Law and Social Change in Ghana, by William Burnett Harvey

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makes the public school central because shared time and shared services are under the exclusive domination of public school officials.

The act, in a strange paradox, is the first federal law to recognize and even "encourage" private schools, but it is also a bill which confers unprecedented centrality and prestige on the public school. By combining basically irreconcilable policies into the same law the act, enacted amid a national mood of religious ecumenicity and a spirit of "let-us-reason-together" political compromise, obscures more than it clarifies and impedes more than it implements. But for all its obscurity the Elementary and Secondary Education Act of 1965 may have forced the Great Society to concede the simple but hitherto rejected principle that Americans may no longer perpetuate the fantasy that those who opt out of the public school, in whole or in part, for reasons of conscience, may be treated by the nation's legal institutions as if they did not exist.

ROBERT F. DRINAN, S.J.


Shortly after Nkrumah was toppled, Erskine Childers interviewed Col. Nasser for The Guardian and reported him as saying of Nkrumah, "You know, when he came here on the way to Peking, Nkrumah said he wanted to talk about Vietnam. I said no, please let us talk about Ghana—because we have had many bad reports of the situation. But it was no use; he did not seem worried at all." And, Childers reports, "Nasser raised his hands slightly in a gesture, not of indifference, but of regret."

The reactions abroad to the Ghanaian coup of February 24, 1966, varied widely, according to the political philosophies prevailing. In Eastern, or "socialist" countries, it took a more virulent form than an expression of regret. There it was regarded as an "imperialist" or "neocolonialist" plot. In the West, the fall of the Nkrumah regime was received in many quarters with undisguised glee, or at least satisfaction; more rarely one found an appreciation of the tragic role of the national hero become tyrant who perverts the uses of power and inexorably fashions his own undoing; Marxists "saw through" Nkrumah, at last, as a petty bourgeois who had never worn the mantle of true revolution.

There is material on a grand scale in the Nkrumah saga for drama. One does not, of course, find it portrayed as such in Dean Harvey's book, but any writer attempting to treat the Ghana of Nkrumah would be well advised to look here for material. Informed by hindsight, we may all find here some of the signposts which pointed to the precipice.

Unhappily, such signposts abound in the new nations of Africa. We can see them, for example, in the wreckage of what was once the most promising of the new African states, Nigeria. Few of us read the portents for what they are, Africans and non-Africans alike. Perhaps it is excusable, for in each recent case the signs have been obscure, and the portents observed did not, in fact, indicate the true sources of revolt: the military—a small, often pitifully small—group controlling "the means of violence," and remaining in the background until a critical moment brought the opportunity for, rather than the cause of, swift and sudden change. African leadership, with rare exceptions, has decried the succession of African military coups, regardless of the ideology of the former or the new regime. Among some leaders this stems from a predisposition toward democratic and orderly processes for accomplishing change, but against the background of contemporary African governmental process, one is forced to conclude that for others it derives from fear for the leaders' own security and the sudden recognition that their own regimes may rest on the way the military reed bends. There is generally as yet no national fabric into which the military, like any other segment of society, is woven, so that—apart from the somewhat sinister arts of intelligence gathering—tension or movement there is signalled elsewhere. But this may be owing also to the fact that the synthetic tapestry of government which has been so artfully contrived, replete with all of the "legal tools of political monopoly" has been woven too tautly. There are then no signals until the fabric tears.

One should not underestimate one important factor, not treated by Dean Harvey, in Nkrumah's downfall, and that is the deterioration of the Ghanaian economic situation. The collapse of the world price of cocoa in the early 1960's (accompanied in Ghana by the "swollen shoot" disease, which cut production) and Nkrumah's profligacy had brought Ghana to the verge of economic ruin. Ghana's long and short term external liabilities, at the time of the coup, amounted to a staggering £840

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2. *E.g.*, the reaction of President Nyerere of Tanzania, who tangled bitterly with Nkrumah at the meeting of African heads of state at Cairo in July, 1964, but commented with equal bitterness after the fall of Nkrumah that Nkrumah had been victimized.
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million. It is impossible to do more than speculate as to whether the Nkrumah regime died because Ghanaian prosperity had passed earlier.

