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**CRIMINAL JUSTICE POLICY, PUBLIC TRIBUNALS AND THE  
ADMINISTRATION OF JUSTICE IN RAWLINGS' GHANA (1982-1992): A  
STUDY IN THE POLITICAL ECONOMY OF REVOLUTIONARY SOCIAL  
CHANGE AND CRIMINAL LAW REFORM**

by

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**Dissertation submitted in Partial Fulfillment of the  
Requirements for the Degree of Doctor of Philosophy  
in the School of Criminology**

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Simon Fraser University  
September, 1993

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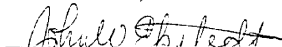
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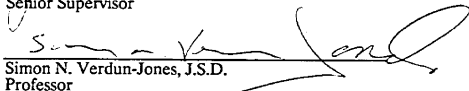
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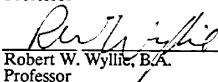
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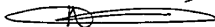
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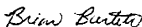
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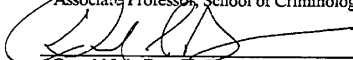
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Criminal Justice Policy, Public Tribunals and the Administration of  
Justice in Rawling's Ghana (1982-1992): A Study in the Political

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## ABSTRACT

This dissertation investigates, describes and analyses the factors which influenced the creation, development and reform of public tribunals in Rawlings' Ghana from 1982 to 1992. The tribunals were mechanisms established by the Provisional National Defence Council (PNDC) regime for the achievement of the policy of popular justice.

Grounded in the neo-Marxian structuralist approach to law and the state, this exploratory study uses a combination of qualitative research techniques including observation and interviews, private papers, memoranda, speeches, letters, archival documents, interviews, newspapers, and secondary works, to examine the motives, historical antecedents, and ideology underpinning the enactment of the public tribunals system and other auxiliary structures of popular justice.

Changes in the nature of contemporary Ghanaian criminal law and its mechanisms of enforcement reflect the tensions and contradictions inherent in the operation of an inherited, alien and antiquated colonial legal system in a rapidly changing society; the dynamic role of human agency in effecting structural change; the capacity, willingness and relative autonomy of the state to articulate and implement novel and radical conceptions of justice; and the complex interplay of politico-economic forces internal and external to the criminal justice system and the Ghanaian social formation in which it exists. The dissertation provides a detailed description and analysis of the dynamic relationships among these forces as they impinged on the tribunals system and propelled changes in its character and functions.

The emergence of public tribunals is linked to: the real and perceived failure and anachronistic behaviour of the English common law system in Ghana; the socialist ideological orientation of key segments of the ruling elites; the PNDC regime's commitment to the continuation of the popular justice agenda begun by the erstwhile Armed Forces Revolutionary Council regime of 1979; the articulation of demands by populist interest groups for greater social justice through radical criminal law reforms; the

influence of the Ghanaian mass media; and the revolutionary regime's need for political legitimation and more effective instruments of social control.

The reform of the tribunals system has been influenced by the lobbying activities of international human rights watch-dogs and advocacy groups, as well as local and foreign anti-tribunal forces. Among the major influences on the development and reform of the tribunals system were the imperatives of the PNDC's economic policies, especially its need for donor capital to support the implementation of its Economic Recovery Programme and the Structural Adjustment Programme.

## DEDICATION

To my dear mother, Mama Elizabeth Ama Dapaa Prempeh, who gave me life and love, and who never went to school but cherished learning and inspired me to pursue university education and to do a Ph.D.

To my sisters Sisi, Charlotte, Veronica, Felicia and Rose, and my twin brother, Ken Agyemang Attafuah, Snr., who gave me all they could to ensure my success at every stage along the way.

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Mrs Doris Hoff of the College of New Caledonia in Prince George typed the bulk of the manuscript for me. Mrs Aileen Sams of the School of Criminology spent many precious hours editing the work. I thank them sincerely.

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## CHAPTER I

### INTRODUCTION

#### **Public Tribunals and The Crisis of Common Law Tradition**

Throughout the common law system, calls for serious legal reforms keep mounting. These are accompanied by the specific suggestion that the judicial systems of common law countries must be modernized to recognize and incorporate the value of lay adjudication as an important restraint on the perceived negative effects of excessive legal professionalism in dispute resolution, both criminal and civil (Silberman, 1980; Provine, 1979). This trend is observable in the United Kingdom, Canada, Ghana, Australia, India, the United States and Bangladesh, to name a few.

The common law tradition is roundly criticized for being too costly in both financial and human terms: it is seen in some quarters as an expensive and inefficient system that inadvertently breeds considerable injustice. The calls for reform have generally been thoughtful, and occasionally, strident and defiant.

In October 1985, the Hon. Justice W.Z. Estey, a Canadian judge, eruditely observed that "there has been a gradual removal of the common man from the common law", and recommended the development of novel procedures for justice. In the words of Justice Estey,

progress in judicial administration can be obtained by redeploing our present judicial forces in new and differently organized courts (1985).

Justice Estey specifically suggested the establishment of "neighbourhood courts" which would exercise limited jurisdiction and be freed from the formal rigidity and adversarial character of the ordinary courts.

Disillusionment with the slow pace of significant reforms in the antediluvian common law has also been noted by other eminent Canadian legal scholars. For

example, Simon Verdun-Jones expresses surprise at the Canadian experience in this respect:

The Canadian Criminal Code was very much the product of Victorian England rather than a document that reflected Canadian experience and conditions... It is surprising that almost a century later, Parliament still has not replaced it with a code that more accurately reflects modern Canadian conditions (1989:14).

Similarly, as far back as August 1906, the American jurist, Roscoe Pound, captured the historical dimension and essence of American popular discontent with the common law tradition when, speaking at the 29th Annual meeting of the American Bar Association (ABA) in St. Paul, Minnesota, he observed that popular disdain toward the administration of justice has had an "ancient and unbroken pedigree". Critiquing the operation of the American judiciary of his day, Pound noted that,

as long as there have been lawyers, conscientious and well-meaning men have believed that laws were arbitrary technicalities and that the attempt to regulate the relations of mankind in accordance with them resulted largely in injustice.<sup>1</sup>

The inevitability of discontent with all law, Pound cautioned, should not preclude or diminish a deeper appreciation of the existence of truly "serious dissatisfaction with courts and lack of respect for law" in the United States.

These views, reflecting the pervasive and innocuous discontent and cynicism toward the American civil justice system at the turn of the century, "are equally applicable to the criminal justice system, under which the individual can suffer even more severely" (Gyandoh, 1989:1132). And they apply easily to the criminal justice systems of common law nations such as Canada, Australia, Ghana, the United Kingdom, Nigeria and India. Francis Bacon's astute observation in the seventeenth century that English "laws are like cobwebs, where the small flies are caught and the great break through"

<sup>1</sup> See Address by Roscoe Pound titled "The Causes of Popular Dissatisfaction with the Administration of Justice", Transactions of the 29th Annual Meeting of the American Bar Association, p. 395.

hints at the inherent class inequality in the operation of the criminal justice system of class-based societies.

Despite Pounds's timely insight into the serious lapses of the judicial system, he was one of its great defenders. He rejected the idea that reasonableness or fairness should form an essential part of legal standards (Boyd, 1986:3), arguing that the element of fairness or reasonableness in legal standards is a source of difficulty and that since, in his view, there is no precise definition of what is reasonable, "it would not be reasonable to attempt to formulate one" (1972:48). In a classic defense of the judicial *status quo*, Pound concluded: "In the end, reasonableness has to be referred to conformity to the authoritative ideal" (1972: 52). This normative definition of fairness and reasonableness is squarely rejected by those students of law who view authority and law not as reflections of social consensus but as sites of struggles for the definition of social reality and the continuous regulation of human conduct - a struggle in which the economically resourceful segments of society are usually at a distinct advantage (Box, 1981).

Calls for the reform of the American judicial system have continued nonetheless. In 1976, seventy years after Pound's initial challenge, the ABA, the Conference of Chief Justices, and the Judicial Conference of the United States co-sponsored a *National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice*. In November 1985, former Chief Justice Warren Burger of the United States echoed this concern when he described the U.S. criminal justice system as "too costly, too painful, too destructive, too inefficient for a truly civilized people" (1986:77). To help ease the chronic congestion which plagues the American judicial system, Justice Burger has spiritedly advocated "an appellate tribunal between the federal courts and the Supreme Court" (Gyandoh, 1989:1132).

More recently, the infamous May 1992 rioting by segments of the American underclass in several major U.S cities following an all-white jury's acquittal of four



Los Angeles police officers who were tried for the video-taped beating of a black motorist, Rodney King, has fuelled calls for criminal law reforms. Several disturbing issues have been raised by the Rodney King case. Among them are calls for a general improvement in police role performance in a multicultural society, and in particular, in police- minority relations.

In the context of Canada, a plethora of research evidence suggests that the criminal justice system is imbued with class, gender and racial biases. The criminal justice system is said to function like a net in which selective policing (Fotheringham, 1982), the slant of laws (Reiman, 1979), the character of law enforcement (Goff and Reasons, 1978; Cicourel, 1968; Erikson, 1973), the likelihood of convictions (Wilkins, 1975), and the nature of sentences (Mandel, 1983) are all heavily influenced by social class, and disproportionately weighted against lower class people (Brannigan, 1984; Hopkins, 1986; Chretien, 1982). The ideal of justice is poorly approximated, and calls for the reform of the criminal justice system have come from women's groups, native people, ethnic minorities, academics, criminal justice policy makers, legal practitioners and a number of single-issue interest groups focusing on specific areas of injustice in the system. In British Columbia, for instance, the following organizations, among others, have added their weight to the chorus of voices from several Aboriginal groups calling for significant structural reforms in the criminal justice system: the Justice Institute, Affiliation of Multicultural Societies and Service Agencies (AMSSA), National Black Coalition of Canada (NBCC), B.C. Organization to Fight Racism (BCOFR), Canadian Anti-Racism Education and Research Society (CAERS), and the Prince George-based Equal Justice for Women (EJW). The Vancouver-based Society for the Reform of the Criminal Law (SRCL) is, perhaps, the most comprehensive and powerful organization to articulate this drive for reform on a world-wide scale.<sup>2</sup>

<sup>2</sup> The Society is an international, voluntary, non- governmental association of judges, lawyers, academics, policy- makers and government officials united for the purpose of working actively to facilitate and improve criminal law reform and the administration of criminal justice, both in their

The call for the modernization of the common law has also been made in England, the source and citadel of the largely anachronistic Victorian legal tradition. The British legal system has been largely unable to alleviate its characteristic delays and injustices to any appreciable level (Gyandoh, 1989:1133). Many eminent British legal scholars have joined ordinary Britons who are demanding fundamental changes in the law. Beginning in July 1983, the conservative British weekly magazine, The Economist, ran a series of feature articles on English justice with the predominant theme that the English civil and criminal justice system which it described as a "hodge-podge of laws and legal institutions" developed piecemeal and haphazardly over seven centuries, was long due for a fundamental overhaul (The Economist, 30 July 1982:54).

In 1986, England's Master of the Rolls (President of the Court of Appeal) criticized the English judicial machinery as "far too slow, far too complex and far too costly", and challenged the judicial system to "alleviate the law's increasingly protracted and sclerotic procedure". In July 1989, in an apparent reaction to the intransigence of the ordinary courts, the Lord Chancellor and Head of the Judiciary issued a government White Paper, Legal Services: A Framework for the Future, on proposed legislative reforms of the legal system, with the specific injunction that,

the courts should have so far as possible straightforward, quick and cost-effective procedures [which will make them both accessible and fair (cited in Gyandoh, 1989:1133.) [Emphasis added].

Implicit in these calls for reform is the notion that the fructification of the policy of popular justice requires that new procedures be established that are sensitive to the ideals of affordability, accessibility, efficiency, reduction of legality, and fairness in the administration of justice. In Ghana, the establishment of public tribunals was a critical component of the PNDC regime's answer to the problem of popularizing the

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own jurisdictions and internationally. From 3-8 August 1992, the Society staged an international conference on Reform of Evidence in Vancouver, British Columbia.

administration of justice. Created in 1982, the public tribunals embody, to some degree, these ideals and aspirations.

What is interesting about these developments is not the general call for criminal law reform *per se* - indeed, legal systems are not static but rather emerge and change through the instrumentality of human agency for multiple reasons. What is of interest here is the specific demand that legal technicalities should be pruned down; that justice is too precious to be wholly entrusted to lawyers; and that new judicial procedures should be created to make justice affordable, and to establish a role for non-lawyer judges in the adjudication of certain disputes. In Ghana, this call was interpreted by the PNDC as a call for public tribunals as instruments for the articulation and realization of the goals of popular justice. By popular justice is meant a form of justice that is swift and certain, fair and frugal, non-classist, readily accessible and unfettered by legal technicalities and incomprehensible legalism. It is an approach to justice that provides a welcoming judicial apparatus as opposed to an intimidating set of ritualistic and confounding legal procedures. Above all, it provides for the involvement of ordinary citizens in the dispensation of justice.

The concept of popular justice has been embraced "more formalistically and more enthusiastically" in Ghana than elsewhere in Africa (Gyandoh, 1989:41). Public tribunals champion the cause of popular justice far more radically than any other mechanism established by the PNDC regime.

This dissertation examines the origins, development, reform and repeal of the public tribunals system in Ghana. As will be shown later, the roots of the tribunal system reach much deeper into Ghana's politico-judicial history and economic crises. Accordingly, it is essential to chart out briefly the unstable political history of Ghana. That is the task of the next section. The objective is to highlight the political context for subsequent discussion of these issues.

### **Political Instability in Ghana A Chronology of Events (1957-1993)**

Active political instability has characterized Ghanaian political life. Over the course of the last three decades, the bullet and the ballot have competed for primacy of place as the chief instrument for determining "popular" political will and ushering in new governments - a contest that is invariably won by the might of the bullet. As shown in Table 1 below, there have been nine different governments since Ghana attained political independence from British colonial rule in 1957. Four of these governments have been elected through the ballot box (with differing degrees of confidence in the fairness of the electoral process), and six others installed through the bullet. Five out of nine regimes have been forcibly removed from office in Ghana's thirty-six-year history as an independent nation-state: the country has experienced four major military coup d'etats (1966, 1972, 1979, 1981), one palace coup (1978), and several abortive coups. On 24th February, 1966, the Convention People's Party (CPP) government of President Kwame Nkrumah was overthrown by a military-cum-police action led by Col. Emmanuel Kwasi Kotoka, Lt. Akwasi Amankwa Afrifa and Insp. J.A. Harry.

The return to civilian rule in August 1969 under the leadership of Prime Minister Dr. Kofi Abrefa Busia and his Progress Party (PP) was a short-lived experiment in constitutional democracy. On 13 January 1972, Lt. Col. Ignatius Kutu Acheampong toppled the Busia government and abolished the 1969 constitution. Acheampong's National Redemption Council (NRC) was later reconstituted via a cabinet reshuffle as the Supreme Military Council (SMC). It held power until 5th July, 1978, when a palace coup brought in Gen. F.W.K. Akuffo as the new Head of State.<sup>3</sup> The SMC was subsequently reorganized as SMCII.

<sup>3</sup> Following a revolt in October 1975 by a number of senior military officers disenchanted with the sudden affluence and insolence of junior officers who were now Commissioners (ministers) in the NRC government, a new level of executive authority was created. The Supreme Military Council (SMC) was established as the ultimate body exercising executive powers in Ghana while the NRC government was radically reorganized and made into a weaker council of ministers with minor executive powers limited to various departments. The NRC was responsible to the SMC. Col. I.K.

A dawn military action by junior officers and other ranks in the Ghana Armed Forces on 4th June, 1979, led to the formation of a new government - the Armed Forces Revolutionary Council (AFRC) chaired by Flt. Lt. Jerry John Rawlings, with Capt. Boakye-Djan as its spokesman. On 24th September, 1979, Dr. Hilla Limann and his People's National Party (PNP) took over the reins of government from the AFRC. Ghana's third attempt at civilian rule came to an abrupt end on 31st December, 1981, when Flt. Lt. Jerry Rawlings toppled the Limann government and formed the Provisional National Defence Council (PNDC) as the highest organ of government. On 7th January, 1993, the PNDC handed over power to the civilian government of the National Democratic Congress (NDC) headed by Jerry Rawlings. This marks Ghana's fourth attempt at constitutional democracy (see Table 1).

The military actions of 1966 and 1979, among others, were quite cataclysmic in their political, social and economic consequences. Apart from these developments, Ghana's checkered and beleaguered history has been punctuated by several attempted military coups, insurrections, assassination plots, secessionist moves and rebellions. In pre-Rawlings' Ghana, abortive coups were undertaken, among others, by the following: (1) Lieutenants Arthur and Yeboa on 17th April, 1967; (2) Sgt. Oppong Nyantakyi, Cpl. Ophelia Mensah, Messrs Ofosu-Armah and Afful-Bempong and others in 1972; (3) Captain (rtd.) Sowu, Major Abito, Captain von Backustein (rtd.) and others on January 11th, 1976; (4) Mr. Johnny Hansen and four others on March 5th, 1976; (5) Captain Kojo Tsikata, Victor Albert

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Acheampong, Chairman of the NRC, was promoted to the rank of General and retained as Chairman of the new seven-member body. The SMC was composed of the Chief of Defence Staff, the Commanders of the Army, Navy, Air Force and Boarder Guard, and the Inspector- General of Police. Some of Acheampong's closest lieutenants who were members of the NRC were fired, while others shifted portfolios and remained junior members of the two-tier executive body - SMC/NRC. Subsequently, it became necessary to amend the subversion decree to become cognizant of these changes and to cover this stencilled bi-cameral legislative-cum executive organ of state. The NRC was later abolished. See National Redemption Council (Establishment) Proclamation (Amendment) Decree, 1975 (N.R.C.D. 360).

**Table 1. Chronology of Ghanaian regimes since Political Independence in 1957.**

Reign	Government	Mode of Installation	Head of State	Mode of Exit
6 Mar'57 - Jun'60	Independence Constitution CPP	Electoral	Prime Minister Dr. Kwame Nkrumah	(Re-election)
1 Jul'60- 24 Feb '66	First Republican Constitution	Electoral	President Dr. Kwame Nkrumah	Military-cum-police intervention
24 Feb'66 29 Aug'69	NLC	Coup d'etat	Triumvirate comprising Col. E.K. Kotoka Gen. A.A. Ankrh Col. A.A. Afrifa	Hand-over
29 Aug'69 13 Jan'72	Second Republican	Electoral	Dr. K.A. Busia	Military Intervention
13 Jan'72 5 Jul.'78	NRC/SMCI	Coup d'etat	Col. Gen. I.K. Acheampong	Palace coup
5 Jul'78 4 Jun'79	SMC II	Palace coup	Gen. F.W.K. Akuffo	Military Intervention
4 Jun'79 24 Sep'79	AFRC	Coup d'etat	Ft.Lt.J.J. Rawlings	Hand-over
24 Sep'79 31 Dec'81	Third Republican Constitution PNP	Electoral	President Dr. Hilla Limann	Military Intervention
31 Dec'81 7 Jan'93	PNDC	Coup d'etat	Ft.Lt. J.J. Rawlings	
7 Jan'93 - present	Fourth Rep. Const., NDC	Electoral	Ft.Lt. J.J. Rawlings	

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### LEGEND

Civilian Governments: CPP - Convention People's Party  
PP - Progress Party  
PNP - People's National Party

Military Governments: NLC - National Liberation Council  
NRC - National Redemption Council  
SMC - Supreme Military Council  
AFRC - Armed Forces Revolutionary  
Council

PNDC - Provisional National Defence

Latzoo, Captain Gustav Banini and others in June 1976; and (6) Flt Lt. Jerry John Rawlings on May 15th, 1979.

It is important to note that in all the instances of abortive coups noted above, military tribunals were established to try suspects, in person or *in absentia* as a means of grappling with the series of political crises occasioned by and reflected in these events. Most of the convicted "traitors" were tried by the tribunals were subsequently sentenced to death. Throughout the Acheampong era, all death penalties were commuted to life imprisonment.

The spate of attempted coups did not subside during the Rawlings era. In 1982/83 alone, there were five daunting attempts to overthrow the PNDC government. Typically, dawn-to-dusk curfews and martial law were quickly imposed on the nation by the then precarious government. The most formidable attempts at dislodging the PNDC from power through coup d'etats occurred on November 23, 1982, and June 19, 1983. By the time of these events, the PNDC had firmly established public tribunals in the country. The tribunals were granted wide judicial powers, and they were mandated to perform functions that went beyond the reach of previous military tribunals as well as the regular Westminster courts.

## **Military Interventions and Public Tribunals in Ghana**

A common feature of military interventions in Ghanaian politics has been the introduction of military tribunals by the new regimes. In addition to the detention of key government personnel of an ousted regime, the establishment of military tribunals has been the most predictable, unfailing action of all military juntas which successfully capture the reins of government in Ghana.

This judicial procedure was first introduced by the military-cum-police junta which overthrew the government of the late President Kwame Nkrumah on February 24th, 1966. The new regime, seeking to administer swift military justice to political subversionists whose actions constituted a challenge to its legitimacy and stability, instituted military tribunals as mechanisms of political containment and retrenchment. Since then, successive military governments have routinely employed military tribunals ostensibly as a form of justice, that is, a procedure for administering justice to persons charged with plotting, conspiring or attempting to overthrow the new regime, as well as those charged with concealment of subversion. Tribunals have also functioned as a scare tactic for winning the submission of the rank and file of the military in particular, and the civilian populace in general.

Military tribunals in Ghana have ultimately served as a source and an expression of what John Kenneth Galbraith calls "condign power" - the capacity to win submission via the threat or imposition of unpleasant alternatives to the preferences of others so that those preferences are abandoned (Galbraith, 1984:4). Thus, like tribunals everywhere, and especially those with jurisdiction over criminal matters, military tribunals in Ghana have functioned as instruments of social control.

In June 1979, military tribunals were renamed as public tribunals, or People's Courts. They subsequently gained an added significance as procedures for justice. Prior to that time, they were generally regarded as temporary adjuncts to the regular



adversarial judicial system, and essentially confined to military personnel and their civilian accomplices alleged to have committed political crimes against the state. The tribunals were never intended to supplant the regular courts, or even become an integral part of the judicial system; essentially, they were *ad hoc* procedures of adjudication modeled after the Westminster system inherited from the colonial era. Their chief distinguishing features consisted in the nature of the crimes they tried, and the military swiftness of their operation. They were exclusively concerned with political crimes, and precision and speed were their hallmarks. Fundamentally, however, they remained martial and adversarial in character.

Nevertheless, the "new" tribunals of 1979 were a short-lived experiment in the development of an alternative system of justice and procedures for its articulation and achievement. On September 24, 1979, the AFRC, which had introduced the public tribunals as procedures for the new policy of popular justice, handed over political power to the elected civilian government of Dr. Hilla Limann's PNP. With this change in government came the dissolution of the People's Courts. The judicial system subsequently reverted, in whole, to the regular system of justice.<sup>4</sup> Nevertheless, during their three-month existence, public tribunals dramatically changed the legal/judicial landscape of Ghana. They affected the future course of justice and legal practice in the country.

On December 31st, 1981, Flt. Lt. Jerry John Rawlings who had been previously retired from the Ghana Armed Forces by the eighteen-month-old Limann regime,

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4 This was in spite of the Transitional Provisions inserted by the AFRC into the 1979 Republican Constitution guaranteeing the non-reversal or reconsideration by future governments or any court, of decisions of the AFRC's People's Courts, and the continuation of the "house-cleaning" policies of the AFRC by the new civilian government of Dr. Hilla Limann. For an interesting discussion of the diverse perceptions and interpretations of the AFRC transitional provisions, refer to the intense debates that raged between Professors Kwamena Ahwoi and Kweku Folson of the Law Faculty and Political Science Department respectively, of the University of Ghana in 1980/81. See The Legon Observer, XII(6) 1980 pp. 153; XII(10) 1980 p. 222.

mobilized a group of junior rank soldiers and successfully overthrew the PNP government and formed the PNDC.

On January 6, 1982, Rawlings announced that his government would establish public tribunals "to try anyone who has committed crimes against the people," and to contrast "bourgeois legality" with "popular justice", and thereby establish an institutional framework for the development of popular law and morality (Ninsin, 1982:40). As part and parcel of the grand 'revolution to end all revolutions in Ghana," the new judicial policy aimed at radically revamping the Anglo-Saxon adversarial system of justice and transforming it into a quasi-inquisitorial system that would embrace traditional Ghanaian conceptions and procedures of justice. In the words of Rawlings, the tribunals would be public hearings, but "they would not be fettered by the technical rules which in the past perverted the course of justice and allowed criminals to go free." (Ninsin, 1982:40)

This policy meant that the mandate of tribunals was to be broadened beyond the traditional pre-occupation with political crimes such as subversion. "Crimes against the people" included *kalabule*,<sup>5</sup> as well as felonies and non-felonies which ostensibly jeopardized the well-being of the commonwealth. Most especially, crimes which were deemed to have political and economic repercussions on the then-fragile revolution were rigorously policed by the several state-orchestrated people's vigilantes and tried before the public tribunals. Thus, offenses such as hoarding and profiteering (selling goods above the government-controlled prices) could be regarded as crimes against the people, and managerial irresponsibility or incompetence that resulted in loss of public funds also qualified for adjudication by the tribunals.

From the socialist ideological perspective of the December 31st revolutionaries, the most serious forms of crimes against the people were those that had the potential to

<sup>5</sup> Ghanaians use the term *kalabule* to designate various forms of crimes, corruption and unspecified moral foibles deemed unbecoming of an upright person or patriotic citizen.

rob ordinary Ghanaians of their right to self-determination and socio-economic advancement. Typically, such crimes included corporate crimes of all shades, misappropriation of public funds by politicians and civil servants, treason, conspiracy to commit subversion, subversion and concealment of subversion against the revolutionary state. In effect, they were mainly political and commercial offenses. Furthermore, the public tribunals took up the role of moral vanguards of the "revolution", and tried cases with a view to purging moral laxity, corruption, indiscipline and lack of accountability among public servants.

The official justification for establishing the public tribunals system blamed the ineptitude, unbridled corruption and inefficiency which allegedly characterized the regular judicial system. In the early days of the revolution (that is, prior to 1984), the ethos of military precision, speedy adjudication of crimes and swift implementation of sentences (including execution via firing squads), and the simple *modus operandi* of the tribunals, were often juxtaposed against the widely-held public perception that the regular courts were bogged down by red-tape, costly legal fees and corruption among judges.

The neo-colonial character of the archaic, over-burdened and over-clogged judicial machinery, coupled with its failure to evolve in consonance with social changes in Ghana (rather than clinging tenaciously to Anglo-Saxon legal traditions and precepts), was held to foster and nurture acts of gross injustice, particularly against the poor. Public tribunals were to usher in a new epoch of genuine justice, unfettered by bureaucratic delays, anachronistic values, and unbridled corruption.

Public tribunals continued to operate in Ghana throughout the period 1982-1992, but they were dramatically reformed in terms of their revolutionary, inquisitorial nature; to some extent, they took on some of the attributes of the traditional judicial system to which they became mere adjuncts. They were eventually abolished on 7 January, 1993 when a new constitution and civilian government were installed.

### **Central Problem of the Research**

An examination of the origins, structure, powers, functions, reform and repeal of the tribunals systems is the focus of this dissertation. The purpose is to discover and examine critically the nature of the relations between a neo-colonial political economy and criminal law and procedure in Ghana. It is arguable that every society contains goals for justice and procedures for their articulation and achievement. Prevailing systems of criminal law and justice may be seen as a function of the political, social and economic circumstances of the society. Changes in the nature and function of criminal law (including mechanisms of enforcement) may reflect the ideological orientation of the ruling elites and the complex interplay of forces internal and external to the criminal law and the social formation in which it exists.

This dissertation is an exploratory study which identifies and analyzes the factors which influenced the establishment, development, reform and repeal of public tribunals as mechanisms of justice in Ghana. It is intended to provide answers to the following specific questions:

- 1) Why were public tribunals established?
- 2) What roles did the tribunals play in the Rawlings's revolution in Ghana?
- 3) What was the nature of the adjudication procedures employed by the tribunals before and after 1983?
- 4) What factors influenced the character, functions and repeal of the tribunals?

### **Subsidiary Questions**

Other ancillary questions addressed in this dissertation are:

- 1) What was the nature of the relations between the tribunals and other procedures of justice in Ghana?
- 2) To what extent did public tribunals fulfil their official mandate?

Several factors contributed to the establishment and development of the public tribunals. This study examines the extent to which the following factors influenced their introduction and growth:

- 1) the role of the Westminster judicial system;
- 2) the role of populist interest groups;
- 3) the ideology of the ruling elites;
- 4) the role of the Ghanaian mass media; and
- 5) the revolution's need for political control and legitimation.

These factors, it is argued, are central to understanding the political economy of criminal law and justice in Ghana, especially regarding the policy of popular justice and the public tribunals which embodied the goals for justice in Rawlings' Ghana (1982-1992).

The dissertation argues further that the reform of the public tribunals system in Ghana must be seen as a function of two distinct but related factors. These are: 1) the imperatives of the PNDC's economic recovery policy pursued through a Structural Adjustment Programme (SAP) supported chiefly by the World Bank and the International Monetary Fund (IMF); and 2) the activities of local and international anti-tribunal forces and interest groups.

### **Rationale**

In 1978, Michael Lowy published a ground-breaking study on dispute management strategies in an urban Ghanaian community. Since then, no systematic sociological investigation has been conducted into the nature and type of judicial processes available to Ghanaians; the factors influencing the selection and use of particular agencies of dispute resolution; the character of dispute management processes; the quality of their outcomes, and the evaluation of these agencies by Ghanaians. Such a study is even more important as the available options of dispute

resolution increased with the introduction of public tribunals in 1982. The public tribunals system articulated an alternative to both the traditional Ghanaian and Westminster systems of justice. It represents a bold marriage of judicial values and procedures derived from traditional Ghanaian and Westminster models of justice. The public tribunals system is probably the single most important and innovative legal enactment in the history of criminal law reform in commonwealth Africa.

The factors influencing the emergence, behaviour and reform of public tribunals have also not been investigated, either as an instance study in governmental policy development or a case study in the sociology of law. It is arguable that, apart from the failure of the traditional Westminster judicial model in Ghana, populist interest group activity, the ideological orientation of the ruling PNDC, the nature of deviance news coverage by the Ghanaian mass media, and the socio-political and economic imperatives of Ghana in 1982/83 significantly affected the establishment and subsequent, operation and development of public tribunals.

It is hoped that this dissertation will make a contribution to an understanding of law that is historically and culturally sensitive. It will also make a comparative contribution to the sociology of law, addressing central sociological concepts of social change and the nature of legal and political authority. Finally, it is hoped that the dissertation will have important implications for criminal justice policy analysis, and serve as an important instance study that tests the applicability of prevailing theories of law reform and state-society relations in a neo-colonial context.

### **Research Methods**

This dissertation aims at contributing to a better understanding of the sociology of law in a neo-colonial country struggling to achieve an equitable dispensation of justice in a revolutionary framework. Ghana's experience with public tribunals

provides an important instance study in the sociology of law that is historically and politically sensitive and timely.

To understand the political, economic, social and philosophical basis of criminal law reform in Rawlings' Ghana (1982-1992), it is necessary to focus attention on the introduction, functioning, development and reform of the public tribunals system as an alternative to the traditional Westminster judicial systems.

The research for this dissertation was conducted over a four-year period, 1988-1992. I commenced preliminary archival research in January 1988 soon after enrolling in the doctoral program at the School of Criminology at Simon Fraser University. This provided an opportunity for a clearer definition and conceptualization of the research objectives. It also enabled me to evaluate different research strategies or designs that could potentially be employed for data production. The actual field work entailing observations, interviews and archival research was conducted in Ghana between June and August 1990. The archival research component continued beyond the Ghana field trip.

The thrust of the research for this dissertation focused on understanding the public tribunals system in terms of the following: 1) the rationale behind the introduction of the policy of popular justice and the establishment of public tribunals; 2) the role of the tribunals in the December 31st Revolution; 3) the nature of the adjudication processes used by the tribunals; and, 4) the internal and external factors influencing the operations, development and reform of the tribunals system.

Thus, in a broad sense, the dissertation is concerned with the nature and dynamics of historical and contemporary forces impinging on criminal law development in Rawlings' Ghana (1982-1992). It therefore requires an examination of data on the historical and contemporary development of criminal justice policy and criminal law in Ghana generally, and primary data on the formulation, development and reform of the

public tribunals system in particular. Hence, the use of a multi-faceted research method was deemed essential.

### **Primary Research**

A combination of ethnographic research techniques was used to gain a comprehensive view of the historical, social, legal, political and economic influences on criminal law, the tribunals system and justice in Ghana. Primary data for this dissertation were produced through the use of unstructured in-depth interviews with key supporters and opponents of the theory and practice of the tribunals system, participant observation of judicial proceedings, and structured interviews with attendees or spectators at tribunal sessions.

### **Sampling Procedure**

The nature of the research aims dictated the use of purposive or judgemental sampling in selecting prospective respondents or interviewees. One main concern of this study was to explore the views of individuals connected with, or interested in, the development of criminal justice policy generally and the public tribunals specifically.

In identifying potential interviewees for the research, two main sources were drawn upon, namely, personal experiences and mass media accounts of political, economic and judicial developments in Ghana and the key personalities involved in those processes. Based on my personal knowledge of Ghanaian politics and social issues (prior to September 1984 when I came to Canada), I identified and compiled a preliminary list of potential interviewees. Next, I perused all issues of West Africa, from January 1982 to April 1990,<sup>6</sup> for material on Ghana's politics and economy, as

<sup>6</sup> I had to make an oral presentation of the prospectus at the School of Criminology in May 1990 prior to embarking on the field research in June 1990. The design of the research strategy for this dissertation was completed in February 1990. Accordingly, in identifying potential interviewees from media sources for this research, February 1989 was used as the cut-off point. With the approval of my Senior Supervisor, I began mailing interview request letters in early March.



well as the subject matter of this dissertation, namely, the public tribunals systems. Based on these and other readings on justice and the political economy of Ghana, another list of names was generated. This list was then used to augment the previous one.

The field research for this dissertation was conducted in Ghana between June 1990 and August 1990. Prior to embarking on the field trip, attempts were made to arrange interview appointments with government officials identified, on the basis of the selection criteria described above, as key players in the public tribunal debate. They were as follows:

- 1) the Head of State and Chairman of the PNDC;
- 2) the Attorney General;
- 3) the Chief Justice;
- 4) the Chairperson of the Board of Public Tribunals;
- 5) the Secretary for Local Government;
- 6) the Chairperson of the Committee of Secretaries;
- 7) the Chairperson of the Citizen's Vetting Committee;
- 8) the Chairperson of the National Public Tribunal;
- 9) the Director of the Public Prosecutions; and
- 10) nine Chairpersons of Regional Public Tribunals (one each from the nine different administrative regions of Ghana).

Despite repeated attempts, there were no replies to the letters requesting interview appointments. On arrival in Ghana, I had no confirmed appointments.<sup>7</sup> While in

<sup>7</sup> I had a supporting introductory letter from Dr. John Ekstedt, the then Associate Dean of the Faculty of Arts and Chair of my Dissertation Supervisory Committee. By confirming that I was a *bona fide* student of Criminology engaged in research in partial fulfilment of my doctoral dissertation requirements at Simon Fraser University, the letter was helpful in dispelling doubts and concerns that some of the potential interviewees had with respect to my identity and the purpose of the research. The academic aim of the research was patiently explained to all who agreed to participate in it. All participants were assured of utmost confidentiality, and only the names of those who expressly gave me permission to include their names have been indicated in this dissertation. I did not request to use any participant's name.

Ghana, I activated my old network of friends and acquaintances in order to gain access to some of the potential participants in the research.

## **Methods of Data Production**

### **Observation**

The ethnographic technique of unobtrusively observing events and proceedings while participating in its ebb and flow was used to gather primary data on the *modus operandi* of the tribunals system. Although my participation did not include being a part of the actual adjudication process but was limited to being a member of the audience, it afforded me a vantage point from which to observe and scrutinize the proceedings. Observing and listening to judicial proceedings as a member of the audience enabled the gathering of basic qualitative data on the mechanics of the tribunals' operations.

In all, the workings of 11 public tribunal sittings were observed: eight National Public Tribunal sittings in Accra, two sittings of the Ashanti Regional Public Tribunal in Kumasi, and one District Tribunal sitting in Obuasi, Ashanti. Tribunal sessions were attended and observed from the public gallery.

Since it was impossible to determine in advance how many of what judicial sessions would be taking place during the period of the field research, I planned to attend as many judicial sessions as opportunity and time would permit. In reality, I was able to witness only two traditional/customary court sessions or "afisem" hearings in my home town of Juaso in the Ashanti Region, three regular/Westminster court sessions in Accra, and 11 public tribunal sessions (as previously noted). Particular attention was paid to the similarities and variations among the regular courts, the traditional courts and public tribunals as they pertain to structure, procedure and outcome. In interpreting prevailing customary forms of adjudication in Ghana, I have

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relied on my knowledge of Ashanti customary court procedures.<sup>8</sup> Ashanti customary law is an example of the formidable pre-colonial African legal systems which have survived the twin forces of colonialism and westernization.

The participant observation technique was the first of the research tools to be used. Observing tribunal sessions was helpful in preparing me for the next component

<sup>8</sup> I received my early childhood socialization in the context of two royal families. On my mother's side was the Royal Oyoko Family of Juaso, Ashanti, and on my father's side was the Royal Agona Family of Oda, Akim Kotoku. An aspect of my life in these two family contexts was the opportunity to frequently witness the resolution of a wide range of disputes through traditional processes of adjudication in the open courtyard.

