THE WORK OF RURAL PRIMARY COURTS IN GHANA AND KENYA*

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I offer the following personal impressions about local courts in Ghana and Kenya in the hope that they will convey some sense of the actual circumstances in which rural African primary courts operate:

In August 1975, by way of contrast to the High Court in Accra, I took a group of American law students[1] to a lay Magistrate's Grade 2 Court about 25 miles up in the hills beyond the University of Ghana's Legon campus. We went to Akropong/Akwapim, a small, semi-rural town. It is near the Aburi gardens, the summer residence of the former British governors, not far from what was once Kwame Nkrumah's country home.

The office of the court clerk is in a small enclosed building, but the actual courtroom is on an open air porch in front. The magistrate sat on a raised bench and he was dressed in a solid black European-style suit with a black tie. The young court clerk was similarly dressed. There were a few policemen , including the police prosecutor, as well as a few chickens, wandering in and out. Most of the large number of spectators were dressed either in simple traditional dress or, for some of the men, in plain European white shirts and black pants.

The defendants in the criminal actions were poorly dressed. The parties in the civil cases, however, were nicely turned out. They had either well-tailored European suits or the traditional togas, the latter often made of the bright, tightly-woven kente cloth, which is quite expensive. The one woman civil litigant was also wearing kente cloth. Young attorneys from Accra were present. Lawyers are now permitted to practice at all court levels in Ghana, and to represent the civil litigants. The lawyers were in the usual European black suits.

In the three hours we stayed at the court that Friday morning three cases were tried, though many others were called and had to be continued because either some of the parties, or more usually their lawyers were not present.

Of the three cases tried, two were criminal and one was civil. The proceedings were conducted primarily in Twi, the main Akan dialect, though parts were in English, in particular the exchanges between the magistrate and the attorneys in the civil case.

The first criminal case involved a mother, her infant son and her father. Their house had been the subject of an unannounced visit by a public health inspector, who had found the child's feces in one corner of the main room. The family was charged with violating a health ordinance. They had no lawyer but the father argued that his daughter had just cleaned the house before the inspector arrived and that the feces were new. This argument did not persuade the magistrate and they were fined the equivalent of $20, as I recall, which is a sizeable amount in a country where the annual per capita income is only $217 per year.[2]

The second criminal case we heard was the arraignment of a young man accused of kidnapping a young girl. He arrived in court in handcuffs and had no attorney. He was about to be bound over to jail to await trial when two of the lawyers present objected on the grounds that there should first be a formal charge and a preliminary hearing to determine whether or not there was a prima facie case. The lawyers, recent graduates of the Faculty of Law at Legon, were present for the civil cases and had not been retained by the defendant. They volunteered these objections, I think, because Aki Sawyerr and Victor Dankwa of the Law Faculty were with us and the young attorneys were a bit worried about the impression the lay magistrate was making on them and on our American law students.

The arresting officer was questioned and it turned out that the girl was the daughter of a local retail merchant and that the defendant had been a clerk in his store. He and the girl had been lovers and she had disappeared. The girl was apparently hiding out somewhere in Accra and her father, who disapproved of the relationship, had been trying to find out where she was. The young man would not tell him and the father had then had him arrested for kidnapping.

There was much discussion back and forth between the magistrate and the attorneys, who in turn consulted with Aki Sawyerr and Victor Dankwa, as to whether or not a law had actually been broken. In the end, however, a formal charge was drawn up and the young man was bound over to jail to await trial.

The third case was a land dispute involving the exact location of a boundary line. The plaintiff was

well dressed in a European suit and, as I recall, had a business in Accra in addition to land near Akropong/Akwapim. The defendant was a fairly wealthy local land owner in his kente cloth toga. Land values in the area were rising as it was a popular place for weekend homes for government civil servants from Accra. The attorneys for both sides had copies of elaborate land survey maps and we left as the magistrate was beginning the long process of recording by hand in his ledger book the testimony of the plaintiff. I don't know how the case was finally decided.

The other personal observations on primary court work that I want to relate are what I learned during one long evening spent drinking beer with a lay district magistrate in Narok in Kenya in the summer of 1971.

Narok is southwest of Nairobi. It is a small government district headquarters by a stream in semi-arid bush country. When I was there workmen were in the process of putting a tarmac surface on the main road since it was the principal tourist route to the Masai Mara Game Reserve which is part of the Serengeti circuit. All the people living in the area are Masai[3], save for a few government officials and Kikuyu and Asian merchants. The town of Narok is small and consists mostly of a few one-story buildings at the intersection of two roads. Though they grow some maize around their bomas (extended family homesteads), the Masai mainly herd cattle and sell a few beads and spears to passing tourists.

