Book Review. Independent Africa: The Challenge to the Legal Profession by L.C.B. Gower

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introductory pages on the importance of disclosure and for its references to the provisions of the bill (subsequently enacted) radically revising disclosure requirements in the United Kingdom. Professor Mackinnon’s chapter on the protection of dissenting shareholders is also a useful survey of a number of widely differing topics, each of which could well have been the subject of a separate chapter, and he does well to give an intelligible introduction to them. His discussion of variation of shareholders’ rights could perhaps have been expanded, especially in view of the complete absence of relevant Canadian authority on these questions, by reference to English and Australian decisions. There is some degree of overlap between Professor Mackinnon’s essay and those of other contributors, but that is perhaps inevitable in a book of this kind. Professor Beck’s essay on Foss v. Harbottle is one of the outstanding contributions to the volume, and is notable especially for his perceptive analysis of the problem of majority rule in letters patent companies, and for his fascinating and novel explanation of the cases dealing with the power of the majority to ratify directors’ breaches of duty. The addendum on the recommendations of the Lawrence Committee contains some extremely cogent criticism of that committee’s proposals, and it is to be hoped that these criticisms will be considered before further legislation is enacted.

Part Five of the volume is devoted to two essays by Professor English on mergers and amalgamations, the first dealing with the corporate law, and the second with the tax aspects of these arrangements. Both contain an admirably lucid account of the topics dealt with. Inevitably they are merely surveys, and it is to be hoped that Professor English will some day find the time to expand upon the corporate problems, at least, for this is a sadly neglected field in Canadian literature.

The concluding portion of the book, “The Canadian Company in Wider Perspective,” is devoted to an essay by Professor Smyth on the social implications of the corporation. Professor Smyth suggests that in recent times “we have become so fascinated with management skills in the individual corporations that we neglect the overriding social considerations.” In large measure the contents of this volume are evidence in support of that assertion. Professor Smyth’s essay is a valuable corrective to the dominant emphasis of the book upon the private law of private (in a non-technical sense) companies, although I was disappointed to find no reference to some of the work in Professor Porter’s The Vertical Mosaic, which is highly relevant to the theme of corporate social responsibility.

No contributor to Studies in Canadian Company Law has been omitted from this review. On the other hand, to none has full justice been done. The criticisms made are for the most part minor and do not detract from the over-all value of the book. Editor, contributors, and publishers deserve the thanks of Canadian lawyers for their enterprise in producing this excellent addition to the literature of the law. It is to be hoped that its appearance will mark the first stage in the development of a Canadian company law that is not merely a faithful reproduction of the English law.

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Professor Gower’s Oliver Wendell Holmes Lectures were delivered at the Harvard Law School in 1966. They deal with problems of profound importance not only
to the legal profession but also to all who are interested in African development. Into a volume of modest size Gower has packed a wealth of background information, a useful survey of current African efforts to produce indigenous lawyers, some trenchant criticisms of past failures and current mistakes, and a set of provocative questions to stimulate further discussion of the role of law and lawyers in the Third World.

Despite his broad title, Professor Gower limits himself to those parts of Africa which until recently were British dependencies. His first lecture explores the legacy of British colonialism; his second assesses the fate of that legacy in the post-independence period. Much of the legacy is of obvious interest to the lawyer: the Balkanized structure of nation states, the Westminster model of parliamentary democracy, the rule of law, and a legal order comprising the common law, doctrines of equity, and British legislation made applicable to the dependencies and retained after independence. Other aspects, though not specifically legal, have important implications for the law and lawyers: British-style education which too often was irrelevant to its African environment, the Whitehall model for the civil service, military, and police organizations, an economic order characterized by pervasive underdevelopment and exploitation, and an emotional and moral outlook which is surprisingly free of self-assertion or revenge-seeking in relation to the former colonial powers and their friends. Gower's treatment is a brief survey, balanced, fair, and often penetrating, and should be especially helpful to those for whom Africa, even in its post-independence exuberance, has remained the Dark Continent.

In the third lecture, "The Legal Profession," lies Professor Gower's major contribution. As background, he describes briefly the English legal profession, divided as it is into barristers and solicitors, emphasizing the serious consequences for the fused African profession of the English structure and the methods of qualification for each branch of the profession. He surveys briefly the development of programmes of legal education in Africa and suggests some "do's and don'ts" to guide American and British efforts in assisting the new African countries to develop a legal profession responsive to the pressing needs of the present and the years ahead.

Since Professor Gower was addressing American lawyers and law students, he saw no need to defend his fundamental premise: that the legal profession has a useful, indeed necessary, role to play in stimulating and guiding African development along desirable paths. He stands on the assertion, a congenial one for lawyers, that "the public responsibilities of the legal profession are even greater in these countries than in more highly developed industrial states. They need commercial, corporation, and property lawyers if they are to achieve an economic take-off. They need bilingual international, comparative, and constitutional lawyers if they are to survive as states and to enter into the larger unions which Pan-African sentiment and economic development demand, and if the Commonwealth is to survive as a worthwhile multi-racial organization. They need courageous lawyers with the highest ethical standards if the atrophy of the rule of law and personal and academic freedom, and the corrosive growth of corruption, nepotism, and elitism are to be arrested, and if military and police power is to be kept within bounds. Most of all, perhaps, they need constitutional lawyers sophisticated in other disciplines if they are to find a viable substitute for the Westminster model of parliamentary democracy." If this position is defensible, as I believe it is, the defence must rest on certain assumptions about or preferences for the kind of lawyers envisaged and the nature of the society to which their functions are to contribute.