Also, my father, Nana Boansi Agyemang frequently mediated and settled various forms of inter-family conflicts, intra-clan disputes and mass conflicts involving whole villages. He was often consulted by chiefs of other towns and villages on difficult matters pertaining to Akan customary law. Some of them often requested him to assist in the resolution of disputes before their own courts. As these consultations and court sessions frequently took place in the evenings or on Sunday mornings, I was sometimes able to accompany him. From these sessions I learned a lot about Akan concepts of justice and alternate dispute resolution procedures. I also learned by listening to conversations between him and the other elders who participated in these processes.

In traditional Ashanti society, the position of *okyame* (linguist) belongs to the community's most articulate, eloquent and sincere citizen; he must be honest and command utmost respect. The *okyame* must also have an unblemished credibility. He is the spokesman of the *ohene* (the King or Chief). The position is somewhat analogous to a President's Press Secretary. The *okyame* and the *krontihene* (head of town/village development committee) are the closest people to the *ohene*. The *okyame* makes all public policy pronouncements on behalf of the King. Only announcements from the *Ohene*, the *Krontihene* and the *okyame* may be broadcast by the *dawurobofo* (the village or town crier) through the beating of the *gong-gong* or, in the case of emergencies requiring the speedy propagation of secret or coded messages to a select few within the wider public, the beating of the *frontomfrom* and the *aanpan* drums.

As a key participant in the adjudication of disputes at the *Ahenfie* (literary, "the house of kings or royals", a palace), the *okyame* must be well versed in the traditional modalities of justice dispensation. He must be able to discern the central points of lengthy arguments and to capture and articulate to the king in summary form, the essence of cantankerous ideas. He is required to be reliable and wise. He must be witty and able to unravel proverbs, adages, philosophical propositions and knotty idiomatic expressions.

During the reign of Nana Kwame Ntow (my mother's brother - that is, my mother's mother's sister's son) as King of Juaso in the early 1960s, my father served as linguist. He later became chief of Oda Akrofonso in the Akim Kotoku traditional area. In these two capacities, he had numerous opportunities to participate in the administration of justice in Ashanti and Akim Kotoku. I witnessed some of these processes, and I learned a lot from them.

I also learned a great deal from my mother through the lessons in Ashanti history and mythology she taught us (her children), and the *Kwaku Ananse* stories she used to tell us on our way to farm or around the fireplace after dinner. She imparted to us the concepts of justice and the wisdom of the elders as embodied in the fables, mythology and history of Ashanti.

For more information on Ashanti chieftaincy, see the following: Busia, Kofi A. (1951) The Position of the Chief in the Modern Political System of Ashanti. London: Oxford University Press; and Wilks, Ivor. 1975 Asante in the Nineteenth Century: The Structure and Evolution of a Political Order. New York: Cambridge University Press.

of the research; it helped to frame the research questions, to determine what key angles and what concepts to focus attention on during the interviews with the potential interviewees.

### **Interviews**

At the onset of the dissertation, it was decided that interviewing the actual actors in the public tribunals debate would be an indispensable research technique for this project. Consequently, an unstructured interview schedule employing open-ended questions was used to gather qualitative data on public tribunals and other judicial structures in Ghana. The rationale for using this interview technique was to allow for a deeper exploration of the interviewees' responses. This seemed to be the technique best suited for this research task as very little is known about the topic under study. Thus, a questionnaire guide or schedule was used. It indicated the general angles of the subject matter to be explored via the unstructured interview technique.

The purposes of these unstructured interviews were to find out, (from the perspectives of the interviewees): 1) the factors leading to the establishment of the public tribunals system by the PNDC in 1982; 2) the intentions behind the creation of the tribunals; 3) the actual functions of the tribunals system vis-a-vis the policy objectives embodied in the legislation that introduced it; 4) whether the functions served by the tribunals had changed over time, and what factors might account for any variation or consistency in functions; 5) the nature of the tribunals' adjudication procedures prior to, and since, 1983; 6) whether the powers, functions, structure and procedures of the tribunals have been influenced by any factors, and if so, their appreciation of those factors; 7) the relationship between the tribunals and other procedures of justice such as the regular (Westminster) courts and traditional, pre-colonial mechanisms of dispute resolution; 8) the nature of their organization's attitude toward the policy of popular justice, the use of tribunals as mechanisms for achieving

popular justice, and the actual performance of the tribunals; and 9) whether there have been any changes in their organization's support for, or opposition to, the tribunal system.

The factors affecting the emergence and development of tribunals were researched through intensive interviews with some of the key players in the public tribunals debate, including, most notably, George Agyekum (the chief legal architect of the tribunal system). Due to his extremely busy schedule, the interviews with Agyekum were spread over five separate sessions, each lasting a minimum of half an hour. He did not agree to the interviews being tape-recorded, and so only notes were taken. These intense and productive interviews focused on the philosophy, structure, powers, *modus operandi* and verdicts of public tribunals.

An important part of the original research plan was to solicit the views of identifiable "opponents" of the PNDC's policy of popular justice and the public tribunals system. Based on personal knowledge of Ghanaian politics and the issues surrounding the public tribunals system, a sample of "opposition groups" was purposively drawn from the ranks of the traditional political elite (both civilian and military), including some of the so-called "old noisy politicians", regular judges, and leaders of the established religions.

A number of key groups reflecting the spectrum of organizations which were overtly connected with, and/or interested in the development of the policy of "popular justice" and the creation of the tribunals system were identified. As a result, the leadership of the following groups were expected to be interviewed: 1) Ghana Bar Association (GBA); 2) Association of Registered Professional Bodies (ARPB) comprising established lawyers, accountants, nurses, doctors, engineers and university dons); 3) National Council of Churches (NCC); 4) Ghana Muslim Council; 5) Ghana Medical Association (GMA); 6) University Teachers Association (UTA); and, 7) National Association of Chartered Accountants (NACA).

Another important element in the research plan was to solicit the views of these bodies on the establishment, operations and roles of tribunals vis-a-vis the traditional courts through unstructured interviews, using open-ended questions. The data from these "opposition" sources were to be compared with data obtained from the "supporters". Interviews were to be tape-recorded where informants gave their consent; otherwise there was to be exclusive reliance on handwritten notes.

In early March 1990, letters requesting interview appointments were sent to all the identified organizations and individuals. As with the "supporters", however, the letters were not replied. After a month of waiting, reminder letters were sent out. No replies were received.

Once in Ghana, telephone directories and personal contacts were used in an effort to reach the identified potential research subjects. I telephoned or walked into the offices of these organizations and individuals to request their participation in the research. Group after group, individual after individual, all but one of my prospective interviewees politely declined an interview appointment and referred me to other members of the national executive committee of their respective organizations. The leadership of only one of the groups listed above, the Ghana Bar Association, agreed to participate in the research. A lot of time and money was expended on efforts to secure interviews.

In spite of the apparent pervasiveness of the culture of silence and the crippling attitude of disengagement from political activities on the part of the *old establishment*, Peter Ala Adjetey, past-President and current Executive Member of the Ghana Bar Association (GBA) agreed to my interviewing him. This was a major breakthrough for me. I was also able to hold "conversations"<sup>9</sup> with four other senior lawyers (two of

<sup>9</sup> I have deliberately designated my interactions with these lawyers as "conversations" rather than interviews since they expressly forbade me from recording their ideas. I learnt a great deal from them. At their request, I promised that I would not use any of the information they had shared with me. I have kept those promises.

whom were High Court judges). They specifically requested to remain anonymous. Under the circumstances, it was an unqualified act of bravery that Peter Ala Adjetey agreed to be interviewed on the tribunals system. He also preferred for his name and comments not to be kept anonymous.

Working on the "background assumption" (Gouldner 1970) that certain interest groups influenced the development of the public tribunals system, attempts were made during the field research to locate and interview people who were leaders of certain identified groups between 1979 and 1981. The following were the groups: 1) the Trade Union Congress (TUC); 2) 31st December Women's Movement (31DWM); 3) the People's Revolutionary League of Ghana (PRLG); 4) the National Democratic Movement (NDM); 5) the National Union of Ghanaian Students (NUGS); 6) the June Fourth Movement (JFM); 7) the National Association of Democratic Lawyers (NADL); and 8) the African Youth Command (AYC). Difficulties in locating some of the targeted informants were anticipated prior to my departure from Canada, but not to the extent that they were encountered on the ground. Most of my potential informants, having fallen out of favour with the PNDC for various reasons, including disagreements over significant policy changes in the revolutionary process, had fled the country into exile, primarily in the Ivory Coast, Europe and North America. A few others, I was discreetly informed, were languishing in jails while some were "missing" in the system. Six key potential informants I was able to locate simply refused to participate in the research.

Eventually, two leaders of two separate interest groups who were willing to "chat" with me but not prepared to grant me an interview were located.<sup>10</sup> As they were friends, they agreed to "chat together" with me. They each forbade me from recording our discussions in any shape or form. An emphatic assurance of the strictest

<sup>10</sup> In actual fact, the "chat" turned out to be an informal interview; it was just a little bit more informal than the others.

confidentiality and anonymity paved way for useful discussions on the important role of their individual organizations in pressing for "a clear policy of popular justice backed by an effective mechanism for its practical realization". There were also brief moments when the informants made some deeply passionate and poignant commentaries on the "current path of the revolutionary process as we fumble our way into a capitalist wilderness". There were also discussions about the nature of leftist interest group politics in Rawlings' Ghana, as well as the future of the intellectual left and the workers' movement in the 1990s. The interview with these two informants was full of insight and proved highly valuable in helping me explore angles which were not assiduously pursued or discussed with the other interviewees.

Understanding the character, depth and extent of public participation in a judicial system ostensibly created to ensure grassroots in-put in the dispensation of justice was deemed essential to attaining the research goals. An unstructured interview format was used to explore these issues. The primary objective was to obtain some data on the attending public's appreciation of the methods of adjudication used by the tribunals as well as their assessment of the nature and depth of their participation in the dispensation of justice via the tribunals. What kind of people attend tribunal sessions and for what reasons? What is the attending public's evaluation of the effectiveness of the public tribunals relative to the regular courts? As lay persons sitting in the public gallery of the courtroom, how do they participate in the administration of justice, including the sentencing process? To obtain answers to these questions, an unsystematic random sampling technique was used to select and interview 54 attendees at tribunal sessions (35 in Accra and 19 in Kumasi).



### **Archival Research**

Finally, archival research techniques were used to supplement and augment the primary data obtained through interviews and participant observation. The secondary data on Ghana's history, economy, politics, criminal law and public tribunals system were obtained from archival sources. The archival materials used were private letters, inter-governmental correspondence, books, journal articles, magazines, Ghanaian newspapers, United Nations publications, Ghana government development plans, reports, press releases, legislative instruments (including decrees, proclamations and pardons), and documents on the proceedings and verdicts of a selected number of public tribunals across the country. Data from these archival sources were systematically analyzed.

This aspect of the field research was underpinned by four objectives. In carefully reviewing these records, the primary objective was to get to the nature of state-society relations and the evolving history of criminal law reform during the two periods of Rawlings' rule, June 4th and 31st December. In terms of the actual research focus, the June 4th era was relatively tangential to the 31st December era since the latter was the period during which the concept of popular justice found material and institutional expression as well as the political and ideological context for further development. Thus, although material from the 1979 era served as an important historical back-drop for a deeper appreciation of the 31st December revolutionary process and the nature of criminal law reform, the key focus in the research was on developments in the post-31st December era.

The second objective was to obtain documented information on the social, political and economic forces propelling and moulding criminal law reforms, particularly with respect to the emergence, development and reform of the public tribunals system. These included the role of political ideology and interest group politics and the socio-political imperatives of rehabilitating the Ghanaian economy.

The third objective was to get to the nature of the regime's use of the print media<sup>11</sup> as an instrument of political legitimation and social control. It also aimed at delving into the nature of other legitimation devices mounted or employed by the Rawlings regime. Although many Ghanaians, both urban and rural, do not have high levels of literacy, they have relatively high levels of political consciousness. Next to the radio, newspapers are the primary agents of political socialization; they are important conveyers of news and information to the masses. Hence, attention was paid to the print media in terms of its accounts of the popular justice agenda and criminal law reform process. Here, the main interest centred around the dynamic role of the media in the social construction of reality, in articulating or championing new versions of reality (including the new legal order), and in legitimizing the new political dispensation introduced by the PNDC regime (including the provision of justificatory accounts for the tribunals system).

The final objective was to determine the nature and impact of domestic and international reactions to the development and implementation of the policy of popular justice. An especial focus here was the manifestation of reactions to the creation of the public tribunals system and other criminal law reforms instituted by the new regime.<sup>12</sup>

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<sup>11</sup> There is only one broadcast medium in Ghana, namely the state-owned Ghana Broadcasting Corporation (GBC). The GBC has several local transmission stations located across the country which run programs in English and many local languages. It is thereby able to reach a larger audience than the print media whose reach and efficiency is circumscribed by literacy in the English language. Radio is the most popular medium of mass communication in Ghana. However, radio news, commentaries and reports were not included in the research for this dissertation mainly because of the general lack of written records and hence the transiency of the information aired.

<sup>12</sup> Based on previous knowledge, it was not expected that the state-owned media would freely publish disagreeable letters or messages from the international community. On the contrary, it was expected that bombastic messages of congratulations, rather than critical and condemnatory ones, would be found in *The People's Daily Graphic* and *The Ghanaian Times*. Accordingly, the "World News" sections of *The Observer* and *The Independent*, two national dailies of England, were reviewed. The rationale for choosing these two papers is that British newspapers tend to demonstrate a greater interest in developments in Ghana than American or Canadian ones. This may be partly due to the historical and current economic and political relations between Britain and Ghana.

A wide range of media sources and publications were consulted. They covered the period from May 1979 when Rawlings made his first dramatic appearance on the Ghanaian political scene to August 1990 (inclusive) when the field research was completed. Four weeks were spent in the Ghana National Archives and some of the country's largest libraries consulting six media sources. These were: The People's Daily Graphic; The Ghanaian Times; The Legon Observer; The Catholic Standard; The Ashanti Pioneer; and West Africa.<sup>13</sup>

The rationale for using these publications is that all of them have had a history of running periodic feature articles and commentaries on public tribunals and the administration of justice in Ghana. The People's Daily Graphic and The Ghanaian Times are state-owned publications which carry daily news items on developments in the country; they constitute the country's main newspapers. Hence, the considerable amount of time spent on these two publications - a total of 17 days compared with 11 spent on the four other publications.<sup>14</sup> With the exception of the Legon Observer which is published bi-weekly, the rest are weekly publications. While other media publications such as Time, Newsweek and The Economist were also consulted, they were not of primary interest as they rarely cover Ghana's "development" issues, except extreme events in the genre of natural and human-made disasters and political catastrophes that they can adequately sensationalize. At one time or another, each of these has run into trouble with different Ghanaian regimes for being critical of government policies, programmes and practices.

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<sup>13</sup> While in Ghana, I did not spend time reviewing West Africa. I have maintained a regular subscription to this publication since 1988. After returning to Canada in August 1990, I relied on my own collection of West Africa for the needed data. I also used extensively, the libraries of the University of British Columbia and Simon Fraser University to fill in the missing issues in my collection, and most importantly, to cover the period from 1979 to 1987.

<sup>14</sup> Very little time was spent on West Africa mainly because, apart from the fact that I maintain a subscription, the magazine is more readily and easily available in Canada than in Ghana.

Thus, in terms of consistency of reporting or coverage, they were not regarded as reliable. Nevertheless, some of

**Table 2. Schedule of Consultation of Selected Print Media Publications**

Name of Paper/Publication	Duration of Consultation (In Days)
People's Daily Graphic	10
Ghanaian Times	7
Ashanti Pioneer	5
Catholic Standard	3
Legon Observer	2
West Africa	1
Total	28

Nevertheless, some of the "foreign" publications, especially The Economist, occasionally features balanced and well-researched articles on topics pertaining to Ghana's political, economic and social development efforts. However, a key point of the field research was to attempt to access information that would not be readily and conveniently available in North America or through the inter-library loan scheme. The two Ghanaian national dailies noted above do not match the international stature of the world's leading newspapers such as The New York Times, The Independent or The Observer or The Globe and Mail of U.S., U.K. and Canada respectively, and are simply not available in any library in Canada. The Ghana High Commissions and consulates have some access to these papers, but in practical terms, they are really partial and of limited scientific research value. For example, although the Ghana High Commission in Ottawa receives Ghanaian newspapers from Accra, the supply is sometimes irregular, and not every daily issue is received. Further, the Commission's

newspapers are yet to be properly compiled and organized for easy reference as part of its library.<sup>15</sup> *Technically speaking*, therefore, Ghana is the only appropriate place for gaining unimpeded access to these publications.<sup>16</sup>

As it was initially impossible to tell with certainty what documents might be available from what specific sources, searches of the newspaper and magazine collections of several libraries were conducted. The periodicals collections of the following libraries were canvassed: 1) University of Ghana, Legon, Accra (Balme Library); 2) Institute of African Studies (also at the University of Ghana); 3) Ghana Institute of Management and Public Administration (GIMPA), Greenhill, Accra; 4) University of Cape Coast, Cape Coast; 5) University of Science and Technology, Kumasi; 6) National Archives, Accra; 7) W.E.B. Du Bois Memorial Centre for Pan-African Studies, Accra; and, 8) Ghana Law School, Accra.

Six main libraries were visited before access was gained to all issues of the Pioneer and the Catholic Standard. Each library had missing issues of several editions, and it took a lot of work to obtain them. Copies of the remaining documents were

<sup>15</sup> The High Commission's apparent lack of a "library approach" to its newspaper supply may be accounted for in part by its meagre staff. The Commission could definitely use extra personnel. Yet, from all indications, its human and financial resources are efficiently managed; beyond that, there is little else it could do. Security concerns limit the prospect of heavily using volunteer help in diplomatic circles (otherwise Ghanaian graduate students of Library Science in the National Capital Region could be encouraged to volunteer their time in creating a library system and data base for Commission staff to follow). In any case, given the vital importance of proper document keeping, perhaps future staff appointments may include persons with expertise in library science or archival management acumen or experience. This will also be compatible with the Ghana government's avowed commitment to the environment.

Several times since 1988 when I have visited Ottawa, I make it a point to visit the Ghana High Commission and comb through its mountain of newspapers from Ghana. I know that the thirst for "news from home" is a real and compelling thirst!. Since 1990, my visits to the Commission, have taken on an additional significance as I also go hunting for data "to fill in the gaps" in my research and to "discover" what is happening with the public tribunals.

<sup>16</sup> I say *technically* because one of the major problems of doing social research in Ghana and other developing countries, as explained later in this section, is the tendency for some public servants and prospective interviewees to exact or expect "tips" (gifts, monetary rewards and bribes) for their "co-operation" which is sometimes no more than showing up on time to do their normal, everyday jobs for which they are paid.

eventually obtained from the main library (Balme) of the University of Ghana, Legon, and the Institute of African Studies library, also at Legon.

Given the limited level of micro fiche usage and the absence of a centralized computerized system of keeping, tracking and retrieving information from newspapers at these libraries, the task proved to be labour-intensive and time-consuming. The papers were thoroughly scanned to identify the feature articles, news stories and editorials bearing on the subjects indicated above. A list was compiled of the identified items that were considered important. Their corresponding titles and page numbers were also noted. At the University of Ghana's Institute of African Studies where a lot of relevant material was found, a library attendant was paid to make photocopies of the selected items during his spare time.

All efforts to gain access to relevant records on the tribunals system from the Office of the Registrar of Public Tribunals proved futile; the Registrar was openly suspicious, and nakedly hostile, despite my assurances that I would use the data for academic purposes only. Due to lack of access to a systematic compilation of cases adjudicated by public tribunals, it has been impossible to produce accurate statistics on the total number of cases processed between 1982 and 1992. Newspaper and magazine reports of tribunal sittings and rulings are sporadic and sometimes inaccurate.

In the absence of useful statistics from the Office of the Registrar of Public Tribunals which is supposed to keep records of tribunal proceedings and verdicts, there was no recourse than to rely on media reports and the personal accounts of tribunal chairpersons and other PNDC Government functionaries. No attempt has been made to do a tally of crimes processed by the tribunals as the information available from newspaper and other media sources on this subject are anecdotal and sketchy, few and far between.

Several books on the colonial Gold Coast and contemporary Ghanaian society, history, law, politics and economy were also consulted. The objective was to delve

into the nature of colonial and post-colonial Ghanaian society in order to ground the forces which shaped and propelled the enactment, enforcement and repeal of particular criminal laws in Ghana.

### **Research Problems and Issues in the Data Production Process**

The basic problems encountered during the field research were the unavailability of many potential respondents; the lack of interest in the subject on the part of many would-be respondents; the political sensitivity of the topic; inadequate communication and transportation facilities; illiteracy; the selective survival of documents and the political construction of historical accounts.

1) Difficulties in locating potential individual and organizational respondents. This was an extremely difficult and time-consuming exercise. One reason for this is that postal rather than street addresses are used throughout Ghana. Thus, one cannot simply drive to an office or a residential address unless provided with an accurate description of its spatial location. Also, telephone listings do not include street numbers. Cartographical aids such as city maps are in fairly rudimentary stages in Ghana. (This is true of even the capital city, Accra, with a population of over one million!). Accordingly, for the "visitor", the easiest way of getting around the problem is reliance on taxis, a fairly expensive means of mobility if used for an extended period.<sup>17</sup>

2) The politically-sensitive nature of the research and the international dispersal of opposition forces. This problem was encountered with respect to the interview component of the research. It is a problem traditionally linked to the general suspicion

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<sup>17</sup> Nevertheless, some businesses, especially law and accounting firms, include the names of the streets on which they are located on their business (complimentary) cards. Business advertisements in the media typically include references to popular "spots", streets and suburbs, (e.g. XYZ Enterprises Ltd., located between Avani Hotel and Texaco Station on Kojo Thompson Road, Adabraka). More up-to-date city maps are also becoming available now.

that research data may be used in ways detrimental to the interests of the participants, including political recriminations.

Presumably, political repression and economic difficulties are the major factors accounting for the international dispersal of opposition forces. Several key members of radical leftist interest groups as well as conservative politicians who were key players in the politics of advocating for, or opposing, the public tribunals system are now scattered all over the world. The rather low interviewee-participation rate<sup>18</sup> was directly related to a much broader phenomenon, namely, the deep-seated fear of political repercussions for participating in a certain genre of social research such as this one.

The magnitude of this problem forced me to realize my own political naivety and ignorance of the political complexities and problems involved in doing field research on public tribunals in Ghana. The reluctance of "accredited knowers" to participate in the research is a manifestation of the larger phenomenon of the "culture of silence" which had deeply enveloped the country. The culture of silence in Ghana is apparently a residue of political repression, including the overt stifling of voices of dissent. Thus, despite the assurance of anonymity, people were simply reluctant to talk openly about anything vaguely resembling a political critique of the new establishment! While some of the reluctance is apparently born out of paranoia rooted in unfounded or exaggerated misconceptions regarding the brutality of the Rawlings state machinery, the social and political basis of the fears are real to a large extent, and not easily discounted.

Many respondents agreed to participate on condition of guaranteed anonymity, while others declined requests to permit the tape-recording of the interviews. Some

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<sup>18</sup> There were, altogether, only thirty-eight interviews. Only two of these were with key players in the public tribunals debate. However, those two individuals, Agyekum and Adjetej, are probably the two most significant contenders in the politics of the tribunals system.



even refused me permission to take notes. Political sensitivity was a factor even in the interviews with the two most important respondents in this study, namely George Agyekum and Peter Ala Adjetey. The chairperson of a National Public Tribunal, Agyekum was concerned that his views might be misrepresented, and insisted that only written material he had given me be quoted in the dissertation. Due probably to his high profile position in Ghana, his tenuous relationship with the PNDC, and his publicly-avowed opposition to the regime, Adjetey was also concerned about political sensitivity. He was, however, quite enthusiastic about his participation in the research. Agyekum and Adjetey reacted to the request differently: the GBA's past-President readily allowed me permission to take notes, but not to tape-record; the chairperson of the National Public Tribunal declined my request for any form of record-keeping but held several extensive discussions with me and gave me lots of relevant literature on the tribunals system.

In spite of this constraint on record-keeping, all the "conversations" and interviews with respondents were conducted in a relaxed atmosphere in their homes or offices. I have a high degree of confidence in the information provided me by my anonymous informants on the role of leftist interest groups in the creation of public tribunals. All the interviewees were credible and reliable.

3) The problem of communication and transportation constraints. A telling dimension of "underdevelopment" in so-called developing countries is the relatively less advanced state of telecommunications and transportation. For example, lack of ready access to telephones, say to reschedule an interview appointment, could be very frustrating as the next available option is equally unpalatable at times - road travel.<sup>19</sup> Research strategies designed for use in such countries as Ghana, Fiji, Rumania,

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<sup>19</sup> I had to contend with this problem for a while before a my twin-brother provided me with a car. This remarkably changed the entire research experience by removing a key source of irritation and frustration.

Tanzania, Cambodia, Guatemala and Venezuela must be sensitive to a range of infrastructural and logistical constraints that can present problems. Poorly constructed and seasonally unusable roads, shortage of reliable and efficient means of transportation, broken-down telephone systems and excessive bureaucratic delays in processing basic information are among the common problems. The limited, slow and arduous forms of locomotion present a set of significant challenges to the social researcher from the western world accustomed to the ever-ready conveniences of dependable transport facilities, reliable telephones, facsimiles and other electronic communications gadgets such as computers. Hence, in planning for social research in developing countries, a key factor that must be taken into account is the limitations imposed by the unavailability or less developed status of infrastructural facilities that are typically taken for granted in developed countries.

4) The problem of illiteracy. A minor problem faced in doing this research was illiteracy in rural Ashanti, the site for the observation of the workings of traditional adjudication mechanisms. In general, illiteracy and language barriers can pose significant communications problems for social researchers using ethnographic techniques such as interviews and participant observation. This is especially so in situations where a low level of basic literacy in the general population combines with language differences between the researcher and the potential research subjects.

A common remedy for this problem is the use of interpreters. However, technical jargons and terminologies particular to the researcher's academic discipline can also interfere with the research subject's understanding of the issues at stake. Often, this requires the careful framing of the research questions, with the goal of ensuring that the research subjects properly understand the questions which they are being asked. Similarly, suspicion may be aroused, and the participant observer's "cloak of anonymity" jeopardized if she/he is unable to "blend in" due to, among other factors, ineffective communication with the research subjects.

The respondents involved in this research were mainly educated urbanites. Only the participant observation component of traditional adjudication processes involved uneducated rural people who did not speak English. As the only researcher, my fluency in both Akan and English languages ensured that communication was never a problem at any stage of the research as all my respondents spoke either or both languages.

5) The problem of "selective survival" of archival records. For a variety of reasons that transcend the scope of this thesis, some of the archival documents - newspapers, magazines and journals - were missing from particular libraries. This situation necessitated visits to other libraries as there was no such thing as inter-library loan system in Ghana at the time of the research. Some amount of time was thus spent in tracking down "missing" materials.

6) The problem of selectivity. The available records are written from the perspectives of authors whose interpretive angles necessarily inform their analyses and often exclude the accounts of marginal groups and individuals who lacked access to printed documents.

### **Effectiveness of the Research Techniques**

A research project of this type always faces the prospect of suffering from the traditional limitations of ethnography. Participant observation allows the ethnographer to acquire what Runciman terms a "tertiary understanding" (1983:-4). Yet, by becoming involved in the situation under study, the researcher may lose his/her objectivity in the process if he/she identifies with the sympathies of the people under study.

Interviewer bias and demand characteristics may affect the research outcome. However, this research did not suffer from any of these problems. The nature of the

research was such that there really was no room for emotional identification with the research subjects or informants, or for sympathizing with the under-dog and thereby losing objectivity, real or fictional. Technically speaking, there were thirty-eight interviews in all: one with the tribunals system's major architect; one with a leading member of the system's main opposition lobby group; one with Mike Oquaye, a political science and law professor at the University of Ghana who was writing a book on the tribunals system, and thirty-five with an unsystematic random sample of tribunal session attenders who were interviewed on their reasons for attending the courts. Nevertheless, to off-set the possibility of biases, and to complement the interview technique, other research strategies were employed. The use of triangulation or a combination of different research techniques is a useful method of reducing the problems associated with the internal and external validity of research outcomes. Hence, the joint use of unobtrusive participant observation, archival research and unstructured interviews in this study. These techniques complemented one another and removed the sources of error that these methods singly entail. Independently, each technique proved valuable in producing relevant data for particular aspects of the dissertation.

The combined use of ethnographic techniques (comprising unstructured interviews and participant observation) proved useful as they allowed for a deeper immersion into the subject of enquiry. As Erickson et al. note, "the social scientist is better equipped to convey understanding of his subject matter if he has been immersed in the world of which it is a part" (1987:77). Such an immersion enables the symbolic significance of particular utterances, gestures and "content" of documents to be fully grasped by the researcher. For instance, the significance of trial proceedings at a tribunal would not be adequately understood by reading media accounts of it since what the media would consider newsworthy (Erickson et al. 1987) may not necessarily coincide with what the researcher considers important. Besides, the problems of

selectivity and bias in media news coverage and limitations of documents - the inability of the researcher to capture the interactive social processes behind the production of documents - are partially resolved through participant observation. Through this technique, the *modus operandi* of tribunals, traditional (Westminster) and customary courts could be compared and contrasted, and their significance as social processes (entailing symbolic interaction and the imputation of meanings) fully apprehended. In turn, data from such observations could be more easily compared with data obtained from interviews and written documents pertaining to dispute resolution processes and their outcomes.

In spite of the methodological shortcoming noted in respect of the archival materials and interviews, the research unearthed a wealth of historical and contemporary data relating to the introduction, enforcement and repeal of criminal law in general, and the public tribunals system in particular. Data produced from the formal interviews and informal "conversations", together with data from the participant observation, the social survey, and the archival research, proved invaluable: they form the raw material for the analyses of the PNDC regime's criminal justice policy with respect to the public tribunals system.

## CHAPTER II

### CONCEPTUAL FRAMEWORKS AND THEORETICAL PERSPECTIVES

Crucial to this venture is the selection of a useful conceptual means by which to analyze the enactment, development and reform of criminal law in Ghana. This requires an overview of the potentially relevant theoretical frameworks for understanding state-society relations and the establishment, extension and repeal of criminal law.

The Chapter reviews the strengths and limitations of the policy framework, noting that although the systems approach is holistic, it does not enhance understanding of the dynamic role of capital, the state, and interest group politics in the policy formulation process; it merely recognizes the existence of these factors and the interrelationships among them. Given the necessity for a deeper appreciation of these dynamics, the Chapter moves on to consider other theoretical perspectives that go beyond the specifics of bureaucratic decision-making to consider and incorporate the myriad of forces that impinge upon the process. Thus a number of theoretical frameworks, including neo-Marxian ones in the sociology of law tradition, are critically examined.

#### **Discourse on Policy, Policy Analysis and the Systems Approach**

Since this thesis is concerned with analysing the policy of popular justice and the system of public tribunals as a mechanism or procedure for its implementation, it is necessary to explore the motivations behind this policy, that is, the factors which facilitated its introduction. This requires a brief overview of what is meant by the concept of policy, the concerns of the field of policy analysis, and the central focus of the systems perspective which has influenced much planning for justice (Clark, 1984) and the study of policy issues generally (Connidis, 1982).

This navigational exercise in policy discourse and systems analysis is crucial to the theoretical understanding of changes in criminal justice policy in neo-colonial countries like Ghana undergoing rapid social change. It allows a case to be made for the use of a theoretical framework that is power-based, recognizes the value of incorporating issues of political economy in the analysis of the origins, development and repeal of criminal law, and emphasizes the centrality of specific group influences on the state in its criminal justice policy formulation and implementation. It is also necessary because policy-making is not always a rational, linear process characterized by knowable or predictable stages (Ekstedt & Griffiths, 1984:99). Furthermore, it is not always easy to identify the "maker" of a particular policy owing to the several levels of authority and numbers of persons that may be involved in its development. Consequently, determining the motivations for a given policy can sometimes be a difficult exercise. In the field of criminal justice, there are always a great many factors that impel policy and affect the course of its development and implementation. Later in this chapter, the details of these observations will be delved into in order to illuminate and connect them to a more theoretical base.

Like other African countries, Ghana has been experiencing rapid social changes such as industrialization, urbanization, population growth and political experimentations aimed at social development (Little, 1965; Lloyd, 1967; Little, 1974; Gugler and Flanagan, 1978). The policy choices made by the Ghanaian leadership are always crucial in their consequences on the pace of socio-economic development. As Ninsin (1988:138) observes, policy expresses concretely the pattern of distribution of the costs and benefits of development among classes and groups, and it is the instrument by which values are allocated throughout society. However, policies are sometimes mediated by forces beyond the ken of decision-makers. Beattie (1986:471) notes that broad shifts in sentiment and large-scale social and economic changes formed the fundamental levers of change in the seventeenth and eighteenth century English

penal system. This observation is applicable to contemporary Ghanaian criminal justice system. Yet, within those larger forces, as Beattie argues, the speed and character of change is shaped by more immediate decisions of people in the courts or in the government, that is, those who contribute to the making of criminal justice policy. This reflects the role of human agency in the emergence, development and repeal of criminal law.

This chapter begins with a brief overview of the salient problems associated with policy and its analysis. This is because, although public policy is a fairly well established field of practice and academic enquiry, it is still plagued with serious definitional, political and methodological concerns that create problems in with respect to its conceptualization and the societal perception of its relevance (Rein, 1976; Quade, 1982).

This prefatory overview helps to situate the analysis of the policy of popular justice and its mechanisms of enforcement within the systems approach in order to explore the potential utility of that perspective. It is argued that although systems theory is valuable in helping to locate the system of public tribunals in the wider system of criminal justice in Ghana and in understanding its relationship with other procedures of justice as well as the environmental factors impinging on it, the approach is severely limited as it is unable to explain the critical and dynamic interconnections between the influences of capital on the state on one hand, and how the responses of the state in turn affect criminal justice policy, on the other.

### **The Focus of Policy**

A clear and concise definition of policy is problematic to produce since the word is used differently by politicians, senior executives of government, line managers and line staff (Ekstedt and Griffiths, 1984:97). Moreover, many of the definitions tend to be broad, potentially encompassing all of the relationships between the society and



the state (Addie & Thomas, 1987:191). For instance, Easton (1965) defines public policy as the authoritative allocation of values for the society.

The merit of comprehensiveness embodied in this definition is negated by the enormity of the research tasks it presents to students of public policy. Indeed, virtually all governmental actions and inactions result in the allocation of values, either material or symbolic. In modern pluralistic societies, only government can allocate values for the whole society, although interest groups and other powerful individuals can and do influence this process.

Similarly, Eulau and Prewitt define policy as "standing decision" characterized by behavioral consistency and repetitiveness on the part of both those who make it and those who abide by it (1973:465). Although this definition identifies some of the salient components of public policy, it entails the difficulty of determining the appropriate duration of a decision as a qualification for policy status. It is also unclear what constitutes behavioral consistency and repetitiveness, as well as who actually comprise the population of policy makers and policy abiders (Jones, 1984:26). Peter Solomon Jr. also defines policy this way:

By policy I mean the main thrust of an actor's approach to a problem, where the actor might range from a government to a ministry, an agency, or a person, and the problem might vary from a broad area of concern ... to a narrow one (1981:6).

While this definition reflects the diversity of actors involved in policy-making and the issues which may be the subject of policy, it is too vague and too all-encompassing to pass for a concise definition of policy. The "main thrust" of an actor's approach to a problem can refer to the underlying motivation or rationale for a given approach, or the impetus for pursuing that particular approach. Yet, the reasons for the formulation and implementation of policy are problematic to uncover, as the illustration in the final section of this dissertation will demonstrate. The purpose of policy suggested by its "thrust" may indeed be political, ideological or any of the myriad of objectives

theoretically conceivable to policy-makers. The purpose may be defined by less than rational, public-oriented concern.

Whether "thrust" means motivation, impetus, goal, focus or point, the fact of these possible interpretations reflects the ambiguity of the definition. Other definitions of policy also share this problem of vagueness.

Thomas Dye, in an attempt to resolve these definitional problems, has suggested that public policy must be seen as what governments choose to do or not to do (1978:3), that is, as a reflection of legal realism. This definition, according to Addie and Thomas (1987:192) summarizes the consensus of most writers that public policy consists of the actions of government. Yet, by treating policy as the decisions of governments, this definition commits the fallacy of viewing policy-making as a series of discrete, isolated events. This is rather artificial. Instead, policy should be seen as the outcome of a long series of more-or-less related activities and their consequences (Addie and Thomas, 1987:192; Quade, 1982:26-27). This approach captures the notion of "disjointed incrementalism" suggested by Lindblom (1980) as the more accurate description of the policy-making process. It is a process, not an event. The conceptualization of policy-making as a serial, prolonged (developmental) course of action taking place over time and involving a large number of decision points encapsulates the wider, underlying political forces that impinge on the policy-making process and its outcome, as well as the labile nature of the values and influences that motivate policy-makers.

According to Larsen (1982:47-50) policy is generally construed as "a decision which establishes the overall direction which a given organization will take regarding a given issue". This is congruent with Ekstedt and Griffiths' (1984:98) conception of policy as a superior decision that directs other decisions and sets out the way in which judgments can be made between alternative choices. This definition captures the notion of incrementalism and the constraining power of policy over other possible decisions.

It also has the advantage of establishing the value component of policy. Thus, policy can be seen primarily as an expression of meaning (Ekstedt, 1989:8) as well as a direct or indirect articulation of social value.

This conceptualization of policy seems to be the best possible approach as it regards policy as a dynamic, superior and constraining decision that makes judgments about what needs to be done, and in broad terms, how it should be done. In this way, the distinction between policy and policy-making is clearly revealed. Policy-making here refers to the process of "deciding what to do about a particular problem and communicating that decision to those persons and agencies responsible for carrying the decision into practice" (Ekstedt & Griffiths, 1984:98).

