

B O O K S

The Law Faculty, University of Ife (ed.), **INTEGRATION OF CUSTOMARY AND MODERN LEGAL SYSTEMS IN AFRICA**. New York, Africana Publishing Corporation, 1971 [Co-publisher: University of Ife Press. Ile-Ife, Nigeria]. xxiv, 461 p.  
\$19.50

This book is an edited collection of papers presented at an August, 1964 conference in Ibadan. Published in 1971, the collection only became available in the United States this spring. The result is that most of the papers are now a decade old, though some were updated in 1968.

The work contains 22 articles by 18 of the conference's participants. The Ibadan gathering was part of a series of conferences beginning in 1960 dealing with integration of laws and courts in independent Black Africa. There was a London conference on the Future of Law in Africa in 1960; a colloquium of French-speaking law faculties on Economic Development and Legal Change held at Dakar in 1962; one in 1963 on Local Courts and Customary Law in Africa which took place in Dar es Salaam; and a meeting, also in 1963, entitled "From a Traditional to a Modern Law in Africa" held in Venice. Meetings by academics and practitioners to discuss legal integration are recurring events<sup>1</sup> and inevitably many of the papers given at Ibadan are statements of well-known positions.

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<sup>1</sup>The Judicial Advisers' Conferences of 1953 and 1956 convened by the British Secretary of State for the Colonies; the Conference on the Future of Customary Law in Africa held in Amsterdam in 1955; the 1964 Warsaw Conference on "Problems of State and Law in Contemporary Africa"; the International Symposium on Harmonization of Law in Africa, Rome, 1971; etc. Concern for legal integration is not new. In 1884 A. Willoughby Osborne, Attorney-General of Ghana, proposed the appointment of a Commission of Enquiry to consider a uniform law of Succession for all the tribes of Ghana. N.A. Ollennu, The Law of Succession in Ghana 294, 307 in the present work. (Hereafter the book under review will be cited by page number only.)

The Ife<sup>2</sup> book begins with a group of articles on the general problems of integration of courts and legal systems. The bulk of the work, however, concerns integration of specific subjects: Contracts and Civil Wrongs, Land Law, Succession and Marriage and Divorce. Each subject is the concern of two or more writers. The emphasis is on Anglophonic jurisdictions and not unexpectedly contributions from Nigerians are the most prevalent. What there is on French Africa, though often among the best pieces in the collection, is by French and Dutch scholars. One would have wished for contributions by French-speaking Africans.

The papers concern themselves primarily with the resolution of conflicts between the customary laws in a given jurisdiction and the received law. The received law is either English or French. With the principal exception of Professor Rene David of Paris, the authors do not consider the possible conflicts created by the influx of enacted laws modeled on systems other than those of the colonial powers. Ethiopia, of course, is the outstanding example in Africa of a state with received laws from more than one foreign country. However, outside Ethiopia, the reception of diverse laws is increasingly common, especially where new legal mechanisms for economic development are being employed.<sup>3</sup> It is thus increasingly inaccurate to speak only of the "dual" sources of law in a given African country.

There is also little discussion in the book of the effect the prevailing political philosophy has or will have on the choice

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<sup>2</sup>The conference, funded by the Ford Foundation, was sponsored by the University of Ife Institute of African Studies. The papers were edited by the Faculty of Law of the same university under the Acting Dean (68/69) A.B. Kasummu. The printing is excellent by West African standards. (See J. Cottrell, Law Reports in Nigeria, 7 AFRICAN LAW STUDIES 63, 68-69 (1972).) There is, unfortunately, no index and the Table of Cases not only neglects the French African cases cited but also fails to give the page numbers in the text where the listed cases are discussed.

<sup>3</sup>See the very provocative article by Peter H. Sand, Current Trends in African Legal Geography: The Interfusion of Legal Systems, 5 AFRICAN LAW STUDIES 1 (1971).

of rules of law.<sup>4</sup> Obviously very different forces are at work in socialist countries than in those which follow an African form of capitalism. Legal integration can be expected to take a different course in Guinea and Tanzania than in the Ivory Coast or Kenya. In fact it has. Such ideological considerations are largely overlooked in these papers.

