NOTES AND NEWS

Judicial Advisers' Conference

In November, 1956, the second Judicial Advisers' Conference was held at Jos, in the Northern Region of Nigeria. The term "Judicial Advisers" was retained to emphasise the continuity between this Conference and the first Judicial Advisers' Conference, which met at Makerere College, Uganda, in February, 1953—and the Record of which was published as a special supplement to the Journal of African Administration in October of the same year. In reality, however, this title gives no adequate indication of the nature or scope of the Conference, which provided an opportunity for the exchange of information about the present state of native courts in different parts of Africa, for the discussion of any relevant problems or points of particular interest, for the consideration of likely developments, and for an attempt to reach as wide a measure of agreement as the variety of local circumstances might allow on the objectives, whether immediate or ultimate, which should be kept in view.

The Conference, which was fortunate to meet once more under the exceedingly able Chairmanship of Sir Kenneth Roberts-Wray, K.C.M.G., the Legal Adviser at the Colonial Office, was attended by representatives from Basutoland, the Gold Coast, Kenya, Nigeria (Northern and Western Regions), Northern Rhodesia, Somaliland, Tanganyika, Uganda and the United Kingdom. These were not delegates, and did not speak for their respective Governments in any official capacity, but represented between them a wide range of experience. Some were members of the Legal Branch of Her Majesty's Overseas Service, more were administrative officers (whether with or without a legal qualification), and two came from the academic world. About half had attended the previous Conference; and, as previously, the atmosphere throughout could scarcely have been more harmonious.

The major item on the agenda was a review of the Record of the 1953 Conference, in order to determine what developments had taken place in the intervening years and how far the former Record was now out of date. To take a few examples, almost at random: The first topic, the "Control of Native Courts: Appeals, Revision and Administration", gave rise to a discussion, *inter alia*, of the progress which had been made towards an 'integrated' rather than a 'parallel' legal system, towards an increased separation of judicial from executive functions, and towards the adequate training of native court personnel. Under the title of the "Position and Functions of Judicial Advisers" a review was made of comparable appointments in various territories, of the different duties—appellate, revisionary and supervisory—exercised in each case, of the possibility of combining these duties with others, of the practicability

of a closer link with the higher Judiciary, and of the prospects, status and salary of the office. The subject of the " Jurisdiction of Native Courts " prompted a discussion of the principles and conditions on which the jurisdiction of these courts could properly be extended to non-Africans and of those cases of conflict between customary and statute law which sometimes arise in native courts even under their present jurisdiction. In reviewing the " Recording of Customary Law ", it was recognised that such recording is still most desirable, and that the danger even of codification has, perhaps, sometimes been exaggerated in regard to those branches of the law (e.g. land tenure) in which the advantages of certainty outweigh the disadvantages of reduced flexibility. And under " Civil Procedure in Native Courts " the discussion ranged over such questions as the necessity for simple procedural rules, the appearance of advocates, the improvement of the recording of evidence, the use of garnishee procedure, the introduction of periods of limitation and the reduction of adjournments due to failure of either party to appear.

A far fuller treatment than was possible in the 1953 Conference was given to the " Problems of Courts in Muslim Areas ". This subject was treated under four headings. First came a general review of the extent to which, and the basis on which, Islamic law is in fact applied in the different territories. Next, an examination was made of various problems to which this application has given, or is likely to give, rise—including a number of comparatively urgent problems of this kind in Northern Nigeria. Then a general review was made of the sequence of appeals or revision, or both, in regard to Muslim Courts or Islamic law; and, finally, a discussion ensued of any problems which have arisen, or may arise, in regard to such appellate jurisdiction—including certain important developments, again, in the Northern Region of Nigeria.

Among other subjects which went far beyond a review of the previous Record may be mentioned the problems connected with Special Courts, e.g. " mixed " courts and land courts; the encouragement or discouragement of arbitral proceedings outside the courts, the form these should take and the effect, if any, to be given to such awards as may result; the question of corruption in native courts, and how this can best be combated and avoided, and the difference between the European idea of punishment and the African conception of compensation. This last topic included a discussion of the possibility of a more extended use of restitution and compensation, or judgment by consent, as alternatives to prison sentences in suitable cases, and so linked up with another major concern of the Conference, namely the " Treatment of Offenders ". Under this last subject a large number of alternatives to imprisonment were successively reviewed, including fines (whether prompt, deferred or payable by instalments) recognisances, absolute discharge, conditional discharge, suspended prison sentences, extramural work and probation—in addition to the special problems raised by juvenile delinquents and the classification of offenders.

