

BOOK REVIEW

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Introduction

The German Association on African Law, on whose behalf the *Yearbook of African Law* is published, was founded in 1973 as the first association in Germany specifically to declare the law of Africa to be its main subject of interest. Since the law of Africa has been rather neglected by German lawyers, the Association's task is an urgent one and its *Yearbook*, being the forum for the Association's efforts to fill in the existing gap in African legal studies, deserves special attention.

Volumes II, III, IV and V, which are under review here,¹ contain eight to ten articles each, in all a total of 36 articles. Besides the articles section, which makes up about two thirds of each Volume, there are several shorter sections which include reports on research projects and on conferences, book reviews, texts of documents and an appendix (which contains a list of members of the Association and its statutes²).

The articles are written in German, English or French and some of them are summarized in English or French. They cover a wide range

1. Vol. I (1980) was reviewed in this Journal by Günter Best: 22: 135-140 (1984).

2. In German (Vol. I), English (Vol. II) and French (Vol. III).

of topics, including international law, some general problems of internal legal systems in Africa, and various individual areas of the internal law of African countries, such as constitutional and administrative law, economic law, criminal law, social security and labour law, family law and land law. There is a clear predominance of topics in the field of public and criminal law. Most of the articles deal with the Western part of Africa, but Vol. V shows a certain emphasis on the Southern part of the continent.

This review will first give a descriptive overview of the topics discussed and of some of the conclusions drawn in the individual contributions. Then it will try to trace certain trends shown in the articles under review and provide a partial critique.

Articles on International Law

Some general questions concerning the African influence on international law are the subject of Albert Bleckmann's and Philip Kunig's contributions. *Albert Bleckmann* (III: 29-44) discusses the integration of African ideas into certain concepts of international law, starting with the decolonialization process in Africa. He argues that this development must be seen in the context and as a result of internal as well as external political pressures and needs of the individual states. He expresses the hope that African and European concepts of international law will be further combined in a genuine synthesis of both value systems involved.

Philip Kunig (IV: 81-98) writes about the specific role of the Organization of African Unity (OAU) in the shaping and developing of international law. He takes two multilateral treaties, the African Convention on Refugees of 1969 and the African Charter on Human and People's Rights of 1981, as examples to show that, in addition to the universally accepted rules of international law, certain new elements were developed which he relates to a specifically African philosophy of law. He concludes that, although there are only few opportunities for direct influence by the OAU on international legal development, its indirect influence, e.g. through the individual politics of its member states, can be considerable.

The problem of refugees in Africa is elaborated in detail by *Rainer Hofmann* (II: 105-136). He gives an overview of the numbers of refugees in the individual African states, political and economic motives for flight, and measures taken to reduce the dimension of the refugee problem. The legal aspects of this problem are discussed with

regard to international law, the practice of the OAU, and national legislation. The author concludes that the OAU Convention on Refugees of 1969 gives a satisfactory legal framework for the handling of the problem. But he finds that, due to the severe economic problems of most African host countries, international aid is indispensable to enable them to cope with the refugee problem. In a further article on the internal law of refugees of Zimbabwe (V: 67-77), he deals with the new Zimbabwe Refugees Act of 1983, which represents the most recent national refugee legislation in Africa. He assesses it as a promising piece of national legislation which may become a model for future legislation in other African countries.

Various aspects of the international economic order and some African responses to it are the subjects of articles by Andreas Landvogt, Umesh Kumar and Konrad Ginther. *Landvogt* (III: 157-171) gives an account of the African Development Bank, one of the three regional international development banks, from its foundation, in 1963, to its opening in 1982 to non-African member states. This step, which aimed at improving access to international financial markets and thus expanding the Bank's lending programme, had been heavily opposed by some of the most influential African member states which, as A. Landvogt notes, wanted to maintain their influence over the Bank at the expense of the poorer African member states.

