AFRIKAN LAW: EXISTENCE AND UNITY

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Anyone who undertakes to give a course on African Law to non-Africans[1] will in one way or other be confronted with two questions: Is there any law in the traditional African society? Can one talk about African Law instead of African Laws? I shall deal very briefly with these two questions.

I. Is there any law in the traditional African society?

I must confess immediately that I am unhappy to have to deal with this question for, to pose it, it seems to me, is to question the very nature of African society as a human organization. Although the question may be meaningful to Europeans, brought up on the belief that humanity begins and ends in Europe, it has very little significance for Africans who have never doubted their own humanity or the nature of their social organization.

After the publication of Elias' Nature of African Customary Law (1956) one would have expected that the question whether African societies have law would be considered finally answered. Some years later, Allott in his Essays in African Law (1960) found it necessary to reconsider the matter, concluding, like Elias, that African societies have a system of law; what remained to be done was careful study of the various laws in action and not the issue of generalizations, usually unfounded, about "primitive" law[2].

The careful and detailed study of the various systems of law has been the main preoccupation of the various law schools and legal scholars in Africa. Their output may be modest by the standards of those who have not experienced slavery and colonial exploitation. However, when we consider what was done during the long period of colonial rule and what has been done since independence, then we must at least recognize what has been achieved[3].

But the view that there is no law in African societies has not been completely abandoned. Recent upheavals on the African continent seem to have reenforced the doubts entertained by some observers who have no sympathy for non-Europeans. Some of these prejudices have found their way into scholarly writings. As recently as 1971, we find Prof. Adda Bozeman denying the existence of law in African culture:

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1 This is the text of a first lecture in a series given at the University of Marburg in summer 1974. As far as I am aware of this is the first time that a regular course on African Law is being held at a West German University. There have, of course, been occasional lectures on African Law at various Institutes but nobody seems to consider it necessary to have a general introductory course on African Law. This may be due to the belief that African Law is an appendix to either the French Civil Law or to the English Common Law.

2 Op. cit. p. 55.

3 There is still a lot of research to be done on the role of law during the colonial period. Something similar to the current re-examination of the connections between anthropology and colonialism, has to be undertaken by jurists. It is relevant to mention that much of the writings on African Law has been asked on the findings of the anthropologists. Now that the value of such research has come under criticism, it would be logical for jurists to reconsider those works which they assumed had given an "objective" account of traditional societies. On the current discussion concerning colonialism and anthropology, see: Talal Asad (ed.), Anthropology and the Colonial Encounter (1973), London, Ithaca Press, A. Kuper; Anthropologists and Anthropology, London, Allen Lane.

"Reflections of the present and future role of law in Africa south of the Sahara should issue from an understanding of the life style and mode of thought with which recent generations have identified. If we were to apply the measure of Western thought system we would have to conclude that law as we know it was unknown in this culture[4]."

For good measure, she adds that "Africans have no deeply rooted interest in theory and philosophy-fields of mental concentration that presuppose a well-developed relationship to writing[5]". Prof. Bozeman does not tell us what contacts she has had with Africans nor what inquiries she made into African Law, Religion and Philosophy. But we need not pursue the point any further when we realise as she expressly states that she derived her inspiration for such pronouncements from Spengler and Pound.

The explanation for such ways of reasoning need not be sought mainly in the racist or decadent attitudes of some scholars. The basic error is that many writers use a conception of law derived mainly from their own culture (at a certain period of its development) but assumed to have universal validity. When they find that some societies have a conception of law which does not fit their definition, they declare that such societies have no conception of law. Some scholars have made the existence of formal courts the criterion for determining whether a particular society has a system of law or not. In this, they follow Holmes' dictum: „The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law[6]".

Many Western European scholars have been affected by a conceptual ethnocentrism. They have allowed themselves to be over impressed by the law in their own culture at a specific time. Many of their erroneous statements about other cultures could have been avoided by adopting a historical approach and by considering their own laws in a comparative way. As Pospisil points out, many of the legalistic definitions offered by Western scholars would, when applied to ancient Greece and Rome, lead us to the conclusion that these ancient cultures had no laws[7].

