

## Chapter 2

## GOVERNMENT UNDER LAW IN AFRICA

*Introduction*

African Societies may broadly be classified into two main types — the chiefly or monarchical, and the chiefless or republican. Most indigenous African societies fall into the first group. In the chiefly or monarchical type, authority is concentrated rather than diffused, while in the chiefless or republican type, government and authority are not markedly institutionalized. The kingly societies are characterized by the existence of a centralized authority, an administrative machinery and a judicial system, all three of which constitute the criteria by which any human society can be regarded as possessing a government. In a chiefless or republican African society, there is no centralized authority, little or no administrative machinery, and the judiciary arrangements are not sufficiently sophisticated, at least in terms of modern political theory.

The chiefly or monarchical group of societies may be said to be distinguished by a highly advanced political consciousness and a sense of racial or even national identity. The people are often heterogeneous and cosmopolitan. The people of a chiefless or republican society, on the other hand, are often homogeneous, and their political awareness is often much more limited to the requirements and social attitude of a closely-knit group. Indeed, they may be described as forming a well-articulated sheet of tin mail, since the tie of kinship is stronger and more pervasive in these societies than in the chiefly ones. The families supply the bond of social cohesion, not the guilds and other economic interest groups that form such a distinctive feature of a chiefly society.

Whereas the chiefly or monarchical societies in Africa are run under the centralized authority of a king or paramount chief assisted by a well established council consisting of lesser chiefs, leaders of economic and other political bodies as well as certain family heads, the chiefless or republican societies display a noticeable aversion to institutionalized authority of any kind, and the normal instrument for the administration of their public affairs is the local council of elders, composed of heads of families. This local council sometimes plays the role of the executive, sometimes that of the legislative, and at other times that of the judiciary, the same group of

people being differently constituted to deal with matters falling into all three categories. There is accordingly little or no division of labour, though this does not mean any lack of differentiation on the part of the people. It is merely that the political and social institutions are somewhat more rudimentary or, if we like, more fragmentary, than in the highly centralized African societies.

In the light of the foregoing, we may now turn to consider what the relations between the ruler and the ruled, in short, what ideas and practices of government, are in African societies. It can be said that the African idea of government is functional as well as pragmatic. As Fortes and Evans-Pritchard have observed, it is obvious that "they would be unable to carry on their collective life if they could not think and feel about the interests which actuate them, the institution by means of which they organise collective action, and the structure of the group into which they organise collective action, and the structure of the group into which they are organised."<sup>2</sup> It cannot be otherwise, since such universal problems have to be tackled as tax collection, payment of tribute, organization of the regional divisions of the State, and their relation to the central authority "where there is one," the reciprocal rights and obligations between the ruler and the ruled, and the mechanism for securing proper maintenance of accepted values and standards. In hierarchically-graded societies the chief is the administrative and judicial head of a given territorial division, having final economic and legal control over all the land within his jurisdiction. This means that the head of the State is a territorial ruler. In republican societies, however, the territorial units are the local groups in which lineage ties and co-operative economic activities supply the framework of political organization. No territorial jurisdiction accompanies the distribution of political power.<sup>3</sup>

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There are, nevertheless, certain indigenous methods employed in both types of societies for the application of checks and balances to the exercise of political power. In monarchical societies the central authority of the chief or king is normally buttressed by such factors as his control of the national regiment, his power of appointment to and removal from regional administrations of subordinate chiefs and, of course, the mystical qualities attributed to his office in popular imagination. In order, however, to pre-

2. Fortes and Evans-Pritchard, *African Political Systems* 17 (1940).

3. For a detailed legal treatment of this subject, see Elias, *op. cit.* at. 98 ff.

vent the office from becoming absolutist or tyrannical, the indigenous mechanisms evolved for the purpose were the king's council of chiefs, the paramountcy of the queen mother over the king himself, certain sacerdotal officials with a decisive voice in the king's investitures, the role of powerful secret societies in which the king is only *primus inter pares*, and the inevitable devolution of authority to the regional and local chiefs — all these as well as the intangible but often effective factor of public opinion serve to protect law and custom by controlling the arrogation of royal power.

