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The Urgent Need to Revolutionize African Law

By Mupendana Pierre Claver

University Institute for Peace and Development of Africa - BENIN

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The Urgent Need to Revolutionize African Law

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Abstract- Africa lives in the middle of conflict. Some seek to identify the causes. This article attempts to demonstrate that one of the main causes is the legal system that colonization has bequeathed to it. After showing the differences between Western law and African traditional law, the researcher highlights the main characteristics of African traditional law before the colonial period and those of the law bequeathed by the colonizers. On the basis of an in-depth analysis, the author of the article notes that African traditional law played an integrating and conciliatory role, while remaining perfectly realistic. The one bequeathed to the African peoples by colonization can be qualified as the Law of the minority, the Law of exploitation, the Law instituting segregation and discrimination, the disorganizing Law, the Law of mimicry and finally the Law negating the African traditional Law. This raises the question of the real future of African law. This question leads to a quadripartite answer: First, it is imperative to resort to the real Africanization of the legal systems in force in Africa. Second, a refinement of these systems must be undertaken. In third position, the researcher invokes an in-depth reform of the teaching of Law in Africa. Finally, this reformed African Law will be able to play its reconstructive role.

Keywords: traditional law, customary law, western law, african traditional law, minority law, mimicry law, conciliatory law, exploitation law, reconstructive law, conciliatory law.

Résumé- L'Afrique vit au milieu de conflit. D'aucuns cherchent en déceler les causes. Le présent article tente de démontrer que l'une et principale de ces causes n'est rien d'autre que le système juridique que la colonisation lui a légué. Après avoir montré les différences qui existent entre le Droit occidental et le Droit traditionnel africain, le chercheur met en exergue les principales caractéristiques du Droit traditionnel africain d'avant la période coloniale et celles du Droit légué par les colonisateurs. Sur base d'une analyse profonde, l'auteur de l'article constate que le Droit traditionnel africain jouait un rôle intégrateur et conciliateur, en restant parfaitement réaliste. Celui légué aux peuples africains par la colonisation peut être qualifié de Droit de la minorité, Droit de l'exploitation, Droit instituant la ségrégation et la discrimination, Droit désorganisateur, Droit du mimétisme et enfin Droit négateur du Droit traditionnel africain. De là se poser légitimement la question sur l'avenir réel du Droit Africain. Cette question mène à une réponse quadripartite : D'abord, il s'avère impérieux de recourir à l'africanisation réelle des systèmes juridiques en vigueur en Afrique. En second lieu, un perfectionnement de ces systèmes doit être entrepris. En troisième position, le chercheur invoque une réforme en profondeur de l'enseignement du Droit en Afrique. Enfin, ce Droit africain réformé pourra jouer son rôle reconstructeur.

Author: Professor of International Law in several African Universities, Founding President of the University Institute for Peace and Development of Africa - BENIN, Member of the Defense Council at the International Criminal Tribunal for Rwanda.
e-mail: prof.mupendana.claver@gmail.com

Mots-clés: droit traditionnel, droit coutumier, droit occidental, droit traditionnel africain, droit de la minorité, droit du mimétisme, droit conciliateur, droit de l'exploitation, droit reconstructeur, droit conciliateur.

Резюме- **Африка живет в разгар конфликта. Некоторые стремятся выявить причины. В данной статье делается попытка показать, что одной из основных причин является правовая система, которую оставила после себя колонизация. Показав различия между западным правом и африканским традиционным правом, исследователь выделяет основные характеристики африканского традиционного права до колониального периода и характеристики права, завещанного колонизаторами. На основе глубокого анализа автор статьи отмечает, что африканское традиционное право играло интегрирующую и примиряющую роль, оставаясь при этом совершенно реалистичным. Закон, завещанный африканским народам колонизацией, можно описать как закон меньшинства, закон эксплуатации, закон сегрегации и дискриминации, закон дезорганизации, закон подражания и, наконец, закон, отрицающий традиционное африканское право. В связи с этим закономерно возникает вопрос о реальном будущем африканского права. На этот вопрос можно дать четыре ответа: Во-первых, необходимо прибегнуть к реальной африканизации правовых систем, действующих в Африке. Во-вторых, необходимо провести доработку этих систем. В-третьих, исследователь призывает к основательной реформе преподавания права в Африке. Наконец, этот реформированный африканский закон сможет сыграть свою восстановительную роль.**

Ключевые слова: традиционное право, обычное право, западное право, африканское традиционное право, право меньшинства, мимикрирующее право, примирительное право, эксплуатационное право, реконструктивное право, примирительное право.

Introduction

We are not the first and perhaps not the last to declare that "contemporary African law" is first and foremost the reproduction of a foreign model that hardly responds to the nature of African social relations and that does not even translate these relations into reality; that it is a law of the intellectual minority and of citizens living in African cities; a law that disorganizes the African social system; a law that enshrines segregation and discrimination between citizens of the same country, and even between the latter and Western nationals; a law that enshrines and perpetuates a system of exploitation of African states. In short, it is a law that is at the origin of almost all the disputes, internal and international, that plague African societies. The decline of justice as a whole, the failure of democracy and "good governance", the threats of

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destruction of the traditional African family, the increasingly conflictive management of the natural resources of African countries, the wars that are tearing the continent apart... are in large part the result of this legal system.

We reaffirm that we are not the first to say that the laws and institutions inherited from colonization are at the root of the African catastrophe. The words of Mr. Koffi Annan, the former Secretary General of the United Nations can be quoted at any time. It is a pure but horrible truth that "the colonial laws and institutions that some new states inherited were designed to exploit local divisions, not suppress them...» [*A.KOFFI (2017): par.7*]. In other words, these legal systems did and do nothing but perpetuate and sharpen the divisions of Africans in order to better exploit and control them.

And this is understandable! When the established rules and institutions do not prevent the birth of controversies and conflicts, but on the other hand support and fuel them; when one does not want to prevent that the latter are settled only by violence, one consequently establishes all the premises of the collapse of the society, of the destruction of all the vectors of the socio-economic development and the social cohesion. It follows that one annihilates any authority and any respect to the latter and consequently, one deprives the society of any institution able to settle the disputes and to restore the social peace. In this logic, the Law, as a "system of obligatory rules governing social relations in a human grouping, which the latter can impose the observance by constraint, by its judicial and executive institutions [*M.VANNEL (1968): 16*], is deprived of any organ, any mechanism of conflict resolution. The first mission of the Law is to settle differences in all their forms or to prevent them. In Africa, this Law, being stripped of the traditional Law, becomes distorted and cannot in any case make the relations between people harmonious in an African society still mostly traditional and traditionalist, because a great fringe of the social relations is either ignored in the framework of the concerned relations; or, even if these relations are envisaged, they are called to be regulated by norms which are not the product of the African society. Therefore, before the application of this law is effective, there is already a conflict in the system itself which, in turn, transposes these conflicts into society. Social relations, being dynamic and evolving as society itself is, by trying to organize themselves around these legal norms artificially constituted to govern them, will generate other conflicts or sources of conflict which, in the long term, should explode the entire social system. And this is the beginning of another crucial problem: the artificial construction of a social system, political institutions and legal system incapable of guaranteeing peace, justice and development to all components of African society. On the other hand, on the rubble of this society, dysfunctions, multiform crises, the decline and even the disappearance of the State and all that accompanies it, are established. To use the words of J. Vanderlinden, "these terms only reflect sometimes the modesty, sometimes the fear, sometimes the frankness, sometimes the cautious style, in fact, most often, the personality of those who use them" [*J. VANDRLINDEN (2001): 1*]. There is only one truth behind it: it is imperative to rethink a Law in conformity with African social relations, without which, Africa will only continue its road of progressive degeneration, which will lead it to its destruction and its recolonization.

It is necessary to recall once again that "contemporary African law", this law inherited from the European colonizer, is today the source of the destruction of the post-colonial African State. Indeed, being "a human group fixed on a territory and in which the social, political and legal order is established and maintained by an authority provided with a public power" [*P.C MUPENDANA (1998): 58; H.KELSEN (1926): 561; H.KELSEN (1926): 231 et ss; H. KELSEN (1962)*], it needs, for the maintenance of the order, a whole system of legal norms. However, these norms are in contradiction with the African state, because they are imposed from outside, whereas they should be the creation, the emanation of this state. It follows that the State is, in all its activities, limited by this law. Therefore, a law imposed from outside is in contradiction with the sovereignty of this State and is in conflict with it. This leads to the dysfunction, to the paralysis of its institutions and organs. Now, the dysfunction of this couple "STATE-LAW" leads to the destruction, either of the two at the same time, or of the State; the latter, in such conditions, being obliged to create a Law in conformity with its own realities. The Law that created the African State has already proven its incapacity to maintain its own State in equilibrium because of its foreign origin in relation to the society on which it must be applied.

Is it true that this Law applied by the post-colonial African State is the source of all the conflicts that risk leading to the destruction of all African institutions? In order to give an objective answer to this question, it will be necessary to agree on the use of several legal concepts used in this context such as: Western Law (European Law, Anglo-Saxon Law), African Law, Customary Law, and Traditional Law before seeing if the reconciliation of African Traditional Law and Western Law is possible. In addition, following a historical approach, we will try to find the main characteristics of African Law as it has been applied or is applied in African societies. Finally, we will try to pronounce ourselves on the future of contemporary African Law, if we want it to really serve the interests of Africans. This will require a real Africanization of this Law, a specialization and a perfection of its contents and its systematization and finally a deep reform of the

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teaching of Law in the higher institutions of legal or paralegal training on the Continent.

