

African Customary Law and Modern Law from Western: An Overview on Their Roles and Impacts in African Societies

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Abstract: The existence of a legal order in traditional African societies before colonization is all the more a palpable reality that the existence of a society is impossible without the presence of the rules of conducts that guide the members of society and, Therefore regulate social relations. This legal order can be attributed to the custom which is the result of the manners of society. This custom, which is a corpus of rules of popular practice, guided social relations in ancient African societies. This is to say that custom is a primitive law that produced rules of conduct to which people had to refer for their activities in accordance with these customary rules. This being so, it is necessary to recognize that the advent of modern law from Western has been so important for traditional African societies that it has allowed the introduction of new laws, the peaceful and equitable regulation of social relations , The separation of powers that contributed to the consolidation of the rule of law. In other words, it is clear that the advent of modern law from Western has contributed to the improvement and strengthening of the values of African customary law.

Keywords: Customs, law, colonization, modern law, society, tradition, African customary law.

1. INTRODUCTION

Before the arrival of the settlers, did African societies regulate social relations by means of binding rules? The answer to this question is no doubt positive because no society can function without establishing rules that have binding characteristics and therefore guide the conduct of people in society. Indeed, for thousands of years, social life in Africa has been governed exclusively by custom, or rather the thousands of local customs which have germinated through the ages and which have been transmitted from generation to generation by the oral way . On the other hand, colonization has established in a little more than half a century a system of written law designed to organize the rule of law and a "modern"¹ legal system. Repeated habits and uses have finally come together in a corpus called "Customary Law". Thus, according to the French author F. Garrisson, the custom is "the set of habits and practices born of repeated past behaviors that guide and shape subsequent behaviors. Tradition, conformism become models of action, standards of conduct. Contrary to the law, custom expresses a law spontaneously and naturally derived from the base, a pragmatic, popular law, made of practices held as rules. Custom is but the result of the manners of a society. "

This custom, which is a corpus of rules of popular practice, guided social relations in ancient African societies. This is to say that custom is a primitive law that produced rules of conduct to which people had to refer for their activities in accordance with these customary rules. However, in the eyes of some, these rules may appear blurry or bizarre in the sense that they are oral among people without writing and often cruel in the sense that they can impose certain behaviors that are differently shared in substance and in the sense. This being so, it is true that there existed an African law that

¹ Traditional justice and the rule of law, a difficult balance !, Manuel EGGEN, Done in Kinshasa, 23 October 2008, <http://manuetflo.canalblog.com/archives/2008/12/24/11856407.html>

regulated the conduct of people in ancient African societies. Even though this law had specific characteristics peculiar to the ancient African societies, it nevertheless had all its meaning and was important in the sense that people conformed to it.

Moreover, modern law, in its ordinary definition, is defined as: "the set of rules governing the conduct of man in society, social relations"², or more fully "the set of rules imposed to the members of a society so that their social relations escape the arbitrariness and the violence of the individuals and are in conformity with the dominant ethic."³ According to the advocates of legal positivism, law is a social phenomenon. The society establishes rules to govern its functioning and to organize the economic or political relations of the natural persons composing it. This gives it considerable importance.

Through these definitions of modern law, it emerges that, like African customary law, both aim at a single aim of pacifying social relations through the rules they impose on members of the society. That is to say that, like modern law, African customary law had a very important social function even if it is criticized for not being written. This leads to the conclusion that African customary law is as important as modern day law. It was also important that it played a crucial role in the regulation of social relations.⁴

2. THE CUSTOM: "NECESSITY AND IMPORTANCE", IS CUSTOM NECESSARY AND IMPORTANT?

It is clear that no society can exist peacefully without the establishment of the rules of conduct to which members of society must refer in order to avoid conflicts in their social relations. In other words, life in a society is possible only by means of the binding rules imposed on its members in order to pacify their relations as much as possible. Indeed, these abstract and mandatory rules indicate what "must be done". These legal rules may originate in a "superior", external, transcendent normative source, such as natural law, or derive from intrinsic norms. In the latter case, the rules are derived from established and accepted practices (customary law) or are enacted and devoted by an official body to regulate the organization and conduct of social relations (written law).⁵

