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COMMENTARY

Evolution Of Contemporary African Law

By Hon. Atsu-Koffy Amega
Chief Justice of the Republic of Togo

The following was excerpted from a lecture given at the Howard University School of Law on October 18, 1974.

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Africa is a continent with a variety of customs that are practiced by indigenous societies—customs as divergent in their origins as in their degree of development. Habits and outlooks vary among communities, tribes and regions.

In studying the ways and customs of African societies, one finds an amazing similarity in terms of their deep significance; indeed, if ways and customs express a people's behavior, it can be said without exaggeration that a moral and religious expression exists in the life-style of African societies that confers great juridical unity on African life. Consequently, the fundamental unit of African society is the cognate family, under the quasi-absolute authority of the head of the family. Likewise, the source of wealth, land, cannot be subject to individual or collective appropriation because it is its own master.

These ways and customs, sanctioned by morals and religion, have been embodied in a set of laws that the authors have called "Tribal Law."

Is this a law in the sense one would construe Roman Law, giving each his due? *Suum cuique tribuere*. In fact, the essential factor in a legal proceeding in traditional Africa was not to apply the law [giving each his due] but to maintain good relations, cohesion, and harmony in the community. Are we speaking about law? No, it is an arbitration concept in equity. Judges are not the righteous and independent figures we have today; they are first friends and relatives of the litigants. Legal proceedings are the occasion for lengthy discussions above and beyond the dispute. A legal proceeding adds zest to bleak village life. There is no hesitation in solving a dispute to break or bend customary law to make allowance for special or new facts in the case.

It becomes clear that custom is continually changing; it has no legal

value and appears closer to what Marxists term the non-law that characterizes primitive societies.

Traditional custom—even when embodied as a system—does not constitute law; the distinction between law and custom is indeed dependent upon human intervention. In traditional societies, tribal rules spring from sacred myths and when humans sanction these rules it is not to break them but rather to adapt them to their conduct, and to venerate them. These rules, therefore, transcend the actions of man who is powerless to change them under penalty of higher retribution. To the contrary, in the concept of modern law, legal rules are not inherent in man; he is not subject to them but rather it is he who establishes this legal rule of which he is master. As a result he can alter it to suit himself. This is the first distinction between modern law and traditional custom. There is a second factor: Time.

In modern law time alters legal situations. Time is therefore creative. For example, in a given time, a cash loan generates interest which increases the borrowed capital, or the legal exercise of rights on property ultimately leads to ownership of that property.

These examples illustrate how in modern law time alters existing legal situations by consolidating them or by creating a new situation that supersedes the former one.

In traditional custom, however, the concept of time as a creative factor does not exist. A loan never produces interest, and property is never acquired through prescription. The lender can never claim more than the original loan. Likewise, time does not transform a holder into an owner.

But in contemporary tribal law, time plays the same role as in modern law since the notion of economic value of property is now recognized.

A third factor of differentiation is the important place given to the *individual* as a legal entity in modern law. In fact, modern legal concept places the individual at the center of everything; he is the alpha and omega of law. The individual's will can become binding in contracts; the right of ownership is defined as an absolute prerogative subjectively tied to the individual. In contrast, in the performance of his gainful or ungainful activities, the

individual is personally responsible for his mistakes.

In the African tribal concept, the individual rarely appears as a center of interest; he is most often rejected as such. Custom does not recognize individual entities with their transitory existence; custom is more interested in global entities. Tradition considers only groups, the collectivity, as social and historical realities likely to be of interest, because the group or the collectivity is permanent, not temporal.

One of the consequences of this principle is that only global or permanent entities are recognized as having subjective rights. It is illustrated this way: Real property rights and actions are collective; marriage, which brings the woman into the husband's family, is primarily of concern to both collectivities and is arranged by them; the consequences of criminal or quasi-criminal responsibility reflect upon the offender's relatives.

These are several factors that separate modern law and tribal custom. But it is important to emphasize that these factors are becoming less divisive as there is a growing unity through assimilation, through the usage of concepts and principles recognized constant by modern law and universally recognized by contemporary civilizations.