Though all of the authors write on "integration",<sup>5</sup> they have no commonly accepted definition of the term. The predominant attitude is one of an ad hoc selection from amongst the customary and received rules on a given subject. Invariably a paper will

<sup>4</sup> But see X. Blanc-Jouvan, Problems of Harmonization of Traditional and Modern Concepts in the Land Law of French-speaking Africa and Madagascar 216.

<sup>5</sup> Professor A.N. Allott of London, in one of his four essays in the book, defines "integration" as "the making of a new legal system by the combining of separate legal systems into a self-consistent whole. The legal systems thus combined may still retain a life of their own as sources of rules, but they cease to be self-sufficient autonomous units." The Codification of the Law of Civil Wrongs in Common Law African Countries 170, 176-177. He contrasts integration with "harmonisation" or "the removal of discord, the reconciliation of contradictory elements, between the rules and effects of two legal systems which continue in force as self-sufficient bodies of law." Id. at 175. Under this concept "neither the customary nor the English law would be abolished or merged in the other." Id. A third approach is "unification" or "the creation of a new, uniform, legal system entirely replacing the pre-existing legal systems, which no longer exist, either as self-sufficient systems or as bodies of rules incorporated in the larger whole; although the unified law may well draw its rules from any of the component legal systems which it has replaced." Id. at 176. For Allott unification "implies the building of a novel law." Id.

Allott favors the integration approach as he defines it since harmonisation leads to continuing conflict and unification, the imposition of a new legal system, may be unworkable in practice. For this latter point he cites the Kemalist reforms in Turkey, in which the Ottoman law was in theory supplanted by new codes taken from Europe with the result that there was a considerable difference between the written law and the rules of law actually adhered to by the populace. Id. at 176-177.

set forth the received law, category by category, together with those rules of customary law with which the writer may be familiar. "Integration" is then achieved by the author's selection of what he considers the best or the most realistic rule, either customary or received, in each category. This may result in the dominance of received law, as in Contracts,<sup>6</sup> or of customary law, as in Marriage and Divorce.<sup>7</sup>

For the writers, successful integration may or may not require legislative enactments. There are those who see legislation as the most effective method for achieving unification, given the little time available in rapidly developing African countries. The leading exponent for this view is Professor Allott. He advocates comprehensive legislation in his article on "The Codification of the Law of Civil Wrongs in Common-Law African Countries." He has given considerable thought to the problems of legal draftsmanship in Africa. In an appendix he includes portions of a proposed code for Civil Wrongs. To Allott legislation rather than a gradual case-by-case unification by the courts is the "only one possible line of action: the problems of modernisation, unification and africanization are too vast to be tackled other than by a major legislative effort."<sup>8</sup>

This view is the logical result of Allott's work as director of the Restatement of African Law Project of the University of London. The project has been collecting specific rules of customary law (Persons, Family, Marriage and Divorce, Property (including Land) and Succession) in different countries (Kenya, Malawi, etc.) and assembling them in a form similar to that of the Restatements of the American Law Institute.<sup>9</sup> The project

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<sup>6</sup> B.O. Nwabueze, Integration of the Law of Contracts 136 (Nigeria).

<sup>7</sup> W.C. Ekow Daniels, Towards the Integration of the Laws Pertaining to Husband and Wife in Ghana 352.

<sup>8</sup> Allott, supra note 5, at 177.

<sup>9</sup> The work of the restatement project is discussed in the book in an article by Allott and Eugene Cotran, A Background Paper on Restatement of Laws in Africa: The need, value and methods of such restatement 18. Also see Allott's introduction to RESTATEMENT OF AFRICAN LAW: 4, MALAWI II v (1971).

hopes that African governments will enact unified legislation once they have a comprehensive statement of their own customary laws. Parliamentary enactments, rather than judicial legislation, is the aim of the restatements.<sup>10</sup>

Many of the authors in the Ife book agree with Allott's legislative approach. Of these, those who are African, and may be taken to be members of the new urban elites, appear to assume that legislation is the only viable means of integration. A few of them, for example B.O. Nwabueze of Nigeria, who writes on Contracts,<sup>11</sup> show little concern for the varieties and details of customary law, in their own or other countries. The impression is given, perhaps erroneously, that since they are indigenous they automatically know the scope of customary law. They appear to have subconsciously assessed its worth, which is often not a great deal. They further assume that development in Africa will follow the same path as in Europe and that received commercial law rules are appropriate for African economies.

