



# SOCIAL SCIENCES RESEARCH CONFERENCE

SOME PROBLEMS OF  
CONSTITUTION IN  
CONTEMPORARY AFRICA

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SOME PROBLEMS OF CONSTITUTION-MAKING  
IN CONTEMPORARY AFRICA

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Introduction

"Africa, like some great giant, awaking out of centuries of slumber, stretches its limbs, stands up and looks at the dawn. It is the dawn of its own day it is looking at . . . Africa is on the march. Can we not help it gird on its coat for the journey - it is a coat of many colours - the coat of African law". These eloquent and imaginative words are Lord Denning's.<sup>1</sup> They were written in a spirit of sympathy and confidence; and rightly so. But it is well to remember that legal clothes cannot be bought off the peg - they must be made to measure - and giants, moreover, are not easy to fit. Perhaps it is these among other factors which make contemporary Africa one of the most interesting and challenging parts of the modern world, particularly to those who would fashion constitutions.

It would of course be a mistake to exaggerate either the novelty or the uniqueness of many of Africa's problems. In the organization and art of government especially, and in the taming of power, all the great issues that have exercised men from the time of Plato and Aristotle are once again involved; and plainly there is much which the experience of the older countries has to offer. But when this has been said, it remains true that old problems have taken on a new urgency and demand a fresh approach in new contexts.

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\* The speaker has indicated that he may not, during his address, strictly adhere to his written text.

1. Foreword to "The Future of Law in Africa", being the Proceedings of a Conference on African Law held in London, December 1959 - January 1960, ed. Allott.

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If it be the case that law is, in large measure, a framework within which a community's social, political and economic life has its being, it is only within comparatively recent years that in many parts of Africa the problem of adjusting and adapting the framework itself has become urgent - due, in part, to the dramatic development since World War II of modern urban and industrial life, and their impact on tribal mores. And what is perhaps more important, it is only since the advent of their independence that the new nations themselves have, in modern times, had the full responsibility and opportunity to use law and legal institutions consciously as instruments in nation-building. The growth of African nationalism and the upsurge of independence throughout the continent have, indeed, given a powerful new fillip to endeavour; and in law, no less than other fields, mark the beginning of a new epoch.

This is not to lose sight of the positive achievements of the past. But much of what was achieved in African law and government during the 19th century and the first half of the present century, was accomplished within a colonial context, and within the limits set by colonial policy. The possibilities and perspectives are today vastly different; a great opportunity is now at hand for lawyers and others - and I speak primarily of lawyers - to do a major job of social engineering, such as Roscoe Pound advocated in the United States fifty years ago.

Again, few would nowadays make the mistake of assuming that African legal development began in the colonial era: long before European colonization, Africans had made their own contribution to law and its administration, and now they are free to do so again. But on this occasion the challenge is greater than ever before. For the first time African states are taking their place as adult members of an international society; and within their own borders, they are having to grapple with the formidable task of welding together what was good in the colonial heritage, and indeed what they may find to be good anywhere, with what they deem worthy of preservation in their own indigenous institutions - so as to make a stable, healthy and viable whole. Never before have lawyers in Africa been more fully alive to the fact that constitution-making is part of a wider social process; an operation designed - sometimes cynically - to provide means and institutions for implementing policies and balancing interests.

And so, it is perhaps worth while, as new vistas begin to open up, to take stock of the position and give some attention to current trends. Obviously these trends involve all the social sciences; but in this paper I shall confine myself to the field with which I am most

familiar - the field of constitutional law and government. It is a significant area of study, affording, as it does, a fair index of a nation's social and moral health; and, in contemporary Africa, it is seldom if ever dull.

If, going beyond the strictly constitutional field, I give emphasis to the international legal aspects of developments in Africa, it is because I believe that, in the modern world, constitutions cannot be regarded as purely domestic documents; they bear intimately on international claims and responsibilities. Indeed it is the international implications of nation-building and the international aspects of constitution-making which are, perhaps, the most interesting; it is here that many time-honoured concepts like "sovereignty", "state," "nation", "federation", "union" are being reassessed and reshaped.

#### Cultural and Legal Pluralism and the Growth of Ascending Unities

Basic to an understanding of contemporary Africa is the phenomenon of cultural and legal pluralism. By this I mean the present fact (whatever the future may hold) that in most parts of Africa peoples belonging to different ethnic, cultural and religious groups live within one and the same political unit under different systems of law.

To begin with, in most African states several different varieties of "customary", or indigenous, law operate side by side. Matrilineal systems, for example, differ significantly from patrilineal ones; and within each of these systems, in turn, there are tribal and regional variations. Then, too, account must be taken of the fundamental role that has been played in the past in various parts of Africa, and which is still being played, by particular Western legal systems, such as the English common law, French law, Roman-Dutch law, and the laws of Belgium, Portugal and Spain. An added complication - or, as I prefer to say, source of enrichment - arises in those areas where Islamic and Hindu groups are strong and where account must be taken of their laws. And finally, among the various states themselves, there are differences in the patterns and conditions of cultural and legal pluralism, and in prevailing policy.