I spent the evening with the magistrate in what was called "The Narok Club". It was a small thatched affair with a couple of sleeping huts attached. It had been started by the British colonial officers stationed in Narok and was now mostly a bar, with a few tables, a dart board and an early picture of President Kenyatta on the wall. At one time I believe there had been a three-hole golf course out back next to the mission school run by two Roman Catholic priests from Holland. The golf course was overgrown with small thorn trees.

The club had one of the two bars in town. Civil servants - the district officer, the police sergeant, the education officer, the public health officer who ran the clinic - a couple of primary school teachers, the Dutch priests from the mission, a few Asian businessmen and the magistrate were the regulars at the club bar. The civil servants stayed away from the other bar in town, which catered to a few Kikuyu shopkeepers and a handful of young Masai ex-moran (warriors).[4] The majority of the Masai had their beer at home in their bomas.

The magistrate, like most of the other government civil servants at the club, did not like being assigned to Narok. He was a Kamba, the second largest Bantu tribe in Kenya. The Masai are Nilo-Hamites. The magistrate's home location was some two hundred miles from Narok and he spent every chance he had, which was most weekends, driving either to his location or the shorter distance to Nairobi. He had been a clerk of one of the old African Courts during the colonial period. His formal legal training consisted of a nine-month lay magistrates' course at the Kenya Institute of Administration. As a Third Class District Magistrate his salary was low, between 300 and 400 Kenya pounds a year, as I recall, or around $1,000 to $1,200 dollars at the exchange rate at that time. His wife worked in Nairobi and he had a small shop and farm at his home location. He felt himself to be continually short of funds since he was paying school fees for his own children and for other members of his extended family.

He did not speak Masai.[5] It had been a policy of the Independence Government not to station magistrates in their home areas to avoid possible corruption and magistrates were rotated every couple of years, or even more frequently.

Much of his work in court was done through a translator, as had been the case with English judicial officers during the colonial period. Few Masai around Narok spoke much swahili, even the limited vocabulary of the upcountry version of swahili which is used in the plateau areas of Kenya. The magistrate had bothered to learn only a few Masai phrases.

The magistrate used elderly advisers for determining local customary law.[6] Customary law applied to most of the cases he tried except for those under the criminal law, or commercial transactions involving non-Masai.[7] The magistrate did not have copies of, nor had he studied, any works on Masai customary law. (There has been quite a lot written about the Masai.[8] One of the Dutch priests at Narok told me he had himself written a monograph on Masai customs which would have been very useful to the magistrate since it was mostly about the Narok Masai. And at the time S.S. ole Sankan, former president of the old Narok African Court, was just completing a book for school children on the Masai.[9])

Most of the cases he handled were criminal.[10] These were usually petty crimes or offenses, such as failing to obey the order of the district officer or the local chief. The civil cases were mostly limited to disputes between Masai and non-Masai, such as the Kikuyu or Asian merchants.

The magistrate told me that the Narok Masai were reluctant to use his court for their personal legal disputes.

Presumably those disputes were settled traditionally. This was not necessarily because of poverty. Though the per capita annual income in Kenya is now only $169[11] - by contrast to $217 in Ghana - the Masai were relatively well off. (However, they did lose many cattle in the years immediately following due to the drought.) At the time I was in Narok, that is 1971, cattle sold for about $100 a head at the Kenya Meat Commission and many Masai extended families had upwards of 3,000 head. Attorneys did not usually appear before the magistrate's court in Narok,[12] but inability to pay for litigation was not really a problem for the Masai.

These unsystematic personal impressions from Ghana and Kenya seem to me to say a few things about the nature and utility of governmental primary courts in the rural areas of Africa. I realize that the examples I have chosen may be subject to criticism on the grounds that the Ghana court was too near to Accra to be truly rural, and that the Kenya court was among the Masai, who are fairly unique in their ability to withstand assimilation into Western culture,[13] and thus are not typical of rural Kenay.

But notwithstanding these possible criticisms, I think that what I have recounted shows several things:

First, it shows that when these courts are used for civil litigation they are used mostly by those of more than average wealth. It is only the rich and well-dressed who can afford to bring or defend civil suits. In Ghana, at least, wealth seems to be a prerequisite for making use of the courts. And Richard Abel has shown that this is also true for Kenya as a whole.[14]

Second, when those who do not belong to the elite get involved in these courts they are usually defendants in criminal cases. Furthermore, these cases rarely involve criminal acts between members of the same community. The acts are not generally homicides, assaults or thefts against equals. Rather, these are cases where an offense has been committed against the central government (for example, the sanitation case in Ghana) or against a higher social class (the supposed kidnapping case, also from Ghana).

