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Recommended Citation
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AFRICAN LAW AND BASIC INSTITUTIONS—A SEARCH FOR PERSPECTIVE

William B. Harvey*

For a number of years I have studied with keen interest the development of governmental institutions and law in the new African countries—particularly in Ghana. In such study and writing, especially at this time, the effort to maintain scholarly detachment and objectivity leaves an ache of incompleteness. Scholarship has not in fact set the outer limits of my work in Africa. In a very minor way, in a small but vital part of Africa, I have had the privilege of being involved in the doing, the building of a new order. That involvement rested on a conviction of the legitimacy of the African revolution and of its long range contribution to human dignity and well being. Thus, I have shared the buoyant optimism and the despair, the hopes and bitter disappointments, hopefully the insights and certainly some of the emotional prejudices that characterize Africa today. Out of this wider experience this brief paper has come.

The longer I have lived and worked in Africa the more hesitant I have become to speak or write about Africa. Experience in West Africa, particularly Ghana, provides some basis for assessment of developments there but certainly not for continental generalizations. I suspect, however, that many of the crucial factors that have influenced developments in Ghana, and the problems that have arisen there, will be found in diverse forms in most of the new nations south of the Sahara. This tentative judgment should not be equated with knowledge however. Even within the narrow limits of Ghana, the awesome pace of change makes today’s judgments suspect tomorrow. Nevertheless, in this essay I will use primarily the Ghanaian experience to suggest a more general perspective of the evolution of law and government in the new nations of Africa.

The indigenous societies of Ghana as well as the colonial regime left a legacy that is largely dysfunctional to the development of a viable modern state. The most significant aspect of that legacy is the essential localism of traditional life and the resulting limitations of perspective and embryonic loyalties. The nuclear social element was the family. On family units was built a governmental order, extending through lineage and clan to an apex at the level of the small Akan state, the Ewe division, or the independent town of

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the Ga-Adangbe people. Only in Ashanti was a wider organization ever stabilized, and that almost exclusively for military purposes. Thus, the directing loyalties were to small, local units, embracing the farms and villages within a few miles of the capital town. People and places beyond were strange, to be viewed with suspicion and often hostility.

Traditional Ghanaian attitudes toward agencies of government differed from those supporting modern national governments. It was, in fact, difficult to isolate such attitudes within the African's total world outlook, since the power of civil government was merely one aspect of a total scheme that included Divinity in its various manifestations, the forces of nature, the spirits of departed ancestors, and the current members of the community. In the Akan tradition, embracing the majority of the people of Ghana, the chief was both civil ruler and priest, the intermediary between the living members of the society and his own royal ancestors who were believed to watch over and protect the people. Ritual functions were thus tightly interwoven with governmental functions in the sacred person of the chief.

Despite his sacred status, however, the Akan chief did not possess absolute powers. He was selected from among a number of eligibles provided by a royal line through basically democratic consultative processes and was impressed from the time of his election with the limitations on his power and his duties to his people. Though perhaps inclined, in dealing with the delinquencies of their chiefs, to a greater reliance than is suggested by modern governmental theory and practice upon supernatural sanctions imposed by the gods and the ancestors, the Akan did not lack more earthy techniques. When a chief persisted in his wrongs despite the admonitions of the elders, he could incur the ultimate sanction of loss of his office or destoolment. It appears, however, that prior to the major impact of European power, destoolments were relatively rare. Their increased frequency reflects changes in the institution of chieftaincy introduced by the colonial power.

The indigenous chieftaincy with its numerous local variations and the Weltanschauung that supported it did not, of course, provide the immediate background for national government. Interposed between the two was an extended period of colonial domination that often tended to distort the chiefly institutions and to undermine their supporting attitudes. In Ghana, the prevailing colonial theory was indirect rule, pioneered by Lugard among the emirates of Northern Nigeria. Relatively small expatriate staffs were expected to govern through the agencies of indigenous government which in turn were regarded as integral parts of the scheme of administration. The positive aspect of indirect rule was its aim to avoid serious social dislocation and to bring the indigenous rulers to a higher level of insight and competence, but lack of under-
standing of indigenous institutions frequently defeated these aims. Sometimes as a result of actual misleading by the Africans themselves, the colonial government attributed or allocated significant functions in ways and to persons lacking traditional bases. Electoral processes were distorted in an effort to bring to the stools persons loyal to the colonial administration. Inevitably, therefore, the chiefs became increasingly identified with British power both in the validation of their authority and in the enlarged range of functions they undertook to perform.