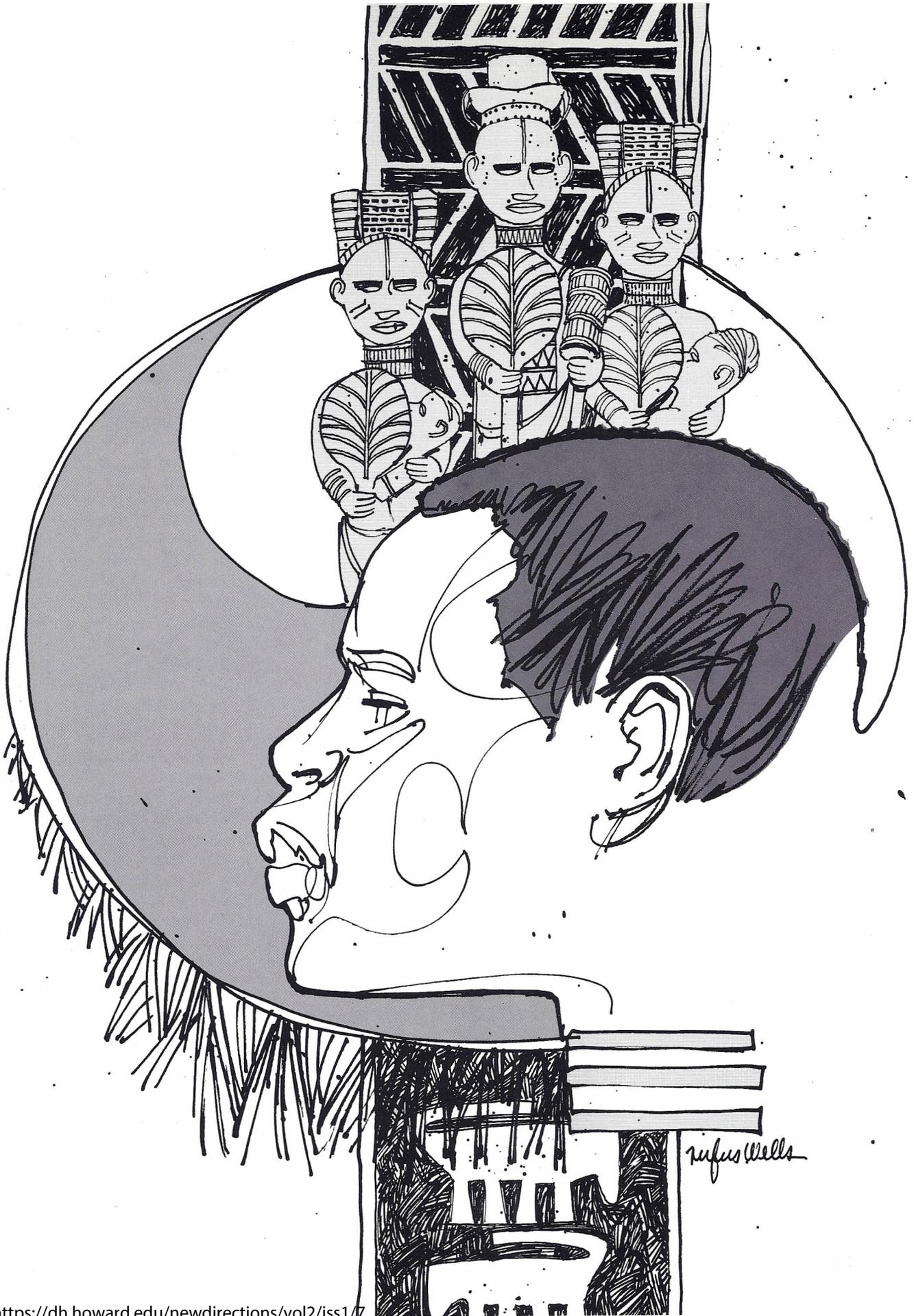
Nonetheless, this trend toward unity passes through various phases during which certain questions are simply left to custom whereas others are subjected to parallel laws; in the final stage, modern law categorically supersedes tradition.

Respect for Tradition

Marshal Lyautey, the great pioneer of modern colonial thought, set forth "respect for tradition" as a principle. This principle was reiterated by the colonial [French] legislators who held power from the First World War to the French Constitution of 1946 which institutionalized the indigenous civil statute governed by tradition. This principle is based on several premises.

The theory of assimilation which governed colonial action from the time of Napoleon misconstrued the problem of guaranteeing the individuality of the colonized.

The colonizer's Christian civilization did not adapt to the practices arising from animistic belief.



It was not proven that the colonizer's institutions were superior to those of the colonized.

These three premises led the colonial legislator to act with extreme caution with respect to certain areas that he allowed tradition to regulate. These are the family, inheritance, and certain contracts among natives (sharecropping).

The legislator reserved the right to intervene by decree in these matters to correct tribal practices involving the marriage of girls under the age of puberty or of unconsenting girls over the age of puberty; exorbitant widows' claims, and dowries.