Policy then is a "thing", and policy-making an activity or process that facilitates the articulation of a "thing". This articulation is procedurally different from the implementation of the policy, the specifics of which process may be entirely outside the experience and purview of policy-makers.

### **The Nature of Policy**

Policy embodies power. As an expression of social value it constrains other alternative courses of action which would be expressive of other values. Like an institution, it represents the channelling of conduct in only one direction; it compels the recognition of its specifications as the real "thing". Policy sets up pre-defined patterns of conduct and thereby proscribes, at least temporarily, the several other directions that would theoretically be possible. (This point is connected to the pluralist paradigm which is discussed later in this chapter). Ekstedt and Griffiths aptly sum up the coercive, controlling power of policy in these words:

The power of policy is that it shapes, reflects and reinforces social values by the way in which it gives meaning to the activities of government; by the emphasis in practice it requires of its agents; and by the tone of the relationship it establishes between government and the citizens who are at once subject to its regulations and recipients of its services (1984:98).

Concerning the intent behind policy formulation, Waller makes the following astute observation:

The process of policy development is primarily a political process of satisfying a number of different interest groups. The process can be characterized in three alternative ways. There is the action to "neutralize" the symptom of crisis. The "altruistic" politician or policy planner wants to use the crisis to bring about a more lasting improvement in the country, often consistent with his or her personal ideology. There are also those who want to find the most "rational" solution by choosing between alternatives on the basis of reliable information (1979:205).

Policy can be seen not only as the articulation of intent and direction, but also as a form of ordering and an instrument of social control. This control dimension of policy has largely been ignored in the literature, yet it is perennially present in policy. Policy embodies value. As a superior, constraining decision, policy proscribes other decisions; sets up the parameters of appropriateness and inappropriateness; defines and gives meaning to the work to be done; regulates the conduct of its agents and subjects alike; and generally prescribes mechanisms for dealing with deviations from its specifications.

It must be noted that policy is not simply a statement of decision. It is a specific kind of decision that transcends the mere description of a "thing". As a superior kind of decision that impinges on the lives of significant segments of society, policy requires the input of valuable information. This is the notion of technocracy or the knowledge-base of policy-making and articulation. Considerable scientific and research information goes into many policy formulation processes. However, there are any number of factors as well as types of "knowledge" that come into play in policy formation.<sup>1</sup> Scientific knowledge intended to inform policy formulation may be compromised by subjective factors, or rejected in favour of other types of knowledge.

<sup>1</sup> Walter Wallace (1971) identifies four modes of acquiring knowledge and their concomitant types of knowledge: 1) authoritarian, 2) mystical, 3) rationalistic, and 4) scientific.

The political climate itself places limits on what kinds of change will be countenanced, how fast, and at what cost. The range of acceptable options is determined by partisan politics, administration politics, as well as agency politics. Thus, technocracy is constrained, and the social structure also limits the kind and amount of knowledge that would be employed in formulating policies.

### **Policy Analysis**

Policy analysis is defined as "the study of the nature, causes and effects of alternative public policies (Nagel, 1980:9). Its focus is the assessment of policy decisions; the identification of factors necessitating particular policy decisions; and the determination of the requisite conditions for the successful implementation of policies.

This is a form of applied research carried out to acquire a deeper understanding of socio-technical issues and to bring about better solutions (Quade, 1982:5). Policy analysis attempts to bring modern scientific and technological insights to bear on societal problems by searching for feasible courses of action, generating information and marshalling evidence of the benefits and other consequences that would follow their adoption and implementation. The objective is to aid policy-makers in choosing the most advantageous course of action in resolving the issues they face (Quade, 1982:5). The aim of policy analysis is improved public policy for engineering social well-being.

Policy analysis is essentially prospective: it has to do with the planning of future policies. It is seen as a vehicle for innovation. It is in this sense different from policy evaluation in two important respects, viz, the evaluation is retrospective and entails a bias against social change (Addie & Thomas, 1987:296). However, the methods of analysis employed in either one of these activities apply to the other more or less equally.

Policy analysis is an important field of activity. Policy analysis here is being conceived of as a process rather than a product. This process concerns itself with such

pertinent questions as: What interpretation can be made from the available information? What are the constraints and limitations worthy of consideration? (Ekstedt & Griffiths, 1984:144). Thus, policy analysis seeks to discover the best possible course of action for the resolution of particular problems. In doing this it relies considerably on knowledge and methodological approaches available in the political and social sciences.

Nevertheless, policy analysis is not a tight mechanism for choice (Quade, 1982:44). It lacks the rigorous, rigid scientific style of the physical sciences such as physics and chemistry. Although it attempts to use the methods of science and strives for the same traditions of explicit methodology, replicability or verifiability, this scientific orientation is balanced against the background of logistics of implementation and political and organizational considerations.

This means that public policy and policy analysis are procedurally affected by political exigencies, logistical considerations and contending values operative in the organizational context and the wider social system.<sup>2</sup> Indeed, these non-scientific, albeit prudential considerations are inexorably entwined in policy-making and its analysis. Thus, with reference to welfare policy, Paul and Russo Jr. (1982:79) have noted that the entire field is reducible to bedrock values and ideological perspectives that posit certain assumptions about human nature, political relationships, economic conditions, and societal obligations.

Given such dynamic issues of sentiment and ideology, the methods of policy analysis cannot but be quasi-scientific, leaving ample room for intuition, judgment and skill. It is this compelling fact that leads Quade (1982:43) to remark that the successful application of analysis to policy problems is an art, notwithstanding the availability of scientific principles and procedures which provide methodological guidance.

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<sup>2</sup> It must, however, be emphasized that this distinction between policy analysis and science is only a matter of degree. Science is not free of these influences as a separate "republic". Only idealized science can claim the status of value-neutrality and unconstrained operation.

Policy analysis is also faced with what Paul and Russo, Jr. refer to as "a veritable can of worms" (1982:9). This is the problem of political feasibility in the adoption of a given policy proposal resulting from analysis. The point here is that an analyst who is aware of the unlikelihood of her/his analysis and proposal being considered or adopted for fear of political repercussions is likely to tailor the proposal to suit the politicians. This introduces the element of bias or subjectivity in the process of analysis. In this way, the analysts' need to avoid frustration may affect the quality of their work and induce them to come up with what will be politically convenient.

### **The Systems Approach**

One of the dominant theoretical perspectives in policy studies is the systems framework. The systems approach has been widely promoted and used in criminological and other social scientific studies (Connidis, 1982). This approach emphasizes the concept of holism (the whole is greater than the sum of its parts); a focus on interrelationships among parts of a whole (or subsystems of a system); the concept of interdependency among system parts, and; the importance of the study of structure and function of a system and their relationship to each other. In this holistic conceptualization of system, researchers are directed to analyze the relations of one particular area of study to other elements in a given system (Connidis, 1982:12). The essential properties of a system are identified by Ackoff (1973:13) as the following:

1. The properties or behaviour of each element has an effect on the properties or behaviour of the set taken as a whole;
2. The properties and behaviour of each element and the way they affect the whole depend on the properties and behaviour of at least one other element in the set. Therefore, no part has an independent effect on the whole and each is affected by at least one other part;

3. Every possible sub-group of elements of the set has the first two properties, each has a non-independent effect on the whole. Therefore the whole cannot be decomposed into independent subsystems.

On the basis of this formulation, Berrien defines a social system as

a set of interdependent role components surrounded by a boundary of social norms which screen certain signal inputs from other systems and produce some service or product acceptable to another social system (1971:120).

This definition captures the concept of interdependence and also emphasizes the performance of a function as a criterion of a social system. According to Connidis (1982:13) a system's function is performed by a selection of inputs relevant to its function that are transformed into an output in the form of a product or service.

Another classic characteristic of a system is that it performs the function of goal attainment (Landsberger, 1961:219). This enjoins the systems analyst to delineate the goals of the system in order to determine whether or not they are attained and, hence, whether or not the system can appropriately be classified as a system (Connidis, 1982:15). This criterion, however, has been seen as too narrow in scope. As Connidis points out, "in many cases, social systems cannot be viewed as systems if specification of goals and goal attainment are prerequisites of a system (ibid.). In addition, to focus on the goals of a social system may tend to move analysis away from a social system's actual operation toward the analysis of ideal goals. Accordingly, Katz and Khan (1969:90) conclude that neither the specification of system goals nor goal attainment are necessary for defining social systems as systems.

Yet another important feature of the systems approach is the concept of open versus closed systems. Kuhn defines an open system as a "system that receives inputs from or releases outputs to its environment" (1974:28). Because of the continuous interaction between social systems and their environments they are regarded as open systems. Social systems (such as the criminal justice system) are exposed to influences



from other systems and are therefore, at least conceptually, treated as open (Connidis, 1982:19; Kuhn, 1971:109, Easton, 1968:429). On the other hand, the key characteristic of closed systems is that they can be isolated from their environment as all interactions take place among system components with no exchange occurring between the system and its environment (Kuhn, 1974:29). Closed systems are thus autonomous - they neither affect, nor are affected by external systems; they are self-reliant and hence unable to acquire negative entropy<sup>3</sup> (Connidis, 1982:21).

Berrien's definition quoted above introduces another salient feature of the systems perspective. This is the concept of boundary determination and its implications for systems research and analysis. In spite of (or perhaps because of) the conceptualization of social systems as open systems, it is imperative that the boundaries of the system be delineated in order to facilitate analysis of its operation and its interrelationships with other systems.

According to Connidis (1982:27) a system's boundaries are determined by its structural arrangements as well as by the functions it is expected to fulfil. To establish the boundaries of a system therefore requires that the character of the relationship of the parts within it are observed to be significantly different from the character of the relationship between the system and its environment. It must also be determined that the system in question is directly involved in performing functions only indirectly handled by other social systems.

It must be noted that the boundaries of social systems are, in large part, analytical constructs, and there is always a degree of closure or openness to most systems, be they social or physical.

The structure of a system refers to the ordering of its activities or organizational pattern. Cortes *et al.* (1974:8) define system structure as "an ordered set of

<sup>3</sup> Negative entropy is an attribute which enables open systems or organizations to maximize their ratio of imported to expended energy and to be insulated against moving toward disorganization or death.

interconnected operations performed by the elements of a system." System structure is not static; it refers to the interrelated flow of events and decisions which order the informal processes and behaviour of actors within it.

System structure, despite its dynamic quality, represents the most permanent feature of social systems. Indeed, Cortes *et al.* (1974:12) refer to structures as the "permanencies" and "long events" of systems. Besides, structural changes occur "discontinuously and abruptly" rather than "gradually".

Structure is crucially related to function. The structure of a social system determines how its functions are carried out (Cortes *et al.* 1974:5), and as such, structure is the logical starting point for establishing the boundaries of a system. It is important to "discover" functions in relation to structure because similar functions may be carried out by several social systems, while the structures for performing these tasks may be uniquely different. System boundaries can also be fine-tuned by relating structure and function.

The environment of a system is defined as comprising all the systems over which a decision-maker does not exercise control (von Giger 1978:25). In terms of this definition, an analysis of the introduction of public tribunals will have to include a systematic examination of as many environmental variables as possible. This would include the pre-history and contemporary history of the legal/judicial system as a whole; the relative effectiveness of the criminal justice system; the political economy of Ghana (the wider social system); and the world-view of the decision-makers who are themselves products of an interrelated set of systems and influences.

Similarly, the actual functioning of the tribunals as mechanisms of popular justice would have to be analyzed in terms of the external forces, i.e., the environmental factors that impinge upon it. How are other systems with identical goals operating? How is the international community reacting to these procedures for justice? What is the public's perception of the role of the tribunals? Who is bringing what

types of cases before the tribunals, and why? To a great extent, these are factors which lie outside the control of both the policy-maker and those charged with implementing the policy.

#### Assessment

This brief overview of the systems perspective has served to underline the concepts of holism and interdependence among system parts; the importance of conceptualizing social systems as open systems; and the need to determine the boundaries of a system by emphasizing its structure and functions.

The value of a systems perspective lies in its emphasis on holism and interrelationship among parts of a system. By using this perspective public tribunals can be rendered as understandable government procedures with a pre-history, a history and a mission for goals of justice. They can be seen not as lunatic representations of the radicalism of trigger-happy soldiers, but as part and parcel of a grand system of structures and events long ante-dating the policy-makers.

The system's perspective also enables the analyst to appreciate the environmental forces that impinge on the wider social formation (system) of which the judicial system is a sub-system, and in which the tribunals are situated. This underscores the need for a perspective that emphasizes holism in policy analysis, especially in the context of a "global village" politics.

Nevertheless, this holistic approach does not enhance understanding of the dynamic role of capital, the state, and interest group politics in the policy formulation process beyond merely recognizing their existence and interrelationships. A deeper appreciation of these dynamics requires that attention be turned to other theoretical perspectives that go beyond the specifics of bureaucratic decision-making to consider the myriad of forces that influence the process. The following sections examine such theoretical frameworks in the sociology of law tradition.

### **Dominant Paradigms in the Sociology of Law**

Three central issues in the sociology of law pertain to the origins of law, the social forces that influence and shape legal enactments, and the processes (and prospects) of instigating change and reform through law (Brickey and Comack, 1986:21). A number of general theoretical paradigms have influenced the study of these issues. Some of the notable paradigms are pluralism, legal realism, marxism, neo-marxism and feminism. In recognition of the strengths and limitations of these paradigms in informing sound sociological research and analysis, it has been argued that a mature sociology of law requires a synthesis of these paradigms (Ratner *et al.* 1987:118), with specific case studies. It is held that such an eclecticism supported by empirical data derived from specific instance studies would enhance our understanding of the etiology, development and role of law (both criminal and civil) in society; that such an approach would help overcome the partial-knowledge problem with which many of these paradigms are imbued, as well as contribute to a wider appreciation of law in the advanced capitalist state.

In the following sections, I review the salient aspects of these paradigms, and comment on their significance for understanding criminal law in developing countries like Ghana. The usefulness of structuralism and the Capital-Logic approach (which represents an attempt to integrate the various neo-marxian theories of state-society relations) for understanding the emergence and development of public tribunals in Rawlings' Ghana are also critically considered.

### **Theoretical Perspectives**

Both the modern advanced state systems of the developed capitalist world and the neo-colonial states of Africa, Latin America, the Caribbean and Asia essentially developed under the influence of a bourgeois class. Although the subsequent rise of a labour movement has resulted in some curtailment of the influence of the bourgeoisie in the processes of law making and state regulation of people in society, Miliband (1970) convincingly argues that the power of labour has never managed to match that of the bourgeoisie. As Kueneman (1987) points out, despite some advances made in democratizing the state apparatus, it still remains a political and legal structure committed to the protection of the interests of property. Hay (1975) also demonstrates the centrality of the criminal justice system to the maintenance of property and the promotion of capital accumulation in Eighteenth Century England, a phenomenon that is replicated in many contemporary state systems such as Canada (Smadych, 1986; Reasons, 1981).

In light of the foregoing, it is imperative to ask the following questions: What is the role of law in the processes of oppression? Is the law in capitalist and neo-colonialist societies an instrument of class domination or an instrument of liberation? With particular reference to the neo-colonial state of Ghana, what factors influenced the emergence, development and neutralization of public tribunals? To answer these questions, attention must be turned to theories of the state and law. The following sections explore the dominant perspectives on the state and law - legal realism, pluralism, neo-marxism and feminism, and with special reference to the Third World, Sumner's (1982) approach to the study of crime, justice and underdevelopment.

### **Legal Realism**

A variant of sociological jurisprudence commonly associated with the American Realists, legal realism asserts (albeit implicitly) the centrality and primacy of law vis-à-vis other aspects of social life (Gavigan, 1986:103). This perspective eschews

what Gavigan calls "black letter" jurisprudence and focuses attention on the social context, economic, psychological and political forces acting upon law (Hunt, 1976). The social consequences and political implications of law for policy constitute the centre of enquiry, and the abstract formalism of analytical jurisprudence is rejected by legal realists. As a reaction to the logical and formalist excesses of legal positivism, legal realism does not take law for granted. Instead, it focuses on the relevance of law for the "real world" (Lloyd, 1976:213).

In this paradigm, the prejudices of judges, the psychological and socio-cultural factors that impinge upon law and affect legal decision-making are considered the important issues requiring the attention of any lawyer or legal scholar worth her salt. To the legal realists, the important thing is not so much what courts say but what they do (Lloyd, 1976:215). To understand the functioning of law it is not sufficient to concentrate attention on the activities of legislators, courts, or other tribunals; the factors that give law its social reality are also crucial.

Legal realism, most significantly reflected in the writings of Justice Oliver Wendell Holmes and Karl Llewellyn, has two aspects which Lloyd identifies as: a) a technique of predicting decision-making, and b) an attempt to achieve a profound understanding of the functioning of the legal system with a view to rendering it a more effective means of social control and of attaining the aims of society (1976:215).

This perspective has been criticized for failing to pay attention to the very foundations of the law itself; for being overly positivistic - its adherents become slaves of method; for minimizing the importance of examining the existence of established laws; and for concentrating on the highly uncertain points or areas of law (Lloyd, 1976:215).

Thus, although Legal Realism has the advantage of sensitizing us to the personal sources of bias in the actual workings of law - law in action, it fails to grapple with the structural, class and gender dimensions of law. It is, therefore, an inadequate

theoretical paradigm for understanding class biases in law and the systemic control of minority groups such as the subjugation of women in patriarchal capitalist society. As well, it is unable to explain the fact that in large areas of legal transactions, there are clearly-defined rules, the application and effect of which there can be no doubt.

### **Pluralism**

The pluralist paradigm is a derivative of the structural functionalist perspective in sociology with its emphasis on the consensual conception of social order characterized by a high degree of shared values. In spite of this consensus, it recognizes that the historical, sometimes overly romanticized, fundamental characteristic of small-scale societies, namely the consensus of beliefs and values, have been replaced by the sectional interests of divergent groups in contemporary pluralist society seeking to protect and promote their interests.

This situation, according to pluralists, creates the possibility for a number of conflicts which are limited in both scope and intensity, and which must be mediated by the state in order to maintain the condition of equilibrium deemed so vital for the orderly and pacific operation of the social system. The state, in this formulation, is not the instigator of social policy (including law) but simply an agency for facilitating agreement (Kariel, 1968). Political parties and elite coalitions which intermittently receive conflicting demands from various interest groups aggregate and represent those demands to the state (Alford, 1975:146). Thus, "the state is visualized as a mosaic of agencies and organizations, each of which is an institutionalized response to an historic sequence of demands and responses to those demands" (Attafuah, 1987:46).

Pluralists argue that power in capitalist society is dispersed among a range of visible, competing interest groups, none of which is capable of dominating the others consistently. Power is fragmented and partitioned along democratic lines, ensuring adequate representation of the interests of various groups in society. Alliances and

coalitions may be struck by any number of interest groups, but such alliances are essentially unstable, and shift in accordance with the purposes to be pursued. Different groups of elites embody power and influence governmental policy making. The state is viewed as a legitimate force serving as an impartial umpire in the regulation of conflicts among competing interest groups - a neutral forum for the arbitration of disputes. In this formulation, policy outcomes represent shared consensus established in accordance with rules which are generally agreed upon.

Proponents of this liberal-pluralist position maintain that the legal and political systems are hived off from the direct determination of economic interests, and the state superimposes the "interests of all" over the interests of the particular (Ratner *et al.* 1987:90). Laws represent a condensation of competing interest groups sanctioned by the authority of the state, and the operation of the coercive apparatus of the state (that is, the criminal justice system) is seen as embodying popular consent. The doctrines of "the rule of law", "equality before the law" and "due process" are held to be well-meaning, consensus-based articulations of genuine equality, impartiality and protection of the rights of the disadvantaged segments of the population.

This perspective has little analytic usefulness for understanding the oppression of women, native peoples, the underprivileged, working class people and other minorities. While it holds the state and the law as autonomous entities regulating public conduct, it fails to see the critical interconnections between the state and law, on the one hand, and the economic processes of production and the acquisition of power, on the other. As Ratner *et al.* observe,

The state is ultimately dependent upon the productive wealth of the economy in order to implement its policies and is thus compelled to reproduce the general viability of the economic relations of capitalism... The state and the law, including its coercive institutions, is therefore implicated, directly, in securing and bolstering the social foundations of vested capitalist interests while claiming universality and impartiality (1987:90).



By conceptualizing the state simply as an agency for facilitating consensus (Kariel, 1968), pluralism plays down the marginalization of minority groups through legislation and social policy. As Keuneman (1987) points out, the pluralist paradigm reflects the ideology of western liberalism, which views government as a mechanism that reflects the interests of the majority in its legislative and administrative functions.

The emphasis accorded the centrality of competition by interest groups which are perceived to receive equal audience from the state is tantamount to victim-blaming. The marginalization of minorities and working class people and their limited influence in policy-making arenas are explained in terms of lack of motivation for organized action and/or organizational incompetence. Yet, as Miliband astutely observes,

What is wrong with pluralistic-democratic theory is not its insistence on the fact of competition but its claim (very often its implicit assumption) that the major organized "interests" in these societies, and notably capital and labour, compete on more or less equal terms, and that none of them is therefore able to achieve a decisive and permanent advantage in the process of competition. This is where ideology enters, and turns observation into myth (1969:131).

Interest groups possessing superior organizational and economic resources are better able to influence policy makers and to thereby attain their objectives than are groups possessing fewer of these attributes and resources (Thompson and Standbury, 1975; Attafuah, 1987). While state policies sometimes reflect public opinion and the congruence of interest group demands with the ideological orientation of the ruling elites (Attafuah, 1987:188-9), the possession of valued (often economic) resources enhance the capacity of groups to tilt governmental decisions in their favour. These issues are inadequately grappled with by pluralists.

### **Neo-Marxism**

The neo-marxist perspective is linked to Marx's theory of society which included his political economy theory. Neo-Marxist theories of the state represent the

attempts of some scholars to continue on where Karl Marx left off - to develop a coherent theory of politics and/or the state (Knuttila, 1987:83). Neo-Marxist theories of the state, based on the fundamental materialist approach of Marx, include the study of deviance; the sociology of law in its stages of emergence, interpretation and action; and the study of the welfare state itself.

Criminological proponents of this perspective come primarily from the related but differing streams of research in the "new criminology" and conflict theory generally, where the focus of inquiry is shifted from the pathologies of individuals and collectivities, to the structural "pathologies" of the state itself. This wholesale shift of enquiry from individual to state pathologies has had a profound impact on criminology. To a neo-Marxist criminologist all the tedious tinkering with reform of the criminal justice system is an exercise similar to the rearrangement of deck chairs on the Titanic.

The neo-Marxist theories of the state embrace four separate "auxiliary hypotheses", viz: instrumentalist, structuralist, Gramscian class-conflict and capital logic-paradigms.

### **Instrumentalism**

As a critic of the pluralist approach, Ralph Miliband (1969), the chief proponent of instrumentalism, emphasized the Marxian concept of class to demonstrate the symbiotic relationship between the interest groups of capital and the state itself (Knuttila, 1987:107-109; Ratner, 1986:29-30). In the instrumentalist view, "...the state is regarded as the direct instrument of class rule and the law and criminal justice apparatus as tools of class domination" (McMullan, 1983:7). In effect, those who dominate economically, rule politically. Thus, apart from very exceptional circumstances, the state is said to act at the behest or command of the capitalist class (Brickey and Comack, 1989:316; Bierne and Quinney, 1982:16).

This perspective is based on the idea that processes of the superstructure in capitalist society are determined by the economic base. In the words of Jessop (1982:12) "the economic base determines the balance of political forces in the struggle for state power as well as the institutional form of the state as an instrument over whose control political struggle is waged." The ruling class, by virtue of its economic power, is therefore able to manipulate the institutions within the state, including the criminal justice machinery.

The central tenets of the instrumentalist position are supported by a mounting body of research evidence reflected in such eminent works as those of Beattie (1986), Hay (1975) and Thompson (1977). According to Beattie (1986) the imperative of maintaining the "King's peace" was critically linked to the advancement of capitalist economic pursuits. Hay (1977) also demonstrates the use of terror - "the raw material of authority," - majesty and mercy in the maintenance of the *status quo* which facilitated the promotion of capital accumulation by the propertied class of seventeenth and eighteenth century England. Similarly, Thompson's analysis of the origins of the *Black Act* (1977) indicates the use of legal enactments to advance economic interests of the dominant class in England.

The concordance between the ideas of these legal historians and the instrumentalist position is, however, not total. The works of Beattie and Thompson clearly reflect the primacy of human agency and struggle in legal enactments as well as the ability of the dominated class to exploit the "rule of law" rhetoric to achieve legal reforms that may be inimical to the immediate interests of the ruling, capitalist class.

Thus, the instrumentalist view of the law as a tool of the ruling class (Quinney, 1975:194) and its rejection of the doctrines of *rule of law* and *equality of all before the law* as mere ideological "masks" are not sustained by empirical data. As Chunn and Gavigan (1988:112) point out, the instrumentalist version of law as social control

obfuscates the reality of law as a site of struggle where women and other oppressed minorities have made gains that run contrary to the interests of their oppressors.

The instrumentalist position can therefore not account for a variety of legislation (such as employment standards, human rights legislation and workplace and health and safety regulations) which seek to place limits on capital accumulation and hence are not in the interest of the capitalist class (Brickey and Comack, 1989:317).

Similarly, the homogeneous conception of the capitalist class inherent in the instrumentalist view is debunked at the altar of analytical scrutiny of the composition of this class; it is arguable that the capitalist state system will not function differently were it controlled by other classes. The instrumentalist view thus ignores the structural constraints which operate to place limits on the state. It is also unable to reconcile its assertion of the class-based nature of law with the existence of democratic ideals and principles which the legal order claims to uphold, and which many people in capitalist society consider to be "fair" and "just".

In summary, instrumentalism, based on a narrow reading of Marx and Engels' famous polemical statement that "the executive of the modern state is but a committee for managing the common affairs of the whole bourgeoisie" (Marx and Engels, 1975:82) contends that the state acts at the behest of the capitalist class. Instrumentalists maintain that the processes of the superstructure (state, law, courts, armies, police and prisons) are determined by the economic base of society, and that all political and legal institutions within the state are tools to be manipulated by the capitalist class as a whole. Thus, instrumentalism posits a direct correspondence between class power (ownership of the means of production) and state power (Brickey and Comack 1986:18). The doctrines of "rule of law" and "equality before the law" are regarded as ideological masks or devices of mystification.

The "law as a tool" thesis inherent in instrumentalism limits the ability of this perspective to explain non-instrumentalist pieces of legislation. The instrumentalist

perspective also tends to view the ruling class as a single unified category, a view which lacks empirical validity. There is no doubt that in many social formations, there exists a small group of individuals who wield considerable power. However, those powerful individuals do not necessarily constitute an elite - a "cohesive, self-sustaining, and self-serving group" (Merger, 1981:81). Furthermore, as Conklin (1987:453-4) points out the powerful individuals are not only heterogeneous along diverse dimensions and sources of power but they also do not always have coordination of their interests and often bitterly disagree on important policy issues. In addition, by reducing the exercise of power to volunteerism on the part of powerful people, instrumentalism amounts to no more than a conspiracy theory devoid of any analysis of the limitations and structural constraints with which the powerful in society have to contend.

### **Structuralism**

Structuralism, in contrast, rejects the instrumentalist view of the law as an instrument at the command of the ruling class. It also discounts the Weberian premise that the legal order in capitalist society attains an autonomous status as it advances toward "formal rationality" (Milovanovic, 1988:69; Burtch, 1992:36). Instead, structuralism conceives of the state as being partially independent of the capitalist class and yet acting on behalf (not at the behest) of capital.

Structural Marxists reject as untenable, the instrumentalist conceptualization of the state as a pliant tool of the ruling class that is alternately concealed, misrepresented and brandished on behalf of capital (Burtch, 1992:36). The essential determinants of social life are not seen as a function of economic forces. This is because structuralists recognize that there is a plethora of research evidence that demonstrates that the state in capitalist society assumes and maintains greater autonomy in addressing the diverse and sometimes conflicting interests of various constituencies, including social groups (Burtch, 1992:36).

According to structural Marxists, the state is a relatively autonomous "organizer" mediating between the two conflicting classes of capital and labour; yet it is a mediation that facilitates capital accumulation and legitimation. To the extent that the state remains a relatively autonomous entity, legal and judicial institutions within it also maintain and reflect their own internal cohesion and degree of autonomy (Ratner *et al.* 1987:104-5). Hence it is possible to understand the enactment of legislation that does not serve the immediate interests of capital, and some that may indeed benefit labour (Gavigan, 1986; Smandych, 1986; Thompson, 1977). Similarly, it is observed that the capitalist class is not immune from legal sanctions, reflecting the relative autonomy of the criminal justice system and its component parts (Ratner *et al.* 1987:114). This "relative autonomy", as Brickey and Comack point out, "enables the state to transcend the parochialized interests of particular capitalist class members and thus ensures that the long-term interests of capital are protected" (1986:19). In structuralist theory, the dynamic role of the relatively autonomous state in regulating capital-labour relations, and social relations generally, as well as the influence of human agency,<sup>4</sup> social movements, resistance, and class struggle in reshaping the social formation are emphasized (Burch, 1992:36).

In effect, structural Marxists argue that the capitalist state is relatively autonomous in its relationship with individual capitalists and their interests (Smandych, 1986:55). This partial independence of the state guarantees the longevity of the process of capital accumulation as a whole (Brickey and Comack, 1989:318). By the same token, the legal and judicial institutions within the state structure maintain their own internal cohesion and degree of independence (Ratner *et al.* 1987:108-115).

The concept of relative autonomy of the state integral to recent revisionist versions of structuralism enables this perspective to account for the presence of laws ostensibly

<sup>4</sup> Brian Burch (1992:36) succinctly defines human agency as the importance of ideas, consciousness and personal actions.

designed to control the actions of capitalists (such as anti-combines legislation) as well as laws which favour workers (for example, legal limitations on the length of the working day). Structuralists point out, however, that the rights and liberties embodied in the rule of law are limited, as the provisions of formal equality in the legal sphere does not extend to the economic sphere (Brickey and Comack, 1989:319). Besides, there is often a disjunction between formal equality and substantive equality.

To Poulantzas, the object of enquiry in neo-Marxist state theory is the mode of production, with its four contained levels of economy, politics, ideology and theory (Knuttila, 1987:109-111). In this thesis the relationship between the state and capitalism is not symbiotic and subjective as suggested by Miliband, but objective. Poulantzas argued that it was sometimes desirable for the state to regulate diverse factions of the capitalist class to save them from themselves, by attending to the preservation of capitalism itself in a structural role (McMullan, 1983:9). According to Poulantzas, the state is not an instrument but a relation. The state functions as a cohesion between the elements of the relation. This requires the relative autonomy of the state, the ability of the state to protect capitalist ideology from the "failings" of not only the working classes but the capitalist class itself (Ratner *et al.* 1987:85-125).

Structuralism marks an advance over instrumentalism in theorizing on the nature of law in capitalist society. Despite its advantages, the structuralist perspective is overly deterministic since it reduces individuals to mere "agents" of the structure. Structuralism cannot explain or incorporate class action which arises from class consciousness as it posits that it is the constraints and limitations of the structure which determine the direction of society. According to Brickey and Comack (1986:20), the "relative autonomy" concept is also problematic because the specific factors which determine the state's degree of autonomy from economic relations are yet to be convincingly explained (1989:319). This criticism, however, ignores recent thinking on the concept as reflected in the work of Ratner, McMullan and Burch (1987).

### Class Conflict Theory

For class conflict theorists, the ideas of praxis and struggle are central to a meaningful conceptualization of the state (Ratner *et al.* 1987:94). According to Antonio Gramsci, the chief proponent of this perspective, the primary role of the state is the regulation of the economy for private capital accumulation. The state also has a crucial role in developing a class-based moral order or consensus that organizes social, civil and intellectual life around the structural tendencies determined by the economy (Ratner *et al.* 1987:94). This perspective recognizes the contradictory nature of the state and directs attention to the processes whereby the state is compelled to function beyond the dictates of the prevailing mode of production (*ibid.*, p.96).

Gramsci emphasized the primacy of civil society (consensus) over political society (force), and the strength of the ideological superstructures over the economic structure (Carnoy, 1984:69).

The concept of hegemony is integral to the class conflict perspective. It refers to "the ideological predominance of the dominant classes in civil society over the "subordinate classes" (Carnoy, 1984:69).

Gramsci uses the term *cultural hegemony* to describe the principle that, in any repressive system, the dominant group will seek to impose its values, attitudes, norms, beliefs, morality and other cultural preferences on the rest of the populace which is encouraged to adopt these preferences as their own, and to defend them with all the resources they can marshal. The intent of the dominant group is to maintain and enhance its own advantageous position. According to Gwynn Williams (1960), the concept of hegemony describes

an order in which a certain way of life and thought is dominant, in which one concept of reality is diffused throughout society in all its institutional and private manifestations, informing with its spirit all taste, morality, customs, religious and political principles, and all social relations, particularly in their intellectual and moral connotations.



This means that the philosophy (ideology) of the ruling capitalist class is reproduced through complex state structures, including the mass media, to become known, by attrition, as "common sense". This formulation renders understandable what the instrumentalist perspective finds inexplicable: why most people in capitalist society consider the state and its coercive institutions as "just" or "fair".

Raymond Williams (1962:125) argues that an authoritarian system of control aims at the protection, maintenance and advancement of a social order based on minority power. It is a system in which the means of communication is monopolized by the ruling elite as an integral part of the political system, although as Miliband (1969:164) points out, neither a total monopolization of the mass media nor the repression of all alternative conceptions of reality is a precondition to the successful indoctrination of the populace. According to Miliband, effective indoctrination such as obtains in advanced capitalist societies does not necessarily require monopolistic control of the media and the prohibition of opposition:

It is only necessary that ideological competition should be so unequal as to give a crushing advantage to one side against the other (1969:164)

The goals of ideological hegemony are thus better served in an atmosphere of competition rather than monopoly over the instruments of communication, thereby fostering the pervasive illusion that indoctrination or brain-washing belong elsewhere - in totalitarian, dictatorial, one-party state systems. In this sense, while the process of dissuasion or the 'engineering of consent' in capitalist society is the result of a permanent and pervasive effort organized through several agencies, both state and private (Miliband 1969:163-4), the subjects of ideological hegemony do not interpret their support for the political system as a function of indoctrination but as wilful subscription to cultural orthodoxy in conditions of pluralistic competition which imply freedom from control and the exercise of free will.

This situation is made possible and plausible by the very nature of pluralism. As Berger and Luckmann (1966:143) point out, pluralism "encourages both scepticism and innovation and is thus inherently subversive of the taken-for-granted reality of the traditional *status quo*". Thus, privately-owned American television networks do not consistently present a unified cultural perspective (Kellner, 1979), unlike the situation in North Korea, or Socialist Soviet Union before the era of Perestroika and Glasnost. Yet the existence of sub-universes articulating different conceptions of reality in pluralistic societies must be integrated into the core symbolic universe in order to be legitimized. The coexistence of partial universes and the core universe in a state of mutual accommodation (Berger and Luckmann, 1966:142) disguises the hegemonic character of the core universe via the processes of indoctrination.

Thus, although American television networks present, to some degree, the variety and contradictions that exist in American culture, they overtly try to convert viewers to the dominant culture through commercials, and subtly canvass support for the *status quo* (Conklin, 1987:78), a fact of which many Americans are virtually oblivious at best, or totally ignorant.

In advanced industrial societies, whether capitalist or socialist, a repertoire of legitimation apparatuses exist for ensuring hegemony. Control of the mass media is but one potent and veritable way of establishing cultural hegemony; the legal, family, religious, political, educational and economic institutions all contribute immensely to the maintenance of hegemony.

The state, according to Gramscian class conflict theorists, is the site and agency of class struggle, where popular consent is forged (Ratner *et al.* 1987:98). The state enjoys a potentially high degree of autonomy as an "alternative force" since it is subject to "mobilizations from below", and to pressures from the dominant class (Ratner, 1987:99).

The concept of hegemony has great value in furthering our understanding of the workings of the capitalist state and structure of civil society; it has broader dimensions of analysis than the basic unmasking of "conventional wisdom" and the exposure of bourgeois subjective ideology. Hegemony also has implications for understanding the issue of power or control. As Taylor (1987:202) correctly points out, "the most effective form of domination in a capitalist society is achieved not via coercion but by "the manufacture of consent". Accordingly, in the liberal-democratic state, the maintenance of power in the interests of capital is achieved ideally by popular consent. The subordinate group members tend to agree with, and believe in the capitalist ideology and therefore consent to be controlled by its interests. Simultaneously, however, they do not comprehend this consent as submission to control because, in the words of Douglas Hay,

An ideology endures not by being wholly enforced and rigidly defined. Its effectiveness lies first in its very elasticity, the fact that men are not required to make it a credo, that it seems to them the product of their own minds and their own experience (1975:55).

Thus, hegemony can be described as an effect of elastic capitalist ideology seeking control of the social relations of production through the subtle yet dominant manipulation of individual and mass consciousness. In this way, a capitalist belief system is established.

In any state system, whether capitalist or socialist, the law enacted to protect the interests of this belief system not only acts selectively but presents itself quite successfully as being just, impartial and incorruptible. In the context of seventeenth century England, Hay (1975) notes that the law formalized the official deification of property which in turn became a social contract barometer whereby ". . . even human life was weighed in the scales of wealth and status" (Hay, 1975:15). Hay identifies three distinguishable aspects of the law as ideology: majesty, justice, and the prerogative of mercy. The theatrical overtones of contemporary Ghanaian and

Canadian courtrooms and the continuing mystification of law (Sumner, 1982:260) attest to the illusion of majesty associated with the law.

