SPARK

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THE FUTURE OF AFRICAN LAW

LONG before the foundation of the universities of the European continent, from which the modern civil codes of Europe have been evolved and long before the establishment of the universities and Inns of Court in the United Kingdom where the common law was taught and developed, law schools existed on African soil.

The Maliki School of Legal Thought, which had started as one of the more conservative trends, assumed a radical form. The universities South of the Sahara, like the great University of Sankore at Timbuctu, were centres of university life and learning. In the fourteenth century a teacher of law who came to Timbuctu to teach law, returned to the University of Fez in Morocco saying that the city of Timbuctu was full of black lawyers and juris consults who knew more law than he did.

'Social Solidarity'

These centres of learning were of importance not only because they were among the foremost centres of culture of the day, but also because they taught a system of law more advanced at that time than that existing in feudal Europe. In particular, they established the principle of the linking of law to social progress. The conception that law was a part of religion and therefore must serve all men equally, was an essential part of their contribution. African thinkers developed this idea into something larger and wider.

Ibn Khaldun, a great African scholar who was also a distinguished lawyer and a Malikite chief justice in Cairo, had, as early as the fourteenth century, pointed out the importance of law being based upon what he called "social solidarity," but what we, in our day, would call "on the support of the masses."

This theory of his is as true in our day as it was in his. Law, to be effective, must represent the will of the people and be so designed and administered as to forward the social purpose of the State. In Ghana we believe that it is only by socialist planning that we can industrialise and transform our country. Our lawyers, therefore, if they are to understand the spirit of our laws, must understand the basic principles upon which the State is directed and why certain laws are enacted, repealed or amended by Parliament. The teaching of law is totally incomplete if it is not accompanied by a background of economic, social and political science, and even politics, science and technology.

By NKWAME NKRUMAH

African Communism

The teaching of law in Africa would also be totally incomplete if it did not include a study of African law. The understanding of the basic principles of customary law is particularly important in that it is necessary to grasp the process by which this law has responded to economic and social changes, and the valuable contribution which it can make to legal thinking.

Well over fifty years ago, one of the greatest of our lawyers, John Mensah Sarbah, contributed a preface to a book on Colonial Gold Coast Law published at the expense of Sarbah and his Ghanaian friends, and written by a British colonial judge of the day, Hayes Redwar. Sarbah began his preface with these words:

"The African social system is communistic and has been built up gradually, and, as a race should grow its own laws just as an animal must grow its own skeleton, so as to meet its own special requirements,

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We devote the bulk of this issue of "Spark" to an outstanding contribution by Dr. Kwame Nkrumah on the question of law in the developing countries in Africa.

In this article, Dr. Nkrumah argues that African law, while it might borrow here and there from foreign legal systems, must base itself mainly on African legal traditions and requirements and must be designed to meet the needs and aspirations of the African people themselves.

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so has native customary law grown.

"The conflict between African communism and European individualism confronts the legislative reformer in the British West African Colonies, who when he essays to destroy, should either provide an adequate substitute, or give the people affected by his new enactments facilities to invent their own restraints suitable to their changed condition.

"It is doubtful whether the official mind has yet grasped thoroughly the fact that the underlying principle of the aboriginal social system is the sense of duty to be performed, respect to be paid to the aged, and obedience to the man in authority whether head of family, headman of a town or chief of a tribe.

"To encourage the individual to compete with his neighbour in the performance of work, and to continue to take interest in the progress of his community is wise; but to insist on individualism to the extent of encouraging selfishness, and destroying what is undoubtedly good and beneficial in the native's institutions is hardly commendable.

"In the African social system the formation of a pauper class is unknown, nor is there antagonism of class against class. Indeed recognition by promotion to office and public position in the community is to many a sufficient incentive to effort and perseverance. Dealing with individualism, one should not fail to develop all the various sides of the native's character, in other words, aim at levelling up; divert to proper use the energy and enthusiasm shown in company fights; and definitely get rid of the idea that aboriginal administration is hopelessly saturated with cruelty and inextricably permeated with corruption. One should recollect that the ancient Britain at a certain period seemed to the Romans no less unpromising.

