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NOTES AND NEWS

African Customary Law, 1858-1958

The study of customary law in Africa has reached at least its centenary. For 1858 saw the publication of *A Compendium of Kafir Laws and Customs* compiled by direction of Colonel Maclean, C.B., Chief Commissioner in British Kaffraria. This short volume, reprinted by J. Slater at Grahamstown in 1906, is a minor landmark in the history of British administration in Africa. Kaffraria, the territory between the Keiskama and the Kei, was a British Crown Colony from 1847 until its incorporation in the Cape of Good Hope Colony in 1865. It was the first instance of a native African territory directly administered by Great Britain.

John Maclean, one of the "1820 Settlers" at the Cape, had been on the ill-fated ship Abeona, which caught fire and sank on the equator on 20th November, 1820. He eventually settled near the Kowie River in Zuurveld but the Kaffir Wars interrupted his later life and he rose to be military and political representative of the British Government in Kaffraria.

The *Compendium*, "including Genealogical Tables of Kafir Chiefs", is a volume of 171 pages consisting of the collected reports of several authors. It includes the letter from Maclean to Mr. Warner, the Tambookie Agent who, with the Revd. H. H. Dugmore, in fact provided the bulk of the material for the book:

> "I am much obliged to you for so kindly acceding to my rather troublesome request, and I am the more obliged to you, as without some such help, and without some insight into the nature of Kafir law, the newly appointed Magistrates might feel some difficulty in forming an opinion on the cases brought before them, which would be thought fair and just . . . As there is safety in the multitude of counsellors, so I hope, by gathering and comparing, we may get a general and correct view of Kafir jurisprudence."

"Warner's Notes", together with the articles by Dugmore originally published in the *Christian Watchman*, form an interesting early survey of the Xhosa and Thembu tribes. For good measure, the book provides the Population Return for 1857 and also "Mr. Ayliff's Remarks on the different kinds of food in use in Kaffraria" —but it comes to grief in an attempt to describe "The Native Law Relative to Land" in three pages. The outline of fundamental principles of customary law includes an analysis of the distinction between criminal and civil actions, with a detailed outline of the steps in the customary judicial process, in which Dugmore emphasises the careful preparation of the case and also the skill and ardour of

the actual hearing: "The Socratic method of debate appears in all its perfection."

Despite the mixture of authors and topics, the book is not without value today, and clearly it must have been of unique interest in 1858. Would Maclean be disappointed if he returned today to find how late, and how little, his example of searching out and describing the customary laws of the African had been followed ?

Reform of Company Law in Ghana

The Government of Ghana, by Gazette Notice No. 1783 of August 25th, 1958, revealed that they had taken a most important step for the future of commercial law in Ghana, by establishing a Commission of Enquiry, with Professor L. C. B. Gower of the University of London as sole Commissioner, to enquire into the present company law of Ghana with a view to its reform. The Commission to Professor Gower said in part:

> ". . . Now therefore the Commission of the Governor-General is hereby issued appointing Laurence Cecil Bartlett Gower, Esquire, Sir Ernest Cassell Professor of Commercial Law in the University of London, to be a Commissioner under the [Commissions of Enquiry Ordinance, s. 2] to enquire into the working and administration of the present company law of Ghana and in the light of such enquiry to make recommendations for the amendment and the alteration of the Companies Ordinance and of such other laws of Ghana as the Commissioner may consider necessary in regard to his conclusions regarding the said Companies Ordinance.
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> Vincent Cyril Richard Arthur Crabbe, Esquire, shall be the Secretary and shall perform the duties specified under section 6 of the Commissions of Enquiry Ordinance.
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> The Enquiry shall be opened in the Supreme Court in Accra on Tuesday, the 23rd day of September, 1958.
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> . . . In making a report under this Commission the Commissioner shall take into account and examine the laws of such other African States as he may consider appropriate and he shall be entitled to recommend that any existing or proposed law in relation to companies enacted by or proposed to be enacted by any African State may be adopted in whole or in part for use in Ghana.
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> In framing his recommendations the Commissioner shall take into account the need for encouraging African enterprise in Ghana and the encouragement of foreign investment therein . . ."