It is very important to mention the character of civilization and the nature of the custom of African law, which is particularly characterized by the way of life and thought of peoples. Thus the customary nature of African law is explained by the civilization of the peoples living in this zone. Traditional African societies of the pre-colonial era are presented in the form of hierarchical but non-discriminatory groups because the rights and obligations of the individual are determined according to their place in society and in relation to the society to which they belong.⁶ Tribal or family regrouping was, of course, taking into account customary requirements and could be distinguished by its non-discriminatory character. And it was the custom that prescribed the rights and obligations of each in relation to his social status. And of course, the choice of leadership in traditional African societies was both democratic and authoritarian. Democratic when the choice was given to the members of the society so that they could determine who could direct it or to a group of notables who could present themselves as the representatives of the other members of the society and had thus the power to elect someone, One to whom they had confidence. Authoritarian when the traditional leader with authoritarian power or dictatorial leadership of the society, succeeded in doing so. But beyond this, peoples in traditional African societies had a very different view. According to them, there is an interaction between human power and divine power and human power emanates directly from the divine power. Thus, in his essay entitled "African Customary Law," Sayon alludes to this characteristic in these terms: "At the head of these chiefdoms there is usually a chief surrounded by notables. The way of access to power was distorted in some areas, both early in a democratic and early autocratic way. Traditional African societies had a rather different view of the world in which we live. For them the individual is straddling the world of the living and the beyond and there are interactions between these two worlds through belief in the spirit of ancestors that remains among the living. This cosmogony has an impact on the formation of law which is

² Emile Littré, Dictionary of the French Language, 1863,

³ Dictionary of Economics and Social Sciences, Nathan, Paris 1993

⁴ Jean-Luc Aubert, Introduction to law and fundamental themes of civil law, Dalloz, coll. "Private Law", 2004, 366 p. (ISBN 2-247-05524-9)

On www.reds.msh-paris.fr (accessed 21 June 2016)

⁵ <https://fr.wikipedia.org/wiki/Droit>

⁶ Essay on African customary law, Sayon Coulibaly, 25 August 2011, page 1

considered the emanation of the ancestral will. As a result, the members of the social group play only a secondary role in the formation of the law.⁷

Thus, it is evident that traditional African societies had a way of regulating social relations. And his law which is the direct emanation of custom had a very important role in determining the rights and duties of members of society on the one hand and how to access the chieftom and attributes of the traditional chief, on the other hand. Traditional African societies, like other traditional societies, had a law typically peculiar to their way of life and thought, and this law had a very important role in the regulation of social relations. Based on this observation, we quote Iliia ch. Axionov and Larissa Svetchnikova, who in their article affirmed: "Thus the historical school of law linked the birth of custom to the demands of national life. According to the conceptions of Puchta and Savigny, it was precisely custom that was to play a predominant role in the creation of new legal norms; the role of the legislator was reduced to removing the inevitable contradictions that were encountered in customary law."⁸ This position, however, seems contradictory. While it is natural that custom and customary law based on it have been able to regulate the social relations that were established in pre-state society, the role of the state is nevertheless in such an approach practically reduced to nothing and the role Of the legislator, as has been said, is reduced to eliminating contradictions. Such an approach virtually deprives the State of the possibility of advancing on the path of progress by reducing its role to pure police functions. The great Russian thinker EN Troubetskoi shows, in connection with the role of customary law in the regulation of social relations, that this approach has been completely rejected by Ihering, who has proved that "the replacement of custom by the written law is One of the great conquests of civilization ... it is true that the distinctive features of custom are the flexibility, the ability to adapt easily to the conditions of real life; But it is also true that the features characterizing the law - fixity, determination, accuracy and stability - have an incomparably greater importance for the law ".