I. About Some Concepts

When reading the legal literature on Africa, one always uses terms such as European Law, Western Law, African Law, African Customary Law, Traditional Law, etc. Are these concepts understood in the same way? I dare to believe that, by recognizing that the most elementary experience reveals that any human grouping cannot exist without a set of rules that establish order in society and avoid anarchy; this is reflected in the traditional Latin adage closely linked to human groupings: "*Ubi societas, ibi jus*" - (where there is a society, there is a Law) -, one cannot affirm that Law is monocolored. It would also be difficult to deny the multiplicity of systems of Law. Hence, it becomes judicious to oppose Western Law to African Law, and Traditional Law to Customary Law.

a) Opposition between Western Law and African Law

Driberg H. states that "Law is composed of all the rules of conduct that determine the behavior of individuals and communities and that, by maintaining the balance of society, are necessary for it to perpetuate itself as a constituted body" [H.DRIGBERG (1928): 63-72]. Although this definition lacks two essential elements: the obligatory nature of this system of rules and the recognition of the obligatory nature of these rules by the members of the community, it should nevertheless be emphasized that it highlights the diversity of Rights that takes into account the nature of the communities (States, Organizations...) that create, apply and perfect these norms of Law. It is moreover what pushes H. Lévy-Bruhl to remark that "every society is, by definition, juridical..., even the most rudimentary societies that we can observe" [*H.LEVY-BRUHL (1968): 1117*].

On the basis of these appreciations, it would be partly wrong to deny the existence of African and Western law. However, this truth would also be tainted with imperfections. As there is not a single homogeneous, mono-cultural, mono philosophical West, ..., how could one dare to speak of an African Law in such a complex and varied Africa? In our opinion, Western Law and African Law do not exist if we understand them in the objective sense of the term "Law". There are systems of Law on the African continent as there are in Western Law[1].

If one were to take Law to designate the "Science of Law" which has as its object the study of legal rules in their sources, their contents, their consequences [*P.C.MUPENDANA (1998bis): p.5*], one would be able to say at that moment without risk of being mistaken that there is an African Law. In this way, one would be right to oppose them.

Thanks to legal science, we manage to discover the differences between Western and African Law. For example, in African Law, the differentiation is not made between movable and immovable things; but the goods have different names according to their nature or their use: thus they distinguish the *amatungo* (domestic animals); the *ibintu*, generic name that addresses the *rugo*, the *imilima, ubwatsi, imyaka, urutoke, ibiti, intwaro, ibikoresho, imyambaro... [J.VANHOVE (1941): 41]*. In Africa, the rights of passage and access are not private as in the West. The people of the hill can move freely on each other's land. The same is true for livestock, for which special paths are laid out in Western legal practice [*J.VANHOVE (1941): 43*]. Another example, "The European lawyer wants to be quick. This Western legal practice can no longer afford the luxury of inventing for each case. Laws and jurisprudence present ready-made solutions; and this is what we call Law. A lawyer is someone who juggles with solutions. He knows the rule before the facts; whereas the Bantu Solomon starts from the facts to find a rule *[R.DEKKER (1970), 21].*

In the field of property law, the following example is significant. The term "corporate property" would be more appropriate here, since the relationship between the social group and the land cannot be separated in African law from the internal relationship of the members of the group with respect to the same land. The individuals thus enjoy well-defined rights, which coexist with those of the group itself. The chief is everywhere considered as the symbol of the land owned by his group. He plays the role of a sort of universal trustee or administrator of the land towards the group[2]; he distributes portions of the land among the family members, who in turn redistribute it among the individual members of the family group.

Since land is the infrastructural basis of African society, it is appropriate that more attention be paid to it. African customary land law did not have the same notions as European law, even when viewed from the perspective of the English law idea that all the land in the United Kingdom is the property of the crown and that each owner has a right to it. The African chief or king has, even in theory, no comparable right; he exercises only general administrative powers over the lands of the community he governs. If he desires for himself the possession of a piece of land, he must ask its owner for it, and can only obtain it if the owner does not make use of it. It is important to emphasize this point, because some Africans have tended, in the face

[1] En Droit occidental, nous disons qu'il existe le système juridique romano-germanique, le système anglo-saxon, le système russe, le système japonais…

[2] Sur ce point une jurisprudence très fournie d'arrêts du Conseil privé : Amodu Tidjani V Secretary, S.Nigeria (1921), 2 A .C. 399 ; Cf, The journal of Comparative Legislation and International Law. Nov. 1951, vol.33, 3è série, 3è et 4è parties, p.49-55.

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of Europeans who were prospecting for mineral resources and asking them for land concessions for this purpose, to set themselves up falsely as feudatories. Any sum paid to the chief under these conditions would be contrary to the law and could not assure the so-called purchaser of any title of ownership.

Finally, the African landowner cannot alienate his share of land, although he may pledge it to secure a personal debt. He may use his land as he sees fit to make it fruitful, including by transforming its original use, provided only that in so doing he does not prejudice the rights of other members of his family. He may even, under certain circumstances, lease his share of the land and even, subject to the acceptance of the other members of his family, alienate it free of charge or for a consideration. Similarly, his right to the land does not lapse upon his death; it passes to his children.

In short, the only serious restriction is that the land can only be alienated with the prior consent of the family, and that it must be shared among all the rightful claimants, with the interested party having only the share that belongs to him. Everyone is perfectly free to do what he wants with his property. However, as a result of his obligation to look after the future of the children he has given birth to, who still belong to the family, the latter retains a right of supervision over this portion of land. This limits any total alienation of land ownership. For example, in the Bugoyi of Gisenyi in Rwanda, families have leased portions of land for a period of 25 years, without being able to sell them permanently. This same practice is also scrupulously followed among the Nande of North Kivu (in the Democratic Republic of Congo). This again shows the difference between European and African law.

African law is unwritten and lives at the rhythm of society, while writing condemns Western law to a slow evolution and transformation. The notions of property and community of management as understood by European Law are poorly transposable to African Law.

This state of affairs provokes heated discussions between several Western jurists, some of whom want to deny the existence of African Law, because it is not written, while others carefully show that African Law has nothing to envy to Western Law. H.S. Hartland, an ardent defender of African Law, expresses it in the following sentences: "That is why civilized peoples, who are accustomed to link law to a written doctrine, refuse to call the rules to which savage peoples adhere law, and grant them only the quality of customs. But customs which are established and respected by the whole population cannot be distinguished from laws. In our country, the judges of the King's courts have always recognized them as laws and applied them as such, even though they have sometimes been prescribed by no written legislation... Custom is equated with law by its supporters as well as by its detractors *[H.S.HARTLAND (1924): 2].* It is not the writing that makes the Law, but the rigor with which social norms are put into execution. Is not Professor Volodymir Butkevich right when he points out that "to base oneself on the absence of written documents to deny the existence of a people's history, or to prove the existence of a people's legal system, or to prove the impossibility of carrying out scientific research, is an empty and dwarfed argument" *[V.G.BUTKEVICH (1981)].*

In any case, if one were to stick to the assertions of certain Euro-centrist jurists, one would ignore the Law in traditional African societies [M.RAYNAL (1994), 25]. This would not be in conformity with reality and science!

b) Opposition between customary law and traditional law

The problem relating to the opposition of customary law to traditional law seems interesting in the sense that in certain circumstances, these two types of law are confused by jurists. Can this confusion be justified? This is exactly the question that must be answered in these few lines.

The doctrine defines custom as "a rule of law that is formed by repeated practice; it is therefore based on habit, the repetition of a certain way of acting and tradition". It is the "result of the conjunction of an effective practice and the acceptance by the subjects of the law of the legal - and therefore obligatory - character of the conduct constituting such a practice (*opinio juris sive necessitatis) [C.I.J (REC-1996), 253*]. It differs from law in two respects: firstly, custom is not formulated by the public authority, although the State sometimes proceeds to draft customs, in order to avoid any uncertainty as to their content. Secondly, custom has an unconscious origin; it is created by the social environment. Custom seems to come not from above but from below; not from the rulers but from the masses. Finally, customary law does not only contain legal rules applicable to persons, property and society. It also contains religious and magical prescriptions, various recipes, and so on. It forms a disparate but solid whole, which provides solutions to the problems posed by the individual and collective life [*J.VANHOVE (1941*): 5] of all members of society.

Before colonization, customary law was a system that favored negotiation and the settlement of disputes through the strict application of rules. It was more focused on the family and less on the state. Its main objective was to preserve the family, as it was the central axis of life in society. In Africa of the Great Lakes, for example, the kinship is the basic cell in the socio-political organization of kingdoms. It is understood as "an isolated household holding an autonomous property or a group of households having a common ancestor, from which they possess, by way of inheritance, the same property that they share *[A.KAGAME (1952): 27].* In other words, the public power could in no case

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achieve its regalian objectives without relying on the family or the extended family. The military organization in society, the administrative organization as well as the socio-economic organization of these kingdoms always passed through this basic social cell. This is the system that developed spontaneously to cope with new conditions while decisions were made by the family and the community [*A.ARMOTRONG (1999): 256*]. This led early observers of African custom to hastily conclude, but fortunately, that "in African traditional law, there was necessarily a law specific to each caste *[DROIT TRAD (1998): N5]*". This predominance of the family in the creation of a custom is universal, as J. Poirier notes. To this end, he writes "the Law itself is born with the organization of a political power clearly differentiated from hierarchies linked to kinship, but under the influence of the latter [*J.POIRIER (1968): 1094*]".

With the arrival of the colonizers on the African continent, their first reflex was to codify the customs in force at the time. This undertaking in itself was commendable. However, it is to be regretted that, instead of carrying out this project as objectively as possible, they codified a custom that was favourable to their objectives. A. Armstrong deplores this situation by recalling that "the colonial state and the post-independence governments constructed a new kind of customary law in which 'customs' were reduced to rules to be applied in the official courts. As a result of this process, the Customary Law of many African states will become a rigid, biased and sometimes distorted version of the original Customary Law, which often has little relevance to the lives of the people in whose name it was constructed *[A.ARMTRONG (1999): 256].*

The creation of such official Customary Law is taking various forms in African states. In Zimbabwe and Zambia, official customary law was largely created by the courts themselves, when they had difficulty applying customary law to new disputes. In countries formerly colonized by England in Africa, customary law was adapted (often authoritatively) to the mould of English law and legal remedies and moderated by the 'repugnance clause', which stipulated that African customs that were 'repugnant' to colonial judges should not be applied. The great variety of customary laws of the many ethnic groups was reduced to a single customary law of "Africans". Take, for example, the customary law in Zimbabwe, according to which the heir of a deceased man inherits all his property. While it was shown that this practice had never been part of Ndebele customary law, it has been applied by courts throughout the country *[WLSA – Zimbabwe (1994*)]. As the courts applied doctrine and case law, customary law was fixed in time rather than being allowed to evolve.