There is a considerable history to the present plans for reform of the company law of Ghana. An American team visited the Gold Coast, as it then was, in order to report on trade and investment opportunities in the Gold Coast, their report appearing in 1956. The American team particularly emphasised that the commercial law of the Gold Coast needed reform. This point was taken a stage further by the present editor of this Journal in an article in the paper *West Africa* for February 9th, 1957, where he recommended the immediate establishment of a Commission for Law Reform that would initiate and co-ordinate projects of reform in the law of Gold Coast (now Ghana), since law reform did not brook of further delay. Special attention was drawn in

this article to the need to tackle the whole field of commercial law, including the law of contract, company law, and bankruptcy law. It appears that, with the Commission to Professor Gower, part of the needs mentioned in this article will now be met.

The aim of the Government in undertaking the revision of the company law in Ghana is to encourage the development of African enterprise and foreign investment; but this is merely the first step in the application of a systematic policy of devising laws to encourage the speedy development of Ghana. There are many deficiencies in the present company law; for example, in regard to proceedings for the winding-up of companies, and the absence of provision for the formation of private companies. There is no bankruptcy law in Ghana. Persons are reluctant to form limited liability companies under the present Companies Ordinance, 1906. Ghanaians are apparently reluctant or not given the opportunity to invest in local public companies by way of share-holding.

In devising a new and improved company law, the British model will probably be followed to a certain extent, though the Commissioner is instructed to have regard to the laws of other African states in framing his proposals. Other common-law African states and territories vary in this matter: some have adopted the current English legislation (i.e., Companies Act, 1948) almost unchanged, whereas others have failed to modernise their laws at all. For example, in the Federation of Rhodesia and Nyasaland, although the Federation is competent to legislate on company law, it is unlikely that this power will be exercised in the near future, and company law is at present regulated by the respective territorial laws.

In Southern Rhodesia the relevant Act is the Companies Act No. 47 of 1951, as amended by Act No. 46 of 1953. "This legislation has been taken over very largely from the South African statutes on the subject, the provisions of which, with the exception of those relating to winding up, have in turn been derived almost exclusively from English sources and particularly from the United Kingdom Companies Act of 1948. The Southern Rhodesia statute can, therefore, be regarded as being up-to-date and containing all the most modern conditions in this sphere of law." Northern Rhodesia has a less modern company law, its Companies Ordinance, as amended, dating from 1921; whilst in Nyasaland the Companies Ordinance, cap. 22, applies to that Protectorate the provisions of the Companies (Consolidation) Act, 1908, and the Companies Act, 1913, of the United Kingdom.[1]

It will thus be seen that, in British African territories at any rate, all roads lead back to the United Kingdom as far as companies legislation is concerned.

The way in which the mind of the Commissioner may be moving is indicated in Professor Gower's opening address (as reported by *West Africa*, October 4th, 1958), where he observed that the current

[1] The quotation and information in this paragraph are taken from a useful *Guide for the Investor* recently (June, 1958) issued by the High Commissioner for the Federation in London.

English companies legislation is unsuitable for Ghana, though the Ghana law must adhere to the familiar English model more or less. "My mind", said Professor Gower, "is moving in the direction of suggesting a comprehensive code rather than a mere amendment."

There could be no better choice of a commissioner than Professor Gower, whose authoritative writings, wide and human interests, and deep practical knowledge of the commercial law of England make him eminently suitable to devise a new law for Ghana. As noted above, this enquiry is but the first stage in a comprehensive programme of law reform. Other African countries will watch with considerable interest the progress of this reform, and doubtless they will benefit greatly from the lead that Ghana is giving in this matter.

Urban Land Tenure in Northern Rhodesia

The setting up of a committee to enquire into the topic of urban land tenure in Northern Rhodesia was noted in an earlier issue of the Journal ([1957] J.A.L. 146), under the same heading. The committee reported in September, 1957, its report being entitled "Committee Report on the Tenure of Urban Land in Northern Rhodesia". This report was debated in April, 1958, in the Northern Rhodesia Legislative Council. The position has now been further clarified.