Whether primary or ultimate cause, discontent with the economic situation worked in an environment of conflicting ideologies, political cross-purposes, and social and cultural stresses which readied the Ghanaian people for the tumultuous acceptance of Nkrumah's overthrow, although they did not participate in it. The post-coup reaction of the populace is witness to that. Dean Harvey's book is concerned with these phenomena, and with the legal instruments, constitutions, and statutes, which Nkrumah manipulated to insure his power—the ostensible forms and mechanisms of social control that obscured the reality beneath. There is, in truth, more of the latter than the former—more "law" than "social change"—in Dean Harvey's volume. But if we look first at his last chapter, "Value Competition in Ghanaian Legal Development," we can better appreciate the significance of the others that precede it. In this way, what may perhaps otherwise be viewed as "too positivistic" an approach to the legal order of Ghana in the earlier chapters, particularly in the light of the coup, bears testimony to the basic antinomies in Ghanaian political life under Nkrumah, as Harvey delineates them in his final chapter.

The contradictions which Dean Harvey lists are four: (1) between traditional localism and nationhood; (2) between nationhood and African unity; (3) between individualistic and collectivist values; and (4) between democratic and autocratic values "in the law-government structure of Ghana."

These antinomies lie at the heart of understanding the preparation of Ghana for independence, the development of its legal order under both colonial rule and independence, and the failure of Nkrumah both as a national and pan-African leader. The pages preceding the discussion of the antinomies describe and analyze the efforts of Nkrumah and his immediate colonial predecessors to overcome them or, as it turned out, to overlay them with the gloss of law or to control their fissiparous tendencies with legal institutions. These were "the legal tools of political monopoly" which were always firmly in Nkrumah's hands, but which did not finally avail him.

What passes for regionalism or sectionalism in many nation-states, including our own, remains a blood-matter in most African nations. Tri-

3. European suppliers, who plied Nkrumah's pride, were as much to blame, one cannot help but feel, as Nkrumah himself. As late as October, 1965, suppliers' credits were still being freely accumulated. The Eastern bloc was no exception. See West Africa, October 16, 1965, p. 1167.
4. These are discussed, successively, at pp. 351, 355, 357, and 364.
bal links are still more meaningful for the vast majority of these agrarian societies than the concept of nationhood. The impact, in concrete and pragmatic fashion, of the idea of "nation" has been very small in Africa outside urban centers and below the levels of political leaders and governmental officials. When blood-ties are elaborated in social and cultural systems with religious and traditional values, which are fortified by strong vested interests in the maintenance of their structure and are differentiated from each other by historical and linguistic or dialectical apartness, it is no wonder that the mass of the people do not respond to the call of nationhood. Even less so, when the new central independent authority views the destruction of the traditional systems of loyalties as prerequisites to national unity.

The erosion of traditional authority began in the colonial era, through the introduction of "indirect rule," by which the British used the ready-made apparatus of the chief and his retinue as a means of insuring control. This secured the chief in the colonial system, but robbed him of his strength in the traditional order. The chief's primary loyalty was turned to his colonial masters and away from his people. His religious role was de-emphasized, and he became a part of the coercive mechanism of colonial administration. "Indirect rule" also eroded the traditional democratic spirit of pre-colonial Ghanaian life, for tribal leadership was not authoritarian. As Harvey says, indirect rule "distorted the traditional dispersion of authority among the indigenous rulers and disrupted the delicate processes of consultation through which, in large measure, popular sentiment had been reflected." 5 To his people, the chief became an agent of British power. This alienation provided an opening into which young "politically progressive elements" 6 could attack the institution of chieftancy on a matter which the colonial overlords could not disregard—the mismanagement of chiefly prerogatives—"stool" properties and revenues, and the administration of justice, which became progressively more corrupt as the traditional links between chief and people fell away. The chief simply lost his sense of responsibility to his people, and the trust of power and property became a personal prerogative. Thus, the colonialists were required to betray the very man they had created, and the formal shift in power from the chief to new forms of public administration was begun, first by the creation of Native Authorities, chosen on the "best man," rather than a hereditary, prin-

5. P. 70. This process of decay had already been noted by Rattray in 1928. See p. 70, n.3.
6. P. 72. AUSTIN, POLITICS IN GHANA passim (1964), uses the term "youngmen" to describe the young radicals opposed to both colonialism and "petty bourgeois nationalism," represented by chiefs and the African pre-independence elite, including lawyers.
ciple. Eventually, the control of land revenues was removed from the chiefs to the colonial government.