The Record of this Conference, which covers all these points and also includes some very useful appendices, is to be published within

the next few months as a special supplement to the Journal of African Administration.

A number of the topics treated therein are of such importance that they may well merit further discussion in subsequent issues of the present Journal.

The Teaching of African Law in British and African Universities

In the United Kingdom the study of African customary law tends to be confined to those taking regular courses in social anthropology, though a certain number of lawyers (including some Africans) have submitted theses on topics in African law for higher degrees (Ph.D. and LL.M.). Surprisingly enough it does not seem to be considered necessary to equip future administrative officers with a basic knowledge of the principles of customary law and its administration in the native courts and elsewhere. (For that matter, overseas service cadets continue to receive their elementary legal training in the law of England pure and simple, without any attempt to deal with the problems of colonial law or the local variations which have been introduced territory by territory in the applicable English law.) In the University of London, however, the London School of Economics offers courses in African customary law and its administration, as well as the regular teaching in anthropology and colonial local government; the courses are intended for graduate students and overseas service officers.

The School of Oriental and African Studies, also in London, alone offers regular full-time courses in African customary law. Apart from special courses, the courses are of two main types: a one-year course leading to an examination for a *Certificate in African Law*, and a two- or three-year course, at a somewhat higher level, leading to an examination for a *Diploma in African Law*. In these courses a wide range of subjects is covered, including the customary law of marriage and the family, land tenure, succession, crimes and torts, and the machinery for the administration of customary law. Islamic law figures as an optional extra in the Certificate course. These courses have been attended by a variety of students, some African, some European, some of them lawyers, some not.

In Africa the position of African law teaching is even less satisfactory. Apart from the Union of South Africa, in many of whose universities native law and native administration are regular subjects of undergraduate study, no institution of higher learning in British Africa has even got a department of law, let alone undergraduate courses on African law. In the Gold Coast there is a lecturer in legal studies at the University College, and a lecturer in commercial law at the Kumasi Institute of Technology; but they are concerned primarily with English law. In Nigeria the University College at Ibadan engages in no law teaching at present, though Islamic law is studied in the North at the Kano Law School. At Makerere in East Africa the position is similar. At the new Rhodesian University College no legal education at present figures in the plans for undergraduate teaching. In a later issue of the

Journal we hope to examine more closely the problem of legal education in Africa; but it can be said here that more requires to be done immediately.

First Meeting of the Inter-African Conference on Social Sciences, Bukavu

We have recently received the printed papers relative to this Conference, which was held at Bukavu, Belgian Congo, from 23rd August to 3rd September, 1955, and which was attended by nearly 100 participants of many different nationalities. The Conference, which was convened under the auspices of CCTA (Commission for Technical Co-operation in Africa South of the Sahara), was organised in six sections, section 5 being concerned with " Methods of Administration ". This section included administrative officers and sociologists. A series of recommendations was adopted by the Conference. Among those emanating from section 5 were the following:

" Recommendation 56.

The Conference, noting the importance of the systems of land tenure in relation to the social life of the communities,

RECOMMENDS

(1) that studies should be undertaken of the evolution of modes of customary land tenure towards new communal or individual systems of ownership bearing in mind the need to meet the demands created by economic progress and to maintain the stability of the community;

(2) that the legal authorities should consult with sociologists and ethnologists when preparing new legislation concerning land.

Recommendation 58.

The Conference, considering the importance in Africa of a knowledge of customary law and of its development,

RECOMMENDS

(1) that it would be of considerable interest if the collecting and recording of native laws and customs could be undertaken in the various African Territories. The recording could be done in co-operation between jurists, anthropologists and social scientists on the basis of accounts already provided by Africans versed in customary law and of previously published studies on the subjects. Publication of important judicial decisions should also be undertaken, as these decisions serve not only in the interpretation and clarification of native laws and customs but also in indicating their evolution. In the editing it is necessary that account be taken of changes which have taken place in these customs; in addition, a reference to older laws now abandoned, would be very useful.

Native laws and customs should be presented in such a way as to permit of their use by social scientists and anthropologists as well as by the courts, and, in general, by all those who are interested in indigenous societies.