While the British colonial power undertook to preserve and to some extent to adapt indigenous governmental institutions and the bodies of customary law they administered, there was also a significant importation of law and governmental models from the metropole. The usual pattern through British Africa involved the reception of statutes of general application in force in England on a specified cut-off date, the rules of common law and doctrines of equity, and such imperial legislation as might be made applicable to the colony. In addition, there was a body of local legislation brought into operation by the edict of the royal governor or, after a local legislative body was created, by enactment. Ordinarily this law derived from England was administered in a system of superior courts staffed by expatriate judges. Custom supplied the norms applicable to the great majority of the people. These norms were applied in inferior courts held in the exercise of chiefly authority, or later by the authority of the metropolitan power, though still largely staffed by the chiefs and their elders.

Ethnic criteria were the prime determinants of the applicable body of law. Where the parties to a cause were Africans living according to the ordinary manner of the African community, customary law was presumed to apply. It was possible, however, to opt out of the regime of customary law and into British law, the option being manifested expressly or by implication from the circumstances. In most of British West Africa, a steadily growing body of educated, Europeanized Africans came under the regulation of an imported legal system, while the majority of the populace continued under regimes of so-called “native law and custom.” This dualism, involving elite and mass population, received law and customary norms, European style courts and traditional tribunals, modern secular government and the indigenous order of priest-rulers, has posed some of the most perplexing problems of nation building in the post-independence period.

The problems of ordering public power so as to respond effectively to the problems of the new countries arise not only from such African circumstances. A complex of world-wide influences also complicates the tasks. The industrialized western democracies have attained standards of living, belatedly sup-
ported by social welfare schemes, that stand in stark contrast to African privation. The Soviet Union by its own meteoric development and its demand for social justice even at the expense of individual liberties offers a compelling though sometimes transitory attraction. The conflict of the two great world forces, now complicated by the advent of Communist China as a third significant factor, inevitably has influenced both attitudes and events in Africa. The obvious courting of the new African states, reflecting the general cold war competition, has compounded the African fear of “neo-colonialism,” of having newly won political independence rendered illusory by pervasive economic and cultural domination. Thus, the world outside Africa has offered with dramatic suddenness a vision of life contrasting sharply with conditions in Africa. At the same time that world stimulates deep-rooted fears of domination and exploitation that colonial experience does not assuage. The outside world also offers competitive development models for African adoption.

Against this general background the basic problems of government and law can be outlined only briefly but perhaps sufficiently to suggest their dimensions. How can Africans themselves, with their limited resources in trained manpower, organize public power so it can respond effectively to the aspirations and demands of their people for accelerated economic and cultural development? How can this demand for accelerated development, to make up for decades and in some cases centuries of neglect and exploitation, be accommodated to the processes of deliberation and democratic control that underlay much of the traditional mode of life? And how can the resources of the world outside Africa be tapped without opening the door to a new bondage, less obvious but no less real than that recently ended?

The constitutional experience of Ghana since independence suggests a pattern of response to these questions that in essentials has become common in the new African countries. The pattern may be seen in terms of certain fundamental issues requiring resolution.

Unity or Communalism

The political units brought to independence in Africa have in general been defined by the colonial boundaries. Thus neither ethnic nor functional rationality has greatly influenced the shape of the new nations. Ghana with a total area about the size of Oregon and a population near 7 millions stretches from a coastal plain along the Gulf of Guinea, through the high rain forests of Ashanti, to the sub-Saharan savannahs of the North. Tribal, cultural, and economic disparities are substantial. The colonial administration functioned on the basis of four major territorial divisions which were merged in independent Ghana. Until virtually the eve of independence, however, the British deferred steps that, at an earlier time, might have reduced the corroding hostili-
ties and suspicions that often affected the small, local groups of the traditional society and thus have fostered a fruitful sense of interdependence on which the new nation could be built.

The nature of the constitutional order at independence became a major internal issue in the Gold Coast in 1954 with the organization in Ashanti of the National Liberation Movement. The constitutional program of the N.L.M. was federalism, its primary drive coming from the communal pride, economic self-interest, and external suspicions of Ashanti. Ashanti cocoa, timber, and gold represented most of the wealth of the embryonic country; why should this be shared through a government alien to Ashanti? Ashanti warriors had for centuries terrorized the southern people and until the end of the 19th century kept the British at bay; what had they in common with the soft coastal people? Chieftaincy in Ashanti was a sophisticated, entrenched institution; what hazards for it lay in Dr. Nkrumah's Convention People's Party, whose center of gravity lay in the masses of the coastal Colony?

Under Dr. Nkrumah, the policy of the C.P.P. has not wavered. He believes that if independent governments in Africa are to meet the challenges before them, they must be unified and strong and in turn must explore every possibility for wider areas of unity. It is unnecessary to trace in detail the constitutional, legal, and political steps taken in pursuing this policy, by which the unity of Ghana has been forged. In summary, it can be said that governmental power has been centralized completely; whatever is done at local or regional levels is by delegated and carefully limited powers. The chieftaincies have been stripped of all independent economic power, largely by the nationalized administration of stool lands, and have been left with only ritual functions. Government has thus been secularized and the traditional seats of local separatism deprived of effective power. The result of the often harsh struggle for effective nationhood is the entrenched affirmation of the Republican Constitution of 1960 that Ghana is a "sovereign unitary Republic," and Ghana's vigorous, frequently abrasive, championing of all measures to promote early political unity on a continental basis.