The Northern Rhodesia Government has decided to relax its policy of land tenure in urban areas (says a recent News Letter) and to introduce a system of freehold tenure, although certain types of land will be excluded. This was announced on September 3rd, 1958, by the Member for Lands and Local Government, Mr. John Roberts. Existing Crown leaseholders who had completed development to an extent and standard to be determined by the Crown would be eligible, unless it was against the public interest, to buy their land in freehold under terms still to be decided. Mr. Roberts said that details of the new land tenure policy would be announced once legislation had been introduced for the better control of subdivision and to ensure the proper use of stands in urban areas. The arrangements are subject to agreement by the Secretary of State for the Colonies.

Constitutional Progress in Basutoland

Basutoland Council: *Report on Constitutional Reform and Chieftainship Affairs*. July, 1958. Maseru. 130 pp.

This Report is not an official document in the sense that it is the report of a government committee appointed by the Basutoland Administration; though it is, of course, official in the sense that it is the work of two committees appointed by the Basutoland Council, the Constitutional Reform Committee under the chairmanship of Councillor George Bereng, and the Chieftainship Committee under the chairmanship of Councillor Mopeli Jonathan.

The Basuto people have long been calling for an increased share of responsibility in the government of their country, in particular by an alteration in function of the Basutoland Council from a purely advisory to a legislative body. The Council passed a Resolution, Motion 90, in 1955 asking for such an alteration in status; and in 1956 the Secretary of State replied to the Resolution that he was prepared to consider proposals whereby the Basutoland Council would be given power to make laws in regard to internal matters affecting the Basuto. The Secretary of State asked the Council to make considered recommendations on how the Central Government and the Basuto Administration might be associated with the Council in the preparation and discussion of draft laws, at the same time as it submitted detailed proposals with regard to the scope of its law-making powers.

The responsibility was thus squarely cast on the Council to make reasoned and acceptable proposals for the augmentation of its own powers; and the Council has now shown that it was worthy and capable of discharging this heavy task by the excellent Report which it has just published. Later in 1956 the Council, in conjunction with the Paramount Chief, appointed the two committees already mentioned; the two committees worked together and prepared a joint Report. In March, 1957, an invitation was extended to Professor D. V. Cowen, Professor of Comparative Law at the University of Cape Town, to act as constitutional adviser to the Council in view of the magnitude of the task facing the committees and the need for expert advice on the technicalities of constitution-making. The writing of the committees' Report was entrusted to Professor Cowen, though the whole of the Report as published was subjected to detailed scrutiny by the committees. It would be a fitting tribute to the value of this Report and of Professor Cowen's services to Basutoland if the Report came to be known as the " Cowen Report ".

The Report contains an extensive historical introduction, which recounts Basutoland's administrative and constitutional history, and also deals with some knotty problems such as who owns the land of Basutoland (the Report quite properly rejects the notion that Basutoland is Crown land if this implies that the Crown possesses any proprietary right therein; " the land is legally vested in the Paramount Chief in trust for the Nation ").

The nature of the problem facing the Council is delimited in Chapter 3. First there is the advance in constitutional status by the grant of a greater measure of representative government; then there is the " problem of dualism," i.e., the nature of the relations between the British Administration and the Basuto authorities; then there is advance in the local government sphere, where the Report advocates the setting up of local government authorities, with elected District Councils as the primary organs of local government; and lastly there is the question of the future of the chieftainship in Basutoland.

The Report envisages the transformation of the Basutoland Council into a partly elected legislative council, having power to legislate on a variety of matters. The Report suggests that,

subject to the retention by the High Commissioner of the power to legislate on a restricted range of "High Commissioner's Matters", the general power to make laws for the government of Basutoland should be exercised by the Paramount Chief with the concurrence of the Basutoland Council. The High Commissioner would thus only have reserve powers, and power to legislate in such matters as external affairs and defence, customs and excise, etc. The Council found the Secretary of State's reservation that the Council would only be able to make laws for the Basuto and not for Basutoland generally, unacceptable, and proceeded on the basis that the Council should have power to legislate for Basuto and non-Basuto alike.