It is not my purpose in this paper to examine the phenomenon of cultural and legal pluralism in detail, nor, though I shall be

concerned with a few of them, is this the occasion for a comprehensive discussion of the many problems to which the phenomenon itself gives rise.<sup>2</sup> It is relevant here to note broad trends rather than detail.

There can, it would seem, be little doubt that much of Africa's diversity will be preserved - consciously and, one hopes, wisely - for a substantial period. But the preservation of diversity is not incompatible with harmonization of differences where this is needed to ensure the achievement of common needs and purposes by common endeavour. Europe, for example, will surely retain its cultural diversity despite the harmonizing of important branches of law which the Treaty of Rome requires for the effective working of the European Economic Community. Again, the preservation of diversity does not preclude the fusion of elements derived from different legal and cultural traditions, in order to make a more workable and satisfactory product. Thus the gradual blending through the centuries of Germanic and Roman elements in the legal systems of Europe has not induced a drab cultural uniformity, though it has improved the quality of European law.

In achieving a balance between these three things: the preservation of diversity, the harmonization of differences in the interest of joint endeavour, and a measure of fusion to improve and enrich, lies the hope for what Mr. Albert Lutuli has called the gradual achievement of ascending unities among peoples generally - and notably among the peoples of Africa. "Somewhere ahead", he writes, "there beckons a civilization, a culture, which will take its place in the parade of God's history beside other great syntheses - Chinese, Egyptian, Jewish, European. It will not necessarily be all black, but it will be African."<sup>3</sup> Whatever the prospects for this prediction may be in Southern Africa in the immediate future, it is undoubtedly the current trend in vast areas of the continent.

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2. See, generally, my paper on African Legal Studies, to be published in the forthcoming issue of Law and Contemporary Legal Problems.

3. Let My People Go, American ed. p. 231.

In their more imaginative and leisured moments lawyers in Europe and the United States sometimes look forward to the fusion of at least two of the world's great streams of legal thought - the Anglo-American and the Romanistic. They recall how Roman law, after the fall of the Empire, received progressive infusions of Germanic law, and vice versa; they note that a system like the Roman-Dutch law became richer and more flexible because of its "hybridization", and they advocate an extension of the process.

I like to think that this may be more than an idle dream, and that one of the chief areas of fusion, extending beyond the welding of Romanistic and Anglo-American elements, will be contemporary Africa.<sup>4</sup> The strength of the English common law and of the English legal tradition is, of course, manifest in Central Africa, East Africa and West Africa. At the same time, the whole of Southern Africa, a major part of the Central African Federation, the Congo and the Portuguese territories, vast areas of West Africa, parts of North Africa, Ethiopia and Somalia - all have powerful infusions of Romanistic law. And what is more to the point, there are important areas in which English and Romanistic legal ideas have already achieved a mutual modus vivendi. For example, in South Africa and in Southern Rhodesia English ideas and an uncodified Romanistic system have long coexisted, and have tended both to fuse and complement each other. The need for a mutual accommodation of Romanistic and English elements is a major issue in the Cameroons today; and interesting developments in other parts of Africa may, of course, be expected if Pan-African aspirations are fulfilled.

Again, as between Western legal systems (both English and Romanistic), on the one hand, and indigenous customary law, on the other, the processes of "reception", "infiltration", and "hybridization" have long been at work in many parts of the continent, especially in the urban areas - where a kind of modern jus gentium appears to be developing.

If these processes are to be encouraged, if the goal of ascending unity is to be achieved, it is necessary to avoid certain errors and to cultivate certain virtues in the process of nation-building, and in the closely related task of constitution-making.

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4. If Britain joins the Common Market, Europe will again become a focus of interest in this regard.

Among the errors to avoid, there are two in particular which I would like to deal with in this section of my paper, deferring discussion of the more positive aspects to the section immediately following.

In the first place, in several African states today there is a discernible tendency to hasten the development of a single national legal system, and to play down the role of laws which are personal to religious, tribal and ethnic groups. Various reasons may be given for this trend; but perhaps the most obvious ones are that a uniform national legal system may aid the development of national unity and sentiment, and, if conceived on modern lines, may at the same time, contribute towards the "modernization" of a country previously regarded as "backward". It was partly for these reasons that in Turkey in 1926 Kemal Ataturk sought to eliminate pluralism inter alia by the radical substitution of a modern law of Swiss origin for the then prevailing multiplicity of personal religious laws in the Ottoman Empire.<sup>5</sup>

There are, however, obvious dangers in attempting to force the pace along the lines favoured by Kemal Ataturk. Thus, to give one example, some branches of law are more deeply and emotionally involved with the life and culture of a people than others; and hence more resistant to sudden and radical change by legislative fiat. This is the case, for example, with family law and the law of succession as distinct from, say, the law relating to such international and impersonal transactions as negotiable instruments. And for this reason family law may well lend itself more easily, and ultimately more effectively, to adaptation and development by the gradual process of judicial interpretation and the influence of public opinion, rather than by radical legislative reform. Indeed,

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5. Compare the conclusions reached by the London Conference on The Future of Law in Africa, December, 1959 - January, 1960; Butterworths, 1960. And see Bryce "Roman Law and English Law", in Studies in History and Jurisprudence, vol. 1, pp. 98, 124 sqq.

