

North Carolina Central Law Review

Volume 1
Issue 1 *Spring 1969*

Article 9

4-1-1969

African Public Law

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Recommended Citation

Sampson, Joseph Chea (1969) "African Public Law," *North Carolina Central Law Review*: Vol. 1 : Iss. 1 , Article 9.
Available at: <https://archives.law.nccu.edu/ncclr/vol1/iss1/9>

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he will not commit certain acts, rather than simply to prohibit them by statute, may greatly heighten his sensitivity to the watchful presence of the state, and accordingly curtail his freedom of action; yet, the alacrity with which the Court has struck down disclaimer oaths in recent decisions suggests that vagueness may not be the principal reason for hostility to this regulatory technique. The state's concern here is with a means of identifying subversives. The disclaimer oath is really designed to deter conduct and enforce an outward appearance of conformity, but it does no more than a simple statutory disqualification to achieve that goal. Therefore, the Court may find the disclaimer oath an unnecessarily degrading type of regulation, especially as applied to members of the academic profession.⁵²

Thus, a properly drawn loyalty program, applicable only in areas where the danger of subversion is significant, could legitimately rely on conduct, overt acts and other direct evidence, as a means of identifying persons likely to be unacceptable for employment in positions formerly requiring loyalty oaths as a security measure.

African Public Law

In Colonial Africa, the term "African law" had a derogatory implication, as if the law of the Africans was not real law in the same way as the English, or other European law. The colonial powers introduced their own laws in every colonial territory as the general law in regulating the colonies, and their governments. But the so-called English law in Africa, was not the only law used in governing the colonial territories. There was the African customary law which was more effective in native administration. The African customary law, although used by the British in furthering their colonial administration, was left undeveloped and publicly ignored by the British for political reasons. Since the departure of the British from Africa, all of this has changed.

In recent times, indigenous legal system in Africa has been the subject of collective study on a comparative basis, because it is now in the power of African governments to modify or reject the colonial laws deriving from antiquity.

In an effort to stimulate African pride and self-consciousness, it

⁵² "Developments in the Law—Academic Freedom," 81 *HARVARD LAW REVIEW* 1069 (March, 1968).

is necessary for African governments to emphasize everything that is valuable in the African past. High on the list of such African elements are the traditional African institutions and values as expressed in their legal systems. Parallel with this feeling is the desire to break away from the overpowering influence of introduced European institutions. The development of African legal institutions are a part of the africanizing process. This article is designed to examine the worthy aspects of the African customary law deserving preservation and development.

AFRICAN CONSTITUTIONAL LAW (CUSTOMARY)

One of the key distinctions between the tribal African constitutions and those of western nations is that the African constitutional law is unwritten and it is based on the customs or traditions of the African society. In short, African constitutional law is a general folkway or every day life of the African village or town.

In the following paragraphs, an effort is being made to illustrate how citizenship, political divisions, selection of kings, and the powers of the kings etc., are set forth by the customary law in the African society.

Citizenship

Citizenship in an African society is acquired either by birth or by immigration from friendly tribes. A citizen is known by law as a free person or a man of the soil, that is, a man belonging to a family which has long been settled in the country. The corresponding term for a female citizen is the woman of the soil. Every citizen is required to become a member of the tribal secret society, the equivalent of a political party in the western nations. No citizens are allowed to participate in the selection of the king, or hold an honorable position in the administration of the country, unless they are members of the tribal secret society. It may be interesting to point out that the method of electing the chief and other public officials is somewhat similar to the voting method of the western nations, although not quite or fully identical.

Political Divisions of the Country

What is usually referred to as a country in Colonial Africa, does not meet the full definition of the word "country" in English, because a country is not a political unit in Africa, but rather a division of a number of independent kingdoms, or more correctly speaking, paramount chieftain-

ships. There may be between fifty and sixty of these, differing considerably in size, in what is known as "country." In most cases, a kingdom contains from twenty to thirty villages. The villages or towns, which are called "ta" by some Afro-Liberians, vary greatly in size and population. Hamlets contain four or five huts, towns often contain several hundred houses. On an average, there are three persons to a hut and the largest towns in the country have about three hundred inhabitants, however, towns with a population of between 1,000 and 3,000 souls are not exceptional in some parts of the country.