In other countries, official customary law was created in the form of codifications or reformulations. In Losotho, in 1903, a commission was set up to record the customary laws of the Basotho in the form of the Lerotholi Law [*P.LETUKA et alii (1954; S. POULTER (1979)]*. This document is used in the courts of Lesotho today as the final word on customary law. While the Lerotholi Laws may have accurately reflected the customs of the Basotho in 1903, they hardly reflect the customs of the Basotho in 2003. Similarly, the reduction of Customary Law to written rules ignores the spirit of negotiation and compromise that allowed for the peaceful resolution of disputes within the community and family context.

Moreover, Lethoroli Laws and other semi-codifications of customary law, such as the re-formulation of Tswana Family Law *[S.ROBERT (1972)],* cannot truly represent the popular customs at the time of their writing. Firstly, the sources used for these written documents invariably involved oral testimony by men who thought they were informed about the custom. This fact alone shows that the testimony of half the population, the women, was omitted, thus skewing the testimony in favor of male rights. Second, most of the experts called as witnesses were of a certain age, and the rights of the old were emphasized over those of the young. Third, the witnesses were often those with power in the traditional hierarchical authority; the results might have been very different if testimony from those without authority had been considered. Fourth, the codifiers were white, i.e., Europeans who may have interpreted the depositions in accordance with their own understanding of family law, property, obligations, political institutions, and other issues such as women's rights. Finally, the creation of these written documents of customary law must be seen as a political process, influenced by the agendas of those who took the depositions and those who gave them. As Rwezaura states:

> *What the elders and other witnesses gave as testimony of Customary Law was a distorted and rigid version of it, expressing their conception of what the law should have been and not what it actually was... Their versions were largely influenced by the anger and frustration of the elders at the loss of their political power and the challenges then posed to them by the women and young men [M. RWEZAURA (1992); A. ARMSTRONG (1993)].*

In view of the above, it is difficult to argue that African law codified in this way is really its own customary law. If one goes even further, one would conclude that this law considered as African customary law is a distorted version of true African customary law. Hence, it is logical that in order to differentiate this falsified Customary Law from the one in which African peoples find themselves and their past and present in order to re-examine the future of their society, African peoples should return to their Traditional Law. This traditional Law will help Africans to rediscover the true values and principles of their original Law, will lead them to seek and give themselves an objective place in the universal society in order to better participate in the

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building of the universal civilization. A people whose past is poorly known by its own members cannot contribute anything to other peoples. One gives what one has, especially when one knows that one has it. Anyone who wants to acquire the legal knowledge of another legal system must first master his own before venturing into other legal systems. If one does not know oneself well enough, what joy will one have in knowing others and sharing with them what they do not know? Know yourself, and you will get to know others better. And in this way, you will complete yourselves in order to walk together.

II. The Characteristics of African Law

The advent of colonization was rather felt as a putting on hold of the African legal manifestations, while political and legal institutions inspired by the imported values were installed. Colonization occurred in Black Africa at a time when this part of the world was undergoing a profound internal transformation, affecting the vital elements of the existence of men and ethnic communities, in their socio-cultural and economic-political institutions. As Tshiyembe Mwayila notes, "everywhere on the continent, new political entities, based on the federation of multiple ethnic groups covering important geographical dimensions, were being created and destroyed either by peaceful means or by force of arms *[M. TSHIYEMBE (1990):* 15]. This colonization had a devastating effect, because it reduced to nothing the participation of Africa in international life, preventing the development of political ideas, the evolution of concepts and principles *[MUTOY MUBIALA (1989): 104; A. NDAM DJOYA (1986): 24]*. To be convinced of this, it will suffice to analyze the characteristics of this law during the ante-colonial period and compare them to those of the colonial and post-colonial periods.

a) Ante-colonial African law

Ante-colonial African law was, to varying degrees, an integrating, realistic and conciliatory law.

i. *An integrating law*

If we say that pre-colonial African law was integrating, it is because, because of its organizational function, it aimed at unifying and progressively consolidating the social system, starting from and based on the family, by means of appropriate mechanisms. This integrating role appears very clearly in the management of the land or in the education of children.

There is no need to recall that land, in traditional African societies, was above all an object of social cohesion, at once sacred [*M. RAYNAL (1994): 188*] (a means of communication between the dead and the living), a factor of social cohesion *[J.GATALDY; http:// www.foncier.org*], and an essential factor of production in its economic forms. For these populations, the land was not something to be appropriated, but an asset from which the bare minimum was demanded for the survival of the group, and which inspired a profound respect. Belonging to a terroir gave the individual and his descendants priority access to the land in the form of a transmissible right of use or usufruct *[MOHAMED DOUCOURE: http://www.foncier.org].* In such a system, tradition rejected any manifestation of individual ownership, which would constitute a challenge to social balance. The solidarity within the clan, guaranteeing security, required collective behavior, itself organized with a view to the renewal of the resource. The tradition or traditional law enshrined exactly those principles that protected the cohesion between members and always encouraged them to work for the progress of the group. This was reflected, for example, in the solidarity that characterized traditional society and the pride of belonging to a family. Outside of the family, man is nothing in his society and they can hardly bear to lose even one of its members. To confirm this idea, the former Rector of the University of Lubumbashi, Mr. René Dekkers said: "the Bantu is not individualistic, like the European. What would become of the individual in Africa left to himself, without the help of society? On pain of perishing, he must adhere to a group, family or tribal, to be able to defend himself against nature. Thus, a Bantu dispute is never between two individuals, but between two groups [*M.DEKKERS (1970): 19*].

The education of its members, of its children, was the foundation, the cornerstone. The first African customary principle was that the child belonged to the family and to its parents. The whole society had the great responsibility of looking after the future of its children. In other words, according to ancestral customs, the child did not only belong to its parents; it belonged to the community, to the lineage. Thus, the weaning of the child marked its taking in charge by the rest of the family group; the siblings, the aunts and uncles, the grandparents, the cousins... but also, any adult of the community and of the parents' generation. This collective care is based on the principle of "diffuse education" as described by Ezembé: "it takes place in two spaces: inside the house where the father reigns, and outside the house where the children are under the supervision of all the adults. In this educational system, a certain logic privileged social kinship and took precedence over biological kinship [*F. EZEMBE (1995): 60-70*]. Indeed, "one is not the son of such and such, but of all those of the generation of the father and the mother". The logical consequence of this social kinship is that the child will call without exception "daddy" or "mommy" all those of his parents' generation and not by their names or first names as is often the case in the West. If he has to refer to someone, he will say daddy "such and such" or mommy "such and such", uncle "such and such" or auntie "such and such" to show respect and to make the difference with his friends and

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classmates. Calling an adult by his or her name without first calling him or her "Mommy" or "Daddy" or "Uncle" or "Auntie" may result in a penalty.

In traditional African societies, this punishment was not to be confused with ill-treatment, because African cultures did not tolerate gratuitous abuse and violence against children. Moreover, C. Ngoura, B. Seck, O. Ly Kane, P. Lambert, M. Gueye and others rightly note that "corporal punishment is well delimited and the community has a right to watch and interfere in the way these sanctions are administered [*C.NGOURA et alii (1995); B. SECK"et alii (1994)*]

Punishment was "legal" in African customary law as long as it was administered for the good of the child and without exaggeration, because customary law repressed excesses even if it tolerated such practices. Thus, a child who was unjustly punished could seek refuge with his aunt or uncle and tell them that he had been the victim of an unjust punishment. To this end, the father had the duty to go and look for the child, but would only take him back if he had just paid a fine if it was confirmed that the punishment had been exaggerated or that it would not have been inflicted on the child who was declared innocent.

The punishments inflicted on children were always based on cultural and educational rigidity, using as pedagogical techniques: physical abuse, food deprivation, mockery, sarcasm... in order to inculcate in children the hierarchy of values proper to the society [*J.P TSALA TSALA (1991), 11-120)*]. For example, in pre-colonial Rwandan society, during the training of men, the elders used to provoke contradictory debates in order to accustom young men to tight argumentation, to reply promptly but always calmly. If one of them, in the heat of the discussion, gave way to a movement of anger, to an indelicate or hurtful word, the assembly had the duty to boo and humiliate him, sometimes he was even chased away from the place of the meeting, if he reared up under the blow of these mockeries. This was done in order to teach him self-control. No one was ever to have respect for them, and these humiliations were not regarded as offenses. No one escaped it. Whether he was a prince or a child of a serf, all were subjected to such a system of sanctions [*A. KAGAME (1952), 25-26*].

These sanctions were willingly part of a maturing and structuring physical or moral pain that prepared the children to endure the pains in a world where slavery, colonization with their procession of frustrations and humiliations were predominant, and where famines, wars and a hostile environment where only the bravest could get out. This opinion is still generally shared by the whole social body, legitimized by the administrative, judicial and school authorities. For this reason, a teacher will not be taken to court for "kicking the butt" of a recalcitrant student three times. On the contrary, the latter will receive another beating from his parents at home to maintain consistency in the community's educational discourse. Thus, anyone in the socio-educational environment can correct a child, even if he or she is not the parent, as soon as it is established that the child has committed a fault that deserves punishment. However, Western law is teaching us other things by individualizing the formerly collective life in Africa. In this way, we are witnessing the destruction of African society, because it is losing more and more of its foundations, with African law losing its integrating role.

ii. *A realistic Law*

If it is said that ante-colonial African law was realistic, it is because it was more practical than theoretical. It was more attached to daily life. And the justice that was rendered was not mechanical. Each case that presented itself did not have one and only one solution, which was identical to itself.