These authors also point out that the reign of custom is only possible at the primitive stages of the development of human society.⁹

Moreover, Africa has a diversified civilization and the study of African customary law can enable us to discover a legal order that is obviously different from that of other legal systems. In other words, the study of African customary law enables us to better understand African custom, its evolution and its influence on social relations in traditional African societies. African customs are very diverse. And with their diversity, they met other civilizations including Western and Muslim. However, the diversity of African customs, which is evidently due to the multiplicity of these ethnic groups, has perplexed certain authors who questioned the existence of a legal order in traditional African societies before the advent of colonization. Later, studies have indeed shown the existence of a legal system in these ancient African societies. These studies have focused on certain signals including: Characteristics. This being so, knowing that a legal system or system brings together the structures and modes of functioning of the bodies involved in the application of the rules of law and the resulting services.¹⁰

Thus, we can ask ourselves the question whether there existed a law in Africa before the advent of colonization?

In response to this question, we refer to Sayon's very pertinent analysis in his essay on African customary law: "If we consider the law as the set of legal rules sanctioned by specialized state bodies, the answer is negative. Africa at the time did not know such a social organization as the European countries. In the same region several ethnic groups practiced different customs and their social organization was different. Different situations could be found, including aristocratic or monarchical peoples (kingdoms of Abomey, Buganda, Serer, ashanti confederacy), peoples with a democratic regime (village democracy of the Anuak of the Sudan), and sometimes communities which do not Have no political organization (Tiv from Nigeria, Tallensi from Ghana, Diola from Senegal). Family status and the legal regime of the land were subject to rules that differed within the same region: "Between the rights on land of a peasant of the Ethiopian high plateau, highly individualized rights ... and the Village of the neighboring Eritrean high plateau where the land is annually redistributed by drawing lots among all the inhabitants in carefully balanced lots ... there is a world of differences,

⁷ Essay on African customary law, Sayon Coulibaly, 25 August 2011

⁸ E. N. Trubetskoi, Enciklopedija prava (Encyclopaedia of Law), Saint Petersburg, 1998, p. 108-109.

⁹ Iliia ch. Axionov and Larissa Svetchnikova, "The theory of customary law in research: ethnology, theory of law and history of law", Law and cultures [Online], 50 | 2005-2, posted on May 28, 2009, accessed December 20, 2016. URL: <http://droitcultures.revues.org/1060>

¹⁰ Essay on African customary law, Sayon Coulibaly, 25 August 2011

although the geographical conditions are the same in both cases. And the resulting land laws of this situation present as much difference between them as those which distinguish them in turn from the forms of land tenure practiced in Rwanda or in the central Zaire basin ". The diversity of African customs arising from its cultural diversity should not constitute an obstacle to the recognition of an autonomous African legal order, even though it may make it difficult to identify...

But if we consider the law as a set of rules that a society imposes on its members, it could be said that there is an African law. There were many rules that regulated the functioning of African societies. A society cannot be reduced to the state or to the institutions emanating from a central political authority, presented as unique, above the citizens and other institutions or social bodies. If this were so, then we would face the existence of a single, exclusive order, to which all others would be indebted and reducible. Wherever there is a social group of a certain density and permanence, there is a right, whatever the level it occupies in the scale of civilization. The law is more than a set of norms, its references being the notions of organization and structure. It is therefore an institution, that is, a legal order. And since it "inhabits" every social body, the state legal order is only one entity among others. Despite the great diversity that marks African customs; several comparativists have admitted that there are several similarities which make it possible to group them within the same legal system. Indeed, African customs form a unity at the level of their origins, of the procedure, the principles, the institutions and the techniques. The existence of these common features made it possible to determine the characteristics of African customary law¹¹. Moreover, Vincent KANGULUMBA MBAMBI in "Laws originally African in the recent codification movements: the case of Francophone sub-Saharan African countries", affirms: "the existence of a law does not rhyme with the fixity of the most. Much of its rules or principles in a writing, collection, stele or code. There are no rules of law that are written. There is a law outside the code."¹²