There are three types of towns distinguished by their origin. Each kingdom has a chief town, an equivalent of the seat of government or a capital city in a western nation. Unlike a western nation, the chief town is usually regarded as the oldest settlement in the chieftainship, and in most cases, it doubtless is the place in which the clan first settled on immigrating into the country. In general, it is the largest in population. From this center new towns branched off. On farms far away from a town, small settlements were formed in which people went to live during the farming season. If these are favorable settlements, they become permanent; the families living there increase, others join them, and so a new town is founded, which in most cases bears the name of the founder. For example, Kunta is the town-"ta"—founded by a man named Kun. These towns are always politically dependent on the chief town from which they have taken their origin. The third class are those small hamlets which have not yet reached the rank of a town. They are called "farm villages" while the mother town is called the "big town," and the classes between the two are simply designated as "towns" or "halftowns."

Selection of the King

The right of succession to a king is inherited, but not necessarily in a definite line. There may be several families entitled to sit upon the royal stool, out of which in a system of rotation, the king is taken. In most cases, the oldest brother, the eldest cousin is chosen. In cases where there is no successor to be found of the same generation, a son or a nephew may be elected.

Not infrequently several pretenders to the throne assert their claims and try to win a following, each basing his pretensions upon some particular merit, such as greater age, wealth, general popularity, or high

birth. It may take a year or more before the parties arrive at an agreement.

Before the elected king enters upon his office, he has to perform certain ceremonies which bring him into magical contact with his predecessors and confer their power upon him. On the grave of the last king, a hut is erected in which his successor lives for several months.

When this preparatory act is finished, the new lord, in solemn procession and accompanied by a shouting crowd, is led into the town by the elders, and is proclaimed king in the presence of the people. In some kingdoms, the subjects are allowed on the day of coronation to beat the king, a ceremony whose original meaning is not known. O. Dapper, in his "Description of Africa" (Amsterdam, 1686, French edition), says: "Formerly, before a man was proclaimed king in Sierra Leone, it used to be the custom to load him with chains and thrash him."

Similar initiation ceremonies are practiced at the institution of a new chief or king among the kingdoms in Liberia. A king entering office should be a man of mature age. The king may be elected between 45 and 50 years old, yet doubts are expressed as to his suitability on account of his youth. Other qualifications required are that he should be without physical infirmity; of a stately, well-built figure; and well-experienced in dancing, playing, drinking, and dealing with women. In short, he should be a person corresponding to the ideal of an average man in the country. But it is also expected that he be a man held in general respect and of sound judgment and wisdom in handling the affairs of public life.

The king holds office until his death. If, however, he grossly violates the laws of the country, or acts contrary to the welfare of the community, his office may be taken from him.

Powers of The King or Chief

Nominally the king has almost unlimited power. He decides on war and peace; administers the affairs of the chiefdom; represents the highest court of appeal in all law cases; and has the right to pronounce a death-sentence or to pardon. He also directs the religious acts necessary for the prosperity of his people. But in reality the king is no more than the executor of the tribal will as expressed by the adult free men, led by the clan-heads. Without their consent he cannot decide any important matter and the initiative in questions concerning public welfare lies no less with the elders than with the king himself. A question of public

interest may be discussed among the men of one or more villages, and if they come to an agreement they will submit it to the king as being the will of the people and he will be obliged to act accordingly.

The king's power is limited also by the influence of the Poro leader, who, as religious head of the tribal community, often forces his will upon the king and upon all men. He is entitled to summon meetings, in which the king has to appear, but from which he may also be excluded, and in which important matters are settled, such as quarrels between two towns or two kingdoms, the punishment of witches, or the inauguration of Poro school. While the king is responsible to the elders for each of his acts and decisions, the Poro leader decrees punishments without any control and has them executed by secret agents.

One of the public duties of the king is to keep the road in order between villages and farms. Larger rivers are crossed on hanging bridges, which are carefully constructed. Canoes and rafts are also used for crossing large rivers. They are the king's property, but their use is generally free; only at much frequented ferries are travelers expected to pay a small fee for being transported. By order of the king, each village has to keep its part of the road in order.

If between two large towns the road is neglected, it is generally a proof that bad relations exist and that a state of war is impending. The reopening of the traffic is inaugurated by the mutual promise to repair the roads. The news-service between the chief town and neighboring villages or towns is maintained by royal messengers who carry the king's staff or an elephant's tail as their sign of authority. An order transmitted by a royal messenger is strictly obeyed by everyone. In very urgent or important cases, or when the messenger is sent by the leader of a secret society, he will carry leaves of a plant called "tofa" as his credentials. At certain intervals, the king himself visits his villages and settles pending questions.