Underlying this aspect of Ghana's development is Dr. Nkrumah's basic assumption that Africa's only hope for rapid development in true independence lies in the creation of strong organs of government embracing sufficient population and resources to meet the challenges and demands of modern life. The national states as defined by the European scramble for Africa and left as the legacy of colonialism are, in his view, a continuing guarantee of African instability, underdevelopment, and vulnerability to outside domination. One can readily agree that no rational mind, unencumbered by colonial history, would ever have devised the present division of Africa. Between that recognition and
effective steps to submerge nascent African nationalism in a larger political unity stands an immense barrier of local loyalties, the entrenched claims of present national leaders to power and prestige, ideological differences, and economic self-interest. Dr. Nkrumah’s urgency in demanding continental political unity has in fact proved dysfunctional to the more limited forms of multinational cooperation that might be feasible in Africa today.

In 1963, thirty-two independent African states formed the Organization of African Unity. Despite its name, the Organization rests firmly on the recognition of present national units as the basic data of legal and political life in Africa. Membership in the Organization involves no cession of national sovereignty. Rather, it provides a forum within which the Heads of State can discuss matters of common concern with a view to co-ordination and harmonization of national policies. With the intra-Africa potential for disputes and conflict in view, the Charter provides also for the creation of a Commission of Mediation, Conciliation and Arbitration. An ad hoc forerunner of this Commission has already acted with apparent success to settle the border conflict between Algeria and Morocco. Other specialized commissions are contemplated to facilitate cooperation in economic, educational, health, defense, and scientific matters.

The birth of the Organization of African Unity has not rationalized the juridical structure of political life in Africa. The conflicting views earlier organized in the Casablanca and Monrovia blocs, the expansionist ambitions of some states, and the corroding fears and suspicions still haunt the councils of O.A.U. Nevertheless, an important first step has been taken by the African nations to create a framework for resolving their differences and extending the areas of shared objectives and programs. The mere existence of such a continental effort at this stage of African development is an achievement full of hope for African stability and progress.

*Absolute Government or Fundamental Rights*

The drive for government stable and strong enough to mold the diverse elements of the new African countries into functional entities has raised constantly the question of the desirability of constitutional restraints on government for the protection of the fundamental rights of the individual. The emerging answers to this question have varied, even within former British Africa. Ghana’s experience suggests the dominant pattern, however.

The Independence Constitution of Ghana, promulgated in the form of an imperial Order in Council, contained three substantive limitations on legislative power. The first prohibited the making of any law imposing on persons of any racial community disabilities to which persons of other such communities were not made liable. The safeguard did not foreclose any particular disa-
bility but only required equality in the application of any disability imposed. The second safeguard guaranteed freedom of conscience and the "right freely to profess, practice or propagate any religion." This guarantee was subject however to "such restrictions as may be imposed for the purposes of preserving public order, morality or health." The third limitation guaranteed adequate compensation, judicially determined, on the compulsory acquisition of property for public purposes. These guarantees were in turn protected by a complex set of provisions rendering the amendment of the Constitution quite difficult.

Although these limited constitutional guarantees were not themselves controversial, they were caught up in the general process by which the Nkrumah government sought to consolidate unified national power. In 1958, the Constitution was amended to grant unlimited legislative powers to Parliament. While the three guarantees were left intact, they became subject to modification by a simple act of Parliament. In fact, however, they were not changed until the Republican Constitution of 1960, which eliminated them entirely.

In the controversy over the Preventive Detention Act, perhaps the most publicized piece of authoritarian legislation in independent Ghana, it was argued by those attacking the act that article 13 of the Constitution had the effect of a Bill of Rights. This article sets out the full text of a "solemn declaration before the people" that the President is required to make immediately after assuming office. Among the fundamental principles to which the President must declare his adherence are these:

That no person should suffer discrimination on grounds of sex, race, tribe, religion or political belief. . . .

That subject to such restrictions as may be necessary for procuring public order, morality or health, no person should be deprived of freedom of religion or speech, of the right to move and assemble without hindrance or the right of access to courts of law.

That no person should be deprived of his property save where the public interest so requires and the law so provides.

In its decision, upholding the validity of the Preventive Detention Act, the Supreme Court of Ghana held that this declaration by the President does not constitute a juridical Bill of Rights. Rather, it is a ceremonial and political declaration of principles, somewhat like a Coronation Oath. This conclusion finds support in the history of article 13, as well as in the fact the principles like those quoted above are coupled with others that obviously could not be more than the postulation of political ideals, e.g., "that every citizen of Ghana should receive his fair share of the produce yielded by the development of the country."