Umesh Kumar (V: 81-94) discusses two African responses to the international economic order. The Lagos Plan of Action of 1980 provides for sub-regional and regional, internally located industrial development, on the basis of national and collective self-reliance and the expansion of intra-African trade. In partial fulfillment of this Plan, a Treaty for the Establishment of the Preferential Trade Area for Eastern and Southern African States was concluded and provisionally put into force in 1983. Kumar criticizes the institutional structure of this Preferential Trade Area as being too bureaucratic and expensive, lacking satisfactory provisions for dispute settlement, and its operational mechanisms as being very complicated and providing for too many exceptions. However, despite many problems, he assesses both the Plan and the Treaty as good first steps towards freeing Africa from underdevelopment and economic dependence.

Similar goals, i.e. of economic liberation and development, but within a completely different institutional framework, are pursued by the Southern African Development Coordination Conference (SADCC). *Konrad Ginther* (V: 47-61) analyses the international legal nature of SADCC which, as he argues, cannot adequately be assessed according to purely formal criteria of international law, but must be seen in its

wider political and international legal context. Against this background he shows how SADCC developed gradually in the course of a series of conferences and, apart from discussing the micro-aspect of institution-building under international law, he relates this process to the macro-structure of the continent as a whole, the specific situation in Southern Africa, and its relationship to the industrialized countries. He concludes, however, that the further process of liberation and development in Southern Africa requires SADCC to develop stronger formal legal structures.

The African struggle against apartheid, which was a major factor in the founding of SADCC, is the subject of *G.K.A. Ofosu-Amaah's* article on the Accord of Nkomati (V: 117-135). The author discusses the development of international law relating to apartheid, the events leading to the Accord between Mozambique and South Africa, and the provisions of the Accord and their implications. He concludes that the Accord, which was largely obtained through the systematic application by South Africa of illegal coercion, does not affect the rules of international law which legitimate the struggle against apartheid.

Articles on general problems of legal systems in Africa

Questions connected with the reception of foreign law are dealt with by a number of contributors. In a broad theoretical approach *Heinrich Scholler* (II: 119-140) discusses theories of reception and implementation of foreign law, taking Ethiopia as an example. He starts with a general discussion of the phenomenon, using the term 'implementation' as the general concept, and then differentiates analytically between 'reception' (where the receiving system plays an active part), 'octroi' (where the donor system is the active one), and 'transplantation' (where both systems cooperate in the implementation process). He then applies a scheme, developed in the social sciences, to an analysis of implementation processes which took place in Ethiopia in the course of her history. He shows how the old Ethiopian law, Western law and socialist law, in different degrees and at different times, became elements of the codified law of Ethiopia. The limits of modernization through implementation of foreign law are reached, according to the author, where, as in revolutionary Ethiopia, law is overemphasized in its function as an instrument of social engineering, without, at the same time, building up the necessary infrastructure of implementation.

Two contributions look at problems of reception of foreign law in the context of development goals of the state. *Eugene Scheaffer* (II:

107-118) deals with legal developments in francophonic Africa since independence. The author develops his argument around the two poles of tradition/authenticity on the one hand and alienation/modernization on the other hand. Man's need for authenticity and his fear of alienation lead, according to Scheaffer, to a rejection by the people of foreign law; but there is also a need for modernization. In order to take account of both these aspects, he suggests that the question which legal provisions are necessary for development be considered first; that one then consider whether such provisions will not have a too strongly alienating effect; and finally, that a suitable compromise be sought.

Hans H. Munker introduces law and development as a new discipline of scientific research and teaching (IV: 99-109). This new branch of legal studies "has grown out of a period of critical analysis and rethinking of the effects of wholesale reception of European law and legal institutions by developing countries" (p. 108). The author describes roughly what may be subsumed under the term development law, referring to the idea that appropriate legal provisions can be used as an instrument for development. In the second part of his paper he describes the scope, activities and approaches of two institutions which offer courses and do research in this area of law: the Institute of Development Law in Paris and the International Center for Law in Development in New York. The International Third World Legal Studies Association is also introduced.

Two further articles are concerned with the dominant state ideology and religion, respectively, and the influence of each on the legal system. *Claude Durand* (IV: 15-25) discusses two new laws of the People's Republic of Congo in the context of Congo's socialist policy. The Land Law Act of 1983 declares all land to be the property of the people, as represented by the state. The Act reorganizing the court system of 1983 introduces a system of popular justice with lay magistrates who are appointed by the Party. The author views both these Acts as a clear step towards further consolidation of the state doctrine of scientific socialism.