For an account of the nature and effect of the Turkish experiment, see, generally, The Reception of Foreign Law in Turkey, the proceedings of the Istanbul Conference, 1955, reported in Annales de la Faculté de Droit d'Istanbul, 1956.

by provoking resentment, the steam-roller approach may, in the long run, prove divisive rather than unifying.

Secondly, it is essential to avoid parochialism in outlook. There has, for example, been a regrettable but very widespread tendency among English-speaking lawyers, and in English-speaking law schools, to concentrate on English and to a lesser extent, American constitutional ideas, virtually to the exclusion of continental ideas, in the study and exposition of constitutional and administrative law. In part this tendency is attributable to the fact that, where it occurs, the English constitutional system is the law of the land - at any rate in outward form. In part, too, it has derived in some quarters from a peculiar notion that Continental or Romanistically based constitutional regimes are adverse to freedom. "It cannot be denied", writes Sir Henry Slesser, "that absolutism in government has often gone hand-in-hand with the reception of civil law, for civil law is of dictatorial origin." <sup>6</sup>

Neither of these considerations, however, affords any sufficient justification for parochialism; and Sir Henry Slesser's views, in particular, are, with respect, exaggerated. <sup>7</sup> Romanistic systems are not necessarily enmeshed in doctrines like quod principi placuit vigorem legis habet - as anybody familiar with the history of Scotland and Holland well knows. Happily there are already indications of a change of attitude, especially in African

6. The Law, 1936, pp.10-11. To the same effect, a statement by Mr. Justice O. W. Holmes, quoted by O'Sullivan, The King's Good Servant, 1948, p.19.

7. For what is submitted to be a better assessment, see F.H. Lawson, A Common Lawyer Looks at the Civil Law, 1953, p.211. And see, generally, D.V.Cowen, The Foundations of Freedom, pp. 208-9, 223.

Sir Henry Slesser has adhered to his views consistently for many years. See, for example, the recent exchange of correspondence between him and Mr. E.N. van Kleffens of the European Coal and Steel Community in the columns of The Times, May 24th, 1962.



legal circles. In this regard the appointment of a Swiss constitutional lawyer to advise the KADU delegation at the recent Kenya Constitutional Conference at Lancaster House (February, 1962), is not without significance; and the appointment of Professor Weston, a lawyer with both a Romanistic and an English common law background, to be Dean of the Law School recently established in Dar-es-Salaam, is very encouraging.

It is well that this widening of horizons should come about; for Continental public law is, in fact, a store-house of principle of considerable significance for contemporary Africa. Consider, for example, practices like the modern Continental alternatives to judicial review by the ordinary Courts, which have already made an impact in what was formerly British Camerouns; or the German idea that, in the interests of freedom, legislation should apply generally<sup>8</sup> - especially legislative exceptions to constitutional guarantees - and that the need for protection should be focussed rather more on administrative action; or, again, the requirement that constitutionally guaranteed human rights, though not absolute and subject to qualification, may not be infringed "in their essence";<sup>9</sup> or the provisions in the West German Basic Law which are designed to offset potential instability in Cabinet government of a Parliamentary kind.<sup>10</sup> Not only are these ideas interesting in themselves, but, as we shall see more fully presently, they may well play an increasingly important role in contemporary Africa - not only, what is more, in areas where Continental influence has in the past been strong. In short, if, as I believe, there is always a strong case for dealing with problems of constitutional and administrative law comparatively, it is especially strong in contemporary Africa, which seems healthily determined to remain flexible in the pursuit of precedent and example.

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8. Art 19(1) of the Basic Law of the West German Federal Republic.
  9. Art 19(2) of the Basic Law of the West German Federal Republic.
  10. Art 67 of the Basic Law of the West German Federal Republic.

A word, now, on the relevance of the indigenous governmental traditions of Africa. Anyone concerned with constitutional law in Africa does well to remember that among many African peoples, the idea of constitutionalism is no novelty, and that indigenous institutions have much to teach concerning the methods of taming power.<sup>11</sup> No one would seriously suggest that the old ways of disciplining tyrannous chiefs, or the old procedures for obtaining a full and free consensus of opinion on matters of public concern, are wholly applicable in a modern state; but modern techniques are often only means of achieving ancient and familiar objectives, and it helps greatly to give them vitality and acceptability if it can be shown that, despite their possibly unfamiliar garb, they are really old friends.

South African and Rhodesian universities are, of course, particularly well placed to study and aid the growth of a system which aims not only at accommodating indigenous African and Islamic elements, but which may also incorporate what is best in the Romanistic and Anglo-American traditions. For the time being this role may, however, be played more actively in centres of learning beyond the borders of South Africa; but one day, when present racial preoccupations and digressions have passed away, Southern Africa will, I hope, contribute in full and great measure to a rich and distinctively African legal development.