Even earlier, the introduction of Christianity had contributed to the disruption of traditional religious patterns, in which the traditional authorities played a large part. Still later, cash crops, which enabled the Ghanaian farmer to sell his produce for money, freed him further from the close web of communal life dominated by the chief. By 1951, when independence was under serious discussion, the role of traditional authorities in Ghana was perilous, and the native courts, which remained to the chiefs as a consequential exercise of power, they had also thoroughly corrupted. The Korsah Commission reported in 1950 that, aside from the Northern Territories, there was general popular dissatisfaction with the administration of justice in native courts, which, it found, were tainted by "the vice of corruption and . . . dilatoriness, somnolent inattention, illiterate in comprehension, [and were used] as a political weapon." 7

Reduced to dependence on the colonial power, it is not surprising that the chiefs saw a threat in Nkrumah, or in any proponent of unitary government and a move of power and prerogative to the center. Nevertheless, the institution of the chiefs was still sufficiently viable in 1957 to insure the provision for a House of Chiefs in the 1957 Constitution, and even the Republican Constitution of 1960 provided in article 13(1) that "chieftancy in Ghana should be guaranteed and preserved." But Harvey could write that by 1964, "only with respect to the initiation of selection and installation procedures does the present law of Ghana leave full responsibility in the traditional authorities. Their action may be rendered ineffectual, however, by a refusal or withdrawal of recognition. The legal tools of a modern state have operated so effectively on the institution of chieftancy that one may accurately say that the chief in Ghana today achieves and retains his office only by sufferance of the national government." 8 Both the British and Nkrumah viewed the chiefs as obstacles to modernization. The Watson Commission of 1948 could not "envision the growth of commercialization in the Gold Coast with the retention of native institutions, save in a form which is a pale historical reflection of the past." 9 The Greenwood Report of 1960 foresaw the "complete exclusion of the traditional authorities from the pro-

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7. P. 210. Ghanaian courts after independence suffered from "the belief . . . prevalent that the courts who administer 'justice' to the great mass of population are in fact for sale to the highest bidder." P. 238.
8. P. 87.
cesses of local government.” Nkrumah’s purpose was the same, that of “keeping the chiefs away from politics.”

After independence, Nkrumah moved vigorously to cut back further the power and influence of chiefs. Their economic situation was already difficult, since they had already lost control of land revenues. By legislation in 1958, chiefs were denied any participation in the division of any revenues accruing to the stool. In 1960, the President was authorized “to declare any stool land . . . to be vested in him [and to] execute any deed or do any act as a trustee in respect of the stool land.” Thus the chiefs were stripped of the economic power which Nkrumah believed had nurtured their activities in opposition to his national cause.

Similarly, regionalism came under Nkrumah’s attack as detracting from the cause of nationhood. The demands that a separate state be created for the Ashanti and the Northern Territories were ignored by the British, but Regional Assemblies were created by the 1957 Constitution as a compromise, for the British then also favored centralization of powers. In 1958, both Regional Assemblies and Houses of Chiefs were eliminated from the procedures established in 1957 for constitutional revision, leaving it to the National Assembly alone, except in cases of “entrenched” provisions which required action of the President, the people (by referendum), and the National Assembly. The Houses of Chiefs, in the same year, were restricted to tendering advice to the national government and to declaring or modifying prevailing customary law. And in 1959, Regional Assemblies were dissolved.

