Everything Changes so that Nothing Changes: A Legal Reading of the Reforms Underway in West Africa on the CFA Franc

By:

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It is difficult in just a few lines to deal with a subject as complex as the monetary cooperation agreement that is supposed to govern the transition from the CFA franc to the ECO[1]. The “franc zone” in Africa comprises two types of CFA Franc, each with a specific denomination: that of the countries of West Africa and that of Central Africa[2], to which is added the franc of the Union of the Comoros. The focus here is on the West African zone.

The bill proposing the ratification of the new monetary agreement between France and the West African States party to the WAEMU[3] was presented during the COVID-19 crisis. On the African side, critical but isolated voices have been heard here and there[4]. They have denounced France’s unilateralism in the decision to declare the “end” of the CFA franc. At the same time, while the

bill has been tabled before the French Parliament, nothing of the same nature has so far been observed in the eight WAEMU[5] member states. This piece proposes an analysis of the proposed reform from the simplest to the most complex issue. The bill adopted by the Council of Ministers presented by the Minister of Foreign Affairs was tabled in the French National Assembly for ratification on 22 May 2020[6]. It contains a single article: “The approval of the cooperation agreement between the Government of the French Republic and the Governments of the member States of the West African Monetary Union, signed in Abidjan on 21 December 2019, the text of which is annexed to this law, is authorized.”

Rather than approaching things as if the legal regime of the new ECO currency had replaced that of the existing CFA franc, it would be more accurate to read the new monetary agreement as a marginal change of a mechanism whose spirit has remained the same over the years. Admittedly, France’s presence within the BCEAO will formally disappear. However, a close scrutiny of articles 4, 5 and 6 of the draft monetary agreement of December 2019 reveals that France has nonetheless kept its presence. These provisions set up a reporting system, enabling France, which is supposed to play the role of “financial guarantor,” to be informed in detail of the financial and economic situation of WAEMU countries.

On closer examination, the central question is that of the continuity of a system inherited from colonization since the monetary aspect of this system remains. This (de facto) status quo also recently prompted many French parliamentarians to question their government about possible “anomalies” in the franc zone system[7]. The answers given by the government to their concerns were invariably the same from a legal point of view: far from being an imposed currency, the CFA franc is the result of treaties freely signed between sovereign states. This is illustrated, according to the French Government, by the ratification of the various legal instruments by African counterparts. However, despite the shortcomings of this argument from a practical standpoint, one cannot totally discount its merits from a purely legal viewpoint.

What about the issue State sovereignty which some commenters take for granted? Indeed, the French government’s communication stipulates that France has been asked by its African “partners” to sign the new monetary

cooperation agreement. However, on an attempt to contextualize such an argument it readily appears that it is a bit misleading to say the least. Continuity of the colonial legacy is definitely the word that suits the franc zone system the most since only the end of this system would imply a definitive separation. Instead of a renewal, an immediate divorce could have taken the form of an outright denunciation of the monetary cooperation agreement. A more “structural” disintegration would probably have presupposed a constitutional change motivated by a clear political will to move away from colonial legacies. If one wishes to highlight the longstanding domination embodied in the franc zone system, then the classical theory of international sovereignty is not of much help. This is where the problem lies since most of the criticisms formulated so far - apart from a few works by economists - are “external” criticisms. By this we mean that they refer to history or philosophy, without taking the trouble to propose a criticism based on the internal contradictions of the franc zone system. Here is one of them.