While the Constitution of Ghana therefore lacks a Bill of Rights in the conventional form, it does seek to assure the most fundamental of the political rights, that is, the right of the people to have their freely expressed will operate as the fundamental source of governmental power. Thus article 1 declares
that "the powers of the State derive from the people, by whom certain of those powers are now conferred on the institutions established by this Constitution and who shall have the right to exercise the remainder of those powers: . . . ." The exercise of the power of the people is made subject to the principle that "without distinction of sex, race, religion or political belief, every person, who, being by law a citizen of Ghana, has attained the age of twenty-one years and is not disqualified by law on grounds of absence, infirmity of mind or criminality, shall be entitled to one vote, to be cast in freedom and secrecy."

As British experience indicates clearly, the full implementation of this basic political right in a society that values liberty and reacts strongly against its arbitrary restraint would leave little, if any, need for a detailed Bill of Rights limiting legislative and executive power. In Ghana the formal machinery of democratic elections was until recently intact. In actuality, however, democratic political choice has often been distorted by a poorly informed electorate, by intimidation at political rallies and even of voters at the polls, and by the multiform pressures and inducements that a monopolistic political party, aided by all of the resources of government, can bring to bear. This should not be read as a unilateral indictment of the Convention People's Party or the Nkrumah government. In fact, electoral abuses have been committed by both the government party and its opposition. It is doubtless impossible at this time fairly to assign initial responsibility or blame between the political groups. Despite the abuses of the electoral processes, however, it is probable that Dr. Nkrumah and his government until fairly recently have enjoyed popular support in approximately the measure shown in election results.

Protection of the basic right to political participation was seriously curtailed in early 1964 by an amendment to the Republican Constitution making Ghana de jure as well as de facto a one-party state. The franchise broadly granted on a non-discriminatory basis and the machinery of elections may become meaningless if restrictions on political organization and achieving a place on the ballot foreclose actual choice. In theory, the interplay of viewpoint and the validation of power by the consent of the governed could occur within the structure and processes of a single party. There is no available experience to indicate that this potential of the one-party system has been realized, however.

The competitive pattern among the new African states is illustrated by the Federation of Nigeria, whose lengthy constitution contains a full Bill of Rights. A complete assessment of the effect of such a device cannot be attempted here. It should be observed, however, that the Nigerian guarantees usually provide some leeway for restraints which are "reasonably justifiable in the interests of public security, public health or morals" or which are "reasonably justifiable in a democratic society in the interests of national security or
public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others.” It seems to me a substantially unproved proposition that such a Bill of Rights would have foreclosed the stringent governmental measures which have been invoked in Ghana. In the final analysis the question is one of circumstances and response. As political tensions have increased in the Nigerian Federation, discussion has turned there, as in Ghana, to a strong governmental response, including, for example, preventive detention. Whether the protection of individual freedoms in the context of a democracy, which has thus far characterized Nigeria, will continue is by no means certain. A period of severe testing is approaching as the country moves toward a national election in late 1964.

Experience in many countries strongly suggests that effective protection of individual rights requires an independent judiciary to which the citizen has ready access and a professional bar both legally and factually free to accept cases in which individuals seek professional help. Whether such institutions, insofar as they have existed in Africa, can survive the present tide of authoritarianism is in grave doubt. Dr. Nkrumah’s dismissal of the Chief Justice of Ghana after politically unacceptable but legally justified acquittals in a treason prosecution and the subsequent amendment of the Constitution so as to make the tenure of judges subject to the uncontrolled discretion of the President have gravely undermined public confidence in the independence and integrity of the higher courts. With the judiciary so compromised and with defendants in politically sensitive cases experiencing great difficulty in securing the assistance of counsel, it is doubtful that any formal constitutional guarantees could effectively protect the individual from official oppression.

Recent developments in Ghana have undermined an established tradition of judicial independence. In some of the new African countries no such tradition has ever existed, and the immediate future does not seem propitious for its development. In a few areas, of which Nigeria is the outstanding example, courts and lawyers still provide limited but extremely important safeguards of a fair hearing under the law of the land in reviewing and to some extent controlling the impingements of official force on the individual.

Political Monopoly or Political Diversity

Sir Ivor Jennings has suggested that a society’s devotion to the Rule of Law may be assessed by an examination of the status of that group corresponding to Her Majesty’s loyal opposition. Such a test would produce bleak results among the new African nations. In fact, the pervasive difficulties that have arisen in developing a “loyal opposition” raise the fundamental question whether such democratic governmental institutions are able to respond to African needs or
able to survive in African conditions. Peregrine Worsthorne, an English journalist, has suggested that absent certain attitudes and institutions which provide its English underpinning, the formal façade of parliamentary democracy on the Westminster model openly invites tyranny. His argument merits careful consideration in the light of African conditions and experience.