Nkrumah naturally viewed customary law as drawing strength and loyalties from the center. Local by its nature, it impeded a sense of unity which a body of national law could serve. And it was administered by chiefs whose interests lay in the preservation of the “local” exercise of power. At independence there did not exist a national value system, for it had not been in the British interest to promote one, quite the contrary. Nkrumah set about at once to alter this, and legislation, particularly after the republican era began, created “an initial presumption of the applicability of the common law rather than a personal customary law, and thus advantage[d] the regime of national law grounded, not on personal status under the traditional order, but on the territorality of the na-

10. P. 93.
11. P. 94.
12. P. 119.
13. Both the Bourne (1955) and Van Lare (1958) reports recommended that Regional Assemblies be advisory only, without any original legislative powers. P. 146.
15. Only two such declarations had been made by 1964.
The anomalous situation, of the Nkrumah government favoring received law over the customary law—"still . . . a vital element of the legal order, indeed. . . . The element most intimately related to the great mass of the people"—produced further tension. Here, as elsewhere, of the nationhood concept was dominant—but it rested entirely on Nkrumah and his elite. The reluctance of traditional and regional authorities to participate in the processes of change and fusion was demonstrated by the fact that after the Houses of Chiefs were empowered in 1958 to declare existing customary law or to recommend its modification, this function was exercised but twice by 1964. Earlier, the State Councils had been given similar powers, in 1940 and in 1951, but the powers were rarely exercised as they might have been, "to affect substantially the development of some of the most significant legal institutions."

At the same time that Nkrumah was trying to consolidate the nation, he was pulling in another direction, that of pan-Africanism, and, in effect, denying the validity of the nation-state as a legitimate goal; here is the second antinomy. African unity was a concept even farther removed from the comprehension of the Ghanaian masses, as necessary and attractive as it may have seemed to Nkrumah and his elite, and as it still seems to much of African leadership. However, Nkrumah was a pan-Africanist before he became a Ghanaian nationalist, after edging into Ghanaian politics upon his return to Ghana in 1947. After assuming leadership in 1951, he gathered "the full array of legal power . . . to neutralize sub-national orientations and power structures." Having established a base from which he could unite Africa, or so he thought, Nkrumah "reached . . . for the leadership of a supra-national movement looking ultimately toward the unity of all of Africa." Nkrumah functioned here, too, as an idealist, forging ahead regardless of the fact that the predicates of African unity, viable nations, did not exist. He disdained Nigerian gradualism. The draft of the Republican Constitution, presented in 1960, proposed "to entrust to Parliament the right to surrender the sovereignty of Ghana so that Ghana can at any time when this becomes possible, be merged in a union of African states."

This proposal encountered opposition from the United Party, which had already engendered Nkrumah's suspicions as a gathering place for "reactionary forces"—traditional authorities, the British-educated and

16. P. 354. See also p. 262.
17. P. 355.
20. P. 151.
21. P. 156. This became art. 2.
oriented elite, and those who simply distrusted the totalitarian tendencies of Nkrumah or who feared his lack of a sense of process. Dr. J. B. Danquah, a lawyer who had led the original nationalist movement, the United Gold Coast Convention, in which Nkrumah had once been Secretary General, was the leader and spokesman for the opposition. Nkrumah won handily, but the acceptance in 1960 of the Republican Constitution marked the beginning of a ruthless campaign to eliminate all political opposition, which ended only with the coup of February, 1966—and with the death, in the same month, just before the coup, of Dr. Danquah in prison.

The third contradiction in Ghanaian political life under Nkrumah was to be found between individualistic and collectivist values. This follows logically from the efforts to rapidly obviate regional and tribal differences in favor of a coherent, cohesive national order. But the traditional, pre-colonial order, as Harvey points out, was one which already favored the community—the tribe or extended family—over the individual. There was "no operative concept of the individual." Colonial policy superficially appeared to favor collectivist values in the sense that it supported and utilized the indigenous institution of chieftancy. And yet, even as the British destroyed the power of chiefs in using them as "agents of colonialism," so they encouraged individualism among the chief's subjects by alienating the chiefs from their people and in loosening the traditional controls. As noted, through the introduction of Christianity and cash crops, and through British individual and institutional models carried from England to Ghana by both Englishmen and English-educated Ghanaians, by dissemination of the franchise, as a result of growth of the local public service, by the development and refinement of a body of private law, and through the rise of nationalism, there began "the movement of the individual toward the center of the stage." This trend continued in independent Ghana, Harvey says, but was more than balanced by "a new collectivist orientation toward the nation-state." The first colonial phase of the rise of individualism was initially and largely negative, i.e., a breakdown of the traditional lines of communal orientation and authority, and only latterly and superficially an attempt to concretize a preconception of a Westminster model with its panoply of individual rights as part of the English constitutional heritage, in pre-independence statutes and in the Independence Constitution of 1957. The trend toward individualism which continued after that date was tri-

