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## FOREWORD

A little knowledge is a dangerous thing. When the Editor invited Professor J. N. D. Anderson to contribute an article on Islamic Law in Africa to the present symposium, he indicated that in his judgment, discussion should focus on two points which—to him—seemed to merit special attention, to wit: (1) whether a modern society can long remain viable if it has an interpersonal conflict of laws system; (2) whether a revealed divine law is or can be rendered sufficiently adaptable for the purposes of resolving the typical conflicts of an industrial society. With obliging candor, Professor Anderson starts off his paper by observing that these two questions are not infrequently asked “by those who approach the subject . . . with a general idea as to the nature of (Islamic) law but a limited acquaintance with legal developments, during the last century or more, in the Middle East, the Indian subcontinent, and the dependent or formerly dependent territories of East and West Africa.”<sup>1</sup>

Professor Anderson’s contribution convincingly demonstrates that the two issues singled out by the Editor are neither unique to Africa, nor as important as is often assumed, nor finally really detrimental to national advance in the African states. The same observation can probably be made about most other legal problems currently arising in the new African states. It would seem, therefore, that the uniqueness of African legal problems does not primarily lie in the—at least to Western observers—unusual and frequently archaic character of major legal institutions to be found in the various African states. It is, rather, the clash between a truly singular cumulation of such institutions and an equally unprecedented pressure for the speedy attainment of modernity that makes African legal problems so unique.

If the above observations are correct, much of what has been written about African law by comparative and international lawyers will require a careful re-examination. This would appear to be especially the case with respect to attempts to deduce “general principles of law”<sup>2</sup> from various African legal institutions. For instance, the discussion of various African tribal laws in C. Wilfred Jenks’ *Common Law of Mankind* (the most ambitious effort so far in the direction of establishing a world legal system by comparative research) would appear to rely largely on those institutions which—not necessarily typical to Africa but fairly often witnessed in traditional, pre-industrial societies—are among the first to be swept away by the tide of

<sup>1</sup> Anderson, *The Future of Islamic Law in British Commonwealth Territories in Africa*, *infra* p. 617.

<sup>2</sup> See generally Schlesinger, *Research on the General Principles of Law Recognized by Civilized Nations*, 51 AM. J. INT’L L. 734 (1957); *id.*, *The Common Core of Legal Systems: An Emerging Subject for Comparative Study*, XXTH CENTURY COMPARATIVE AND CONFLICTS LAW (LEGAL ESSAYS IN HONOR OF HESSEL E. YNTEMA) 65 (1961).

modernity.<sup>3</sup> Learned references to Ashanti "constitutional" law fade into insignificance when confronted with the hard facts of the constitution of Ghana.<sup>4</sup> The same observations seemingly appear with at least equal force to present attempts to establish universal legal rules in favor of the status quo—such as the "sanctity" of contracts—on the basis of traditional or divine law.<sup>5</sup> One might well doubt the historical validity of such research. It seems, for instance, hard to believe that capitulations, Mixed Courts, and the introduction of Western law were really misguided acts by the colonial powers because Islamic law as actually in operation afforded all the security and justice needed. But quite aside from this, it appears abundantly clear that especially in the areas of law to which such studies apply (contracts, commercial law, public law), traditional law has been or is being rapidly swept away by Western-type institutions. And it seems rather difficult to unearth many "general principles" in the steadily crumbling bulwarks of traditional or religious law: status, family, and succession.

This is not to say that the new African states hold nothing of interest to students of comparative and international law. It is merely suggested that studies which focus on traditional and religious legal institutions are highly prone to be misleading or even mischievous—misleading because the institutions referred to are on the periphery even now and are rapidly melting away; mischievous because any emphasis on traditional or divine law necessarily poses ideological obstacles to the legal reforms which the African states must undertake in order to attain modernity.

