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NOTES AND NEWS

Informal Meeting of British and African Law Teachers at Oxford

The Deans of the Law Faculties at the Universities of Khartoum, Ghana, Lagos and Addis Ababa, and representatives of the University College, Dar es Salaam; the University of Ife; the Ahmadu Bello University, Zaria; Fourah Bay College, Sierra Leone; the Nigerian Law School, Lagos; the University of Nigeria at Nsukka; and the University College of Rhodesia and Nyasaland; were among the participants who met representatives of many of the law faculties in the British Isles at Wadham College, Oxford, on 29th-30th June. Representatives of the Department of Technical Co-operation, the Inter-University Council, the Council of Legal Education and specialist law publishing firms were among those also taking part. The object of the meeting, which was convened by the Society of Public Teachers of Law and which was under the chairmanship of Dr. A. N. Allott, Reader in African Law in the University of London, was to provide an opportunity for informal discussion of ways in which law faculties and other interested bodies in the United Kingdom could be of assistance to the rapidly developing African faculties, more especially in the recruitment of law teachers, the provision of textbooks and the organization of law libraries.

The main emphasis was on recruitment. Here Britain, whose legal systems are intimately connected with those of the Commonwealth and English-speaking Africa, has a unique opportunity to assist. Britain has already done much to help through the supply of distinguished law teachers to act as Deans of the new African faculties; but the continuing need which the expanding faculties in Africa will have for experienced teachers can probably be met most satisfactorily by the encouragement of secondment of British teachers, preferably for a two-year term. One of the hopes that was repeatedly expressed at the meeting was that universities in this country would look favourably on this sort of initiative (the University of London has already formally stated that it does so).

This was a unique and highly profitable occasion, both for the British and the African law teachers who took part. It is likely that it will lead to the augmentation and underpinning of the flow of British law teachers to Africa through the provision of permanent machinery by which teaching opportunities in Africa can be brought to the notice of law teachers in this country; but it should also lead to the enrichment of British law faculties through faculty exchanges,

linking arrangements with African faculties, and the engagement of staff with African experience.

Judicial and Legal Developments in the Northern Region of Nigeria

In 1958, the Government of the Northern Region of Nigeria invited a Panel of Jurists to consider and to make recommendations as to (*a*) the systems of law in force in the Region and the organization of the courts and the judiciary enforcing the systems and (*b*) whether it was possible, and how far it was desirable, to avoid any conflict between the systems.[1] Virtually all the Panel's recommendations were accepted by the Regional Government; and in 1962 the Panel was invited to review the progress made and to advise on any further changes that might be necessary. The Panel's report as such has not been published, but a White Paper on the report has been issued by the Northern Nigerian Government.[2]

Subject to certain reservations, the Government has accepted the Panel's recommendations and proposes to introduce shortly the legislation to implement them. From the section devoted to review of progress it is clear that the Panel was, in general, well satisfied with the results of the implementation of the most revolutionary of the 1958 recommendations: the introduction of a Penal Code and Criminal Procedure Code of universal application to replace the Maliki law. Professor Anderson, a member of the Panel, speaks of the enthusiasm with which these reforms have been accepted in the Region as a whole, although the strongest opposition might well have been expected:

> " [these codes] had come to be regarded as ' belonging ' to the Northern Region rather than as foreign importations or impositions and a very genuine attempt was being made to apply them properly."[3]

The main problem, however, lies in the training of the native court staff. The Panel have recommended more intensive training for selected native court personnel at the Institute of Administration, Zaria (now part of Ahmadu Bello University); there should be a diploma course of at least one year's duration; and diploma holders should be entitled to higher salary scales, the Government providing grants-in-aid to the Native Authorities in respect of these salaries. To this the Government has agreed. Adequate training in the operation of the new codes must, however, take time and the Panel recommended that, in the meanwhile, native courts should continue to be guided, rather than bound, by the Penal Code, the Criminal Procedure Code and Evidence Ordinance, apart from

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[1] See [1959] J.A.L. 89.

[2] *Statement made by the Government of Northern Nigeria on additional adjustments to the Legal and Judicial Systems of Northern Nigeria*, Govt. Printer, Kaduna.

[3] Anderson, " Return Visit to Nigeria: judicial and legal development in the Northern Region " (1963), 12 I.C.L.Q. 282, at p. 284.

certain basic provisions of procedure and evidence which must be followed.