It is fair to say that the constitutional principle has long been established that, if a king or paramount chief abuses his power, subordinate chiefs have the right either to depose him or to secede from the kingdom with their own people. In Nigeria, among the Yorubas, the king would in former times be requested by his chiefs to "open the calabash," that is, to commit suicide by voluntarily taking poison or to go into voluntary exile. A recent writer, who has spent some years in the country, has noted: "Most Yoruba towns are still governed in fact by their tribal chiefs and kings. . . . The tribal system of government was essentially democratic. . . . The King was usually chosen from the lineage whose ancestor was the founder of the town. In most towns it seems to have been the custom for the members of this lineage to select candidates for the kingship and for the chiefs of the other lineages in the town to make the final selection."<sup>4</sup> In the same way, if subordinate chiefs became tyrannical over the local people or insubordinate to their overlords, the latter could, with the co-operation of other subordinate chiefs, remove them from office or punish them in some other prescribed manner. This step could only be taken where the case against the offending chief was adjudged to be strong and just.<sup>5</sup>

A former governor of the Gold Coast (now Ghana), Guggisberg, once said during a Legislative Council debate in Accra:

It may be asked by the stay-at-home Briton whether a body composed solely of chiefs can be fairly regarded as representative of a democratic people? The anxious enquirer may assuage his fears. The Gold Coast native is no fool. He had thought this question out long before Christopher Columbus and Bartholomew Diaz visited the Gold Coast in 1481. Sovereignty in the Gold Coast tribes lies in the people themselves who elect their chiefs and can, if they so desire, deprive them of office. Each chief is, in fact, but the mouthpiece of his State (Oman) Council, without whose approval no chief can perform any executive or judicial act. Accordingly, when the Head Chiefs of a Province are summoned to the Provincial Council in order, say, to elect representatives of their people as Members of

Legislative Council, each chief carries with him instructions which he is to pursue and the manner in which he is to record his vote. The system of election is, it will be noticed, very similar to that in use in the United States of America for the election of a President. The great body of electors is there also represented at the actual election by selected representatives who attend and vote in accordance with mandates given them by their constituents. In order to satisfy themselves that the Head Chief carries out his duties in the manner which the State Council has prescribed, he is accompanied by eight councillors who report the result of the mission on their return home. Could anything be more democratic or more representative of the wishes of a people? It was well said by one of the Head Chiefs recently that: "when you are installed as a Chief, you become the humblest servant of the state; you are absolutely under the influence and guidance of your councillors so that there is nothing whatever to fear as to the powers of a Chief being misused or misapplied by such Chief, without a check."<sup>6</sup>

Most of the stories of corruption or misgovernment of chiefs have been due, not so much to the absence of these checks and balances, as to the transformation which the office has been undergoing in recent years under European rule in all parts of the Continent.<sup>7</sup> The process of converting the tribal leader into a local administrator and, more recently still, even into a central legislator has resulted in strains and stresses as well as in a number of progressive changes.

The lesson to be drawn from the instances just given is obvious. According to African notions of government, the territorial chiefs represent the central authority in relation to the people in their districts; but they also represent the people under them in relation to the central authority. Similarly, local councillors and the principal ritual functionaries represent the community's interests in the preservation of law and custom by seeing to the due observance of the rites and ceremonies designed for the welfare of the local group. No king or local chief can disregard their voice in such matters. Other specialist organizations exist for the protection of particular values of a public character and these must be duly consulted by either the central or the local authority concerned if certain proposed measures are to be valid. It will thus be seen that government in an African society implies a delicate balance between power and authority on the one hand, and obligation and responsibility on the other. He who wields political power and influence necessarily incurs corresponding obligations and responsibilities. As Fortes and Evans-Pritchard have put it: "The structure of an African State implies that kings and chiefs rule by consent. A ruler's subjects are as fully aware of the duties he owes to them as they are of the

4. Lloyd, "The Integration of the New Economic Classes into Local Government in Western Nigeria," *52 African Affairs*, No. 209, 329-30 (1953).

5. Elias, *op. cit.* at 180-81.

6. *Legislative Council Debates*, 3 March 1927 at 20-22.