Konrad Dilger (III: 3-42) discusses the role of Islamic law within the national legal systems of Somalia, South Yemen and Ethiopia. He notes that in Somalia the common Islamic tradition was used as a means to integrate the formerly British and Italian parts of the country, by declaring Islam the state religion and main source of the law. In modern state legislation, Islamic teachings are combined with socialist elements. The case of South Yemen is similar, except that not Islam but the constitution is considered to be the main source of

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law. The Ethiopian legislature is silent about the role of Islamic law within the national legal system. However, the author notes, whereas the Civil Code of 1960 has introduced Western concepts of law, in practice, Islamic law is still widely applied in matters of personal status.

Two contributions deal with the internal conflict of customary and state law. In his article on the internal conflict of laws in Botswana, *A.J.G.M. Sanders* (V: 137-158) gives an overview of the still existing dualism of courts and laws in Botswana and the problems arising from that situation, in the fields both of criminal and civil law. He views the unification of law as a rather long-term objective and argues that a necessary first step would be a gradual integration of the customary law courts into a general national court system.

H.W. Kofi-Sackey (IV: 65-79) shows how the institution of chieftaincy has been maintained in Ghana by the colonial as well as the independent governments. Chieftaincy matters have remained under the jurisdiction of the chiefs' courts. The author discusses in detail the statutory provisions on jurisdiction. He argues, however, that state law did not take into account the unique character of chieftaincy in Asante, particularly the special position of the Asantehene, the highest chief in Asante. Thus the Asantehene is facing considerable status problems which arise out of this conflict between the specific Asante customary law and unifying state regulations.

A number of the questions dealt with in a rather legal-technical way in the contributions summarized above reappear, now viewed from a legal-anthropological perspective, in *Simon Roberts'* article on some conflicting perceptions of the relationship between state law and indigenous institutions in contemporary Africa (II: 99-106). He divides the early literature on legal anthropology into two phases, the first one reflecting a broad comparative evolutionary approach, the second consisting of a number of detailed studies of individual communities at a given point in time. He discusses the achievements as well as the limitations of these studies and then introduces some recent attempt to relate the "domain of rules" more closely to the "domain of action" in order better to understand both of them. This relationship between rule and behaviour, and similarly between state law and indigenous systems, must be viewed, according to the author as a "two-way interactive flow". Thus on the one hand, customary law, when codified by a national legislator and applied by a national judiciary, is considerably transformed; state law, on the other hand, is transformed when it is applied "at the periphery", since it is not effective there in a legal vacuum.

Articles on Various Areas of Internal Law

Constitutional, Administrative and Economic Law

In an article on internal self-determination in Lesotho in the 1980's, *Kelebone A. Maope* (V: 95-115) analyzes the legislative arrangements for the conduct of elections in Lesotho, resulting in a rather pessimistic assessment of the probability of genuine and free elections in the near future. At the same time, he stresses the urgency of such elections to bring to an end the crisis of legitimacy of the Lesotho government, which he attributes to rigid state security measures and declining human rights in Lesotho.

Three contributions discuss various aspects of the constitutional, economic and administrative law of Nigeria. In an article on political and legal problems of the Nigerian constitution, *Akinola Aguda* (III: 3-27) gives an historical account on the development of the Federation of Nigeria and its various constitutions in their specific political contexts.

Jonathan O. Fabunmi (V: 13-33) analyzes the Nigerian indigenisation laws as a means of economic control. He shows that the urge for economic independence led to various legislative measures for indigenisation of ownership, control, manpower and/or technology of business enterprises. However, he also shows that, due to loopholes in the law, problems of interpretation, and lack of proper orientation and consciousness of those applying the law, only a very unsatisfactory degree of implementation has been achieved.

The development of local government in Nigeria is the subject of *Fatai K. Salau's* contribution (IV: 111-138). Against the background of the historical development of administrative structures in Nigeria since 1914, he discusses the local government reform of 1976 as a central step towards national unity, by means of decentralization and the strengthening of local autonomy. He concludes that in practice the reform has been a failure due, among other reasons, to conflicts between civil servants, traditional chiefs and politicians.

