Michigan Law Review

Volume 65 | Issue 8

1967

Harvey: Law and Social Change in Ghana

Max Rheinstein
University of Chicago

BOOK REVIEWS

LAW AND SOCIAL CHANGE IN GHANA. By *William Burnett Harvey*. Princeton: Princeton University Press. 1966. Pp. xiii, 453. $10.

In January 1963 an event of national significance was celebrated in Accra, the capital city of Ghana: the inauguration by the President of the Republic, Doctor Kwame Nkrumah, of the handsome new building of the national law school. The neatly printed program admonished the several hundred invited guests, Ghanaian and foreign, to be in their seats fifteen minutes prior to the arrival of the Oságyefo, the Saviour of the People of Ghana. Punctually, three minutes before the appointed time, the assembled guests heard the rhythmic shouts of the crowd outside coming ever closer to the new building: "Oságyefo, *Oságyefo, OSÁGYEFO*." Then trumpets and fanfares and the entry of the leader and his entourage, greeted by enthusiastic shouts of "Oságyefo." With measured steps did he ascend the dais to deliver a major address on the role of law in the new Ghana. It would have the task of nation-building and of constructing socialism; never ought mere formalities of procedure be allowed to stand in the way of reaching these great goals. Always would the law have to provide the instrument to deal effectively with the enemies of progress. New fanfares—Exit the Saviour. Reminiscences were conjured up of the Duce's Italy, the Führer's Germany.

It was but natural that the Oságyefo's ideas about law were to clash with those of the man whom he called to head the faculty of law of Ghana's university, Dean William Burnett Harvey, the author of the book under review. Nkrumah could not bear that the lawyers of his country be educated by a man whose ideas of law were those of Anglo-American tradition. After just about two years of constructive work at Legon, Dean Harvey was ordered to be deported.

Harvey's book is a fruit of his Ghanaian venture. He describes in detail the transformation of the legal system of Ghana: the hesitant, although important, measures of the British colonial administration; the acceleration of the transitional stage of emerging self-government (1946-1957); and the radical changes of the independent state of Ghana, first, as a member nation of the Commonwealth (1957-1964) and then as the new Republic of Ghana. The lawyer's narrative reflects the transformation of the social structure of the country. In fact, it constitutes a new history of the ways in which law is used as a tool to establish an authoritarian regime determined to transform in haste a backward country into a modern nation.

In the first three chapters, Harvey describes the legal measures by which the colony of the Gold Coast was established, by which it was transformed into the Commonwealth country of Ghana, and by

which that new nation was turned from a British-type democracy into a republic of one-party rule under the domination of a single man.

When in the late nineteenth century the British entered the Gold Coast and gradually extended their rule northward, they sought to preserve the traditional authorities and to integrate them into their own system of government. As in India, Nigeria, and other regions, pacification and administration were to be achieved through "indirect rule." Under the guidance and control of a small number of British administrators, the current tasks of government were to be carried out by native chiefs and councils.

In the Gold Coast, different systems of native rule were found in the North than were found among the Akan people of the South. The Northern system was simple: secular rule over the numerous small tribes and lineages was exercised by local chiefs; religious functions were performed by priests. Among the Akan people, however, the warlike Ashanti had established a complex system in which the local states and lineages had been forged into a large federation-like unit. The paramount ruler, the Ashantehene, as well as the subchiefs, combined secular power with the religious function of mediating between the living and the ancestors. Indeed, secular power rested essentially upon the belief in the charisma of those families from among whom the rulers were elected. Through these elections, as well as through the traditional need of the rulers to consult regularly with their councils and the people, a democratic element was injected into the otherwise authoritarian form of government. As we know from other sources, the Ashanti system, originally an efficient hierarchic military government, had degenerated so as to allow wide opportunities of oppressive despotism and corruption. Thus, if the British wished to use the native authorities, they had to reform them. Transformation had to occur also for the reasons stated by Harvey: occasional British misinformation about the state of native affairs, the desire to have the positions of power occupied by people loyal to the Crown, and, above all, the need for efficiency. In the end, the Governor had the power to dominate the traditional native administrations and to substitute for them native authorities of his own creation. The result, as Harvey aptly states it, was the preponderance of the British District Commissioners over the native authorities. But the native authorities, although in many ways transformed, remained the governmental authority with which the individual native had direct contact. By and large, the chieftainships and the councils continued to be occupied by the members of the old charismatic families rather than by that steadily growing group of alumni of institutions of modern education.