22. P. 358.
partite: there was a continuation of the process of subverting and destroying traditional authority; there was, at least early in the independence era, a continuation of the surge toward economic individualism; and third, there was a continuation of an unsubverted reservoir of political individualism which, present-day Ghana attests, survived the collectivist efforts of the Nkrumah government. By 1964, economic individualism had all but disappeared in the name of socialism, political individualism was stifled, and the masses who had been liberated from traditional controls were caught up in the wide and complete range of new national controls which put them completely at the mercy of the central government. Even the right to vote was lost by the Ghanaian citizen by 1964; the constitutional referendum, January 1964, "an election not unmarked by large-scale fraud, had the effect of disenfranchising the electorate and rendering the electoral process obsolete." There were restrictions on movement, association, speech, and political activity. Thirty-seven industries had been nationalized, and the "means of production" firmly, if not efficiently, put under the control of the ruling group. Complete power to order the life of the nation and every person in it rested in the hands of one man, and it was implemented through one political party, whose monopoly was authorized by constitutional amendment.

All of this, it is important to note, was accomplished "in an unbroken chain of legality." In this sense, Harvey points out, while one may speak of a Ghanaian revolution, "there has never been a definitive break with the past." One wonders now whether one can really speak of a "Ghanaian revolution" in fact, for it seems now to have been little more than a shift in the locus of power, from colonial ruler to indigenous clique. Indirect rule began a process of subverting democratic values in the traditional order and elevated an autocratic model. Nkrumah, after a brief experience with the libertarian Constitution of 1957, restored the autocratic mode of government. And the tools to do it were at hand, for "virtually every legal technique of autocratic, authoritarian government, employed in recent years by the Government of Ghana under Dr. Nkrumah, finds its historic precedent in the Colonial Gold Coast." Thus, the Preventive Detention Act of 1958 was preceded by regulations promulgated by the British Governor to arrest and detain persons if he was "satisfied" that it was "expedient for securing the public safety and the maintenance of public order." Dr. Nkrumah himself was caught up

27. P. 367.
28. Ibid.
29. P. 362.
as a result in 1951 (along with Dr. Danquah), and he remembered it well: as in his own case, under the 1958 act persons were not formally charged and there was no review, judicial or otherwise, of the executive action. But while the procedure lacked what we would call due process, it was nevertheless, quite legal.

Thus, we see Ghana enmeshed in the fourth antinomy, that between democratic and autocratic values which is not necessarily but so often a concomitant of the third, that between collectivism and individualism. The civil rights "entrenched" in the 1957 Constitution, requiring elaborate and difficult procedures to remove them, were reduced to statutory level a year later, so that they were no longer restrictions on the power of Parliament with respect to the individual. These rights were simply omitted from the substantive portion of the 1960 Constitution and survived only as parts of a "solemn declaration before the people," which the President was to recite upon taking office. Dr. Danquah made a valiant effort before the Supreme Court of Ghana in 1961 in a habeas corpus proceeding, to create of this declaration "a bill of rights creating justiciable rights in individuals." Of course, he failed. The Attorney General of Ghana, an English Q.C. and sycophant of Nkrumah, who must bear a great share of the blame for the oppressive course of the Nkrumah regime as its chief legal architect, argued that the presidential declaration was "a solemn statement of principles intended to prevent any person who cannot subscribe to them becoming President" and imposing merely "a moral obligation, to be sanctioned, if at all, at the polls."