When Nwabueze, for instance, does document rules of customary law he relies on appellate court decisions by English judges. Such decisions are not the most authoritative or most complete guide to the customary law. With such sources as evidence of the sophistication of customary rules, a heavy reliance on received law is given as unavoidable. Nwabueze would enact new Contract legislation based primarily on received law with a few limitations in deference to customary traditions.

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<sup>10</sup>In fact Eugene Cotran, who is involved in the restatement projects, now defines "integration" as a method realized by legislative acts: it is the process by which "the law would bring together under one enactment the different laws, with a view of laying down rules governing all of them." E. Cotran and N.N. Rubin, 1 READINGS IN AFRICAN LAW xxiv (1969) (emphasis supplied).

<sup>11</sup>Nwabueze, supra note 6.

It is true that the literature on customary contracts as such is not extensive.<sup>12</sup> But there is more than may at first appear, especially if contractual obligations are extracted from their customary settings, for example, in marriage and cattle transactions. Contractual rules are to be found in the reports of anthropologists<sup>13</sup> and in the reports of the native courts.<sup>14</sup> Customary law is also not static and many of the traditional courts, or their current magisterial embodiments, have often ingeniously updated traditional contracts or reinterpreted received contract principles to fit local conditions.<sup>15</sup> Perhaps integration by means of imposed legislation is appropriate for the more complex commercial contracts in urban areas; but much will be lost if the case-by-case solutions of the rural customary courts are totally ignored.

Oddly, it is the authors from civil law jurisdictions who are more wary of enacted legislation than their common law col-

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<sup>12</sup> Cotran and Rubin, supra note 10, at 201. A result, no doubt, of Sir Henry Maine's famous statement that "the movement of the progressive societies has hitherto been a movement from Status to Contract." ANCIENT LAW 165 (5th New York ed. 1888).

<sup>13</sup> See I. Schapera, Contract in Tswana Law, and M. Gluckman, The Ideas in Barotse Jurisprudence extracted in Cotran and Rubin, supra note 12, at 201-209 and 213-220.

<sup>14</sup> Eugene Cotran, in his article in the Ife book with Allott on restatement, says that "(m)y experience in East Africa has shown that only about 5 per cent of African Court judgments may usefully serve in recording customary law." Supra note 9, at 31. But see R.L. Abel, Case Method Research in the Customary Laws of Wrongs in Kenya 5 E.A.L.J. 247 (1969) and 6 E.A.L.J. 20 (1970).

<sup>15</sup> See Y.P. Ghai, Customary Contracts and Transactions in Kenya, in IDEAS AND PROCEDURES IN AFRICAN CUSTOMARY LAW 333 (M.G. Gluckman ed. 1969). Professor Keuning of Leiden in the present book states that "(i)t is too readily taken for granted, in my opinion, that customary law can have no importance with respect to modern industrial and commercial transactions." Some Remarks on Law and Courts in Africa 58, 64. He then cites case law in support of his statement.

leagues. These authors are disposed to letting the courts handle the task of integration. Professor Keuning is of the view that there should be "codified law only when necessary"<sup>16</sup> and that, working on a prevailing base of customary law, legal modernization should be the task of the courts.

In their interpretation of the law the judges dealing with the present must look back to the past and at the same time glance into the future. They must consistently consider the demands of the present against the background of the past. We must not recoil from judge-made law or, formulated more precisely, law developed by the intellectual activities of the judicial machinery. The judges must re-interpret the traditional law for their own times, extend it, and, when necessary, supplement it in new situations. But in doing so they will have to use extreme care that their interpretation and their "legal creation" remain in harmony with the framework of the customary legal system, so that an optimal amount of certainty is achieved and the mutual cohesion of the rules continues to exist in the law 'on the move.'<sup>17</sup>

Dr. F.A. Ajayi in his essay "The Judicial Development of Customary Law in Nigeria" is the principal spokesman from the common law jurisdictions who favors judicial integration. He, however, does not have the same deference for customary law as does Professor Keuning. He wants the courts to take a more revolutionary stance, to engage in "'judicial legislation' which would go beyond . . . mere assimilation."<sup>18</sup> He urges the courts on their own to utilize modern legal principles which others would leave to the legislature to introduce initially.

