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NOTES AND NEWS

Customary Criminal Law in Kenya

The first stage of a project for the recording of the customary laws of Kenya has been completed with the publication of the *Report on Customary Criminal Offences in Kenya* by Eugene Cotran.[1] The work of recording is being carried out with the collaboration of the Restatement of African Law Project at the School of Oriental and African Studies in the University of London.

Criminal laws were chosen for the first stage in the recording as they are limited in number and diversity; recording them was regarded as a pilot project from which lessons would be learned for the investigation of other branches of customary law later; and it was regarded as an urgent task to ensure that the criminal law of the territory should be *written* and *certain*. In his report, Mr. Cotran indicates the method of investigation adopted which will be of general interest in other territories where similar recordings may be contemplated.

The first step in the project was the collection and analysis of all written materials on customary law extant, including unpublished documents in local and central, and non-official, archives. The offences existing in customary law were then recorded in each District, with the assistance of the District Law Panels which were established in Kenya on the recommendation of Mr. A. Phillips in his *Report on Native Tribunals* (1945). For various reasons these Panels had failed in their main aim of recording the customary law. As reconstituted in 1960, each Panel consisted of the District Commissioner or his nominee as chairman, all Presidents and Vice-Presidents of African courts in the District and other persons appointed by the Provincial Commissioner. The statement of offences recorded with these Panels followed a uniform format, in turn stating the definition of the offence, designating the prosecutor and who may be charged, stating defences recognized to the charge, indicating extenuating circumstances which might mitigate the sentence, and aggravating circumstances which might increase it, delimiting the penalties and civil liabilities and finally stating any other relevant matters.

The third stage was the consideration of restatements agreed by the District Panels by African District Councils and certain Locational Councils, which generally approved the statements with very few alterations. The fourth stage was the unification of offences at provincial level—the investigation having revealed, as anticipated,

[1] Nairobi, 1963. 34 pp. Sh. 4.

a wide measure of similarity between offences in different districts. A Provincial Meeting in each Province was attended by three or four representatives of each District Law Panel. At this meeting some " crimes " in certain districts were converted into civil wrongs and *vice versa*; some district representatives agreed to modify elements in certain offences to attain wider unification; and certain offences, omitted by a District Panel, were applied by the Provincial Meeting to the District. Further, some offences were eliminated altogether where it was found that they were already covered under some written law. The resulting Provincial Restatements superseded the District Restatements, and they are so similar to each other that further unification at the territorial level was not felt to be possible.

The final stage of the recording will consist of the incorporation of these customary offences into the statute law of Kenya.

There are few offences at customary law, because African courts in Kenya (unlike their counterparts in Uganda and Tanganyika) have long had jurisdiction to apply certain sections of the Penal Code in preference to convicting a person of an offence against customary law. Thus most of the original customary offences have been superseded; those which remain are either not unlawful, or else merely civil wrongs, under the statute law. The offences recorded by Mr. Cotran were as follows:[1]

(I) adultery with a married woman (an offence throughout Kenya);

(II) taking away or enticing a married woman;

(III) taking an unmarried girl out of the custody of her parent or guardian;

(IV) sexual intercourse with a person within the " prohibited degrees " of relationship according to the customary law to which the man is subject (this is a criminal matter in Nyanza Province only);

(V) receiving a second bride-price during the subsistence of a marriage;

(VI) circumcising a person without consent (this is an offence in every Province, although the details as to consents vary);

(VII) taking property without consent, or misappropriation (this is distinguished from theft under the Penal Code because the taker appears to have a right to the property —he may even be the owner of it, for example where a man takes back a cow, which he has leased to another, without that other's consent);

(VIII) removing boundary marks made by the indigenous elders;

(IX) abuse likely to cause a breach of the peace (" abusing a person of a higher age-grade ", in the old law—the definition takes account of the feeling that abuse should now be an offence irrespective of the respective age-grades);

[1] Except where otherwise indicated, the offences stated apply to all Africans throughout Kenya.

(X) consumption by, and supply to, minors of alcoholic liquor (this crime, first raised in Baringo District, was extended to Rift Valley Province but does not exist elsewhere);

(XI) other offences which formerly existed were declared to be civil matters only, or already covered by other written laws, e.g. failing to maintain a dependant, unlawful alienation of land, unlawful use of communal clan land (Teita), breaking a marriage, sexual intercourse with an unmarried girl or impregnating an unmarried girl, paying or receiving an excessive bride-price.

The final question which arises is the problem of incorporating the offences now recorded in written law. Mr. Cotran indicates that there are alternative methods, including:

(i) incorporation in the Penal Code or other existing criminal statute—this would involve the extension of the offences to persons not subject to customary law, but has " the supreme advantage that the legislation will not be held discriminatory ";

(ii) minor alterations to the Penal Code or other existing criminal statute (this would be a possible treatment for some offences which are close to existing sections in the Penal Code in definition);

(iii) enactment of a new Ordinance applying the law to Africans only;

(iv) incorporation of the offences in the African Courts Ordinance or a Schedule to it (at the expense of being discriminatory, this solution, like (iii), would avoid the application of the laws concerned to persons not otherwise subject to customary law);

(v) local legislation, i.e., by-laws under ss. 36, 37 of the African District Councils Ordinance[1] or by Orders of Chiefs under s. 9 of the Native Authority Ordinance;[2] the method is useful where local variations exist.

In discussing this problem, Mr. Cotran makes no general recommendation but discusses the application of the different solutions to the different offences in turn, stressing that each offence gives rise to different sorts of problems.

Meeting of the Working Committee of the Conference on Legal Education in Africa

The Conference on Legal Education in Africa, meeting at Accra in January, 1962, unanimously passed a resolution calling for the creation of a permanent council representing African states that

[1] No. 12 of 1950.
[2] Cap. 97.

would concern itself with African legal education. It also called for a further conference on legal education in Africa to be held in the near future, in order to carry further the work of the Accra Conference. To achieve these purposes it was agreed that there should be constituted a follow-up committee, upon which each African state would be represented and whose function it would be to draft a constitution for the proposed council as well as to make preparations for the next conference. As convener of this committee the conference designated the Chief Justice of Sierra Leone, Sir Salako Benka-Coker.

This working committee met in Freetown from 3rd to 7th February, 1963, under the chairmanship of Sir Salako. Every African country was invited to send representatives, but in fact only Ghana, Nigeria, Tanganyika (also representing the rest of East Africa) and Sierra Leone were able to be represented. Two American and one British delegates were also personally invited. As there were no French-speaking delegates, the usual bilingual problems did not arise; but it would be unfortunate if co-operation between African states were to proceed on linguistic lines, and one hopes that French-speaking states will be able to take a full part in the proceedings of the projected council and conference.

The Working Committee was able to draw up a constitution for an "African Council for Legal Education and Research" (A.C.L.E.R.) which will be submitted for the approval of African governments. The pattern upon which the Council is organized is substantially similar to that of C.C.T.A. The arrangements for a follow-up conference on legal education were also discussed in detail, and a lengthy agenda was agreed. The conference, it is suggested, will be open to those concerned with law teaching in Africa, whether working inside or outside Africa; though participation will be by invitation.

The fact that the Committee was able to conclude its deliberations with such despatch and with such concrete results is due in no small measure to the efficient organization provided by the convenors.

It is hoped to give a fuller account of the projected organization of the Council and the conference in a subsequent number of the Journal. It is also hoped at the same time to amplify and bring up to date the description of African legal educational facilities provided in the special number of the Journal (Vol. 6, No. 2) which was devoted to this topic and which was generally welcomed.