#### New Patterns of Closer Political Association

One of the outstanding facts of contemporary Africa is the great interest which is being shown by the newly independent states, and by those on the eve of independence, in forms of closer association. As is well known, this interest stems from many causes, among them being (i) a desire to avoid the impotence of "balkanization", and to secure the advantages in economic prosperity, military strength and international influence which, it is felt, may result from association on a large scale; (ii) a desire to remedy the effects of the artificial boundaries established

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11. The point has been emphasized by almost every informed writer on African institutions. See, for example, Maclean's Compendium of Kaffir Laws and Customs, 1858, pp. 24 sqq; J. M. Sarbah, Fanti National Constitution, 1906; and among more recent writings, I. Schapera, Government and Politics in Tribal Societies, 1956, pp. 135 sqq; and M. Fortes and E. E. Evans-Pritchard, African Political Systems, 1940.

during the scramble for Africa, by superimposing more inclusive and appropriate boundaries; and, perhaps, (iii) the sense of brotherhood involved in Pan-Africanism.

All this is perfectly natural and understandable; and, from one point of view, it would seem to suggest little that is either novel or of compelling interest; for history affords many other examples of movements towards closer association for basically similar reasons. But when one looks deeper, the contemporary African scene deserves the closest attention, because many of the African states are professedly seeking to evolve patterns of association which do not easily fit into the conventional categories of "federation", "confederation", "political union", "customs union" and so on.

With these considerations in mind the Centre for Legal Research (New Nations) in the University of Chicago organized a Symposium on Federalism in the New Nations, earlier this year, to discuss the relationship between the achievement of the particular objectives which peoples may have in desiring closer association, and the form of political or constitutional structure best suited to achieve these objectives.

The Conference was attended by persons from many parts of Africa as well as by economists, constitutional lawyers, sociologists, anthropologists and political scientists from the United Kingdom, Continental Europe, India, Australia, Canada and the United States.

During the course of a week's conference, we discussed many topics; and it is not my purpose here to attempt a summary of the papers which were presented, the discussion which took place, or the conclusions which were reached.<sup>12</sup> There are, however, a few topics of direct relevance, which were dealt with, and which I would like to develop somewhat.

(a) Clear-minded Assessment of Means and Ends

One of the advantages of an internationally composed conference on law and government, especially if it is interdisciplinary, is that it may help to disabuse people's minds of a

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12. I am at present editing the proceedings for publication, it is hoped, early next year.

certain amount of nonsense and delusion, and open the way for the clearer perception of real issues. In this regard the Chicago Conference was rewarding. Those, for example, who tended to think about movements towards closer association in terms of clear-cut categories, neatly labelled "political union", "federated state", "a confederation of states", "customs union", "common market", "common services organization", and so on, were soon disabused; they came to see that this was both unfruitful and divorced from current reality. Rather than devote time to conceptualism, and problems of definition, it is preferable to regard movements towards the closer association of peoples and groups as taking place upon a wide spectrum of development, in which peoples who think of themselves as members of more limited communities gradually broaden their awareness of interests, concerns and needs which they have in common, and which can only be satisfied by common endeavour.<sup>13</sup>

Those who on the basis of some of the experience of some of the older federations, feared that classical federation leads progressively to overbearing and irresistible power at the centre, found reason to modify this view.

Those who had become disenchanted with the whole idea of federalism because of the "bad odour" which it has acquired in Central Africa and Indonesia, came to realize that good institutions may be used for bad ends. They saw the Central African experiment as an abuse of federal machinery - a means whereby an entrenched minority controlling a powerful centre dominates an overall majority. But it did not follow that the institution of federalism should be jettisoned because of previous misuse. It could be remedied. "Give me three black Prime Ministers," said one delegate, "and of course I would be in favour of a a (re-drafted) Central African Federation."

Those who saw in federalism the only way of effectively entrenching a Bill of Rights came to see that this was not the case.

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13. Points emphasized at the Chicago Conference with great force, especially by Gabriel d'Arboussier, the Minister of Justice, Senegal, Professor Robert Bowie of Harvard University and by Dr. Oscar Schacter of the General Legal Division of the United Nations Secretariat.

In this regard the recent Constitution of Jamaica is instructive. <sup>14</sup>

There were those, too, who emphasized - and rightly emphasized - the danger of big states, and wished to retain a maximum of autonomy in small communities - who felt, with de Jouvenel, that :

"The big state is a bad thing in itself. It becomes all the more blind to individual realities as its size increases. It becomes more inhuman, more geometric, more automatic. It cannot recognize individuals and their size, but only their classified files. If in a small state there may be injustice through favour consisting of unequal treatment of equal cases, the big state presents another form of injustice - injustice through classification, and consisting in treating unequal cases in a uniform way. The Greeks believed that the dignity of the individual only finds assurance in a small state where each may make himself heard and where each is taken into consideration. 'The empire,' said the Greeks, 'is the work of barbarians, as the city is the work of civilized men.' "

It was salutary for such persons to be reminded by Professor Paul Freund, of Harvard, that though size had its dangers it also had its advantages. He reminded the Symposium that James Madison in a brilliant essay, No. 10 of the Federalist series, had shown that size had within it the seeds of its own salvation; for the very multiplicity of interests potentially present in a large association requires (as, indeed, the history of the United States has proved), shifting coalitions on various issues - and this tends to operate as a barrier against the tyranny of a firm majority. <sup>15</sup>

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14. Constitutional amendments require a measure of support from the opposition.
15. "Extend the sphere . . . take in a greater variety of parties and interests; you make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens." Federalist, 10, p. 47 (Max Beloff's edition).