Finally, to demonstrate how completely autocratic government in Ghana became under Nkrumah, it is only necessary to point to Article 55 (2) of the 1960 Constitution: "The first President may, whenever he considers it to be in the national interest to do so, give directions by legislative instrument." And how does one remain "first President?" Literally, under article 11, by staying alive and not dissolving Parliament (thus ensuring the frustrations of any demonstration of popular will). Nkrumah thus gave himself a "legal tool" to perpetuate his rule for life. Thus, should the President decline to dissolve the Assembly, "no breakdown of cooperation, even to the extent of a direct expression of lack of confidence in the executive, can force the [first] President out of Office." By 1965, Nkrumah's control of Ghana in no sense depended upon

30. Art. 13(1).
31. P. 286.
32. Arrested after the coup, the Attorney General was reported as saying, "I regret nothing and am ashamed of nothing." West Africa, March 12, 1966, p. 307.
34. P. 50.
such constitutional assurances. Parliament was dissolved and new elections were held in June, 1965, the first since 1956. Of the former 114 members of the former parliament, 96 were returned. The remainder of the 198 members constituting the new assembly, were partly stalwarts or members of the CPP bureaucracy. Harvey notes that Nkrumah's powers were not coextensive with those of Parliament: he could not amend the Constitution, impose taxes, or raise loans or an army. But, in reality, under the prevailing system, all of these were readily within his reach. The Constitution was essentially meaningless under Nkrumah. It never became an effective symbol of continuity and stability. It was cut out of whole new cloth whose patterns dimly reflected some of those found in the indigenous order, but which was essentially alien to Ghana. It was a wish of the British and a few enlightened foreign-educated Ghanaian liberals, but it never became a real fact of Ghanaian life.

We should not be, and yet we are, continually taken by surprise by African political events. This is, as one commentator puts it, because our knowledge is still "couched in legal and institutional vocabulary that effectively conceals the factors and interests influencing political behavior in concrete situations." As a result, he suggests, we tend to ignore the sociological and anthropological factors influencing revolutionary Africa. Lawyers, perhaps, are more guilty than others of viewing the formal and claiming to see life. It should be clear now, in early 1967, with more than a half-dozen African military coups just behind us, that law and legal institutions as we know them in older, developed nations of the West have not, despite the colonial influence, penetrated deeply and taken root in the lives of the people and the nations of Africa. The masses continue to be governed mainly by traditional legal norms, and the received and modern law of the new states touches them only incidentally. Constitutions have no tradition in Africa, as an idea or of themselves. Parliament is supreme. There is generally no pervasive, guiding philosophy of government or law (even "African socialism" has not been adequately defined), but then, in all our efforts vis-à-vis the developing nations, we have supplied precious little of original thought as well, pre-

35. P. 43.
37. In large part this is true because of the British tradition of an unwritten constitution and parliamentary supremacy. The British (and their colonial heirs) appear to have been unable to assimilate the role of the written constitution and the concept of judicial review as we understand it in the United States. See Park, 1 THE LAWYER 89 (1963) (Bulletin of the Students Law Society, University of Lagos): "It is to me an unacceptable constitutional doctrine that violence may be done to the clear wording of the Constitution in order to permit a non-elected and largely irremovable group of five judges to enquire into allegations of bad faith on the part of a majority of the elected representatives of the Nigerian people."
ferring rather to suggest or create political and legal systems fashioned in the Western image.

Dean Harvey says in his introduction that a new, general theory of law is not needed, but a "closer study of the law-society interplay, guided by an effort to treat values as social facts and not as standards of criticism." If we seriously undertake such a study, perhaps we will find it necessary to construct a new theory of law, at least to the extent of updating Dean Pound's "social engineering" as applied in the African milieu. When Harvey says that his focus is on "the pattern of claims or the demands in a particular society that have shaped the positive law" we must ask whether we can learn very much by presuming to examine the claims and demands that shaped Ghanaian law, when we know the law was imposed, first by the colonial overlords and then by the independent power elite? In most cases, the claims and demands of the colonial era were preconceptions to meet the needs of a small minority and were derived from experiences external to the nation. Since independence, claims and demands have been shaped by goals which are not the product of any popular consensus but of small ruling groups, controlling new states with high levels of illiteracy, and where the required knowledge necessary for "modernization" is concentrated in the ex-colonial or other developed powers on the one hand and in a handful of indigenous leaders on the other. We like to assume that there is a range of choices open to the new African leaders, both as to ends and means. But given the stipulated goal of nation-building and the assumed goal of economic modernization, perhaps there is little or no choice; perhaps there are only certain dynamic factors of political and economic life which impose their inexorable claims and demands upon human and material resources which are formalized in law apart from any popular will, or even apart from the will of the elite leadership itself. Whether this is true or not, it seems clear that in Africa the conviction is widespread that the problems of nation-building and the stimulation of economic growth against heavy odds permit, or even dictate, wide latitude in the exercise of arbitrary and unpredictable executive power.