When these scholars have not been in search of formal courts, they have insisted that there must be a sovereign authority or state authority for law to exist in a society. As you know, this is the view of the analytical school with its ideas about command and whose chief exponent was Austin. Obviously, in the African societies where there is no visible or well-established central authority[8], the analytical jurist feels compelled to deny that there is any law. It should perhaps be mentioned that similar arguments have been used in the past to support the view that International Law was not law properly so-called.

Another variant of the positivist approach, closely connected with the command or imperative theory, is to make the availability of sanctions the decisive criterion for the existence of law. In other words, where there is no effective central authority, capable of imposing sanctions for breaches of law, there can be no law.

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4 The Future of Law in a Multicultural World (1971), New Jersey, Princeton University Press, p. 102.
5 Op. cit. p. 25.
6 "The Path of the Law" (1897), 10 Harvard Law Review 457—478, reprinted in O. W. Holmes, Collected Papers, p. 173.
7 L. Pospisil, Anthropology of Law (1971), New York: Harper and Row, p. 15.
8 The distinction between states with centralized authority and those with such an authority is discussed in M. Fortes and E. E. Evans-Pritchard, African Political Systems (1940), London: Oxford University Press, p. 5.

We leave aside the difficulty involved in defining law by reference to sanctions when, in theory at least, sanctions are only legitimate when authorised by law. It is not logical to define law by one of its products. But this tendency dies hard. We find Poirier recently declaring: "L'existence du droit, qu'elle que soient les modalités de l'impératif loi ou coutume-, est donc conditionnée par l'existence de la sanction juridique[9]".

The denial of the presence of law in traditional African society may also be found in Marxist writings. There we meet the view that law is a phenomenon to be found only in capitalist or class society. We read for instance, from the Marxistisch-Leninistisches Wörterbuch der Philosophie: "Das Recht ist mit der menschlichen Existenz nicht notwendig verknüpft (falsch: ubi homo, ibi ius). Vielmehr ist das Recht ein Produkt der menschlichen Gesellschaft auf einer vorübergehenden Entwicklungsstufe, der in Klassen gespaltenen Gesellschaft[10]". A related viewpoint is that law arises with the development of the state. In other words, there is no law in pre-capitalist societies since (according to this view) there is no state in pre-capitalist society. This conception, as you no doubt recognize, is derived from Engels explanation of the genesis of the state and its role in the class struggle[11]. Engels tells us that the function of the state is to ensure that the class truggle does not get out of hand i.e. that the dominant class uses state power to defend its interest.

The fact that some Marxists may find themselves in the same position as some racists in denying the existence of law in African society, may force them to reconsider their position. They would realize that the fundamental problem lies with the adoption of unlinear evolutionism[12]. A more fruitful approach for Marxists would be to rely on the basic idea stated by Marx in his formulation of the materialistic conception of social development[13]. The application of Marx's conception that the relations of production constitute the basic structure on which rise legal and political structures, and that the latter reflect the former has an advantage: it avoids the confusion between the nature of law as a social phenomenon and the function of law in a given society. The way is then open for an examination of the role of law in the various societies, whether as an instrument of class domination or as an element of social cohesion and solidarity[14]).

My own position is that every society has a legal system. The existence or more correctly, the survival, of a human group as society necessitates organization and organization of society implies law. Every society must have rules which determine who is to have which property, who is to do which work, who can marry whom etc. and it must decide on what attitude to adopt towards those who violate the imposed rules. Law then, in our view, is of the essence of human society and not merely a characteristic of societies in certain parts of the world or at a certain level of development[15].

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9 Ethnologie Générale (ed. J. Doirier), 1969, Paris: Gallimard, p. 1093.
10 Eds. G. Klaus and M. Buhr, Rowohlt, 1972, p. 914.
11 Der Ursprung der Familie, des Privateigentums und des Staats, Berlin: Dietz Verlag 1884, pp. 190, 194.
12 One should perhaps remind readers that Engels relied on Morgan's evolutionary theory in writing. Der Ursprung der Familie, des Privateigentums und des Staates (1884).
13 In Marx Engels Werke, 13, p. 8.
14 This is not the place to undertake a full examination of the Marxist theory of law. Readers interested may consult M. Villey (ed.) Marx et le droit moderne, Archives de philosophie du droit, Paris: Editions Sirey 1967; Umberto Cerroni, Marx und das moderne Recht, Frankfurt: Fischer Verlag 1974.
15 See H. Lévy-Bruhl, "L'ethnologie juridique", in Ethnologie Générale, p. 1113—1114.