This collection of native laws and customs should not however be in the nature of a judicial code, binding on the judge, but should serve him solely as an aid to understanding, so that any crystallisation of custom which will impede its evolution may be avoided.

(2) that studies should be undertaken with a view to determining, having regard to the psychological reaction of the communities, methods and judicial systems best suited to African societies.

(3) that studies be undertaken with a view to determining the modalities of execution of the penal sanctions most appropriate to African societies."

These recommendations, which intimately concern the future administration of customary law, deserve a fuller comment which cannot be given here; but one or two observations may be made. The first is that it is doubtful how far an anthropological treatise can at the same time be a useful text-book for use by the superior courts. The problem of the ascertainment and proof of customary law in colonial courts in which it is a foreign law is a difficult one; it is questionable whether it can be solved by the production of collections of customary law in the manner recommended, unless further extensive changes are made in the manner of the administration of customary law. The second point is that accounts provided by Africans of their own customary law are sometimes misleading. Partly this is due to inability to stand outside their own system and take an objective and broad view of the way they live; partly it is due to lack of the correct legal equipment, such as a refined terminology which deals adequately with concepts like 'ownership'. Thirdly, collaboration of lawyers and sociologists in dealing with customary law is an admirable method to adopt; but could one suggest that future meetings of the Inter-African Conference on Social Sciences might include more lawyers among its number?

The Study of African Law at the University of Paris

The Faculty of Law at Paris has decided to institute a course of study in African customary law. This news is given in the issue for January-March, 1956, of the *Revue Internationale de Droit Comparé*[1], which also prints the introductory lecture[2] delivered by Professor Chabas (of the Institut des Hautes Études at Dakar) at the first course actually held from 30th January, 1956, at the Faculty of Law.

The course was given by three lecturers, who each delivered thirteen lectures. M. Chabas dealt particularly with judicial machinery and the interaction between native custom and French law; M. Alliot (also of Dakar) with the sociological aspects of custom; and M. Poirier (of the École de la France d'Outre-Mer at Paris) with the distinguishing features of customs and their relation to the social structure. The ambit of the course was necessarily limited to that portion of negro Africa under French rule, which meant that a large portion of Africa was left untouched. Nevertheless the complexity and diversity of the remainder are sufficiently staggering to test anyone proposing to deliver a general course of lectures on African law.

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[1] At p. 67.

[2] Under the title *Introduction a l'Étude du Droit Coutumier Africain.*

M. Chabas says, in his most informative and penetrating lecture[1], that

> " . . . the decision taken by the Faculty of Law at Paris to institute this course of study is a happy and important event, which marks a new orientation, an expansion of the interests of the Faculty into a hitherto-neglected field. Perhaps, on closer examination, this event has a connexion with the current of reform which is modernising legal studies and making them capable of dealing with the most diverse forms of life in society."

And he points out that in the past France, despite her great responsibilities in Africa, has lagged behind Belgium and Britain, not to mention Holland, in this type of study[2].

We welcome most warmly this further indication of the widespread and growing interest in customary law and its administration in Africa, and wish every success to our French colleagues.

Ethnographic and sociological research in East Africa

Under this title the present state of research in the East African territories and suggestions for future studies have been reviewed in a recent article[3] by J. H. M. Beattie, of the University of Oxford. A considerable amount of the work in progress or recently completed relates, directly or indirectly, to customary law. Political and social organisation, and types of land tenure, are in particular being examined in a number of different tribes. Of studies in progress or being written up the following catch the eye as being in the field of customary law: I. Kaplan on Chagga law and political organisation; P. Reining on Haya political organisation, land tenure, and types of family structure; G. Wilson on Luo land law; H. Lambert on Meru land tenure and political organisation; a number of enquiries dealing with Uganda tribes; and local studies in the fields of land tenure and administration by anthropologists and administrative officers of the Tanganyika Government.

Beattie's suggestions for possible lines of future research are very helpful, and include:

> (1) An inter-territorial study of the East African coastal regions, with special reference to the influence of Islam on the indigenous African cultures. The impact of Islamic law is particularly important here.
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> (2) A comparative study of institutions in the inter-lacustrine tribes, with special reference, *inter alia*, to land tenure and marriage.

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[1] At p. 69.