Dr. Nkrumah introduced the mass political party to sub-Saharan Africa. The Convention People's Party still provides a model of monolithic organization under his charismatic leadership. Somewhat similar phenomena can be found in Guinea under President Toure, in Western Nigeria under Chief Awolowo before his imprisonment, in Eastern Nigeria under the earlier Azikiwe, in Tanganyika under Dr. Nyerere, and perhaps in Kenya under Jomo Kenyatta. Semi-feudal leadership with monopolistic tendencies has achieved power in Liberia and Northern Nigeria. In the Congo leadership status has appeared to be largely a function of tribalism; only Lumumba seemed to have a conception of a truly national political movement not resting primarily on tribal loyalties. Whether Moise Tshombe will in this respect be the heir of Lumumba remains an open question. Opposition in the Congo has thus far tended to be separatist and violent. If the national government is able to stabilize its power, there is little reason to expect its leaders to be tolerant of even peaceful political opposition.

Despite the hazards of generalization, one observation seems generally valid—political opposition to the incumbent leadership is non-existent or ineffectual virtually everywhere in independent Africa except at the federal level in Nigeria. A 1962 survey by the International Commission of Jurists is illuminating. No official opposition exists in eight countries—Dahomey, Ghana, Guinea, Ivory Coast, Mali, Mauritania, Niger, and Upper Volta. In the Central African Republic, Chad, Republic of Congo, Senegal, Tanganyika, and Togoland, as well as the Regions of Nigeria, one party is completely dominant. (The inclusion of the Nigerian Regions in this category might now be questioned.) In Ethiopia, Liberia, Sudan, and South Africa, there is also an observable tendency toward a one party system. In some states the leaders of former opposition groups have joined the dominant party; in a number of other instances they are in prison or in exile. As noted earlier, Ghana formalized its status as a one-party state by a constitutional amendment in early 1954.

How can one explain this development? Certain causal factors which have appeared clearly in Ghana may suggest answers.

1. *Concentration on primary goals.* In the twilight of a colonial experience there is an understandable tendency for certain primary goals to dominate political life—political independence, stability, rapid economic development,
avoidance of entanglement in major bloc conflicts, freedom from the more subtle “neo-colonial” domination. These objectives are hardly controvertible, though significant shadings of emphasis and variation in approach may appear. In Ghana, for example, the old United Gold Coast Convention plumped for independence as soon as possible, but Nkrumah’s C.P.P. carried the day with its demand for independence now.

The tendency for mediate or instrumental values to define moderate but effective lines of political controversy or competition is a function of more mature, sophisticated experience. The political group in an African country that manages the fundamental transition from colonial to independent status can usually depend on an extended period of almost unquestionable dominance while pursuing a set of generally accepted goals. Opposition to that group or its policies can easily be transmuted into a timorous or positively subversive adherence to the familiar and alien colonial or “neo-colonial” pattern.

2. The scarcity of political talent. Several of the new countries have discovered a certain number of dynamic political leaders, tough, astute, and sensitive to the aspirations of their people. The supply of such leadership is relatively limited, however. A leadership group whose personal charisma has been reinforced in the successful drive for independence is unlikely to be challenged seriously for some time by leaders of the quality and stature of those outside its ranks. Not only does the shortage of high level manpower serve to explain one-party dominance, it provides as well the most plausible justification for such a system. As many have pointed out, the loyal opposition must be a group outside of and unassociated with the government party, who have the potential through orderly elective processes to become an alternative government. Such a system requires a reserve of able leaders freely devoted to criticism and opposition outside the functioning organs of government. Few, if any, of the new African states now have available human resources that would justify the relegation to such non-operational roles of a substantial share of its best manpower. Certainly Ghana does not. The demand is urgent and, I believe, justified, that non-fundamental differences be submerged and all talents and energies devoted to the pressing tasks of national development.

3. The abandonment of constitutional processes of opposition. Those who see the lack of organized opposition as evidence of suppression of democratic processes in the new African countries often have a mental picture of the “loyal opposition” familiar in western democracies. If, in fact, such opposition is being eliminated in Africa, it is a cause for serious concern. In most places, however, a serious doubt exists whether the suppressed opposition has by its conduct made a valid claim to continued activity.

Ghana again is a useful case in point. The nationalist movement in the
Gold Coast had traditionally been a middle class, intellectual movement, with close though not always harmonious ties with the traditional authorities and with a relatively paternalistic attitude toward the mass of people. Such a movement was the United Gold Coast Convention whose leaders invited the young Nkrumah to return from Britain in 1948 as Secretary of the Convention. Deep cleavages in philosophy and method were soon evident between the young agitator and his more conservative seniors. In 1949, Nkrumah left the Convention and organized the Convention People's Party, the first mass political movement in sub-Saharan Africa.