7. See Elias, *Government and Politics in Africa* 182-87 (1961).

duties they owe to him, and are able to exert pressure to make him discharge those duties."<sup>8</sup>

In chiefless societies, somewhat different principles apply: here, the chief or the chief-in-council is invariably replaced by a council of elders. There are also certain traditional ritual functionaries whose role differs but little from that of their opposite number in centralized societies so far as it concerns matters of community rites and ceremonies and even political and judicial affairs. The political framework is based upon divergent local loyalties as well as conflicting lineage and ritual ties. All the local segments are of equal rank and of more or less parallel interests. It follows also that, as there is no central political authority to exploit the divergent local loyalties for its own ends, or to keep in check any interterritorial conflicts, the mutual desire of the equivalent segments for social and political equilibrium is the really stabilizing factor. Particular interests are protected against common interests and values by these inter-segment conflicts.

It is therefore clear that, whether the society is a monarchy or a gerontocracy, one common denominator is the constant aspiration towards the democratic principle in constitutional government. In the absence of a superordinate political authority, the actual legal situation is far from being chaotic. Among these societies, *rules* rather than *rulers*, *functions* rather than institutions, characterize the judicial and political organization. Lord Hailey, probably the greatest living European authority on Africa, has this to say in a recent publication:

African sentiment attaches special importance to the due observance of the procedure by which all members of the community concerned are able to have some voice in determining issues which are of major interest to it. It is rare to find in British Colonial Africa any instance in which the indigenous form of rule previously in force could be described as autocratic, and there are not many cases in which it could be described in a strict sense as authoritarian. It was a prevailing characteristic of the indigenous system of rule that whether power was vested in the hands of individual chiefs or of a ruling class, these had (unlike the absolutist regimes of a certain stage in European history) no machinery by the use of which they could enforce obedience to their orders.<sup>9</sup>

Here we have a fair appraisal of the African system of government, except for the reference to the lack of machinery for the enforcement of judgment in which the learned author would seem to have overlooked the far greater number of those African societies which, as we have seen, possess a highly centralized authority, administrative and military machine as well as judicial institutions. Even in the case of the republican or chiefless societies, there are many instances of effective police arrangements for

ensuring compliance with decrees and orders issuing from duly constituted councils of elders. Nor must the point be overlooked that recent research has disclosed the existence of some form of seniority among certain religious officiants which helps to assure a high degree of cohesion and solidarity in these equalitarian and democratic, even if chiefless, societies.

#### *Democracy and the Rule of Law*

The question may well now be asked: what prospects are there for democracy and the rule of law in African societies today?<sup>10</sup> From what we have seen in the preceding analysis, the indigenous political and judicial systems display qualities of adaptability and relevance to the contemporary world conditions. The introduction of European rule has certainly brought about a number of modifications to the traditional institutions and ways of life of the people.<sup>11</sup> The chief has had his position radically altered firstly by being made to function as a necessary instrument of local government, secondly by the separation of administrative and legislative functions from the judicial, and thirdly by the participation of certain classes of important chiefs in the central legislatures in both the British and the French-speaking territories in Africa.<sup>12</sup> The new political heads of government often come from the non-traditional elements in the community and, to that extent, represent a new symbol of impersonal authority. All the recent constitutions of the thirty-five African and Malagasy States that are now independent of both British and French rule in Africa embody the British as well as the French ideals of parliamentary democracy with the Rule of Law as its corner-stone. Indeed, the marriage of the imported European form of parliamentary rule to the indigenous African systems is in many respects a happy one, as witness this testimony of Marín Wight:

In very broad terms, Africans may be said to have two fundamental political attitudes. They are fundamentally law-abiding, and they resent and resist government by dictation. There is no intrinsic disharmony between the indigenous institutions of the Gold Coast and the imported Western representative system. There is no *a priori* reason of political tradition why the Gold Coast African should not receive the institution of Legislative Council and make it his own. For the purposes and methods of the indigenous and the imported institutions are the same: both embody the representative principle, and both are government by discussion.<sup>13</sup>

10. Elias, *Ghana and Sierra Leone: Development of their Laws and Constitutions* (1961).

11. A full account of this will be found in Elias, *British Colonial Law* 76-97, 197-222, (1962).

12. Elias, *op. cit.*, *supra* note 10.

13. Government Printing Department, *The Gold Coast Legislative Council* 34 (1947).

8. Fortes and Evans-Pritchard, *op. cit. supra* note 2, 12.

9. Hailey, *Native Administration in the British African Territories*, pt. IV at 2 (1950-53).

This conclusion is in no way invalidated by any tendencies towards strong government that might be discernible in parts of Africa today.<sup>14</sup>