Parallel Laws

The growing tendency among Africans toward modernism—the way of life of the colonizers—has led to the erosion of tribal law: parental authority is slackening, family bonds are becoming looser, personal autonomy is increasing, and with it, the birth of individualism.

Those factors, among others, have caused cracks in the system of tribal law. As a result, some matters have become subject to modern law because it is more applicable to the new conditions of economic and social life. Among those matters is the regulation of real property.

Indeed, the colonizers soon understood that in Africa rights over land did not have the same significance as in Europe. There, land can be the subject of rights originated by men, but here such rights would be apostasy because land, a cosmogonic force like air or water, is not liable to private appropriation. That is why the colonial lawmaker, applying the principle of respect for customs, allowed the indigenous systems of land occupation—tribal ownership.

But the imperatives of economic development have led the colonial lawmaker to move from tribal ownership toward individual ownership, and thus to permit the State to develop immense stretches of vacant and ownerless land.

Therefore, two parallel institutions, two legal statutes coexist, derived from tribal law and modern law, respectively.

Substitution of Modern Law for Custom

The last stage of the evolution—the tendency toward legal unity—appeared symptomatically through the absorption

by modern law of certain matters governed until then by custom.

That evolution was hastened in 1946 by the accession to French citizenship of many nationals of the colonies. Legislative equality called for legal equality; therefore, the French of France and the French Africans were going to be subject to the same regime, which was to be the regime of the French of France because it was considered technically more advanced.

Traditional law was abandoned in favor of the penal code of 1810; that was done by the law of April 30, 1946. However, the colonial lawmakers created new laws to cover such local customs as cannibalism, sorcery, witchcraft, administration of poison, consummation of marriage with a minor and slavery.

Similarly, in the social domain, custom has no longer been able, since the Second World War, to govern the working class; several attempts at lawmaking took place, but it was not until 1952 that the "overseas labor code" was produced. Custom no longer has a place in labor-management regulations.

New Trends in African Tribal Law

New trends appeared in tribal law after the Second World War, when custom was recognized as a legal system either in the pure state—animistic customs—or the hybrid state—customs more or less impregnated with Christianity or Islamism. Tribal law is especially oriented toward that second state.

Because tribal law is disregarded by many people, natives have renounced their customary civil law and chosen modern law. Also, it has been declared inapplicable to certain legal matters, such as obligations, and has been excluded from penal law and labor law. Tribal law has been deliberately abandoned when one of the parties to litigation is a national of the colonial power or a native who has adopted that culture or when there is a gap in the tribal law. In the latter case, the written law is applied.

So the domain of tribal law has shrunk while that of modern law has grown and, in these conditions, tribal law will certainly disappear from lack of use.

Another reason for the disappearance of tribal law is the judicial organization itself: the tribal jurisdictions are special

jurisdictions although, paradoxically, they are the jurisdictions of the immense majority of the people of Togo.

The fact that, before those tribal jurisdictions, custom is variable and apparently inconsistent further corroborates that idea. Let us not forget that custom has lost the immutable and sacred nature of something beyond human will and that its present judges are no longer the judge-priests of the past.

I believe that tribal law is disappearing under the effect of the evolution of the African world. But does this mean that we will have only imported law? I don't think so, as long as we Africans continue to interpret the evolution of our society in a rational manner by creating codes adapted to its cultural behavior. □

The editor welcomes commentaries on issues relevant to the Black experience for possible use in New Directions. Commentaries should be 8-10 typewritten pages, double space.



Books

Black Students, White Campus: Implications for Counseling

By Frederick D. Harper
American Personnel and Guidance
Association Press, Washington, D. C.

Reviewed by Judith S. Andrews

The Black student who trudged off to the predominantly white college campus during the 1960s was in many instances an unwitting intruder in a world for which he was emotionally unprepared. The anxieties and hopes of these Black pioneers is the subject of a book, *Black Students, White Campus: Implications for Counseling*, by Frederick Harper, Ph.D., associate professor of counselor education at Howard University. It is scheduled for publication this winter.

Broadly, the book deals with the present and future condition of the white university and how the demands of the white campus are often at variance with the background and needs of the Black student. Also, examined extensively are the various behavioral reactions of both Black and white students to this racial dilemma. Dr. Harper's aim is to give counselors an idea of what factors might contribute to crisis for Black students. He maintains that proper counseling can aid Black students in becoming responsible agents of change in the university system.

Dr. Harper's beginning point is the early 1960s when Black students were first admitted to many previously white institutions, especially in the South. He explains that while numerous white universities had admitted Blacks before the 1960s, it wasn't until this decade that the number of Blacks reached visible proportions.