To argue that every society has a system of law is, of course, not the same as saying that laws everywhere are the same. It merely implies the ubiquity of law. But legal systems have their peculiarities, reflecting the material and historical conditions of the particular societies. As we shall see later on, African Law has characteristics which may not be shared by all legal systems. But can we talk about African Law?

II. Can we talk about African Law?

Given the diversity of peoples, languages, religions and modes of life in the African continent, can we put the laws of the various peoples into one group? Can we talk about African Law instead of African Laws? We are faced with the question of the unity or diversity of the legal systems in Africa. This problem of classification raises immediately the question of criteria. By which criteria do we determine whether two or more legal systems belong to the same family? Let us say it at once. The unity or diversity of African Law cannot be based primarily on the identity of single rules of substantive law. We will have to place ourselves on a higher level of abstraction. This is not for the convenience of a scholar more interested in abstract, armchair speculation rather than in empiric concrete facts. Rather it is based on the belief that the rules of substantive law are by themselves not decisive for determining the nature of a legal system. In any case, these rules are being frequently changed by the legislator or the judge. English law, for instance, has changed over the centuries and yet its basic character remains the same. Again, to change from a historical perspective to a comparative perspective, French, German and Italian laws have fairly different rules of substantive law and yet we have no difficulty in putting them all in the same family of laws.

A more fruitful way of classifying legal systems is to ask whether some one who understands one system can without too much difficulty find his way in the other system. If so the two systems under consideration belong to the same family. Can, for example, somebody who understand Ghanaian Law feel at home in Nigerian Law? Here, we are immediately faced with another problem. As it is well known, the legal systems of the African countries have elements of the traditional African Law, Islamic Law (not in all countries) and European Law (French, Belgian, English, Portuguese and Spanish). Which elements are we to select for comparison? Should we confine ourselves to the original traditional elements or the imposed European elements? Can we say with René David that "they (African legal systems) can, to be sure, only be conceived as making up a group within larger families, whether Romano Germanic or Common Law[16]"? It is perhaps not irrelevant to notice that similar problems are involved in the classification of African Literature[17].

David's refusal to recognize the specificity of African Law is surprising since he himself suggests that classification should not be based only on legal technic but should also take into account the philosophical, political and economic principles on which the systems operate[18]. The same author suggests that in the state of present knowledge, the question of the unity or otherwise of African Law serves

16 R. David and J. E. C. Brierly, Major Legal Systems in the World Today, London: Stevens 1968, p. 20.
17 See Abiola Irele, "The Criticism of Modern African Literature" in (ed.) C. Heywood, Perspectives on African Literature, London: Heinemann 1971, p. 22.
18 Op. cit. p. 12.

very little purpose; that it is vain to pose such questions with respect to Africa since they (the Europeans) have not been able to provide an answer to a similar question relating to European Law. In any case, David declares, since at the present time English and French African studies are carried on separately, "explanations of fundamental similarities between various African customs amount to little more than theorizing[19]". What David is suggesting is that a fundamental question concerning African Law, namely, whether there is any unity between the various laws on the continent, should be postponed until French and British scholars have combined their efforts; that the question should not be posed at all since Europeans are unable to a similar question concerning the unity of European Law. An African may perhaps be forgiven for not sharing the views of the learned professor, on this point. Instead, I intend to adopt the sociological approach mentioned by David and to follow his suggestion that "the profound unity of certain laws which once seemed disparate becomes apparent when we compare them with legal systems which were formerly quite unknown[20]".

The fundamental unity of the various African peoples is founded on the material conditions of our continent, on a shared experience based on attempts to wrestle from nature our means of subsistence. It is no accident that our religion, philosophy, political systems and myths reflect a culture elaborated in conditions different from those of other continents. The economic position of all African countries is characterised usually as underdevelopment[21] — its main features being: lower standards of living, emphasis on agriculture, dependence on one or two commodities and dependence on external markets controlled by the former colonial and slave masters. This disastrous economic situation must be reflected directly or indirectly in the various legal systems.

