

COLONIAL LAW, "CUSTOMARY" LAW AND
MAMPRUSI LITIGANTS

BY

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My present research involves a study of the development, interplay and rooting of various legal forms - "customary" law, Islamic law and British colonial law - among the Mamprusi chiefdoms in northern Ghana. Although my research is set within a descriptive framework of legal history, my primary objective is to unite the subject of law with the political, economic and social history of the Mamprusi under British rule and thereby demonstrate how the historian's study of law can enrich our ability to reconstruct the experiences of an African people during a period of fairly rapid change.

I

Scholarly interest in law in Africa has a long tradition. Briefly, one may categorize the broad parameters of this interest in terms of three approaches, although the boundaries delineating these approaches are by no means hard and fast. There is the

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anthropological approach to the study of law and the settlement of disputes. There are the applied concerns of administrators and lawyer-scholars, and there is the focus by historians on process and change in their studies of law and African legal systems.

The early anthropological studies of African law were shaped by the perceived imperatives of colonialism. Indeed, many of the anthropologists, of whom Rattray is a prominent example, were in the employ of colonial governments. There was a need to better understand the subject populations in order to more effectively rule them. Since European officials considered law and the rule of law to be essential elements in the maintenance and control of a social order, it was natural that anthropologists during the colonial period should have directed their attention towards the study of law in "primitive" societies.

In general, anthropologists employed two paradigms in their examinations of law. Meek and Rattray, among others, adhered to an evolutionist perspective in which the law of African societies reflected an earlier stage in the development of "civilization", which was here equated with the developed societies of Britain and continental Europe (Meek, 1937; Rattray, 1932). Law was conceived as evolving and reflecting a process of societal transition from a politically decentralized to a more centralized social system. In contrast to the evolutionist paradigm was the functionalist perspective represented most notably by Malinowski

with his conception of law as a broad and rather vague range of a society's efforts to maintain order and cohesion. Differences in the law of various societies could be explained by referring to the particular characteristics and nature of their social organization.

Although belief in the validity of either or both of these paradigms was part of the cultural baggage colonial officials and administrators brought with them, the two approaches were often presented in anthropological monographs at too abstract and theoretical a level to be of much practical value to those who were seeking to determine what role indigenous institutions could play in the operation of the colonial state. Increasingly, attention was turned towards the study of rules and procedures employed in the resolution of disputes. Schapera's Handbook of Tswana Law and Custom (1938), a collection of rules gathered from the oral testimonies of elders, provided British administrators of Bechuanaland with a guide to "customary" rules. In this work, it should be noted, Schapera did not directly observe any actual adjudications. Nevertheless, the practical orientation of his inquiries makes his work one of the better examples of the ways the anthropology of law during the colonial period contributed to the colonial state's efforts to incorporate the indigenous level of legal proceedings within its purview. Much the same could be

said for the later studies of Max Gluckman on the Barotse (1955). The major difference between Gluckman and Schapera, however, is that Gluckman actually witnessed the ways in which Barotse judges handled the disputes which were put before them. Through his observations of adjudications, Gluckman was able to describe and place the operation of Barotse law within a concrete social context. He therefore removed the study and conception of law and legal systems out of the lofty and idealistic confines in which earlier analysts had tended to sequester it.

The emphasis on rules which marks the approaches of Gluckman and Schapera represented an effective way administrators and lawyers could meld the evolutionist and functionalist paradigms into some kind of practical application in which the belief in law as an instrument of social change could be borne out. The codification of "customary" law was conceived as part of the process of "modernizing" it and incorporating it within the context of the colonial state and later of the post-colonial nation-state. In the hands of administrators and lawyer-scholars, the study of African law became essentially a problem of applied science. The work of Antony Allott (1950, 1962) and many of the contributions to the Journal of African Law are representative examples of these efforts of lawyers and constitution builders throughout Africa to codify and systematize "customary" law while

retaining as much as is practicable the specific characteristics of such law.

The interest of historians in the study of law may be characterized by the different objectives of their analyses. As in the case of administrators and lawyers, historians have seen law as an agent of social change and political domination. Ranger in his work with Hobsbawm (1983) and Chanock in his studies on Malawi (1985) view "customary" law and its codification as intrinsic to a process of domination in which law becomes part of a broader construction of a "traditional" African society more amenable to the exigencies of administration. Snyder (1981), although strictly speaking not a historian, incorporates much historical material into his analysis which sees law as part of the efforts of the state to channel and direct transformations in the relations of production. Lastly, social historians, in particular those included in the Hay and Wright collection (1982), have used litigation and legal records as source material for the reconstruction of African lives.