The Panel proposes that now that the Penal and Criminal Procedure Codes have been largely assimilated, attention should next be given to the drafting of a Civil Procedure Code. Furthermore, it is recommended that steps should be taken towards codifying native law and custom, particularly in respect of personal status. In view of the large number of different systems of customary law, some standardization will be necessary. Research will be undertaken and codes drawn up each covering as wide an area as possible including all provisions common to the system and excluding minor differences. These codes would not at first be binding but merely persuasive. Professor Anderson expands this last point saying:

> " The resulting records would then constitute *prima facie* evidence of the law concerned, while it would still be open to litigants to produce proof to the contrary."[1]

The Government's intention is that, as soon as there comes into existence a body of inspectors, the setting up of which in the Ministry of Justice for the supervision of the native courts was one of the Panel's recommendations, one of the tasks of the inspectors will be to conduct the necessary research to enable codification to take place.

Among other subjects on which the Panel has made recommendations are the appointment and discipline of court members, the size and number of courts, the Sharia Court of Appeal, and Northernization of the judiciary and legal departments. The only recommendations of the Panel which the Government has turned down are that Haddi lashing should no longer be awarded in addition to a fine or imprisonment for such offences as adultery, and that automatic appeal should lie to the High Court where the death penalty is awarded by a Grade A Native Court, to safeguard an illiterate person who might not understand his appeal rights. The Government's reason for turning down the last recommendation is that it is in their view unnecessary, since the native court judge will always inform the person of his appeal rights.

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[1] I.C.L.Q. *ibid.*

COLLOQUIUM ON AFRICAN LAW, LONDON, JUNE 1963

CODIFICATION AND UNIFICATION OF LAWS IN AFRICA

We give below the background paper circulated to members of the Colloquium, which was prepared by Dr. A. N. Allott, and a summary of the discussions at the Colloquium, prepared by Mr. I. O. Anozie and Mr. J. S. Read.

I. The Relevance of the Problem

The effect of the colonial period on the legal and judicial systems of the colonial territories was to create a fundamental dualism or pluralism, whereby the laws administered in any particular territory consisted in part (i) of the *general law* (usually but not always based on English law in the British territories—Indian law and Roman-Dutch law were applied in East and in Southern Africa respectively), applying to persons of all races (subject to the application of special local, customary and religious laws) and more particularly applied by the territorial or general-law courts (superior and subordinate courts); and in part (ii) of *special laws*, consisting of indigenous laws maintained in operation by the colonial power (local African customary laws, Islamic law) and other special laws applied to special classes or communities (*e.g.* Hindu law). Such dualism is no longer universally acceptable in African countries, many of which are thus led to attempt partial or comprehensive integration or unification of their laws.

Apart from unification, most African countries are concerned with modernization of their laws, in order (i) to remove some of the antique survivals cluttering their legal systems (*e.g.* through the reception of the English law as it stood at a certain date in England, without any of the subsequent amendments which have been adopted in England having been introduced into the territory in question), and (ii) to produce a law more in line with modern economic and social needs. The Africanization of the law, *i.e.* the procurement of a legal system more responsive to and representative of African traditions, institutions, attitudes and aspirations, is also felt to be a paramount requirement in some countries (notably in Ghana, Tanganyika, and Nyasaland).

As one of the main methods of radical improvement in or alteration of the law, codification has been justly popular, especially in rapidly transforming countries such as France in Napoleonic times, British India and modern Turkey. Codification can be a purely technical exercise, and extend merely to the tidying up of the existing written and unwritten law (*cf.* the Sale of Goods Act, 1893, in England); or it can go hand in hand with underlying social purposes and policies: *i.e.* it can be a means for the shaping of the social environment as expressed in the legal system. In England

heretofore, interest in codification has been confined to the former task; in Africa it is possible that the more far-reaching type of codification will prove the more popular, in so far as the enactment of a new code provides opportunities to make a fresh start.

The object of this Colloquium is to survey the existing demand for codification and unification of the laws in Africa, to explore the technical means by which such codification and unification may be brought about, and to consider some of the problems, not least in so far as the style of administration of the existing " English " and customary laws is concerned, which may arise from such an attempt.

II. Unification of Laws

Unification of laws may take place at different levels. For each type it is necessary to ask: (i) is it necessary? (ii) if so, why is it desired? (iii) how may it be brought about? The major dichotomy is between unification within the framework of a single state or territory, and international or interterritorial unification—the latter raises problems of the relations between states.

A. At territorial level

(1) *Internal unification of English or general law component.*—At present in many countries the general law consists partly of the common law of England as at a certain date, partly of the doctrines of equity, partly of the statutes of general application in force in England on a certain date, partly of more recently received statutes from India, England or elsewhere, and partly of local enactments. How, if at all, may these different elements be brought together into a harmonious or integrated whole [*cf.* experience in Western Nigeria, Ghana]?