The ideology of capitalist justice is given integrity via the widespread notion that the law is the guardian of all members of civil society. The element of mercy also finds expression in the provision of character references (by people of property) which bears more weight in mitigating the outcome of the trial for the accused (Hay, 1975:26-47).

Ian Taylor makes three points about the theory of hegemony which require emphasis: first, that the state is given an absolutely central role as the site where the ideology of social and economic relations of capitalist society are reproduced; second, that working-class and popular acceptance of bourgeois domination should be seen as a reflection of the fact that the state does respond to popular needs and demands; and third, that there should be a recognition of the conditional character of working-class acquiescence to domination (1983:203-4).

Bourgeois hegemony, however, is never absolute: it is a dynamic and continuous process. In relation to the Ghanaian context, the relevance of the Gramscian theory of hegemony is easy to locate, due in large part to the pervasiveness of economic, political and ideological crises in the history of Ghana. These crises are further elucidated in Chapter IX.

The Gramscian perspective has one major limitation: while it avoids the economic reductionism of the instrumentalist perspective and the determinism of the structuralist view, class conflict theory marginalizes the process of capital accumulation and the ways in which the coercive and ideological practices of the state and law are limited by economic forces. Panitch observes that there is

an ideological hegemony emanating from both the bourgeoisie and the state which is awesome, which is reflected in the sheer pervasiveness of the view that the national interest and business interests are at one (1977:13).

The coercive and ideological practices of the Ghanaian state and its legal system have been heavily circumscribed by local and foreign economic influences. Locally, the activities of merchant companies, "market mummies"<sup>5</sup> and the petite-bourgeois traders and speculators have constrained many coercive acts, legal enactments and ideological leanings of governments in both colonial and post-colonial Ghana. Foreign economic forces represented largely in multi-national corporations such as Lornhro, Kaiser Aluminum Corporation and Unilever, have significantly constrained the capacity of

<sup>5</sup> For a long time, the traditional "middleman" role in the food-crop sector of the Ghanaian commodity market has been played by women. They specialize in the procurement and retail of a wide variety of food-crops such as yams, plantains, maize, fruits and vegetables. Women traders in the markets are known as "market mummies". They dominate and control the several open-air markets and market complexes such as the Adum, Central and Kajetia markets in Kumasi, and Kaneshie and Makola Nos. 1 & 2 markets in Accra. They also form various Market Women's Associations. These are self-help organizations or informal credit unions that regulate and control the retail trade in particular primary commodities. They are headed by powerful female merchants known as "queens".

Women's control of retailing in Ghanaian markets is buttressed by traditional cultural values and norms which define petty-trading and food-stuff or grocery shopping as female activities. For example, Ghanaian society typically scorns men who are seen in the markets buying groceries. It is viewed as degrading and demeaning for a man to do such chores. Further, it is considered as a sign of failure (not having a wife or daughter) and/or weakness (being afraid of one's wife or being a hen-pecked man).

Women jealously protect their economic interests in the markets. They commonly hoot at male fish-mongers and tomato traders, for example. Through a combination of naked hostility, sarcasm and ridicule, women effectively prevent men from entering these sectors of the economy. However, both men and women trade in cosmetics, garments, textiles, construction/building materials and other processed commodities. The following are some of the social norms governing male-female participation in the retail business in Ghana: (1) Women can trade in any commodity of their choice; (2) Women sell in "stalls" (cubicles) in the marketplace while men sell in stores outside the marketplace; (3) It is not acceptable for men to buy or sell primary commodities or food-crops; (4) It is acceptable for men to sell non-primary commodities so long as the trade takes place in stores spatially removed from a marketplace. On my visits to Kaneshie, Makola and Kajetia markets during my field research in 1990, I observed a few males in auxiliary or support roles to women traders. I sensed that these attitudes toward male-female participation in the retail sector of the Ghanaian economy are gradually changing.

In the past, market mummies mobilized themselves to oppose unpopular government policies that aimed at restricting their activities, including government stipulated (control) prices for specified commodities. With the worsening of the Ghanaian economy throughout the 1970s, the power of market mummies increased considerably, and many of them came to be resented as champions of *kalabule*. The public display of opulence and arrogance by some of them, their disdain for academic pursuits, and their collective disrespect for the junior ranks of the police and the military became well-known. During the AFRC era in 1979, soldiers used bulldozers to raze the huge Makola No. 1 market, widely perceived as the citadel of *kalabule*. Nevertheless, the demolishing of the market and the subsequent prosecution and maltreatment of several women did not produce the naively-expected fall in prices.

post-independent Ghanaian governments to act in decisively coercive and ideological ways in some instances, with regard to fiscal and monetary policies that would regulate the export of capital even when such actions would apparently benefit equally the ruling elite and the foreign capitalist concern. As with the experience with multi-national corporations world-wide, local national governments are often incapable of resisting the pressures to become docile puppets financially disabled and dependent. The fear of flight of capital is real and compelling; the debilitating impact of being labelled hostile to foreign capital investment in the international financial community 's gripping and total, one that most neo-colonial governments sternly seek to avoid. Food aid, donor capital from foreign (Euro-American) governments and multilateral investments all constrain recipient states which are thereby cajoled into "proper" behaviour.

The class conflict approach, despite its impressive insights, is an inadequate framework for understanding the influences on state-law and state-society relations in Ghana as it diminishes both the process of capital accumulation and the constraints imposed on the state and its criminal justice system by powerful economic forces - factors that are vital to a deeper appreciation of the emergence, development and repeal of criminal law in Ghana.

### **The Capital-Logic Approach**

This perspective is an attempt to integrate the three Marxist positions on the nature of the state and law in capitalist society. It holds that politics, ideology and culture must be viewed as more or less directly connected to the process of capital development, and that the ideological nature of law and the state are a function of the "logic" of capitalist economic relations as articulated by Karl Marx in *Capital* (Ratner *et al.* 1987:97). Changes in the economic structure, class dynamics, and changes in the balance of political forces impinge on the efforts of the state to secure the conditions for capital accumulation.

In this formulation, there are three distinct "moments" in the development of the capitalist state: the "laissez-faire" moment when the preconditions for capital accumulation are laid; the "liberal" moment characterized by the full separation of politics and economics, and the "monopoly" moment - the contemporary period in which the socialization of production generates a declining rate of profit (Ratner and McMullan, 1989:235).

In the first moment, the state lacks autonomy from the economic forces in society as it acts primarily at the behest of the ruling class, as articulated by the instrumentalists. During the second moment of liberal capitalism, the state acquires relative autonomy. Exploitation is masked in legal form underpinned by such doctrines as "rule of law", "fairness" and "equality" which conceal the actual content of substantive inequality in economic and social relations. Yet, law is not merely a bourgeois artifice since it "also reflects the influence of sustained class struggles, notably in the extension of the franchise to dominated classes and later in the establishment of social welfare programmes (Ratner *et al.* 1987:97).

The criminal justice machinery then constitutes the outcome of struggles waged in the formulation and application of the laws facilitating bourgeois hegemony. The state has relative autonomy at this stage.

In the period of monopoly capitalism, the state becomes the locale of conflict between competing capital and organized labour. The relative autonomy of the state is magnified at this stage in response to the political crises of accumulation (Ratner *et al.* 1987:97). The power of the state is only minimally restrained by the rule of law. This is the prototype of the "exceptional state" (Ratner and McMullan 1983). The central claim of capital-logic is that the nature and functions of the state can be derived from the major laws of motion of capitalism. In order to understand the ideological character of law and the state, it is necessary to understand political economy (Ratner, 1986:33-4).

The capital-logic approach maintains that law and state function to secure the conditions for capital accumulation in accordance with the developing "logic" of capitalist economic relations (Ratner *et al.* 1987:99). This perspective holds that the state remains partly subject to changes in the balance of class forces. According to Ratner and McMullan (1989:234), the capital-logic approach examines the nature, functions and forms of the capitalist state in relation to the autonomous dynamic of capital. In so deriving the state as a political form, the approach avoids highly economistic and political interpretations which indefinitely theorize state actions in relation to the systematic determinants and exigencies of the accumulative process. The economy and the state are treated as different levels of a totality in which the logic of capital is predominant.

In sum, this perspective, which explicates the character of the three moments of the capitalist state, sees "criminal justice" as representing the eventual outcome of "class struggle over the framing, application, and enforcement of the legal fetishisms arising from the attempted legitimation of bourgeois hegemony" (Ratner and McMullan, 1989:235).

The capital-logic approach is considered as a synthesis of the instrumentalist and structural approaches, and the Gramscian "class theoretic" position (McMullan and Ratner, 1983:11-2). The major advantage of this synthesis is that its analytical sophistication "enables an account of the structural constraints and human agency in complex dialectical interplay", and "offers the best prospect for further theoretical explorations of 'criminal justice' in the advanced capitalist state" (Ratner *et al.* 1987:118).

Precisely because of its theoretical sophistication and emphasis on a clear-cut demarcation of the three moments of capitalist state, however, the capital logic approach appears to have limited value for understanding state-society and state-law relations in developing, neo-colonial states such as Ghana. For example, it is doubtful



whether the liberal moment of capitalism characterized by "the full separation of politics and economics" has ever been reached in any neo-colonialist Third World country, or ever will be. Yet, it is in this moment that "exploitation is codified by disguising it in legal form (standards of 'fairness' and 'equality'), thus masking the real content of unequal social and economic relations" (Ratner and McMullan, 1989:235), a feature that is observable in the neo-colonialist state as a borrowed "property" from the metropolis. The point here is that while certain salient aspects of the capital-logic approach are pertinent to the study of the character of state-law relations in the neo-colonial capitalist state, the paradigm cannot be wholly applied to less advanced capitalist states.

### **Feminism**

Although the neo-Marxist perspectives enhance our understanding of the sources and nature of inequality in capitalist society, they do not provide an adequate basis for understanding the oppression of women in society. Feminism, especially the socialist feminist version<sup>6</sup>, incorporates the concepts of production and reproduction (which are central to Marx's materialist theory of the state) and develops them by positing that the labour of reproduction is a process of "procreation, socialization, and daily maintenance" (Messerschmidt, 1986).

In many relations of reproduction, patriarchal domination abounds where the labour power of women is regulated, allocated and controlled by men. Working on the assumptions of the structural Marxist perspective, Shelley Gavigan (1986) argues that it

<sup>6</sup> There are at least four important versions of feminism. Alison Jaggar (1987) has classified feminist theories into liberal feminism, radical feminism, traditional marxism, and socialist feminism. This classification, as Stamp (1989:14) points out, enjoys considerable appeal among feminist scholars. Other variants are cultural feminism and lesbian feminism. For a thorough discussion of these perspectives, see the following: Rosmarie Tong (1989), Feminist Thought: A Comprehensive Introduction. Boulder, Colorado: Westview Press; Margaret L. Andersen (1988), Thinking About Women: Sociological Perspectives on Sex and Gender. 2nd. ed. New York: Macmillan Publishing Company; E.D. Salamon and B.W. Robinson, (Eds.) (1987), Gender Roles: Doing What Comes Naturally?. Toronto: Muteon Publications.

is problematic, however, to regard the law as representing men's control over women in all instances, as there clearly are instances where the law has advanced the interests of women over those of men. She contends that it is more useful to regard the law as the site of struggle, and as having a relative autonomy from men's control. The socialist feminist perspective contends that reproduction must be situated within the base or infrastructure "in order to accurately understand how the dual forces of reproduction and production operate in society" (Brickey and Comack, 1986:263).

This perspective regards the processes of production and reproduction as having a dynamic interaction, co-reproducing one another. Despite the obvious advantages of feminism in facilitating understanding of gender relations and the marginalization and oppression of women and children through patriarchy and capitalism, it is of limited value in addressing the central research tasks of this thesis. That is, the major issue of the emergence and development of criminal law generally, and the public tribunal system in particular, cannot be adequately explored within any of the several feminist frameworks.

### **Sumner's Approach**

Colin Sumner (1982) offers a neo-Marxian method of studying criminal law and the state in the Third World. He considers an internationalist, comparative and historical approach as crucial and indispensable to any social scientific analysis of crime and criminal law in so-called underdeveloped countries (Sumner, 1982:6).

The approach to the study of crime and justice in the Third World enunciated by Colin Sumner (1982) constitutes an attempt "to get beyond the dominant view that the 'crime problem' in the Third World primarily means urban, working class juvenile delinquency accelerating rapidly due to the pressures of 'modernization'" (Sumner, 1982; emphasis added). It is an approach that rejects the view that the 'justice problem' in such societies is a reflection of the inability of 'native' officials and

politicians to grasp the rules and procedures that constitute the "rule of law". Instead, it is an internationalist, historical, and comparative approach that locates crime and justice within the broader patterns of social development. In this developmental perspective, the problems of crime and justice in the Third World are linked to the processes and effects of underdevelopment as a special kind of social development engineered by Euro-American colonialist expansionism and capitalist exploitation (Rodney, 1986; Sumner 1982:1).

This perspective marks a radical departure from the parochialism of orthodox criminological theory typified by the ahistorical work of Clinard and Abbott (1973) on crime and justice in the Third World, which stresses the effects of modernization and urbanization (Sumner, 1982:i). For instance, one of the most outrageous examples of "capitalist nonsense" (Sumner, 1982:xi-xii) on crime in developing countries appears in the following formulation by Clinard and Abbott:

Today the process of development is bringing pronounced changes, and among the more serious is the general increase in crime. In fact, one measure of the effective development of a country probably is its rising crime rate (1973:v) [Emphasis added].

Such a simplistic, Euro-centric ideological proposition founded on what Sumner (1982:2) calls "insulting moral categories" has influenced many criminological studies in the Third World. Thus, in his analysis of crime trends in Ghana, Nortey (1977:115) attributes the upward trend in both the incidence and volume of crime between 1960 and 1970 to demographic factors relating to teenage youths, rate of urbanization, and 'the demoralizing effects of urbanism'. Only scant attention is paid to policing activities. There is also no reference to the connections between the processes of imperialism and underdevelopment and the whole range of law violations and legal institutions in Ghana (Sumner, 1982:xi-xii).

The approach advocated by Sumner calls for the analysis of the nature of capitalism and the forms of crime and justice it produces in the underdeveloped world. Sumner

conceives of underdevelopment as grounded in the imperialists' appropriation and exploitation of other people's land and labour (1982:xii). In this approach, colonial capitalist penetration, with its production of new crime categories and new crimes in the Third World become pertinent areas of scholarly attention, as do the class structures and class relations (antagonisms) fostered by capitalism, and the attempts of the neo-colonial state to respond to particular forms of lower class reaction to the contradictions of the neo-colonial economy.

Sumner's approach makes possible the examination of the use of criminal law and of crime by the colonialists (1982:2), and the continuation of this process by the new ruling elites - the prefects of imperialism in the underdeveloped countries. This Marxist 'crime and development' perspective recognizes that since underdevelopment constitutes a distinct process within international capitalism, its forms of crime and justice would be unique, as well as providing some interesting parallels (Sumner, 1982:5).

In spite of its apparent merits, Sumner's approach suffers from one key limitation: the difficulty of conceptualizing it. It is doubtful if this approach can be adequately conceptualized for research purposes. Suffice it to say that Sumner himself has not met this challenge.

#### **Assessment**

The preceding overview of the prevailing theories of state and law indicates that none of them is exclusively well suited to this research task. On the whole, the neo-marxian perspectives have greater theoretic relevance than the pluralist, legal realism and feminist approaches to the analysis of the state and law in a neo-colonial country like Ghana. Nevertheless, the limitations embodied in each of the four variants of neo-marxist explanations significantly constrain their utility for this analysis when

taken singly. Each of them has specific strengths that can be usefully applied to the analysis of public tribunals in Ghana.

The structuralist approach emerges as the framework best suited to the task, despite its overly deterministic character which limits its capacity to explain the processes by which legal enactments of the state emerge, are modified, neutralized or reversed as a consequence of class-propelled legal struggles. Undoubtedly, human behaviour is circumscribed or constrained by social structure to some degree. This is the paradox of the politics of reform: even dissident groups must organize themselves to challenge the legitimations of that which they seek to deconstruct; they must mobilize themselves within the framework of the established political order if they are to attract a significant following or sympathetic audience (Attafuah, 1987:29). Yet, structural constraints are neither total nor perennially present: the factual rarity of fatalistic suicides (Durkheim, 1951), except in slave societies in which individuals are hopelessly over-controlled and overwhelmed by the structural and legal impositions, attests to this observation. The point here is that human agency plays a critical and dynamic role in the social construction and modification of reality, including the emergence and repeal of criminal law, a fact which is implicitly denied by structuralism. As Burch observes,

this strand of Marxist theory argues that the economic, political, and ideological spheres interact to produce particular "conjunctures" in a given social formation. Taken to its extreme, it sees human agency ... as disappearing from the matrix of factors that affect social life. A less stringent interpretation would allow for the influence of social movements, resistance, and class struggle in shaping the social formation (1992:36.) [Emphasis added].

Herein lies the key limitation of this perspective as both class consciousness, class action and individual human agency have been instrumental in the establishment and development of public tribunals. And these actions were not robotic responses to the constraints of the Ghanaian legal structure but were the result of conscious humans

exercising their relative autonomy in generating legal discourses and creating new legal structures to accomplish goals for popular justice.

In spite of these shortfalls, structuralist advances over instrumentalism are real and compelling. While recognizing that the autonomy of the state is only partial and that formal equality does not reach into the stratified sphere of economics, structuralists note that the capitalist state is not entirely wedded to the interests of the dominant class. Instead, the state is able to use its partial autonomy to mediate the class, race, ethnic, gender, age, and other forms of conflicts. Structuralism permits understanding of the state's capacity to provide and preserve the conditions for capital accumulation while attempting to prevent particular capitalist interests from over-exploitation of labour - a practice which has the potential to subvert the longevity of the processes of capital accumulation. Thus, the state is semi-independent of capitalist control and is therefore able to act frequently on behalf of capital without being controlled by it.

The state in Rawlings' Ghana was consequently able to effectively control the nefarious activities of certain capitalists, including some powerful multinational corporations such as UNILEVER, AGRIPETCO, G.B. OLIVANT, SHELL and VALCO (Volta Aluminium Corporation, a Ghanaian subsidiary of the US-based Kaiser Aluminum Corporation). At the same time, the state managed to vigorously pursue an International Monetary Fund-cum World Bank-approved Structural Adjustment Programme (SAP) and Economic Recovery Programme (ERP) which jointly facilitated the opening up of the Ghanaian economy to foreign and local investment activities. As this dissertation amply demonstrates in Chapter IX, all these forces significantly impinged on the structures and essence of popular justice in Ghana under Rawlings. Furthermore, notwithstanding the anti-capitalist and pro-worker rhetoric of the PNDC regime during 1982, the state under Rawlings was able to create a conducive atmosphere for capital accumulation, attract and retain foreign and domestic investors'

capital, mediate a host of capital-labour conflicts, contain political opposition, and remain fairly popular.

The theoretical framework of this dissertation then centres on the structuralist principle of the relative autonomy of the state and its legal actors, but is unfettered to it. While this work is grounded in structuralism, it borrows some ideas and concepts from instrumentalism, Gramscian class conflict and capital-logic approaches. It also draws on the theoretical insights of Sumner's (1982) approach to the study of crime and justice in the developing world, with its emphasis on internationalist, comparative and historical discourse.

Finally, the dissertation uses theories of populism to explore the politics and social psychology behind Rawlings's ability to remain popular in spite of notable contradictions and transformations in his regime's rhetorics and actions. While Rawlings and his close lieutenants initially espoused Marxist-Leninist theories of social and economic development, by 1984 they had effectively disengaged themselves ideologically from socialism and from their original power base (the urban working class) as they devised and implemented IMF-sanctioned monetarist economic policies which they had originally lambasted. While Rawlings pursued a Structural Adjustment Program, he did not eschew socialist "talk". Yet, he remains popular, and massively won (by 58%), the November 3rd, 1992 Presidential elections. In the heated political campaigns leading to the elections, three political parties scrambled to woo him to their side, each citing the PNDC's economic development record as a testament to Rawlings' seasoned leadership and a justification for their calls for "continuity" (West Africa, 27 July 1992).<sup>7</sup> Theories of populism are useful for exploring these issues, as well as the enigmatic and charismatic personality of Jerry John Rawlings.

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<sup>7</sup> The political parties which vied for Rawlings as their leader and Presidential candidate in the November 3rd, 1992 elections were the National Democratic Congress, the National Convention Party and the Egle Party. (Egle is ostensibly an acronym for "Every Ghanaian Living Everywhere").

The dissertation maintains that such an eclecticism greatly aids the analysis of social change and criminal law in Rawlings's Ghana. This eclecticism also bolsters the strength and utility of the structuralist approach. The dissertation demonstrates that, bolstered or modified in this way, structuralism is a relevant theoretical framework for understanding state-society relations, and law and justice in a neo-colonial country.

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In fact, Jerry Rawlings did contest the November 3rd, 1992 Presidential Elections on the ticket of the National Democratic Congress. He won the hotly-contested elections with a 58% majority of total votes cast. He was sworn in as Ghana's fourth civilian President on January 7th, 1993, with his running-mate, Mr. A.N. Arkaah as Vice-President (West Africa, January 18th, 1993). In the run-off to the Parliamentary and Presidential elections, the National Democratic Congress (NDC), the National Convention Party (NPC) and the Egle Party formed an alliance (the Progressive Alliance) and presented Jerry Rawlings as their sole candidate. The alliance proved effective in beating University of Ghana History Professor, Dr. Adu Boahen of the New Patriotic Party (a key contender and Rawlings' main rival); former President of the Third Republic, Dr. Hilla Limann of the People's National Convention (PNC); evangelist Pastor, Mr. Kwabena Darko of the National Independence Party (NIP) and former Commander of the United Nations Peace-keeping Force in Lebanon, retired Lt-Gen. Emmanuel Erskine of the National Heritage Party (NHP). Charging that the Presidential elections were marred by "gigantic fraud and mournful gloom" (West Africa, December 14th, 1992), these opposition parties boycotted the December 29th Parliamentary elections. This was in spite of the independent verdicts of the Interim National Electoral Commission (INEC), the Organization of African Unity and the Commonwealth Observer Groups that the elections were generally "very free and fair".



### CHAPTER III

#### REVIEW OF RELEVANT LITERATURE

There is a dearth of published research on public tribunals in Ghana *per se*. As the following review of the literature shows, only one published work with which this author is familiar specifically deals with public tribunals in Ghana despite their crystallization in the Ghanaian judicial system for over nearly a decade.

Burnett Harvey's Law and Social Change in Ghana published in 1966 offers a very detailed exposition of legal forms and discourses on the historical evolution of the legal system in Ghana. This work, however, is largely an exposition of the relations between the three wings of the post-colonial state; namely the legislature, the judiciary and the executive. It traces the political development of these branches of government and analyzes the social forces undergirding their evolution and the forces impinging on their performance.

As a historical exploration of the interplay of colonial and local influences on the Gold Coast (and later the Ghanaian) state, this detailed analysis traces the struggles and argumentations that shaped the law as a vehicle of social change in Ghana from the 1900s to the period immediately preceding the demise of Ghana's First Republic in 1966. It devotes considerable attention to the British colonial administration of the Gold Coast through the dual systems of indirect rule (via the chieftaincy institution - the pre-colonial political formations based on royalty), and direct rule (via appointed colonial officers and the establishment and evolution of legislative assemblies, Westminster judicial and executive structures). Despite its solid account of the processes of state and legal transformations in Ghana, this work is quite dated, and of little practical value to this research task.

"A Good Name is Worth More Than Money: Strategies of Court Use in Urban Ghana" by Michael J. Lowy published in an edited volume by Laura Nader and Harry Todd Jr. in 1978, The Disputing Process - Law in Ten Societies, is a brilliant analysis of

the procedures for justice in urban Ghana. It discusses the use of various dispute-resolution strategies and assesses their relative merit for Ghanaians using traditional Ghanaian conceptions of justice as the backdrop.

As a comparative analysis of procedures for justice, this work advances our knowledge of dispute-management techniques, grounded in Ghanaian philosophical doctrines, as well as British legal institutions and values. It represents the Westminster judicial model as the least popular or reputable in Ghana, arguing that its principles conflict significantly with local judicial principles and beliefs as to the quality and function of justice.

Lowy's work is particularly useful for understanding the ideological/philosophical relevance of forms of justice and the procedures for their articulation and achievement in Ghana. As will become clear later on, much of this thesis builds on insights from Lowy's work.

The Contribution of The Courts to Government: A West African View, by A.N.E. Amissah, a former Justice of the Supreme Court of Ghana, published in 1981, is perhaps the most detailed analysis of the role of the judiciary in social development in Ghana. Although not specifically focusing on Ghana, Amissah, who was Dean of the Law Faculty, University of Ghana, draws on his legal scholarship and experiences as former Attorney General and Commissioner for Justice in Ghana to provide substance to his argumentations regarding the centrality of law to social development.

Like Harvey's, this work pays attention to the local and foreign influences on legal transformations in Ghana, as well as providing a lawyeristic analysis of the composition and functions of the Westminster court system in colonial and post-colonial West Africa.

Amissah's other work, Criminal Procedure in Ghana (1982) provides an exhaustive descriptive and analytical account of *Ghana's Criminal Procedure Code 1960*, and the main institutions involved in criminal procedure. It charts out in an impressive, methodical manner, the details of the procedural stages of a criminal offense from report to

determination. This erudite work also reveals and analyzes the historical, political, constitutional and social contexts of the emergence and development of criminal procedure in Ghana.

Contending that "the field of criminal law and procedure is one in which our (Ghanaian) law is rich in judicial authority" (1982:xiv), Amisssah uses Ghanaian cases to illustrate the law. He cautions against uncritical acceptance of foreign judicial pronouncements, no matter how authoritative they may be. He notes:

Sometimes the utilization of foreign authorities does harm to our law because we at times use judicial pronouncements without considering the basic law upon which those pronouncements are made. The blind acceptance of foreign expositions of the law is not only unnecessary but an obstacle to the development of clear thinking (1982:xiv). [Emphasis added].

Amisssah<sup>1</sup>, who was once a prosecutor and a Director of Public Prosecutions as well as an Appeal Court judge in Ghana argues further that authoritative pronouncements from the courts in England, however high, may be completely irrelevant and even harmful, especially in those areas where the laws of the two countries have diverged from one another (1982:xiv).

Amisssah believes that "it is about time that some writing is done to generate debate and stimulate thought on our law and its practices" 1982:xiv).

Criminal Procedure in Ghana (1982) is deeply informed by the author's personal interpretation of legal cases, a style which is designed to accomplish that goal. The book is both authoritative and controversial: the former in its soundness of argumentation, and the latter in its challenge to legal scholars and Ghanaians generally to set about looking primarily at Ghana's own laws and thinking "how best to promote the ideals and objectives behind them" (1982:xiv).

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<sup>1</sup> Justice A.N.E. Amisssah has recently been appointed Chief Justice of the Republic of Kenya, East Africa (West Africa, April 12, 1993).

This advocacy is competently presented without sacrificing scholarship to the fervour of nationalism. In the end, Amisssah succeeds in making the study of criminal procedure in Ghana nearly as interesting as its substantive counterpart.

Intended primarily as a text for law students in Ghana, the book contains in-depth discussions pertaining to criminal proceedings (e.g. bail, witnesses); the nature and functions of the courts with criminal jurisdiction; the powers and functions of the Attorney General's department in criminal proceedings; the powers and roles of the police; trial procedures and the repertoire of legal punishments, as well as a short section on military tribunals and many miscellaneous modes of trial in Ghana.

Nevertheless, there is no mention of public tribunals, nor of the revolutionary regime of the AFRC in 1979 when the policy of popular justice and the system of public tribunals as its mechanism of enforcement first emerged and began to crystallize. This is probably because the preparation of the manuscript preceded the events of 4 June 1979 which swept the AFRC to power and set the stage for the creation of people's courts or public tribunals.

A brilliant essay by Samuel O. Gyandoh, Jr. (1989), former Dean of the University of Ghana Law School and presently visiting Professor and Fellow at Temple University School of Law in 1989, published in the Temple Law Review, is the most detailed, authoritative analysis yet of public tribunals in Ghana. In "Tinkering With the Criminal Justice System In Common Law Africa", Gyandoh traces the diverse sources of discontent with the administration of the judicial systems in common law Africa. Using Ghana's experience with public tribunals as an instance study, Gyandoh examines the reasons for the pervasive attacks on the inherited judicial system and the emergent forms of judicial procedures in Africa.

Gyandoh's essay proceeds in a liberal-democratic (pluralist) framework. It outlines the nature and functions of the various structures of revolutionary justice in Rawlings'

Ghana. It is primarily concerned with the containment of populist tinkering with the criminal justice system in common law Africa.

Critiquing what he describes as "hastily convened tribunals and other institutions" of popular justice and "the usually draconian sentences" they impose, Gyandoh advocates a gradualist approach to the reform of the criminal justice system so that "warped notions of popular justice are not used as a pretext for dismantling the entire criminal justice system, or depleting it of all integrity" (1989:1134).

Gyandoh believes that public tribunals as they operated in contemporary Ghana violated certain fundamental principles of government and the common law tradition such as the doctrines of separation of powers and the independence of the judiciary. The tribunal system, in his view, also violated the rule of law and other principles of due process such as the presumption of innocence, the right to legal counsel, and the principles of *habeas corpus* and *mandamus*. He notes that,

there is a crisis of major proportions insidiously eating away the very fabric and inner texture of the judicial systems in many African countries" (1989:1137).

The essay offers an incisive criticism of the public tribunal system in Ghana. Concluding his essay, Gyandoh offers a number of recommendations for a gradual reform<sup>2</sup> of the criminal justice system, with a view to preserving

<sup>2</sup> Some of Gyandoh's criticisms of the tribunals system are well-taken. Among these are the "flagrant violations" of the common law doctrines of legality, including the principle of rule of law, due process, *habeas corpus*, *mandamus* and *certiorari*. However, there are several inherent problems associated with the gradualist approach to law reform which he suggests. Throughout the world, numerous examples of half-baked, cosmetic and ill-implemented reforms abound. Gradualism has not resulted in a fair, just and inclusive system of justice in Canada, Ghana, Australia, United Kingdom, New Zealand, China, Soviet Union, the United States and South Africa. While some noticeable law reforms have taken place in these countries, it must be recognized that they have largely been the product of significant struggles by disadvantaged groups.

Much gradualist criminal law reform is no more than cosmetic and deceptive tinkering. The maintenance of hegemony by the dominant group - the preservation of its advantageous position - has too often thwarted even some of the most carefully-designed agendas of reform. The dominant group "loves" to talk about reform, the classic case of "doing the Tango", one step forward, two steps backwards. For examples of this phenomenon from India and South America respectively, see the following: Thorne, [Agrarian Reform in India](#); Andre Gunder Frank, [Latin America: Reform or Revolution?](#)

the best features of the inherited judicial system while minimizing, and eventually eliminating, defects as they are revealed in the course of time" (1989:1137).

These five works generally, and the last one especially, provide an invaluable historical framework and data for exploring some of the key factors influencing the establishment, development and reform of public tribunals in Ghana.

One of the most consistent features of modern public discourse is the relentless and controversial discussion of the process of law-making and law-breaking, as well as the development of criminal law. The motives underlying particular legal enactments, their historical antecedents and the basic ideology underpinning modern law have become central issues of scholarly discussion. The works of John Beattie (1986) Crime and the Courts in England, 1660-1800, Edward Thompson (1977) Whigs and Hunters: The Origins of the Black Act, and Douglas Hay (1982) "Property, Authority and the Criminal Law" mark significant advances in the discourse on the historical origins of law and the development of modern criminal law. These works provide rich insights into the factors that influenced the extension, reform or repeal of criminal law in England. While they are specifically concerned with the English legal tradition, these works have important implications for a wider appreciation of law and social control in the former British colonies, including Ghana and Canada. A survey of these works will help to delineate the scope and boundaries of the historical and continuing influences of English criminal law and procedures on law and social control in Ghana.

As the most comprehensive of the three works, Beattie's work, Crime and the Courts in England, 1660-1800, will be given considerable attention in this review of the literature on the history of English criminal law. It traces some of the key transformations in the nature of judicial administration and the corresponding structures connected with crime and punishment. Its central concern is "the way the English courts dealt with crime

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in a period in which the foundation of modern forms of judicial administration were laid" (Beattie, 1986:3). By reducing the scope of his study to a sample provided in the counties of Surrey primarily, and Sussex additionally, this ambitious goal becomes manageable. Beattie uses primary documents from this era, particularly manuscripts and proceedings of the Surrey Assize, and attempts to make connections between prosecuted crime *per se* and the criminal law and judicial administration, placing changes in this period in a broad social context.

Beattie excavates a plethora of data from a diversity of sources and organizes them to demonstrate the intricate relationships between crime, courts, punishment and the larger English society of the period, 1600-1800. His work also illuminates the snail's pace nature of the transformation of the British judicial system during this period. So slow was the pace of judicial changes in British society, especially before 1770 that, a number of social historians, notably Webb and Webb (1963), Briggs (1966) and Radzinowicz (1968) have tended to regard this period as a stagnant, antiquated era of docility, little critical thought or questioning (McCarthy, 1987:187). Beattie rejects this characterization and demonstrates that, although the changes were slow, they were quite significant.

Beattie also shows that the effectiveness of the reformist ideas of Beccaria and John Howard in producing changes to the British criminal law and penal system took place against the background of social attitudes that were receptive to the changes during the period 1660-1800. Thus, while the advocates of reform catapulted the British judicial system into the era of humane and rational treatment of criminals, the foundations of their success lay in the much quieter, less politically organized transformations spanning several decades before the fundamental restructuring of the criminal law by Sir Robert Peel in the 1820s (Beattie, 1986:13). The value of Beattie's work lies primarily in the detailed account it offers of changes in levels of crime, perceptions of crime and the complexities of social thought which informed social reactions (including state practices) to crime.

The major factors identified by Beattie as influencing the enactment, extension and repeal of criminal law in England are too numerous, and the discussion too comprehensive to be adequately reviewed within the scope of this dissertation. Consequently, only seven key factors are discussed here. These are: (1) the nature of criminal prosecution; (2) the authority of the state and specific powers of prosecution; (3) the phenomena of violent crimes and capital punishment; (4) the adjudication of property offenses; (5) the maintenance of "the King's peace"; (6) the use of discretionary powers; and (7) changing penal options.

### **The Nature of Criminal Prosecution**

The criminal justice system in seventeenth and eighteenth century England, unlike modern-day criminal justice, was not a complicated network of organized multi-level police forces, crown and defence attorneys, social workers and other courtroom personnel, in addition to the judge. Indeed, the rudiments of an integrated system of official policing did not emerge in England until 1792 (Beattie, 1986:67). Although formal laws existed and courts were routinely assembled to hear cases where instances of law-breaking were alleged to have occurred, the process whereby such instances were identified and brought to trial was greatly affected by the private nature of prosecution.

Victims played a significant role in the prosecution of offenders (Beattie, 1986:35;-38). The burden and expense of prosecuting an offender were left entirely to the victim of crime. Victims had to decide whether they could afford the time, costs and related tasks of preparing for prosecution. This entailed a complex array of responsibilities such as apprehending the offender, assembling witnesses willing to testify in court (and ensuring that the witnesses were people of "honourable" character and respectful disposition), reporting the case to a magistrate, collecting and collating evidence in aid of the prosecution, and possessing sufficient financial resources to insulate oneself from the sometimes exorbitant costs of prosecution (Beattie, 1986: 41- 42).



There was nothing automatic in this period about the registering of complaints before the local magistrates and the pressing of criminal charges, even when it was obvious that an offense had been committed and a suspect was readily at hand. This situation derived from the costs and burdens of prosecution. The system of private prosecution worked to the disadvantage of everyone but the well-to-do (Beattie, 1986:9). Yet, the prosecutors who brought cases to the quarter sessions were overwhelmingly drawn from the middling ranks of society, including significant numbers of artisans and labourers. This is a telling commentary on the legitimacy of the criminal law and the system of judicial administration (Beattie, 1986:10). It demonstrates the unity of purpose of people of all classes, and their profound conviction in the appropriateness of the criminal law. Undoubtedly, the criminal law served definite symbolic and material powers. Nevertheless, as Beattie argues, the ideological power of law enjoyed a significant measure of public support:

If the criminal law had served only the interests of the propertied classes it would hardly have attracted the widespread approval that was so clearly bestowed upon it ... However constrained in practice access to the courts was for the working population, the law appears to have been widely accepted in society as a means of settling disputes and ameliorating grievances (1986:622).

Thus, the prevailing attitude toward the criminal justice system was favourable even if there was resentment toward the kinds of punishments that were often meted out to convicted offenders such as murderers and armed robbers.

Even so, the problems of pursuing formal prosecution were such that *informal means* of dealing with offenders abounded, including direct and immediate physical punishments such as whipping. Indeed, in the context of rural parishes, such informal methods of penal sanction were preferred to formal prosecution because the latter sometimes created tensions in social relationships as people repudiated the use of the death penalty for many offenses (Beattie, 1986:39).

After much tinkering with the system of court costs, judges began awarding costs more often, but in amounts which probably did not meet the expenses that most victim-prosecutors had to bear (Beattie, 1986: 46-48). Clearly, these financial variables had an impact on victims' decisions to prosecute or not, and created a distinction between those who could afford justice and those who could not.

Another major influence on the nature of criminal prosecutions was the emergence of prosecution associations to pull resources together to counteract the debilitating costs of mounting a court case (Beattie, 1986:48). These were associations of propertied men organized to share the costs of apprehending and prosecuting thieves. The cost of prosecution were essentially prohibitive even for propertied men, and constituted a major disincentive to formal prosecution. That they attempted to deal with the financial constraints on their ability to mount prosecutions in court via formal organizations is a reflection of their fundamental belief in the justice system, particularly as it related to property offenses to which the propertied class was most vulnerable. This is linked to the growth of classes and wealth, and the use of state resources to protect private property.