Following elections in 1950, under the new Coussey Constitution, a substantially responsible African government under Dr. Nkrumah was installed. The U.G.C.C. and a number of successor and related organizations have remained "the opposition," insofar as that term can be used. Their record of constructive political activity in the past twelve years has been disappointing indeed. In the constitutional deliberations prior to independence, Nkrumah frequently invited consultation, but the invitations were declined. Sir Frederick Bourne was invited to the Gold Coast as constitutional adviser in an effort to reconcile the sharply conflicting views over regionalism. The opposition groups refused to consult with him, however, and also declined to attend the conference held at Achimota to discuss the Bourne report. On critical occasions the opposition boycotted the Legislative Assembly debates. By 1958, political non-cooperation had reached the point of refusal to contest elections. In the important Regional Assembly elections of that year there was a total refusal by the opposition groups to participate.

Whatever may have been the reasons for this recalcitrance of the opposition, it has had a most unfortunate effect on political life in Ghana. The Government has used it as evidence to support the contention that as early as 1954 the opposition groups decided to abandon constitutional processes of opposition and to attempt to acquire power by force. I do not find the evidence persuasive to support such a broad conclusion. Two facts are quite clear however: the opposition in Ghana has not played the traditional role of the loyal opposition, and there have been, in fact, resorts to violence and apparent efforts to stage a coup d'état.

An attempt on Dr. Nkrumah's life at Kulungugu in August, 1962, another in January, 1964, and continuing acts of terrorism fit into a pattern that has become tragically common. The assassination of President Olympio in Togo, an alleged attempt against President Tubman of Liberia, the disgusting murder of Patrice Lumumba in Katanga with the obvious complicity of his enemies in Leopoldville, allegations of attempted coups in Senegal and Mali go far to explain the widespread suspicion of political opposition and its frequent suppression in the new African states.
4. Lack of institutionalized opposition in the traditional order. Another partial explanation of the current status of opposition forces in the new nations may lie in the absence of any notion of institutionalized opposition within the framework of indigenous government. It is clear no such institution was known to the people of Ghana, even among the Akans who developed the most complex governmental systems. The chief was a sacred figure; he represented the gods and the ancestors, and neither his program, his responsibilities, nor his loyalties were partisan in any common use of the term. In his administration he had the benefit of the counsel of his elders who in turn depended on extensive patterns of consultation from the family level upward. The chief who habitually failed in meeting his responsibilities could be destooled, but neither this event nor the selection of a successor involved the use of a critical opposition who stood ready to provide an alternative.

It is quite possible that deeply rooted attitudes drawn from the traditional life in part explain the difficulties of the modern opposition political groups and the tendency to equate institutionalized opposition with disloyalty. It should be emphasized, however, that these indigenous attitudes did not stigmatize dissent or the expression of conflicting views. When these appeared in the traditional councils, it was expected that discussion would continue until a consensus emerged. Similarly today the proponents of a one-party system insist that such a framework can accommodate diversity and provide the benefits usually claimed for inter-party competition and parliamentary debate. This is doubtless true, if the leaders of the single party open basic issues to debate and tolerate the expression of diverse views until a consensus develops. There is little evidence that this has occurred in Ghana.

Prediction and Assessment

Some tentative conclusions may be drawn on the probable developments of the next decade, though the longer range prospects are obscured. In areas where government achieves a moderate degree of stability and effectiveness in mobilizing social forces for the tasks of national development, it will be characterized by a strong executive wielding on a broadly discretionary basis a wide range of powers. In some instances, as in Ghana, the executive will draw support from a mass political party using modern propaganda techniques and preserving its entrenched position by intimidation and manipulation of the perquisites that a national government can provide. Executive domination will be buttressed by the personal charisma of leaders like Dr. Nkrumah in Ghana, the religio-cultural leverage of others like the Sardauna of Sokoto in Northern Nigeria, and the tribal roles of others like President Kasavubu of the Congo Republic. Incumbent executives will tend to view with suspicion and hostility
even embryonic opposition forces and to employ a variety of legal and extra-
legal methods to neutralize them.

Legislative bodies will rarely, I believe, represent significant power centers
checking the initiatives of the executive establishments. In many instances this
weakness will result from the single party political structure that identifies the
overwhelming majority with a strong leader of the executive branch. A num-
ber of other factors such as limited educated manpower, dispersal of influence
among tribal and other subnational groups, will also tend to diminish legisla-
tive effectiveness.