[2] It is not only France that could, in the past, have been accused of dragging her feet in the scientific juristic study of customary law. Britain too has for long neglected her obligations, and it is only now that adequate steps (of which this Journal is one) are being taken to meet them. It would also be fair to point out, for purposes of comparison, that the School of Oriental and African Studies in the University of London has for some time past offered full-time courses of study in African customary law (see above at p. 6).

[3] At (1956), 26 *Africa* 265.

(3) A comparative study of indigenous systems of land tenure in Kenya, with special reference to Central and Nyanza Provinces.

(4) A further enquiry into the working of the African courts in Kenya, with particular regard to the nature and viability of the indigenous judicial institutions, and how they are modified by present-day conditions.

Legal developments in Ghana

The University College of Ghana is at the moment considering plans for the establishment of a department of law. This will be the first in West Africa and, if any plan that is adopted sees academic legal training against the wider background of professional training, the College will be doing West Africa a most important service.

The Ghana (Constitution) Order in Council, 1957, which took effect on the grant of independence to the Gold Coast, under the name of Ghana, on March 6th, 1957, makes provision in Part VII of the Order for the future judicature of Ghana. The Chief Justice is to be appointed by the Governor-General on the advice of the Prime Minister ; Justices of Appeal (when the Ghana Court of Appeal is established) by the Governor-General on the advice of the Prime Minister after the latter has consulted with the Chief Justice; and puisne judges by the Governor-General on the advice of the Judicial Service Commission (section 54). A judge will be removable from office by the Governor-General only after an Address of the Assembly has been passed by at least two-thirds of the Members, praying for his removal on the ground of stated misbehaviour or of infirmity of body or mind (section 54 (3)). These provisions should satisfactorily ensure the continued independence of the judiciary. (The other provisions of the Order in Council will, we hope, be considered in detail in a later number of the Journal.)

The intention is that the judiciary, which is to consist of magistrates, judges and justices of appeal, shall be unified under the Chief Justice. This reiterates the already expressed Government acceptance of the principle of a gradual replacement of native courts by a magistracy, as advocated by the Korsah Commission on Native Courts, 1951. Ghana is withdrawing from the West African Court of Appeal and is consequently establishing a Ghana Court of Appeal. Appeals to the Privy Council are to be retained and the hope may perhaps be expressed that a Ghanaian judge will one day join that body.

Law reporting in Africa

We are happy to be able to refer to important and widespread developments in the issue of law reports throughout British Africa. The significance of these developments for the study and improvement of the law in Africa hardly needs mention. In West Africa, the new West African Law Reports, which supersede the old

W.A.C.A. reports, have just begun publication. They report cases in the superior courts of Ghana (the Gold Coast), Sierra Leone, and the Gambia, and appeals therefrom to the West African Court of Appeal and the Privy Council. Volumes XII and XIV of the old W.A.C.A. Reports have also recently appeared, and contain a wealth of new case-material which deserves close examination[1]. It is a pity that, apparently, no selection of cases decided in the Gold Coast Supreme Court since 1937 is to be published, since this recent period has been fruitful of important decisions, *inter alia* on the developing customary law. Nigeria has, of course, now withdrawn from the West African Court of Appeal; the Federal Supreme Court, and the High Courts of the different regions, are now issuing their separate series of reports. Incidentally, the Law Reports of the Northern Region of Nigeria are officially to be cited as " 1956 N.R.L.R.", we are told; this will surely lead to confusion with the Northern Rhodesia Law Reports.

In East Africa the Kenya Court of Review and the Tanganyika Central Court of Appeal (which are the final courts of appeal from African courts) have begun to issue separate reports of their decisions in cases concerning customary law. These valuable publications raise the question whether cases in the superior courts which deal with customary law should be reported in a separate volume of the law reports. Except in dual (or " parallel ") legal systems separate reporting is, it is submitted, undesirable, since, for a start, many cases in West Africa now involve some question of customary law without being solely concerned with such law; and this trend to " mixed " cases will increase in the future.

In Central Africa the Federal Supreme Court of the Federation of Rhodesia and Nyasaland has now begun to issue its own reports.

Commissions of Enquiry

Eastern region of Nigeria: *Report of the Committee on Bride Price* (1955. Government Printer, Enugu: 1/6 net).

This Committee, appointed by the Eastern Regional Government and under the Chairmanship of M. O. Balonwu, Esq., Barrister-at-Law, was given the following terms of reference:

" To investigate the social effects of the payment of Bride Price in the Eastern Region and to make any recommendations to Executive Council it might think fit with a view to the removal of any anomaly or hardship."