Let us now turn to some practical examples. In the field of international law, for instance, it is submitted that little can be gained from scanning frequently obscure tribal and religious customs for evidence of "general principles of law." The new African states accept international law; several of them are currently before the International Court of Justice as plaintiffs against "white" powers.<sup>6</sup> They do not challenge the legal force of treaties concluded by free negotiation after independence. But they do worry about the status of pre-independence treaty obligations entered into by the colonial power; and they do object to the unilateral imposition of quite frequently disputed rules of customary international law which they did not help develop.<sup>7</sup>

Is such an attitude towards international law really to any appreciable extent the manifestation of a unique law-culture? It seems much more sensible to assume that at least as regards customary international law, the new African states are

<sup>3</sup> See, e.g., C. WILFRED JENKS, *THE COMMON LAW OF MANKIND* 91, 126, 127-28 (1958), but cf. *id.* at 112. For criticism, see especially Stone, *A Common Law of Mankind?*, 1 *INTERNATIONAL STUDIES* 414 (India 1960).

<sup>4</sup> See JENKS, *op. cit. supra* note 3, at 128; F.A.R. BENNION, *THE CONSTITUTION OF GHANA* (1962); LESLIE RUBIN & PAULI MURRAY, *THE CONSTITUTION AND GOVERNMENT OF GHANA* (1961).

<sup>5</sup> As exemplified by Habachy, *Property, Right, and Contract in Muslim Law*, 62 *COLUM. L. REV.* 450 (1962).

<sup>6</sup> The South West Africa Cases (Ethiopia and Liberia v. South Africa), Preliminary Objections, 1962 I.C.J. Reports 319; Case Concerning the Northern Cameroons (Cameroon v. United Kingdom), *cf.* Order of April 25, 1962, 1962 I.C.J. Reports 3.

<sup>7</sup> See Anand, *Rôle of the "New" Asian-African Countries in the Present International Legal Order*, 56 *AM. J. INT'L L.* 383 (1962); and Stone, *supra* note 3.

merely assuming the position indicated by the present stage of their economic development and by their national ambitions. They seek to avoid, or at any rate to minimize, the constraints imposed by an international custom which was created almost entirely by the capital-exporting countries.<sup>8</sup>

With respect to treaties, we seem to be faced by a series of "typical" cases of state succession, with, however, the distinguishing mark that the problem has not arisen until now with such pressing force and on such a large scale. It is estimated, for instance, that there are some 300-odd British treaties which might be applicable to Nigeria. By exchange of letters between the Prime Minister of the Federation of Nigeria and the United Kingdom High Commissioner on the very day of independence, the Federation Government assumed all rights and obligations stipulated by international agreements entered into "on their behalf" before independence, and undertook to keep such agreements in force "until such time as the Government of Nigeria can consider whether they require modification or renegotiation in any respect."<sup>9</sup> Nigeria was faced with three major questions in this connection: Which agreements are applicable to Nigeria? (For a country which has just reached independence and is still in the process of setting up a Foreign Office, this is no mean question.) Will the other contracting parties regard themselves to be bound as against Nigeria? How can the various agreements be denounced, and which agreements should be terminated?

Another new African state, Tanganyika, has attempted a different solution of the treaty problem. Instead of concluding an "inheritance agreement" with the United Kingdom, Tanganyika has filed a formal declaration with the Secretary General of the United Nations. Pursuant to this declaration, all valid bilateral treaties are kept in force on the basis of reciprocity for a trial period of two years, pending negotiations as to eventual readjustments. Multilateral treaties are to be dealt with by *ad hoc* agreements but Tanganyika undertakes to treat such agreements "as being in force vis-à-vis other States who rely on them in their relations with Tanganyika."<sup>10</sup>

Both solutions are seemingly unexceptionable under traditional international law. Since almost all relevant agreements can be terminated unilaterally by appropriate, relatively short-term notice, the essential legal problem is the question as to the extent of the other parties' obligation toward the new states. Vastly more complicated is the issue of the legality of pre-independence agreements between the former colonial powers and the emerging African states on the eve of independence.

As a rule, the former colonial power will seek guarantees in three distinct fields: the continued recognition of pre-independence obligations of the colonial administration, particularly of civil service tenure and pension rights;<sup>11</sup> the continued pro-

<sup>8</sup> See Friedmann, *The Changing Dimensions of International Law*, 62 COLUM. L. REV. 1147, 1151 (1962).

