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LAW AND SOCIAL CHANGES IN AFRICA

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We all have been to school: grammar school, high school, college, professional school. In our school days we have been in contact with a great many teachers. Many, perhaps most of them, we have forgotten. Others are lingering on in our memories in a more or less shadowy form. But some of us may have had the good fortune of meeting one or two outstanding personalities whose memory has stayed with us, because they have influenced our development, our professional training, our lives. I have not had the privilege of personally knowing Professor Tyrrell Williams, but I have met people who have known him, and I could see when they talked about him how their faces would light up in the memory of a man who must have had a great influence upon them, who must have left an indelible impression. From what I have heard about Professor Williams, he seems indeed to have been one of those rare personalities who had the gift of teaching, that gift which one cannot acquire, but which simply must be innate, the peculiar gift of inspiring enthusiam. I thank you for honoring me with the privilege of participating in this annual commemoration of Tyrrell Williams.

Geographic distances do not mean insignificance. As a matter of fact, I think we can say that what is happening today and what will happen tomorrow in Africa may be of decisive importance for us here in the United States, for us and for our children. Africa has come to be a crucial part of the world. In the last few years we have witnessed the voluntary abdication from colonial rule and power of Britain, France, Belgium and Italy. Nothing like it has happened since the Roman withdrawal from Britain in the fifth century A.D. A complete transformation has taken place in Africa, South of the Sahara and North of the Limpopo, which is the part of the African continent with which we are to be concerned. Both North Africa and the Republic of

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South Africa are different worlds with problems of their own. In our part of Africa twenty-two regions have been granted independence during the past seven years, and seven more are to follow shortly. These countries are now not only able to determine their own internal governments; they also have entered the field of world affairs, and it is in that role that their policies, their developments and their attitudes affect us here in our country. We must understand what is going on there. For lawyers there seems to be no better way to understanding a country's problems than that of observing its legal life and legal issues.

What happened to the legal system of the African countries when they attained independence and since they have been independent? Basically, the influence of the attainment of independence on the legal systems of the African countries has been exactly the same as it was upon the thirteen colonies which formed the nucleus of our nation. With some exaggeration one might say that on the 5th of July, 1776, the law of Pennsylvania, Massachusetts or Virginia was exactly the same as it had been on the 3rd of July. The mere fact that the sovereignty of the King of England had ceased and that the people of the regions had assumed their own sovereignty had, of course, changed what we nowadays call the constitutional bases of the legal order. The laws which up until then had been the command of His Majesty George III, King of England, now were commands of the sovereign people of Massachusetts or Pennsylvania. But the content of the rules had not changed; the law of procedure, the law of contracts, the law of torts, the criminal law and so on remained exactly as they were on the day before independence. Such also is the situation in the new nations of Africa. If we want to know what their legal system is and what it is likely to be, we must thus know what their legal system was just before independence.

Common to, and characteristic of the legal systems of all African territories is what may be called dualism or pluralism, *i.e.* a situation in which we have not just one law equal for all, but where we find a plurality of legal orders, each applying to a particular group of individuals. Before the white man came into the vast regions of the African Continent, the Africans lived in tribal communities, and each of these tribes lived according to its own traditions and customs which were administered by their chiefs, councils or other bodies. As a matter of fact, a great many of the African peoples had highly developed legal rules and well organized courts following elaborate procedures. The customs varied from tribe to tribe, but there was a common stock among many of them.