With the coming of, first, national autonomy and, then, inde-

pendence and one-party-rule, the fate of the traditional authorities was sealed. A new, centralized network of administration was built up, carefully organized so as to implement the policies of the Oságyefo. The ancient authorities were not completely abolished, but they were deprived of their political powers and of their functions in the public administration. A comparison with the fate of the European aristocracy might have been instructive: as the modern state came to be established in the eighteenth and nineteenth centuries, Europe's nobility, too, was reduced from positions of political rule to decorative functions and a declining status of social preeminence. The legal steps by which this result was achieved in Ghana and by which the resistance of the traditionalist groups was broken are traced by Harvey. Of decisive significance were those measures by which the chiefs were deprived of their powers over the stool lands, which resulted in the destruction not only of their economic influence but also of their religious contact with the dwellings of the ancestral spirits and, thus, meant the elimination of the magic base of their traditional powers.

The elimination of the traditional authorities was both a requirement and a result of the option for political unity. Like Kenya, Uganda, Nigeria, the Congo, and most others of the new African states, Ghana harbors within its borders tribes and groups of ethnic, linguistic, cultural, and religious diversity. Under the British rule much of this diversity had remained undisturbed. Upon independence, a choice had to be made between a system of decentralized pluralism and one of centralization and unification that would tend to reduce and ultimately eliminate the internal diversities. Harvey calls the problem "a dominant factor in determining how the organized legal force would be used."

Under Nkrumah's leadership, the Congress People's Party passionately opted for nation-building through centralization. The radicalism with which this aim was pursued was one of the principal causes of resistance to Nkrumah's regime and of his ultimate downfall. Harvey describes the long series of British steps by which the groundwork was laid not so much for unity of the Gold Coast as for unity of such component parts as the Fanti Confederation of the Ashanti. It was against the tendencies of regionalism which resulted from these measures that Nkrumah had to push his drive for national unity and to suppress the opposing advocates of a federal structure. It would be interesting to know what position the new military regime has taken on this touchy problem.

In presenting these momentous events, Harvey, as a lawyer, emphasizes the legal measures in which they found expression. The reproduction of the full text of the Republican Constitution of 1964, the White Paper by which it was proposed, and other funda-

mental legislation is highly welcome. The book thus neatly illustrates the legal steps by which the totalitarian dictatorship was established. A comparison with the corresponding measures of Italian Fascism and German National-Socialism might be tempting; also tempting would be an analysis of the revolutionary forces which through these legal measures sought to hasten the transformation of a traditionalist African society into a Westernized and industrialized modern nation.

To lawyer-readers, the fourth chapter will be of special interest. It deals with the legal profession. Its significance is indicated by the opening sentence:

> The hypothesis underlying this chapter is that adequate understanding of a legal system cannot result merely from the study of the legal norms and the structure of courts. The study must also include the professional group that holds itself out to the public as advisers in matters of law and as representatives of litigants in the courts. [P. 171.]

We might add that in the Ghanaian story the lawyer also appears in the role of draftsman of the legislation by which the country was prepared for independence by the British and by which the Oságyefo attempted to achieve his political goals. As draftsmen, lawyers moulded the underlying political thoughts into working tools. Who were these lawyers? When independence came to the countries of East Africa, there was hardly a handful of legally trained men. However, ambitious young men had gone from West Africa to England for several generations, and many of them had gone through the legal training required for admission to the English bar. In 1957, the time of independence, quite a few Ghanaians were members of the English bar. Some had taken law degrees at English universities; more had, like many of their English brethren, obtained their legal training as barristers' apprentices or in the law school of the Inns of Court.