<sup>9</sup> Quoted by Cole, *The Independence Constitution of Federal Nigeria*, in ROBERT O. TILMAN & R. TAYLOR COLE (Eds.), *THE NIGERIAN POLITICAL SCENE* 63, 66 (1962). See also *id.* at 77-78.

<sup>10</sup> See Note, *Problem of State Succession in Africa: Statement of the Prime Minister of Tanganyika*, 11 INT'L & COMP. L. Q. 1210, 1211-12 (1962).

<sup>11</sup> See SIR CHARLES JEFFRIES, *THE TRANSFER OF POWER* (1961); KENNETH YOUNGER, *THE PUBLIC SERVICE IN NEW STATES* (1960).

tection of minorities—not necessarily European subjects—whom the colonial powers had undertaken to protect against the dominant local ethnic or religious groups; and finally, the continued preferential treatment of the former colonial power and its nationals, especially in matters of trade, investment, and the like.

While such guarantees, or some of them, could be incorporated into the independence constitutions enacted by the colonial power, such constitutional protection had already proved to be insufficient. For once independence was attained, the former dependency could—as the Union of South Africa eventually did—<sup>12</sup>repeal or amend its constitution. Even the abolition of an “unamendable” constitutional provision by revolutionary action would not be a violation of international law, as international law does not guarantee the constitutional form of sovereign states.

In their search for more abiding securities, at least two European powers—France and Belgium—turned to the novel expedient of a *pre-independence international* agreement with the emerging nations. The Loi fondamentale of the Congo, enacted in the form of a Belgian statute of May 19, 1960, provided in its article 49 that even before independence, the Government of the Congo could conclude a general treaty of friendship, assistance, and cooperation with Belgium, as well as particular conventions on the details of post-independence cooperation within the framework of such a treaty.<sup>13</sup> A “treaty” was actually concluded between Belgium and the Congo (as represented by its future government) before independence; it was promptly renounced when the Republic of the Congo became independent.<sup>14</sup>

The second example of a pre-independence agreement is the Evian Agreement between France and the Algerian National Liberation Front (F.L.N.), announced on March 18, 1962.<sup>15</sup> As early as September 19, 1958, the F.L.N. had formed a Provisional Government of the Algerian Republic. Between 1958 and the Evian negotiations, this government had been recognized, either *de iure* or *de facto*, by some 25 states. France had consistently treated such acts of recognition as “unfriendly acts,” and had also consistently denied the legal existence of an Algerian government. On the day after the Evian settlement, the Soviet Union extended *de iure* recognition to the Provisional Government of the Algerian Republic. The French Foreign Minister summoned the Soviet Ambassador the same evening, informing him that neither the cease-fire nor the Evian Agreement had modified the legal status of Algeria, and that France would exercise both internal and external Algerian sovereignty until the self-determination plebiscite. When the Soviet Union failed

<sup>12</sup> For a comprehensive discussion of the various phases of process, see EDWARD McWHINNEY, *JUDICIAL REVIEW IN THE ENGLISH-SPEAKING WORLD* 98-108, 190-99 (2d ed. 1960).

<sup>13</sup> Loi fondamentale relative aux structures du Congo, [1960] *MONITEUR BELGE* 3988, 3992. The expression used is “conclude” (in the Flemish text, “sluiten”), from which it seems to follow that approval by the Chambers as provided for by Art. 25, sec. 2, was not necessary. In any event, Article 25—if it follows dominant Belgian opinion on the subject—requires the approval of the Chambers merely for the internal effectiveness (“effet”), not the international validity of treaties.

<sup>14</sup> See Franck, *United Nations Law in Africa: The Congo Operation as a Case Study*, *infra*, p. 632, at 633, with note 1.