A broad overview and analysis of various patterns of centralization and decentralization in a number of francophonic African states is given by *Gérard Conac* (III: 47-84).

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A practical report of his experiences in the Republic of Senegal as a government advisor for public administration, within the framework of development cooperation, is provided by *Georg Theuerkauf* (III: 175-191); and a short contribution by *Herbert Hof* (II: 69-71) summarizes some problems of sanitary legislation in Togo.

Criminal law

Seven articles deal with criminal law. *Geoffrey Feltoe* (V: 35-46) gives a report on the state of the codification project of the Zimbabwean criminal law. This codification project is viewed as a highly urgent step since Zimbabwe still relies upon a common law system of Roman-Dutch criminal law with numerous South African precedents, which became unacceptable for independent Zimbabwe. The author, being himself a member of the codification committee, discusses the objectives, contents and sources of the latest draft of a transitional penal code for Zimbabwe.

Gotthilf Walz (II: 159-177) discusses the functions of criminal law within the colonial regime during the period of German colonial power in Cameroon (1884-1914). He shows in particular how German colonial lawyers and legal anthropologists of that time were influenced by colonial policy in their attitudes towards the African population and traditional laws. He suggests finally that even in the contemporary discussion of criminal policy in Cameroon, certain colonial ideas, such as the idea of the educational function of criminal law, reappear, a fact which makes legal historical research all the more relevant today.

Another contribution in the *Yearbook* on the criminal law of the Cameroon is by *André Belombé Yombi* (V: 3 -12), dealing with the suppression of witchcraft by the Criminal Code.

Of the two contributions on the criminal law of Nigeria, both by *George N. Vukor-Quarshie*, the first suggests introducing into the Criminal and Penal Codes of Nigeria provision for corporate criminal liability (II: 141-158); and the second discusses the question of intoxication and criminal responsibility under these Codes (V: 159-175).

Kwame Frimpong examines in one article the trend of criminal law legislation and the administration of justice in Ghana since the military coup of December 31, 1981 (IV: 27-44). He deals in particular with the establishment and working of the public tribunals, which

have operated, since 1983, side by side with the regular courts, and whose future he assesses in a rather skeptical manner. In a second article (III: 85-103), he reflects on Ghana's penitentiary system, its historical development and problems.

Social Security and Labour Law

Two contributions are concerned with questions of social security in Africa. *Maximilian Fuchs* (II: 43-67) discusses some general problems of social security laws and policies in Africa. With regard to the socio-economic conditions prevailing in most African countries, he argues that the existing systems, originating from Europe, which grant social security benefits mainly or only on the basis of regular wage employment, cater for only a minority of the population since the vast majority has no permanent employment.

Otto Kaufmann (III: 137-156), who provides a detailed overview of social security law in Senegal, comes to a similar conclusion. He argues for the extension of social security benefits beyond the existing schemes.

In an article on the realization of workers' interests under Ethiopian labour law (IV: 3-13), *Daniel Haile* discusses the Labour Proclamation of 1975, enacted shortly after the Ethiopian revolution. This Proclamation deals with individual and collective labour law; it improves the minimum labour conditions; it sets the requirements for the founding of a trade union; and it contains provisions on strikes. Although the author assesses the Proclamation positively in general, he comes to the conclusion that lawful strikes are virtually impossible, since it is highly unlikely in practice that all the conditions for a lawful strike can be fulfilled.

Family law and Land law

There are two contributions on family law in Africa. *Johan Pauwel's* article (II: 73-98) is on the new family law of Burundi of 1980. After a retrospective view of the Belgian colonial family law, the provisions of the new law are presented in detail. The law integrates certain institutions of traditional family law, such as the family council, while it rejects others, such as polygamy and the bridewealth requirement. One has to wait and see, says the author, how far the courts will follow these legislative decisions.

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Ulrich Spellenberg (IV: 139-160) discusses the Family Act of 1972 of Senegal which deals with aspects of property relations within the family. The Act contains provisions not only on matrimonial property relations as such, but also on inheritance and succession; it thus propagates a uniform concept of family property. While it is based mainly on French law, it integrates, at certain points, elements of traditional Islamic law. The author assesses the Act as an interesting attempt at creating a combination of modern and traditional family law and views it as an instrument towards development which, however, is rather based on a hoped-for future state of affairs than on an actual social and economic reality.

