BOOK REVIEW

Ulrich Wacker, Der Konflikt verschiedener Rechtssysteme vor, während und nach der Kolonialzeit in Kenia (Augsburger Schriften zum Staats- und Völkerrecht edited by Dieter Blumenwitz, vol.8). Frankfurt and Bern: Peter Lang und Herbert Lang, 1976 (pp.VII + 196).

Jahrbuch für Afrikanisches Recht - Annuaire de Droit Africain - Yearbook of African Law, vol.1, 1980 (pp.XIV + 212).

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The study of law in Africa has recently gained an increasing amount of attention from jurists in Germany, thereby enriching general research on comparative law.

Wacker's publication is his doctoral thesis submitted to the faculty of law at the University of Augsburg. Using Kenya's private law as an example, he endeavours to analyse the development of the legal system of an African country before, during and after colonization. Wacker does not try to undertake the task of giving a definition of the term "traditional African law" but instead consults old hands in the field of legal anthropology such as Austin, Dundas, Elias, Hartland, Hobhouse, Malinowski and Radcliffe-Brown among others. Concerning the origin of traditional law we are once again told that, at present, there is no useful information on the subject.

In dealing with traditional private law, Wacker takes the various ways of settling conflicts into consideration, devoting one short paragraph to self-help, his statement on this point being based upon the Turkana's conception of self-help.

Concerning the influence of Islamic law exercised by both immigrant Arabs and Asians, Wacker fails to bring to our notice the Islamic Somalis who not only live in Kenya's northeastern territory, but who are also scattered all over the country. Islamic law and the reception of common law are dealt with at length, but there is a marked absence of cases for illustration, especially where members of different ethnic groups are involved. On the other hand, we find that applied English common law did not function well at all in cases involving sorcery, witchcraft and the like. Conflicts consequently arose due to the unacceptability of the verdicts to Africans. The British judges and magistrates

were confronted with cases the likes of which were hitherto unknown to them.

Finally, Wacker deals with the development of the law of Kenya and its resulting conflicts after independence. The author is of the opinion that English common law ought to be used as a basis for the law in English-speaking African countries (p.161). His opinion, however, is not convincing. It is a well known fact that, in the strict sense, this would never function satisfactorily, and this is the reason why the Kenyan government has recently been introducing a new kind of law to be practised at a local level. This law, called mitaa, is a fusion of traditional and common laws from the administration of which magistrates and judges are excluded. The cases are presided over by volunteer mitaa-members who, at the same time, continue to administer justice in traditional courts. Anyone who is present and has an interest in the case, whether he is indirectly involved or not, may speak during the proceedings and even make suggestions for settling the case if he is competent. But the verdict is passed by the mitaa-members only. I have been witness to numerous such cases amongst the Marakwet of Kenya during 1981 and 1982 and am of the opinion that this type of law is adequate and functional. However, it should be stressed that the Marakwet still first and foremost try to settle their cases in the traditional courts; failing this they forward the case to the mitaa. The mitaa deals with land cases, theft, injury, assault, slander, adultery and the like. Murder and manslaughter are dealt with by magistrates in towns where there are government law courts.

"The Yearbook of African Law is intended to be of use to legal practitioners and academics concerned with African law and, in particular, to the African lawyer seeking information beyond the borders of his national legal system." (p.VIII)

The introductory article, "The past and future contribution of law to development in Africa", by Antony Allott is, like most of the articles in this volume, based on a paper read at the second annual meeting of the African Law Association in Heidelberg on November 12th, 1976. Allott puts forward the question, "Does law contribute to development?" during the discussion of which he considers the traditional, early and late colonial phases and the modern period. He comes to this conclusion: "Law is not only a factor of development; it is, or can be, also itself a tool of development." (p.5) This development may be positive or negative which means that law itself can either help or hinder development. Allott concludes his article by considering the future of law in Africa. He is of the opinion that, generally speaking,

African students have a well developed political conciousness and will therefore be more likely to put into practice the modern law they have learnt. Allott thus expects less law reform but instead more developmental changes in the law (p.19).

The Cameroon élève magistrate Belombé Yombi André comments only briefly on the "Modern law and the rural population" of his country. He comes to the conclusion that modern law appears to be a new reality to the rural people, forcing upon them originally unknown rules. However, the author considers modern law an extremely important factor on the road towards unity and stresses that it will eventually lead to a uniform social behaviour throughout the national territory.

Peter Bringer discusses the "Evolution and present problems of the administration of criminal justice in Cameroon". Due to the colonial heritage, even today we can find that the law in East Cameroon is influenced by French law, whilst that in West Cameroon is influenced by English law. Although the West Cameroon trial appears to be far the more efficient in terms of protecting the individual rights of the accused against abusive police power, the tendency is a clear shift away from the official modern courts to traditional courts. This is especially the case amongst the strongly traditional-minded population of the northern province who regard traditional law as better suited to handle their cases justly and adequately.

Although starting from a similar principle, Raymond Verdier takes a different course in his contribution on the dualism of modern and traditional law in Togo. In this instance the phenomena of the feminist movements and the increasing influence of progressive youth are involved in trying to improve in particular, the social situation. Because of their preference for modern law, they have become of special significance.