The Council would not be an entirely elective body; it is recommended that 40 out of its 80 members should be indirectly elected by the District Councils sitting as electoral colleges, the other half comprising 3 official members, 22 chiefs *ex officio*, and 15 nominees of the Paramount Chief. It is obvious that the provision for indirect election would be merely a transitional one, as experience in other African territories shows that the indirect system becomes difficult to work when active political parties are in the field. The Council proposes that the right to vote should be restricted to members of the Basuto nation, though this expression would include a number of persons who are not Basuto, or perhaps not even of African descent. A certain amount of criticism of this restriction has been made; but in favour of it it can be argued that alteration of the qualifications for election would not enfranchise more than a few hundred non-Basuto, and that the Basuto people have very real fears as to the possibility of their policy, "Basutoland for the Basuto", being undermined if the door were opened, however narrowly, to non-Basuto who do not accept the Basuto national way of life.

The Report further recommends a measure of unofficial representation on the Executive Council, which would consist of four official members (including the Resident Commissioner, who would take the chair and have a casting as well as a deliberative vote), and four unofficials, of whom 3 would be elected by the Basutoland Council from among their own number, and 1 nominated by the Paramount Chief from among the members of the Basutoland Council. The Paramount Chief would not be a member of the Executive Council, but the interesting suggestion is made that the Executive Council might advise both the High Commissioner and the Paramount Chief in the exercise of their respective powers under the proposed new constitution; a sort of dyarchy with a single advisory body, though having slightly different functions according as it was the Resident Commissioner or the Paramount Chief who was in receipt of advice, is thus advocated.

As to the Chiefs, the Report proposes the setting up of a "College of Chiefs", which would deal with the recognition of chiefs, adjudication upon cases of inefficiency, criminality and absenteeism on the part of Chiefs, and upon disputes concerning succession to Chiefdoms.

It is not possible to do justice to the clarity and the complexity of this Report in a brief space; but it is to be trusted and expected that proposals of so moderate, comprehensive and reasoned a character will prove acceptable to the Secretary of State. Constitutional discussions between the Secretary of State and a Basuto delegation are taking place in November, 1958; out of these discussions it can be confidently predicted that Basutoland will receive that larger share in its self-government which the Basuto people desire and deserve.

Legal Education in Ghana

Reference was made, in an earlier number of the Journal, to the intention of the University College in Ghana to create a Department of Law, and at the same time to establish a Chair of Law, whose occupant would head the Department. More recently the Ghana Government announced the intention of establishing a professional School of Law in Accra, which would train candidates for the new professional examinations to be conducted by a Board of Legal Education. The intention of the University College has now been realised by the appointment of Mr. J. H. A. Lang, former Assistant Solicitor to I.C.I. and more recently practising at the Revenue Bar in England, as first Professor of Law. Professor Lang, whom one warmly congratulates on his appointment, is charged with building up the new Department, developing the law courses at the University College, and recruiting the necessary staff to conduct them.

At the same time Mr. Lang has been appointed the first Director of Legal Education at the new Law School. Here his task is to work out in detail the requirements for the Ghana Bar Examinations, which it is intended by the Government (*vide* the Legal Practitioners Act) should within the next 4 years become the sole qualifying examination, as far as Ghanaians are concerned, for practice before the courts in Ghana. This means that after the period laid down English and other legal qualifications will not entitle their holders to practise in Ghana, unless they also pass the necessary local examinations and are admitted to the Ghana Bar.

The fact that one pair of hands will hold both sets of reins means that the University and Board of Legal Education will proceed in concert (and not in competition) with their related tasks. Obviously this is a valuable solution to the problem of harmonising professional and academic requirements in the field of legal education.

These new developments are of the greatest importance for the future of the law and the legal profession in Ghana; and it is hoped to discuss the details of syllabuses and qualifying examinations—when they become available—in a later number of the Journal. This is the first Department of Law and the first professional school of law in a Commonwealth African country (outside the Union). Other British African countries, and especially the University Colleges of Ibadan, Fourah Bay, Makerere and Salisbury, will closely watch these experiments in the field of legal education as tailored to the needs of Africa.