### *Africa and an International Rule of Law*

Another aspect of our problem concerns the interrelationship between the different countries of Africa. It must not be lost sight of that Africa has had its own share of internal as well as internecine warfare. If the legal situation hitherto described may in a limited sense be regarded as the law of peace, it is also useful to add a note on the law of war. Bovill has recorded this fact:

Leo Africanus relates how certain tribes of the Atlas, who were constantly at war with each other, held a regular truce to ensure the continuance of their inter-tribal markets. Even during the long centuries of conflict between Christian Europe and the Barbary States, trade between the opposite shores of the Mediterranean was so little disturbed that Christians and Moslems continued fearlessly to frequent each other's market.<sup>15</sup>

It is possible to multiply the instances of international intercourse, both peaceful and warlike, that took place for centuries not only between the countries north of the Sahara but also between Africa and other parts of the world, notably the Middle East, India and China. It is a matter of recorded history that the African Ibn Battuta had such a reputation for scholarship in the 14th century that, when he reached Delhi during his world travel, he was appointed Malikite Qadi (or Chief Judge) at the court of the then Sultan of Delhi for seven years, from 1325 to 1332. Similarly, from the time when the Almoravids and the Tuaregs overran the old empire of Ghana in 1087 till the assumption of the kingship of Mali by Mansa Musa, of Timbuktu by Askia the Great, and of the subsequent potentates of the old kingdoms of Songhai, Walata, Sosso, and Jenne, there were regular exchanges of ambassadors between the African courts and those of Spain, Egypt and most of Asia.<sup>16</sup> The stories of conquests and of empire-building by King Shaka of the Zulu empire, and those about the 18th century kingdoms of Bunyoro and Buganda and of the Wachagga of Tanganyika, all serve to illustrate that Africa has had its own share of territorial conflicts, consolidations, fissions as well as fusions in the old-world struggles for survival. The Mashona and the Matabele kingdoms in Central Africa represent the latest of the 19th century struggle between Europe and Africa before the colonization of the Rhodesias.

Within Africa itself, there were innumerable instances of interchange of services as well as of persons as between one community and another.

Sometimes, neighbouring peoples would enter into mutual agreements for joint defence against hostile neighbours or for the purpose of administration of justice. Among the peoples of the hinterland of Sierra Leone, a litigant who felt dissatisfied with a decision of his own chief was free to refer the matter to a neighbouring but friendly chief who had a reputation for justice and fair play. Such a reference was not strictly an appeal, because the two chiefs were often of co-ordinate authority. The reference by the aggrieved litigant to the neighbouring chief was intended to induce the chief appealed from to do what was right to avoid the slight involved in the reference to a colleague thus considered to be more just than himself. The manner of getting him to do the right thing was for the second chief to remit the case back to the trial chief with a token present as a friendly gesture and a polite request for a review of the judgment. The second chief would, of course, have satisfied himself in the first place that the original judgment was wrong according to the generally accepted standards of customary law and usages.

This excursus demonstrates, if proof were needed, two significant principles. The first is that African communities and States have for centuries had contacts with the countries of Europe and Asia and thereby shared with these a certain measure of common experiences in international living. These would entail the observance of certain practices in the field of diplomacy, the rules and practices of warfare, treaty-making, and patterns of international behaviour and of international morality. Many of the African States have had the same kind of experience in international relations as have the Nation States of Europe since the break-up of Western Christendom in 1648 as a result of the Treaty of Westphalia. The second principle which the preceding analysis serves to bring out is that in large areas of Africa there had emerged broadly similar political and economic conditions and, therefore, similar rules of customary law, which makes it possible to speak of the existence of a universal body of principles of African customary law that is not essentially dissimilar to the broad principles of European law.<sup>17</sup> Even today, English law and French law have merely substituted two major juridical regimes in their respective areas of provenance.

African customary law, it should be carefully noted, shares with customary international law the characteristic that its validity does not depend upon any theory of sovereignty. John Austin, the leader of the English analytical positivists, has in his famous theory of Law and Sovereignty lumped together public international law and customary law and even the conventions of the British Constitution as merely rules of "positive morality," not "law properly so called." Since there is no

14. See, for example, Elias, *op. cit.*, *supra* note 10, 79-81.

15. Bovill, *The Golden Trade of the Moors* 80 (1958).

16. *Id.*, at 62-63, 124-29.