Membership in the prosecution associations typically covered middling property owners of a town or parish or group of parishes. Such groups proliferated during moments of acute anxiety about the level of crime in society, especially during the 1780s. Another incentive for the rise of these organizations was the pervasive conviction among property owners that crime was being encouraged by the uncertainty of punishment as well as the failure of victims to prosecute (Beattie, 1986:48). Accordingly, the prosecution associations undertook to help their members in two interrelated ways: members who had been victims of felonies were assisted to find and apprehend the offender, and then to mount a prosecution in return for an annual subscription (Beattie, 1986:49). An additional responsibility shouldered by some of these associations was the maintenance of patrols in their parishes to prevent crime or to pick up suspicious characters. Some required their

members to turn out to conduct searches for stolen goods, while others engaged a solicitor to prepare the case and to brief counsel.

Although prosecution associations were responsible for the detection and arrest of some offenders who would otherwise have escaped justice, the impact of such bodies was rather marginal on the number of offenders brought to trial before the quarter sessions and assizes (Beattie, 1986:50). To some extent, activities such as these are similar to modern police-sponsored programs such as Neighbourhood Watch, Block Watch, and TIPS in Canada, and vigilante groups and Peoples' Defence Councils in Limann's (1979-1981) and Rawlings's (1982-1985) Ghana respectively.

One of the measures undertaken by some of the prosecution associations - such as the one formed in the Surrey parish of Mortlake in 1784 - was the payment of rewards for evidence that would lead to the conviction of thieves within the parish, be they members or not, and to pay the costs of those victims of theft too poor to undertake prosecution. This development, (akin to the contemporary "Crime Stoppers" program in Canada) arose in an era characterized by intense anxiety among people of property about a perceived increase in the rate of property crime.

The system of rewarding providers of evidence that would lead to the prosecution of felons was also to counteract the reluctance of most magistrates and constables to respond to the complaints brought to them. It was also aimed at circumventing the strictures of due process, and the constraints on time and resources entailed in prosecution. The point of offering the reward then was to encourage initiative in the investigation and prosecution of offenders. Indeed, the British Parliament had long before undertaken to enlist the pecuniary self-interest of the public in the administration of the criminal law.<sup>3</sup>

<sup>3</sup> In the Canadian context, the phenomenon of plea bargaining finds its most extreme and bizarre form of abuse in the case of Clifford Olson, a notorious serial murderer who exacted monetary payment from the Royal Canadian Mounted Police (RCMP) in Vancouver in exchange for incriminating evidence against himself. The 42-year old married construction worker killed eleven children (three boys and eight girls) in a nine-month period from November 1980 to August 1981. He had sexually abused some of the children (ranging in ages from nine to 18) before beating, strangling and/or stabbing them to death. He demanded \$10,000.00 for each body to which he would direct the

By 1689, rewards had emerged as a fundamental aspect of English criminal justice policy. This was part of a zealous effort to stem the intermittent anxiety over rising crime rates. To bolster the forces of law and order, rewards were periodically boosted by government proclamations making more money available in response to particularly shocking offenses. One disquieting side-effect of this policy was the prevalence of malicious prosecutions for monetary gain (Beattie, 1986:55). By the early 1750's the use of rewards had resulted in the creation of a whole new service industry - thief-taking.

Thief-takers acted as freelance detectives and appear to have been susceptible to the temptations of monetary greed, as evidenced in examples of thief-making for the purposes of collecting a reward.<sup>4</sup> The conflict of interest incurred between the pursuit of justice and personal interest soon became apparent, and was often used as a tool in the defence of the accused, and this led to the decline in thief-taking (Beattie, 1986: 57-59). In 1818, the rewards system was abolished and replaced with the payment of costs, which also had a marginal impact.

Altogether, the payment of blood money undermined the credibility of "peace" officers in the courts and seriously weakened the administration of justice. Like the reward system (which nonetheless helped lay the foundations for a regularised police force established in London in 1829), the wickedness inherent in the phenomenon of thief-taking meant that its impact on criminal prosecution was negative, at best, or simply disastrous for many people, at worst.

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police. The money was deposited in a trust account from which his wife was paid \$10,000.00 each time he revealed a body. For a detailed discussion of the Cliff Olson story, see Maclean's, January 25, 1982; Jack Levin and James Alan Fox (1991), Mass Murder: America's Growing Menace, New York: Berkeley Books.

<sup>4</sup> According to Beattie, the privatization of justice led to gross abuses. Jonathan Wild earned the accolade of "Thief-Taker General" for controlling thieves and profiting from offenses by negotiating with victims in return for money.

### **Powers of State and Prosecution: Some significant Constraints**

Although the state had the authority to regulate civil conduct in society via the criminal law, there were a number of constraints on its authority and its power to administer the law. It would appear that the nature of criminal prosecution between 1660 and 1800 was influenced by variables which, by today's standards, would seem more typical of civil law than criminal law. The onus was on the victim to bring the case to the attention of the authorities, and to pay for the court costs and gather evidence at his/her own expense. The state then, depended on the will and resources of the people to bring criminal violations to its attention, and to some extent this must have undermined its authority in spite of its power to invoke the death penalty or shameful penalties - such as the pillory or whipping on conviction. The use of rewards, while certainly increasing the state's powers of prosecution, also tugged at the credibility of justice as it was eventually abused by enterprising individuals through malicious prosecution.

The most notable limitation on the authority of the state consisted in the disinclination of "gentlemen" to take on the burdens of judicial office as magistrates. The trouble and expense of going to the quarter sessions and assizes and to the local petty sessions and committee meetings were a major disincentive, as was the bother involved in dealing with the disputes of their neighbours in their parlours. Also of concern to gentlemen were the administrative issues and criminal matters over which they had jurisdiction.

This unwillingness on the part of qualified candidates to accept magistratical responsibilities was compounded by their unwillingness to serve in rural parishes. Rural justices were chronically in short supply, and compensated for to some extent by the inclusion of increasing numbers of clergymen in the commission, provided they possessed the requisite minimum education and time to act as justices of the peace.

Increased responsibilities of judicial officers also meant that fewer still were willing to accept the job. This shortage also curtailed the state's authority to administer justice.

This problem was much more acute in the metropolises of London and Westminster. The difficulty of finding magistrates was undoubtedly aggravated by political considerations in the late seventeenth century and the first half of the eighteenth century. Membership of the commissions of the peace was determined as much by party affiliations as administrative needs. This system of patronage and nepotism in judicial appointments constrained the state's authority in justice administration.

Private justice or informal methods of conflict resolution, as already noted, had the effect of circumventing formal prosecution. This was also one phenomenon that constrained the authority of the state over criminal prosecution.

The powers of prosecution were significantly constrained by the lack of legal counsel for much of the period. Eloquence and skill of presentation of evidence was crucial in the establishment of the guilt of the accused, as was the prosecutor's credibility as perceived by the jury and the judge. Until the advent of lawyers in the courts as prosecuting attorneys, those who could not afford the services of solicitors were left to their own devices. The prosecution associations, however, helped to mitigate the financial burdens of their members. The introduction of lawyers as defence counsels did not occur until after 1714 (Beattie, 1986:33).

### **Violence and Violent Crimes**

Attitudes toward the "proper" use of violence, and the nature of violent crimes affected the extension and reform of English criminal law. Beattie portrays the home as the scene of much violent crime during the period under review. Although most confrontations in which brute force was used did not give rise to legal action, the court records give some indication of the nature of violence. According to Beattie, much violence was perpetrated against the weak in superior-inferior relationships. Violence against wives, slaves and maid servants was commonplace, and hardly were the superior persons ever prosecuted. Men and masters had it by right of ownership of their wives and

children, and servants respectively, to discipline them according as they saw fit unless they employed "improper instruments" or "immoderate force" (ibid., p.86).

The state also employed terror and physical violence and intimidation in combating crime, just as men and slave owners used terror to control their subordinates and to obtain obedience to their will. Treason was deemed a far more reprehensible crime than the phenomenon of murder *per se*, and it was punished by torture and/or death.

Beattie makes it clear that violence in this era was both greatly tolerated, and in other specific cases, considered morally repugnant. This contradiction in the perceived quality of violence is traced through its presence in certain forms of interpersonal relationships. This was especially true in cases of assault - whether within the family, school or between friends or sports combatants - where such matters were regarded as private, or at worst, civil cases. Violence against strangers, however, was treated differently. Violence was also an accepted social phenomenon when used by the state in hangings, burnings and flogging as a response to specific crimes (ibid., pp. 74-75).

Conjugal violence was considered normal. That violence against wives and slaves, and capital punishment were condoned between 1660 and 1800 reflects a patriarchal moral attitude which was threaded in the philosophical fabric of private property. Women who intentionally killed their husbands were subjected to conviction for petty treason, as were subjects who killed their masters (Beattie, 1986:100-101). Typically, in a rape trial, it was the moral character of the woman victim that was put on trial not her alleged ravisher, unless she was "fortunate" enough to have had witnesses at the scene of the offence willing to testify (Beattie, 1986:132)!

### **Attitude Shifts and Law Reform**

One important factor which contributed to the repeal of the criminal law with regard to penal sanctions in the period 1660-1800 was the shift in attitudes toward capital punishment occasioned by the spread of scientific thinking, especially medical knowledge

about the causes of death. Attitudes began to change in regard to previous sweeping evidence of murder, especially in cases of infanticide and accidental deaths (Beattie, 1986: 89; 111). People began to demand more rigorous establishment of the direction and certainty of causation of death. Mothers accused of murdering their infants particularly benefitted from this *atmosphere of doubt on the causes of death* engendered by the enhanced status of medicine as a way of knowing (Beattie, 1986: 117). Prevailing etiological accounts of crime therefore influenced the administration of the criminal law. As Beattie puts it:

The English attitude was strongly encouraged in the seventeenth and eighteenth centuries by the prevailing view of what crime was, and of the related matter of the nature and purpose of the criminal law (1986:42) [Emphasis added].

### **The Adjudication of Property Offenses**

Two principles were central to the adjudication of property offenses. These were a) the commercial value of goods, and b) the benefit of clergy. Changes in the use of these principles or the extent of their application meant changes in the criminal law. For instance, a rise in the use of capital punishment was associated with a decline in the number of clergyable offenses.

In the adjudication of property offenses - theft, arson, vandalism - the commercial value of the property in question relative to the overall financial well-being of the victim (Beattie, 1986:144) was an important consideration. Thus, horse-thieves were generally given harsher penalties than sheep-thieves. Strict financial imperatives, however, did not determine the interpretation of the value of goods; while mail robbery was evidently a more profitable venture for the thief, it entailed considerable risks because for the state, the crime constituted an affront to its authority through the interference with what was obviously an essential communication service (Beattie, 1986: 156- 158).

Furthermore, whether stolen goods were retrieved or not influenced the nature of punishment meted out to the offender. By and large, however, many property offenses



were severely punished by hanging, underscoring the centrality of property (private property in particular) to English society in the seventeenth and eighteenth centuries.

The benefit of clergy was a major factor that influenced the criminal law in England during the period under consideration. The significance of benefit of clergy pertains to the adjudication of property offenses. Beattie provides a fairly detailed discussion on the changing use of this "legal tool", tracing it from its origins in the ecclesiastical courts to its general use among the citizenry, and its gradual restriction of application.

Originally restricted to churchmen, it was later extended to cover literate people (a test used to prove clerical status). Eventually, this principle was extended to almost everyone regardless of literacy, but on a one-time basis only (Beattie, 1986: 141-3). The subsequent reduction of the influence of clergy in the adjudication of property offenses appears to have been motivated by an apparent increase in violent crimes (Beattie, 1986: 143,148), a growing concern about the moral health of society (1986: 144), and the movement toward "statism" - the overreach of the state control.

As the number of clergyable offenses declined, there was a corresponding increase in the potential for executions. It appears that this had an effect on the amount of charges pressed by victims, of whom a growing number disapproved of capital punishment. The rising unpopularity of capital punishment thus affected the repeal or reform of the criminal law in terms of penal sanctions (Beattie, 1986: 86). Capital punishment began to be viewed less and less as appropriate and sacrosanct, and these shifts in public opinion affected the state's use of deadly force and the death penalty generally. The development of prisons and transportation (of convicts, imbeciles and other social deviants to Australia, Canada and Barbados) were in part, a response to these shifts in public attitudes (Beattie, 1986: 471).

Although a high degree of tolerance for violence existed during the period (Beattie, 1986: 135), an apparent decline in recorded violent offenses is explained by improvements in family relations and the self-discipline which the needs of commerce demanded (1986:

136-137). The state consequently adjusted the character of its responses to violence to accord with public opinion (1986: 139).<sup>5</sup>

### **Maintenance of Peace**

The imperative of maintaining the "King's peace", that is, to obey the Kings's authority, was tied into interests which transcended the mere disturbance of his peace through the disobedience of his subjects. This imperative was closely linked with the *interest of merchants*, as the new social and political imperatives of property gained momentum over the historical claims of the monarchy. Thus, robbery on the Kings's highways was disruptive of commerce and was deemed highly reprehensible. Accordingly, this form of crime was severely penalized. Gang crimes were particularly condemned because they endangered life and safety, as well as property, and rendered the condition of society wretched, by fostering a sense of personal insecurity (Beattie, 1986: 148). Thus, incidents whereby the "King's peace" was violated were also likely to be activities in which somehow hindered or disrupted the flow of commerce. This is evident in the particular concern registered over robbery of the mail, a mechanism for the transportation of bank bills and other negotiable papers, and highway robbery generally, which threatened transportation as a whole and thereby the movement of goods destined for some marketplace.

The influence of merchants on law-making is not, however, spelled out by Beattie in his accounts of variations in sentiments and penalties associated with various forms of crime. The growing restrictions on the use of clergy and the creation of piecemeal legislation against newly-defined crimes made the administration of justice fairly complex and largely incomprehensible (1986: 162). However, Beattie does not offer any explanation for this new trend in legal tinkering. Instead, he shifts his focus to the

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<sup>5</sup> Although Beattie make this casual claim, he neglects to indicate why this change occurred. For the answer to this problem, one has to turn to Douglas Hay (1975).

apparent variations in the character of public sentiments and penalties. He notes that growing numbers of victims were reluctant to prosecute offenders because of the potential harshness of penalties, and when they did prosecute, they tended to vary their accounts of the crime to qualify it for clergy (1986: 181). There was a noticeable difference between rural and urban people in terms of their willingness to prosecute. With their characteristic sense of community, rural folks' willingness to prosecute was low, while urbanites had a high willingness level. Beattie notes that a large proportion of prosecutors were from the middle-class. He also emphasizes the "powerful awareness" possessed by Englishmen of all levels of their rights and liberties (1986:184-197).

These variations are not well explained. Beattie's documentation, although meticulous, has painted an incomplete picture of the purpose and role of criminal law in seventeenth and eighteenth century England. One gets the impression that law is dynamic and complex, but no explanation is offered for this. What are the forces which link these variations in people's willingness to prosecute offenders? How are the variations in the interpretation of appropriate penalties, class and geographic location of the prosecutor related, and how does the perceived awareness of civil liberties fit in this linkage? These questions are addressed in Douglas Hay's essay on "*Property, Authority and Criminal Law*".

Beattie's analysis demonstrates that by the third decade of the nineteenth century, the criminal law and its machinery of administration had been transformed. There had been a shift from an intensely personal system of justice concerned with the particular attributes of offenders and one that conceived of punishment as a means of deterring others by bloody example, to a system of administration that emphasized equality and uniformity of treatment as ideals and that thought of punishment as reformative. Violent punishment meted out against the body of the offender as a public spectacle was replaced by incarceration and punishments that aimed at reforming the character of the prisoner.

Beattie contends that the stimulant for the reform of the criminal law was increases in crime, seen then and now as signals of moral decay (1986:14). As can be seen from the foregoing analyses, the major factors influencing the repeal of the criminal law were structural. They included shifts in social attitudes occasioned by the development and propagation of new forms of knowledge which challenged the taken-for-granted assumptions underpinning the system of justice. Human agency also played a crucial role, as represented in the gains made by the reformists movements of John Howard and Beccaria. Thus, for instance, the abolition of the death penalty was in response to growing public disaffection with this form of penal sanction, while the development of the prison, the introduction of transportation and the repeal of the latter were instigated by pressure group activity.

#### **Douglas Hay on Property, Authority and the Criminal Law**

Another major contribution to the understanding of the emergence of modern criminal law and judicial administration is offered by Douglas Hay in his essay "*Property, Authority and the Criminal Law*." Concerned with the nature of the criminal law during this era, Hay focuses on the growth in capital offenses, especially as they relate to property. He argues that the Criminal law was concerned with the civil dealings which propertied men had with one another, and the labouring, unpropertied men generally met the law as criminal sanction. He reiterates the views of Timothy Nourse (1706) on this issue:

The criminal law is as much concerned with authority as it is with property. For wealth does not exist outside a social context; theft is given definition only within a set of social relations and the connections between property, power and authority are close and crucial (cited in Hay, 1975: 24).

The criminal law thus emerges as an instrument in the service of power, property and authority. As Hay puts it, the criminal law was extremely important in ensuring that "opinion" prevailed over "physical strength". The opinion was that of the ruling class, and

the law was one of their ideological instruments for moulding the consciousness of the public which facilitated the subjugation of the many to the will of few.

Hay describes the Lockean philosophy of the time as apparent in the deification of property and how the law commissioned a policy of *terror* in order to protect property. He introduces his discussion of eighteenth law-creation by acknowledging the influence of John Locke's assertion that "government has no other end but the preservation of property" (Hay 1975:18). In this framework, political power was defined as the right to create the death penalty and by extension, all lesser penalties (Hay, 1986: 19). The central point is that property was deified in eighteenth century England, and a mass of statutes protecting property were quickly enacted during this time. These statutes, according to Hay, were not a reflection of conscious public policy, but rather a response to someone's personal interests. The impression given is that the state is an instrument of the propertied class.

Hay points out that the economic foundation of English criminal law contrasted sharply with the dominant ideology that linked crime to *moral degeneracy* (1975:20). Although the criminal law relied heavily on a complex repertoire of terror, this did not translate into increased executions; indeed, the implementation of this "bloody code" led to a decline in the actual number of executions, though not necessarily of crime. First, the number of executions declined as the use of clergy and royal pardons increased (Hay, 1975: 22). Second, the popularity of the policy of terror was declining for a couple of reasons: the death penalty terrified prosecutors and juries who began to find ways around it, and the arguments of Beccaria for a series of lenient, but swift and certain punishments were presented during that time. In spite of these developments, the arguments for law reform were resisted by the British Parliament (Hay, 1975: 23-24).

Hay points out the contradiction in this apparent resistance to reform by indicating that these reforms would have helped to protect property. He provides conventional explanations for the dismissal of reform attempts during this time - the refusal of the gentry to create a regular police force and the lack of punishments other than the death penalty

(1975: 24) - but contends that neither of these explain the obstinate rigour with which the repeal of laws that were rarely enforced was opposed. Using the writings of Timothy Nourse and Archdeacon Paley, Hay concludes that the conservatives must have been convinced that the unreformed law was serving their interests (Hay, 1975: 24-26), and that:

The criminal law was critically important in maintaining bonds of obedience and deference, in legitimizing the status quo, in constantly recreating the structure of authority which arose from property and in turn protect its interests (1975: 25).

Thus, the criminal law was instrumental in ensuring that "opinion" (of the propertied ruling class) prevailed over "physical strength" (of the working masses); that is, *that law is one of the chief ideological instruments of the ruling class*. Terror and discretion were used to "mould the consciousness by which the many submitted to the few, " and it was this usefulness that inhibited law reform.

Having identified the law as an ideological system, Hay proceeds to outline and elaborate on three aspects of the English legal ideology: majesty, justice and mercy (1975: 26). The majesty refers to the ceremonial and theatrical dimensions of the law reflected in the costumes and demeanour of judges as well as the pomp and pageantry of English courtrooms. In the quarter sessions and assizes, "the powers of light and darkness" were drawn out into a ritual and "formidable spectacle" (1975:27-29). This was designed to have a strong impact on the audience. The need for social order was juxtaposed against the need for vengeance: the former was deemed desirable, natural and progressive; the latter was presented as an inevitable antidote to wretched offenders who were commonly depicted as contagion. The judge functioned as the secular priest delivering the "secular sermon", that is, the law. Portrayed as healing processes to restore the moral balance of society, these rituals of justice were imbued with divine and earthly notions of punishment and justice. They were deliberately crafted to be both mysterious and mundane. Exemplary punishments were frequently meted out by the special commissions in the quarter sessions

and assizes. These state-approved executions were augmented by the play of symbolism which characterized the law and the courts. This was connected to the second aspect of English legal ideology, that is, justice.

Justice was also established via the veneration of the law. The legal system was ostensibly rooted in the principle of *equality before the law* (Hay, 1975:33-34) and adherence to formalities and "strict procedural rules". In this system, the gallows functioned, symbolically as the great equalizer: the rich and poor alike had a fair chance of receiving justice at the King's court. As Hay points out, however, the doctrine of legal equality and a *universal morality* served to mask the reality of unequal justice (Hay, 1975:35). There was fundamental disjunction between formal and substantive equality. According to Hay, the masses were tricked into according reverence to the law:

[T]he trick was to extend the communal sanction to a criminal law that was nine-tenths concerned with upholding a radical division of property" (1975:35).

The seed-bed of English criminal law was the protection of private property.

The third aspect of the law was *the prerogative of mercy*. This power was chiefly exercised through pardons and the imposition of lenient sentences. The granting of lenient dispositions and the hope of mercy lent credence to the justice system. Hay notes that these practices were widely praised and criticised by the public. The legal order was justified through the convergence of fear and compassion.

Hay concludes that the legal order created by the English ruling class was neither benevolent nor altruistic despite the egalitarian promises which the law embodied. On the contrary, "It contained within it the ever-present threat of malice" (Hay 1975:62) and it aided in the consolidation of the powers of the ruling elite.

In Whigs and Hunters, E.P. Thompson (1977) provides a detailed analysis of the emergence and implementation of the *Black Act* in 1723. Thompson notes that the implementation of the law greatly increased the number of capital offenses in England. The law was a form of terror established to protect private property. Although the *Black*

*Act* was a piece of "class legislation", it was neither complete nor all-powerful; indeed, it was fiercely resisted, severely undermined and eventually repealed. Thompson shows that the ideological power of the ruling class was occasionally contested by other interests. The survival of the legal order and its ideological power required the dominant class to grant concessions to other interests. The maintenance of the dominant class's legitimacy and its legal order depended on the wide acceptance of the principle of rule of law.

Thompson discovered that the ruling class was inhibited by its own rule of law from exercising unrestrained force. He concludes that while there was a "callous and oppressive political oligarchy" that served its own interests, the rulers of England surrendered to the imperative of the law and its "logic of equity".

Thompson views "the rule of law" not as a sham but as an insurance against tyranny, despotism and repression; it is an "unqualified human good" that must be treasured and defended:

We ought to expose the shams and inequities which may be concealed beneath the law. But the rule of law itself, the imposing of effective inhibitions upon power and the defense of the citizen from power's all-intrusive claims, seems to me to be an unqualified good; to deny or belittle this good is, in this dangerous century when the resources and pretensions of power continue to enlarge, a desperate error of intellectual abstraction. More than this, it is a self-fulfilling error, which encourages us to give up the struggle against bad laws and class-bound procedures, and to disarm ourselves before power. It is to throw away a whole inheritance of struggle *about* law, and within the forms of law, whose continuity can never be fractured without bringing men and women into immediate danger (Thompson, 1977:266) [Emphasis in original].

According to Thompson, although the *Black Act* was a piece of class legislation "serving first of all the interest of government's closest supporters", the law is relatively autonomous of the ruling class, as members of this class are occasionally subjected to the rigours of its justice. Justice must often be seen to be done, if the law is to sustain its legitimacy. He notes:

if the law is evidently partial and unjust then it will mask nothing, legitimate nothing, contribute nothing to any class's hegemony (Thompson, 1977:263).



This insight enables us to realize the inherent tension built into the law, a tension which is reflected, in part in the fact that the law is a means of both coercive and ideological domination, of both force and consent.

### Summary

Beattie's work is a useful, detailed historical analysis of the origins of many aspects of contemporary criminal law which we take for granted today. It alerts us to the multiplicity of factors which shaped the development (extension, reform or repeal) of English criminal law in the seventeenth and eighteenth centuries. Some of these factors, such as interest group activity, apparent crime rates and shifts in social attitudes are present in several societies such as Canada and Ghana. For instance the continuing controversy over capital punishment and abortion all reflect these forces at work.

Furthermore, there are several notable similarities between the development of law in seventeenth and eighteenth century Britain and the introduction of the public tribunals system in contemporary Ghana. The following were some of the key factors in the emergence, functioning, extension and reform of the public tribunals system: emphasis on treason and other economic and political crimes; shortage of judges; logistical constraints; nepotism and patronage appointments; malicious prosecution; and state use of terror and executions. I elaborate on the role of these factors in the tribunals system in Chapter V.

For its part, Hay's essay (1975) exemplifies the centrality of the criminal justice system to the maintenance of property and the promotion of capital accumulation.

One of the problematic issues in Marxist theorizing on law relates to the controversy over the role of law in maintaining and reproducing an unequal, exploitative system. Even the possibility of using law as a mechanism for securing substantive social change has been discounted by instrumentalist Marxist theorists. E.P. Thompson's Whigs

and Hunters (1975) is particularly useful in revealing the value of the law as an instrument of liberation, even if for most of the time, it is amenable to manipulation by the ruling class. He makes a passionate case for Marxists to see the worth of doctrines such as "the rule of law", and to promote its use for social change rather than automatically viewing it as a device of mystification, or as an instrument of the capitalist ruling class against the working class. Thompson contends that the maintenance and extension of the rule of law is necessary, although not inevitable.

Throughout the rest of this dissertation, but especially in Chapter in V, the relevance of these three English-based, historical accounts of law for a wider appreciation of Ghana's contemporary legal system and its law reform problems will become evident. This dissertation will also be informed by several of the other works reviewed earlier, especially Amissah's (1982) and Gyandoh's (1989).

#### **Chapter IV**

### **HISTORY, STRUCTURE AND FUNCTIONS OF THE COLONIAL AND POST-COLONIAL JUDICIARY**

The primary purpose of this chapter is to argue that one of the historical antecedents to the emergence of the public tribunals system is the failure of the colonial common law system bequeathed to independent Ghana in 1957. The chapter examines the systemic failure of the judicial system in post-colonial Ghana and the rising tide of popular disenchantment toward it. The failure of the judicial system, it is argued, partly facilitated the emergence of public tribunals in Rawlings' Ghana (1982-1992). This "failure" is conceived both in terms of systemic inappropriateness and the inability of the users to adapt the colonial legal system to suit local conditions. While other "alien" systems such as Mission Christianity were, to some extent, successfully modified in Ghana (as in the rest of Africa), the structures and ethos of the colonial judiciary, except for some opportunistic political tinkering, remained virtually unchanged.

The chapter delves into the pre-history of criminal law and justice in colonial Gold Coast in order to excavate and elaborate on the factors that militated against the timely and effective reform of the criminal law. Furthermore, the chapter seeks to answer three fundamental questions. First, what were the sources of the criminal law, and to what extent did they accord with the legal traditions of imperial metropolitan Britain, or those of the periphery, the natives of the Gold Coast? Second, what was the nature and purpose of colonial criminal law and justice? Third, what problems hindered the reform of the criminal law in pre-Rawlings' Ghana? Answers to these questions will help clarify the essence of colonial justice, as well as establish its crucial interconnections with the contemporary failure of the judicial system in particular, and the criminal justice system in general. Additionally, answers to these questions will help reveal the link between colonial justice and the public tribunals system in Rawlings' Ghana.

This chapter has three key objectives. First, it charts the historical context of the failure of the colonial legal system and the judiciary to relate to, and serve, the indigenous peoples of Ghana. Second, it shows how the courts were sometimes used for the enforcement of unwelcome government policies to the extent that many Ghanaians developed an attitude of cynicism toward the judicial system as a whole. Indeed, by 1957, Krobo Edusei, Minister of Interior in the first post-colonial Government of Ghana, had come to regard the court primarily as "the institution through which a Government, colonial or otherwise, imposed its policy behind a cloak of magisterial propriety." There were numerous incidents in the past legal history of the Gold Coast which could be cited to justify this argument (Amissah, 1981:70). In the colonial era, the courts did not play the role of stalwart champions of individual liberty, nor were they perceived as serving such a function. On the contrary, they were seen as one of the mechanisms through which the colonial power exercised its domination. This legacy was wholly bequeathed to the various governments of independent Ghana. Finally, the chapter critically examines the factors which militated against the effective and timely reform of the Ghanaian criminal law prior to 31 December 1981.

### **Colonial Justice**

The statutory creation of structures for the administration of justice in Ghana dates back to the second half of the nineteenth century when metropolitan Great Britain transferred *in toto*, its court structures, substantive laws, and rules of procedures to the former Gold Coast colony. This wholesale importation of English common law was effected by the famous *Supreme Court Ordinance* of 1876. Promulgated by the then Governor of the Gold Coast with the advice and consent of the colony's Legislative Council, the ordinance provided for the administration of justice in the colony in exactly the same format and manner as those then operative in England. It provided that,

The common law, the doctrines of equity, and the statutes of general application which were in force in England at the date when the colony

obtained a local legislature, that is to say, on the 24th day of July 1874, shall be in force within the jurisdiction of the court<sup>1</sup>.

The *Judicature Acts* of 1873-75 introduced broad structural reforms and qualitative changes in the administration of justice in metropolitan England (Gyandoh, 1989:1144). These reforms not only simplified the judicial machinery but also effectively merged the administration of law and equity, making it possible, beginning in 1875, for both legal and equitable remedies to be granted by all superior courts of justice in England and Wales which constitute the Supreme court of judicature. Prior to 1875, law and equity in England were administered by separate courts (Gyandoh, 1989:1144).

The reformed High Court of Justice in England was vested with universal jurisdiction in 1875 (Gyandoh, 1989:1144). The Gold Coast Supreme Court, created by the *Supreme Court Ordinance* of 1876, was invested with the identical powers and mandate enjoyed by the English High Court of Justice. As Gyandoh puts it, the Gold Coast Supreme Court

was invested with all the jurisdiction, powers, and authorities (except those of the High Court of Admiralty) which were vested in, or capable of being exercised by, the reformed High Court of Justice in England (Gyandoh, 1989:1144)

The "blessings" of these structural reforms were thus bestowed upon the Gold Coast colony through the provisions of the *Supreme Court Ordinance* of 1876. Incidentally, by virtue of these provisions,

Ghana became one of the first territories outside of England, to receive the benefit of not only the English Structural reforms of 1873-75, but also the substantive laws designated as "statutes of general application developed in England from the earliest times up to the arbitrarily determined date of July 24, 1874 (Gyandoh 1989:1145).

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<sup>1</sup> Ordinances of the Gold Coast Colony, Ordinance No. 4 of 1876, section 14. The blanket extension of imperial English common law to the Gold Coast via this provision was typical of the manner in which all former colonies of the British Empire received, and thereby became integrated into, the British legal culture.

## Sources of Colonial Law

Criminal law and judicial statutes operative in colonial Ghana were chiefly derived from English criminal law and justice. British authorities in the colony imported British laws originally for the governance of the affairs of the settler and merchant groups in the colony. It has been argued that such laws disturbed, but did not, and were not meant to, supplant the traditional Ghanaian laws and legal systems (Amisshah, 1981:76). Nevertheless, one consequence of the introduction of these laws was that the legitimacy of Ghanaian legal institutions was effectively undermined and their growth hindered, especially in those localities where British influence was most profoundly felt (Rodney, 1978). British laws and judicial statutes were made applicable in many cases to the regulation of the life of Ghanaians as the British government expanded its jurisdiction throughout the colony. The result was the existence of a dual system of law which in turn amounted to an anomic legal situation characterized by uncertainty over the dominant normative order, and involving a conflict of loyalty and legitimacy. Formal legitimacy, consisting in overt compliance, was accorded colonial law mostly by the educated class, while substantive legitimacy entailing acceptance of law grounded in experiential appreciation resided in the traditional or customary legal systems.

At any rate, the bulk of judicial enactments and laws applicable in the colony was chiefly derived from England. This fact is dramatically revealed in the examination of the Law of Inheritance in Ghana, as the following quote illustrates:

...apart from the law of Succession...the administration of estates of deceased persons was governed in Ghana by no less than thirty-six enactments. Of these thirty-one were English statutes and five Colonial Ordinances modifying in some particular or another this British legislation (Quoted in Amisshah, 1981:78)<sup>2</sup>.

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<sup>2</sup> Geoffrey Bing, Reap the Whirlwind (1968), pp. 199-200. Quoted in Amisshah.

The blanket imposition of English law on the colony and the attendant complexity of deciphering which of these statutes were of general application in post-independence Ghana was compounded by their antiquated character:

Of the English statutes which still applied in 1961 the earliest was of 1285. Four other of the laws concerned dated from the same reign, that of King Edward I. Three more statutes were from the time of Edward III, having been enacted at various dates between 1330 and 1337. Five were Acts of the Tudor Parliaments, two from the time of Elizabeth I. Three other enactments still applying had become law in the reign of Charles II and one during that of James II. One more came from the time of William and Mary. There was one statute of George III, two of George IV, two of William IV and eight from the earlier part of Queen Victoria's reign. They embraced in all a legislative history of 584 years. The most recent of them had been enacted 92 years previously and the earliest 676 years before.<sup>3</sup> (Quoted in Amisssah, 1981:78. Emphasis added).

The chronology of English statutes operative in Ghana in 1961 reveals not only the anachronistic nature of the laws because of their contextual separation (in time and space) from the existential realities of Ghana and Ghanaians, but also the character of imperial British ethnocentrism and belief in the eventual Anglicization of Ghana. For one thing, the journey through this legislative maze could have been somewhat relieved if these British statutes had been readily accessible to the lawyers whose duty it was to assist in identifying and applying the law (Amisssah 1981:78). Complete sets of the volumes of imperial statutes were not available to practitioners, even in their archaic language forms.

Yet, the discovery of a statute of general application in point<sup>4</sup> did not end the ordeal of practitioners. They had to decide whether local conditions made it appropriate to apply it to the colony, as the operation of the laws of general application within each British territory had to be necessarily qualified by local conditions. Although a greater degree of

<sup>3</sup> Ekow Daniels, The Common Law in West Africa (1964). p. 319. Quoted in Amisssah.

<sup>4</sup> The myriad of possible interpretations applicable to the term "statutes of general application" and the frustration entailed in determining the appropriate one prompted Macleod J. to remark in 1884: "I am afraid I must designate those words "statutes of general application" as slovenly expression, made use of by the Legislature of this Colony to save itself the trouble of explicitly declaring what the actual law of the Colony shall be." (Quoted in Amisssah, 1981:77).

attention to local conditions would have given the law a more African dimension and helped in the process of fusion of that with the traditional laws, this was never done, primarily because it was not in the interest of the practitioners.

This situation was also due to the fact that the British expatriate judges never stayed long enough to learn enough about one territory before being transferred to another, in their "noble" missions of conquest and "civilization" of the vanquished. Finally, many of these statutes had been amended several times in the country of origin, yet only their original versions were imported into the colony. This complicated in no small way the interpretation and application of the law by the colonial courts (Amissah 1981:79).

The Westminster judicial system was also considered an oppressive institution that only checked the activities of the poor. In justifying the introduction of public tribunals as an alternative to the colonial-independent judicial system in 1982, Mr. Chris Atim, member of the PNDC, charged that the regular judicial system was essentially discriminatory against the poor. He noted further that "the system allows the rich man who stole millions to go scot free, while the poor man who stole bread goes to jail" (West Africa, March 1, 1982:619)<sup>5</sup>.

### **The Character and Purpose of Colonial Law**

The maintenance of law and order was the principal function of courts in the colonies, a function which was entirely consistent with the colonial administration's policy of establishing peaceful conditions for the promotion of trade and entrepreneurial enterprise (Amissah, 1981:93). The pursuit of capital accumulation required the imposition of institutions which would facilitate not only the suppression of the natives but also legalize

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<sup>5</sup> This was a restatement of Solon (7th-6th Century BC), who observed that 'Laws are like spiders' webs: if anything small falls into them they ensnare it, but large things break through and escape.' Quoted in Diogenes Laertus, Lives and Opinions of Eminent Philosophers (3rd Century AD). Nicolo Machiavelli articulates the same view when he states: "He who steals a handkerchief goes to jail, but whoever steals a country becomes a Duke."



the economic scrambles of colonial exploiters and regulate the relations among them. The contribution of the courts in this regard was phenomenal. Indeed, as Amissah notes:

The most outstanding contribution of the judiciary in the hundred years of colonial rule in Africa was the maintenance of law and order. The administration of the criminal law occupied a substantial portion of the court's time.

Not surprisingly, the civil litigation which came up seldom involved governmental powers but primarily concerned disputes among native populations, or between two parties of colonial exploiters (Amissah 1981:74).

### **The Utility of Disorder**

The role of the courts in the maintenance of social order proceeded in the best tradition of British colonial administration, for it was in the imposition of the *pax Britannica* over foreign lands that it excelled. As Amissah (1981:74-75) points out, the administration of British justice in the Gold Coast, for instance, was not a consequence of the extension of British dominion but rather the precursor of its extension. This fact is crucial to the understanding of the character and purpose of British colonial justice. During the era of slavery and slave trade, there was no need for law and order as instability and lawlessness provided the most conducive atmosphere for the procurement of captive slaves, and therefore enhanced a booming slave industry. Slave merchants thus had an interest in the maintenance of disorder and lawlessness which facilitated the promotion of business (Amissah, 1981:74-75).