In the sixteenth century the first white men appeared, but for a long

time they did not reach beyond narrow strips of coastal areas. Not until the second half of the nineteenth century did the Europeans begin to penetrate into the interior and there to establish their colonial regimes. In their colonial policies, Britain and, to a lesser extent, France, Belgium and Italy were anxious to interfere as little as possible with native life. As a general rule each tribe was thus left to live according to its ancient traditions, customs and laws. This policy of non-interference had worked well in British India as well as in French North Africa. In these parts the policy of minimum interference was inevitable because the indigenous patterns of life were firmly tied up with religious convictions. Attempts to tamper with deep-seated religious beliefs and convictions would have stirred up resentment and resistance. The policy of non-interference was implemented by the policy of indirect rule, which was specifically the policy of the British administration, and, to a lesser extent, of the other colonial powers. This policy meant that the individual African would have little direct contact with the white administrators. The European powers would primarily rule through, and with the help of, the traditional native authorities, *i.e.* the tribal chiefs, paramount chiefs, or where they existed, African kings. There were, of course, a good many instances of interference by governors and district commissioners, but they too were anxious for each tribe to maintain its own law. By what law an African's life was to be governed depended on what tribe he belonged to. In such a world it was but natural that a white man would live under the law of his tribe, *i.e.* the law of the English, the French and so on. Just as the Englishmen who had come to the Atlantic seaboard of North America in the seventeenth century brought with them their own law, the common law of England, so the British, the French, the Portuguese, the Italians and the Belgians brought with them their laws. The French and other continentals brought their codes and statutes, and the British brought with them the English Common Law with its cases and statutes. But the white man's law came to be more than just the law of the British, French and other white tribes. Among the tribal laws, it came to occupy a position of paramountcy. After all, it was not only the law of the ruling group but, above all, it was a mature law capable of taking care of the needs of that complex, complicated modern civilization which the Europeans brought with them to Africa. Thus the French, the Belgian, the Italian or the English law came to be not only the laws by which the Europeans were to be judged in criminal and civil matters, but they also became the law for a great many of the Africans, in cases of major crimes, as well as for civil transactions between Africans and Europeans and even for a good many transactions between Africans, transactions of that mod-

ern pattern for which the traditional customs had no rules. Furthermore, the range of the African laws is also limited by the general principle that they were not to apply insofar as they would be contrary to natural justice, equity and good conscience. That was the usual formula of the enactments, British and other, which defined the place of the native law in the colonial legal systems. The European laws thus came to be the common law of these regions, *i.e.* the general laws, to which the native laws would appear as the exceptions. In effect, one can say that the common law of Nigeria is the common law of England, the common law of the Congo is Belgian law and the common law of Sénégal is French law. Yet, in spite of all this, the customary laws, the tribal laws and the native courts retained their significance for the African population for which they constituted law and justice in the affairs of daily life. However, this very life began to change at an ever increasing speed until it had undergone such profound transformations that the traditional old laws of the primitive past were no longer fit for the new conditions.

Among those influences by which this transformation was brought about one ought to mention first of all Christianity, which came into Africa through the far-flung, extensive activities of the missionaries. By Christianity, ethics and moral convictions were influenced in every sphere of life, but most profoundly in that sphere which has been basic for the structure of African society, the sphere of family life. The traditional African form of marriage is polygamy with pronounced male dominance and, in most native customs, with fairly easy divorce. In the Christian view, marriage is monogamous and, at least on general principle, indissoluble. Conflicts and tensions were bound to arise, especially among those Africans who were converted to Christianity. Although they never came to be a majority, they have been significant and influential. Besides, Christian life patterns were those of the white rulers. With Christianity, and largely through the missions, another powerful influence made itself felt: education. Schools, first on the level of grammar schools, then high schools, were built up. In recent years colleges and universities have been added. Even before the latter were built, a great many Africans, especially West Africans, had gone abroad, to Paris, Oxford, Cambridge or London, and they came home imbued with new ideas. Obviously, the rules and customs which had been developed for an illiterate population were not fit for the educated élite.

Another change wrought by colonialism, perhaps the most far-reaching of all, was the transformation of the African warrior societies of continuous inter-tribal warfare and clan feuds into a society of peaceful agriculturists and urban workers. Instead of becoming a

warrior, a man now came to be a peaceful peasant or a worker for wages, a being that had never existed before in Africa. Work had been almost exclusively agricultural and had been left to women or to slaves captured in war. Now free men found themselves compelled to work, not as pastoral herdsmen, but as wage earners on the white man's plantation or in the domestic service of a white man, in the mines or, more recently, in urban plants of the developing industrial enterprises, mostly of small scale, but occasionally even of large size. Along with this development came urbanization. The migration from the land to the modern cities of European pattern was often of a temporary character only, the stay in the city meant to be only long enough to earn the money needed for the purchase of a wife. But more and more people became permanent city dwellers, taking to a completely new way of life. Besides, in the cities, people of different tribes were thrown together in new communities. With urbanization and industrialization came the development of modern traffic, the automobile, and with it there came new occupations and vocations. Africans now would be taxi and truck drivers, repair men, waitresses, or ministers of the gospel, teachers, clerks, salesmen, businessmen, journalists and, quite recently, politicians, diplomats or cabinet ministers.