(2) *Unification of local customary laws.*—To what extent is this either needed or desired? [Contrast the situation in Ghana, Tanganyika, Basutoland, Uganda, Nigeria, etc.] There appear to be two stages: (i) reduction of local variations; (ii) elimination of local variations. How are these to be achieved? If one starts with promotion of uniformity within an ethnic group,[1] how does one define the ethnic group? What are the major obstacles to such unification [different relationship systems; different economic systems]?

What are the most appropriate methods by which to achieve such unification, if desired; and can it be combined with the recording of customary law generally [restatements; codification; the function of the appeal courts; declarations by local or traditional authorities]? Is it better to postpone such unification until one can move on to a further stage [*e.g.*, unification of personal laws generally; general codification]?

(3) *Unification of criminal law.*—That is, the consolidation of the statute and unwritten law. Are there any special reasons why this is desirable [*cf.* the restatement scheme in Kenya and the elimination of unwritten criminal law in Uganda and Nigeria]?

[1] *E.g.* within the Kikuyu of Kenya, for which see report by E. Cotran on customary criminal offences in Kenya, Govt. Printer, Nairobi, 1963.

(4) *Unification of personal laws.*—Here an attempt is made to unify not only the customary laws, but the statute and religious laws as well. A good illustration is the Marriage, Divorce and Inheritance Bill of Ghana. Nyasaland and Tanganyika appear to be pursuing similar long-term objectives, but are approaching the problem gradually by way of recording and eventual unification of customary laws.

Is it possible to find a *via media* between African and English ideas in such fields as marriage and divorce, succession, property, tort and contract law? Is a compromise possible between patrilineal and matrilineal succession, or between a law based on God's command and one based on custom or the will of Parliament?

Are the political or economic arguments for unification convincing? Is it possible to build a nation-state in Africa with a multiplicity of different personal laws, varying by locality, religion or race? Is it necessary to have uniform laws in order to achieve political unity? Can one successfully unify laws without unifying the way in which they will be interpreted and applied (in other words, if they are to be administered both by sophisticated professional judges and by semi-trained local court judges)?

(5) *Unification as a by-product of general codification.*—This seems an especially popular solution in the civil law countries, *e.g.*, in Mauretania, Senegal, Ivory Coast, Somali Republic, Ethiopia. In such an instance one begins *ab initio* to construct a general civil code which embraces and replaces all the existing forms and sources of law. Is this feasible in the common law countries with their very different attitudes to codification?

B. At international level

(6) *Unification within a law-group.*—Many advocates of inter-territorial harmonization of laws argue that the proper way to set about it is to begin by trying to procure greater uniformity in the laws of countries belonging to the same legal family. Thus all the civil law countries in Africa could endeavour to adopt similar institutions by convention; and the common law countries might do the same by regions. This gets over the primary difficulty of any attempt at international unification on a continental or even regional basis, that one has to try to find common ground between the common and civil law systems, with their allegedly very different methods, classifications, and techniques. Perhaps some of these differences have been exaggerated; nevertheless, there is more here than a language problem.

To a large extent the various law groups have started off with similar laws: thus the former British West African territories had legal systems deriving from that of England, though at different periods and with different local statutory variations; and in East Africa the original fund of territorial law in many fields was basically the same. The existence of common appeal courts (West African Court of Appeal; Court of Appeal for Eastern Africa) and a common system of legal training, as well as the interchange of legal and judicial personnel, helped to maintain these links. There is a real risk that this harmony may now be lost as different countries go

their own way; indeed even in a single federation, such as Nigeria, divergencies are appearing between the laws of different regions.

How can one maintain the existing harmony? Or create it where it does not exist? Is it important that such harmonization should exist? If so, in what fields [private international law; commercial law; labour law; transport; nationality]? Should a special institute, or other special machinery, be created to serve a particular region or group of states [*cf.* the scheme proposed for the francophonic states by Professor David]? Would a West African Law Institute serving Ghana, Nigeria, Sierra Leone and the Gambia or an East African Law Institute serving Kenya, Tanganyika, Uganda, and Zanzibar be helpful in the promotion of new legislation or the rectification of old? What status should be given to the judicial decisions of one country by the courts of another?

(7) *Regional unification.*—There are strong arguments for West African unification of laws, extending over the legal as well as the territorial frontiers, at least in matters of common concern, such as commercial law. Experience in such juridically mixed countries as Cameroun and Somali Republic would be helpful. Note the special experience of Ethiopia, which has united laws drawn from different sources (Swiss, French, English, as well as local); and the special difficulties facing the projected union of the Gambia and Senegal.