As nineteenth century European traders settled in their forts on the coast, and were deprived of their source of income from the slave trade subsequent to the abolition of the trade, there emerged a sudden interest in the maintenance of peace and stability in the neighbouring countryside (Amissah, 1981:75). The maintenance of peace therefore became an urgent prerequisite for the promotion and protection of trade in other

commodities. By 1882, local merchants were increasingly being appointed as magistrates and officers to deal with criminal cases arising in the nearby forts, and petty debt courts were also established (Amissah 1981:75). Thus, by November 1836, it was possible for George Maclean, Governor of the Gold Coast between 1830 and 1843, to remark in a letter to the Committee of African Merchants in London that,

the great means whereby the local government has been enabled during the last seven years to maintain peace and order throughout so extensive a country, with such feeble and apparently inadequate resources at its command, have been the strict and impartial administration of justice (Griffith, 1836:3).

In sum, the maintenance of disorder and anarchy was functional to the unbridled economic interests of European slave merchants during the period preceding the abolition of the slave trade. Whatever form of order existed was limited to ensuring the safe passage of slave commodities from the zones of conquest and market centres, via the trade routes to the ports of embarkation for eventual shipment to Europe, the Americas and the West Indies (Caribbean). It was only after the abolition of the slave trade that the maintenance of order became important as it was tied to the furtherance and protection of European trade in agricultural commodities and minerals. In either case, the existence of criminal law and order, or the lack thereof, ensured the accumulation of capital by European merchants. This means that what the law did not do intentionally is as important as what it did do: the promotion of European mercantilism in colonial lands.

Furthermore, whereas the law in the post-abolition era regulated relations among civilians, it placed no such controls on the authority of the government or any of its functionaries. Indeed, civil litigation during this period was mainly over private disputes, and there was no right to sue the Crown at this time. Grievances against the government were dealt with outside the judicial system, via petition to the executive authorities in the colony, or in serious cases, or when no satisfaction was forthcoming from the local authorities, to the British Colonial Office (Amissah, 1981:74). The executive thus developed its own system of justice for the redress of public grievances. Hence, even

within the common law system of Colonial Gold Coast, there was a dual system of justice: one for the lower classes, and one for the colonial authorities and the expatriate English (European) settler community and their allies in the local bourgeoisie. Yet, as Olson observes,

Different kinds and types of courts do not lead to equality before the law... [The courts] tend to be differentially used by different classes in society: not only that but standards, procedures, and sanctions vary from one court to another (1980:63).

This source of judicial bias has been entrenched in Ghana (as in many former British colonies), to the extent that many students of law question the ability of the courts to serve as the forum for the resolution of disputes between the citizen and the state.

#### **The Failure of the Judiciary in Post-Colonial Ghana (1957-1981)**

Those responsible for the introduction and administration of the Anglo-Saxon system of criminal justice in colonial Gold Coast in the late 1800s failed to weave it into the web of Ghanaian society. The inherited colonial justice system still remains an alien institution effectively disengaged from the essentially restitutive philosophical ideas of dispute settlement which existed in the pre-colonial social systems of the Gold Coast, and which still exist in the rural areas of what is now Ghana. Even in the urban areas, semblances of pre-colonial customary systems of conflict management prevail, co-existing with the regular Westminster court system (Lowy, 1978:187). Griffiths et al. have noted the continuing importance of traditional, negotiative systems of social control at the village level in the Arab Republic of Egypt, where

the ethic of community of shared responsibility dominates over the ethic of individual accountability which operates in the more formal, urbanized structures of social control in metropolitan Cairo (1989:10).

The inability of the colonialists to relate the Westminster criminal law to the people of the Gold Coast is most acutely evident in rural communities where traditional conceptions and

structures of justice still prevail, albeit weakened by the sporadic incursions of colonial criminal law and its personnel. In such communities where traditional ties and values structure and regulate human interactions, the modern state police and the courts simply do not exist, and where they obtain (as in semi-urban centres), they do not play any direct, significant role in the daily maintenance of social order, but merely function as symbolic authority figures of the state. The social ordering function of the police becomes pertinent largely during moments of social tension (e.g. soccer hooliganism, chieftaincy crises and violent inter-group conflict between neighbouring ethnic populations). On such occasions, the urban police are mobilized to maintain law and order in the rural areas. On the whole, however, the use of the 'European court' ranks last after "afisem" (private hearings at home), and the supernatural, on a scale of preference of strategies of conflict resolution (Lowy, 1978:202-7).

Altogether, in the experience of the local people, the courts have not proved very useful. And neither has the law. As Cotterrell (1984) points out, an essential requirement for the long-term effectiveness of law enforcement is that the law must have legitimacy:

If law is to be effective it must be in the interests of those upon whom the law depends for its invocation or enforcement to set the legal machinery in motion. The law must provide incentives to ensure its own use [T]his will mean ensuring the availability of adequate and suitable remedies in the law for those whom it is designed to aid or protect; remedies sufficiently attractive to motivate the victim of illegal practices to seek the aid of the legal system [Emphasis added].

Indeed, in the rural sectors of the colonial state, the blanket provision of incentives to condition court use could not be seriously expected as this would run counter to the exploitative mission of the state. The only exception to this was in the case of the productive rural areas of the country: those places in Ashanti, Brong Ahafo, Volta, Eastern, Western and Central regions of Ghana where the tropical rain forest assured cocoa production and provided opportunities for lumbering, and the abundance of gold, bauxite, diamond and other minerals made commercial mining lucrative. In such areas, the coercive apparatus of the colonial state was readily extended to regulate productivity and

ensure the safe conduct of commerce. In this context, law was instrumentally connected to the interests of the colonial state.

Further, the coercive resources of the state, including colonial law, were channelled into the imposition and enforcement of the head and poli taxes to force able-bodied men to migrate from the "unproductive" areas to the mining towns and commercial farming areas (Chambliss, 1986; Sumner, 1982; Sweet, 1982). As Sumner reminds us, colonialism was first and foremost a search for super-profits rather than a 'civilizing mission' (1982:23). Thus the scanty infrastructural network (trunk roads and railways, clinics and hospitals, and schools) (see Appendix A) established by the colonial state and the cohort of Christian missionaries were primarily found in the rich and productive centres of the colony, regardless of local factors (demographic) and need, while the "unproductive" areas were robbed of their men and their labour power. Soon, many "deserted" women followed the men into the towns and cities, producing an unorganized army of urban proletariat which would provide cheap domestic labour and other "legitimate" economic enterprises such as petty trading, as well as the human resource base for a buoyant industry in vice, prostitution and gambling.

The unequal integration of different regions of the colony into the international capitalist economy had two consequences for traditional criminal law and justice. On the one hand, urban residents were subjected to a barrage of "white" laws and judicial procedures, while on the other, rural dwellers retained their traditional systems of justice.

As the foregoing analyses indicate, the persistence of African institutions such as chieftaincy was not simply because of colonialists' perceptions or realization of the usefulness of such institutions as frameworks for servicing colonial administrations and furthering their exploitative purposes (as in the "indirect rule" system imposed on Northern Nigeria by the British Colonial Administrator, Lord Lugard). It was not always out of British benevolence or goodwill and respect for African traditions and so-called customary law (as the proponents of the "indirect rule" method of British colonial administration

would have us believe) that chieftaincy and traditional judicial systems were preserved. On the contrary, in some instances, the preservation of chieftaincy as a system of government and framework for justice administration was also the result of colonial aloofness (as in the northern parts of Ghana) as well as a function of continuous and bitter struggles against colonial domination (as in Ashanti). Where it served the interests of colonial economic exploitation, and where resistance was weak or lacking, traditional institutions, including systems of justice, were weakened; where colonial capitalist penetration and influence were minimal, such as in the northern and upper regions of Ghana, traditional systems of government and justice were preserved.

For the average Ghanaian, "white man's law and justice" was the most formidable tool for promoting the systematic disintegration of communities through long-standing litigation (with the attendant financial drain), corrupt lawyers and judges, abusive police officials, incomprehensible laws and a myriad of rules of conduct that were both repressive and foreign. In particular, the judicial sub-system emerged as the symbol of imperial British callousness, disregard for the values and institutions of so-called native peoples, and despotic colonial administration.

### **Alien Justice**

The justice system is widely perceived as an aloof set of structures, procedures, and practices largely incomprehensible to ordinary Ghanaians. This perception was especially widespread and acute during the colonial era when general educational levels were particularly low. The perception of justice as alien is surely not confined to colonial situations. Most people in most societies, regardless of the degree of complexity, experience this sense of alienation, largely due to the increasing professionalization of law and the complexity of justice. Excessive professionalization and complexity of law facilitate its mystification and aloofness. The peculiar language of law and legal practice

ensures that legal discourse remains a bureaucratized magic expressed in legalese (Sumner, 1982:25).

The privacy of legal discourse and its subsequent impenetrability is connected to another method of mystification: the mobilization of esoteric symbolisms and rituals. Commenting on the ideology of law and its mystifying characteristics, Colin Sumner (1982:26) observes that,

the inner structure of legal practice and its key social function in attempting to maintain order combine to give legal discourse and institutions an external appearance of something special and mysterious. Professional secrecy, esoteric language, grand ceremony, special clothing, carefully structured courtrooms, the rituals of legislations and the occupational status of the judge are all internal factors which work to present the appearance of magic [Emphasis added].

The internal structure of legal practice and its manifest features obfuscate both the ideological nature of law and its transparency as a form of political control.

A legacy of the colonial era, the "independent" Ghanaian judiciary steadfastly maintained the transcendental character of law and justice. It is a remarkable act of unflinching loyalty and faith in tradition that the wearing of robes and wigs has been maintained and presented as an indispensable part of a lawyer's apparel in Anglophone tropical Africa. The continued use of these English judicial costumes in Ghana is justified in some circles as a harmless and dignifying practice. Indeed, there is a sense in which the use of wigs and robes in tropical Africa can be seen as neutral professional uniforms. In this regard, Robert Wyllie (1991) asks:

Isn't it just another professional uniform, no more colonial or foreign in its origin than those worn by Ghanaian soldiers, students,...soccer players and ministers of religion, etc, or no more than practices like using the English language or drinking tea? (Letter, 21 March 1991).

There are, undoubtedly, several grounds for speculating that the introduction by the colonialists of uniforms and other elements of western culture, both material and non-material, into former colonies was underpinned by benign motives. There are also several

compelling reasons for appreciating the sense of gratitude many people feel for the introduction of western cultural items and practices. Acculturation is an indispensable aspect of development, and the value of borrowing and incorporating desirable foreign cultural items cannot be questioned. For example, the relative durability, versatility and inexpensiveness of khaki uniforms used in Ghana and virtually all African, Asian, Latin American and Caribbean countries are a real blessing, just as the many forms of technology transfer and social inventions embraced by these countries have meant qualitative and substantive improvements in the lives of most so-called Third World people. It is, however, precisely because of the functionality, adaptability and suitability of these cultural items in terms of the actual or perceived needs of a people that they are so popularly used. The value of cultural diffusion or the utility of most cross-cultural borrowing is definitely above question. Indeed, the contents of most modern cultures have been gained through diffusion from other cultures, past and present (Linton, 1936: 326-27; Hagedorn, 1990:51).

Nevertheless, the use of heavy, black or heat-absorbing textiles for police uniforms, like the gowns and wigs of lawyers, is definitely suitable for temperate climates but of dubious value in tropical Ghana where annual temperatures range from 21-35 degrees centigrade. The retention of these relics of colonialism on the grounds that they reflect the maintenance of a neutral tradition rings hollow. The practice of Ghanaian lawyers wearing those gowns and wigs can perhaps be understood in terms of the maintenance of 'mystery' as a form of control. As a symbol of admission to the English Inns of Court, the retention of this relic of Georgian England is further testimony to the extent to which colonial values penetrated the psyche of the colonized and ensured their continued domination and exploitation<sup>6</sup>. This, indeed, is what colonialism is all about. As late as 1979, wigs and

<sup>6</sup> There is a strong resolve from both bench and bar in Ghana to retain the wigs and gowns. President Nkrumah described the wig as 'that ridiculous headgear' and called for its abolition. Thomas Jefferson, who opposed the wearing of these robes and wigs in America commented during a debate on the propriety of their use in the U.S. that if the gown was to carry then "For Heaven's sake, discard the monstrous wig which makes the English Judges look like rats peeping through bunches of



gowns were *de rigueur* in Ghana. Though still used today (1993) they are not as popular, and seem rather anachronistic.

The mystification of the criminal law was accomplished through the reification of legal iconographies and the attachment of Christian religious essences to legal practice, albeit, without the "redemptive" power of Christianity, despite the apparent popularity of Christian denominations like the Roman Catholic, Presbyterian or Methodist churches.

These criticisms notwithstanding, the colonial judicial system served as an indispensable instrument of the vindication of national authority (Amisshah, 1981:3). As well, it functioned alongside other British institutional impositions (such as the formal school, the Christian religion, the English language and state bureaucracy) to integrate the various nation-states or pre-colonial principalities into a single Gold Coast colony, and thereby forged the foundation for the emergence of a unified Ghana. The judiciary also provided the training ground for an elitist group of Gold Coast scholars to gain experience in British governmental activities, and somehow sowed the seeds for nationalism and self-government.

In the period immediately following the Second World War, the leadership of the Gold Coast legal establishment, by dint of hard work in the de-colonization process and chiefly by virtue of its apprenticeship to the colonial government, was poised to achieve independence for the country.

The Gold Coast intelligentsia, consisting mainly of lawyers and rich businessmen - and nearly every politician of any consequence was either a lawyer or a businessman - symbolized the aspirations of the people. They embodied the great expectations of "freedom and justice". The United Gold Coast Convention (UGCC) was formed at Saltpond on 29th December, 1947, as the first political party in the colony. It became the centre of gravity of local politics. Established at the initiative of George Grant, one of the

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oakum!" (The judges took the English gown but rejected the wig.) Quoted in Amisshah (1981:84). See Charles Warren, *The Supreme Court in United States History*, (1926) vol. 1, p.48 n.1.

richest Gold Coasters and business tycoons specializing in the export of timber and cocoa, the UGCC became the political platform of conservative members of the urban and rural elite. The UGCC leadership, made up of rich merchants and lawyers, "thought that the masses were not ready for independence" (Smertin, 1987:38). It was committed to ensuring that

by all legitimate and constitutional means the control and direction of the Government shall within the shortest possible time pass into the hands of the people and the chiefs (Nkrumah, 1957:69).

Contrary to public expectations, the UGCC did not become a national party; it mobilized the sentiments and support of only the Gold Coast intelligentsia, and a crop of petty bourgeois aristocrats in the cities and urban centres.

The UGCC clearly favoured a gradualist approach to self-rule, and subsequently broke ranks with the radical Kwame Nkrumah whom it had recruited from London in 1947 as its General Secretary. Nkrumah's slogan, "self-government now" was an anathema to the gradualism of the elitist UGCC leadership.

Independence eventually came to Ghana - the first of its kind in sub-Saharan Africa - on 6 March 1957, not through the rhetoric and negotiative skills of the legal profession, but through the radicalism, simplicity, mass organizational skills and tactics of the verandah-boys<sup>7</sup> led by Kwame Nkrumah and his Convention People's Party (CPP). Formed at a mass rally at the Accra Arena Stadium on 12 June 1949, the CPP was the first radical, national liberation movement in Africa. By 1950, it had a membership of over one million drawn from all strata of Gold Coast society (Smertin, 1987:42-43).

Meanwhile at the top echelons of the judicial establishment, professional secrecy guaranteed that public scrutiny of nefarious activities and nepotistic promotions within the

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<sup>7</sup> Led by Kwame Nkrumah, these were a group of young, easy-going radical politicians. Their simplicity earned them the accolade "verandah boys" because they did not mind sleeping on balconies and generally contending with incommodious accommodation in rural communities while on a campaign trail.

judiciary would be foreclosed, while a lodge-style brother's-keeper protectionism prevailed, underpinned by esoteric language, old-boyism and class alliances.

Nevertheless, the justice system, like other alienating colonial institutions such as the centralized apparatuses of government (including the police and the military), is viewed with disdain by the ordinary Ghanaian. In fact, in Ghana as elsewhere, while police and judges are seen as powerful because of their abilities to physically coerce and incarcerate respectively, as a group, lawyers are seen as chronic liars who work against the interests of the poor. Although the legal profession historically enjoyed tremendous popularity because of its key role in colonial government administration and during the early phase of the struggle for independence, today it is perceived, in some quarters, largely as a parasitic profession that thrives on protracted litigations, the flames of which it helps to fan.

#### **Justice Administration**

For the purpose of justice administration, each British colonial territory was divided into large judicial divisions in which a single judge constituted a court. British colonial possessions in West Africa (namely, the Gambia, Sierra Leone, the Gold Coast, and Nigeria) were divided into administrative units called districts. Each district was headed by a District Commissioner who wielded considerable legislative, executive and judicial powers. Government at the smallest unit of colonial administration was thus characterized by fusion rather than separation of powers. While prudent logistical and personnel considerations undergirded this practice, abuse of powers was a fact of colonial domination, especially at the district level.

District Commissioners and their deputies, whether or not they possessed any legal training, were empowered to constitute a court in each district. The courts of the District Commissioners exercised both civil and criminal jurisdiction. Appeals from the divisional and district courts lay to the Supreme Court. As the lower tier of the Supreme Court, they were subject to the direct control and supervision of the Supreme Court (Gyandoh, 1989).

The highest court of Judicature in the colonial Gold Coast was the Supreme Court. It comprised two or three judges, one of whom had to be the Chief Justice or his deputy. Its mandate was to hear appeals from the divisional and district courts. Judgments of the Supreme Court could be appealed to the West African Court of Appeals (WACA) which rotated its sittings in the capitals of colonial British West Africa (Banjul, Freetown, Accra and Lagos). With leave of the Supreme Court, its decisions could be appealed, on a point of law, to the Judicial Committee of the Privy Council (Gyandoh, 1989). A wing of the British House of Lords, the Committee of the Privy Council was the court of last resort in all British Colonies on matters pertaining to points of law. In Britain, however, this "High Court of Parliament" (Gyandoh, 1989:1146) was not the final court of appeal on points of law.

Despite the benefits of the reforms in the *Judicature Acts* of 1873-75, the imposition of English laws on the Gold Coast colony, as elsewhere, was done with impunity and without regard for the customary laws and traditional politico-judicial institutions of the indigenous people. For example, the institution of chieftaincy, a highly developed hierarchical system of government embodying the ideals and practice of democracy as practised in Britain (Busia, 1951; Rattary, 1969; Hayford, 1970; Rodney, 1976) was in many instances, undermined or exploited through the so-called system of indirect rule such as was the case in Lord Lugard's northern Nigeria. This time-honoured institution was simply abolished in the case of the French West African colonies of Senegal, Guinea and Cote d'Ivoire (Kiwanuka, 1980). Where the institution still persists, such as among the Ashantis of Ghana or the Yorubas of Nigeria, it owes its existence to resistance rather than to imperial goodwill or respect for the traditions of native peoples.

## **Structure and Administration of Post-Colonial, Pre-31st December 1981 Judicial System**

In spite of some reformist tinkering with its basic structures by various post-colonial governments in Ghana, the essence of the Westminster judicial model has persisted since its inception in 1874. Attempts have been made by all post-independence governments except the AFRC, to streamline and restructure the inherited judicial system in order to better serve the goal of justice delivery as conceived by the government of the day.

With the attainment of independence in 1957 came a series of measures designed to assert, advance and concretize the economic and political autonomy which independence was perceived to embody. One of the first colonial government structures to be reformed by the new independent government was the judiciary.

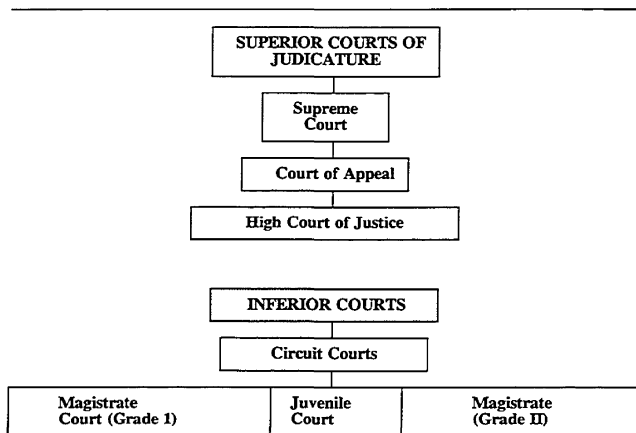
Through the *Courts (Amendment) Act, 1957 No. 8*, the CPP regime of Nkrumah fused the High Court and the Court of Appeals as one Supreme Court, and subsequently abolished the right of appeal to WACA. The government made an administrative decision disallowing appeals from the new Supreme Court to any court outside Ghana, and in 1960 completed this disengagement of Ghana's judiciary from overt imperial linkage and control by revoking the enactments establishing appeals to both the WACA and the Privy Council. With the promulgation of the 1960 First Republican Constitution, the Privy Council lost its appellate jurisdiction.

The 1960 Republican Constitution established two superior courts and, by Statute, four inferior courts. The High Court and the Supreme Court constituted the superior courts, while the inferior courts consisted of circuit courts, district magistrate courts, juvenile courts and local courts. An enactment of 1958 - the *Local Courts Act of 1958, No. 23* - had previously established local courts with the intention of bringing the administration of justice closer to the population in rural areas (Gyandoh, 1989:1147).

A dual system of court administration existed in Ghana during the Nkrumah era. The Chief Justice had responsibility for administering all courts except the local courts, which were presided over by local magistrates (Amissah 1982:1). At various times, the administration of local courts was the responsibility of the Minister of Local Government and the Minister of Justice.

After the overthrow of the CPP regime in February, 1966, the NLC government abrogated the 1960 Republican Constitution but briefly maintained the existing court structure, with the same powers, duties and functions of its various constituents.

**FIG. 1 Structure of the Judiciary in Ghana, 1969-1979**



Section 2(2) of *The National Liberation Council Proclamation 1966* allowed the continuation of the courts existing prior to the coup. On October 1st, 1966, the NLC introduced a new court structure under the Chief Justice. The single court system, established by the Courts Decree (N.L.C.D. 84), replaced the previous dual system in operation since independence. This single structure has ever since been retained (Amisshah, 1982:1).

Under the NLC, the superior courts were reconstituted. The Superior Court of Judicature established by the *Courts Decree*, comprised the Court of Appeal as the highest judicial organ, and the High Court. The inferior courts remained the same except for the district and local courts which were rechristened magistrate courts (grades I and II). The Supreme Court was abolished. Several high and circuit court judges, and local magistrates

regarded by the new junta as political appointees of the CPP were dismissed in a bid to instill discipline, probity and accountability in the judiciary.

Following the voluntary vacation of power by the NLC in 1969, the PP civilian regime took over the governance of the country under the Second Republican Constitution. This constitution superseded the *Courts Decree, 1966*. It vested the judicial power of the State in the judiciary with jurisdiction in all civil and criminal matters (Amissah, 1982:1). Article 102, clause 4 of the Ghana Constitution of 1969 recreated a Supreme Court. The constitution established the Superior Courts of Judicature comprising the Supreme Court, the Court of Appeal, and the High Court of Justice. The lower tier of the court structure - the inferior courts - remained the same as obtained under the NLC regime (Gyandoh, 1989:1147).

By section 4 of the *National Redemption Council (Establishment) Proclamation of 1972*, the NRC junta which overthrew the PP government in 1972 maintained the court structure existing before the *coup d'etat*. The new government suspended the 1969 Constitution, dismissed the executive, and dissolved parliament just as the previous military junta, the NLC, had done.

In September 1972, the NRC abolished the Supreme Court and transferred its functions to the full bench of the Court of Appeal. It argued that since the substantial jurisdiction of the Supreme Court consisted in the interpretation and enforcement of the 1969 Constitution, with the suspension of that constitution, there was no need to retain the court. The regime, however, retained all the other components of the judiciary as established by the 1969 Constitution.

Neither versions of the NRC - SMCI and SMCI - tinkered with the judicial system. Nor did the AFRC which replaced the SMCI in June 1979. The AFRC, however, established under *AFRC Decree 23*, a number of special tribunals alongside the traditional courts, to act as instruments of popular justice.



The Third Republican Constitution of 1979 restored the Supreme Court previously abolished by the NRC. Before the overthrow of the Third Republican government, the judiciary in Ghana consisted of the Superior Court of Judicature made up of the Supreme Court, the Court of Appeal and the High Court of Justice, and the inferior courts as previously constituted under the 1969 Constitution.

Hence, under the Third Republican Constitution, the judicial structure of Ghana was essentially the same as that of the 1969 constitution, with the sole exception that the 1979 Constitution contained a set of twenty Transitional Provisions. The Transitional Provisions enshrined in the 1979 Constitution clearly specified that

It shall not be lawful for any Court to entertain any action or proceedings whatsoever for the purpose of questioning any decision, judgment, findings, order or proceedings of any Special Court convened under Section 1 of this Decree; and for the removal of doubts, it shall not be lawful for any court to entertain any application for an order or writ in the nature of habeas corpus, certiorari, mandamus, prohibition or quo warranto or any declaration in respect of any decision.<sup>8</sup>

These Provisions were inserted by the AFRC, ostensibly to smooth the transition from military to civilian government and to guarantee immunity against prosecution for previous participants in military coups in Ghana.

This novelty in Ghana's constitutional history was also designed to preserve the gains of the June 4th Revolution. The Transitional Provisions further aimed at ensuring that the judicial decisions of the AFRC Special Courts would not be reversed in the future, and that the purging or "house-cleaning exercise" initiated by the AFRC government would continue beyond September 24th, 1979, when the Third Republican Constitution took effect. Rather than facilitating a smooth and pacific transition to civilian rule, the Transitional Provisions became the subject of intense controversy and spurred considerable political ire and venom.

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<sup>8</sup> See Ghana Constitution of 1979, Transitional Provisions, Marginal Notes to Sections 16-17 which refer to "preservation of confiscations and penalties imposed by the AFRC in relation to purging exercise", and "continuation of purging exercise."

### **History, Nature and Functions of Special Tribunals in Pre-31 December 1981 Ghana**

The use of special tribunals in Ghana predated the PNDC regime under whose auspices this instrument of justice blossomed. During the Nkrumah regime, such courts were established to try a stipulated set of special offenses including treason (Oquaye, 1990:56). All military regimes in Ghana have employed several versions of special courts as instruments of justice.

Despite their constancy, special courts were never expected to crystallize as permanent structures of justice. With the exception of the NRC/SMC I and II and the AFRC regimes, these streaks of judicial innovation have been mainly *ad hoc*, uninformed by any clearly articulated philosophies of justice, and characterised by celerity and certainty of prosecution of the political foes of the ruling junta.

#### **Tribunals Under the NRC/SMC I and II Regimes**

While the powers exercised by special courts under various regimes prior to 1972 had been limited to matters of military insurrections or treason, the special courts established by the NRC regime of Col. Ignatius Kutu Acheampong enjoyed very wide powers. For the first time, the mandate of military tribunals was expanded to enable them to exercise considerable criminal jurisdiction over ordinary civilians. Thus, the official designation of these courts as military tribunals belied their character and broader functions. They were mechanisms for the social control of military as well as civilian populations.

A closer examination of the law establishing military tribunals by the NRC regime, the mandate given these courts, and the kinds of cases they adjudicated during the period 1972-78 reveals that although they had no jurisdiction to try offenses generally under the 1960 *Criminal Code* of Ghana, they nonetheless exercised criminal jurisdiction over the civilian populace. The ambivalence surrounding this point of law was highlighted in the

famous case of *Oforu-Amaah v. The State* which challenged the constitutionality of military tribunals to try non-military persons (Amissah, 1982:13).

Military tribunals were instituted under the *NRC Subversion Decree, 1972* (N.R.C.D. 90 S.4). The decree also specified a number of offenses, mainly political and economic, which were justiciable by the tribunals. These offenses were specified by Section 1 of the decree (as amended by the *Subversion (Amendment) Decree, 1973* (N.R.C.D. 159), S.1) as follows:

a person shall be guilty of the offence of subversion who

- (a) prepares or endeavours to overthrow the Government by unlawful means; or
- (b) prepares or endeavours to procure by force any alteration of the law or the policies of the Government;
- (c) prepares or endeavours to carry out by force any enterprise which usurps the executive power of the State in any matter of both a public and a general nature; or
- (d) incites or assists or procures any person to invade Ghana with armed force or unlawfully to subject any part of Ghana to attack by land, sea or air or assists in the preparation of any such invasion or attack; or
- (e) without lawful authority (proof of which shall be on him) imports into Ghana any explosive, firearm or ammunition; or
- (f) kills or attempts to kill or conspires with any other person to kill any member of the [Supreme Military Council] or the National Redemption Council or a Regional Commissioner or any other citizen of Ghana with a view to securing the overthrow of the Government or with intent to coerce any other citizen of Ghana into opposing the [Supreme Military Council] or otherwise into withdrawing or withholding his support from the Supreme Military Council; or
- (g) commits the offence of robbery; or
- (h) smuggles or attempts to smuggle any cocoa, timber, diamonds or gold out of Ghana; or
- (i) steals any cocoa, diamond, gold, motor vehicle, underground telephone cable, or any telephone wire attached to or connected with a telephone or telegraph pole, or any electricity cable or wire owned by the Government or a statutory corporation; or
- (j) wilfully damages any public property by act of violence; or
- (k) organizes or incites any other person to go on a general strike likely to cause suffering to the general public; or
- (l) steals any funds intended for the purchase of cocoa; or
- (m) steals any drug, medicine, or pharmaceutical preparation, substance or material from a Government hospital, health post, clinic or store; or
- (n) hoards any goods, contrary to the Price Control Decree, 1972 (N.R.C.D. 17); or
- (o) unlawfully deals in any foreign currency notes in a manner likely to damage the economy of Ghana; or
- (p) steals any public funds; or

- (q) offers a bribe to obtain any import licence, or takes a bribe to allocate any import licence; or
- (r) being a member of the Armed Forces, the Police Service or a public officer, demands or takes any bribe; or
- (s) impersonates any member of the Supreme Military Council or the National Redemption Council or a Regional Commissioner, or falsely and dishonestly represents to any person that he is acting in accordance with instructions, orders or a request of the Supreme Military Council or National Redemption Council or any member thereof or a Regional Commissioner; or
- (t) does any act with intent to sabotage the economy of Ghana.

The offenses listed under paragraphs (a) to (f) are political in nature, while those under (g) to (t) are predominantly economic. The offenses of subversion or treason in the first category attracted the penalty of death by firing squad upon conviction, while those in the second category were punishable with a prison term ranging from a minimum of fifteen years to a maximum of thirty.

The offence of robbery is generally regarded as a crime of violence and it has been severely punished in various historical and contemporary criminal justice systems. In 1785, William Paley, commenting on the justifications for the harshest sanctions for the crime of robbery in England noted that such violent offenses "endanger life and safety, as well as property: and...render the condition of society wretched, by a sense of personal insecurity" (Beattie, 1986:148). Break and enter offenses committed while the victims were asleep and defenceless were deemed particularly reprehensible. And, as Beattie points out, robbery aroused the greatest anxiety, and robbery on the King's highways, which amounted to treason, was sternly feared and

regarded as one of the most heinous offenses, no doubt because it threatened not only the safety of individuals but also freedom of travel and commerce, and involved violence in a place especially protected by the King's peace (Beattie, 1986: 148).

So repugnant was the crime of robbery that between 1531 and 1692 all forms of robbery had been removed from the benefit of clergy, and were punishable by death, with statutory provisions offering rewards for the apprehension and conviction of offenders (Beattie 1986:148).

By the time the NRC seized power in Ghana from the civilian government of Dr. Kofi Busia in 1972, robberies had become quite common. According to Nortey (1977), between 1960 and 1972, property offenses accounted for 46.0% of recorded crime, with a mean growth rate of 7.9% a year. Robbery, burglary and break and enter offenses reached a peak in 1968, a situation which Nortey explains as follows:

This picture was due to the political and economic conditions then existing in the country. In order to stamp out thuggery and political terrorism which led to an increase in the number of crimes of violence due to the political instability which characterised party political activities immediately after the attainment of independence, the government ordered the arrest and detention of all known recidivists who were alleged to have been used as tools by the opposition parties in the terrorist campaigns. This action had the unintended effect of reducing the number of robbery, housebreaking, etc., between 1961 and 1966. When these persons were released after the overthrow of Nkrumah's regime in 1966, the incidence of robbery, etc., increased (1977:111-2).

The relaxed political atmosphere and general sense of euphoria occasioned by the overthrow of the one-party state dictatorship of Nkrumah and combined with the cumulative results of years of declining economic growth and increasing joblessness and heightened materialism to create the appropriate anomic situation which facilitated an increase in property crimes. There was thus a state of anomie in both the Durkheimian and Mertonian senses. Situations characterized by a relative breakdown in the regulatory power of social norms (Durkheim, 1933) conjoined with a disjuncture between culturally prescribed goals of success and the socially approved opportunity structures or avenues for realizing those aspirations (Merton, 1938) are generally conducive to the proliferation of instrumental crimes. In its determination to put a lid on this increasing trend and to protect private property and defend property rights, the NRC government made the offence of robbery a subversive act punishable by death.

Section 3 of *N.R.C.D.90* also made concealment of subversion a treasonable offence attracting a prison term ranging from fifteen to thirty years minimum and maximum respectively. Since all these offenses were triable by a military tribunal, the

*NRC Subversion Decree, 1972*, had the effect of making all Ghanaians potentially subject to the jurisdiction of military tribunals. Many civilians were subsequently tried by military tribunals during the Acheampong-Akuffo reign, 1972-1978. Hence, these courts were, in this particular sense, no different from the public tribunals established under the PNDC regime.

The tribunals were also placed beyond the control and supervision of the regular superior courts. The promulgation of Section 4(8) of N.R.C.D.90 which was inserted by the *Subversion (Amendment)(No.2) Decree* of 1973 (N.R.C.D.191) ensured that decisions of military tribunals were final and excluded from the prerogative writs or orders of *habeas corpus*, *certiorari*, *prohibition*, *quo warranto* and *mandamus*. It provided as follows:

No court shall entertain any action or proceedings whatsoever for the purpose of questioning any decisions, judgment, findings, order or proceedings of any Military Tribunal convened under this section; and for the removal of doubts, no Court shall entertain any application for an order or writ in the nature of habeas corpus, certiorari, mandamus, prohibition or quo warranto in respect of any decision, judgment, findings, order or proceedings of any such Tribunal.

Thus, the tribunals had original jurisdiction over subversive offenses, and the strong wording in Section 4(8) of the Decree was intended to effectively remove the decisions of the tribunals from the appellate jurisdiction and supervisory powers of the ordinary superior courts. As Kumado (1975) and Amissah (1982) strongly argue, however,

it is doubtful whether the apparent comprehensiveness of the exclusionary provision accomplished this goal since the interpretation of the terms, purposes, and effect of the Subversion Decree itself had not been taken away from the courts (Amissah, 1982:13).

### **Composition**

A military tribunal could be convened by the Commander-in-Chief of the Armed Forces or his/her duly authorized agent. Only Armed Forces personnel of the rank of

Captain or above could be appointed to the tribunal. When duly constituted, such a court was presided over by an officer with the rank of Lieutenant-Colonel or above in the Armed Forces, and not less than two other members of the rank of Captain or its equivalent in any of the forces. Decisions of the court were by majority, and not subject to any appeals.

### **Special Courts Under the AFRC Regime**

The AFRC established special tribunals to carry out revolutionary popular justice. The *Armed Forces Revolutionary Council (Special Courts) Decree of 1979 (AFRCD 3)* provided for the creation of special courts as the instruments of the "house-cleaning" exercise which the regime initiated.

Section 3(1)(a) of AFRCD 3 specified a number of offenses justiciable by the Special Courts/People's Courts. The offenses included:

- a) acquisition or obtaining of a loan, property, material promise, favour or advantage whatsoever by any person who uses, abuses or exploits his official position in any public offices;
- b) illegal or dishonest acquisition of property by a public officer, citizen of Ghana or other person resident in Ghana;
- c) gross negligence or dishonesty in applying public property;
- d) intentional or reckless dissipation of public funds or property.

The creation of the People's Courts was predicated on the AFRC's recognition of three fundamental truisms about the nature of politics, economy, justice and morality in 1979 Ghanaian society. These were: (1) the venality and kleptocratic character of the ousted Achampong/Akuffo regimes; (2) the state-supervised institutionalization of *kalabule* (unethical and corrupt business, professional or personal conduct) and its pervasiveness in Ghana; and (3) the historical inability and/or unwillingness of the traditional judicial system, owing to its ideological and class alliance with capitalism, to deal firmly, swiftly and justly with the widespread corruption, wanton abuse of power, gross incompetence and blatant human rights violations perpetrated mainly by public officials and the upper and middle classes generally.

Given the AFRC's commitment to "cleaning the mess" created by the military dabbling in state governance, as well as its conviction that the traditional criminal justice system was too morally and ideologically bankrupt to execute revolutionary justice, the regime created a parallel judicial system (the People's Courts) to advance its goal of popular justice.

Kwamena Ahwoi, one of the main intellectual back-bones and ideologues of the June 4th Revolution, poignantly stresses the inability of bourgeois legality and its entire criminal justice apparatus in Ghana to conscientiously and decisively deal with *kalabule* when he observes that

Long before June 4 itself, there were clear signs of institutional breakdown of the law enforcement and other agencies especially the Police and Judiciary. The fact that these institutions were helpless whilst the NRC/SMC rule was going on was an admission of the failure of the legal system to place limitations on the power of the excesses of those Governments and reverse the calamitous trend that they had embarked upon (The Legon Observer, 25 December 1981, p.298).

