in which this struggle between traditionalism and modernization was fought. It was also a battleground between different types of modernization, the capitalist and socialist models. As the political struggle in Ethiopia culminated in the ousting of the emperor and the socialist-inspired military takeover by the Derg in 1974-1975, direct action eclipsed reforms. Tragically, many of the law school graduates did not survive the Red Terror of the early Derg period. While many students became radicalized and participated in the movement to oust the emperor and create the new Socialist Ethiopia, others became suspect under the new regime because of their Western education.

In practice legal pluralism continued as the codes remained unused in the countryside. One of the most popular actions of the Derg was the institution of land reform, which nationalized land previously held by the aristocracy and the church. How much this benefited the Tigray region is open to debate, because the region was dominated by resistance movements and warfare during most of the Derg and Socialist periods. At least the need for a restatement of customary rules of land tenure was reduced by the nationalization of land (Kidane 1990).

³⁹ Schiller 1932: 3-5, 18-20; Schiller 1971.

⁴⁰ Schiller 1936: 261-263; Schiller 1942: 31. According to Schiller, the opponents of pluralism claimed that "eventually the higher, more moral, European law will prevail over the more primitive eastern law" (Schiller 1942: 37). Independent Indonesia later opted to develop Western style law codes, while *Adat* law still applies in rural areas in the village level (Fasseur 1992: 255-256). The evolution of studies on *Adat* have been considerable (Gluckman 1949; Hooker 1978; Davidson and Henley 2007).

In current debates the very definition of legal pluralism is controversial. Much of the disagreement follows from the different traditions of pluralism, those of anthropology, comparative law, and international law. While small scale anthropological projects tend to follow the postcolonial antagonism towards state law as oppressive to indigenous peoples, the approach of legally oriented scholarship is very different.⁴¹ Closer to what Schiller was proposing is the deep legal pluralism aspired to currently in South Africa. The practically oriented deep legal pluralism project seeks to harmonize the different legal systems such as Roman-Dutch law, common law, customary law, unofficial customary law, Islamic law, Hindu law, Jewish law, and people's law, in addition to the various official and unofficial court systems, to "a legal system which revolves around a core of parallel, yet different residual sources" (van Niekerk 2006: 14).⁴² Both the anthropological and comparative law approaches to legal pluralism should be separated from the idea of global legal pluralism, which deals with the rules of international legal norms, human rights, NGOs, and migration (Tamanaha 2008: 20-36, 63)⁴³.

What the example of Schiller and his project may show is that the best of intentions and the use of advanced methods are of little use when political developments are not favorable. The projects of legal reform were swept away by the revolution, but it is doubtful whether Schiller's endeavor would have been successful even without the revolution. Pluralism does not work artificially, as Schiller well grasped in theory, and, as the South African examples show, no legal tradition will live in writing if it is not part of the social reality. The uniting factor between the colonial systems, the Restatement of African Law Project and Schiller's project was the belief in the neutrality of recording. While the RALP and Schiller strove to free themselves from the tradition of the imposition of law, they could not translate and transfer the law neutrally to writing because of the very impossibility of reducing a living system to a set of rules. That does not mean that the restatements are not used in practice, quite the contrary (Read 1987: 11).

⁴¹ The growth of the conflict between the legal and social anthropological approaches is evident in the debates in Allott and Woodman 1985.

⁴² Bennett 2006 points out that the price of legal pluralism is the perpetuation of conflicts of laws (Bennett 2006: 25-27).

⁴³ On the debate over pluralism, see also Merry 1988: 872 on the division between classic and new legal pluralisms; Rouland 1994: 50-65; Berman 2007.

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The question is whether a ruling separated from its context is meaningless without the decision making process, as claimed by the critics of restatements? Or whether the glorification of the process is simply essentialism? Should one not record the rules, if there is a state legal system after all? The answer given by Schiller was to make the traditional rules as compiled earlier by the traditional authorities available, and to enable the indigenous people itself to develop its own rules. However, the end result in this case was a victory for deep pluralism as described by Schiller in his article on Coptic law in Late Antiquity: the abandonment of the state legal system.

Conclusions

In recent years scholarship has increasingly recognized the often scientifically guided efforts that colonial powers made to further the development of their African colonies. It has been noted that the simplistic picture of colonialism as oppression and ignorance is not perhaps the most accurate but more the product of emancipatory postcolonial scholarship, which drew a strict separation between the enlightened and the oppressive. In practice the problems were too complex to be resolved simply by good will (Cooper 2004: 9-38).

There were two conflicting agendas for legal reform in Ethiopia and Africa in general: modernization through the adoption of legislation after Western models, and the reform and renewal of traditional African law. The Ethiopian imperial government sought to modernize society through legislation, while Schiller attempted to demonstrate the wisdom of the latter. In the end, both projects were made redundant by the socialist revolution. However, the intellectual history of legal reforms would be incomplete without both, because they testify to the alternatives considered and the process of the struggle for legal reform.

While colonial powers had imposed their own laws on their African colonies, the main consideration in African legal reforms was the restatement of customary law. Indigenous law was applied in courts already during the colonial period, but the issue of deducing the content of that law remained. The bulk of the legal systems in Africa were normally the imported laws of the colonial state, which was reflected in the aims of legal reforms. On the one hand, restatements of African customary laws were made and, on the other, law schools were founded to train African professionals who would master the legal system left behind by the colonizers. African nationalists had mixed feelings with both elements of the legal system: the European law was an imposed, alien system, but customary law had

also been a tool of colonialism.

The project of Schiller was based on the premise that legal pluralism was the future of African law. The Ethiopian Civil Law codification recognized a very limited validity of customary law in the norms of land tenure, which Schiller used as a pretext for his project. The project also had a wider agenda, demonstrating that law reform based on the utilization of traditional law was possible and would successfully correct the nullification of law in rural areas.

As one of the pioneers of the study of African law in the United States, Schiller could utilize his network of connections within the African law community. Though the law school at Addis Ababa was committed to modernization and law reform, former students and colleagues from the African Law Center he had founded at Columbia University would assist him in the process. Schiller's background was in the historical study of legal pluralism and as such his approach to legal reform was very different from that of the young modernizers of the law faculty. In his studies on ancient Egyptian Coptic law and Indonesian *Adat* law, Schiller was committed to the primary nature of indigenous law in legal pluralism.

However, Schiller was hindered by the quest for historical accuracy and originality, the search for early and uncontaminated sources. As in the nineteenth century German law reform, with which Schiller was intimately familiar, the result was not a record of a living tradition but rather an antiquarian exercise. The fundamentals of the process were flawed, and the decline of Ethiopia into revolution and later civil war ended the project before corrective measures could be taken.

The legacy of Schiller is in legal pluralism, where he attempted to chart a course between the subjection of indigenous law to the state legal system and its irrelevance. The colonial state legal pluralism recognized indigenous law only as a set of rules, while the contemporary idea of deep legal pluralism attempts to take into account indigenous law but considers its existence independent of state structures. Schiller was unashamedly state centered and held that in order to be relevant in practice, the rules of indigenous law should be developed and reformed. A lawyer and thinking like one, he saw little utility in the detachment of indigenous law and the state. Even though African nationalists intent on development saw customary law as unchangeable and beyond reform and political control, Schiller advocated autonomy and development within the traditional culture.

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