Law as law is commonly viewed as not necessarily concerned with its ultimate source, which is seen rather as a political question. It is itself, Dean Harvey says, value-neutral. The lawyer, then, who does not concern himself with sources outside the law, is merely applying a technique of social control, devoid of "particular value assumptions or any particular set of functions within the broad scope of arranging, channel-

38. P. vii.
39. P. viii.
ing and directing forces within the social group . . . (whether) western democracy, Soviet communism, Nazism, or any other ideology." Is this not a definition of "legalism" rather than law? And if he thus sees his role, is this not why the lawyer-technician is ill equipped to respond to the demands for social change, not only in emergent Africa, but in developed America as well? In fact, although the philosopher or lawyer may claim that the law is value-neutral, does it not assume (and is it not given by government, by judges, and by lawyers) a value-role of the highest order in the social system? Once established, it competes as an institution and a value in and of itself—especially in constitutional systems—with emerging societal values, and because it is highly organized and has the virtue of tradition, it often succeeds in stifling or delaying realization of new values as law. As a result, lawyers have rarely been in the vanguard of reform, and have instead reinforced the status quo. The institutional value of law has, in fact, taken on certain religious overtones, and a kind of mariolatry surrounds a figure more sensibly described in an earlier day only as a jealous mistress.

But we have begun to look at sources. We now examine law in its social and cultural milieu, and we have become quite accustomed to judges making "value assumptions." One finds it surprising, therefore, to find that Dean Harvey has addressed his first seven "positivistic" chapters to "lawyers and social scientists interested in Africa whose concerns do not include value structures implicit in the legal development." This is an appeal to a very limited audience, and, one would like to think, an audience of diminishing numbers.

The prized virtue of predictability, the hallmark of a stable society, suffers when law ceases to be value neutral, but predictability is itself a value which the law-giver may or may not observe. And it is not absolute, of course. Social stability is not always enhanced by insisting on predictability in the law. Given the rapid changes in old values and the development of new, social stability may as often, or oftener, be frustrated by established, unresponsive laws. As a result, the needs of social viability, law's primary objective, may increasingly impose value assumptions in the interpretation and application of law, at the expense of predictability. In our own country, for example, it is doubtful if the tensions of the civil rights struggle can be resolved under value-neutral law argued by value-neutral lawyers before value-neutral judges. Otherwise, private property rights would have prevailed over civil rights in the trespass cases involving commercial property.

40. Pp. 343-44.
41. P. 343 (emphasis added).
The avoidance of arbitrariness is often cited as the objective of the rule of law. But this, too, is a value. Equal protection of the law is not a *sine qua non* of law generally, but only of laws of general application, and it can be realized only in a democratic society, and there, imperfectly. Both predictability and the avoidance of arbitrariness are essential parts of democratic justice, not of law.

Predictability and the avoidance of arbitrariness do not characterize the workings of African legal systems. There is a conspicuous lack of social and national stability. Nevertheless, the whole apparatus of the law is present in all of these countries. What is lacking is democratic justice, the infusion of the legal system with values and norms deeply rooted in a pervasive national tradition of fair and objective dealing. This is a phenomenon of achievement societies, not of status-oriented societies, and African societies fall uniformly into the latter group. Has, then, the flexibility with which law has been created, modified, retroactively amended, applied and misapplied met the rapid eruption of new societal needs, and thus enhanced the viability of the new African nations?

In general, no. First, societal needs—the "claims and demands" that well up from the populace in a democratic society and eventually (and theoretically) find their expression in law—are in African nations, as previously noted, largely imposed or preconceived needs. They are the result of a received way of life (which includes the structuring of these nations, through their agricultural economies, into an international economy dictated, for them, by world commodity markets), and they reflect not a national will but the notions which foreign planners and indigenous elite hold regarding the requirements of nation-building and economic development. Not to be overlooked are the claims and demands made upon these new nations by reason of their entry into the family of nations, those of international norms and law, to say nothing of the self-imposed claims and demands resulting from notions of what befits the status and dignity of sovereignty.