ADMINISTRATIVE LAW (CUSTOMARY)

Political Institutions

The clan as a Political Unit: The head of a clan is called "father," "master," or simply "old man." The clan is unquestionably the most important and, in the view of the Africans, the most natural political unit. It is based upon common descent. Its chief is the patriarch who is

honored and willingly obeyed by all. He enjoys a greater and more immediate authority than the village chief. While the latter cannot decide any matters of importance without the consent of his counselors, the clan-father is completely independent within his own sphere. If one clan forms a village, the clan-head becomes the village chief. But even when several clans inhabit a village, which is the general rule, the clan-chiefs are the real masters, and are the leaders in the council which directs all public matters.

The Village Chief: A village as I have already mentioned, is called "ta," and the village chief is the owner of the village, the overseer of the village, or the man at the head of the village. When a family or clan establishes a new village, the head of the clan takes the position of village chief, and his office is inherited by the succeeding clan-heads. If an additional family comes to live in the village, it is subordinate to the governing chief's authority. If there are in a village several clans, which are equal in age and authority, a chief may be elected from among them alternately by the council of the old men. Generally, the king tries to influence the appointment of village chiefs, but only in rare cases will he venture to vest one of his sons or another person under his influence with the office.

If a village chief is by old age, or by illness, unable to fulfill his duties, one of his counselors, frequently his presumptive heir, is appointed as his temporary representative, but all decrees are issued in the name of the chief, who nominally holds office until his death.

The Paramount Chief or King: The highest political unit among the Africans is the kingdom or paramount chieftainship. The king is either called Kalon, Masa, or Maha, in various dialects. This was originally the most distinguished clan-head in the oldest settlement of the kingdom. When some families left the chief village and founded new settlements, due to population growth, they did not separate entirely, but for various reasons maintained close relations with the other village. Two or more villages which are united offered greater security against outward enemies, and more important still, the inhabitants of the new settlement were desirous of having a share of the blessing which the common ancestor, who was buried and worshiped in the mother village, bestowed upon his descendants. New settlements also needed for their prosperity the clan charm kept at the court of the oldest clan-father. So the whole group of families remained united by bonds of common descent and of religious

worship, and their common head was the reigning patriarch of the group. The bulk of the population in African kingdoms is to this day family groups. In most instances, the group has been loosened and enlarged by migrations within the kingdom and by immigration from other kingdoms and also by the penetration of one chiefdom into the territory or another chiefdom. Today within one kingdom may be found members of other kingdoms who are subject to the authority of the king in whose territory they live. It may be interesting to point out that the size of the kingdoms and the number of villages which belong to them vary considerably; they are generally larger and more populous in the land-locked areas of the African continent.

Village Ordinances

The public life of a village centers around the meeting-house; the smaller towns have one, and the larger towns have several. One finds company at all times of the day in the town hall. In the meeting-house, the law-court holds its sittings and public questions are discussed. Here, the bodies of the dead are put on the bier before they are interred, and funeral ceremonies are held. On an evening, the chief invites the men to a pot of African wine. Women are seldom seen in the meeting-house; it is the resort of the men and the favorite place for passing a leisure hour.

The personal conduct is regulated by fixed forms. Everybody knows how he has to behave and what is expected of him in any given situation, and nobody will ever neglect these rules. No one will enter a hut without knocking at the door or announcing his approach by calling, and without being asked to come in; nobody passes a person, whether man or woman, without saluting. Little services are rendered as a matter of course, such as lifting a load, helping to cross a river or a swamp. When strangers put off their loads in the meeting-house, someone will be ready to call the chief and to bring some drinking water, and it is certain that he who receives a service will not fail to show his gratitude. Good manners and polite behavior are expected of everybody and the scrupulously observed forms give a certain dignity to public and private life. Even the chief's messenger, when he delivers a message from his master, will begin his speech by saying: "The chief sends you greetings and asks you so and so."

The King's Revenues

Taxes are paid by the subjects in work or in natural products. All the young men in common prepare the farm of the king or the village chief, and gather in his harvest. They all unite in building a new house for him or a meeting-house for the community; they are also expected to carry loads for their ruler. The king receives his share of meat when game is killed, and also the tail and tusks of an elephant and the teeth and skin of a leopard. All the villages in turn have to supply food for the maintenance of the king's guests.