The change from an attempt at democracy to authoritarianism was reflected in the enactments concerning the organization of the bar, as it was reflected in all other fields of law in Ghana. In 1964, the composition of the governing body of the bar, the Central Legal Council, was so arranged as to shift preponderant influence from the judiciary to the executive. Legal education was begun in Ghana itself in late 1958 with the opening of the Ghana Law School, which was intended first to prepare students for the English bar examination, and later to provide short-time training for the lower ranks of the judiciary; it was essentially a night school and had no connection with the university. One of its aims was decidedly political: to train lawyers imbued with the revolutionary spirit of the Congress People's Party as a counterweight to the preponderance of lawyers who had received conservative British training. In the political as well as in

the conventional outlook of the new law school was to be found the seed of conflict with the department of law that was intended to be established as an academic institution at the university in Legon. This conflict became apparent during the term of office of the first head of the department, Mr. John H. A. Lang of England; it became acute under the deanship of Mr. Harvey, who brought with him the scholarly outlook of the leading institutions of American legal education. The story of the struggle about legal education would constitute a thrilling part of the legal development of Ghana. But having been a principal protagonist, the author has imposed upon himself the restraint he believes to be demanded of the scholar.

All of the new countries of Africa are faced with the problem of duality in the administration of justice. The colonial powers introduced modern judicial systems patterned upon the court system of the home country—England, France, or Belgium—and charged with the application of a law that was substantially the same as that of the home country. However, for the small affairs of the natives, indigenous courts were preserved or established which, under the control of the administration and subject to the appellate jurisdiction of western-style courts, were to apply the customary law of the native communities. What the customary law was, could not, it is true, always be ascertained with certainty even by the elders and much less by the European or European-trained judges of the Western-style courts acting on appeal. But in spite of manifold difficulties, the native courts more or less conformed to the traditions of the African communities that they served. The new African governments in striving for uniformity are inclined to do away with the differences between the laws of the several tribes, to integrate the native courts into the general judicial structures of their countries, and to unify their national legal systems through the general application of the modern European laws as they had always been administered by the Western-style courts. Thus, under the guise of Africanization, the law seems pretty generally to be de-Africanized.

The many changes that were made in the judicial system of Ghana, first under the British administration, then by the Nkrumah government of self-rule and later of complete independence, and, finally, under the Republic Constitution of 1964, are reported in detail. Unification of the court system was one of the earliest acts of the autonomous government. The duality of the substantive law was still preserved. However, the judges of the new local courts are no longer local chiefs or other notables, but are appointees of the central government, who can hardly be expected to be familiar with the local customs. There also appears to be a tendency to redress the attempts at strengthening judicial independence which had been made during the late stage of British rule. The ultimate steps,

the President's dismissal of the chief justice and the judges of the Supreme Court when they acquitted a group of political opponents and the creation of a constitutional basis for such presidential action by express amendment to the Constitution, are described without comment and with that detachment which is characteristic of the book. Nevertheless, Harvey concludes his description with rare outspokenness:

> The superior courts are generally regarded with respect. Below the High Court level, however, the prestige of the courts rapidly dissipates. The most unsatisfactory situation exists in the local courts, for here chiefs and other traditional officials, whose primary qualifications were familiarity with the customary laws, have now generally been replaced by political appointees. The educational level of these magistrates is so low that in-service programs are of questionable value. Suspicions of bribery and corruption in the local courts seem to be no less prevalent than they once were with respect to the old Native Courts. The recent constitutional changes directly strike at the confidence in the integrity and independence of the superior courts. [Pp. 237-38.]

How laws were used to deliver the "Tools of Political Monopoly" and how "Value Competition" has found expression in Ghanaian legal development are demonstrated in the last two chapters of Harvey's book. The story is carried to the end of 1964. No attempt is made to show what happened under the present military regime. The legal history of Ghana's formative period will be of interest to students of law, of political science, and of African affairs. It has been presented with remarkable objectivity by a competent and sympathetic observer.

Max Rheinstein,
Professor of Law,
University of Chicago

INTRODUCTION TO LAW AND THE LEGAL PROCESS. By *Bernard F. Cataldo, Cornelius W. Gillam, Frederick G. Kempin, Jr., John M. Stockton,* and *Charles M. Weber.* New York: John Wiley & Sons. 1965. Pp. xiii, 880. $9.50.