The social changes were rapid and profound, but the law did not fully keep up with them. In the Portuguese, French and Belgian regions it became possible for an African who had taken to European ways of life formally to step out of the framework of tribal organization into the world of modern civilization. Upon passing a rigorous test, he could register as an "évolué" and thereby switch from native to European law and jurisdiction. In the British regions such formal possibilities were not fully available. Only with respect to marriage was a choice given to the African between the old style polygamous African marriage and the European-style Christian monogamous and, on general principle, indissoluble marriage, the so-called registered marriage. But there was no possibility of a complete shift from African tribal law to European law. In many regions the native courts did a remarkable job of adapting the law which they had to administer. But while some courts at some time might lean toward innovation, at other times and places they would be conservative and reluctant. Much depended on accidents of time and place and the attitudes of the supervising district commissioners and high courts. Besides, in the British regions the system of following precedent tended to petrify to some extent the growth of the customary law in the courts. On the other hand, it was very difficult, if not impossible, to bring about necessary changes by way of legislation. The result has been a

growing discrepancy between the conditions of life and the law. To remove this discrepancy, to bridge the gap between life and law, is now the great challenge for the new nations of Africa. Beyond this adaptation to existing conditions, there is the task of providing the legal channels for further development.

What, for instance, shall be the future of pluralism, *i.e.* that system in which one man lives under one law and another man under another in the same place? Shall that system be continued or shall the law be one for all citizens of a country or state? Pluralism is not peculiar to Africa. It has existed in the world before. It was characteristic, for instance, of Europe in the earlier Middle Ages. We have a famous statement of a Frankish bishop, who tells us that in the Frankish Empire of the Carlovingians each of five men sitting around a table might be living under a different law. Each of the conquering tribes of the Frankish Empire had its own Germanic law, and the Roman subject population continued to live under Roman law. It took several centuries before the differences disappeared and the system of personal laws, as it was called, was transformed into that of territorial law, *i.e.* that system under which the law is one and the same for all persons living in the same territory. Personality of law still remains today in many countries of Asia. In India, for instance, the English common law basically is the law of India, but in matters of family life, of succession to property on death and a few other matters closely connected with religion, such as pious foundations and charities, the rules are different for Hindus, Moslems, Buddhists and Christians. In the countries of the Near East, for instance, in Lebanon, French law and in Israel English law, is more or less the general law of the country, but in matters of family life and succession each of the numerous religious communities has its own law and its own courts. All these countries are faced with the question of whether legal pluralism shall be maintained or abolished. Fortunately for Africa, it is less tied up with religious aspects than in Asia. A passionate discussion has set in already in some of the African countries, for instance Kenya, which will be independent shortly. Generally, one may expect an expansion of the sphere of the Western laws, which are likely everywhere to become the common law, except for the sphere of family structure and matters closely related therewith. The development in the field of the law will thus parallel that in the field of language, in which English or French have come to constitute in each country the "lingua franca." This development is facilitated by the remarkable lack of hostility towards the former colonial powers, the strong ties between the African élite and the colonial mother countries, and the insight that, after all, the European laws are the laws

appropriate to those needs of Western civilization of which Africa is now to become a part. This idea was aptly expressed by a leading Tunisian jurist who recently paid a visit to the University of Chicago. "Every law in the world," he stated, "constitutes an effort in one way or another to express the needs of human reason and of civilized community life." Of all laws, the European, as the most modern, are those laws coming nearest to this goal. Of course, if the French or English laws are to become the common laws of African countries, they have to be adapted to the local conditions, just as the law of England had to be adapted to the conditions of America. To achieve this adaptation will be no mean task.

While unifying tendencies are strong in some countries, for instance Ghana, strenuous efforts to maintain diversities can be observed in others, for instance Nigeria, where the Moslems of the Northern Region are by no means willing to give up their sacred law for a law of a purely secular origin.