This realism was rooted in the fact that it was based on judicial bodies, in accordance with the socio-political organization of the country. The central authority of the king or traditional chief was usually based on such elements as control of the military force, the power to appoint and dismiss subordinate chiefs in charge of regional administrative functions and judges (whether or not they were members of his family), and the mystical aspect that the popular imagination attributed to his functions. Such a chief was the administrative and judicial ruler of a particular territorial section, and had complete economic and legal control over the entire territory of his jurisdiction. In other words, the Head of State was a territorial ruler *[T. E. OLAWALE (1998): 28*]. However, in order that this organization did not lead to monarchical absolutism or political tyranny, certain mechanisms had been developed, such as the royal council of chiefs, the court of the queen mother, religious officials playing a decisive role in the investiture of the King, secret societies in which the King was only an equal member and the inevitable devolution of power to local and regional chiefs. All these elements, together with the intangible but effective factor of public opinion, helped to protect law and custom by controlling royal power [A. KAGAME (1952)].

Thus, in the Kingdom of Bangassou (in CAR), "At the King's side stand the judges. Not just anyone can be a judge. He must belong to the noble lineage (Bandia), or be an elderly person with great authority and wisdom; only worthy people with sound reasoning who are respected by all can take on this task [*M.RAYNAL (1994): 201*]. If a king abuses his power, his subordinate chiefs have the right to succession, or to depose him. In Yonoubaland, Nigeria, the chiefs used to ask him to open the calabash, i.e. to commit suicide by drinking poison, or to go into exile [*P.C. LLOYD (1953): 327-334*]. Similarly, if subordinate chiefs tyrannized their people or disobeyed their superiors, the latter could, in collaboration with other subordinate chiefs, remove them from office and punish them.

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Custom in some Islamic parts of Africa was influenced by Qur'anic law. In each misside, for example, there was a judge chosen by the chief and the notables; he had three assessors with whom he held hearings. The parties had the right to appeal to the tribunal of Labé. The tribunal of Labé was presided over by a judge chosen by the chief and the notables, assisted by ten assessors; crimes that could lead to the death penalty as well as assault and battery causing bloodshed were within his jurisdiction. Decisions in matters of civil status, inheritance, property, etc. were dictated by custom, which was itself inspired, to a greater or lesser extent, depending on the subject, by Koranic law [*A. DEMOUGEOT (1944: 48*)]. Judges accepted gifts. As everywhere in Africa, justice was free.

A justice that applied the Law created and lived by a people, a justice rendered free of charge by those in power, a justice that took into account the economy of the country and the social structure, a justice governed by a Law that adapted to the daily life of the people, could only be dominated by realism.

iii. *A Conciliatory Law*

Ante-colonial African law was conciliatory in the sense that those who had to use it to settle conflicts had the strict duty to examine all aspects of the conflict, to elucidate the issues in dispute, to gather for this purpose all useful information and to propose to the parties the terms of settlement that seemed best suited to restoring balance in society. Everywhere, in traditional African societies, conflict management was based on this principle, because reconciling two individuals was nothing more than restoring trust between two families. And this is what Mr. René Dekkers, former Rector of the University of Lubumbashi wrote in these terms: "In Africa, the group takes the place of a technique in the struggle for life. Also, a Bantu dispute never opposes two individuals, but two groups. And one discusses from group to group: it is the famous palaver which sometimes lasts hours, days, and weeks. Why? Because the Bantu lives in a less restricted, very well organized and stable society. The people involved in this long debate have known each other for a long time, and are condemned to live together. Therefore, an inappropriate word carries much more weight than in Europe. This will be remembered. One insult will lead to another, and life in this small society will become a living hell. Therefore, in the discussion, it is necessary to spare the future. In addition, one wishes to find a solution that satisfies everyone. One tries to obtain the adhesion of all. They are looking for unanimity. What happens if a minority has to bow to a majority? The dispute would leave some feeling proud and others feeling bitter. And that would make this society hell *[R. DEKKERS (1970), 19].*

In pre-colonial Rwanda, in the event of a dispute over land, the dispute is brought before the chief of the hill, who goes to the site and, after hearing the witnesses and the council of elders, decides between the parties [*J.VANHONE (1942): 43*]. To this end, "those who had to settle the dispute did not do so all at once. He consulted the elders, the notables; he informed himself of the precedents without submitting to them. In the end, the good chief, the good judge, the wise judge was the one who managed to pacify the parties [W. VAN GERVEN (1983): 93].

Almost everywhere in Africa, "the normal means of ensuring the proper functioning of society and the harmony of social relations did not lie in the promulgation of laws. These laws, with their abstract character, could not take into account the infinite variety of possible situations and their strict application would risk undermining man's innate sense of justice [R. DAVID (1966): 531).

In the traditional legal philosophy of the Africans, "the solution of today is therefore binding on the future and must guarantee a common life in good understanding. If the groups in dispute do not reach a satisfactory solution, then, but only then, will they turn to a higher authority, generally the chief of the tribe. But the Chief will not make an authoritative decision. He too will be patient. He too will seek a solution that will win all the votes. And the good leader is the Solomon who finds it. He will listen to the explanations of the families involved, he will consult the elders, he will find out if there are precedents. But even if there are, he will not feel bound. For the purpose is not to cling to a pre-established rule, as do the Courts of European origin, but to seal the peace. Instead of putting a ready-made garment on the dispute, the good chief will know how to make him a garment made to measure *[R. DEKKERS (1970): 90]* ".

If integrating, realistic and conciliatory as it was and remains for the great majority of the African population, the colonial and post-colonial law had as main mission only to undermine, to destroy the foundations of it

b) Colonial and post-colonial law

Colonial and post-colonial African law is the result of an amalgam of European law and African law favorable to the colonial enterprise. As Tshiyembe Mwayila happily points out, "torn by two contradictory wills, the colonial enterprise could neither revalorize the institutions produced by African civilization, which would have emptied the "civilizing mission [*M.O. MNATSAKANYAN (1976)*] " of its sustenance, nor systematically replace it with the democratic institutions produced by European civilization, which would have led to the rupture of the bond of sovereignty placing the colony under the legal tutelage of the metropolis [*M. TSHIYEMBE (1990*): 16]. From this, it is important to conclude that current African Law is the result of two historicities: the African and the European [*TOURAINE (1973): 531*)]. The post-colonial African Law finds itself

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then at the horse of two civilizations whose evolution it does not control perfectly. It has in fact lost the compass that grasps and interprets the capacity of action of the society on itself, leaving the legal regulation of African social relations atrophied by the clash of civilizations to the prey of conflicts between the indigenous Law and the European Law, the crises inherent to colonization and especially to the management of a State that is not the result of the natural evolution of African societies. This could only lead to deep internal rifts. The legal system that was to be applied in these societies was then only to be a Right of the minority, because it only answered to the interests of the colonizer and of the one who succeeded him by resorting to the same weapon; a Right of exploitation, because thanks to it, the colonizer as well as the African will put on their legal costume by ensuring the monopoly of the exploitation of the goods and services of the people subjected to the colonial yoke and its semblance of African modern State; a Right instituting the segregation and the discrimination; a Right disorganizing the African society; a Right of the mimicry and finally a Right negating the African traditional Right

i. *A law of the minority*

It was said earlier that with the arrival of the colonizers, there was a juxtaposition of two systems of law, one traditional, which governed social relations in African society, and the other imposed by the colonial power, which was used only when a conflict in which the colonizer or his agent was involved had to be settled. Everywhere, tradition and custom occupied a predominant place in the management of society. Custom is still very present. No one can ignore it when it comes to establishing a system that affects a land that is still mythical and largely controlled by traditional organizational structures. According to this custom, rights are attached to a parcel, a portion of land, as well as to a person or to any group with a personality (family, village), even if this notion of personality is not legally defined or codified. This law is juxtaposed with land law, which has nothing in common with customary law, either in its origin or in its essence. Thus, for example, traditional land law is communalist, in the sense that the land belongs in common to the whole family, clan or lineage and the management of this land responds to evolving social norms recognized as obligatory and binding by and for all members of this social organism. Whereas the Land Law behaves like a system of norms imposed by a foreign power or the small minority that has learned to handle it and to juggle with its content and form, at the expense of the great popular majority. Consensualism and communalism are supplanted by dictatorship, individualism and the privatization of land.

This disparity can also be seen in the area of business law. This is indeed a field in which exogenous law is actualized in some countries, but it must also be admitted that this part of the law is of little interest to the populations as a whole. This is likely to be the case with regard to the exogenous mechanisms put in place by OHADA; but, as J. Vanderlinden points out, "of course, there is no doubt that this is a field in which exogenous law is being applied in some countries. Vanderlinden, "once again, they are of little interest to the great mass of those subject to the law, and it is candid, to say the least, to see in them a tool that will enable the populations to escape from the state of great material and moral misery in which they are currently struggling [*J.VANDERLINDEN (2001): 3-4*].

Law is the social discipline par excellence, and it is fortunate that society needs the right to rice or beans. "It is thus observed - and the observation is almost unanimous - that, in Africa today, normative networks have been created, based on all sorts of personal solidarities and on the emergence of personalities to whom individuals have turned more or less spontaneously to satisfy their need for justice in their daily lives. A large number of normative networks are thus juxtaposed, complementary or competing (including that of the postcolonial state in some cases), which contribute precisely to the constitution, on the part of individuals, of situations characteristic of legal pluralism [*J. VANDERLINDEN (2001): 3*]. The positivists will undoubtedly object that this is not a question of law -- the kind they like to write with a capital letter -- insofar as the State, an artificial creation of the colonizer, is not part of these multiple normative networks. This is not the place to start a discussion, without doubt without end, about these cream pies of the conflict between positivists and pluralists. It is however necessary to specify that African societies are subject to a pluralism of Law, whose origins differ, and are therefore very often contradictory to the point of being at the origin of several conflicts that we witness day and night. The post-colonial State does not master this whole set of rights, and to impose its will, resorts to violence rather than conviction. This can be seen, for example, in the Ivorian practice where, in 1960, the Ivorian Constitution decided that the property regime is a matter of law - and therefore of State competence - at a time when the President of the Republic was asserting the unwritten precept according to which "the land belongs to the one who develops it", which is still respected.