Again, those who saw federalism as the only means of preserving cultural diversity were corrected by the examples of the United Kingdom and Holland - unitary systems enjoying very considerable cultural diversity.<sup>16</sup>

But, for present purposes, perhaps the main point emphasized by both lawyers and political scientists at the Chicago Conference<sup>17</sup> is the importance of recognizing that constitution-making is a functional operation in which it is necessary first to identify the actual human interests, and clarify the human objectives involved. Only when this has been done can one realistically begin the more technical though very sophisticated task of devising means and instrumentalities for the accommodation of interests and the achievement of objectives.

Moreover, if this task of adjusting institutions for the achievement of objectives is to be successfully accomplished, there would seem to be certain minimum requirements. In the first place it is necessary to uncover or disclose real objectives as distinct from bogus ones (which are often camouflaged in fine phrases). Then it is necessary to place objectives in some order of priority; for often choices have to be made between having one's cake and eating it. And thirdly - to revert to a point which I mentioned earlier - it must be kept in mind that the search is always for the appropriate pattern of government, not the conventional stereotype nor the precise label; for there are many possibilities of closer association at various points in a wide spectrum.

Let me now try to give these points concrete illustration in a few specific cases which are of immediate practical significance in contemporary Africa.

(b) Federation and Economic Benefit

Critics of political federation in Central Africa, when they give their attention to economics, tend either to cry down the economic advantages of closer association among states; or alternatively, while conceding that in certain circumstances economic advantages do result from a customs union and, on a more comprehensive scale,

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16. A point stressed by Professor Morton Grodzins of the University of Chicago.

17. Especially by Professor Rustow of Columbia University and the Brookings Institution.

from a common market,<sup>18</sup> question whether it is necessary, in order to gain these advantages, to establish a supra-national political entity, a new political state with law-making and tax-raising powers. They ask, as Advocate H. W. Chitepo asked in a notable paper presented to the Chicago Conference, whether it would not suffice to set up a mere treaty relationship between the associating states, along the lines, perhaps of the East African Common Services Organization.<sup>19</sup>

Possibly these views as to the economic advantages which may be achieved in Central Africa without political federation are coloured by an antipathy (which is, I think, understandable enough) to the very notion of federation. For, in this regard, it is interesting to observe that the same doubts about the need for political association in order to secure economic benefit were voiced in East Africa during the years before World War II, when it was feared that East African federation would be merely an expedient for white minority control over the African majority. But now that these fears have been removed - there is no longer any possibility of white domination in East Africa - we find leading politicians, like Dr. J.G. Kiano of the Kenya African National Union, taking pains to show why the full advantages of a common market cannot be secured in East Africa without a substantial measure of political federation; without, in short, establishing an adequately powered central government.<sup>20</sup>

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18. For the nature of these advantages, see the short and lucid account in The Report of the Economic and Fiscal Commission (East Africa) - the Raisman Report, Cmnd. 1279 of 1961, paras 45 sqq; and compare the rather more perfunctory paragraphs in the Monckton Report, Cmnd. 1148 of 1960, paras 50 et. sqq.
19. Adv. H. W. Chitepo, formerly of the Southern Rhodesian Bar and a leading member of ZAPU, is now Director of Public Prosecutions in Tanganyika.
20. This was, indeed, the main burden of his paper on The Emergent East African Federation, presented to the Chicago Conference.

That Dr. Kiano is correct in his conclusion may, I think, be demonstrated by the lessons of history, by the provisions of the Rome Treaty setting up the European Common Market, and by certain considerations of a more theoretical nature.

Neither the Zollverein (1836-71), which preceded closer political association in Germany, nor the pre-Union Customs and Railways agreements negotiated in South Africa, nor the Articles of Confederation which preceded the establishment of the American federation in 1789, afford any evidence that economic benefit among states can be promoted and peacefully shared without a substantial measure of political integration. Indeed the evidence is the other way, and in all three cases the economic imbalance which resulted from political impotence repeatedly threatened to break out into armed hostility.

Again the framers of the Treaty of Rome gave a great deal of thought to the relationship between a customs union (or external tariff barrier) and the maintenance of an internal free market in goods, services, capital and labour (a common market); and especially to the conditions necessary for obtaining the benefits of such institutions. They reached the conclusion that customs unions and common markets were, in fact, interrelated; and what is perhaps more pertinent for present purposes, they were satisfied that the advantages of a common market could not be achieved without harmonization or approximation of laws among the Six in regard to such matters as anti-trust (anti-monopoly) legislation, dumping, state aid, tax benefits, and social security laws. <sup>21</sup>

In regard to the more general theoretical considerations involved, I do not propose here to canvass the field. It must suffice to say that the case for a substantial measure of political organization in order to secure economic benefit in trans-national association has been argued with great cogency by Lord Robbins, <sup>22</sup> and more recently, with special reference to economic growth and industrialization, by Professor Soia Mentschikoff. <sup>23</sup>

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21. For specific provisions see Article 85 et sqq. of the Treaty.

22. "Economic Aspects of Federation", in Federal Union, a Symposium edited by M. Channing-Pearce, London, 1940, pp. 167 sqq.