But whatever the local situation may be, adaptations will have to be made. Legal changes will have to be made, particularly in two fields of life of basic importance, *viz.* land tenure and family structure, including marriage and the status of women.

Land tenure in Africa has been characterized by a system wonderfully adapted to the needs of traditional African society. As a general rule land has been owned not so much by individuals as by groups, usually families. An African family is not just a group of a husband, his wife and their infant children; an African family or clan is the group of descendants of a common ancestor of three or four generations and thus consisting of a potentially large number of kindred whom we might regard as fairly remote. Generally, land is owned by such groups. While land pressure exists in some regions of Africa, for instance in Kenya, in others, perhaps one might say in most other regions, one finds large stretches of seemingly empty land. Whether that land is arable is another question. The experts seem to agree that little of it should be subjected to intensive methods of agriculture. Of those lands, large tracts are "owned" by family or other groups, but only sections of these tracts are cultivated at a given time. After a number of years that section is left fallow, *i.e.* left to be grown over by bush or forest. At another section the bush is cleared and the land taken under cultivation until one moves on again and again. This seemingly wasteful system is said to be well adapted to the peculiar qualities of the African climate and soil which might be threatened by erosion if it were cultivated more intensively. But not all soil is of this kind and not all agricultural experts are of this view. It is certain that a system which sufficed for the needs of a subsistence economy

cannot continue unchanged in an era of production for world market needs. In the older days an African family would grow what it would need for its own consumption. But one of the most far-reaching changes that is taking place in Africa is the shift from production for immediate consumption to production for the market. In Ghana, for instance, the economy depends on the cultivation of cocoa, in Uganda upon cultivation of cotton and coffee, all to be sold in the world market. In such an economy one needs different agricultural methods, such as intensification, the use of fertilizer, machinery and other improvements. All this costs money and thus requires credit. If land is owned not by one man but by a whole group, one must at almost every step of a complex process obtain the consent of all its members. One traditionalist holdout may well prevent the necessary modernization. Furthermore, in those regions in which there is empty land, newcomers have often been allowed to use parts of a family's land that are temporarily unused, with the understanding that the "tenant" has to move out upon the owning family's request. Such a "tenant at will" is hardly inclined to make investments, and even if he were, he could not obtain the necessary credit. If agriculture is to adapt itself to the conditions of the new market economy, it will need a new system of land tenure, which may be a system of a more or less cooperative pattern, but considerable changes are necessary, changes that will require in their implementation much legal skill and great care, lest economy and society be dangerously disrupted.

The other field in which major changes must be brought about is the structure of the family. The traditional system is the clan organization, the large group, which was so well adapted to the old African needs, especially of the warrior society, where the family was a unit of defense, of warfare, in which people had to stick together in large groups. The system also fitted a social order in which the survival of the group depended on ample and continuous supply of manpower. Consequently, female fertility was of the utmost value. Furthermore, since there was constant danger that a group might clash with another, that out of a personal quarrel a clan feud might arise with continuous mutual killings, it was felt desirable to create alliances between groups. The most effective way of bringing about such an alliance was marriage; a girl of one group would be given in marriage into another group. Marriage was thus more an affair of the two groups than of the two individuals concerned. It was an affair arranged by parents or elders; the immediate parties, quite particularly the female, had little choice. Obviously, in such a society the males dominate over the women. Marriage is polygamous. A man tries to have as many wives as possible. They constitute his labor force, they

increase his wealth and the number of his children and, consequently, his value to the group and thus his social standing. If a man wishes in that way to increase the power of his group and his own standing, he has to pay the price for the transfer of the woman's fertility from her group to his. Thus the payment of the customary bride price, lobola, is essential in the conclusion of a marriage. If the woman turns out to be sterile, he may return her to her group and receive back the lobola, a right that he might also have in other cases of disappointment with the woman. But a wife could not leave her husband unless her father would be willing to repay the lobola, which he could not easily be expected to do. In some tribes the father would be allowed to keep the lobola, but only when the husband had been guilty of grave abuse. Often detailed rules had grown up about lobola, its size, its mode of payment and its repayment. The entire system was complex, but it neatly fitted the needs of traditional African society. It no longer fits the need of the new Africa, of a society in which a man may be an urban worker, or a cabinet minister or a diplomat stationed in Washington, or where the wife may be an urban domestic, a teacher or a nurse. Changes must be brought about, but in what ways? Should they be worked out slowly by the courts or at one fell swoop by legislation?