As long as history, human geography, customs and modes of social organization are not taken into account [*J. GASTALDI- http://www.foncier.org/liste*] in the elaboration, adoption and implementation of legal norms intended to maintain harmonious relations in politically organized society, it will be risky to declare that the Law in force in Africa is truly African. Is it not the lawyers trained in the legal mold of the ex-colonizer who conceive and impose the implementation of the Law currently applied in Africa? Is it not the rules adopted by the intellectual minority that presides over the destiny of

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the African people at a time when the latter live in another traditional legal system, specific to them and different from the one imposed on them? The price attached to the inheritance, the historical content of the whole patrimony, the social security... the predominance of the family in the management of the social relations are relegated to the background for the benefit of the minority which dominates the African society. It is therefore urgent that this anomaly cease and be replaced by the democratic rule according to which society must be directed by taking into account the will of the majority, without which it is and will remain as long as no legal revolution is made, a Law of exploitation.

ii. *A Law of Exploitation*

Colonial and post-colonial law is qualified as a law that has laid the foundations for the exploitation of African wealth and labor. From the 14th century to the present day, the Western powers have never ceased to initiate laws defending their interests on the continent. To begin with, the right of ownership was taken away from the Africans. Only the State, the omnipotent overlord, at the beginning of colonization, sought to appropriate everything through a system of direct administration, with an attitude tinged with innocence, humanism and compassion. This strategy was aimed at the sole objective of attracting Africans, making them "friends", in order to better tame them in order to better snatch their goods. It was the recourse to the African principle that instructs that "whoever wants to slaughter a bull, caress it first". In this way, they will manage to appropriate the soil and the subsoil in Africa. The possession of the subsoil thus returned of right to the suzerain since this one virtually imposed its authority to those of the conquered native monarchs. How then to be surprised by the poverty which strikes without pity more than 90% of the African populations?

Subsequently, from 1792, when Urdaneta, Minister of the Treasury of Santa Fe, was sent to the site by the Crown to inspect the methods of production and to inquire about the real results of the exploitation, laws were enacted to "put an end to the fraud on the charges and dues and to fight against the smuggling that deprived it of an important part of the expected rent". Thanks to these provisions, all the monopolies were entrusted to civil servants paid by the State in charge of supervising and rationalizing if necessary the production techniques. This reform was the first step in the preliminary definition of a Mining Law[3]. All the fruit of the work went to the crown, as in the Belgian Congo, where "the act of constitution of June 19, 1900, provided that two thirds of the profits of exploitation should be paid to the State and one third to the Katanga Company, a company financed by the private capital of his Majesty the King of the Belgians *[LEOPOLD II (2000)]*.

The aborigines, constituting the free labor force for the exploitation, were not allowed to move freely on the national territory. In this way, "the movements of the Congolese outside the chiefdom of origin are regulated. An absence of more than one month is subject to obtaining a "transfer passport" issued by the chief and stamped by the administrative district chief. This limitation on freedom of movement remained in force for a long time (even after independence) in several African states *[L. B. PROYART (1776)]*.

In the field of trade, the principle of freedom of trade was established. From the outset, one would think that this freedom was universal. Only the so-called "civilized" nations could enjoy it. The Berlin Conference provided that "in the Congo Basin, the trade of all nations shall enjoy complete freedom and all flags, without distinction of nationality, shall have free access to the whole coastline of the territories enumerated (in the Act) above, to the rivers flowing into the sea to all the waters of the Congo and its tributaries, including the lakes, to all the ports situated on the banks of the waters, as well as to all the canals which may be dug in the future with the object of connecting the rivers or lakes included in the whole extent of the territories described in the first article. They may undertake all kinds of transport and exercise maritime and river cabotage as well as inland navigation, on the same footing as nationals, and finally, goods of any origin imported into these territories under any flag whatsoever, by river or land, shall not be subject to any other taxes than those which may be levied as equitable compensation for expenses useful to commerce and which, in this respect, shall be borne equally by nationals and foreigners of all nationalities. All differential treatment is forbidden with regard to ships as well as to goods *[ACTE GENERAL DE BERLIN: 1885; P.VAN ZUYLEN (1959), 107; J.L.MIEGE (1973):151; R.P.ROEKENS (1950): 28; A.CHEREDAME (1905): 148; H.BRUNSCHWIG (1971): 21)]*. Finally, the signatory powers of the General Act of the Berlin Conference recognized the obligation to ensure, in the territories occupied by them, on the coasts of the African continent, the existence of an authority sufficient to ensure the respect of acquired rights and, if necessary, the freedom of trade and transit under the conditions in which it would be stipulated [ACTE DE BERLIN: ARTICLE 35]. In view of the above, it should be noted that only the Western powers benefited from the exploitation of the natural resources of the African countries placed under the colonial yoke without the local population benefiting in any way.

This situation persisted even after independence, since the colonial laws and institutions that some new states inherited were designed to exploit local divisions, not to suppress them. Moreover, as the UN Secretary General reminds us, "the patterns of trade relations instituted by the colonial powers have caused

[3] La naissance du droit d'exploitation minière, http://www.parallelpage.free.fr/page/droit/htm

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long-term distortions in the political economy of Africa. Transport networks and related infrastructure were designed to meet the needs of trade with the metropolis, not to promote balanced growth of the local economy *[A. KOFFI (2017): §. 9]*. Economic activities, with their strong emphasis on extractive industries and commodities for export, not only frequently imposed unfavorable terms of trade, but also did little to stimulate demand for upgrading the skills and education of the labor force. The consequences of this pattern of production and trade continued to be felt after independence. To the extent that the struggle for political power was not based on the establishment of viable national economic systems, in many cases it seemed more attractive to use the institutions inherited from the colonial era to serve the interests of one faction or another, very often defending the cause of the former metropolis. Thus, the current law does not defend the interests of the African people, but on the contrary, reinforces today more than yesterday, their exploitation. What should we do with it then? The least rational and civic-minded person would order that one does not cross one's arms or lower them.

iii. *A law instituting segregation and discrimination*

Colonial and post-colonial law in certain areas instituted segregation and discrimination without mercy. This is clearly evident in colonial legal texts. For example, almost all African colonial ordinances provided that customary law should apply primarily [*T. A. OLAWALE (1998): 15-16*], to all matters of marriage, land ownership, inheritance, succession, testamentary dispositions[4], and of course to traditional functions and institutions such as chieftaincies[5]; all other cases in which the parties are Africans, or in which the subject matter of the dispute is not normally subject to English, Belgian or French law, nor subject to English, Belgian or French law in accordance with the will of the parties[6]; where, although one party is an African and the other is not, it would be unfair to apply English, Belgian or French law[7]; and finally, in cases where customary law does not contradict any legal text or the principles of natural justice, equity and good faith. In other words, there is a law for indigenous people and a law for foreign nationals in the same legal system and on the same national territory.

On the other hand, the population itself was categorized according to their race, tribe, ethnicity, etc.... Colonization, for example in Rwanda and Burundi, widened the gap that existed between the different ethnic components of these countries. Thus, during the whole period of German colonization, two great mistakes were made; mistakes that crystallized the relations between the Hutus and the Tutsis [*RESIDENT KANDT (1995): 2*]. First, they based their power on the principle of indirect rule, thus reinforcing the hegemony of the existing administrative and political framework, which was totally Tutsi, over the Hutu majority. Secondly, the Germans favored this ethnic group by creating and running a School for the Sons of Chiefs in Nyanza until 1907. As one can see, the school was founded with the aim of providing the country with leaders who knew how to write and read, and therefore intermediaries between the colonizer and the local authority in order to better establish colonial power. Thus, the Hutu became excluded from this administrative and political machine and therefore, placed under the double domination: that of the colonizer and that of the Tutsi. Their successors, the Belgians, did not do any better to reduce the disparities between the two ethnic groups. In fact, in 1928, they made the same mistake as their predecessors by creating a school - the Groupe Scolaire d'Astrida - where only the children of Tutsi chiefs could study. Since then, everywhere in the country, access to education has been the prerogative of the nobles alone. In a 1928 Report on the Schools of the Vicariate of Rwanda, it is said that French classes in the four missions of Kabgayi, Kigali, Kansi and Save were organized for "young Batutsi"... [*RAPPORT DU VICARIAT (1923): 1; VAN KERKEN (1943): 192*]. Moreover, Belgian colonization maintained the policy of indirect rule, which perpetuated segregation in the management of public affairs [A.DEFAME *(1920): 25-26*].

In terms of marriage, a white woman who married a black man was subjected to terrible segregation and her children were mistreated by the colonial class. This is what Barthélémy Boganda, the father of the independence of the Republic of Oubangui-Shari (now the Central African Republic) criticized when he denounced the French colonizers who sequestered for two days his white wife and his six and a half month old daughter. The only fact that they were accused of was that the white woman had married a macaque, and his daughter had been born of a macaque [*SANMARCO (1983): 180 -183*].

In the land of their ancestors, Africans have often been prevented from visiting or living in such places. This is confirmed by the policy of apartheid, which advocated separation and separate development in South African society. This form of racial discrimination, institutionalized in South Africa, was based on a policy of total separation of races into

[4] Voir à ce sujet, par exemple, la Section 17, paragraphe 1, de l'Ordonnance de 23 de 1943 de la Cour Suprême du Nigeria.

[5] Par exemple dans l'affaire Eshubgayi contre le Gouvernement nigérien 1931, A.C. 662, p. 673.

[6] Sauf dans les cas où il est juridiquement impossible d'appliquer le droit anglais à certaines situations exclusivement réglementer par le droit coutumier – par exemple le droit d'un individu sur les terres familiales ne peut être transformé en propriété simple selon la conception britannique- les parties à une transaction quelconque peuvent stimuler que le droit anglais sera appliqué.