On 11 September 2014, the Constitutional Court of Benin ruled on the application of Mr. Zakari Boukari, a national economic operator. The applicant intended to challenge the constitutionality of the use of the CFA franc in the light of several provisions of the Constitution of 11 December 1990, namely articles 3 and 148[8] respectively. The grounds put forward by the applicant attempted to show that the franc zone, because it was managed in the interests of France, was contrary to the interests of the Republic of Benin. The judges rejected the application, holding that Benin had been bound by a succession of agreements since the 1961 Monetary Agreement[9]. Nowhere does the Court's judgment genuinely seek to confront Article 3 on sovereignty with the national instruments and ratifications that accompany it at the national level. It is as if, on this point, the discontinuity of political regimes in no way affects the continuity of the franc zone. The judgment illustrates once again the rejection of a real separation or, to put it in more technical terms, a constitutional change that could break with previous legal commitments. In order for such a change to take place, a contrary norm of constitutional level must prevail over previous norms. Other solutions were conceivable. In the Zakari Boukari ruling, the judges reasoned as if the international commitments entered into by Dahomey and then Benin were part of the same legal linearity. And this despite the fact that the constitution of 11 December 1990, which

emerged from the national conference of the nation's living forces, was presented in Africa and throughout the world as a model par excellence for breaking with the previous dictatorial regime. Clearly, this break has never extended to colonial legacies.

It was in order to move away from a formal approach to international law that, as early as the 1990s, several authors proposed alternative approaches that took the point of view of the Global South seriously. Siba Grovogui's thesis[10] is one of the first to propose a critique of law and international relations from the perspective of the Global South. Is it possible for the states of the Global South, particularly African states, to assert their self-determination by using the language and categories of an international law that was complicit in their own enslavement? This is essentially the proposition, based on empirical work - in this case the analysis of decolonization in Namibia. According to Grovogui, there is some difficulty in being able to envisage the economic sovereignty of West African countries in the same patterns of thinking as the international instruments implemented by the former metropoles. This is why he proposes a critical genealogy of international law that allows us to grasp its unintended “Eurocentric” character.

From this perspective, we can question the legitimacy of a political and monetary system initiated in 1945, at a time when France was negotiating in international forums on behalf of its empire. Pushing the reasoning further leads one to realize that independence was also “granted” - in most of the former French colonies south of the Sahara - by the metropole, which also raises questions about the terms of self-determination and, at the same time, the economic sovereignty of the postcolonial states. This perspective implies rethinking the very concept of sovereignty used by classical international law. To start from this hypothesis is to admit that, in economic and monetary matters, the French-speaking African states that use the CFA Franc have not yet acquired any real autonomy. Thus, it is quite possible to assert that the Franc Zone was only an extension of the influence of the former metropole in Africa.

The monetary cooperation agreement of December 2019 is only one more piece in these relations of influence. The adoption of an ECO currency competeswith the monetary project of the ECOWAS (Economic Community of

West Africa) in its own territory (Eco being the name originally chosen for the single currency of this regional space)[11] and participates in the desire to isolate Nigeria, the main economic power of the region[12]. It is not surprising, therefore, that Nigerian President Buhari spoke of the risk of disintegration of ECOWAS. A classic legal approach cannot, as we can see, grasp the complexity of the problems that arise today in the adoption of the ECO.

Such complexity must go beyond legal formalism. It must be able to grasp, over a long period of time, the genealogy of the CFA Franc, itself linked to the advent of the Marshall Plan in Europe. The dogma of the supposed “will” or Consent Theory of the French-speaking African states is just as dependent on the colonial and post-colonial context in which the creation of the CFA franc emerged. The question must therefore be asked differently: which actors before and after independence, French and African, had an interest in maintaining the franc zone system? To approach the question in this way is also to venture to admit that the divergent political voices that emerged on the issue before and after independence were systematically dismissed as illegitimate.

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*I am grateful for the remarks and criticisms made by Ndongo Samba Sylla and Siba Grovogui on this text. The errors contained therein are solely attributable to me. Since the writing of this text in the summer of 2020, several things have evolved on the issue of the Franc CFA. The Treaty authorizing the approval of the cooperation agreement between the Government of the French Republic and the governments of the WAEMU member states was definitively adopted by the French Senate on January 28, 2021: https://www.senat.fr/leg/tas20-052.html As I write these lines, the various West African parliaments are still examining the text in order to ratify it in their turn. The political and media space given to the issues related to this ratification process seems very limited. Most of those who express their opposition are in the minority or are simply not heard ; others are brutally excluded from the discussion. These new developments do not change the substance of our demonstration, on the contrary. The ratification process leading to the ECO is of no interest to French parliamentarians, who do not always understand what is at stake, nor to West African parliamentarians, who live in post-colonial political systems where it is not seriously possible to engage in a serious and contradictory debate on monetary issues, due to a lack of skills and expertise. On the French side, a

good summary of the situation can be found here : https://blogs.mediapart.fr/fanny-pigeaud/blog/260121/franc-cfa-le-silence-complice-des-progressistes-francais