The courts will, in my judgment, rarely play a strongly creative role in the
development or adaptation of the law or serve as a significant restraint on the
political branches of government. Neither the English nor the French judicial
tradition transmitted to Africa makes such roles natural or familiar to the
judiciary. The absence of a juridical Bill of Rights in most of the new con-
stitutions, substantially forecloses resort to the courts by individuals who feel
their fundamental rights are in jeopardy. Even where constitutional guarantees
of individual rights have been articulated, as in Nigeria, there is sufficient
maneuvering room for African judges, who cannot be insensitive to the pres-
sures and tensions of the new national societies, to enable them to sustain
stringent applications of governmental power. There is an increasing risk, as
well, of the complete subordination of the courts to the political branches of
the government and to unofficial political pressures.

If these forecasts are substantially accurate, one immersed in the politico-
legal traditions of the western democracies may be inclined to view the future
of law and government in Africa with pessimism. There are, however, certain
long range factors that justify a more hopeful view of the development of law
and government in Africa.

The dominant ideologies behind the current ferment in Africa are in gen-
eral humane. The human being, his needs, demands, and aspirations are the
central data. The stereotype of the happy savage, content in a simple agricul-
tural or pastoral life, undemanding of the material and cultural advantages
desired by the European, and accepting of the latter's natural domination,
certainly does not reflect the African of today, if it ever had validity. The
African has grown increasingly conscious of a broader world and of the goods
it offers that have been denied him. He, therefore, wants education, if not for
himself then certainly for his children. He wants a greater freedom from
endemic diseases. He also want a far greater share of the material benefits of
his land and his labor than the colonial order assigned to him. And finally,
but perhaps most fundamentally of all, he wants to take his place as an ac-
cepted equal in a world society of free men.
This pattern of needs and expectations underlies the revolutionary developments in Africa since the Second World War. It is these demands that African political leaders and governments, in a variety of ways, with varying degrees of patience and differing concessions to human greed and personal ambition, have been pressing. If the idea of natural law has any rational meaning whatsoever, that meaning derives from the quasi-empirical perception that demands such as these are felt by all men and from the moral conviction that they should, insofar as possible, be satisfied.

In pursuing their goal of rapid development, African leaders have given varying degrees of consideration to the left-authoritarian models of the Eastern bloc. The competition of the cold war assures such consideration, whatever intrinsic attraction the models might have. As a consequence, the African countries are often categorized by reference to their degree of commitment to the West or the warmth of their flirtation with the East. Some political figures in this country, possibly out of malice but more probably ignorance, have used the epithet "Soviet satellite" in referring to Ghana. Aside from trade, aid, and cultural relations with Communist bloc countries, which surely are not the hallmark of satellite status, there is fairly widespread throughout the new African countries a declared commitment to socialistic development and great admiration for the technological and economic achievements of the Soviet Union over the past forty-five years. The tragic myopia of the Cold War seems to obscure the fact, however, that these attractions are not basically political in the sense of forming loyalties to one of the major power blocs but rest firmly on moral, humane grounds.

The most powerful force in Africa today is the determination to bring political domination to an end. The resistance to those more subtle forms of economic and cultural control that are usually described by the Eastern bloc term "neo-colonialism" is equally strong. The leaders of the new African countries are not willing to accept a new satellite status from either of the great power blocs. In the simplistic scheme of some Western politicians and newspapers, the perceived alternatives for Africa are apparently only two: if the new African nations are not willing to become Western satellites, then they must belong to the East. This naive view doubtless finds support in the sharp criticisms of the West that African leaders frequently make and spokesmen for the Eastern bloc readily echo. What is the guiding ideology in Africa and what does it portend?

In my judgment the apparent appeal of Eastern models, frequently couched in terms of "African socialism," is moral and humane. It is the vision of rapid development of resources for the benefit of all members of the community and freedom from exploitation by any privileged class whether it be economic or
racial. When the Soviet Union has misread the nature of its appeal to Africa and has sought its own national aggrandizement, it has encountered effective resistance. The West too has a moral appeal to Africa, but unfortunately it is too frequently muted and obscured. The Africans are keenly aware of the hiatus between our avowed moral code and our conduct, and their sharpest criticisms are reserved for our moral delinquencies—for Little Rock and Birmingham—for providing economic and military support for Portuguese oppression in Angola and Mozambique, and for refusing to support effective sanctions against the inhuman Verwoerd regime in South Africa. If African reactions to such events seem disproportionate to the moral indignation they show over internal Soviet oppression or such ruthless Soviet interventions as that in Hungary, the explanation is not difficult to find. They are familiar with Western colonial exploitation; they see within their own restricted world the continuing oppression of African people in the Portuguese colonies, South Africa, and Rhodesia; and they feel vicariously the indignities and deprivations of the millions of black Americans. That their indignation lacks a fully mature world view is hardly a defence for the moral failures of the western democracies.