3. HAS THE ADVENT OF MODERN WESTERN LAW BENEFITED AFRICAN SOCIETIES?

It is very difficult to deny the positive impacts on socio-economic structures that modern law has brought about in African societies. Customary law, which was both authoritarian and dictatorial when the customary chief succeeded in strengthening his power by the use of a law which was destined to peacefully regulate social relations, was devoted to its ends. This customary law now gives way to a law which regulates not only social relations (objective law), but also to equitably share the prerogatives that the members of society must enjoy (subjective law).

Thus, customary law will finally cease to be a peasant, authoritarian, dictatorial rules with, of course, the introduction of new laws such as labor law, administrative law, civil law, contract law, Consumer law, commercial law, etc...

And law is no longer a tool serving the interests of the elders, not to say the authoritarian traditional chiefs, but a positively effective means of further improving existing social regulators, while peacefully organizing social life. This is to say that the modern law from Western has enabled the establishment of a fair justice which constitutes one of the pillars of the pact citizen and republican of our country. Its impartiality, its capacity to ensure a balance between prevention, punishment, reparation and protection of individual freedoms are at the heart of the good functioning of society. It is a bulwark that protects people, guarantees the rules of living together, the rights and therefore the duties of each, the conditions of a peaceful society and is a response to the legitimate demand for safety of the members of society.¹³

Moreover, it is also important to recall that the modern law from Western allowed the introduction of the notion of the separation of powers in African societies. It is all the more affirmative of the idea that in societies claiming the separation of powers the application of the law results from a collaboration between the legislative power which defines the law and the executive power which ensures its execution - In collaboration with the citizens - and the judiciary which receives mission to interpret and sanction any breaches or disputes raised by its application.¹⁴

¹¹ Essay on African customary law, Sayon Coulibaly, 25 August 2011

¹² See: G. CORNU, "Canvas of introductory reflections. Accessibility of the language of law in theory and practice (Hearing the language of this right that no one is supposed to ignore) ", in *The language of law: accessible to all ?*, Proceedings of the Colloquy of 27 November 1999, Brussels, R.D.J.A. Asbl, KU Brussel, 1999, p. 5-15; V. KANGULUMBA MBAMBI, "The Writing of Orality: Semiotics and Metalanguage as Expressive Supporters of African Traditional Law", in *La langue du droit: accessible to all ?*, op. Cit., Note 2, p. 69-90; J. DU BOIS DE GAUDUSSON and D. DARBON (ed.), *The Creation of Law in Africa*, Paris, Karthala, 1997.

¹³ The importance of law in society, http://www.liberation.fr/societe/2011/08/24/de-l-importance-du-droit-dans-la-societe_756554

¹⁴ <https://fr.wikipedia.org/wiki/Droit>

Ultimately, it is necessary to recognize that the advent of modern law from Western was as important for traditional African societies as it was for the introduction of new laws, the peaceful and equitable regulation of social relations, the separation of powers that contributed to the consolidation of the rule of law.

4. CONCLUSION

The existence of law in ancient African societies can not be denied insofar as it is impossible for life to be organized in a society without the existence of a legal order which has the vocation of regulating social relations. This law, customary, was important and played a very important role in the regulation of social relations. Although it has not been written, since it has its origins in customs, African customary law has values and these values must be recognized. However, the advent of modern law from Western has also contributed to the improvement and strengthening of the values of African customary law. In other words, it is necessary to recognize that the advent of modern law from Western has been so important for traditional African societies that it has allowed the introduction of new laws, peaceful and equitable regulation Social relations, and the separation of powers which contributed to the consolidation of the rule of law.

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