Second, even if one grants the legitimacy, or at least, inexorability of these claims and demands, the material and human resources have not been adequate to fulfill them. The "historical necessity" which required a large public economic sector and authoritarian control, has not been matched by the historical inevitability of success, or viability, or even the continuance in office of the authoritarians.

It is not only the democratic ideal which demands that government must be a sort of orchestration, but the diversity of the society, the varieties of that society's values, and the tensions and cross-purposes and contradictions that exist within it. The role of law in achieving social viabil-
ity is not to establish ideal goals, for law is not ideology. By and of itself it cannot be used to achieve a political act. We know that the farther removed law is from popular will, the greater the coercion required to enforce it. The role of law is rather to create a milieu in which social and cultural diversities are harmonized, values essential to societal and governmental purposes are unified (and the others left alone), and tensions and contradictions are alleviated and resolved. The role of law is to maintain stability within a climate favorable to desired, necessary, and inevitable change, and it does so through an awareness by those who make it or apply it, at every level at which it is created of its functions, of its sources, of the values which sustain it, or would alter it, and of its creative role of directing society toward generally-agreed goals by specific and graduated formulations. It is hardly to be viewed today only as "a specific technique of social ordering, deriving its essential characteristic from its reliance upon the prestige, authority, and ultimately the reserved monopoly of force of politically organized society."42 When we stop the film, "freezing the action," so to speak, at a given moment—in a particular case at a particular time—we may witness the employment of a value-neutral tool. But law in society is a continuum of action, and what we see is an image not so much of the state which enforces it as of the society which creates it. Thus, it is not a technique of social ordering, but social ordering itself, and it derives its essential characteristic not from the state, but from the values that shaped it. Enforceability is not the essence of the law, it is a characteristic of law in politically organized society. Its essence is the values a society holds and towards which it is directed.

To look only to what law says it is, or purports to say it is, and to work within the political and judicial apparatus which sustains and applies it, and can do so because it enjoys a monopoly of force, is not enough. The role of lawyers in colonial and independent Ghana bears witness. Although lawyers (like Danquah) were prominent in the earlier days of the nationalist movement, they quickly lost their places. "They represented a more conservative and, as time passed, traditionally oriented segment of society."43 Educated in a relatively static concept of law, unaccustomed to change and unwilling or unable to adapt their roles as lawyers to the "revolutionary" needs of the new Ghana (as indeed of any nation emerging from colonialism), they retired to the litigious level, technicians of social ordering of limited scope. They repudiated Nkrumah, by and large, but with a few notable exceptions they did noth-

43. P. 193.
ing to channel or contain him, or even to assert values which they held in opposition to the regime. Thus, we read that "Tentative discussions of the desirability for the Bar Association to designate certain lawyers to represent the accused [in a 1963 trial of seven persons for allegedly attempting to assassinate Nkrumah in August, 1962] resulted in no action."  

What the authoritarian state requires, of course, is legal technicians. Thus, the Attorney General in 1961 moved the creation of a law school to provide "quickly a number of legally trained persons, not necessarily of university quality, who could play important roles in national development through both Government service and private practice." These would replace, in their obedience to the declared law of the power center, the existing "economically and politically conservative" bar of Ghana wedded to an alien and imposed system. One has the distinct impression, both from this book and again by hindsight, that the former Dean of the Ghana Law School frustrated the intent of the Attorney General, and that he conducted a law school in which Chapters 1 through 7 were a necessary introduction to Chapter 8. Hoping, no doubt, that despite his ouster by Nkrumah in 1964, his book would be admitted into Ghana and would be read by Ghanaian law students under the Nkrumah regime, perhaps explain why Dean Harvey emphasized the positivistic aspects of law and tended to minimize its value content. However, allowing even for this, I would challenge his statement in Chapter 8 that "Law is merely technique. The values, claims, desires or demands in aid of which the techniques may be employed are as variable as human experience. They are data extrinsic to law in the strict conceptual sense, and, therefore, neither an irreducible minimum of values nor an order of priorities of values is used as an essential identifier of law."  

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44. P. 192.
45. P. 192.
46. P. 245.

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