23. In the course of a powerful paper presented to the Chicago Symposium. See also Federalism and Economic Growth in Underdeveloped Countries, ed. Ursula Hicks, London, 1961.



The nub of the matter is that if states would enjoy the economic advantages of a common market, they have to pay a political price - a price involving a surrender of national sovereignty in the economic field.<sup>24</sup> Thus, to give one illustration, the Dutch Constitution was specifically amended to enable the Netherlands to participate effectively in the European Common Market; the amended constitution expressly provides for the supremacy of international treaties over national legislation or, indeed, over the national constitution itself.<sup>25</sup>

This is not an easy price for new nations to pay.<sup>26</sup> But it is noteworthy that the constitutions of Ghana and of several West African states in the French-speaking area do, in fact, specifically provide for a surrender of sovereignty in the interests of international cooperation. This, on the face of it, augurs well; but only the future can establish whether constitutional professions of this kind will be matched by actuality.

(c) Federalism and International Legal Relations

In the course of his paper on "The Emergent East African Federation",<sup>27</sup> Dr. J.G. Kiano said that :

"The realities of the situation call for a novel type of federation - that provides the central government with a very wide range of powers in administrative, economic and social-service matters, while specifically leaving the fields of foreign relations, international defense, and cultural development to the separate states."

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24. See, in particular, Gerhard Bebr, "The Relation of the European Coal and Steel Community Law to the Law of the Member States" in vol. 58, Columbia Law Review, 1958, pp. 767 sqq.

25. See also Art. 24(1) of the West German Basic Law and Art. 11 of the Constitution of Italy.

26. Compare the reluctance of the states of the Netherlands to give up any of their newly won sovereignty after the struggle against Phillip II.

27. Above, p. 14, note 20.

The reason for such a proposal was stated by Dr. Kiano in the following terms:

"After all, Africa wants to play a decisive role in international politics. To do this, African countries can ill afford to reduce their voting strength in international matters."

In terms of conceptual categories, the problem posed by Dr. Kiano may be stated as follows : can one combine the advantages of a "federation" for internal or domestic purposes with those of a "confederation for international purposes? Or, as I prefer to formulate the issue, more functionally, what are likely to be the effects of making the attempt (a) on the proposed federation, and (b) on international legal relations.

Dr. Kiano and others see, as a precedent for the kind of accommodation which they envisage, the relationship between the Union of Soviet Socialist Republics and the constituent Republics of Byelorussia and the Ukraine. But are they right?

It must be emphasized that there are both advantages and disadvantages in attempting to follow the Russian precedent; and the disadvantages probably outweigh the advantages. To begin with, looking at the matter from the purely internal or domestic point of view of the associating states, one must offset against the formal retention of "sovereignty", (a) the additional cost of diplomatic representation; (b) the risk of jeopardizing the political stability of the federal government - especially where centrifugal forces are strong; and (c) the risk of a weakened impact in international relations, which might result from presenting a divided front to the outside world.<sup>28</sup> For these, among other reasons, it is generally considered to be wise to make international relations the overriding concern of the central government.<sup>29</sup>

It is true that the expedient which we are now discussing works in the case of Russia; and in fact Russia derives considerable

28. One of the main themes of a paper written by Professor Kenneth Dam for the Chicago Symposium on Federalism.

29. See also Lord Robbins' essay, note 22 above.

diplomatic advantage in the United Nations and elsewhere by reason of the separate international identity of Byelorussia and the Ukraine.<sup>30</sup> But it is at least doubtful whether the reasons which induced world powers to recognise the separate identity of Byelorussia and the Ukraine could easily be duplicated; for Russia succeeded in pressing her claims by hard bargaining and with great resources during a critical formative period in the life of the United Nations. Whether African states could exert similar pressure on the United Nations today, without disrupting the organization, is another matter.<sup>31</sup> Again, while it is true that the Constitution of the U.S.S.R. makes provision for formal autonomy and independent statehood among the component republics - designed, *inter alia*, to open the way for multiple voting in international organizations - it is probable that this kind of *de jure* or formal independence can only be successfully manipulated where, *de facto*, there exists rigorously co-ordinated political control.

This is not to say that the member states of an associating group, which have technically abandoned sovereignty in a federal structure, should be denied all participation in international organisations. If they do not pitch their claims too high; if, for example, they were to confine their claims to membership of the associated agencies of the United Nations (UNESCO, W.H.O., W.M.O., etc.), there would be both sound precedent and sound reason in their favour. There are, however, limits to what can be done without seriously blighting the tender but incalculably valuable plant which we call international law.

The moral of all this is, perhaps, the need for scrupulous candour in formulating and stating objectives, and a sober weighing of what is involved to achieve them. Without this, constitution-making may degenerate into a cynical process of make-believe and double-talk.

(d) Federalism, Ethnic Groups, and Human Rights

Turning now to the protection of individual human rights and of group rights, here again there is need for scrupulous candour and clarity.

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30. Aspaturian, op. cit.