Clearly the need is not for the kind of African lawyer, most typical in the colonial period, who returned to practice in his own country after taking British
professional qualifications. Lack of funds usually barred him from a university education and consequently he kept terms in the Inns of Court to qualify as a barrister. With minimal training in the litigation-oriented technicalities of the British legal system, he was eligible, on his call to the bar and his return to Africa, to practice in a fused profession. Being trained to litigate, the African lawyer had little interest in or skill for the shaping and guiding of transactions so as to avoid litigation. It is not surprising, therefore, that he failed to perform or performed badly the types of professional service that in England would fall in the province of the solicitor: counselling lay clients, planning transactions to accomplish his client's purposes effectively and securely, drafting contracts, conveyances, and other instruments, and negotiating settlements to avoid costly litigation. Nor is it surprising that a lawyer so limited in his education and perception of professional roles would be unable to meet the needs for legal services when these needs were shifted from the private to the public sector and became needs for constitution building, development of rational and decent administrative procedures, and law reform. It is understandable that the African lawyer often failed to appreciate the vital link that must exist between a legal order and the society it serves, and, when the law-shaping power passed to African hands, that he had no sense of urgency to guide the reshaping of a colonial legal system to render it responsive to the needs and aspirations of an African society. Beyond these professional deficiencies were distressingly common personal failings: loose ethical standards in dealing with the property and other interests of clients and elitist attitudes toward the functions and status of lawyers.

In this bleak picture of lawyers in the former British dependencies in Africa there is no suggestion that professional qualifications and standards in other countries are above criticism. Surely somewhat similar criticisms could be directed fairly toward many lawyers in the United States, Great Britain, and elsewhere. To single out the African profession, however, can be justified on two grounds: first, the generality of the defects and limitations, and second, the especially urgent need there for the right kind of lawyers. Yet in Africa too, there are exceptions. I know, as I am sure Professor Gower knows, African lawyers of outstanding professional qualification, broadly and humanely educated men, with deep sensitivity to the needs of their society, who are concerned over the failures of their professional colleagues to respond to them.

Like Professor Gower, I am encouraged by the efforts of many African countries to develop local programmes for the education of lawyers. These efforts have been strenuous, and grave difficulties lie ahead, but in them lies promise of a greatly improved and strengthened legal profession. The new African programmes usually contemplate university education in law with some attention to the social sciences and the humanities. Increased emphasis is being placed on law in African circumstances and, to some extent at least, on the development of constructively critical attitudes toward the existing law and legal profession.

In one aspect of legal education in Africa, my own views may differ from Professor Gower's: the desirability of committing to a non-university law school responsibility for a programme of post-university, professional education. Abstractly considered, such a non-university school seems to offer advantages. Located at the heart of a centre of governmental activity and private practice, ideally it could secure the services of able and experienced practitioners to teach the "know-how" of professional practice. Under such supervision the students might observe and perform many of the important tasks lawyers must do well. My own experience tells me, however, that these theoretical advantages are painfully difficult to achieve. Too few law offices or practitioners provide acceptable models for students. The ablest lawyers often are unable to commit adequate time to teaching and supervising students and, where the commitment is made,
it almost inevitably is subordinated to the fluctuating pressures and demands of practice.

In my view, therefore, it is preferable to give to a university law faculty the primary responsibility for designing and staffing the full programme of professional education. This does not preclude effective use of selected practitioners within that programme. Furthermore, when a university assumes such a responsibility, care must be taken that the full-time faculty includes not merely university law graduates with formal qualification as barristers but also a number who have followed their university education by qualification and practice in the solicitor's branch of the profession. The latter are scarce in Africa, and the universities will have stiff competition for their services. I believe, however, that a career in law teaching can be made sufficiently attractive in prestige and perquisites for the university to attract and retain the kind of legal manpower it requires.

As suggested earlier, Professor Gower's postulation of the needs for lawyers in Africa rests on certain assumptions concerning the nature of the society they are to help create and to serve. Is it to be a society in which a significant role is left for private decision making, private property, and private commercial transactions? Is it to be a society in which the roles of officials are defined and their powers are allocated and controlled by law susceptible of invocation by the ordinary citizen? Finally and most fundamentally, is it to be a society in which government will find its legitimacy in the consent of the governed and in which an important range of citizen involvements in government will be permitted? I share Gower's preference for affirmative answers to these questions as well as his implicit optimism that a similar preference will guide the peoples of Africa and their leaders.

Should the African peoples and their leaders opt for democratic values and some measure of political and economic pluralism, this choice does not mean that their developing societies will resemble closely the societies of Britain and the United States. That social dissimilarity has profoundly important implications for the legal profession and for the education of lawyers. Gower has recognized these implications and framed clearly a number of critical issues. Does the British or American private practitioner provide an acceptable "production model" for the African lawyer, likely to serve in government or at least in a society where the role of government is more dominant and pervasive? Can a legal profession operating for private gain and often large economic rewards adequately meet the needs of societies in which over 90 per cent of the population have real per capita incomes of less than $120 per year? If a private bar is to be preserved, primarily as a bulwark of individual liberty, can it avoid becoming, or appearing to political leaders to be, an obstacle to progress which must be eliminated? To these disquieting questions, Professor Gower attempts no extended answer. It would have been fruitful indeed could he have added a fourth lecture to consider the evolving structure and function of the African legal profession and the needed adaptations of legal education to produce suitable lawyers for African conditions.

Professor Gower has provided a useful survey of the British legacy to Africa, particularly as that affects the legal profession, and an assessment of the current malaise of much of that legacy. He has demonstrated conclusively that the British, and to some extent, the American, model of a legal profession is not appropriate for the underdeveloped countries of Africa. Thus he has laid the basis for a continuing search for better means to produce the lawyers that emerging Africa needs. Hopefully, the leading role in that search can and will be played by the leaders of the African profession themselves.

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