But the chief wealth of the king consists of his wives and his serfs, whose working power in farming, hunting, fishing, industrial activities, and load-carrying is at his personal disposal. Guests who stay at the king's village and are provided with food and a house, are expected to give corresponding presents, and are particularly welcome when they are traders.

On the other hand the expenses of a royal house-hold are high and sometimes even exceed the revenues, so that only a man of personal wealth can afford to reign. He is responsible for the support of his numerous wives, serfs, and their families. Though they keep their own houses and have to provide their own food, in extraordinary cases they expect some help from their lord, and he must pay the expenses of a burial, maintain their guests, and pay the bride-price if a man of his house-hold marries. From time to time he entertains his leading men with food, palm wine and gin. The court is never without visitors, royal messengers, village chiefs, traveling traders, ordeal-men, diviners, counselors and other respected men, all of whom may count upon hospitality.

The public appearance of the king is unostentatious. He is not to be distinguished in dress from other people. When he travels, he is always accompanied by several attendants, one or two counselors, and other respected officials.

CIVIL LAW (CUSTOMARY)

Law and Its Applications

A law or ordinance is a prohibition laid upon a certain action, and generally means a regulation proclaimed by the king or Poro leader (religious leader) in particular cases. Beside these temporary proscriptions there are the laws of the chiefdom transmitted from immemorial times, called "customs" used in explaining some of the laws. When a new town

is founded, the chief proclaims the laws of the chiefdom. This is called laying down the regulations, but it means that the old laws are also to be observed in the new foundation.

Within the clan the clan-head is judge; within a village the village chief. The high court is formed by the king and his counselors. Every law suit has to be brought before the court to whom both parties belong. If two members of one clan have a quarrel, their matter is settled by the clan-father, and if the accuser and accused belong to two clans living within the same village they go to the village chief. Litigation between inhabitants of several villages is settled by the king's court.

Against any judicial decision an appeal to the next court of instance is possible. A man is also entitled to bring his matter immediately before a higher court instead of that which is competent to hear his case. The judge may accept or reject such a demand; but in the first place, he is obliged to lay the case before the competent judge and hear his opinion before he gives his own decision. A great number of cases are not brought before an official judge at all but are settled by private persons. In almost every village, there are elderly men, sometimes native religious leaders whose wisdom is sought not only by litigants in their own village but often by persons from distant kingdoms also, and their decisions are always obeyed.

A case between members of two different kingdoms belongs to the jurisdiction of the king whose subject is the accused person. In case a lawful settlement cannot be concluded, there is only the alternative of a friendly adjustment brought about by the two kings or their counselors. In former days if this failed, the offended clan would wait for an opportunity to kidnap a member of the hostile clan and would retain him until his people gave the desired satisfaction. Blood-revenge was also practiced sometimes in the case of indemnification, when it was impossible to receive a positive compensation because the offender was subject to another authority. Here also, friendly mediation between the two kings was generally tried first, but in many cases it did not lead to a satisfactory result. Then the offended clan would not rest until a member of the offending clan had been killed, though years might pass before an opportunity for this arose.

The Procedure

In a court procedure the accusation is raised by the accuser appearing personally before the judge. But in cases where the common welfare

is concerned, such as in arson, continued robbery, black magic or intercourse with evil spirits, the judge himself may be the accuser. In bringing an action against a person, the accuser has to pay a fee. As a matter of importance, both the accuser and the accused have to post security in native money for the payment of fees to the judges and for the indemnification of the successful party. If the parents of the litigating parties are alive, they are asked to attempt a friendly adjustment; if this fails, they have to give their consent to the judicial procedure and are asked to assist. As a rule the judge also tries to bring about a reconciliation.

The pleadings are public and take place in the meeting-hall, both parties being accompanied by their families and friends. All free men or men of the soil are entitled to be present, and assist, but women are only admitted when they have to make a statement before the court.

The transaction begins by "eating the king's charm." This is usually done by placing a small bit of the "medicine" in some water which the witness drinks. It is equivalent to taking an oath in Western law courts. In some kingdoms, the accuser, the accused, and the witnesses are all sworn; in others, only the accuser and the accused or only one of them are sworn.

Most frequently the accused is bound by oath, in the belief that he will not venture to take an oath unless he is innocent, otherwise the charm would kill him. But if one party has been sworn, the other is entitled also to make affirmation by an oath. In such a case, the court will not give judgement, but will wait for the charm to kill the guilty person. The two families who have thus been sworn against each other will henceforth live in eternal enmity.