<sup>15</sup> For an English translation of the Evian Agreements, see 1 *AMERICAN SOCIETY OF INTERNATIONAL LAW, INTERNATIONAL LAW MATERIALS* 214 (1962).

to react to this announcement, the French Ambassador in Moscow was recalled.<sup>16</sup>

Here, we seem to have the unique case of the obligor admitting his capacity to contract, but the obligee denying it. One should ordinarily suppose that France would be hard put to affirm Algeria's capacity to contract at the time of the Evian Agreement, and that Algeria would be equally embarrassed in asserting that the Provisional Government of the Algerian Republic was at that time legally in-existent. Yet, obviously, neither side relied on the representations of the other, and there was in all probability no estoppel as to either.

Are these pre-independence agreements valid treaties? It seems that the Belgian treaty was a case of self-dealing pure and simple, as the Congolese government—before independence the creature of Belgian legislation—was accorded “international capacity” solely for the purpose of concluding this treaty. As an act of direct and delegated Belgian sovereignty, the treaty could outlive Congolese independence only if ratified in some form by the Republic of the Congo. On the other hand, the Evian Agreement was concluded with a government which was anything but the creature of France. It seems more appropriate to disregard French official denials of the legal existence of the Algerian government as mere political declarations, and to concede at least *de facto* authority to the latter government as of March, 1962.

In actual fact, the Belgian-Congolese treaty was denounced after independence; the French-Algerian agreement was not only approved by the Algerian plebiscite, but also by the new Algerian government. It remains to be seen whether these two cases will come to be regarded as precedents for pre-independence international agreements, a species of treaty born in Africa. In any event, however, the African states concerned were but reluctant partners in this attempt to develop new rules of international law.

Our conclusion, then, is that there is at least at the present no typically African school of thought in public international law, as contrasted with, say, Latin American doctrine. But what about constitutional law? Is it possible to find specific African ideas in the constitutions of the new African states? This would certainly seem to be the case at least to the limited extent that the new constitutions preserve tribal symbols and institutions, especially chieftaincy. On the whole, however, there seems little doubt that the new African constitutions draw their inspirations primarily from three European sources: Belgium, France, and Britain (the latter, usually *via* the “written” constitutions of India and Australia, and the British North America Act). Indeed, to an outside observer, the two most striking phenomena in African public law are not novel indigenous institutions, but first of all, the amazing

<sup>16</sup> The above description follows Rousseau, *Chronique des faits internationaux*, 66 REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC 580, 623-32 (1962). See generally MOHAMMED BEDJAOUI, LAW AND THE ALGERIAN REVOLUTION (1961); THOMAS OPPERMAN, DIE ALGERISCHE FRAGE (1959); Flory, *Algérie et droit international*, 5 ANNUAIRE FRANÇAIS DE DROIT INTERNATIONAL 817 (1959); *id.*, *Algérie Algérienne et droit international*, 6 *id.* 972 (1960); *id.*, *Négociation ou dégagement en Algérie*, 7 *id.* 836 (1961); Charpentier, *La France et le G.P.R.A.*, *id.* at 855.

variation in the application of imported models, and secondly the curious lack of contagion of United States constitutional law.

The former phenomenon is most strikingly illustrated by the contrast between President Kasavubu's dismissal of Patrice Lumumba as Premier of the Republic of the Congo, and the dismissal of Chief Akintola, the Premier of the Western Region of Nigeria, by the Governor of that Region.

The Kasavubu-Lumumba crisis turned on the interpretation of article 22 of the *Loi fondamentale* which provides: "Le chef de l'Etat nomme et révoque le Premier Ministre et les Ministres." Did this really mean, as it literally seems to imply, that the Chief of State can dismiss the Prime Minister at will? This would appear to depend not so much on the wording of article 22 as on the basic characteristics of the institutions of Chief of State and Premier under the *Loi fondamentale*. Here, the constitutional lawyer would in all probability commence with an investigation of the proceedings of the constitutional convention, in this case, the Round Table Conference held in Brussels in January and February, 1960. He would establish that the Conference rejected a United States-type presidency and decided in favor of a non-political Chief of State, as in Belgium—with, of course, the thought that this position might conceivably be offered by the grateful Congolese people to the King of the Belgians.<sup>17</sup> A comparison between the *Loi fondamentale* and the Belgian constitution of 1831 would then establish that the former is (at least with respect to the institutions here material) an attempt to re-codify Belgian constitutional law and convention as it stood in 1960. The relevance of Belgian models, if at all in doubt, would be definitely settled by article 51, section 2 of the *Loi fondamentale* which provides that the Congolese Parliament can request binding interpretations of the *Loi fondamentale* from the Belgian parliament—a seemingly senseless provision if the latter is not to be guided by Belgian experience.