When we turn to the political field, we discern similarities in the development of the various systems of administration. Whatever may have been the differences between the states with centralized authority and the so-called chiefless societies, they all worked basically on similar principles and were based on government by discussion and representation. Whatever may have been the nature of traditional African systems of government, they have all been corrupted by the imposition of colonial rule. Everywhere, the colonialists set up central autocratic government, depriving the traditional authorities of effective powers. Later on, these powers were transferred (in some areas, wars had to be fought, and in the southern part of the continent racist white minority governments are still carrying on the centuries old practice of oppression and exploitation) to independent African government only to be accused by the same colonialists of being autocratic. The story since the acquisition of formal independence is well known: failure of most governments to improve the material conditions of their subjects (and how could they, since formal independence did not imply any structural changes in the social and economic systems of these countries?), corruption, inefficiency, foreign interference and, of course, military coups, usually aided and abetted by the former colonial and slave masters.

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19 Ibid. 462.
20 Ibid. 13.
21 See W. Rodney, How Europe Underdeveloped Africa, 1972, London: Bogle-L'Ouverture Publications; Osendé Afaha, L'économic de l'Ouest-African, Paris: François Maspero, 1966; Kwame Nkrumah, Neo-colonialism: The Last State of Imperialism, London: Heinemann, 1965.

There is also the same basic similarity in religion and philosophy. Most African scholars would seem to agree on the essential unity of African philosophy and religion. Prof. Mbiti emphasizes this unity in his African Religions and Philosophy[22]. He examines the African's attitude towards time, God, nature, life and death and concludes that there is a remarkable similarity, whether the people concerned are found in East or West Africa[23]. The same stress on the unity of African culture, philosophy and religion is found in Jahnhein Jahn's, Muntu: Umrisse der neoafrikanischen Kultur (1958)[24].

Turning to the legal field, can we discern any unity among the various laws existing in Africa? When we examine branches of African Law which were not immediately and directly disturbed, or if you like, perverted by the colonial domination, we recognize the primacy of group or collective interest. Thus for example, in all the land laws the right to usage is based on one's membership in a group, be it the family, village or nation. In family law too, the group interest prevails. Whether this is in the formation or dissolution of marriage, or, in succession to property. Of course, the predominance of group interest is weakening and in some areas where European influence has been strong, it may have completely disappeared, but it has left its mark on the basic character of African law. Similarly, in the settlement of disputes, the community takes an active part. We are here far removed from the typical Western European system of adjudication, where only the judge, the parties and their counsel have right to talk. In the traditional settlement if dispute, anybody who thinks he (or she) has something relevant to say, may freely express himself (or herself), unhindered by any narrow rules on what is relevant and what is not. The judges are, in addition to settling the dispute and restoring harmony between the parties, concerned to remind those present of the basic norms of the society.

What may be even more important than any similarity of spirit between the various legal systems is the attitude of African lawyers. The courts in West Africa, for instance, have always assumed that there is a fundamental unity between the traditional laws of Nigeria and those of Ghana. Moreover, many African writers have no doubt about this unity[25].

I should like to emphasize again, that whether one sees unity or diversity among the various laws in Africa, depends largely on the level of comparison and, more decisively, perhaps, on the motivations and objectives of the one making the comparison[26].

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22 1970, New York: Doubleday and Co., xiii.
23 Ibid. 38, 212.
24 Düsseldorf: Eugen Diederichs Verlag.
25 E. g. Elias, op. cit. p. 3.
26 It is interesting to notice that whilst David put German and French Laws into the same family of Romano-Germanic laws (op. cit. p. 14). Zweigert and Kötz in their Einführung in die Rechtsvergleichung, I (1971, Tübingen: J. C. B. Mohr, p. 71) put German Law into a different family (Deutscher Rechtskreis) from French Law (Romanischer Rechtskreis). Jurists from the Socialists countries see no essential differences between the two systems and qualify them all as bourgeois system. A jurist from a non-European country may put them all, bourgeois or socialist, into a big family of European Laws.