After the chief has opened the case in a few words, the parties are called upon to speak, first the accuser and then the accused; their speeches may last a whole day. Interruptions by other persons, except expressions of applause, are immediately punished with a fine. When a statement of each party has been made, the judges retire for a secret session in which the witnesses are questioned and the verdict is found. The decision of the court is then publically proclaimed.

Judicial Proceedings

The aim of laws and their application is the protection of the property of an individual or more frequently of a family. The idea of punish-

ment or of atonement does not exist. The African has a civil law but not a criminal law. A person who has been damaged by another is entitled to claim damages. The sole object of the tribunal is to discover if and by whom a person, or a group of persons, has been damaged and what indemnities are to be paid. In accord with this view, there can be neither imprisonment nor capital punishment, nor any kind of sentence which dishonors. To commit an unlawful act is not necessarily infamous, but is rather regarded as an unsuccessful attempt to obtain an advantage at the expense of other people. It is true that in certain cases, criminals were executed or otherwise punished, as in the case of a person possessed of an evil spirit, or one who was convicted of arson, or a man with an incorrigible tendency to steal. But even this was not regarded as a punishment in the proper sense, but merely a means of ridding the community of an obnoxious member; for an evil spirit may enter a man without the latter's will or knowledge. If he steals or commits arson, it is because he has been born with a heart that irresistibly incites him to such actions. And even such crimes, though frequently punished by execution, expulsion from the community, or in the case of theft, by the cutting of one hand, might be settled by paying a sum of money and catching and killing the guilty spirit. If a person has, with or without intention, killed a man or misused another man's wife, he has committed a material damage just as if he has stolen or set a house on fire. The evil-doer or his family has to make amends in accordance with the amount fixed by traditional law for each judicial case.

The responsibility for an act and for the consequences arising out of it do not rest with the individual who has committed the deed, but are matters for the whole clan, whose head takes the settlement into his own hands. When a crime is committed, the criminal is seized and put into the stocks, or is imprisoned. The king is then notified, and he informs the man's family, asking them at the same time to pay the damages by a fixed date and intimating that the prisoner will be permanently imprisoned if the required sum is not forthcoming. The clan chief makes an effort to provide the necessary number of persons from his own clan to work for the payment of the damages.

This method of procedure is followed in cases where there is no doubt about the guilt of the accused. In financial cases, however, or in "woman palavers" (quarrels over women), which claim the greater part of the

court's activity, the verdict has to be reached by extended discussions which may last for days.

If a person is taken in the very act of committing a serious crime such as manslaughter or adultery, the damaged person may take the law into his own hands, and in the subsequent law-court the provocation for his act will be taken into account. He will either be acquitted or receive a light sentence, even though his retaliation may exceed the usual punishment.

Conclusion

It must be remembered that many of these customs are being deserted by the new westernized African States, in preference to the so-called Western customs; and that is what this paper is about. My opinion is that Africa should not abandon her social, political, economic and legal customs only to import new ones from abroad, but rather she should try to improve or develop her own. In short, I am saying that African customs as outlined in this work are worth the efforts of preservation and development.¹

Mission Impossible: The Indigent Posts Bail

The concept of equal justice under law for all persons has little meaning for many of the hardcore people in America. Frequently unaware of his legal rights and responsibilities, the indigent is unaccustomed to using the services of a lawyer, reluctant to seek help, and mainly unable to pay legal fees.

One need not be poor to see the problems confronting the poor man but unless one is poor, he can neither appreciate nor understand the needs and the desires of the indigent.

The indigent is beyond an accurate description or comprehensive definition. "The laws of some states distinguish between paupers and

¹ Anderson, J. D., *The Future of Customary Law in Africa*, Leiden: Afrika Instituut, 1955; Anderson, J. N. D., *Changing Law in Developing Countries*, London, Allen and Unwin, 1963; Ellis, G. W., *Negro Culture in West Africa*, New York, Neale Publishing Company, 1914; Elias, T. O., *The Effect of British Colonial Law in Africa*, London, Crown Agents Publishers, 1957; *Foreign Bulletin of African Politics*, November 2, 1964; Guggisburg, Sir Gordon, *The Gold Coast: A Review of Native Customs*, London, Crown Agents Publishers, 1927; Johnston, Sir Harry, *Liberia*, 2 volumes, London, Allen and Unwin, 1920; Mancheste, A. M., *The Nature of African Customary Law*, Manchester University Press, 1956.