In one fundamentally important respect the humanism of African Socialism differs from the pure Marxist model. It does not see man in a single dimension—to the African, man is both material and spiritual. Perception of the latter aspect arises from strong indigenous attitudes as well as the imported faiths of Islam and Christianity. This dual view of man is well illustrated in Dr. Nkrumah's self-description as a "Marxist Socialist and a non-denominational Christian." The demand in Africa for economic development and material well-being is thus moderated by certain drives of the human spirit and personality that offer hope of avoiding the denials of individual human value that characterized the socialistic revolutions in the Eastern bloc countries.

A second hopeful factor is a commitment to the principle of legality. Such a commitment is clearly perceptible in Ghana, whose experience will be used to illustrate the point. Somewhat similar evidence can, I believe, be found elsewhere. The Akan tradition in Ghana did not vest autocratic power in officials. On his enstoolment a chief was carefully reminded of his obligations, both affirmative and negative, to his subjects. Major policy was developed on a councillar basis, through protracted discussions intended to produce unanimity. Law-making functions were usually performed in such a way as to de-emphasize the fiat of the rulers—as in the common law tradition, even clearly legislative innovation was often articulated as the time-honored custom of the community. The ruler who arrogantly disregarded these limitations on his power imposed by indigenous law and custom faced the ultimate sanction of destoolment.
In its post-independence experience, Ghana has preserved the insistence on legality. Each step in the evolution of the formal structures of government and in the allocation of public power has been taken with a punctilious regard for the legal niceties. An excellent illustration of this insistence can be found in the procedures utilized to convert Ghana into a Republic in 1960. At that time it seemed reasonably clear that a new constitution could have been provided by a simple act of the pre-Republic Parliament. A number of rather hyper-technical legal doubts about this procedure, plus some obvious political advantages of a more dramatic technique, led however to a national plebiscite authorizing a Constituent Assembly to enact a Republican Constitution along lines explained to the people in advance. The emerging legal order of Ghana has vested strong powers in government, and legislation has frequently approved wide areas of discretion for the executive. The policy has been consistently followed, however, of articulating in a duly enacted law the powers to be exercised and the range of discretion enjoyed.

The principle of legality, standing alone, provides no necessary substantive restraints on government. As much of the Nazi experience and more recent events in the East reveal, extreme denials of fundamental claims to human dignity can be perpetrated while the principle of legality remains intact. The fact that it does not offer ultimate protection should not however obscure its advantages. As I have observed elsewhere,

To be sure, the requirement that governmental interference be supported by law imposes in itself no substantive restraints on government, nor does it determine how power and function will be allocated among the facilities of government. It is, nevertheless, of profound significance for two reasons: first, it provides a basis on which the action of one agency can be reviewed and checked, and second, it opens up to popular inspection and political response many of the most critical decisions affecting the incidence of public force.1

As the number of educated, politically sensitive Africans increases, this adherence to the principle of legality could have profoundly significant effects.

A third important force in African development is internationalism. Despite the African insistence on the end of all external domination and occasional outbursts of national or ethnic provincialism, there is no discernible tendency to barricade Africa from the rest of the world. African leaders want to play a role in the broadest international community; they want international help in accelerating development; and they are keenly aware of the image they project to the rest of the world. The African nations in general have been strong supporters of the United Nations and are most inclined to stress the moral commitments implicit in United Nations membership. I have rarely detected among Africans, official or private, an unwillingness to discuss their

policies, to attempt to defend them, and to accept criticism, so long as they are treated as equals and criticism is supported by good will. While these attitudes persist, there is strong hope that law and government will develop in Africa to levels of decency at least as high as those possessed by the rest of the world.

Finally, the very success of the African revolution argues for its long term moderation. Development of better balanced economies, improved health facilities, and wider educational opportunities inevitably will support the demand for humane government under which men can enjoy their progress and work out their destinies in freedom and security. I would not hazard prediction on the details of structure and method. One is surely entitled to hope that the African horizon will not be limited by experience elsewhere, and that in their own way and out of their own traditions Africans will be able to evolve novel and useful devices for handling the complex, perennial problems of law and government.

We must not underestimate the magnitude of the tasks facing the young leaders of Africa, nor can we discount the probability that the coming years will bring curtailments of individual freedoms and consolidations of autocratic power that would be totally unacceptable in the stable western democracies. Where the possibility of strong government exists, power will be exercised in proportion to the threats perceived to supreme interests. Molding the diverse elements inherited from colonialism into functional nation-states, breaking down the barriers between these states to form viable larger entities, bringing the economies of the new nations to the critical take-off point, and moving on all these fronts with sufficient speed to accommodate the awakened expectations of a continent require strong leaders and governmental interventions in virtually all aspects of life. From the rest of the world Africa needs support and encouragement, not carping criticism. Here are great challenges to the conscience and capacities of the entire world community.