(8) *General unification.*—But perhaps the answer is to promote general unification in particular fields. Such unification might be continental, if the present initiatives for African unity persist and extend; or they might be world-wide, as by adherence to universal conventions on particular topics. Where unification extends over two or more legal families, there will be a considerable problem in ensuring that the interpretation of the laws remains in step (one has only to remember the very different approach of English and continental European judges to the interpretation of a statute). There will have to be continuing machinery to ensure that the laws once unified remain unified. Perhaps one requires some central interpreting authority that might give advisory opinions on the interpretation of the unified laws (a "supreme judicial council for Africa")? What machinery should be established for consultation? How can one procure uniformity of status (*e.g.*, that a married person is recognized as married in every country)? How can one extend knowledge of other countries' laws and projects of legislation in Africa?

III. Codification of Laws

1. The machinery of law reform

What special machinery should be set up for the systematic reform of the law or branches of it? Does one need a standing Law Revision Committee, or is it better to appoint *ad hoc* commissions (*e.g.*, to reform company law in Ghana)? What should be the ideal composition of a Law Reform Commission [judges; law officers; politicians; sociologists; law teachers]? Is the existing number of legal draftsmen adequate? Do they have the right sort of training? Could other countries (*e.g.*, England, the Commonwealth, or the

United States) do anything to help here by loan of draftsmen, despatch of special commissions, special training courses? Is parliamentary time available for general law reform? Should there be a special committee of Parliament charged with the oversight of such legislation?

2. Techniques of legal drafting

Can the techniques of legal drafting be taught? If so, how? Are the techniques acquired in England or in service in African countries adequate for the heavy legislative programme of African countries, with its social and economic overtones? Can common law countries learn anything from continental experience in this respect? Or from the codification programme in 19th-century British India, or in 20th-century modern India?

3. The definition of a code; rules of statutory interpretation

What is a " code "? Is it accurate to say, as do many continental lawyers, that English law is uncodified? Is this true of law in the common law African countries? Can one distinguish, as the books attempt to do, between a " code " and a " consolidation "; and is this distinction useful?

On what principles should a code be interpreted [the same as any other statute; in a " liberal " way]? *Cf.* the interpretation provisions in the Ghana Companies Code, the American Uniform Commercial Code, the East African Penal Codes, the Ghana Criminal Code; and the absence of any special rules of interpretation in Indian legislation such as the Indian Penal Code or the Indian Contract Act.

Will not the strict use of English canons of interpretation frustrate the operation of a code which is intended to deal exhaustively and systematically with the law relating to a particular topic or field? How about equity, constructive judicial manipulation of code to suit changing circumstances, etc.?

4. Prerequisites for codification

One must therefore re-examine the function of codification and the existing principles of statutory interpretation. Should we try to persuade the judges to disregard, or at least not to treat themselves as strictly bound by, previous decisions? In other words, does the doctrine of judicial precedent also require modification (*cf.* the continental approach to precedent)? Otherwise there is a danger that the code will be so overlaid with judicial decisions that one will not be able to rely on the text of the code as it stands. The code will cease to be a handy and authoritative guide, by itself, to the applicable law; and one of the possible main justifications for codification, that it makes the law simpler and more accessible (indeed, in the circumstances of Africa, more portable) may be lost. Can one influence the judges to approach statute law in a new and more constructive spirit?

Existing laws in African countries usually lack any adequate general law covering (*a*) principles of interpretation of statutes,

and (*b*) choice of law in internal conflict cases. There are Interpretation Acts and Ordinances, but these are not general codes of statutory interpretation (though *cf.* the Ghana effort in this direction); and there are also choice of law rules scattered throughout the legislation; but rarely if at all is the effort made to provide a complete and coherent body of rules specifying the applicable law in possible situations. There would thus appear to be a case for a preliminary code or law, which would systematically and exhaustively cover these points for a particular state or territory. Such a code might be entitled THE APPLICATION OF LAWS ACT, and would specify rules for choice of law, and the principles of statutory interpretation, with special reference to the effect of codification on the previous law.