17. On these questions the reader is strongly recommended to refer to Elias, *op. cit.*, *supra* note 1; and Elias, *British Colonial Law: A Comparative Study of the Interaction between British Law and Indigenous Systems of Law in British Dependencies* (1961).

superordinate political authority in the international community to compel obedience to the rules of international law, public international law in Austin's view of law and sovereignty lacks the element of sanction which he regarded as indispensable to law properly so called. While not denying that an element of coercion is essential to a rule of law, however, both the historical and the sociological schools of jurisprudence have instead maintained that sovereignty is not indispensable to law. In this respect, Von Savigny and Roscoe Pound have ideas that are of immediate relevance to African legal thinking, while Leon Duguit's theory of the *règle de droit* or "the principle of social solidarity" is very much akin to the maxim, *pacta servanda sunt*. It was this idea that made it possible for various communities to maintain orderly and friendly relations with one another over spells that were often long enough for there to have been the efflorescence of the art of Ife and Benin or of the Ashanti, or the Zimbabwe Culture in Central Africa. It is necessary to mention this in order to remind ourselves that pre-European Africa was not all chaos and inter-tribal feud. Agreements were often entered into by one king or paramount chief with another as much to regulate their external relations as to promote territorial advancement. There were, of course, well established rules for securing a truce as for regulating the practice of warfare. Proverb after proverb could be quoted from many different African languages to the effect that it has always been an established principle that agreements must be kept. One illustration should be sufficient. When H.M. Stanley, acting as Chief Agent of the *Association Internationale Africaine*, signed a treaty with five Chiefs of the districts of Pallaballa in the Congo on 8 January, 1883, the use of the expression "Cession of Territory" had to be technically interpreted in a subsequent treaty of 19 April, 1884, to exclude the subsoil of the territory purported to be sold under the earlier treaty which must be taken to relate only to "The purchase of the Suzerainty by the Association." This second exercise was necessary because the chiefs, on being told that their first treaty had transferred an absolute title to the European grantees, were anxious either to set aside the whole transactions at once or to have it rectified in order to avoid a breach of the agreement later on. It is interesting to record that a little while previously the five chiefs had solemnly declared, in Article 5 of another treaty entered into among themselves as follows: "The confederated districts guarantee that the treaties made between them shall be respected."<sup>18</sup>

Our analysis in the preceding paragraphs will have shown that indigenous African societies have from the beginning of recorded history always

18. Stanley, *The Congo and the Founding of its Free State* 192-205, esp. 197 (1885).

regarded the ruler as subject to law. The various mechanisms evolved to ensure this have been described in some detail. So has the correlation between African law and law in general been demonstrated. This has led the present writer, after an exhaustive examination of the nature of law in general and of the reasons why law is obeyed, to proffer this all-inclusive definition: "The law of a given community is the body of rules which are recognised as obligatory by its members."<sup>19</sup> Sovereignty is clearly an inconvenient and unnecessary postulate introduced by the analytical jurists to confuse the nature of law with its political presuppositions. Sovereignty has thus stood in the way not only of a universal acceptance of public international law and other customary bodies of law as law properly so called, but also of making it possible for the Nation States of the world to accept a supranational authority as the cornerstone of a world government. In short, sovereignty has given birth to the ever-recurrent crisis of the modern Nation States.

Our analysis has also attempted to show the intercourse between certain countries of Africa on the one hand, and those of Europe and Asia on the other; and also the interrelations between one African territory and another both in peace and at war. It is inevitable that these relationships must have thrown up certain general principles of international behaviour, certain universally accepted standards of international conduct between one State and another. The way is thus clear for the emergent States of Africa today to be willing and ready to enter into new international relationships with other States, without feeling too much like strangers in the international legal community. Finally, it has been shown that African customary law shares with customary international law the acceptance of the fundamental principle of *pacta servanda sunt* as the basis for the assurance of a valid world order. In sum, the ruler, like the ruled, must be under the law.

19. Elias, *op. cit.*, *supra* note 1, 55.