One gets the impression that most of the writers in the book are committed to a forced integration of customary and received (or modern) law, whether by legislation or by the

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<sup>16</sup>Keuning, supra note 15, at 66.

<sup>17</sup>Id.

<sup>18</sup>116, 131.

courts. Inescapably the tone is that of expatriots and members of the new educated élites dictating what the rules of behavior ought to be. They assume that there should be but one uniform set of rules -- customary, received or mixed. This despite the fact that in every African country two or more economic and social stages of development are taking place simultaneously. And each stage has different legal needs.

Much could be said for having a dual system of laws, one for rural areas and one for urban, rather than a single integrated system. Instead of the dual colonial system based on race, there could be two sets of laws, one customary and one modern, whose applicability would depend on the geographical location of the parties. Parties could elect which system of rules they wish to be bound by and for doubtful cases conflicts rules could be established. It would not be necessary to have two sets of courts. And while the laws which would be applicable to urban areas would be more fixed and uniform, customary law in the rural areas could remain diverse and capable of substantial change.

Such a system of dual laws would permit integration to occur as the population was ready for it and as the stages of economic development required. Many of the problems caused by forced integration might be eliminated. Arbitrarily selected norms, whether legislated by urbanized politicians or imposed by judicial fiat, could be avoided. Such a system would demand a highly developed body of conflicts rules but one not beyond the capabilities of the present day appellate courts in Africa. Legislation could always be enacted to correct judicial abuses or implement politically required policies.

Professor Rene David, in a very interesting essay,<sup>19</sup> warns of the dangers of attempting to force economic and social change by imposed rules. This is especially so for rules that are not carefully drafted nor modest in what they seek to do. "Poorly conceived laws and regulations run the risk not only of their own demise; they risk -- and this is more serious -- compromising and handicapping the development of the country, contrary

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<sup>19</sup>R. David, *Critical Observations Regarding the Potentialities and the Limitations of Legislation in the Independent African States* 44.



to the intention of their authors."<sup>20</sup>

Customary rules are still the dominant set of norms for most Africans and are essential to the stability of social life. Attempts to change these norms can be dangerous, even though some of the changes are only customary rules which have been individually selected and enacted into law.

In seeking to convert customary rules into legislative rules, no matter how faithfully one seeks to adhere to customs one strips them of their true nature; one gives them a fatal rigidity by seeing in them rights and by injecting into them a principle of individualism opposed to the notion of community solidarity and to the community of interests on which they are based. This deformation is magnified when legislators seek to create a regional or national customary law out of customs which, by tradition, are and must remain local and distinct. Unification of customary law is possible and will, no doubt, come about by spontaneous evolution; it cannot be accomplished by the brutal and artificial action of the legislator, who runs the risk of destroying the very principle on which the authority of custom is based.<sup>21</sup>

The law becomes arbitrary and destructive of established order as soon as it attempts to regulate relationships between individuals who feel that they have worked out a fairly successful modus vivendi for themselves. The legislator begins to err as soon as he attempts to legislate relationships between husband and wife, between parents and children, between a village community or tribe which has as its major preoccupation not the affirmation of individual members but, on the contrary, has the idea of maintaining the cohesion of the group which it forms and the solidarity of its members, because they

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<sup>20</sup>Id. at 45.

<sup>21</sup>Id. at 47.

cannot conceive of life outside their particular community.<sup>22</sup>

Thus for personal law subjects, which are the concern of most of the articles on integration in this book, David is reluctant to seek integration at all. He does recognize that there may be "situations where it is essential to forbid and correct certain practices contrary to morality or to the dignity of man."<sup>23</sup> Legislators should exercise some control over the way traditional institutions function and they should prevent abuses if they arise.<sup>24</sup> But to him their role is much more limited than that envisioned by, for instance, Professor Allott. For David the transformation of custom, if desired, should be accomplished by gradual evolution through education rather than by forced legal integration.