The former way seems to be preferable over the latter which would hardly be able to take notice of the great variety of situations existing in a society in transition. The modern family of Western type is not yet the exclusive family pattern in Africa. One still encounters old style family groups, and all possible stages of transition in between. The courts are more apt to deal with such a variety of situations than the legislature. But can the job be done by courts often staffed with people of insufficient insight, by courts which proceed piecemeal and without contact with each other? Since hardly any decisions of native courts are ever reported, how can the law be developed consistently when the decision remains unknown beyond the small community served by a particular court?

Far-reaching reforms may be needed in the organization of the administration of justice. Can they be achieved without endangering that regime of the rule of law which constitutes one of the most precious gifts of the colonial powers to Africa?

Here in the United States we are cozily inclined to condemn colonialism. No doubt, colonialism has had its dark sides, as have all human institutions. But the colonial powers have brought to Africa those essential goods of civilization without which the African nations would not be able now to enter actively the international community of nations. Africa has been a continent of hunger and disease, and to

a large extent it still is, but in the decades of colonial rule much has been done to alleviate these plagues. Africa also has been the country of continuous feuding, tribal warfare and slave hunts. The colonial powers have established peace, they have made an almost complete end of the enslavement of Africans by Africans and they have replaced the rule of the feud with the rule of law.

In all regions, the colonial powers established well functioning impartial courts staffed with competent personnel. The rule of law has been made a reality, not only in the British regions, but also in the Belgian, French and Italian regions. What is to become of the rule of law? Will the impartial administration of justice by well educated, competent lawyers continue? This problem is, perhaps, the gravest with which Africa is now faced. In some parts of Africa we can already observe danger signals. There are some parts, where impartiality has begun to suffer and corruption has begun to creep into the administration of justice. There are some parts of Africa in which arbitrary government command has come to replace justice and equality before the law. Here we are confronted with a serious and difficult situation. How can the tradition of the rule of law be maintained in view of the scarcity of legally trained personnel? The number of people trained in the law is considerably higher in West Africa than in East Africa. For instance, in Nigeria the bar has about 1,000 members, in Ghana some 200. But these figures are much too small for countries of their size. Nigeria has almost 40,000,000 people and 1,000 people with legal training just are not enough. In East Africa the situation is worse. Tanganyika has all told about 200 lawyers, most of whom are Indians who have had their legal training in England or India. There is a handful of Europeans, but the number of African lawyers in Tanganyika is about half a dozen, and the situation is similar in Kenya and Uganda. There is an urgent need for legal education. Law schools are now being established in the various parts of Africa. What kind of training are they to provide? Should there be a crash training so as quickly to turn out people with some kind of legal training to take care of the most urgent needs? Or should the training give the African lawyer not only a solid knowledge of the law, but also of the social sciences with which he must be familiar if he is to perform the tasks of law reform? African lawyers must be legal creators, adapters of the law to the transformations of African society. We in the United States have a society which is well established. We know which way our society goes, at least more or less, and we have specialists in all fields of social and technical science. But in Africa the law must be adapted to constantly changing conditions. In order to do that intelligently, the African lawyers must know about society.

The ideal African law creator ought to be not only a technician of the law, but also an anthropologist, an economist, a sociologist, perhaps an educator and a historian. He ought to learn of the experiences in other parts of the world. The task is an impossible one for any single individual. Cooperation is needed. This is where we come in, we people of the United States. We cannot simply look at the African developments. They are potentially dangerous to us. Africa has come to be a part in the great East-West struggle. The withdrawal of the old powers has created a power vacuum. If we do not go in, others will. We are simply compelled to participate, but we are reluctant to do so, especially since we do not wish to interfere with those aspirations of the Africans which we regard as justified, as demanded by human dignity and justice. So, what are we to do? This is the question which we have to ask ourselves. We cannot answer it unless we try to obtain an impartial view of the situation and until we know what is going on in that important part of the world.