[7] Par exemple la Section 17(2) de l'Ordonnance de la Cour Suprême du Nigeria, N° 23, 1943

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geographically defined areas for each race. This policy was extended to South West Africa (now Namibia) and the two Rhodesias [*PIERSON-MATHY (1964): 479*]. In addition, in the territories under Belgian colonization, an almost similar policy was established. I remember in my youth reading in the Bikini Hotel and the Palm Beach Hotel in Gisenyi the poster: "NO DOGS OR NEGRIES". This made such an impression on me as a child because I could not understand how a Negro at home could be prevented from going to such and such a place in his country. Moreover, penal laws had been enacted to severely punish anyone who violated these prescriptions. The Piron Code is full of examples.

When the right to vote was established in Black Africa, it is curious to note that it was given only to a minority. Thus, in "Moyen-Congo" (future Congo-Brazzaville), the right to vote was first limited to "literates", then, in 1951, to "all those who possess a certain identity document" [*R. BOUTET (1960)*]. In Belgian Africa, according to Maurice VERSTRAETE, Professor at the Colonial University of Belgium, "following a terminology borrowed from our immediate neighbors, we reserve the denomination of 'Belgians' to those who are Belgians by virtue of the laws of the Kingdom, while we call 'Belgian subjects' or 'Belgians of colonial status' those who acquire, according to the Congolese civil code, the 'Congolese nationality', which became, since the law of 18-10-1908, a Belgian nationality of non-metropolitan status. According to this author, there were at that time some "Belgians of colonial status of white race, in other words white Belgian subjects who were not Belgian citizens" [*M. VERSTRAETE (1947): 470-485*]. Thus, "Belgian subject", "Belgian of colonial status" or "Congolese" was "any individual born on Congolese soil of native parents", with the exception of "the children of foreign parents or of Belgian citizens" [*M. VERSTRAETE (1947): 470-485*]. As a result, "the child of indigenous parents born outside Congolese territory will most often be stateless, because foreign law will rarely grant him the nationality of the place of birth [*BRAUSCH G.E.J.B (1957): 249*]. On the political level, "the Constitution grants the general electorate only to citizens": "Belgian subjects are excluded". "The Congolese natives being Belgian subjects, they enjoy in Belgium the fullness of the civic and public rights; only the political rights were refused to them; they were thus not Belgian citizens and as such were not obliged to the military service [*M. VERSTRAETE (1947): 480-485*]. Curiously, for a long time these texts will remain in force after independence. These are some vulgar examples that show how much the colonial law instituted segregation and therefore rooted it in the habits and customs of Africans.

iv. *A disorganizing law*

It would not be wrong to say that colonial and post-colonial law has played a disorganizing role in African society. Indeed, the first and most harmful influence of colonial and post-colonial law is the suppression of African communalism by Western individualism. On this subject, J. Gastaldi rightly notes that before colonization"..., the notions of individualism, autonomous enterprise, emancipation within the family, and the monetarization of exchanges, conveyed by migration, colonial law and information, take their place in Africa. The resulting behaviors are challenging traditional authorities and hierarchical relationships [*J. GASTALDI- http://www.foncier.or*].

This individualism, which guarantees the right to private property, will not take long to sow dissension and discord between brothers of the same family. The solidarity that traditionally characterized African society deteriorated. The land, the foundation of production relationships and the unity of the African family, becomes a source of discord and multiform conflicts. The memory of the land is disappearing. The role of the chief of the land, of the council of elders, is diminishing. The memory of men, who were the guardians of rights, disappears over the generations [*J. GASTALDI-http://www.foncier.org*]. Traditional law relating to land use is giving way to colonial land law.

If the traditional law relating to land had the mission of guaranteeing social prosperity and balance, colonial land practices wanted, on the other hand, to impose modalities of control of the land. It was necessary for the newcomer to have guarantees of a different nature than those based on recognition of the right by the village authorities alone. Among the new requirements, it seemed convenient to establish the principle of land concessions establishing a right of ownership on a perpetual basis.

In Western societies, private ownership of land is evidenced as soon as there is proof of purchase, and private property, whatever it may be, is legally defined. The registration of this right in a public register, held under the control of the new administrative authority, ensures its enforceability [*J. GASTALDI- http://www.foncier.org]*. In traditional African societies, land belongs to the extended family and its management is its sole responsibility. Any alienation of this land is strictly prohibited. In African societies in transition, the objective of land plans or programs financed by international organizations and former metropolises is to get rural populations to register land that has already been developed. If the real objective was to move towards the European land model, it would be necessary to proceed in a different way, because by undermining this guarantor of family unity, one destroys the unity of the entire nation and thus dooms African societies to the slow and gradual destruction of the basis of their possible development. In the current situation, it is very risky to say towards which land tenure model the majority of African countries will evolve. Clarification would be necessary. It would be necessary to revisit

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certain notions used up to now in order to better translate the thinking of African populations and remove any ambiguity [MOHAMED DOUCOURE: http://www.foncier.org].

In the field of traditional family law, especially in matters of succession, conflicts are likely to destroy African society if we are not careful. Traditionally, the woman theoretically had no inheritance. This does not mean that she was ignored or neglected. In fact, during the redistribution of land upon the death of the head of the family, all the boys received a portion of land. The new head of the family also received, for safekeeping, a portion of land intended to provide for the needs of women born into that family who might be banished from the in-laws and forced to rejoin their family of origin. In this situation, a woman in such a situation would farm all or part of this land. Her children, if the mother had never been endowed, would become full members of their uncles' families and receive the inheritance like everyone else. This state of affairs thus created a cohesion between all the members of the family and made the family accountable to each of its members. Curiously, the introduction of Western law into African society will turn women against their own families. Their claims are based on the equal rights of men and women. Commonly, they declare themselves the weaker sex who need specific protection from society. Nobody is against this equality, but why then should they seek protection from their equals? However, the African traditional law had solved this problem very simply, but effectively. The woman is called to integrate another family which owes her protection and respect. But when she can no longer bear life in this family, she has the right to return to her family of origin which owes her everything until the end of her life or her next remarriage. Should we give in to this pressure of Western Law or should we return to the source, improving it with significant positive foreign contributions?

People have always tried to make us believe that in traditional Africa no pluralism of ideas was known. They always want to prove to us that Africa has never known good governance. Should we continue to believe these heresies? If "good governance includes the following factors: an effective State; a mobilized civil society; an efficient private sector, accountability, transparency, the fight against corruption, participatory management and a favorable legal and judicial framework [T.MKANDAWIRE et Alii (1999); BAD (2000)], how can we dare say that Africa has never known good governance? Were not family meetings, palavers, and the traditional settlement of social conflicts an opportunity to translate this pluralism of ideas and institutions? Colonization only eliminated it from African social life.

In several cases, and most often in the first decade following independence, the post-colonial State did away with the pluralism that had characterized the period of national liberation movements by drafting unifying legislation that no longer left even a space of semi-autonomy for pre-colonial rights; this was the era of family "codes" and redefinitions of land tenure systems that were quickly denounced as constituting more program legislation than forms of law practically applicable to the populations. To these reproaches," notes J. Vanderlinden, "coming largely from legal anthropologists, but also from pure jurists who noted a growing divorce between the Law "in the books" -- which is more appropriate than saying the "dead" Law -- and the "living" Law, the supporters of a legal construction inspired by the colonizer opposed the "necessary progress" of the Law that their legal engineering was supposed to bring about. Insofar, however, as this was limited to the formulation of a purely theoretical tool -- the law -- without concern for the actualization of the legal prescription in the life of the Law, it was, given the environment in which it was supposed to operate, doomed to failure [*J. VANDERLINDEN (2001): 2]*. He continues by affirming with relevance that "the dysfunctions, the crisis, the withering away, even the disappearance of the administration of justice accompanied the identical phenomena noted at the level of the State by the observers of the African worlds. In the legal model imported by the colonizer into Africa, the law has always been so closely associated with the State function that it was impossible for the decline of one to be without incidence on the other and vice versa [*J. VANDERLINDEN (2001):2*]. Contemporary laws have substituted the notion of a domain of sacred origin for that of the domain of the State or the national domain. Strangely enough, this substitution has not been made properly and totally, because in reality, we are still witnessing a juxtaposition of legal systems, one of European origin, minority and imposed by will and force on the great majority of the population; the other purely African, majority, alive, but threatened by the intellectual minority incapable of substituting it with a law capable of regulating all the real and objective relations of the society.

There is a fundamental African reality to which, whether one watches it or not, it will be difficult to circumvent: the African family. "If modernization fragments the lineage and separates the generations, belonging to the fundamental group is always expressed in the difficult moments of life. It is not without guilt that some distance themselves from it, because the relationship with the family and the group of origin have a very strong cultural meaning and role for the African. Those who move away from it quickly find that their system of loyalty is disturbed and they live with the feeling that they are betraying the village and the ancestor [DELACROIX (1994): 1994; D.MBAE MENICK (1995): 174].

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v. *A Law to Mimicry*

Mimicry has been much decried by researchers and practitioners of law and political science in recent decades. Countless books and articles have been devoted to this theme [*Y. MEMY (1993); A. QUIJANO, I. WALLERSTEIN (1992); D. DARBON (1990); A. SCHWARTZ (1974)*]. It is agreed to define institutional mimicry as "a particular mode of social engineering characterized by the more or less massive concrete or diffuse importation of external institutional technologies extirpated from their generating environment, arbitrarily reconstructed and modeled through the exporters' and importers' own codes and having vocation to be inserted in another environment (another encoding system), which will subject them to permanent reinterpretations defined by the political strategies of the competing elites [*A. DARBON (1993): 119-120)*] ".

While the newly independent states of Africa were defending the right to self-determination of the colonial peoples, the first weapon in their struggle having to be the Law, it turned out that they tamed the one that had long subjugated them to fight against those who still harbored the desire to dominate and exploit them. How can one better handle a weapon of which one is not the inventor or of which one knows the handling in a rudimentary way? It is a truth: the colonial powers were led to project onto the occupied territories, subjected to their domination, an original "legal order" combining the law of the colonizing country, that of the colonized country and an original law born of the colonial phenomenon. The rules that were devised, whether applied or not, were in part the result of a "colonial design" that itself mixed contradictory ambitions, and in part the result of practical management, oblivious to any design, or even the result of local initiatives that were organized and received the label of the official authorities a posteriori. It was to be expected that this law would only defend the interests of the colonizer.