Ahwoi illustrates his argument with the inability of any lawyer in Ghana to attempt to institute a legal challenge against the creation of excess liquidity in the economic system by the NRC/SMC regimes. The excess liquidity was a direct result of the over-printing of currency authorised by the Government in flagrant violation of the *Bank of Ghana Act, 1963* (as amended).

The intentions behind the creation of the People's Courts were primarily punitive and reparative. Through these courts, the regime aimed at exacting retribution and reparation for crimes against the people. While the regular courts have traditionally tended to over-concentrate on the adjudication of street crimes, the People's Courts devoted their energies largely to the prosecution of suite crimes and other white collar offenses. Similarly, whereas in the regular courts, the poor, compared to the rich, are generally given stiffer penalties upon conviction, the reverse was the case with the People's Courts. Nevertheless, unlike the regular courts, the People's Courts were quite draconian in the



sentences they imposed on both the rich and the poor. The strategy was to employ fear as a mechanism of achieving compliance to the new normative order.

The People's Courts were also intended as a forum for the inculcation of discipline, probity and accountability in Ghanaian public life. This was accomplished via the imposition of stiff penalties on convicted offenders. By pursuing both specific and general deterrence through swift prosecution and the imposition of penalties, the People's Courts hoped to educate the public on the virtues of honesty, public-spiritedness, modesty and patriotism. Finally the People Courts functioned as a symbol of people's power which the June 4th Revolution sought to advance.

In their actual operations, the People's Courts served retributive, deterrent and symbolic functions. The most distinctive thing about the People's Court system, besides its characteristic procedural simplicity, severity of punishments and the swiftness of their enforcement, was that they were largely an instrument of class justice - a device for the social control of the middle and upper classes who were the special targets of these courts.

The Decree also provided that any individual found guilty by the People's Court of any of the offenses specified under Section 3 would be liable to death by firing squad or to a minimum of three years imprisonment. The State would also confiscate any assets found by the Court to have been acquired unlawfully by the convicted person.

The revolutionary tribunals did not permit a right of appeal to any higher court. Moreover, sentences imposed by the People's Court were subject to the approval of the AFRC. Needless to say, these policies constituted a rejection of the venerated traditional common law doctrines of *habeas corpus*, separation of powers and judicial independence. It allowed the AFRC the legal space to pursue selective justice and to make political "adjustments" to judicial decisions. In this way, the AFRC guaranteed the effective synchronization of the actions of the judiciary in accordance with its goals. The executive's control of the new judiciary was therefore total.

## **Problems of Law Reform in Pre-Rawlings Ghana**

This section considers the factors that militated against a significant reform of the received law and criminal justice system in Ghana prior to the advent of Jerry Rawlings on December 31st, 1981. The argument here is that although several changes were made in the structure of judicial administration and in the law itself, these modifications were largely cosmetic and ineffectual in connecting the criminal justice enterprise to the rapidly changing requirements of Ghana and the aspirations of the people. This section answers the question: Why were serious reforms not effected in the law before 1982?

As pointed out earlier, the bulk of Ghana's law was derived from the colonial era. By virtue of section 1 (1) of the *Ghana (Consequential Provisions) Act 1960*, the Gold Coast, on its move into independence and subsequently to Republican status as Ghana, took with it what Marshall (1981) describes as a collection of miscellaneous, possibly archaic and largely unidentified statutes of England as part of its basic law. Some lawyers on both the bar and the bench in Ghana have frequently expressed a growing impatience and frustration with the alien and archaic character and dilatoriness of the received law and judicial system. Indeed, prior to the 31st December Revolution a number of legal scholars and legal practitioners called for significant reforms in the criminal justice system in order to render it more meaningful and effective in meeting the complexities and aspirations of a changing society. Despite the pervasive recognition of the necessity for a radical revamping of the system, both the judiciary and successive regimes failed to act accordingly. Yet, section 3 of the *Courts Act* of 1971, Act 732 allowed for the elimination of antiquated colonial laws from the statute books and for their replacement by a substantive body of law which was clear, certain and up-to-date.

The failure to modernize the law is all the more perplexing since many eminent legal scholars who are well disposed toward the British legal practice of using decided cases (case law) as guidance in the resolution of current court problems in Africa have articulated sentiments favouring reform of the law. For example, in discussing the future

of the received English law in the countries of the commonwealth, H.H. Marshall identifies Akilagpa Sawyerr, former Vice-Chancellor of the university of Ghana and a constitutional lawyer, and Jack Hiller as "two learned authors" who favour the use of the British case law system but advocate reform in the system. In their 1971 work titled "The Doctrine of Precedent in the Court of Appeal for East Africa", Sawyerr and Hiller were critical of the evolution of the case law system in East Africa and disapproved of the effects of English courts decisions on the development of the law in Commonwealth East African countries (Bankie, 1987:2). Their criticism of what they term the "fetish of cases or case fixation" also extends to the exaggerated respect given by East African courts to English decided cases. As Bankie (1983) points out, Sawyerr and Hiller's criticisms of the East African legal system may be safely applied to the legal systems in Commonwealth West Africa.

Similarly, Samuel Asante (1980), formerly of the United Nations Centre on Transnational Corporations in New York, and former Solicitor-General of Ghana and Ghanaian Ambassador to the United Kingdom has offered an incisive criticism of the basic ingredients of Ghana's legal heritage. He defines that heritage as: 1) a system of colonial courts and native courts, now fused into one; 2) the local customary laws, procedures and processes so long as they did not conflict with colonial notions of natural justice and equality; 3) "received" colonial laws; 4) colonial legal traditions and techniques; 5) local Ghanaian legislation made by Parliament; 6) colonial rules of procedures as modified in Ghana; 7) judicial decisions over the previous hundred years; 8) western concepts of justice; 9) public international law including the law of international organizations; and 10) the legal works of jurists and other publishers.

Asante points out that the legal authorities in Ghana have failed to seriously modify and reshape the colonial legal heritage in consonance with the changing requirements of an independent country. The failure to reform the colonial judicial legacy can be attributed to the combined effects of inertia on the part of the legal authorities in Ghana; judicial

conservatism; absence of consensus among judges on a plan of reform; lack of an organized, determined and articulate group to champion the drive for reforms; and political intimidation.

The independent judiciary in Ghana failed to meet the challenge of creativity in adapting the colonial legal heritage to the changing needs of Ghana partly out of sheer laziness, inertia and complacency. It is arguable that such creativity would have made a distinctive contribution to the world's jurisprudence and possibly forestalled the introduction of the policy of popular justice and the system of public tribunals created by the Rawlings Revolution.

Judicial conservatism also lies at the heart of this failure. As Saced El Mahdi, former Dean of the Law Faculty of the University of Khartoum points out:

cultural and legal imperialism are still in existence despite the attainment of political independence. Judges still think in terms of London, Paris, Madrid, Rome or the Hague. The justice and judicial systems we have in Africa are poor carbon copies of European justice, complete with bowler hats, pipes, ivory towerism, chancery lane suits, Oxford accents, conservatism, robes, gowns, wigs and above all brainwashing (cited in Bankie, 1983:5).

Saced El Mahdi labels this form of justice as 'second rate justice'. This conservatism stifles initiative.

Critically connected with this conservative judicial outlook is the excessive reliance by Ghanaian judges on previous decisions derived from English courts. Prior to 31st December, 1981, Ghanaian judges presiding over Ghanaian courts were routinely upholding exploitative concessions extracted in the colonial era from illiterate African chiefs by many English mining and timber companies (Asante, 1980; Bankie, 1983). It would seem that many Ghanaian legal practitioners, by virtue of their colonial legal education and class interests, had become ardent defenders of the inherited legal system, and were largely incapable of transcending the intellectual boundaries of the judicial *status quo*, nor of a deeper appreciation of the role of law in social transformation. Thus, many crucial areas of Ghanaian law remained inherently archaic and divorced from the existential

realities of the Ghanaian social formation from which legal conflicts emanated. For example, the British concept of freedom of testation in the area of wills is categorically alien to Ghanaian values and customary practices. Indeed, in the Ghanaian context, the concept is tantamount to the freedom to disinherit one's spouse and family (Asante, 1980). Nevertheless, Ghanaian judges pathetically applied this concept without qualification, even in respect of property otherwise governed by customary law.

The tendency for Ghanaian courts to passively recite and apply the decisions of English Courts also extends into the area of torts arising out of a breach of duty resulting in a right to damages, as well as the area of civil liabilities. With regard to laws governing interpersonal relations, Asante (1980) observes that the excessive individualism and debilitating materialism common to western liberal democracies are totally inappropriate and foreign to the social values and existential conditions of Ghana where the traditional social outlooks and philosophies of the constituent ethnic groups support the supremacy of collective interests. Despite the increasing encroachment of individualism and other Western values on traditional social structures in Ghana subsequent to modernization and urbanization, the general ethic of collectivism still reigns paramount, as does the sense of a collective, clan-based destiny.

It must, however, be pointed out that on the whole, Ghanaian judges have shown a far greater cultural sensitivity in their interpretation of customary law than did the colonialists whose attitude toward African customary law was generally one of contempt (Asante, 1980; Bankie, 1983: 6). The tendency of Ghanaian courts to blindly apply Euro-centric concepts in the determination of cases in Ghana is indicative of a lack of legal creativity and insensitivity to local conditions. It also reflects the constrictive power of the case method which constitutes a substantial portion of the legal education of many legal practitioners - a method which mainly stacks the deck of legal education in favour of a form of highly complex, elaborate and sophisticated elite discourse divorced from the real life settings or social structure from which legal dramas issue. Historically, this

abstraction of legal cases from real life was reinforced by another time-honoured method of legal training - the case-law technique - which stretches the legal rules in a given case to the fullest limits of logic and practicality.<sup>9</sup>

Often, the net effect of the use of these methods in teaching legal reasoning is the production of highly rational and finely dissecting, albeit pseudo-scientific, minds which become slaves to method; it is usually a successful formula for the production of catatonic scholarship and captive minds. Legal reasoning is more a process of mystification than clarification, and it has the potential to produce legal robots who robustly articulate case law with brilliance but brutishly disregard the social contexts of the cases; it sometimes absolves its devotees from social responsibility while equipping them with the power of legal pellets moulded in arrogance and opinionatedness.

The foregoing analysis must not be construed to mean that all legal practitioners, by virtue of their legal training and class position, are emotionally and intellectually removed from the yearnings for justice, appreciation for the dire socio-economic conditions and aspirations of the common people. Throughout the world, a small but vibrant and dedicated band of lawyers, mostly with socialist ideological orientations, sooner or later crop up to champion the cause of the ordinary people for greater social justice and economic equality through legal, political and economic reforms. Although some may be motivated by careerist ambitions and/or a blind commitment to socialist ideology, the fact remains that some lawyers demonstrate a remarkable devotion to the pursuit of popular justice. For instance the National Association of Democratic Lawyers (NADL) is a legal advocacy group lobbying for judicial reforms in Ghana since its inception in 1982, and claiming to represent the interests of the ordinary citizens. To its credit lie two important legal initiatives: (1) the establishment of Legal Aid to ensure greater access to legal counsel, and

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<sup>9</sup> The Socratic method is now a rarely-used teaching technique in law schools, although its influence may be pervasive and enduring in those ex-colonies in which traditions, local or imported, die hard. Probably, most of Ghana's top-brass, "establishment lawyers" are products of the "old school".

(2) the enactment of the *Intestate Succession Law, 1985*.<sup>10</sup> This law aims to remove the anomalies in the law relating to intestate succession, and represents an unqualified victory, particularly for women who are often deprived of access to the economic investments or resources registered in the name of their husbands upon the death of the latter.

Another impediment to the reform of the legal and judicial system in Ghana is the absence of consensus among judges of a plan for reform (Asante, 1980). Although most judges are basically conservative, differences exist within the top strata of the legal profession as to what should be reformed, how and when.

In other words, judges in Ghana are not necessarily a class in itself in the classical Marxian sense of the word, and can therefore not be expected to act in concert on all matters pertaining to the administration of justice. Various sectarian, ideological and class interests impinge on the very possibilities of law reform. Ghanaian judges have tended to leave law reform to Parliament, an institution which has had a troubled history. The difficulty is exacerbated when ideological configurations are entered into the calculation. The socialist-oriented "jurisprudence of insurgency" (Brickey and Comack 1989) and demands for popular justice articulated by some left-wing lawyers do not often sit comfortably with most of the Oxford-trained conservative lawyers and judges. This ideological cleavage, possibly limits the design of a consensual program of legal reform by legal authorities in Ghana. Unlike the situation in Canada where Royal Commission reports are generally respected by political parties of nearly every shade the Ghanaian experience is different mainly because of the absence of a long-established tradition of continuity in party politics and consensus-building.

A free, determined, well-informed and articulate class of law reform advocates is lacking in Ghana. This situation also possibly contributed to the absence of significant legal and judicial reforms in the period before December 31st, 1981.

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<sup>10</sup> The 31st December Women's movement and the National Council on Women and Development were also influential in the passage of this law.

These factors are further compounded by pervasive governmental interference and intimidation of the judiciary in Ghana. These tendencies constrict and poison the atmosphere conducive to the pursuit of the difficult task of law reform. The history of Ghana is replete with examples of executive interference in the administration of the criminal justice system; both civilian and military governments are guilty of this practice. The law reform problem in Ghana epitomizes the classic chicken-and-egg causation riddle: it is probable that political repression and the absence of democracy have prevented free and conscientious law reform advocacy from blooming; it is equally probable that the absence of such an advocacy has enabled dictatorships to flourish. Both factors are culpable.



## **Chapter V**

### **THE ROLE OF LEFTIST INTEREST GROUPS AND THE GHANAIAN MEDIA IN THE ESTABLISHMENT OF PUBLIC TRIBUNALS**

This chapter examines the role of leftist interest groups and key sections of the Ghanaian media in the introduction and perpetuation of the public tribunals system as the primary vehicle of a new judicial dispensation. While recognizing that certain fundamental differences exist between the AFRC and the PNDC regimes, the chapter conjoins the two periods of Rawlings' reign, and explores the principal undercurrents in the introduction of the radical concept of popular justice as an alternative to the traditional judicial system.

Combining the two periods of Rawlings' rule facilitates a clear and concise overview and analysis of the AFRC/PNDC conception of justice and the mechanisms created for its articulation and achievement. It also permits a conjunctive and harmonious analysis of the role of leftist interest groups and the state-controlled media in the creation of the People's Courts/Public Tribunals during the two periods.

#### **The Role of Leftist Interest Groups**

Interest groups play vital roles in governmental processes and the formation of social policies in pluralistic societies such as Ghana (Alford, 1975; Attafuah, 1987; Eckstein, 1960; Lewis, 1985; Prestus, 1973; Thompson and Stanbury, 1979; Van Loon and Whittington, 1971). Leaders of important interest groups play direct, continuous and active roles in the political apparatus (Prestus, 1973:8).

In order to have any impact on the formation of social policy, interest groups must reach some threshold of size, homogeneity, and organizational capability (Alford, 1975; Attafuah, 1987:183-8; Galbraith, 1984). Indeed, the most influential interest groups are those possessing physical resources and organizational cohesion (Attafuah, 1987; Eckstein, 1960; Thompson & Stanbury, 1979; Van Loon & Whittington, 1971).

The point here is that actors in the political arena take into consideration their perception and interpretation of the power of other actors before embarking on certain significant actions. Power, as used here, encompasses economic and other human resources, as well as the organizational strength of interest groups.

A number of interest groups were influential in the introduction of public tribunals as a substitute for the regular courts and as a key component of a new judicial dispensation in Ghana. Among these were: (1) the New Democratic Movement (NDM); (2) the June Fourth Movement (JFM); (3) the National Association of Democratic Lawyers (NADL); (4) the National Union of Ghanaian Students (NUGS); (5) the Trades Union Congress (TUC); and, (6) the People's Revolutionary Youth League of Ghana.

The justice policies of the PNDC during the early phase of the revolution were a natural continuation of the AFRC's goal of establishing a new judicial dispensation in Ghana. This interpretation is consistent with the regime's emphatic and persistent claim that the 31st December Revolution was a logical extension of the June 4th Revolution. Thus, in introducing the public tribunals system, the PNDC was rejuvenating and recreating the AFRC's revolutionary justice agenda abandoned between September 1979 and December 1981 by the civilian PNP government.

Working class and leftist interest group demands affected the judicial thinking and policies of the Rawlings regimes, especially as they pertained to the creation of special tribunals. This proposition is validated by Rawlings' remark in 1984 that the establishment of the public tribunals constituted

a response to the demands of a growing legal consciousness on the part of our people and the need to simplify and speed up the dispensation of justice [Emphasis added].

Begun in June 1979, demands "to let the blood flow" - a popular student and working-class euphemism for revolutionary justice pursued via public tribunals (with its attendant executions by firing squad) - had marginally continued during the Limann regime. For

example, on 5 June 1980, rambunctious workers of the Ghana Industrial Holding Corporation (GIHOC) expressed their disenchantment with the Limann government's deplorable economic performance and failure to carry on with the AFRC's house-cleaning exercise by invading Parliament House and demanding economic reconstruction and the continuation of revolutionary justice. Earlier in the same year the militant People's Revolutionary Youth League of Ghana (PRYLG) had also picketed Parliament and issued several peremptory demands including asking for "blood to flow", that is, revolutionary justice (Ninsin, 1982:35).

The return of Rawlings to the leadership of Ghana saw an invigorated articulation of demands by radical interest groups for revolutionary justice. Rawlings' remark indicates that the tribunals system was developed partly in response to these persistent demands by the working class for a different judicial system. As Oquaye points out, the creation of the public tribunals was

the fruit of persistent demands by the working class for a different judicial system and the establishment of the tribunals was seen as a victory for the ordinary man (1990:19).

These interest groups, generally identified by the local media as "progressive forces" and allies of the working class, singly and jointly advocated the radical revamping of the judiciary and the introduction of People's Courts to replace "the bourgeois legality" that had ostensibly oppressed and intimidated the mass of Ghanaians.

Oriented toward leftist ideological positions, these interest groups, with the exception of the NUGS and the TUC, sprang up during the three-month reign of the AFRC which seized power in a bloody military putsch on June 4th, 1979. This military interregnum carried out a "house-cleaning" exercise which ostensibly aimed at ridding the society of corruption and infusing it with honesty, accountability, hard work and justice. By September 24th, 1979 when civilian government was restored, three former Heads of State and six other top military officers associated with various military regimes had been

publicly executed by firing squad. They had been found guilty by the People's Court for committing crimes against the people<sup>1</sup>.

The several People's Courts or public tribunals set up across the country by the AFRC were the site of the trial of these senior officers and the several hundred Ghanaians who were tried *in absentia*. Many people were sentenced to death, or to long prison terms (and/or heavily fined).<sup>2</sup>

The impetus for the establishment of the People's Courts came from two main sources: (1) the AFRC itself, and (2) the street demonstrations of support by ordinary farmers, civil servants and students, for the AFRC's intervention and its new brand of justice. Most crucial here was the call by the NUGS, a very important power broker in Ghanaian politics, to "let the blood flow." After the execution of former Head of State Gen. I.K. Acheampong and Border Guard Commander Major-General Utuka for "crimes against the people," there were more calls throughout the country, mainly from socialist revolutionary organizations, to transform the military take-over from a mere rebellion into a revolutionary transformation of the entire society. The first step, it was argued, consisted in the eradication of the key champions of state-sponsored corruption. Thus, the execution of more corrupt politicians and corporate criminals would signal the process of revolutionary change, including the pursuit of a new era of justice.

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<sup>1</sup> At 6:10 a.m. on Saturday 16 June 1979, General I.K. Acheampong, former Head of State, and Major-General E.K. Utuka, Border Guards commander were publicly executed by firing squad at the Teshie Firing Range. On Tuesday, June 26th, 1979 two former Heads of State - Lt. General Akwasi A. Afrifa and General Frederick W.K. Akuffo, a former Commissioner for Foreign Affairs - Colonel Rojer J.A. Felli, and three members of the Supreme Military Council - Major-General Robert E.A. Kotei, Air Vice-Marshal George Y. Boakye, and Real-Admiral Joy K. Amedume, were also executed by firing squad at the same shooting range.

<sup>2</sup> For a detailed account of some of the sentences imposed by the People's Courts, see Chapter 9 of Mike Oquaye's (1980), Politics in Ghana: 1972-1979 Accra: Tornado Publications.

Although "progressive forces" and socialist intellectuals applauded the AFRC's radical measures and called for their continuation and the institutionalization of "a new people's justice system," international economic and political pressure coupled with the AFRC's own determination to merely set the agenda for "concrete, democratic changes" compelled the junta to hand over power to the civilian government of Dr. Hilla Limann. Within this three-month period, the regime succeeded in increasing the level of political consciousness in Ghana.

The populist lobby groups which sprang up during this era devoted themselves to protecting the gains of the AFRC regime and to continuing the struggle for justice and equality. Although the new civilian regime tried to subdue these "popular" interest groups<sup>3</sup>, it failed to obliterate the pervasive sense of injustice that existed before and after the AFRC era.

Those interest groups providing a medium for the articulation of the interests and concerns of the mass of Ghanaians increasingly became embroiled in headlong controversies with the government, and by virtue of this opposition, gained an increased sense of credibility and popularity. Not surprisingly, when the civilian government of Dr. Limann was toppled, these interest groups became the political allies of the PNDC.

These groups were instrumental in the call for, and the institutionalization of, the public tribunals and many of the judges and prosecuting attorneys in these "people's courts" were drawn from the ranks of the NADL which comprised leftist law professors at the University of Ghana and other socialist-inclined lawyers. The core of intellectual support for the government was initially derived from these "progressive" organizations in the country. These groups acted as moral entrepreneurs defining new crimes and championing the cause for the decriminalization of certain "anti-people" crimes, and

<sup>3</sup> For a detailed but one-sided account of the persecution of Rawlings, selected individual supporters of the AFRC, and socialist/revolutionary interest groups by the Limann administration, see Kojo Yankah (1986), The Trial of J.J. Rawlings: Echoes of the 31st December Revolution. Tema: Ghana Publishing Corporation Chap. 7.

advocating changes in sentencing practices as they affect "the oppressed underclass" in Ghana.

The system of justice advocated by the populist lobby groups appealed to the mass of rural Ghanaians. The operating principles and logic of the public tribunals accord with some traditional Ghanaian notions of justice and judicial practice, especially in the Akan-speaking areas of Ghana. In these parts of the country, traditional justice systems were basically inquisitorial, as in many European countries today. Yet, apart from charges of witchcraft which might have been rampantly and unjustifiably levelled against certain people, especially women and those who embodied dissent, the system was hardly ever abused and the people had a great deal of confidence in it (Lowy, 1978:200). The punishment for bringing false and/or malicious charges against an individual could be as serious as the penalty for serious offenses. Shame and death were the ultimate punishments in Akan societies although shame was considered far more dreadful than death. As the Akans say, "fere ne owuo de, anka fa nyam owuo" (between shame and death, choose death) because "anim gu ase infata kanin ba", (shame does not befit a child of the Akan). As individual shame was a collective property of the disgraced person and his/her family, lineage and clan, an Akan child (person) had a compelling obligation to avoid shame. The inquisitorial mechanism of adjudication provided accused persons an opportunity to clear their names - to exonerate themselves and their families.

The goal and essence of this inquisitorial system was not simply to declare one of the disputing parties the victor and the other the vanquished, and to award fines, compensations and penalties. Above all, it aimed at uniting the disputants, putting them on genuine talking terms, ensuring that they and their families cooperated in other social endeavors again.

Thus, dispute settlements in traditional Ghanaian societies were also important occasions for the management of social tensions. Chiefs and elders, both men and women,

played a vital role in the settlement and adjudication of disputes.<sup>4</sup> The management process aimed at averting communal disintegration. Indeed, there is a shared sense of collective destiny in justice administration in traditional Ghanaian societies. Lowy (1978:195-9) has brilliantly described the processes and procedures of traditional dispute management in Koforidua, capital city of the Eastern Region of Ghana, and a predominantly Akan area. He points out that dispute resolution mechanisms such as "afisem die" (home- based hearings) and "kramoso" (intercession at a shrine) emphasize reconciliation, retribution, prestige-maintenance and good neighbourliness. These virtues are seen as the primary motivations impelling disputants to prefer any of these agencies of dispute management to the Westminster judicial system, "abrofo mra", literally, "white people's law" or "white justice".

The point is that traditional Ghanaian social structures, including value orientations, are much more supportive of the people's court/public tribunals concept than the colonial

<sup>4</sup> Women occupy prominent positions in the traditional social systems of many ethnic groups in Ghana. Especially in the matrilineal Akan societies such as Ashanti, women, especially Queen-Mothers, play vital roles in religious and cultural matters as well as in political and judicial administration. "Mo nko bisa aberewa" is a common Akan saying which underscores the centrality of elderly women in judicial administration and matters of wisdom generally. The statement literally means "Go and ask the old lady". Although contemporary Akan male chauvinism does not permit its frequent expression, women in Akan societies were generally deemed to be wiser than men. This is presumably because in the warring days of the eighteenth century feudal Ashanti empire, women were often there at home while the men were at war; they were (and still are) more attentive, curious and inquisitive - attributes necessary for the accumulation of knowledge and wisdom. Personal physical presence and attentiveness are indispensable to the acquisition of knowledge in non-literate cultures. Ashanti women are active participants in, and actually control the minute-by-minute going-ons of, much social and political intercourse in society. Yet they gracefully defer to their men, a tendency which may wrongfully be perceived by an "outsider" as acquiescence or even subordination.

Prior to British occupation of Ashanti in 1896, the Queen-Mother had the most power in choosing the King. French (1985) captures some of the crucial dimensions of the power of women in matrilineal Ashanti society when she writes that, in Ashanti, "it is believed that women alone contribute the blood to a child; men contribute *ntora*, soul, spirit, or sometimes, semen. Women's menstruation and childbirth are parallel with men's hunting and warfare; both activities are highly valued in Ashanti society, and women have retained power and authority in Ashanti life". (Italics added). See, Marilyn French (1985), Beyond Power: On Women, Men and Morals. New York: Ballantine Books, p.81.

adversarial system. Indeed, on a continuum of moral ratings, the inherited Westminster adversarial court system is ranked lowest by Ghanaians (Lowy, 1978:203). The coincidence of traditional conceptions of justice and processes of justice delivery with the principles and operating procedures of the public tribunals meant that, although the sanctions of the latter, particularly executions by firing squad were dreaded, it was conceptually acceptable to the mass of rural peasants and poor urban Ghanaians.

### **The Ideology of the Ruling Elites**

Interest group activities take place in a political context in which the ideological position of the ruling elite is as important as the demands of the interest groups. As Lewis (1985:17) points out, a nation's social policies are generally assumed to be developed as solutions to social problems based upon perceived need. Nevertheless, the recognition of "need" and its satisfaction are vitally affected by the ideology of the prevailing political stance. In other words, social policies on many items of reality are influenced by the political ideology of the ruling elites. Thus, congruence between the ideological position or commitment of a target group (e.g., government) and the demands of an interest group is an important measure of the chances for success by the interest group (Attafuah, 1987:165).

The ideology of the PNDC can be determined from its written (published) policies, decrees, proclamations and ordinances, its programmes, the political statements of its leadership, as well as the political background and affiliations of its members.

The PNDC underwent two distinct ideological phases since January 1982. The first phase, ending in the November 1983 radical shake-up of the government, was characterized by socialist revolutionary policies and measures, tinged with populism, the use of scare-tactics and intimidation via abusive rhetoric and actions. The second phase is the era of populist pragmatism. Largely a product of economic difficulties and the



influence of foreign capital, it was characterized by a dramatic reversal of the socialist transformationist course of development to a capitalist accommodationist stance.

The new phase of populist pragmatism embraced the role of the local bourgeoisie, the International Monetary Fund (IMF), the World Bank and other foreign monetarist financial institutions in the economic development efforts of Ghana. During the socialist revolutionary phase, the PNDC piously castigated the local bourgeoisie and these foreign financial establishments as the principal architects of Ghana's social, economic and political woes.

### **Socialism and Popular Justice**

Socialism is a political and economic theory that advocates collective responsibility for the well-being of members of a society and hence collective control over economic processes within society (Hale 1990: 578). Although models of socialism differ considerably, most socialist ideologies hold that a socialist society presumes a combination of industrial democracy, central direction of economic fluctuation and redistribution of the national wealth; socialist ideologies advocate governmental control of the economy to various degrees. Centralized economic and political control are fundamental aspects of socialism. A basic assumption of socialism is that,

it is possible to harmonise social and individual needs, that state intervention and public ownership will positively increase individual freedom, and, therefore, help to promote democracy by eliminating poverty and disabilities imposed by lack of educational or social opportunity, or by gross inequalities of wealth, and at the same time ensure more efficient running of the country in the interests of the whole community (Pickles, 1972:69)

Socialism then is a politico-economic system based on cooperation rather than competition in which the group or collectivity (usually represented by the state) owns the means of production and in which production and distribution are managed ostensibly for the welfare of the entire collectivity rather than for private profit. Contemporary socialism takes the

form of state socialism with restrictions placed on private ownership of the means of production. In its ideal form, the production and distribution of goods and services within a socialist society would proceed along Marx's famous dictum "From each according to ability, to each according to need".

The ideological position of the PNDC government between January 1982 and November 1983 was clearly socialist. This was reflected in its policies and programmes, official rhetoric and alliances, as well as the privately expressed opinions of members of its leadership.

The massive nationalization of key sectors of the Ghanaian economy during this phase is an indication of the PNDC's revolutionary socialist or egalitarian orientation. Government decrees were promulgated to legitimize and buttress these socialist policies which sought to reduce "the stranglehold of privatization" on the economy and to increase state-control of essential services as a means of protecting the people from unscrupulous local and foreign capitalists. This policy was accompanied by price-control measures and the imposition of tariffs and heavy import duties on certain commodities imported into the country.

The new concept of justice, primarily expressed through the creation of public tribunals, was, among other things, intended to give credibility to the new socio-economic order in Ghana. Most importantly, the tribunals were set up to administer swift, popular justice to "criminals". The establishment of People's Defence Committees (PDCs) as quasi-judicial crime-screening bodies and watch-dogs of the revolution augmented the public tribunals as well as provided further evidence of the socialist revolutionary orientation of the government.

Another indication of the socialist orientation of the PNDC is the philosophical ideas of its leader and members. During its first phase, the PNDC was composed of avowed socialist intellectuals, junior officers in the military, a street-preaching Catholic Father of the liberation theology persuasion, a student activist, and a radical trade union

leader (Ray, 1986:30-4). The appointment of non-radical socialists was vehemently protested by powerful leftist interest groups. With the exception of the decade-long Minister of Foreign Affairs, Dr. Obed Asamoah, the government had to withdraw all such appointments in order to appease its socialist allies in the country.

The Chairman of the PNDC, Jerry John Rawlings, called for "a revolution to end all revolutions in Ghana" subsequent to his assumption of power in 1981. Interviewed on the judicial system, he declared his preference for a traditional pre-colonial system of justice over the Westminster model. Some of the traditional mechanisms of justice embody the use of supernatural agencies as mediators in the resolution of disputes. These agencies include shrines, churches and specialists in the manipulation of supernatural power (Lowy, 1978:188). This situation reflects the diversity of the available agents of dispute management in Ghana even before the introduction of tribunals as facilities in dispute management. The public tribunals, embodying the swiftness of the military courts, the values of the traditional courts as operated in the institution of chieftaincy, and organized around religious beliefs and morality, seemed a preferred form of justice to the PNDC and many Ghanaians.

Thus, even though the PNDC later abandoned most of its socialist rhetoric, policies and programmes, it clung tenaciously to the policy of popular justice via public tribunals. What many ordinary Ghanaians deplored about the PNDC's justice policy was not its apparent conceptual departure from the adversarial Anglo-Saxon system, but the severity of the sentences which the tribunals handed down and the swiftness with which executions were carried out, foreclosing any real possibility of appeals and the reversal of judgements. Invariably, this is what critics pointed to as an indication of the Ghana government's violation of human rights and its mockery of justice through "kangaroo courts."

## **The Role of The Ghanaian Mass Media**

Journalists are a part of the system of politics that obtains in any modern society. The media is simultaneously a tool for the manufacture of consent and a barometer of public opinion. Depending on its interests and political circumstances, the media play a crucial role in the maintenance of the *status quo*, or in engineering and garnering public support for social change. Where it aligns its interests with the ruling elites (as it most often does), it becomes an ardent apparatus of hegemony, committed to the defence of "law and order".

For example, when on May 15th, 1979, the then thirty-one-year-old Flt. Lt. Jerry Rawlings led a handful of Air Force personnel in an abortive effort to topple Gen. F.W.K. Akuffo's SMC II which was preparing to hand over the reins of political power to a civilian government later that year, the Daily Graphic of May 16th carried an editorial comment under the caption, "WHY THIS DISTURBANCE?". It said in part:

The shock is deepened by the fact that yesterday, a three-man delegation led by Mr. Justice V.C.R.A.C. Crabbe, Chairman of the constituent Assembly, was scheduled to present the final draft of the Constitution to the Supreme Military Council; a ceremony symbolizing the meticulously planned and the steady steps being taken towards the June 18 election day---The question then arises: what had the adventurers hoped to achieve at this period when the majority of Ghanaians have all tuned their minds to June 18 and after? Were they propelled on by mere love of power? Do they have genuine grievances which they hoped can be redressed only through staging a coup? Couldn't they have directed such a grievance, if any, through the appropriate channels?...

The editorial comment was a repudiation of the May 15th uprising, whatever its intentions, as well as a veneration of the SMC and its determined efforts to return Ghana to civilian constitutional rule. On May 19th, four days after the foiling of the rebellion, the Daily Graphic continued its celebration of the gallant quelling of the "disturbance" and the castigation of the rebels. (The previous day [18 May], the Army commander, Major-General Odartey-Wellington had decorated the officers who put down the uprising). The Graphic editorial commented:

The honour conferred on the brave men should revive the time honoured spirit in our soldiers that heroism is always rewarding and the individual precipitate action can lead to disgrace and dishonour. But for the esprit de corps demonstrated by the remaining units of the Armed Forces, last Tuesday's action could have set the country several decades back from our cherished goal of returning to civil rule and involving all and sundry in saving the nation from the economic malaise in which we find ourselves... It will be foolhardy on the part of any group to attempt a coup when the SMC has drawn up a programme which leads to the election of a popular government on June 18 [Emphasis in original].

The Daily Graphic was essentially underscoring its conviction in the fundamental rightness of the *status quo*, including the planned return of the country to constitutional democracy. It regarded any derailment of the "democratic" agenda as a return to despotism and backwardness. In its view, true military heroism was one devoted to the maintenance of the *status quo*, directed to the defence of the political agenda of the ruling elites. In these terms, the media is part of the state apparatus for maintaining the *status quo*.

Nevertheless, the media can be an instrument of radical social change. It can become the platform for popular agitation for change when its interests intersect with the interests of the majority of the people. For example, the Daily Graphic partially abandoned its role of defending the *status quo* and begun to champion the cause of the "people's revolution" once it realized that the sympathies of the broad mass of Ghanaians lay with the architects of the May 15th Uprising and the June 4th Revolution. The only exception to this was the principled objections of Elizabeth Ohene, then Acting Editor of the Daily Graphic who was critical of both the SMC and the AFRC regimes as unwanted usurpations of power through the might of the bullet.

At any rate, the softening of the tirade of criticisms by the Daily Graphic against the May 15th insurrection was occasioned by the trial of Jerry Rawlings and his seven accomplices on May 28th, 1979 at Burma Hall, the Conference Room of the Ghana Armed Forces. During his defence, Rawlings' integrity and populist appeal endeared him to the junior ranks and civilians in the audience whose cheering applause to his selfless, revolutionary "redemptive" ideas invited several warnings from the President of the

General Court Martial, Col. Joseph Enningful, who threatened to stop the proceedings unless members of the audience comported themselves accordingly (Yankah, 1986:16)<sup>5</sup>.