[1] The CFA franc - originally the franc of the French colonies in Africa - was created in 1945, at the same time as the franc of the French Pacific colonies, by Decree No. 45-0136 of 25 December 1945, setting the value of certain currencies of the overseas territories denominated in francs.

[2] To be even more exhaustive, it should be noted that Guinea-Bissau in West Africa and Equatorial Guinea in Central Africa are also part of the franc zone.

[3] It is important to distinguish between WAMU with monetary competence and the WAEMU (West African Economic and Monetary Union) created in 1994, after the devaluation of the CFA franc. The two sub-regional organizations are however linked, insofar as the provisions of the WAMU Treaty apply to WAEMU countries. The creation of the WAEMU follows several attempts, including the Council of the Agreement in 1959 and then the Economic Community of West African States created at the same time as the Monetary Agreement of 1973.

[4] https://www.financialafrik.com/2020/05/21/est-ce-au-parlement-francais-dacter-la-fin-du-franc-cfa/

[5] The sequence of the calendar is important to grasp here since the draft monetary cooperation agreement signed by the French-speaking West African States dates from 21 December 2019. It must be deduced from this that, unlike the French Parliament, the African national parliaments were not consulted or even involved upstream in the discussion of this agreement.

[6] Draft adopted on the basis of Article 39 of the French Constitution, which therefore presupposes that an opinion of the Council of State (unpublished) has been adopted on the subject.

[7] E.g. Written question by François Asensi, 14th parliamentary term, No 87150 asked: http://questions.assemblee-nationale.fr/q14/14-87150QE.htm (to which no answer was given); written question by Christine Prunaud, 15th parliamentary term, No 03375 asked: https://www.senat.fr/questions/base/2018/qSEQ180203375.html

[8] Article 3: "National sovereignty belongs to the people. No fraction of the people, no community, no corporation, no political party or association, no trade union organization and no individual may claim to exercise it" and article 145: "Peace treaties, treaties or agreements relating to international organizations, those that commit the State's finances, those that modify the internal laws of the State, those that involve the transfer, exchange or addition of territory, may be ratified only by virtue of a law. No cession, exchange or addition of territory shall be valid without the consent of the populations concerned.

[9] Constitutional Court of Benin, Decision DCC 14-170 of 11 September 2014, Mouphtaou Zakari Boukari, at p. 7-9.

[10] S. N. Grovogui, Sovereigns, Quasi Sovereigns and Africans. Race and Self-determination in International Law, University of Minnesota Press, 1996, "Bordelines" collection, vol. 3. This work follows in the footsteps of authors such as M. Bedjaoui, Pour un nouvel ordre économique international, Paris, UNESCO, 1979, E. Seaton, T. Maliti, Tanzania Treaty Practice, Oxford University Press, 1974.

[11] The minutes of the Finance Committee's meeting evoke the fears expressed by several French parliamentarians on this point. See Compte-rendu de la Commission des finances, de l'économie générale et du contrôle budgétaire, 12 February 2020, n°43, XVth legislature, p. 10.

[12] A quick reading of French legal doctrine points to this problem as early as the 1970s. See J-C. Gautron, "La Communauté économique de l'Afrique de l'Ouest, antécédents et perspectives", *Annuaire français de droit international*, vol. 21, 1975, p. 201-203. D. Herzog, Happy Slaves: *A Critique of Consent Theory, University of Chicago Press*, 1989.

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