"In fact Cicero, writing to his friend Atticus, recommends him not to procure his slaves from Britain, 'because they are so stupid and so utterly incapable of being taught, that they are unfit to form a part of the household of Atticus'."

All that Mensah Sarbah is trying to say is that our law must embody our traditional social attitudes of communal endeavour, of a classless society and of mutual self-help so as to avoid the narrow interpretation of man's duties to the community and the State, found so often in Western law.

Inappropriate?

For example, the emphasis laid by nineteenth century judges in Britain and in the United States on the rights of property, is entirely inappropriate in Ghanaian conditions.

There is a ringing challenge to African lawyers today. African law in Africa was declared foreign law for the convenience of colonial administration, which found the administration of justice cumbersome by reason of the vast variations in local and tribal custom. African law had to be proved in court by experts. But no law can be foreign to its own land and country, and African lawyers, particularly in the independent African States, must quickly find a way to reverse this juridical travesty.

The law must fight its way forward in the general reconstruction of African action and thought and help to remould the generally distorted African picture in all other fields of life. This is not an easy task, for African lawyers will have to do effective research into the basic concepts of African law, clothe such concepts with living reality and give the African a legal standard upon which African legal history in its various compartments could be hopefully built up.

Law does not operate in a vacuum. Its importance must be related to the overall importance of the people, that is to say, the State.

Application of Law

Law, like all other subjects and perhaps more than most, must be practically applied. I am convinced that its application, like that of other subjects, must be relative. No absolute application of the knowledge of law could therefore be of use either to the lawyer himself or to his client or clients.

Two Ghanaian lawyers trained in the United Kingdom were once arguing on property in my presence. It was Ghanaian property. One of them, newly arrived, referred to something called Fee Tail. At once the other exclaimed: "Fee Tail? Here in Ghana? You must be dreaming!" The Fee Tail lawyer knew of Fee Tail in English Law and believed therefore, that there must be a Fee Tail in Ghanaian Law. Our lawyers must do their utmost to serve Africa in the context of our own conditions and circumstances, our traditions and culture, our hopes and aspirations.

It is important that we realise the great advantages which may result from a progressive and organised development of common law legal institutions.

In reforming our own laws we have sought technical assistance from Commonwealth countries, the Irish Republic and the United States of America. In our new legislation, we have adopted a number of local principles advocated by such bodies as the New York State Law Revision Committee. Such outside help is of value provided, of course, that the basic principle—that all our laws must be designed to meet the needs and aspirations of our people—is never forgotten.

Scope of Law

Indeed, the object of our founding a law school and establishing a law faculty at the University, was to teach law appropriate to Ghana and not the law and the political thinking of any other country, however appropriate that law and political thinking might be in that particular country. Naturally, since we have inherited the common law system from the United Kingdom and since much of our written law is founded upon Acts of the United Kingdom Parliament and upon ordinances of the colonial days, much of the legal instruction given us was based upon English and Commonwealth law.

It is therefore natural that we should look in the main for law teachers who have been trained in English Law, but it is the duty of these teachers not to represent English law as the standard to which we must necessarily conform or as containing fixed and rigid principles from which we must never depart. They must regard it rather as a foundation from which to build in a form adapted to our own social system.

We must broaden the scope of law taught. In a developing country, the first priority is not for lawyers trained to conduct litigation between wealthy individuals. Unfortunately colonial conditions produced just this type of lawyer, and our own colonial legal system resulted in, for example, "land" cases between chiefs involving law suit after law suit.