The primary purpose of this book is to teach laymen the fundamentals of law. The authors apparently believe that law is too important to be left to lawyers alone, and that, as a result, the academic community bears the responsibility of giving legal instruction to laymen. The Ford Foundation has given financial support to this endeavor to meet that responsibility.

It is an implicit assumption of *Introduction to Law* that one need not become a lawyer in order to achieve an adequate understanding of how law works. The validity of this assumption is certainly open to question. While there is probably little disagreement in either the law schools or the academic community as a whole as to whether an educated layman *ought* to understand the workings of law, it is debatable whether an understanding of this kind *can* be instilled in such a person outside the traditional framework of legal education. Nevertheless, in the years to come, both law teachers and other educators have the opportunity to test the validity of the authors' assumption through classroom experimentation. Such actual experience might well provide an empirical basis for determining the potentialities and the limitations of legal education for lawyers as well as for laymen.

The authors' methodology is a radical departure from the casebook approach traditionally taken by the law schools. Instead of requiring the student to analyze cases, memorize precedents, and follow prescribed pathways in reasoning, the book leads him on a fascinating descriptive tour of legal institutions and their historical development. The tour begins with a presentation of the institutional, jurisprudential, and historical aspects of law and legal systems; in this connection there are chapters on "Nature, Meaning, and Sources of Law," "Legal Reasoning, Growth of Law," "Federalism and the Legal System," "Puzzles in Pluralism," and "Judicial Procedure." Next, the authors demonstrate the historical and social impact of the law's response to economic and social problems through an examination of the law of contract. The tour concludes with a brief, nut-shell treatment of the law of agency and tort.

Lawyers who received their formal legal education through casebooks may frown on a descriptive, textbook presentation of law; they may say that an approach of this kind is like fiddling without a fiddle. Yet these same lawyers stoically accept the enormous consumption of classroom time and the key-hole perception of law which are inherent in the casebook method. *Introduction to Law* deserves a more open-minded reception.

The authors' pedagogical approach is suggested by the following passage from their work:

> *Modern Developments*
>
> Conflict-of-laws rules are traditionally formal and exclusive in character. The search is always for "the law of the place." The accompanying assumption is always that finding the law of the place ends the matter. That law, and that law alone, controls. There is, however, a marked trend away from that dogma. The new view is variously called the contacts theory, the interests doctrine, the center-of-gravity concept. It originated in contract cases, but has

been extended to torts, and argues that a state other than the locus may have a closer and more vital connection with a transaction and the parties than does the locus. If so, the theory concludes, the local law of that state should control, rather than the local law of the locus. The Uniform Commercial Code and the Conflict of Laws Restatement both adopt this view. The latter declares: "The local law of the state which has the most significant relationship with the occurrence and with the parties determines their rights and liabilities in tort."

In a current case that illustrates the newer view, a motorist and his guest, both New Yorkers, took a weekend trip to Canada. A collision in Ontario caused injury to the guest, who sued his host, the driver, in New York. By statute in Ontario and several of our states, but not in New York, a driver is immune to suit by his guest. The court compared the relative contacts and interests of the forum and of the locus and concluded "that the concern of New York is unquestionably the greater and more direct and that the interest of Ontario is at best minimal." It decided that the Canadian statute did not bar the present suit. One judge dissented and criticized the court for "extending the principles of extraterritoriality as though we were living in the days of the Roman or British Empire, when the concepts were formed that the rights of a Roman or Englishman were so significant that they must be enforced throughout the world even where they were otherwise unlikely to be honored by 'lesser breeds without the law.' "

The authors show judicious scholarship in their case analyses and discussion, and carefully document their propositions of law with appropriate citations. Case problems are included at the end of each chapter as student exercises.

In the collaborative authorship of the book, each author prepared certain chapters, and although the finished work shows remarkable unity, it appears that the concepts may not be presented in a sequence appropriate for the building of a proper substructure of student understanding. Viewed as a whole, however, it seems to this reviewer that the authors have created a new and worthwhile instrument for teaching law to laymen, and that the impact of their work on legal education—for prospective lawyers as well as for laymen—will be of major proportions.

Joseph Lazar,
Associate Professor,
School of Business,
University of Colorado