At this point the inquiry would be conveniently narrowed down to the question whether under Belgian constitutional law as it stood in 1960, the King could dismiss a Premier who had not demonstrably lost the confidence of Parliament. The answer seems quite clear: he could not.<sup>18</sup>

It is common knowledge that the Kasavubu-Lumumba crisis was not approached by any of the protagonists along the lines sketched above—or, for that matter, any other essentially legal line. But that is precisely what happened in the similar though fortunately somewhat less sanguinary constitutional crisis of the Western Region of Nigeria.

Here, there had been a major rift in the Government party, and 66 of the 124 members of the Region's Assembly had written a letter to the Governor, stating that the Premier no longer enjoyed their confidence. The Governor thereupon denied

<sup>17</sup> See FRANÇOIS PERIN, *LES INSTITUTIONS POLITIQUES DU CONGO INDEPENDANT AU 30 JUIN 1960*, at 27-29 (1960); Debbasch, *Le problème constitutionnel congolais*, [1962] *REVUE DU DROIT PUBLIC* 25, 41-42.

<sup>18</sup> 2 PIERRE WIGNY, *DROIT CONSTITUTIONNEL* 609-12 (1952); Debbasch, *supra* note 17, at 42-43. Article 65 of the Belgian constitution provides, in terms literally as unconditional as those of article 22 of the *Loi fondamentale*: "Le Roi nomme et révoque ses ministres."

to grant a dissolution to the Premier, dismissed him, and appointed a new Premier in his stead. Chief Akintola, the ousted Premier, challenged his removal from office in an action before the High Court of the Western Region of Nigeria. That court referred the constitutional questions raised by the action to the Federal Supreme Court.

The controversy centered on section 33(10)(a) of the constitution of the Western Region of Nigeria which provides that the Premier holds office at the Governor's pleasure, but that the Governor shall not remove the Premier "unless it appears to him that the Premier no longer commands the support of the majority of the members of the House of Assembly."<sup>19</sup> The questions posed in the referral were whether the Governor could remove the Premier (1) in the absence of a decision or resolution of no confidence, regularly adopted in the Assembly; or (2) on the basis of any materials extraneous to the proceedings of the Assembly.

Speaking for the majority of the Federal Supreme Court, Ademola, C.J.F., answered the first question in the negative, thereby deciding the issue in favor of plaintiff. He interpreted section 33(10) in the light of constitutional conventions obtaining in the United Kingdom and came to the conclusion that "Law and convention cannot be replaced by party political moves outside the House." The dissenting justice, Brett, F.J., agreed with the premise that United Kingdom constitutional convention was highly relevant to the issue. He found, however, that there was no constitutional precedent exactly in point, and consequently felt free to interpret the written constitution of the Western Region in a sense different from that of the majority.<sup>20</sup>

Why was the issue of the dismissal of a Premier by the Chief of State decided extra-legally and without recourse to Belgian constitutional practice in the Congo, but legally and in accordance with United Kingdom constitutional conventions in Nigeria? The answer may simply lie in the fact that the first two Congolese lawyers received their degrees from the University of Lovanium in Léopoldville in 1961—<sup>21</sup> after the "solution" of the constitutional crisis by the tragic death of Patrice Lumumba. In Nigeria, however, there was no dearth of qualified counsel, at least outside the Northern Region.<sup>22</sup>

But in all probability, the answer lies somewhere else: in the magic attraction of the British constitutional model for nations new and old,<sup>23</sup> and in Commonwealth

<sup>19</sup> Nigeria (Constitution) Order in Council, 1960, Fourth Schedule, STAT. INSTR., 1960, No. 1652.