Instead of integration, David would maintain much of the dual system of laws that had existed in the colonial period. The applicability of one or the other system would, however, depend on the circumstances of the parties rather than the predominantly racial considerations that had governed in the pre-independence period.

Those citizens who move to urban areas, who become traders or civil servants, adopt a new way of life, and it is natural and appropriate that they should be subject to a new law and be freed from customary or traditional law. On the other hand, for those who continue to live, to think, and to react as in former times, traditional custom, with all the guarantees and safeguards that it brings with it, without doubt remains the best rule of life possible.<sup>25</sup>

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<sup>22</sup> Id.

<sup>23</sup> Id. at 49.

<sup>24</sup> This is not very different from the supervisory role colonial courts exercised over customary law. "(N)ative law" shall apply "so far as it is not repugnant to justice or morality." Kenya, African Courts Ordinance 1951 (No. 65 of 1951), s. 17.

<sup>25</sup> David, supra note 19, at 48.

The position taken by David is perhaps a form of "harmonisation."<sup>26</sup> But it is a form which permits very little interference with the rules of customary law and is in substantial contrast to the "integration"<sup>27</sup> advocated by most of the writers in the book. Some of these writers would allow customary rules to continue in limited areas of Land Law, Marriage and Succession. But even here usually only one set of customary rules would be permitted. The diversity of customary rules in a subject would not necessarily continue nor would the customary law be permitted to change. If change was desired, parties would have to opt for the fixed rules of the received laws.

On another point Professor David stresses that with any legislation (enacted or judicial) that is employed care should be taken that its language is simple. Most developing countries do not have available lawyers in sufficient numbers to interpret the laws to those who are expected to use them. What few new rules are created should be accompanied by manuals explaining their content and purpose.

Law and regulations are not useful until they are known, and then only to the extent that they are applied.<sup>28</sup>

The application of laws is conditioned by the existence of complementary documents -- elementary manuals, circulars and instructions -- drafted with a view to explaining the texts to a lay public, e.g. those authorities charged with application of the law at the local level, or even citizens in general.<sup>29</sup>

So often in Africa laws or case decisions that are carefully written are not followed, not due to willful design, but because they are not understood. Or in some cases because the

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<sup>26</sup> Allot, supra note 5.

<sup>27</sup> Id.

<sup>28</sup> David, supra note 19, at 52.

<sup>29</sup> Id. at 53.

text of the laws are not up to date or the case reports are not available.<sup>30</sup>

My own experience in Kenya (1968-71) bears this out. Local government authorities -- municipalities and county councils -- were regulated by an elaborate two-hundred page statute which detailed their permissible day-to-day operations. This was modeled on law in Britain where local government bodies are substantially funded and controlled by the central government. In visiting rural Kenya councils I found that a great many had only one copy of the Kenya local government statute. Most of these were ones issued at independence (1963) or shortly thereafter and were by now considerably out of date. Some of the smaller councils did not have copies of the statute at all. Thus much of the daily business of these rural authorities was conducted either by seriously dated legal procedures or by no set rules at all.

With a book of this size containing many articles it is impossible in a single review to discuss all that I would like. I have given some indication of the debate on the nature of legal integration and of the content of some of the articles on specific areas of the law. It is within the context of this debate that the other articles on specific subjects were written.

The articles present a wealth of detailed information which will be of considerable use to scholars interested in the posture of legal integration a decade ago. This is especially so for those without ready access to the printed primary materials. It will be interesting to compare the proposals for integration given here with empirical studies of the manner in which new legislation has been applied<sup>31</sup> or of the way in

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<sup>30</sup>Cottrell, supra note 2 generally.

<sup>31</sup>See R.C. Pozen, Public Corporations in Ghana: A Case Study in Legal Importation, 1972 WISC. L. REV. 802.

which the courts have reconciled the needs of development with customary traditions. It is only when we have a sufficient body of empirical studies that we will be able to accurately assess the different theories of legal integration.

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