My study will take advantage of these recent trends in the historians' analyses of African law. I intend to reassess the writing on African legal systems which stresses elements of continuity and survival in African "customary" law (Rubin and Cotran, 1970). I am arguing here that far from being a survival,

"customary" law should not be understood outside of the impact of the colonial political economy upon African communities. The questions which I am striving to answer in this regard are to what extent changes in legal form engendered by colonial rule reflected and/or induced transformations in Mamprusi social relations of production. One of the major premises of my project is that Africans employed courts and tribunals as tools to not only define and consolidate new relationships, rights and obligations, but to defend old ones. Accentuation of "custom" was a response by elders and heads of households whose control over junior members was adversely affected by opportunities for increased autonomy afforded to younger Mamprusi as a consequence of their participation in a wider economic world in which both labor power and goods could be sold as commodities. The goals of this facet of the study are to clarify the nature and extent of the transformation of the African economies in the Mamprusi region during the colonial period and to determine the connection this transformation may have had to legal change and the uses Mamprusi peoples made of various legal fora at their disposal. The attempt to more precisely place law and legal change within the kaleidoscopic patterns of the Mamprusi political economy should result in a more solid appreciation of the nature of "customary" law. My contention is that "customary" African

Legal systems were the products of the interaction of often competing claims by Africans about the nature of their customary law with the legal conceptions, strategies and tactics of colonial administrators and jurists. The development of customary law during the colonial period can best be observed by abandoning the definitional debate about the "true" nature of law in African communities and its comparability with western law which has often preoccupied legal scholars (Alias, 1956; Gluckman, 1965).

Instead, African statements about their customary law should be conceived of as expressions of not only juridical knowledge, but of felt needs as well. Evidence about customary law is primarily evidence about the people giving it and about the circumstances and changes which they are confronting. It is necessary to inquire into the reasons impelling people to articulate the tenets of their customary law in particular ways. Pursuing this line of inquiry will hopefully enable me to discern and chronicle processes of law creation. More significantly, it is in the process of selective understanding by colonial authorities of African claims and selective presentation of these claims by Africans to colonial authorities that insights into Mamprusi social history can be gleaned. Courts and tribunals were often the venues in which claims were articulated, and it is in court cases, recording grievances and conflicts of African litigants,

that scholarly interest in African legal and social history can merge, for one can distil from these records, however muted and distorted it may be, an African perspective.

On a broader level, I hope that my project will provoke a general reassessment of the components of "traditional" or "customary" African ideas and values. Custom is more than practice or a collection of rules guiding behaviour; it is also the language of legitimation. Definition and acceptance of the customary or traditional depends on prevailing images and models of political authority, on models of relationships within the household, between the sexes and between different classes of people (MacGaffey, 1970; Chanock, 1985). Both Europeans and Africans had their own conceptions and models of African society. As mentioned, these conceptions were seldom fixed and they could be altered in response to changing conditions and perceived needs. Terence Ranger points out that the European model of "traditional" Africa was the result of a conscious effort by colonial authorities to establish order, security and a sense of community in their subject populations by means of defining and enforcing what Europeans perceived to be "customary" African practice (Hobsbawm and Ranger, 1983). For their part, Africans realized that getting the colonial government to recognize and accept certain rules and practices as "customary" was about the

only way certain groups of Africans could seek to impose their social aims upon the colonial order (Chanock, in Hay and Wright, 1982).

II

Perhaps the major objective of my project as a work of history is to counter-balance the southern and Asante bias in the historiography of Ghana. Obviously, until a historiography of the north is developed and integrated with the literature on other regions in Ghana, our understanding of the Ghanaian past will remain inadequate. So too will recognition of the part played by northern peoples in the historical development of southern and central Ghana.

Except for an occasional ethnographic monograph (Drucker Brown, 1975), research on the Mamprusi is exceedingly thin. As a medium sized member of the congeries of over twenty precolonial Mossi-Dagomba states in the Voltaic basin, the Mamprusi kingdom shared many of the salient aspects of social organization possessed by the larger and more thoroughly studied polities of Yatenga, Ouagadougou and Dagomba (Zahan, 1967; Skinner, 1964; Staniland, 1975). Surrounded by affiliated

Voltaic states or by acephalous societies, the Mamprusi were buffered somewhat from the expanding Gonja and Asante states to the south. Contact with Europeans was minimal until the last quarter of the nineteenth century.