It is particularly important to state in such an Act the rules which:

(i) declare which body of law is to apply in cases where a code or other statute has left the possibility of choice open, *i.e.*, has not also unified the law;

(ii) indicate the relationship between any code and the constitution;

(iii) indicate how far the pre-existing law is to take effect, if at all, with special reference to the doctrines of equity, the common law as in force in England or other parts of Africa or the Commonwealth or the United States, and imported statute law;

(iv) indicate the extent of operation of the rules of private international law;

(v) deal with commercial usages and practices, *i.e.*, with the extent to which private citizens can opt out of, or modify or supplement, the provisions of a code, either by reference to existing usages or by express agreement;

(vi) state how far, if at all, decisions or commentaries on a code are to have binding authority (some provision should also be made in connection with *travaux préparatoires*).

IV. The Object of Codification: the Content of the Code(s)

1. The object of codification

What are the pressing reasons in Africa why some or all of the law should be codified [reduction of conflict; unification; streamlining; simplification; modernization; logical arrangement; accessibility]?

At whom should the code be aimed—at the ordinary man or at the lawyer? It is probably impossible to devise a code which will be readily intelligible to the man in the street, and at the same time be sufficiently precise to satisfy the demands of judges and practitioners. It is, however, important to remember that many judges in local (African, customary) courts do not have full legal qualifications and may have difficulty in dealing with a complicated legal document.

Moreover, there may be a need to translate a code for use by such courts into the appropriate vernacular; a complicated legalistic " English " style may make the task of translation more difficult (*cf.* experience with translation of Penal Code of Northern Nigeria into Hausa, of Tanganyika legislation into Swahili, and of Uganda and Buganda legislation into Luganda).

One must remember that much of the existing law of African countries is already codified (*e.g.*, Penal Codes, Criminal and Civil Procedure Codes, Evidence Code, Succession Code, Contract Code). Is the object to fill in the gaps, improve the existing codes, or start again from the beginning?

2. The content of codification

Should one aim at a single Civil Code on the continental model, maybe supplemented by a commercial and a labour code? Or does one need a series of smaller codes, each covering a limited field (*e.g.*, civil wrongs)? There are strong arguments for and against such approaches. Some of the existing codes are highly satisfactory, but are unadapted to African conditions; is it easier to weave in those aspects of the law (*e.g.*, African customary principles) formerly left out, or to begin again? (One remembers that it is extremely difficult to begin any statutory drafting afresh and without a model.) Would a restatement of English law be of assistance here?

3. The arrangement of topics

A good example where a completely fresh approach is probably needed is in the field of civil wrongs. The existing English law of torts is generally accepted as being chaotic in its principles and arrangement; the African law of torts has been much understudied. A codification of the law of civil wrongs, which would include not only the wrongs usually called torts, but also unjust enrichment, injuries to family relations (*e.g.*, adultery), and breaches of interpersonal relations (*e.g.*, breaches of trust, breaches of contract), systematically arranged and incorporating African institutions and principles where desired, is badly needed.

Another field requiring systematic revision and codification is the law of property. Tanganyika, for example, has begun to make a reassessment of its land law in the light of " African socialism ". The process needs to be carried much further, and a complete reappraisal of existing land laws, as well as of the categories and terms employed for describing them, seems to be called for.

The law of marriage and divorce and the law of family relations are other departments of the law which are obvious targets for remedial action.

V. Recording and Codification of Customary Law

1. The need

Is there a need to write down customary laws? For what reasons [academic study; application by local courts; application by superior courts; reform and revision; incorporation in general code]?

2. Methods

What are the most appropriate methods for achieving this [restatement; field enquiry; case records of superior and subordinate courts]?

3. Results

What should be done with the law once it has been recorded? Is it advisable to have a statutory code, a semi-authoritative statement, a persuasive restatement? (Experience with the Natal Code of Native Law suggests that codification of customary law in the more formal sense is probably not advisable today.) Does codification, or even restatement, harmfully restrict the flexibility or adaptability of customary law to changing conditions? If so, how can one provide for periodic revision? What is the alternative? Will customary law continue to be applied if it is not systematically ascertained and written down?

A. N. Allott

Some Suggested Reading

Codes and other legislation

Indian Penal Code.
Indian Contract Act.
Indian Evidence Act.
Indian Succession Act.
(English) Sale of Goods Act, 1893.
(English) Interpretation Act, 1889.
Penal Codes of Kenya, Uganda, Tanganyika, Northern Rhodesia and Nyasaland.
Nigerian Criminal Code.
Ghana Criminal Code.
Ghana Marriage, Divorce and Inheritance Bill, 1963.
Liberian Code of Laws, 1956.
Ethiopian Civil Code, 1960 (in English and French).
(American) Uniform Commercial Code.
Ghana Companies Code.
(French) Code Civil.
Ghana Interpretation Act, 1960.
Northern Nigerian Penal Code, 1959.

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