In an article on the Nigerian Land Use Decree of 1978 (IV: 45-63), *Hagen Henry* criticizes this Decree for completely ignoring customary land law systems existing in the country, and, on the other hand, failing to achieve its purported goals, such as a reduction of the number of conflicts over land and the implementation of the country's development plans. He concludes that the Decree may have been conceived rather as an instrument of political power than for any substantial reasons of law reform and unification.

Critique

With its wide range of topics and the high standard of its contributions, the *Yearbook* serves as a valuable and reliable source of information on many aspects of African law which otherwise would often not be easily accessible. This informative value is increased by the documentary section of the *Yearbook* which contains important documents, often those discussed in articles of the same Volume.

It is striking that only a few of the contributions are concerned with the more general questions of conceptual and methodological approaches to African law. However, those which are dedicated to such basic questions provide evidence not only of the urgency of a general debate, but also of the divergence of possible approaches. Two very interesting, and very different, propositions for a conceptual approach to African law are provided by Heinrich Scholler and Simon Roberts. Scholler looks at processes of reception of foreign law mainly from the viewpoint of the state, whereas Roberts emphasizes the importance of people's behaviour and its influence on state law. Scholler employs a highly theoretical framework for his approach, whereas Roberts' argument is based on his experience in empirical anthropological studies. Each of these views has its own merits, and in fact they may be considered complementary. Both of them discuss

questions which cannot simply be ignored. It is the more regrettable, then, that the discussion initiated by them is not resumed and continued in other contributions.

Although certain authors do express awareness of some of the problems connected with the reception of foreign law in the context of social security law, family law, land law, etc., there are no articles which follow up these problems in more detail. The interaction between small-scale legal systems and the national legal systems emphasized by Roberts, and the resulting transformations of the law in the course of its implementation, are largely neglected by the contributors to the *Yearbook*. The current general debate on the relationship between state law and customary law so far has hardly penetrated to the pages of the *Yearbook*. Although themes such as the discrepancy between lawyer's customary law and sociologists' customary law (G. Woodman), the importance of semi-autonomous social fields (S.F. Moore), the idea of the imperial invention of tradition (P. Fitzpatrick) are of central interest in a discussion on law in Africa, they are not reflected in most of these articles. Greater awareness of the general debate would have permitted Schaeffer, for instance, to consider the purported dichotomy between tradition/authenticity and alienation/modernization in a more discerning way; and terms like modernization, which Scheaffer understands merely as a means towards industrial development and towards the achievement of the standards of the international market, might have been more reflected on and criticized.

A number of authors do discuss the legal provisions concerned in the light of their specific political background. The contributions on international law are particularly interesting in so far as they discuss attempts at and gradual successes in the Africanization of international law. The specific external and internal political conditions which determine the attitudes and behavior of African states on the international stage are graphically described and analyzed. Some articles in other fields of the law reflect a political consciousness when they suggest that we view the law as a result of certain political and ideological convictions and constraints, and as an instrument to achieve certain political goals. This is an important perspective; but here again, it is exclusively that of the state, whereas the perspective of the ordinary people, those who are affected by the law, and their responses to it are not considered.

It may be concluded that the concern of most of the articles contained in the Volumes under review is with the field of official law, rather than with unofficial, informal law and its interaction with

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official law. This is a legitimate interest and it has its own merits. However, the question remains whether a stock-taking of the actual social and economic conditions under which the so-called traditional and modern laws are operating, and by which their nature, functions and effects are modified, is not indispensable. It appears futile to speak of tradition and authenticity without considering the degree to which they have changed. The illusion of an unchanged and unchangeable tradition is an obstacle to an appropriate understanding of ongoing processes in the development of African law. It is also an obstacle to a creative and innovative attitude in legal policy, which is needed in order to solve many problems in contemporary Africa.

This critique cannot diminish the high value of the *Yearbook* (which, unfortunately, is also reflected in its high price). It will be interesting to see which direction future Volumes will take.