31. A point which has been developed by Professor Dam, note 28 above.

To begin with, it is necessary to distinguish clearly between individual and group rights. One may achieve an effective protection for the position of a group qua group, yet within the group itself the individual may not be protected. French Canadians in Quebec have thought much about group rights but they have not hitherto been conspicuous in the assertion of individual rights.<sup>32</sup>

Secondly, if it is feared that a small group may be "swamped", as a group, by a larger or economically more powerful group - which is, for example, the KADU fear in Kenya today, or the fear which the Malays have for the Chinese in Malaya - it by no means follows that classical federation is the answer. In fact, where the members of ethnic or religious groups desire special protection, but where they are dispersed horizontally throughout the community, then it would seem that federalism as such has no role to play in their protection. This is a point that has been well expressed by Mr. F.G. Carnell of the University of Oxford. Dealing specifically with Central Africa and Malaya, he says:

"It would be generally conceded that federalism is an attempted solution to territorial rather than racial conflicts of interest. It endeavours to square unity with diversity, but it can only do so on the supposition that the major diversities are territorially expressed. If the major diversities have no inclusive territorial base but traverse the whole society in the form of racial or communal conflict between intermingled communities, it is extremely doubtful if federalism can serve any useful purpose . . . There are undoubtedly almost insuperable difficulties over working an orthodox federal system in plural society federations like Central Africa or Malaya".<sup>33</sup>

In these circumstances, then, assuming it is considered desirable to give protection to groups as such, there are other more appropriate constitutional techniques which may be used for this

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32. A point stressed by both Professor Stanley de Smith, of the London School of Economics, in the course of an admirable paper presented to the Chicago Conference, and by Dean Frank Scott, Q.C., of the Faculty of Law, McGill University, Montreal.

33. Federalism and Economic Growth in Underdeveloped Countries, ed. Hicks, pp. 22-3.

purpose, such as "protective discrimination" clauses, along the lines of those in the Indian and Malayan Constitutions - clauses which guarantee a quota of jobs, and so on. Again one may resort to specially composed second chambers in a bicameral system - a topic to which I shall revert presently.

Thirdly, it should be remembered that the entrenchment of group rights may not only conflict with certain individual rights (as is the case, for example, where land rights, or jobs, or a quota of jobs, are reserved for a group), but it may also tend to harden divisions which one would hope to eradicate in the course of time. Though, as a matter of expediency, deviations from principle may sometimes have to be made in the interests of nation-building, they should only be accepted after the most careful weighing.

Fourthly, it is sometimes argued that individual rights themselves can only be effectively entrenched within a federal structure. This is plainly not the case. There are, in fact, several ways in which Bills of human rights may be effectively entrenched within a unitary constitution, and even within a plural society. One way is to entrench the constitution as a whole,<sup>34</sup> to establish a second chamber representative of the various groups in the state,<sup>35</sup> and to require a measure of consent from all groups when amending the constitution. This, incidentally, is an expedient which is being canvassed in several parts of the world beyond the borders of South Africa - for example, by KADU in Kenya.<sup>36</sup>

Having called attention, however, to the limitations of the federal "solution" in a racially plural society, where the various groups are widely dispersed and inter-mingled, I would like to guard against the suggestion that such a situation excludes the usefulness of federation for purposes other than group protection.

34. On the importance of giving rigidity to the constitution as a whole, as distinct from the fatally defective formula of "partial rigidity", introduced by the framers of the original South Africa Act, see my Foundations of Freedom, pp. 133-5.

35. Either by proportional representation, or in one of several other ways.

36. And compare the new Constitution of Jamaica.

On the contrary, the very size of a large country, and its geographical formation, may well justify the use of the federal principle. And where this is the case, other substantial benefits may also be gained.

Indeed, federation has considerable value in itself; for it disperses power, induces the habit of negotiation and compromise; and by allaying fears, allows groups to grow into the gradual awareness that they may have common interests, needs and concerns, which can only be satisfied by cooperative action.

### The Future of the Westminster Model in Africa

Earlier I said that legal clothes must be made to measure. This is especially true of constitutions. That the Westminster model of government is not easily transplantable abroad - that it is not always suitable tropical dress - is indeed a truism, and evidence accumulates daily to illustrate the point. Ghana's Independence Constitution was fashioned on the Westminster model; yet within a very short space of time it was radically changed - the Bill of Rights provisions, and the patterns of both legislative and executive government have all been given an entirely new look. Tanganyika is soon to have a president who, it seems, will be much more than a figure-head; and Nigeria is following suit. The "party-system", as it has developed in Great Britain, and upon which so much of British constitutional practice is based, is likely - for some considerable time at least - to develop along very different lines in many parts of Africa. <sup>37</sup>

The general lines of these developments are, however, reasonably familiar, and probably do not need elaboration here. Certainly broad "brush-work" embodied in phrases like "the drift to autocracy", and similar stuff, <sup>38</sup> do not seem to me to get one very far; nor is it very illuminating. Rather than this sort of thing, I have thought it might serve a useful purpose if I deal in concrete terms with a few specific examples of constitutional practice in

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37. See, generally, a perceptive article by Chief H. O. Davies, Q. C., of Nigeria in the January, 1962, issue of Foreign Affairs.

38. See the letter of the High Commissioner for the Federation of Nigeria, The Times, 1st May, 1962.

African states which are likely to deviate materially from the Westminster model. I shall have to be selective rather than comprehensive, partly because I do not know enough to be comprehensive, and partly to avoid an already long paper dragging on to inexcusable length.