In his contribution on "The revival of Islamic law in Africa as a consequence of the emancipation of member states of the Arab League" Konrad Dilger deals with two member countries: Algeria and the Sudan. As a result of strong national identity, Algeria has demonstratively, after 15 years of independence, replaced the legislation of French origin. However, the new Algerian law is, in fact, a slightly revised version of the Egyptian Civil Code which itself is essentially based on French law. Socialist thought has, so far, not had any influence on the new Algerian Civil Code. English Common Law took root in the Sudan in 1898 and remained valid until after independence. Only after many years of revolution, in 1971, was the Egyptian Civil Code adopted. Two years afterwards, the new civil code was already a failure and in 1974 an independent Sudanese Common Law was introdu-

ced which itself was partly based on English Common Law, but also incorporated various Islamic elements. Thus, Islamic law is the primary source in family and inheritance law as well as in traditional law. The attempt to develop a pure Arabic Islamic legal system has failed. Regarding the future, Dilger says, "The Sudan is now on the way towards establishing its own legal identity; the use of traditional law in conjunction with an emphasis on Islamic law forms part of this process." (p.75)

Different thoughts regarding the private law system are brought forward by Klaus Wähler in his article on the "Current importance of Islamic law in the private law system of black African states". Private law in the former British and French colonies can be characterized as possessing a certain dualism between modern law and the traditional laws. It was mainly in the field of family law and in the law of inheritance that a certain pluralism in religious and traditional laws could be found. Many new African states are undertaking steps to try to replace or combine the laws of the former colonial powers with their own traditional laws. Especially in countries where there are large proportions of Islamic or Islamized ethnical groups, Islamic law is particularly taken into consideration.

The South African attorney Mathole Serofo Motshekga endeavours to explore the social basis as well as the legal justification and application of Apartheid policy. In 1948 the South African government introduced laws for Europeans as well as non-Europeans providing for separate facilities. Sexual relationships and intermarriages between the two groups were and still are prohibited. The South African government's policy is fundamentally based on racial discrimination which is revealed by the fact that the laws implementing South Africa's Apartheid allocate rights unequally to non-Europeans. The author concludes by drawing parallels between the present day South African legislation and those of totalitarian states such as the Nazi law introduced in 1935, of which we know only too well the fatal consequences.

There are two articles which are mainly concerned with co-operative societies, one by Martial Lipeb and the other by Hans-H. Münker. The first article deals with "Traditional forms of co-operation in African village communities as compared to modern co-operative societies". The latter article is primarily concerned with the "role of co-operative societies legislation as an instrument of state promotion of co-operatives".

Part two of the book under review is concerned with two research projects: "New prospectives and concepts of international law and the teaching of international law at African universities"

carried out by Konrad Ginther and Wolfgang Benedek and "Strafrechtspflege in Kamerun" by Kurt Madlener.

In part three, Kurt Madlener summarizes the congresses held by the African Law Association during the years 1975-1979. Part four is a review by Götz Nagel of recent legal literature, followed by three book reviews. The appendix contains the rules of the African Law Association and a list of its members.

The two books here under review demonstrate clearly the problems and conflicts which were brought upon African societies by the introduction and adaption of modern European law. However, there are hardly any comparisons between traditional and modern law which would, I think, help lead to a better understanding of the problems being dealt with here. As Franz von Benda-Beckmann stresses, "... systematische Vergleiche von Rechtssystemen oder von Teilen von Rechtssystemen (sind) selten. Selten bereits dann, wenn es um den Vergleich von Rechtssystemen traditioneller Gesellschaften geht. Noch seltener sind systematische Vergleiche zwischen Rechtssystemen traditioneller und europäischer, westlicher Gesellschaften." (1981: p.311) This seems to be symptomatic not only among jurists but also among legal anthropologists. Yet jurists would be in the best position to fulfil this task, the prerequisite for which would be a knowledge of traditional law.

Traditional law, however, does not seem to be of any interest to German jurists today. Yet in Germany, the subject was, as the legal anthropologist Rüdiger Schott recently demonstrated, "At first and for a long time solely the work of lawyers or jurists and not of ethnologists or anthropologists" (1982: p.38). Only a few names should be mentioned here, such as Albert H. Post, Josef Kohler and Georg Cohen. The founder of German legal anthropology was Austrian-born Richard Thurnwald who was himself a trained jurist.

As German jurists do not study traditional law, we might well ask who is then concerned with this uncodified law today? Anthropologists? Schott followed up this question and came to the conclusion that "the present generation of German students of ethnology seems to be terrified of 'law and order'" (1982: p.60), and wonders "why do German ethnologists keep aloof from these urgent tasks?" (1982: p.61). It is surprising, if not contradictory, that, according to the information in the Studien- und Forschungsführer Ethnologie mit Ethnologenverzeichnis 18 anthropologists specify their field of study as legal anthropology. Eleven anthropologists have studied law, but only five of them state that they are interested in traditional law.

The study of traditional law requires primary sources which makes field research necessary, a method familiar to the anthropologist but not to the jurist. And in fact none of the German authors of the books under review has carried out field research as understood by anthropologists. They obtained their information from published sources or modern African courts and universities. Jurists who endeavour to study African law - not merely foreign law in Africa - will have to go into the field and observe or even participate in traditional African law cases. On doing so, they should not be surprised if they find verified what Sir James Marshall, formerly chief justice on the Gold Coast and in Nigeria, is reported to have said almost one hundred years ago after having served as judicial assessor to African chiefs: "These people have their own laws and customs, which are better adapted to their condition than the complicated system of English jurisprudence." (cited from Elias 1956: p.35)

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