The legal model that was presented to African jurists during and after colonization seriously contributed to detach them in appearance from the rights of their fellow citizens, and then to distance them from them. Perhaps no clearer example of this can be found than the avatars that befell many in the Ghanaian legal profession following the rise to power of Jerry Rawlings in their country. As J. Vanderlinden describes, "in the purest common law tradition -- including the wearing of wigs at the bar and in the judiciary -- many lawyers, often of great talent, were forced into exile because of the stigma attached to their profession, which was perceived by the population as exploiting esoteric knowledge for personal gain; This situation is reminiscent, mutatis mutandis, of France and its Canadian colony, where lawyers were, for identical reasons, forbidden to practice in modern times. The parallelism between these two theaters of law production does not end there. Ghanaian aspiring lawyers were trained in an exogenous law -- the Common Law -- in a language that was not their own -- English -- by foreign masters -- from Commonwealth faculties -- just as students tempted by the basoche were taught by other foreigners -- for a long time mostly Italians -- an exogenous law that was five centuries old -- that of imperial Rome -- in a language that was incomprehensible to the population at large -- Latin. This is not to mention, in both cases, the light years separating the exogenous systems cultivated by the jurists from the Rights -- in the plural -- practiced by the populations [*J. VANDERLINDEN (2001): 5]*.

Moreover, it is curious to note that the very solutions that were advocated in the legislative formulations were considered as totally foreign -- which they objectively were -- to local conceptions, but also those who had, in the State system, the responsibility to apply them -- therefore the judges -- saw themselves discredited at first, then ignored by the people. Many jurists, some of whom seemed to believe that the mere production of a so-called development law would transform society, bear a great responsibility for the underdevelopment of African law and, consequently, for the ills affecting the State.

This way of acting has only resulted in the rupture between the law applied by the colonial and post-colonial jurisdictions and the living rights applied, against the will of the defenders of the legislation of colonial origin, by the great majority of African populations. Thus, Edem Kodjo points out, "cut off from his past, projected into a universe shaped from the outside by a civilization that erodes his values, stunned by a cultural invasion that marginalizes him, the distraught African is today the distorted reflection of the image of others" [*E. KODJO (1985):139*]. What is curious and regrettable is that he allows himself to be swept towards an uncertain future where he loses more and more his personality and his identity by seeking at all costs to resemble their colonizer of always. Of always, because, although physically gone, the colonizer continues to laminate our traditional intrinsic values, to destroy all the philosophical foundations of what was to be our African Right, by the Right and the economic system that it does not cease imposing us. To be convinced of this, one only has to see good governance, - as if Africa has never known any in its history -, decentralization, the Structural Adjustment Program... [*MICK MOORE (1993): 39-49*] which were imposed by the Bretton Woods institutions. These programs, these concepts were in fact designed, as Ms. Cynthia Hewitt de Alcantara aptly points out, "not only to shrink the State and the structures of African societies, and to make them increasingly less effective, but also to ensure that power in society shifts from government and the public sector to individuals and private groups [C. HEWITT DE ALCANTARA (1998): 113]. The result of

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these actions was only to be the enthronement of an uncontrollable disorder because born outside and not mastered, both in its origins and in its essence, by the African populations.

This perpetuation of an Overseas Law has only resulted in the mechanical reaction of African legislators to conceive the new African laws through the distorting prism of the political philosophy and the purely Western economic system acquired after several years of colonization. This is how, for example, the system of "land registration" and the "book" or "land register" was established, purely as a mimicry of the system of conquest and, by its very nature, totally artificial in relation to the environment [*J. GASTALDI- http://www.foncier.org*].

vi. *A law that negates traditional law*

The existence of an African law was contested by missionaries, colonial officials, anthropologists and indirectly by the constitutions of the new quasi-independent States.

a. *Missionaries*

Missionaries, especially those of the nineteenth century, usually considered African laws and customs as nothing more than hateful aspects of "paganism" and that their duty was to extirpate them in the name of Christian civilization. Is this not a pure and simple confusion of law and religion by these vehicles of Christian and Western civilization? [*A. S. DIAMOND (1923): 49-53*] They did not hesitate to qualify the African culture as a confused mass of customs, rites and inhuman practices. And from this they concluded that African customary law must be detrimental to a religious enterprise of this kind and must therefore be totally abolished.

More explicit is the testimony of Sir T. Morrisson, who at one time headed the Wachaga District in Kenya, who wrote: "I soon found myself confronted by serious questions of policy, by questions which go to the heart of colonial administration. Should we suppress the native customs, some of which are contrary to our western ethics? The Missionary certainly answers this question without difficulty. They are, in his opinion, pagan customs, and his duty is to destroy them and replace them with a higher law... Some of them, especially in the past, have gone much further and behaved as if they believed that the habits and customs of the English middle class were incorporated in the Sermon on the Mount. The District Chief cannot follow such a simple rule of conduct. In theory, the District Chief declares that his policy is to raise the standard of native customs so that they approach what we believe to be higher standards [T. MORRISON (1933): 141-142]."

b. *Colonial officials*

It should be noted that our colonial official quoted above does not reserve the right to declare that his mission is to raise indigenous customs to a higher level. In other words, although he recognizes the existence of African traditional law, he does not fail to qualify it as inferior to that of the West. In the first place, the colonial official is more concerned with the problem of the punishment of crimes. This leads him to hastily and falsely conclude that African traditional law is only penal. By considering that crimes committed in Africa and those committed in Europe are punished differently, they believe that the two systems are opposed to each other. What wonder that a murder committed in Africa is punished by the murder of some member of the criminal's family and that in Europe, this murder is followed by, for example, life imprisonment, or capital punishment? What is there, in both societies, is the recognition that murder is a negative fact that must be repressed at all costs. The punishment, on the other hand, is taken into account the reality of the socio-economic infrastructure. Killing, as a form of revenge or punishment, because the person killed is considered to be an integral part of a particular society and his death is more of a loss to that society than to the person who was killed. For the European, he conceives that everyone must answer for his actions. For Africans, the being belonging first and foremost to a family, it is the family that must answer and not the individual. The individual predominates in Western philosophy, but in African society it is the community that takes over. Hence it is not surprising that the sanctions are different for the same crime.

This leads us to conclude that African legal systems, like all legal systems, are based on the responsibility of the man or the society to which he belongs and on direct and indirect evidence.

c. *Anthropologists*

The ideas of anthropologists are much more fanciful. Legal anthropologists have formed a false opinion of African traditional law. According to Peget R.T., "thought in tribal society is governed by fetishism, not logic. For the tribe, justice by fetish is good and justice by reason is not... It is futile to look for reason in tribal justice, since it is not rational. It seems that it is not necessary to make any comment on such an erroneous statement [*R. T. PEGET (1951)*". We should confine ourselves essentially to the statement of Lord Proter quoted by T. Olawale Elias: "the common law is a historical development rather than a logical whole, and the fact that any doctrine is not logically consistent with one or more other doctrines does not justify its condemnation [*T. ELIA. OLAWALE (1998): 41*] ". The accuracy of this observation is similar to the famous observation of Olover W. Holmes that "the real life of law is not one of logic but of experience. The necessities felt in every age, the prevailing moral and political theories, the overt or unconscious intuitions of public policy, and even the prejudices which officers of the law share with

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other men, play a far more important part than syllogism in determining the rules of law.[*O. W. HOLMES (1948): 1,213, 312*]

It is fortunate, however, that these anthropologists do not have the same viewpoint. While there are those who assert without reservation that African law does not exist or exists only to a limited extent, and who insist strongly that custom is king [*S. HARTLAND (1924)*], the others assert without ambiguity that in this society the law is distinguished from custom, because the law is imposed directly or indirectly by the community; and moreover, this distinction is recognized by the people *[M. M. GREEN (1947): 78*]; the third, with their knowledge of comparative institutions and contemporary legal thought, recognize that African law is a true law, although there are normal differences between its origin and that of other legal systems, differences linked to the social and economic environment in which this system functions and has evolved [*SCHAPERA (1938).* It is interesting to note that in this last group, one of the defenders of the existence of African traditional law dares to declare that "among the Negroes of Africa, primitive jurisprudence has reached its most complete development.

In precision and extent, their code rivals the Ifugao code, with the difference that the Negroes everywhere practiced a certain procedure before the constituted courts. This testifies to a remarkable taste for legal casuistry and a keen pleasure in judicial eloquence [*R. H. LOWRIE (1921): 404*].

Since it has been confirmed that pre-colonial African societies had developed a legal system that had nothing to envy to that of the colonizing peoples, why should we accept the loss of our own for the benefit of the one that has been imposed on us directly or indirectly?

d. *The constitutions of new quasi-independent states*

In the African tradition, private property was not well known, because the community took precedence over the individual and the communal good prevailed over the individual good. In contradiction with the African tradition, the constitutions of the quasi-independent states enshrined an institution that was ignored by the African people. Curiously, these constitutions were adopted by the People and for the People. This is not surprising, because all these constitutions were a reproduction of the constitutions of the Metropolis.

Thus, in 1960, the Ivorian constitution decided that the property regime was a matter for the law. In addition, there is an unwritten presidential precept that "land belongs to the person who develops it", which is still respected. In other words, it enshrines that land can be privatized when it used to belong to the community. The right to private property is also enshrined in the Cameroonian [*CONSTITUTION CAMEROUN (1996)*] and Senegalese constitutions [*CONSTITUTION SENEGALAISE (2000)*]. The Nigerian Constitution of 1992 establishing private property is innovative. The Rural Code of this country (1993) decides that property can be acquired through both modern and customary law. In particular, it contains specific provisions in favor of transhumant law.