(a) The Need for Executive Stability

Executive power is perhaps the main aspect of government which will react distinctively to the plural nature of African societies, and the widespread absence of anything like the British party-system. Increasingly, as it seems to me, claims will be heard among the discerning for executive government to be organized along, say, Swiss lines in preference to the Westminster model. Thus, to begin with, Swiss practice accords representation to the various cantons on a seven member executive - which could be a useful precedent in African territories where ethnic and regional loyalties are too strong to overlook.

Again, while the Swiss executive (the Federal Council) is democratically the servant of the legislature (the Federal Assembly), stability is ensured by the fact that the Federal Assembly elects the Council for 4 years - and neither the constitution nor convention requires the resignation of the Federal Councillors, should their policy conflict with the Assembly's.

It was not surprising, therefore, at the Conference on Kenya's constitutional future, which was held in February, 1962, at Lancaster House, to find the KADU delegation favouring an executive structure modelled on Swiss lines. A less radical innovation, which would allow the continuation in substance of the British model, and yet provide a degree of stability and continuity of executive policy, would be the West German provision under which the government cannot be unseated on a mere vote of no confidence - in addition an alternative government must be proposed.<sup>39</sup>

(b) An Increasing Use of Strong Second Chambers

If it be the case that the need to accommodate pluralism and to provide stability are likely to result in material modifications of the Cabinet system in many African Territories, it should be

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39. Art. 67 of the Constitution.

added that there is another material factor which points in the same direction. And that is the increasingly important role which may be played by strong, specially composed, second chambers in several parts of Africa. For obvious reasons the existence of a strongly powered second chamber, especially if popularly elected, has a close bearing on the subject of cabinet responsibility.

Nor can there be much doubt that the case for second chambers will continue to be pressed; for not only may such bodies act as powerful bastions of a constitution itself, but in plural societies they ensure that significant minorities are not overlooked.

Moreover, in societies in which a traditional chieftainship is an important factor, a second chamber may perform a most useful function in associating the more traditional elements with new centres of power. In Basutoland, for example, though in 1957-8 a single chamber comprising Chiefs, ex officio, as well as popularly elected members, was favoured, I have come to doubt the wisdom of that decision (and let it be added, several others) though I was party to the constitutional drafting - and accept my share of responsibility for it. A House of Chiefs, along Nigerian lines, might have been a wiser choice; nor, in view of the moderate powers enjoyed by second chambers in Nigeria, would such a choice jeopardise the growth of a Cabinet system, should it be decided that a Cabinet system may flourish in Basutoland.

This is not the occasion to elaborate upon how the position in Basutoland could be improved and developed, beyond, perhaps, saying this: it was fully anticipated that the 1958 constitution would be merely a first tentative step out of the doldrums towards greater responsibility; and certainly the experience of the last four years should make the road to greater self-government much easier. <sup>40</sup>

(c) Heads of State

I come now to the last of the subjects with which I propose to deal. Between the more formal type of head of state, like the President of India - who has substantially the powers and functions of the British monarch - and a president like General De Gaulle or Dr. Nkrumah, there is very wide scope for differentiation in function

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40. See more particularly, the Basutoland Constitutional Report, 1958, paragraph 84.



and power. I have no intention here of reviewing the field. There are, however, two aspects of the subject which may be appropriate for discussion on an occasion such as this; and I raise them summarily with the specific purpose of provoking discussion.

In the first place it would seem that in those areas of Africa where a traditional chieftainship has lost the balance of power to what have been called "the new men", and where the Head of State may well be a "new man", enjoying wide popular support, the office is likely to be far more than an ornamental one - less like the presidency of India, for example, and more like the presidency of the United States. At the same time the scope for experiment is vast - and most fortunately so.

Secondly, in those areas where a hereditary chieftainship, and especially a hereditary Paramountcy, is still a powerful factor in politics - alongside a growing democratic movement - the pattern may have to be somewhat different. If, as I believe, there is a very strong case for making traditional rulers in territories like Uganda, Basutoland and Swaziland Heads of State, the course of wisdom may be to structure their powers nearer to the model of a "constitutional ruler". Though here, again, I must guard against any suggestion (mischievous or innocent) that this means reducing a traditional ruler to the status of a mere rubber stamp. Not only does such a suggestion grossly misconceive the status of a "constitutional ruler", but, what is more, there is scope for considerable variation in patterns of power and function. The search, let me repeat, is always for the appropriate institution of government, not the stereotype.

It is, for example, tempting to see a possible source of guidance for Uganda (no more than a source of guidance - and not to be slavishly copied in detail) in the Malayan arrangement whereby the rulers quinquennially elect from among their number a head of state (the Yang di Pertuan Agong). However, this would involve recognition on the part of the Kabaka of Buganda that he should, from time to time, be no more than first among his peers - the Omugabe of Ankole, the Omukamas of Bunyoro and Toro, and, perhaps, the Kyabazinga of Busogo.

But it is time to draw these speculations to a close. Might it perhaps be that the aphorism *ex Africa semper aliquid novi* may come to be as appropriate in the field of constitutional theory and practice as it was to the natural historians of the ancient world.



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