The decision to extend British authority into the north was primarily motivated by a desire to prevent the acquisition of the area by German or French rivals. In contrast to the more obviously wealthy Asante and coastal areas, the Northern Territories had few exploitable natural resources and therefore offered no immediate returns for government expenditure. This does not mean that once acquired, the north was neglected by the colonial government in Accra. As Plange notes (1984), the inhabitants of the north were subject to certain colonial pressures and goals, the most important being the recruitment of cheap migrant labour to work the mining and cocoa regions to the south. /in

It is apparent that while historians have not been unmindful of these facets of the colonial experience in the Northern Territories, they have yet to intensively examine them. In Kimble's gargantuan study, for example, analysis of northern developments is attenuated by an emphasis on processes of "modernization" and nationalism taking place in the south (Kimble, 1963). Staniland's book on the Dagomba is of interest

in that it focuses on a northern people, but his analysis remains confined to the realm of politics and the impact of "indirect rule" upon political elites. The recent dissertation by Davis (1984) is invaluable because it is the only historical study of any length of which I am aware that deals solely with the Mamprusi. His work, however, also is confined to elites, and one should question his assumption that because the short-handled hoe, the basic means of agricultural production, changed only slightly during the colonial period, most of the agrarian Mamprusi were little affected by the colonial incursion. By isolating the means of production as an independent variable, Davis neglects to fully consider any possible transformations in the social relations of production. His work does not provide evidence of conflicts and tensions arising from questions of control over the means of production and the social product of labor.

The initial months of my fieldwork have been primarily spent delving into the National Archives in Accra. Of particular value for material on the north are the ADM 56 files. Ranging in time from the onset of the colonial presence in the region in the late 1890s to the present, these files contain reports, ethnographic surveys and development schemes of the British officers stationed in the north. In addition, one can find statistical information on local economies, markets, caravans, labour recruitment and wage rates.

During the next eight to nine months I plan to be in Gambaga, locale of the Mamprusi paramount chieftaincy, where I hope to gain some first hand experience of the deeper structures of the Mamprusi-past. I also must learn more about the influence of Islam and Islamic law and its place in the matrix of northern legal forms. The archival material I have found thus far has not been very informative on this subject. If all goes well, I shall return to Accra in October or November for some final finishing touches in the archives. Then it will be off to the U.K. for a brief stint in the Public Record Office before flying back to Stanford for rest, reflection and write-up.

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BIBLIOGRAPHY

- Allott, Antony: Essays in African Law. London, 1960.
- Judicial and Legal Systems in Africa.
London, 1962.
- Chenock, Martin: "Making Customary Law: Men, Women and
Courts in Colonial Northern Rhodesia."
In Hay and Wright, Boston, 1982.
- Law, Custom and Social Order.
Cambridge, 1985.
- Drucker-Brown, Susan: Ritual Aspects of Mamprusi Kingship.
Leiden, 1975.
- Elieas, T.O.: The Nature of African Customary Law.
Manchester, 1956.
- Gluckman, Max: The Judicial Process among the Barotse
of Northern Rhodesia. Manchester, 1955.
- Hay, Margaret &
Wright, Marcia (eds.): Boston University Papers on Africa IV:
African Women and the Law. Boston, 1982.
- Hobsbawm, Eric &
Ranger, Terence: The Invention of Tradition. Cambridge,
1983.
- Kimble, David: A Political History of Ghana.
Oxford, 1963.
- MacGaffey, Wyatt: Custom and Government in the Lower
Congo. Berkeley, 1970.
- Meek, C.K.: Law and Authority in a Nigerian Tribe.
London, 1937.
- Plange, N.: "The Colonial State in Northern Ghana:
The Political Economy of Pacification,"
Review of African Political Economy.
December, 1984.

- Rattray, Robert: Ashanti Law and Constitution.
London, 1929.
- Tribes of the Ashanti Hinterland.
London, 1932.
- Rubin N. & Cotran, E.
(eds): Readings in African Law. New York, 1970.
- Skalnik, P.: "Early States in the Voltaic Basin,"
Skalnik (eds.) in Claessen and The Early State. The
Hague, 1978.
- Skinner, E. P.: The Mossi of Upper Volta.
Stanford, 1964.
- Staniland, Martin: The Lions of Dagbon. Cambridge, 1975.
- Zahan, Dominique.: "The Mossi Kingdoms," in Forde &
Kaberry, (eds) West African Kingdoms
in the Nineteenth Century. London, 1967.