The work of the Committee can be divided into two halves. First, there is the comprehensive and illuminating series of reports on the marriage laws of the different ethnic groups which make up the Eastern Region, with special reference to the mode of celebration of marriage and the nature and amount of the marriage payments (including the marriage consideration—the so-called " dowry " or " bride price "—as well as other customary payments). This information, which occupies most of the space in the Report, should be most valuable for comparative purposes, legal and anthropological.

[1] For comments on some of the cases reported therein, see p. 51 *et seq.*, *post.*

Part IV of the Report deals with the principal recommendations of the Committee, which have been accepted by the Government as the basis of future action. The recommendations are: (i) " dowry " should be limited to £30 throughout the Region, and it should be an offence to pay or receive more; (ii) petty expenses to be similarly limited to £5; (iii) all marriages under native law and custom to be registered, and marriage registries established for the purpose; (iv) divorce to be obtainable only by decree of a competent court for certain specified grounds, and divorce by mutual consent to be forbidden; (v) child marriage should be abolished; (vi) matrilineal systems of marriage and inheritance should be abolished by regional legislation; (vii) a considerable number of other recommendations on cognate subjects. It does not need emphasising how far-reaching are the changes recommended in the customary law of the region. It will be interesting to see whether the legislature and the courts are able to work out effective means of carrying the recommendations into effect, or whether the attempt to radically alter the social system from above will be wrecked on the innate conservatism of the customary law.

ZANZIBAR PROTECTORATE: *Report on the Inquiry into Claims to certain Land at or near Ngezi, Vitongoji, in the Mudiria of Chake Chake, in the District of Pemba.* By Sir John Gray, Kt. 1956. Government Printer, Zanzibar: Shs. 2/50.

This fascinating investigation of Pemba land tenure by Sir John Gray first of all narrates the history of Pemba Island. It continues by examining the indigenous system of village community organisation, with special reference to the functions of the village council or *Watu Wazima*, especially in the matter of the allocation of land to strangers. Next, Sir John tackles the formidable legal problems raised by the collision of three distinct systems of law, indigenous, Islamic, and English. He notes the principle that the mere fact that a tribe is converted to Islam does not mean that its customs, particularly those relating to land tenure, are thereby changed; where the first Muslim Arab settlement was by peaceful means there is no presumption that the settlers imposed their laws on the indigenous inhabitants or interfered with the laws and customs already in force. He further refers to the *Jibana Land Case* (1915) 6 E.A.L.R. 31, which established the principle that if native customary law only recognises communal ownership of land and does not recognise individual ownership or the right to alienate such land outside the community, then neither the purchase of such land from an individual member of the community nor the acquisition of such land by a stranger who enters and plants thereon can confer a good title on such a stranger as against the community. A stranger can only acquire a valid title by adverse possession for a period exceeding the statutory period of limitation.

Furthermore, in Zanzibar it is necessary to modify the English legal concept that the ultimate title to all land is vested in the Crown, and that accordingly land without an owner belongs to the Crown.

The particular dispute with which the inquiry had to deal was,

in fact, a good example of the competing interests of the three different types of party—indigenous, Arab, and British. In the instant dispute Sir John Gray found that whilst the Arab sheikh's family (one of the claimants) originally acquired a right or interest in accordance with local custom, an interest of a temporary nature determinable by the village community, yet the original acquirer and his family had treated the land as their private property, and the villagers and their predecessors had always obtained leave to plant on the land. The effect of this adverse possession under the Limitation Decree was that the sheikh's family could now defeat any claim to recover the land by pleading possession for more than the limitation period. " In other words, the Mauli family have over a period exceeding sixty years treated this land as stamped with the same character and attended by the same incidents as would attach to it if it had been acquired by them under pure Muslim law in their country of origin, namely, Oman."

The facts that (i) the law of limitation of actions can in Zanzibar be invoked in cases affecting the indigenous inhabitants and their claim to land in accordance with their local or tribal law, (ii) possession of land originally lawful and by one title—customary law—can become adverse and by another title—Islamic law, (iii) members of an immigrant community can import with them and impose on the local land law features of the land law in the society from which they originate—these facts will doubtless be of considerable comparative interest in other parts of Africa where Islamic law or immigrant communities are to be found.