Appeals to Privy Council

In the old days, one case alone might go on appeal to the Privy Council two or three times upon one or other aspect of the matter and perhaps take up to twelve years before a final decision was reached. In consequence, there was no certainty as to the legal position and the revenues of the traditional authorities involved were wasted in the working of a fantastically cumbersome, expensive and dilatory process. Land disputes of this nature should be settled, as our law now permits, by appropriate actions by the administration. The land litigation of the past should serve as a warning of

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BLACK SASH DEMONSTRATION

Black Sash members in Durban recently demonstrated against the Government's policy of house arrests.

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the disastrous consequences of attempting to apply English legal forms to issues for which they were never intended.

The lawyers needed in a developing state are, in the first place, those trained to assist the ordinary man and woman in his every day legal problems and particularly in the new problems likely to arise through industrialisation. For example, lawyers are required by the trade union movement to assist in making effective agreements with employers and seeing to it that the individual trade unionist obtains what is legally due to him if he is injured at work or is illegally dismissed. In the same way, lawyers are required throughout the continent so that in small towns and villages inexpensive but good advice can be had by the ordinary man and woman so that they are not put at a disadvantage in dealing with a wealthy trading or commercial firm.

This is a very different conception to that of the lawyer of colonial days who lived in the big towns and spent most of his time in court or chambers dealing with a very restricted class of client. In consequence of the nature of his work he was very liable to become subconsciously an exponent of the views of colonial economic interests.

Secondly, and perhaps most important of all, we need lawyers in the service of the State, to deal with treaties and with questions of private and public international law. A modern State requires also in its public services an increasing number of persons with a legal education, not only as advisers and legal technicians, but also in the day to day administration of the country.

You all know my general views, and it is therefore not necessary for me to elaborate what I have always stressed on innumerable occasions, namely, the need for African unity. This, however, is not only a political question. It is also a matter of constantly increasing inter-African economic and cultural relations. Thus, Ghanaian lawyers must become well acquainted with the law of other African countries and must be taught at least the principles of civil and administrative law as obtaining in many African States through their adoption of a system based on the great European continental codes of the nineteenth century.

Reactionary Force

In my view, legal education in Africa should be founded on a grasp of the systems of law which exist in our continent today. It must also be based upon a sound knowledge of progressive economic and social theory.

We must avoid the tendency to suppose that the form in which the law is administered is more important than the content of the law. Law is converted into a reactionary force once it is regarded as an abstract conception, which is in some mysterious way universally applicable without regard to the economic and social condition of the country in which it is being applied. The reverse is true.

The law should be the legal expression of the political, economic and social conditions of the people and of their aims for progress. It is the height of absurdity to attempt to assess the legal institutions of any country by adopting a formalistic yardstick which completely disregards the material content of the law and measures justice or injustice solely by procedural rules. Unfortunately such an approach too often marks the attitude of even the most eminent lawyers towards people with whose economic needs and social and political aims they do not see eye to eye.

The Ghana Law School was founded less than two years after Ghana became independent, to prepare students to become lawyers. Our initiative in this is proof of our belief in legality and our realisation of the needs for a dynamic approach to legal teaching.

The object of the School is to give both full and part-time tuition in law so that those who had wished to become lawyers but who could not in the past afford the large sums required to study at the Inns of Court in London, can now qualify. It will thus result in future generations of Ghanaian lawyers obtaining their qualifications in their own country.

How Coloured Can You Be?

JOHANNESBURG.

There is a difference between Coloured and Cape Coloured in the classifications of the Population Registration Department, according to a notice published in the Government Gazette.

The notice says that the letters which appear with identity numbers on identity cards issued in terms of the Population Registration Act have the following meaning:

W—White;
C—Coloured;
K—Cape Coloured;
M—Malay;
A—Asiatic;
G—Griqua.

ANOTHER MOVE AGAINST S.A.

LONDON.

Yet another frontal attack on accepting South Africa in the councils of the civilised world will be launched at the United Nations in December. The Economic and Social Council of the UN will have before it the resolution of the Economic Commission for Africa which called on the Council to expel South Africa until the government has changed its policy of apartheid.

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