However, while African states are striving to privatize land, Western countries are seriously reducing all prerogatives linked to private property! [M. BACHELET (1968); A. G. KOUASSIGAN (1966): 265]. And it is important to understand this: when one only mimics the rights of others, one always acts late when it comes to correcting or regulating any social relationship. Worse still, the African states continue to improve the law that organizes the exploitation of the African peoples and forget so quickly that yesterday the metropolis used all these means to order and organize the colony. In fact, for the colonizers, "to order" the colonies was to look for the formula that would allow them to animate a common life of the territories situated outside the national borders in order to weld them to the metropolis, temporarily or definitively, either by giving colonization a precise goal, or by thinking of it only as an exercise of definitive domination. To order the colony was to organize it so that it could give the metropolis everything it needed: raw materials, free labor, capital and other cheaper goods. Curiously, this same policy persists, and the African states do nothing to get rid of it. In this way, one wonders about the future of African law.

III. What Future for African Law?

I am deeply convinced that the future of African law remains uncertain as long as concrete actions are not undertaken to liberate it, to make it truly African, to entrust it with its mission of organizing, not destroying, African society. I also have the feeling, in view of almost seven decades of evolution and the current state of both the economic situation and the available resources, that the challenges that await it in terms of the simple material survival of the populations are such that it will be difficult for the convalescent African State to devote a significant portion of its resources to the administration of justice. It is not likely that the complex organizational charts of courts and tribunals or the elaborate statutes of the judiciary concocted by experts who arrive with turnkey solutions will restore the lost confidence of the people in the state jurisdictions or the laws adopted with the pure aim of defending the interests of those in power. In this case, we would be back to the paper law that has caused so much damage after having demonstrated its total inefficiency. "The work, as J. Vanderlinden aptly puts it, -- not to say the real work -- to be accomplished is otherwise complex and long term

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[J. VANDERLINDEN (2001): 4]. To do this, it will be important to think of really Africanizing the African Law and the State by perfecting them by taking into account the African habits, customs and traditions by the teaching and the scientific research in the field. In this way, the new Law will really play a reconstructive role for the interest and the prosperity of the African people.

a) For a real Africanization of African Law

Dare I say, following the example of J. Vanderlinden, that we must have the courage to ask most African jurists, trained - if we can speak in this way - in the image of the Western jurist, to completely renew the conception that the Faculties of Legal Sciences have presented to them of Law and its implementation. Is it not time to convince them that the Western system, the one whose merits the Westerners have praised, is itself in deep crisis in many countries. The congestion of the courts, with its corollary, the extreme slowness of civil justice or the saturation of penitentiary establishments, about which one tends more and more to agree that they contribute very little to a possible social reintegration, when they are not criminogenic, as well as the poverty of the means granted to justice with the consequence that its services are often behind a war compared to certain delinquency in the financial field, are only examples! *[J. VANDERLINDEN (2001): 4]*. Globalization worsens the situation, because it induces more and more an aggravation of inequality and discrimination in the world, Africa being the biggest victim. These inequalities and discriminations are reflected in several cleavages: the cleavage between rural and urban areas, the cleavage between the haves and the have-nots, the imposition of the Rights of the Westernized minority on the Rights of the oppressed majority, reduced to the rank of instruments of production. Does this globalization, a new form of colonization, benefit those who contribute a lot to its success everywhere in the world, namely the workers - in a regular situation or not (migrants, the various categories of domestic workers), the African peasants, and the African researchers forced to emigrate to the West?

One thing is true and at the same time realistic: we must dare to break with the legal colonization of Western countries, by rejecting the legal norms that do not respond to the socio-political and legal philosophy of Africans, and by replacing them with those that would best respond to African realities, precisely by adapting them to the realities of the moment. In this way, we will have participated, in a small way, to the real Africanization of the African Law and to the blossoming of these peoples bruised and exploited during several centuries until today by the Westerners [MONDIALISATION (2000)]. Blind is the one who does not understand this truth.

b) For a perfection of the African Law

The rejection of colonial and post-colonial law, its replacement by a new one and its adaptation to African realities is not an end in itself. It is important to think about its improvement. The latter can only have an effect if it really transcends the will of the people. Indeed, the law is a product - some prefer to say "a construction", an expression which is apparently less materialistic or commercial and which presupposes more talent on the part of the producer - of the human spirit implanted and evolving in a very precise and concrete social environment. This product must however, if one wishes to make it play a social role, be communicable, "communicable" and thus pass from the interior of the producer on the public place. The source of Law is precisely the form that the juridical product takes when it passes from the ideal field to the real field. This source thus contains the will of those who produced it. Now, since society evolves, this product must not be fixed, stagnant. It must evolve with it. And this is where the fundamental role of the State lies, when it is an emanation of the people, in amending outdated legal norms or in revising them when they need to be made more effective, and finally in creating new legal norms, when new social relationships are born and do not find their corollary in the system of regulation of social relationships. Such actions, when they are carried out by institutions born of the will of the people and truly translating this will, perfect African Law and predispose it to the defense of the interests of the Nation.

In this perspective, this Law, well developed in a State well organized according to the will of the people, gives rise to uninhibited relations in relation to that of other States. From there are born the relations of complementarity, of collaboration... in the full equality of the actors in this type of relation. And consequently, colonialist, dominating and imperialist impulses cease to exist, giving way to the equality of peoples in their own independence. What is the very foundation of the right to the self-determination of the peoples.

c) For an in-depth reform of the teaching of Law in Africa

This large-scale undertaking cannot be conceived without the reform of our law teaching system and its content. It is sometimes funny to see a magistrate trying to resolve a family conflict between two spouses living in a village in his country without mastering all the customs and traditions related to marriage. Sometimes we see ridiculous judicial decisions that have nothing to do with reality. Or we often see prosecutors who never manage to understand how the murder of a head of a family, for example, inevitably leads to retaliation. They ignore that the individual in African society is first of all a collective being of the family, the lineage, the tribe, the ethnic

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group, the race, the region, the Nation... Something that does not exist in Western Law where man is only an individual being, left to his own devices. The examples related to this are numerous.

Faced with this situation, it seems to me that it is high time that African legal teachers rebuild their educational model and their knowledge in the image of their society and no longer in the image of their colonizers or neo-colonizers and that they reconcile themselves with their people, even if it means that they admit to give back part of the production of the Law that they tried in vain to confiscate from them during the period after independence *[J. VANDERLINDEN (2001): 5]*.

Borrowing the terms of the jurist Professor J. Vanderlinden, I remain convinced that "such a renovation of the role of the jurist, of his training and, of course, of the very object of his art passes necessarily by his awareness of the environment which surrounds him beyond the texts in which he would be too happy to confine the Law. This is not enough, however, if those who are attached to the reconstruction of the State are not ready for an identical awareness. The question is thus posed to them of the place they are willing to give to a true legal pluralism in the African State of tomorrow *[J. VANDERLINDEN (2001): 5]*.

Moreover, in this delicate undertaking, it is necessary to take into account the history, geography, customs, traditions, mores and modes of social organization in any request tending to ensure the representation of any nature. The price attached to heritage, the historical content of any heritage, the security that it represents, the family context that permeates it requires that these components be respected. Hence the need for formulas and procedures that integrate these factors, while innovating to respond to the changes in the world and the constraints of the moment.

These innovations could not be possible without being accompanied by well-developed and sector-specific scientific research. Who will lead them? Where will he lead them since few lawyers have "resigned themselves" to remain attached by their umbilical cord to their society of origin? Africa is still lucky to have some holders of African tradition, custom and wisdom. These are the best of the professors who can lead this research on the revalorization of our cultural heritage. With them, the modern jurist worthy of his origins and identity will work and little by little will be able to codify this traditional Law which will be able to be adapted to the realities of the moment.

The creation of specialties in the teaching of law at the master's level will facilitate the realization of this challenge. Thus, those who would like to specialize in purely European Law, such as Air Law, Insurance Law, Business Law, Telecommunications Law, Computer Law, ... will have the freedom to remain linked to the Western civilization from which these Rights were born, while specialists in Family Law, Rural Law, Constitutional Law and Political Institutions, ... will be forced to refer to the source before proposing any norm.

d) The reconstructive role of reformed African law

The reconstruction of the African State is on the lips of several political actors at both the national and international levels. However, those who believe that it is useful, or even necessary, to rebuild the African State are faced with an alternative: either to rebuild it, with certain adjustments to the way it was on the day the colonizers cast off its moorings, leaving it to drift rapidly towards what it is today, or to reinvent it. The first branch of this alternative almost necessarily implies that the State should take back from the people the production of law. This would be a clumsy step, because logically, the people and the State are indissociable. An undifferentiated collective whole, a people only acquires consistency in relation to a problem that its reference is supposed to solve. Now, this reference is nothing else than the State. Moreover, the State cannot in any case not refer to its people. Just as in principle there is no people without a State, neither can there be a State without a people. Therefore, the reconstruction of the State must be accompanied by the in-depth restructuring of the People. This restructuring must pass by its total liberation, -psychological, economic, political, legal, social... As soon as the people lives its freedom, its independence, its blooming..., it produces legal rules to make harmonious the relations between its members and so organizes politically its society which is nothing else than the State. From now on, the State ceases to be a tiger that produces and devours papers. As for reinventing it, it is not possible. One can only reinvent what no longer exists. Now the African state, although in a ghostly way, does exist. What is important is to revive it, to reinvigorate it.

The reconstruction of a solid and authentically African state will only be possible by taking into account what the people themselves have built during this period. And, perhaps, by touching it as little as possible. And it is not the recipes that come or will come from beyond Africa that will rebuild it. Only the people, acting in unison and stripped of all discordant voices professing imperialist or neo-colonialist ideologies, will rebuild their state. Only such a people can envisage another conception of Law, another way of considering the production of this Law, another form of training of its jurists; the conception of a Law proper to Africa, the determination of the way to produce this Law and finally the training of jurists committed to develop this Law constitute concomitant requirements to a reconstruction of the African State. And this is the content of the "Afrojurisophy", this science determined to rebuild the African State and the African Law by taking into account the habits and customs, the traditions, the history, the

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politico-legal philosophy, the culture... of the Africans. IS IT POSSIBLE? YES!

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