And third, the formal procedure, in fact the whole atmosphere of these courts, is alien to the majority of the local population. The magistrates are educated, while the populace by and large is not. Proceedings are conducted, for the most part, in a language unintelligible to most. The magistrates may have little knowledge of and even less interest in the customary laws of the litigants who appear before them. The magistrates, the

court clerks, the attorneys - if present - are all part of another world, one centered in the capital city where most of those in authority would rather be if they could. Thus, despite political independence and the fact that government at the local level is now staffed entirely by Africans, the primary courts are not the principal dispute-settling mechanism for the majority of the rural population.

Studies other than my own confirm these conclusions. Richard Abel has shown that in 1969 about 50,000 civil and over 250,000 criminal cases were filed in the primary courts in Kenya.[15] This is a five to one ratio in favor of criminal cases.

The kind of criminal case that is most often heard is important too. To quote Professor Abel:

> "(In 1966)... little more than a tenth of all prosecutions were brought under the Penal Code, the remainder consist(ed) of contraventions of administrative regulations concerning trespass, boundary markers, markets, licensing, taxation, stock movement, production or consumption of alcohol or narcotics, or non-compliance with the orders of administrative personnel."[16]

Thus the primary courts of independent Kenya are mainly in business to enforce the will of the central government.

A recent study of one particular Kenya primary court also bears out the law and order emphasis.[17] The study contains figures on the number of criminal convictions in the Magistrate's Court at Siakago, Mbere Division, southeast of Embu, which in turn is south of Mount Kenya. The Embu are a Bantu group closely akin to the Kikuyu.

In 1970 there were 624 criminal convictions, of which 308, or almost half, were for "failure to pay tax". Thus the main work of this court was collecting taxes. The next largest category was "drunk and disorderly" (128), and the related offenses of "idle and disorderly" (10), and threatening a breach of the peace (12). After "failure to pay tax" and "drunk and disorderly", the largest number of convictions was for refusing to obey the order of a chief (71); nine more were convicted for refusing to obey "other order(s)," and three of "escaping from custody". Sixteen were convicted because they had not inoculated their livestock, 22 for having no latrine, and two others on health grounds (one violation in a beer hall, the other in a tea shop); two people were convicted for having "no license" (a license for what was not indicated),

while one person was convicted for not having a liquor license. Most interesting of all, five were convicted for "refusing to work".

Of the 624 convictions in the Siakago Magistrate's Court in 1970, only 45 could have originated in disputes between the Mbere people themselves, rather than from disputes between one of their numbers and the government. And even some of the 45 are suspect, since the study from which I have taken these figures does not identify the participants, some of whom could have been government officials. Of these 45 convictions there were 30 for assault, 12 for causing an "affray", one for indecent assault, and two for malicious damages. In the entire year there were no convictions for trespass or theft.

Thus in 1970 the criminal work of at least one magistrate's court in Embu District was devoted almost entirely to enforcing the authority of the central government against the population. Almost half of the cases were tax collection convictions. And the number of civil cases was probably insignificant. Professor Abel shows that there were over eleven times as many criminal cases as civil cases filed for Embu District as a whole in 1969.[18] (Mbere Division is part of Embu District).

This emphasis on law and order in the primary courts of Kenya today differs little from the policy of the colonial regime. Then the government "use(d) the (native) tribunals as the enforcement part of the system of native administration, rather than as dispute settlement machinery amongst Africans".[19] In Embu District in 1942, for example, there were 3,601 criminal cases, "the great majority of which were tax cases."[20] The courts from which these 1942 figures were taken were native tribunals made up of panels of tribal elders "constituted in accordance with the native law or custom of the area".[21] Thus things were not necessarily any better when, instead of a single non-local African civil servant as judge, courts had been composed of local elders. The only conclusion is that no matter how they are constituted the primary courts in Kenya have functioned mainly to carry out the law and order policies of the Nairobi government. They have not been the means for settling disputes among the local peasants.[22]

In summary, then, the primary courts of Ghana and Kenya - when used for dispute settlement - are used by those who are substantially wealthier than the average rural peasant. When rural peasants are involved they are more often in court as defendants in criminal actions. The result of all this is that the lowest levels of government courts exist in an atmosphere removed from the

realities of peasant life.