The plight of these first headline-making students is perhaps best

expressed by a quote in the first chapter of the book from Charlayne Hunter, one of the first Black students to enter the University of Georgia. "... I sometimes feel that my attitude was wrong. I had to suppress too much. Everyone was talking about how cool and dignified I was, but perhaps if I had exploded more, I wouldn't have some of the anxieties and anger I have today ..."

Ms. Hunter's comment is representative of what Dr. Harper describes as the "NAACP Negro" or the Black student of the early 1960s. This student, he says, molded himself into a model for the Black masses. "He studied exceptionally hard, dressed impeccably and honored all of the social graces. He was even taught to control his emotions, to act in, and to suffer any pain to prove a point for his people."

The late 1960s however, elicited different behavior from Black students whose numbers on white campuses had steadily increased. Dr. Harper calls this student the "Militant Black." Angry, and no longer willing to internalize hurt and frustration, this student struck out at the system—questioning the university and the larger society as well.

Of particular interest in Dr. Harper's discussion of Black students during the era of protest are his observations about the adjustment problems of Black female students. He touches on the tension between Black male and female students on the white campus.

"... because dates for the Black woman are scarce, Black women tend to be anxious about holding onto a relationship with a Black man once it is established. Black women, at times exhibit feelings of anxiety and anger in discovering that certain Black fellows of the campus choose to date white females. The Black female often complains that the supply of Black men is too scarce for the 'brothers to be fence-jumping.'"

Also contributing to the often stressful nature of daily life for the Black female student is her awkward relationship with white females in the dormitory.

Dr. Harper writes, "Some Black women have even complained of white women (mainly freshmen) coming by their rooms to learn the latest Black dances, discuss Black books, or in one rare case peeping in the public shower room to see how a Black women looked naked."

Interracial dating on the white campus is still basically a one-sided affair, according to Dr. Harper. The Black male and the white female are more likely to be seen together than the Black female and the white male. He notes that white males who would like to date Black women are usually apprehensive about being seen in public; not so, however, with the white woman who is more open about dating Black men.

"Being in the aggressor role," Dr. Harper writes, "the Black male is expected to pursue the white female; however, Black males are generally more reluctant to ask a white girl for a date than a Black girl. In other words, it is less painful to be rejected when asking a Black female out than asking a white female and running the risk of being rejected. The Black male often gets a subtle invitation from a white female student ..."

Dr. Harper devotes most of his research to the problems of Black students, but he is also sympathetic with the often ambivalent role white students play in race relations. He feels that many white students sincerely want to seek relationships with Black students but are kept from doing so because of guilt about white racism, fear of taking the wrong approach, preconceived notions of Black behavior, etc. He also offers some advice to white students who yearn to know more about Blacks.

"... some whites want to talk only about racial topics, in a way picking the

44 mind of Blacks or trying to drain all the information of a lifetime in one sitting. It might be a better approach if those white students would talk about everyday topics in a natural way and thus get a chance to learn much more about one Black person as an individual."

Dr. Harper shows great concern for the Black student of today. He categorizes him as the "Alienated Black," because of his isolation from the white university and from other Blacks. "The goal of this student is to get the degree, to play the game and get out. He is tired of promises of university change and thus he has given up."

Dr. Harper is critical of administrators who are too concerned with the economic survival of certain university programs that they have no time to be concerned with the needs of Black students. He notes that white administrators are free now from the demands and pressures of student protest and that change in the university will be delayed even longer.

However, Dr. Harper is hopeful that change can still take place. "If the university is to change and grow away from its rigid, impersonal, irrelevant, racist, and isolated stance that often causes Black students to cry out in pain, then administrators, Black students, faculty, student personnel workers, and white students must coordinate their struggle and efforts. Such combined efforts must not be temporary but long-range; not sporadic but consistent; and not meager but broad in scope."

Black colleges, he observes, can fill the present void for Black students. He suggests, though, that some Black colleges in need of financial support should consider a partnership arrangement with a Black school that is more firmly grounded. He deplores the fact that Black schools offer limited

opportunity for graduate and professional studies. For example, he cites the existence of only two predominantly Black medical schools—Howard University College of Medicine and Meharry Medical College.

Ostensibly, Dr. Harper has conducted his research for the purpose of aiding "those who might counsel the Black student in crisis," but his work ultimately fills a much larger order. He has succeeded in accurately describing the frustrations of daily life for Black students during the heyday of desegregation. He notes in his preface that he was motivated by the dearth of serious scholarship in this area. The fact that his research is compounded with his own experiences as a Black student on a white campus and as a counselor in the same milieu should make believers out of those who dismissed Black student protest as a mere whim of youth. □

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