<sup>20</sup> Akintola v. Governor of Western Nigeria and Adegbenro (FSC 187/1962). The full text of this decision was not available to the Editor; the above description relies on the report of Davies, *Nigeria—Some Recent Decisions on the Constitution*, 11 INT'L & COMP. L. Q. 919, 919-20, 924-25, and 933-35 (1962).

<sup>21</sup> See Report, *République du Congo (Léopoldville)*, in Symposium, "African Legal Education," 6 J. AFRICAN LAW 75, 92 (1962). On legal education in Africa, see also Paul, *Legal Education in English-Speaking Africa*, 15 J. LEGAL ED. 189 (1962). "Phineas Phogmore," *Aboriginal Legal Education in East Africa*, 14 *id.* 353 (1962) deals with quite a different subject. It is, to a surprising extent, a satirical parallel to our plea not to seek too much "uniqueness" in African legal systems.

<sup>22</sup> See Ademola, *Personnel Problems in the Administration of Justice in Nigeria*, *infra* p. 576, at 580.

<sup>23</sup> Especially constitution-makers outside of the Commonwealth might well heed the warning of Needler, *On the Dangers of Copying from the British*, 57 POL. SCI. Q. 379 (1962).

solidarity of constitutional conventions in the relationship between Governors-General (or Governors) and Premiers.<sup>24</sup> Such a solidarity seems understandable, but still a bit strange to observers from the United States. Here, we turn to our last point of inquiry. Why, it may be asked, has the United States contributed so little to the constitutional law of the new African states, even the Anglophonic ones? For as judged by the four standard criteria for differentiation between the United States and the British constitutions (a written instrument, federalism, judicial review, ministerial responsibility), the new African states such as Nigeria follow the United States three times out of four.

One explanation—certainly not to be discounted—may be the predominantly British (*i.e.*, almost invariably English) training of the senior members of the bar in Anglophonic African states. Another theory is a bit more circuitous and vastly more flattering: the United States, the argument runs, influenced the B.N.A. Act and the Australian constitution as well as (together with these two) the Indian constitution. Consequently, it is contended, a constitution such as that of the Federation of Nigeria, while ostensibly relying on Indian, Canadian, and Australian models, is nevertheless basically shaped by United States constitutional concepts.

It is submitted that a third explanation—not claiming exclusive validity—is more weighty. United States constitutional law is neatly divided into two categories: (1) “litigious” constitutional law, *i.e.*, the outcome-determinative impact of the Constitution on a huge array of the legal controversies of individuals and corporations with and among each other, as well as their controversies with various governmental organs; and (2) institutional public law, *i.e.*, the structure, operation, and interaction of constitutional organs. Unfortunately, only the former, which is of relatively secondary interest to constitution-makers, is regularly taught at the law schools. And while there is probably no rival to United States political science in the methods of case study of political processes, a foreign statesman may well hesitate to turn to political scientists for counsel in the drafting of constitutional instruments.

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The basic purpose of the above Foreword has been to suggest that African legal problems are mainly unique because of the frequency of atypical situations; that little danger to traditional “Western” values and concepts lurks in a specific “African” conception of law, national or international; and that finally, the really singular telescoping of articulate societal and legal development into an unprecedentedly short time span affords the comparative scholar a splendid opportunity not only to see other societies in actual development, but also to comprehend his own legal frame of reference more thoroughly—and more modestly.

HANS W. BAADE.

<sup>24</sup> See, *e.g.*, Franck, *The Governor General and the Head of State Functions*, 32 CAN. B. REV. 1084 (1954); EUGENE A. FORSEY, *THE ROYAL POWER OF DISSOLUTION IN THE BRITISH COMMONWEALTH* (1943); Campbell, *The Prerogative Power of Dissolution: Some Recent Tasmanian Precedents*, [1961] PUBLIC LAW 165.