I do not see much hope of change in the near future. Ghana is now under military rule. The Kenya government is equally authoritarian, if civilian. Though the individuals currently in power will be replaced, I doubt that future governments will differ greatly or that they will conceive of the primary courts in any way other than that which I have described.

And as for the rural peasants, their lot, if anything, will worsen. I note the findings of the 1975 edition of the Atlas published by the World Bank that the annual output per person in the developing countries is actually declining.[23] Even in places like Kenya, where there has been a dramatic increase in the economic growth rate, this has been almost nullified by increases in population.[24]

Thus I do not see that rural peasants will have the economic means to make proper use of the primary courts. For the foreseeable future, delivery of justice at the primary level in rural communities in Ghana and Kenya will have the same law and order emphasis as it has today, and had during the colonial period.

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1. Temple-University of Ghana Summer Law Program, July 7 - August 15, 1975.

2. N.Y. Times, Sept. 28, 1975, #E, at 3, col. 1.

3. Also spelled "Maasai".

4. Young adult male Masai go through a "period of moranship". Those who went through this period together constitute an "age group" or age-set. Cf. S.S. Ole Sankan, The Maasai xii (1971).

5. The language is called "Maa", "OlMaa" or simply "Masai" or "Maasai".

6. "A magistrate's court may, if it thinks fit, call for and hear evidence of the African customary law applicable to any case before it." Magistrate's Court Act, No. 17 of 1967, s. 18.

7. See E. Cotran, "Kenya", in Judicial and Legal Systems of Africa 132, 136-138 (A.N. Allott ed. 2d ed. 1970).

8. See R.L. Abel, "A Bibliography of the Customary Laws of Kenya," 6 E.A.L.J. 100, 141-143 (1970).

9. Generally note 4 supra.

10. Of the total cases filed in the local courts in 1969 in Narok and Kajiado Districts per 1,000 population, 27.4 were criminal and 0.4 were civil. Kajiado is also a largely Masai area. R.L. Abel, "Why Go To Court: A historical and comparative study of patterns of local court use in Kenya," Appendix A, Tables III & IV, December 14, 1973 (unpublished working draft).

11. New York Times, supra note 2.

12. However, members of the bar were no longer prohibited from practicing before the lowest level courts. Generally note 6 supra.

13. "The Masai seem to be...fundamentally impervious to European influence...". A. Phillips, Report on Native Tribunals 141 (1945).

14. R.L. Abel, supra note 10, Table VI: Civil Litigation as a Function of Urbanization.

15. Id. at Table I.

16. R.L. Abel, "Case Method Research in the Customary Laws of Wrongs in Kenya, Part I: Individual Case Analysis", 5 E.A.L.J. 247, 262-263 (1969) (footnotes omitted).

17. D. Brokensha and J.R. Nellis, "Administration in Mbere: Portrait of a Rural Kenyan Division," Appendix C, 1971 (Mimeographed, Institute for Development Studies, University of Nairobi).

18. R.L. Abel, supra note 10.

19. Y. Ghai and J. McAuslan, Public Law and Political Change in Kenya 148 (1970), as quoted in H.C. Dunning, "Legal Systems and Legal Services in Africa", in Legal Aid and World Poverty 28 (Committee on Legal Services to the Poor in the Developing Countries ed. 1974).

20. A. Phillips, supra note 13, at 81.

21. Native Tribunals Ordinance, No. 39 of 1930, s. 4.

22. There is no doubt about the relative insignificance of the number of civil cases filed in rural primary courts in Kenya today in comparison with the number of criminal cases filed. R.L. Abel, supra notes 15 and 18, and accompanying texts. Nor is there doubt that the Masai have always been reluctant to bring their civil disputes to the official courts. R.L. Abel, supra note 10. Phillips was unable to obtain 1942 figures for Narok. A. Phillips, supra note 13, at 142. But for Kajiado there were 53 civil cases decided that year as against 489 criminal cases (of which 453 were tax cases). Id. at 143.

However, with the exception of the Masai, earlier in the colonial period many more civil than criminal cases had been filed in the local courts (for Kenya as a whole). But by 1948 criminal cases predominated. R.L. Abel, supra note 15. And in Embu in 1942 there were already more criminal cases tried than civil (3,601 as opposed to 2,606). A. Phillips, supra note 20.

23. As reported in the New York Times, December 21, 1975, at 18, col. 1.

24. Id.