- <sup>5</sup> The DPP also revealed that a "draft" speech was found on the person of Rawlings when he was searched subsequent to his arrest. According to the DPP, it was suspected that Rawlings intended to read the speech on national radio and television after the exercise. The authorities promised to publicise the contents of the speech but never did. The full text of the speech was never read in court due to the June 4th 1979 coup d'etat which effectively ended the trial. The details of the speech, written in Rawlings' handwriting a reproduction of which appears in Yankah (1986), were as follows:

*"Fellow Citizens of Ghana, "Now! you listen to me well and good because I am not here to waste my time talking. First and foremost, let me inform you that I am not here to impose myself on 10 million citizens of this country. But I am telling you that I am here today in the history of this country to address myself to military senior officers, all those politicians, all those businessmen and foreign criminals who have used our blood, sweat and tears - the toils of our labouring - to enrich themselves, to drown in wine and women, while you and I, while the majority of us, are daily struggling for survival, yes!*

*"I know what it feels like going to bed with a headache for want of food in the stomach.*

*"Let me give you, the struggling and suffering masses, just one little warning. Should anyone or group of you dare collaborate or help exploiting pigs to run away - this country will once more bleed than we anticipate. I am not an expert in Economics and I am not an expert in Law but I am an expert in working on an empty stomach while wondering when and where the next meal will come from.*

*"I am going to prove to you today that it is no longer a question of the military against civilians, it is no longer a question of the Akan against the Ewe, the Ga against the Northerner. But a question of THOSE WHO HAVE against those who HAVE NOT - A question of the vast majority of hungry people against a very tiny minority of greedy, inhuman, selfish senior officers, politicians, businessmen and their bank managers and a bunch of cowardly Lebanese who will not stay in their country to fight for a cause. But who is a fool? You and I.*

*"You and I are the bigger fools for allowing such a blatant abuse of human dignity for so long. 22 years after independence, you and I are still hitting our heads on the ground and leaving it all to God to save us one day. Where on this earth has God come to the salvation of a people without the suffering, starving, hungry people taking the law into their own hands!*

*"America has seen her brand of a revolution, France has seen her brand of a revolution. Britain has seen her brand of a revolution. Russia, China, Iran, all of them. Only the black man in the black African Continent goes on leading his fellow blackmen like a herd of cattle while suppressing them like slaves. Let me tell you today that God will not help you, and*

When the Director of Public Prosecutions (DPP) Mr. G.E.K. Aikins, sweating profusely under the barrage of television and press lights and cameras concluded his presentation of evidence against the six persons charged with "conspiracy to cause mutiny and mutiny with violence", and a seventh with "concealment of mutiny", the crowd greeted it with laughter (Yankah, 1986). Flt. Lt. Jerry John Rawlings Jr., was the first accused. The following is a list of the other accused persons: 1) Leading Aircraftman John Newton Gatsiko, 2) Leading Aircraftman Sylvanus Tamakloe, 3) Capt. David Baba, 4) Leading Aircraftman Albert Kwasi Gbafa, 5) Leading Aircraftman Daniel Dzibolusu, and 6) Cpt. Ajowiak Ubald. During the trial, Rawlings's motives for master-minding the coup, his patriotism and revolutionary sentiments, oratorical skills, identification with the ordinary people, and dedication to social justice were effectively, albeit unwittingly, revealed and played up by the Prosecution. Rawlings himself also missed no opportunity to highlight his motives for the insurrection, and to articulate his vision of a corruption-free Ghanaian military and a new Ghana embodying his utopian ideals of social justice, freedom and liberty. For example, the DPP revealed that:

During the course of negotiations, Major Okyere asked the first accused to outline his aims and objectives for the exercise that morning, but the first accused replied that it sounded rather foolish for one to ask him of his aims when people are dying of starvation in the teeth of a few well-fed, who even had the chance of growing fatter, when the economy of this country was dominated by foreigners, especially Arabs and Lebanese, whom successive governments had failed to question about their nefarious activities. The first accused started talking about wide-spread corruption in high places, and stated that this nasty state of affairs could be remedied only by going the Ethiopian Way (Yankah, 1986:16.) [Emphasis in original]<sup>6</sup>.

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*the big man will not help you because his stomach is full, his children's stomachs are full and there is enough for them to go and come as they like. "Only you can help yourselves."* (Quoted in Yankah, 1986:17-18.

<sup>6</sup> At this stage in the proceedings, the joy of the crowd was quite evident, and its admiration of Rawlings unmistakable. The crowd cheered so loud that the President of the Court repeated his earlier warning, indicating his preparedness to halt the proceedings unless the audience comported itself.

The most revealing aspect of the trial, before adjournment was granted for the court of resume in two days, was the occasion it provided for the prosecution to inadvertently articulate in an open court, and thereby publicise the revolutionary ideal of Jerry Rawlings. The trial was the site for testing the Ghanaian public's receptivity to Rawlings' revolutionary ideas and for speculating on the extent and character of public support for, as it happened, the pending June 4th, 1979 revolution.

By Wednesday, 30th May 1979 when the trial resumed, the walls of Burma Camp leading to the vicinity of Burma Hall were filled with conspicuous posters with such evocative and unmistakable messages as:

REVOLUTION OR DEATH  
STOP THE TRIAL OR ELSE...  
IF YOU WANT TO DIE, CONTINUE THIS TRIAL  
THE STRUGGLE WILL CONTINUE  
ALUTA CONTINUA

The massive volume of posters and graffiti that surfaced in Burma Camp could be seen as a reflection of the pent-up anger, violent mood and revolutionary sentiments of the rank-and-file soldiers aroused by the trial of Rawlings and his "henchmen". Although the military authorities tore down the posters and washed down or painted over the graffiti just in time for the resumption of the trial, the message was propagated throughout Accra. Beyond the frontiers of the Capital, the media carried the message, with the statement of the DDP given wide coverage much to the chagrin of most members of the government. The newspapers spoke of Rawlings as an opponent of social injustices (Yankah, 1986:18).

On the second day of the trial, the crowd was huge and uncontrollable, and they cheered wildly as the first witness for the prosecution, Flt. Lt. J.B. Atiemo confirmed that Rawlings had declared his readiness to die on behalf of the rest of the accused persons. The front-page banner headline of The Daily Graphic of Thursday May 31st, 1979 read "LEAVE MY MEN ALONE!...I'm Responsible for Everything."



During cross-examination of the first prosecution witness by the defence counsel, the shouting and clapping from the public gallery in support of Rawlings's stance grew so loud that before adjourning the trial till Monday, June 4th, 1979, the President of the General Court Martial felt compelled to issue what he called a final warning to the audience "to desist from any further shouting and clapping", otherwise he would not hesitate "to stop the public from listening to the rest of the proceedings" (Yankah, 1986:19). As it turned out, Rawlings had inspired millions of frustrated and disillusioned Ghanaians to share his vision of a revolutionary transformation of Ghanaian society, and there were, indeed, to be no more trials. On June 4th, 1979, Rawlings was released from the Special Branch (Secret Police) annex cell where he was locked up. The popular uprising of June 4th, 1979 had begun. It decisively-preempted and prevented conclusion of the trial.

Thus, one day after the architects of the June 4th uprising freed Jerry Rawlings from gaol to head the Armed Forces Revolutionary Council (AFRC), The Daily Graphic was able to carry an editorial which stated in part:

For far too long the poor who form the majority have lived on the verge of starvation. It has been virtually impossible for most people to eat, care for their sick and cloth themselves within their income because of the high cost of living... There was no hope in sight for the poor. No one heeded his [sic] cry for mercy and justice... It is rightly believed that men [sic] in high positions are party to this exploitation of the masses. Morals and discipline had virtually broken down and the Ghanaian had lost his sense of propriety, honesty and good-naturedness. With all these, what happened yesterday was not unexpected by the broad masses of the people who had been crying for justice (Daily Graphic, June 5, 1979)

Evidently, The Daily Graphic had undergone a remarkable metamorphosis in its thinking about the state of the economy, politics and morality in Ghana. This reflects the relative capacity of journalists to re-align their sympathies in consonance with the popular aspirations of the masses.

Journalists contribute immensely to the discourse of failure - the substance of deviance news - and the discourse of progress so vital to visualizing social development.

While contributing to the discourses of failure and progress, journalists function as agents of social control (Ericson, 1987:8). The preferences, procedures and "knowledgeability" (Giddens, 1984) of journalists affect their production of specified conceptions of deviance and control, and order and change with which the general populace becomes inseeded.

Journalists do not simply mirror reality but construct it; they do not just provide accounts of events but interpret them. Yet this interpretation is not a reflection of the individual journalist's personal value orientation, understanding or political persuasion. By and large, journalists' accounts accord with the dominant world-views articulated and supported by their superiors who are in turn answerable to some political and/or economic higher-ups. Thus, news creation is not just a product of the personal whims and caprices of the journalist. On the contrary, news creation is a process which is heavily circumscribed by the

systemic relations among journalists and their sources. It is a product of the cultural and social organization of news work, not of events in the world or the personal inclinations of journalists...News can best be seen as an ongoing communication among journalists and influential sources (Ericson et al, 1987:9) [Emphasis added].

Both the cultural and social organization of news work and the control exerted on the media by influential others such as accredited knowers, sources, experts, owners, managers, financiers and governments significantly narrow the news aperture, rendering news as ideological articulations of hegemony. As Ericson et al put it, news is partial because

it gives preferred readings to the ideological messages of particular source organizations, either by omitting altogether the ideological messages of other organizations that have something to say on the matter or by relegating them a less significant status. News represents particular interests, allowing accounts of justification, excuse, and apology to selected individuals, organizations, and institutions. Journalists' 'words are also deeds' (Whittington, 1972: 146), enacting a view of the world partial to particular sources and their versions of reality. (1984:9) [Emphasis added].

Furthermore, by construing events in journalistic angles and frameworks, only limited versions of reality are made available to news consumers. Under conditions of reduced

competition and even local monopoly, the corporate power of news outlets allows them to make selective forays into adversarial journalism (Ericson *et al.* 1987:359). In the context of Ghana during the first phase of the Rawlings revolution, such selective forays into adversarial journalism were frequently mounted on behalf of the government, and against the economically and socially powerful members of the society who were deemed by the media to be allies of the old political order.

Undoubtedly, the mass communications media constitute an important organ of the state. Whether in the hands of conservatives or radicals, the media are a vital tool for moulding the consciousness of the public in accordance with the ideals of the ruling elites. This goal may be accomplished through a variety of ways ranging from a highly sophisticated, subtle and well-orchestrated process of indoctrination to a more open, blatant and crudely defiant method. For national democratic regimes in Africa, capturing the commanding heights of the media is as vital as taking political power and controlling the economic institutions. As Yuri Smertin argues:

any national-democratic state wishing to defend its revolutionary gains must make the system of state organs and institutions national in character. This is accomplished not by a mechanical type of "Africanisation" but through political education affected in the spirit of the nation's interests (1987:138).

Kwame Nkrumah also articulates the same view when he advises African revolutionaries to capture the top echelons of strategic institutions or establishments. He suggests that,

after a people's revolution it is essential that the top ranks of the Armed Forces, Police and Civil Service be filled by men who believe in the ideology of the Revolution, and not by those whose loyalties remain with the old order (1968:71).

To this list of institutions vital to the success of new regimes can be added the mass media.

In a classic conformity with the system of patronage that underlies the appointment of editors, managing editors and news editors of state-owned media, especially in totalitarian and neo-colonial countries, the PNDC replaced the editorial boards of the Daily Graphic, and the Ghanaian Times. The government also quickly replaced the news and television directors of the Ghana Broadcasting Corporation (West Africa, February 22,

1982). In all these appointments, the incumbents were sent on compulsory indefinite leaves of absence, having themselves been appointed by the previous civilian administration of Dr. Hilla Limann. This was to ensure that the media would be sympathetic to the cause of the government and support its policies and programmes. The late Gen. I.K. Acheampong recognized the value of this wisdom when, after seizing power in January 1972, he appointed as Editor of the Daily Graphic, the former editor of a small but popular newspaper called The Spokesman which had been highly critical of the civilian government of Dr. Busia (1969-1972). Nothing but praise oozed from the prolific pen of the new editor of the Daily Graphic who ostensibly abandoned principle for expediency. While he had previously maligned the Busia government for a 44% devaluation of the Cedi (the local currency) he had the audacity as the new Commissioner for Consumer Affairs, to praise the 139% devaluation of the Cedi in 1978 by the SMC II regime of which he was then a member (Oquaye, 1980: 214-215).

Unbridled media sycophancy and double standards wedded to political opportunism<sup>7</sup> makes mockery of the concept of freedom of the press, cheapens press integrity and weakens freedom of expression generally. Needless to say, freedom of the press in Ghana is more mythical than real.

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7 The most ludicrous and grotesque manifestation of state control of the media and the abject sycophancy which this situation engenders was revealed in the infamous Chris Asher admissions of 1982. Asher, was editor of the Peoples Tribune during the Limann regime. When virtually all privately-owned newspapers were shutting down for lack of newsprint, Asher's paper was thriving like flowers in the spring. He crowned himself as the Commander-in-Chief of the Anti-Coup Crusade in Ghana which he founded with assistance from the Limann government. His paper contained nothing but a tirade of criticism against the AFRC era, and attacks on the integrity of Rawlings and, to some degree, the former AFRC Spokesman, Capt. Boakye-Gyan. Soon after the collapse of the PNP regime, Asher made a dramatic u-turn in his journalistic posturing and started condemning the PNP government and praising the PNDC regime. He indicated that he had deliberately been fabricating lies about the AFRC and he rendered a public apology to Rawlings and his new government. On October 20th, 1982, Chris Asher, also known as Barimah Awuakye Akenteng II, Chief of Osoroase near Akim Oda, admitted to charges of impersonation and extortion of money in an insurance fraud. The next day, he was convicted of these crimes by a public tribunal and given a 10-year sentence (Daily Graphic, October 21, 1982).

The reshuffling of the higher echelons of the media outlets proved advantageous to the government in that the media began to vigorously police the bureaucracy and other key targets of the revolution. The media carried daily accounts of the positive activities of the new regime, and of the abuses of the previous regimes - abuses which were revealed through the National Investigations Committee, the Citizen's Vetting Committee, and the public tribunals. Journalists therefore helped convey a sense of urgency, importance, novelty and improvement in the society. As Erickson *et al* point out:

the news media play an active and instrumental role in social and political movements, ...underpinning the authorities by giving them preferred access while undermining the organizations and individuals in political opposition by giving them unfavourable coverage (1987:357).

Journalists help in the maintenance of the existing social order by constituting visions of order, stability and change. Tepperman and Richardson (1991) also capture the instrumentality of the media's role in the construction, maintenance and change of public opinion and social order when they state:

As a conduit for the passage of information between the dominant political and economic institutions and the general population, media are seen to be in a position to select, rank and define the salient issues and events of the day. They establish the agenda setting, the priority list of concerns for public awareness and discussion, emphasizing the significance of some issues and views, while playing down and excluding others (Tepperman and Richardson, 1991:453-4) [Emphasis in original].

Accordingly, demands for change in the existing allocation of benefits and privileges in a political system can be suffocated before they are even voiced (Bachyach and Baratz, 1970:44). In general, the management of opposition in the political process often entails the manipulation and stifling of the voices of dissent through the mass media. Controversial and threatening topics and individuals can be kept off the agenda for, and platforms of, public debate respectively. In extreme cases, those who embody dissent can be repressed via the criminal law and its ubiquitous tentacles of surveillance. As Luke (1974) argues, people's perceptions of their interests (and hence what they come to regard

as an issue) can be so controlled that they came to accept the existing state of affairs as legitimate, or at least come to believe that there is little point in publicly challenging it.

The most effective way of exercising power is to have one's position of control identified as legitimate by those subject to it (Tepperman and Richardson (1991: 482). The social construction of this form of legitimacy, entailing political domination and accomplished through the control of information presented by the media, also influences the character of political socialization by which the political culture of a nation is transmitted and shaped. Dawson and Prewitt point out that:

Every dimension of the polity, public order, justice, legitimacy, public stability and leadership is affected by the process of political socialization and the structure through which the process occurs (1969:201)

When the opinion-forming institutions of a society, especially the mass media are effectively controlled, people may acquire the values that lead them to accept authority and become participants in what Paulo Freire has described a "culture of silence". This evocative concept describes a passive acceptance of inequality and powerlessness in which people appear to acknowledge the legitimacy of their own subordination. Media sycophancy and political repression combine to produce a generalized political apathy which feeds and reflects the culture of silence.

Recalcitrant media outlets in Ghana were penalized. The Legon Observer, a critical news magazine from the University of Ghana, and the Catholic Standard, a conservative weekly newspaper, were banned for their critical, unfavourable commentaries on the revolution. This development also had several historical precedents. For example, through the Newspaper Licensing Decree 1973, the NRC/SMC government enjoyed the power to grant, refuse or withdraw a licence for a newspaper to be published. This power was maliciously exercised to the detriment of the Legon Observer which the government strongly detested. For four years, the magazine could not publish due to the Ministry of

Information's refusal or failure to act on the paper's application for the renewal of its licence (Oquaye 1980: 201-202).

The media, in articulating a vision of a new social order during the short-lived reign of the AFRC advocated the establishment of the people's courts/public tribunals to try political saboteurs and political enemies of the June 4th, 1979 Revolution. Once again, the sole exception to this trend, as indicated earlier, was the daring voice of dissent heard from Miss Elizabeth Ohene, then Acting Editor of the Daily Graphic who cautioned against the excesses of the revolutionary euphoria, rhetoric and tactics. University students demonstrations held in Accra and Kumasi labelled her "an enemy of the people's revolution" and called for her immediate removal from office. On July 2nd, 1979, students of the University of Science and Technology (UST) parading through the principal streets of Kumasi in support of the secret trials and executions by firing squad of eight top officers of the Ghana Armed Forces, chastised Elizabeth Ohene for her editorial stance and demanded that she be fired (Daily Graphic, 3 July 1979).

In the period after December 31, 1981, the media actively supported the government. The state-owned press, the Ghanaian Times and the Daily Graphic, as well as the Ghana Broadcasting Corporation (GBC), systematically took a pro-government stance, aligning their editorials and commentaries to fit the ideological trajectory and policies of the PNDC revolution. The press outlets justified their position by reference to the overall objective of the media in all politico-economic systems, and thereby debunking the myth of press neutrality. For example, in its editorial of February 10th, 1982, the Daily Graphic, writing under the caption "Neutral Press For Who? (1)", stated, *inter alia*:

Some believers in the so-called concept of "free press" are at it again, claiming that "once the press ceases to be neutral, the country is going to go to the dogs. The reason being that there is fear that the other side will not be heard" ... It is becoming increasingly clear everyday that most of our people have not clearly understood the dimension of the present revolution. People cannot even grasp the simple reasoning that America or Russia uses the press for a Specific Purpose...The American press will criticise their President or his budget, but the ultimate caution is that CAPITALISM must be protected. The Russian media also provides their space for the defence

of the Socialist or Communist system. For anybody to preach that any press has been OBJECTIVE is to DECEIVE the people in the real sense of the world. In Chinese, Cuban, or Eastern societies, criticism is allowed. The same goes for the so-called free press of the West. But the understanding is that every criticism must ADVANCE the IDEOLOGY or aspirations of the people. This is what is referred to as CONSTRUCTIVE criticism. People must start looking at the press from a different perspective now. (Daily Graphic, February 10, 1982 Emphasis original).

The Daily Graphic's denunciation of media neutrality as mythical and fundamentally deceptive was ideologically congruent with the resource mobilization ethic of the new regime. Indeed, earlier on January 18th, 1982, Rawlings had declared that,

The Press is a public press, part of the mechanism of state power, and it is funded by the taxpayer, which in Ghana, means the poor masses. In the past, the press had been used against these very people. We now want to be sure that the press will constitute an expression of the people's freedom and not their oppression (Yankah, 1986:98).

It is fair to say that the state-owned press readily and jubilantly embraced the new regime from its inception, and subsequently produced only pro-government editorials in accordance with the PNDC's pontification on the crucial role of the media in the process of revolutionary reconstruction. Throughout 1982, the Ghanaian Times and the Daily Graphic never published any anti-government editorials. Virtually all feature articles and news items published by the papers were decidedly "progressive", which in the circumstances meant pro- government. The papers also typically carried articles and "Letters to the Editor" which provided support and justificatory accounts for their editorial positions. For example, the Daily Graphic of November 29th, 1982 carried a feature article written by a Malek Eshun, under the caption "The Press and the Revolution". It said in part:

One of the tragedies of the post-independence era of our developing society has been the wrong use of the power of the press. Ghana inherited from the colonial power, and continues to maintain, a communications system inadequately designed to serve the needs of the press. For obvious reasons, the colonial press did not choose to address itself to the problems of development - particularly rural development: and the eradication of illiteracy, ignorance and disease. Nor has the post-independence press in Ghana addressed itself to these problems ... Now that Ghana has once again been liberated from the shackles of imperialism and colonialism by the



December 31 Revolution, what role has the press to play in the transformation of the society? The press should serve as a means to bring the masses to greater revolutionary awareness so that they may display the highest degree of heroism. True heroism is one consciously displayed by the masses purposefully to attain their set goals. It is the heroism of the people struggling to become masters over their own destinies. It is the heroism of a collective will and determination (Daily Graphic, November 29th, 1982 p.3.) [Emphasis added].

In this piece lies an affirmation of the prevailing brand of journalism pursued by the state-owned press. Malek Eshun also articulates a new definition of heroism as grounded in the display of devotion to the pursuit of the goals of national reconstruction. In keeping with this framework, the press has an obligation - a logical imperative - to support the initiatives of the masses. Hence Eshun continues to outline the role of a progressive press:

There is an urgent need today to decolonize the press and liberate the minds and thinking of those who work in them. The Press should be made relevant to the needs and aspirations of the society. Progressive journalism means rejecting servility to bourgeois taste in press activities. The press media which serve as the means of enjoyment for the rich, paralyse the ideological awareness of the poor, distort the history of the people, and keep the working masses misinformed must be rejected. Progressive journalism means directing all the press efforts - news reports, editorials, commentaries and even photo placements - towards enlightening and awakening the masses as the masters of their own destiny. Press efforts must aim at arousing the enthusiasm of the masses to successfully carry out their economic development plans, and thus make them serve the revolution (Daily Graphic, November 29th, 1982, p.3).

Eshun noted further that the notion of press freedom as advocated in Western countries is nothing but a sheer lie. He argued that capitalist publications belong to the monopolists opposed to the workers and farmers, and that "such publications aim to defend and hide social-political oppression and suppression under the cloak of the so-called press freedom".

According to Eshun:

The substance of genuine press freedom lies in the revolutionary publications which are rooted among the masses of the workers and farmers and which inform them of the experiences and achievements gained in the revolutionary struggle. These publications which champion the liberty of the oppressed and encourage the people working for the revolution. Since propaganda work reflects the revolutionary movement of the masses, the press must become part of the mass movement. There is the need to publish weekly community newspapers geared to the level of middle school pupils. Apart from heightening the revolutionary awareness of the rural folks and

instilling in them a high sense of patriotism and dedication, community newspapers must carry news about farming and nation building. These publications should sustain rural dwellers in achieving reading skills, improving live-stock and farm methods. This is the press system that is urgently needed in Ghana today. (Daily Graphic, November 29, 1982. p. 3) [Emphasis added].

Here is an open call for the media to become an avowed instrument of governmental propaganda, a message which the state-owned media definitely endorsed. Virtually all local news during the early years of the revolution, represented the interests of the government, allowed accounts of justification, excuse and apology to selected pro-government individuals, organizations and institutions (Ericson, *et al.* 1987:9). The only news accounts of events in Ghana that differed from the accounts of the state-owned media, were those of foreign-owned news outlets, such as Time, Newsweek, the London-based Economist and West Africa news magazine, Voice of America, and British Broadcasting Corporation (BBC) news reports.

Indeed, by 1989, so repugnantly sycophantic had the Ghanaian press become that Chairman Rawlings vehemently criticised the press for its one-sided, excessively pro-government, pro-establishment news coverage. In 1989, Rawlings bemoaned the pervasiveness of a "culture of silence" which had engulfed the country as the broad mass of Ghanaians kept their political opinions to themselves for fear of being traduced by the press and persecuted by the government and its political agents. Character assassination of anti-government elements had become quite typical in the media's handling of dissent and "politically incorrect" discourses.

Invariably, the Ghanaian media adopted the world-view of the Ghanaian political leadership and its "accredited bodies"; the media functioned to legitimize the regime and its social control apparatus, including the public tribunals.

## Summary

The data in this chapter shows that the introduction of the public tribunals was facilitated by the conjunction of interest group politics, the socialist ideological position of the ruling elite, and the dynamic role of the Ghanaian media in articulating and disseminating the ideology and policies of the PNDC regime. The creation of the tribunals was partially in response to demands by various leftist interest groups such as the NADL and the June Fourth Movement for an alternative, simple and ordinary- person-centred judicial system. In general, the data on the role of leftist lobby groups in Rawlings Ghana agrees with Ray's (1986) conclusion that such groups were powerful allies of the PNDC government and did influence many of its decisions in the early phase of the revolution. The success of those demands was also a function of its coincidence with the socialist ideological orientation of the PNDC.

The data also shows that the Ghanaian media served as conduits for the propagation of the ideology, policies and programs of the PNDC. In the process, the media served to amplify, justify and legitimize the regime and its policy of popular justice of which the public tribunals system was the primary manifestation.

## CHAPTER VI

### TOWARD A NEW JUDICIAL DISPENSATION

A revolutionary process must take leave of the normal processes of political governance, economic organization, justice administration and the production, maintenance and regulation of social order, otherwise it is not revolutionary.<sup>1</sup> Flt. Lt. Jerry Rawlings' statement below evinces the PNDC's belief in the necessity for the 31 December Revolution to manifest a clear departure from the traditional, institutionalized modalities for the social, economic, political and judicial organization of Ghanaian society:

Any transformation, in order to be truly revolutionary, must aim at a complete and radical change of both the existing social, political and economic structures and the human rudimental elements within the government machinery.

During periods of revolutionary social transformation, the criminal justice system is among the first established state institutions to become casualties of change.

First, revolutionary regimes typically articulate new conceptions of justice which radically depart from the traditional judicial philosophies and the established apparatuses reflecting them. Predictably, such regimes create new judicial structures and other related quasi-judicial institutions for the achievement of the new vision of justice which they dub frequently "revolutionary justice" or "popular justice".

Second, such regimes show a tendency to enact laws which criminalize certain hitherto permissible behaviours. The extension of the criminal law into traditionally non-criminal domains is vital to a revolutionary regime's immediate and long-term goals of entrenching itself in power, suppressing political dissent, averting economic sabotage and punishing counter-revolutionary activities.

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<sup>1</sup> For comparative perspectives on twentieth-century revolutions, see Barrington Moore Jr.'s classic work, The Social Origins of Dictatorship and Democracy: Lord and Peasant in the Making of the Modern World (1967) Boston: Beacon Press.

Third, nearly all revolutionary regimes evince a penchant for strengthening the enforcement of existing laws deemed by the leadership to be crucial to the maintenance of social order and the pursuit of revolutionary social transformation. Stalinist Soviet Union, Maoist China, Castro's Cuba, Khadaffi's Libya and Mengistu's Ethiopia, among others, reformed and burgeoned the repressive capacities of the instruments of coercion, with law being a capital tool. Similar to these trends in revolutionary praxis, the PNDC regime in Ghana has established public tribunals as new structures for its vision and policy of popular justice, introduced new criminal offenses, and vigorously, albeit selectively, enforced existing laws concordant with its revolutionary ideals.

This chapter explores the PNDC regime's efforts and strategies directed toward the creation of a new judicial dispensation in Ghana. It exposes and examines the regime's justifications for introducing the policy of popular justice, and describes the strategies or mechanisms for achieving this end.

### **The Establishment of Public Tribunals Under the PNDC Regime**

The intention to establish public tribunals in Ghana by the PNDC was first publicly articulated by Flt. Lt. Jerry Rawlings in a national Television and Radio Broadcast on 5th January 1982. In the course of this address, during which the new regime elaborated on its rationale for initiating the revolution and spelled out its economic and foreign policies, the Chairman of the PNDC noted that the revolution aimed, *inter alia*, at ridding Ghanaian society of corruption and injustice. He declared that public tribunals would be established to try those who had committed crimes against the people and to contrast bourgeois legality with popular justice. He continued,

The People's Tribunals, which will conduct the investigations and trials, will only act on the basis of investigations scrupulously conducted and evidence properly assembled. Their trials will be public but the tribunals will not be fettered in their procedures by technical rules which in the past have perverted the course of justice and enabled criminals to go free. (Daily Graphic 6th January 1982).

Sounding clearly populist, Rawlings stressed that the creation of public tribunals was a means to the attainment of popular justice. Popular justice entails easy and inexpensive access to dispute-settlement mechanisms employing principles of adjudication grounded in, or according with, traditional Ghanaian conceptions of justice. Rawlings emphasized that the creation of the public tribunals would help redress the widening class disparities in the delivery of justice which inhere in the structure, requirements and operation of the Anglo-Saxon regular courts. Thus, the tribunals would coexist side by side with the regular courts. As Rawlings said of the intentions behind the creation of the tribunals,

They are not meant as replacements for the regular courts, but neither do we expect the regular courts to superintend the operations of the People's Tribunals. Let each respect the boundaries of the other, and there will be peaceful co-existence. But even though each will be acting within its own confines, we believe that ultimately it is for the people to decide the correctness or otherwise of the judgments of the two systems. This is one way in which the dispensation of justice itself will be democratised. (Daily Graphic, 6 January 1982.) [Emphasis added].

It is evident from the above statement that the PNDC aimed at expanding the choice of judicial machineries in the country through the creation of an alternative system of justice. As a means of democratising the dispensation of justice, the tribunals system would permit a real or substantive choice, as well as afford Ghanaians an opportunity to make judgments about the moral stature of the two systems of justice. The degree to which the creation of public tribunals occasioned real choice in mechanisms of adjudication are discussed later in this Chapter.

### **Constitutive Law and Structure of Ghana's Public Tribunals System.**

The translation of the ideals of popular justice into practical institutional structures is found in *Public Tribunals Law 1982*, PNDC Law 24 (hereinafter PNDC Law 24) enacted in July 1982. For reasons discussed later in this chapter, PNDC Law 24 was repealed and replaced with a more comprehensive law, *Public Tribunals Law, 1984*,

PNDC Law 78 (hereinafter PNDC Law 78) which clearly articulates the powers, functions and organization of the public tribunals system in Ghana.

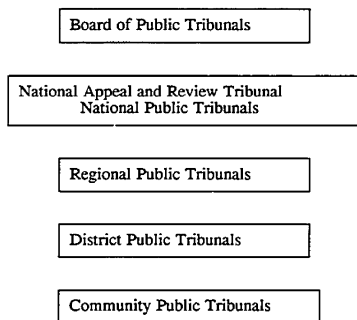
### **Structure**

The structure of the public tribunals system is sketched out in the diagram below. At the apex of the system was the Board of Public Tribunals. Below it, in descending order of importance, were the National Public Tribunals, the Regional Public Tribunals, the District Public Tribunals, and the Community Public Tribunals.

### **Board of Public Tribunals**

Originally established under *PNDC Law 24* in 1982, this is the body charged with the responsibility of administering all public tribunals in Ghana.

**Figure 2. Structure of Ghana's Public tribunals System**



As required by Section 1(1) of *PNDC Law 78* which amended the previous law, the Board consisted of not less than five and not more than fifteen members, at least one of whom had to be a lawyer with a minimum of five years' standing experience. All members of the Board, including the chairperson, had to be lawyers. They were appointed by the PNDC.

Under sections 10-13 of *PNDC Law 78*, the Board is authorized to make limited staff appointments to, and all regulations for, the establishment of all public tribunals. George Agyekum, former chair of the Board, describes the functions of the Board as follows:

The Board has both judicial and administrative functions. It has administrative power to administer all tribunals under the Tribunal Law. It also has powers to appoint some members of District and Community Tribunals and to appoint staff to the Tribunals. It has no power to appoint chairmen of regional or national tribunals as these appointments are done by the PNDC (Bankie, 1987:44).<sup>2</sup>

The deliberations of the Board were presided over by the chairperson who, together with the members, made decisions regarding the day-to-day functioning of the tribunals system.

Concerning the composition of the Board and the philosophy of its operation, Agyekum (1987) makes the following observation:

The Board, reflecting the concept of participatory democracy has got a membership from a very wide cross section of the general public. For example, we have policemen on the Board, we have soldiers on the Board, we have a farmer on the Board, we have a lawyer, at one time a Queen-mother<sup>3</sup> was on the Board. The belief is that the general public

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<sup>2</sup> Statement by Mr. George Kwaku Agyekum, former Chairperson of the Board of Public Tribunals (1982-1986) in an interview with Mr. B.F. Bankie, former Registrar of the Superior Court of Judicature. The interview, rich in detail, was conducted on May 20th, 1987.

<sup>3</sup> Queen-mothers occupy prominent positions in the traditional social systems of many ethnic groups in Ghana. Especially in the matrilineal Akan societies such as Ashanti, queen-mothers play vital roles in religious and cultural matters as well as in political and judicial administration, much of which is often inseparable. Queen-mothers are seen as the ultimate repositories of wisdom, and their judgments in dispute resolution are sought and respected. Historically, queen-mothers embodied considerable power, and they had the final word in the enstoolment and destoolment (enthroning and dethroning or removal) of Ashanti kings or chiefs, an authority which their male counterparts lacked.



would enrich the tribunal system with their background and ideas (Bankie, 1987:43).<sup>4</sup>

On May 24th, 1985, the *Public Tribunals (Amendment) Law 1985*, PNDC Law 108, was passed to reconstitute the Board and to provide for appeals within the tribunals system. Subsequently in May 1986, the Board was reorganized. The effect of this amendment on the composition of the Board is described by Agyekum thus:

[F]or some time there were only two lawyers on the board. On the reorganized board we have a representative from the Attorney-General's Department, a representative from the military, a representative from the police and a representative of the Chief Justice... A High Court Judge was appointed the chairman of the Board (Mr. Justice Brobby) (Bankie, 1987:43-44. Parenthesis in original).<sup>5</sup>

The significance of these changes, may be found in (1) the introduction of the right of appeal in the tribunals system; (2) the expansion in the number of legally-trained persons on the Board; and (3) the appointment of a seasoned judge as its chairperson. This will be elaborated upon later in Chapter VII.

### **National Public Tribunals**

By virtue of *PNDC Law 78*, Section 4 (1)(c), the National Public Tribunal (NPT) had original jurisdiction to try criminal offenses provided under the *Ghana Criminal Code 1960, Act 29*. Further, the NPT had jurisdiction to hear cases resulting from reports of commissions of enquiry. Offenses relating to rent control, price control, foreign exchange, local or central government revenue, import or export, and any other offenses created by *PNDC Law 78* were justiciable by the NPT. The nature and implications of these offenses for entrenching the PNDC in power, as well as the ideological seed-bed from which the offenses sprung are later elaborated upon in this Chapter.

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<sup>4</sup> Bankie, *ibid.* p.43.

The NPT also had original jurisdiction to adjudicate disputes referred to it by the PNDC except cases or orders which emanated from the Office of Revenue Commissioners (formerly the Citizens Vetting Committee). Section 101, subsection 4(2) of *PNDC Law 78* entitled an NPT to take over any case pending before a lower tribunal, regardless of whether or not a hearing had already commenced at such a lower court. Such a take-over could occur at the volition of any of the two NPTs in the country, or emanate from either a directive of the PNDC or the Board.

This case mopping-up capacity of the NPTs ensured the expedient handling of cases that were of special interest to either the government or any senior personnel within the tribunals system. By definition, this permitted the swift transfer of cases within the tribunals system from anywhere in the country to Accra where the NPTs were based. Such selective forays into lower level tribunal justice by the NPTs reflected the tight control Accra ostensibly exerted over its own judicial apparatus.

Decisions of the NPTs were final. A convicted person could appeal an NPT decision via a petition to the NPT to review its decision provided that it has not previously done so. Despite the provisions of *PNDC Law 78*, Section 101, subsection 5(3) which authorized this review, there were no guidelines detailing the grounds and circumstances under which such reviews could be conducted.

In August 1984, the National Appeal and Review Tribunal (NART) established by the PNDC started sitting. It Operated under the administration of the Board of Public Tribunals; it was a higher court than the NPT since appeals from the latter lay to the former. As Agyekum (1987) points out, however,

[U]nder the law the National Public Tribunal is actually the appellate body, so that appeals from the region go to the National Public Tribunal which, when sitting in its appellate capacity, becomes the National Appeal Tribunal; where it hears an appeal from the National Public Tribunal then is [sic] considered a review (Bankie, 1987:43-44).<sup>6</sup>

Thus, the NART, which in reality was the same body as the NPT, had two main jurisdictions: (1) an appellate jurisdiction with regards to decisions and orders of regional public tribunals; and (2) a review power over the decisions of the NPT. In its appellate role, the NPT, sitting as the NART, had jurisdiction to review its own orders and decisions, or those of a regional public tribunal.

The NPT was composed of the members of the Board of Public Tribunals, the Regional Public Tribunals, and any other persons appointed by the PNDC. It was presided over by the chairperson of the Board. Its numerical size was a function of the jurisdiction it was exercising at a given moment. When exercising its original jurisdiction, not more than five and not less than three members constituted the NPT. When it sat as an appellate tribunal or to review its own decisions or orders, it had five members.

### **Regional Public Tribunals**

Each of the ten administrative regions into which the country is divided had one Regional Public Tribunal (RPT). An RPT had original jurisdiction to try any offenses under the *Criminal Code*, offenses which arose from the findings of a commission of enquiry, and any offenses which occurred in that region in relation to rent control, price control, local or central government revenues and import or export. Certain specified offenses such as treason, and matters within the jurisdiction of the erstwhile AFRC special tribunals could not be entertained by a regional tribunal without the express written permission of the Board. The RPT could, however, try any offense justiciable by the district or community public tribunal.

The RPT was composed of as many members as the PNDC would appoint. When it sat as an appellate tribunal, however, it had five members. Decisions of the RPT in exercise of its original jurisdiction could be appealed to the NPT as of right.

The RPT had the power to hear appeals from the District and Community Public Tribunals. Once the RPT dismissed an appeal against the decision of a District or

Community Public Tribunal on the ground that it lacked merit, the matter could not be appealed any further unless the RPT itself, or the NPT so permitted.

### **District Public Tribunals**

A District Public Tribunal (DPT) had the mandate to adjudicate offenses that occurred in the district. Such offenses related to violations of import or export laws, local government, revenue, levies, market tolls, lorry park tolls, radio and television licenses, and overcharging of road traffic rates and fares. A DPT could also try offenses under the control of the *Bush Fire Law*, abuse of power by District Defence Committees, and violations of building regulations. The Board could also refer cases to a DPT for adjudication. A DPT could try offenses occurring outside the district only upon a specific directive from the Board authorizing it to do so. Appeals of the decision of a DPT lay to the appropriate RPT.

A DPT was composed of not more than seven members appointed by the Board, although a minimum of three members could constitute a trial panel. Members were appointed for a two-year term after which they were eligible for reappointment. Misconduct, counter-revolutionary activity and incompetence were grounds for removal from a DPT by the Board.

### **Community Public Tribunal**

The jurisdiction of a Community Public Tribunal (CPT) was limited to offenses that occurred within that community unless it was otherwise authorized by the Board. It had the mandate to adjudicate offenses pertaining to theft, public nuisance, vagrancy, assembly for idle or disorderly purpose, price control, rent control, abstinence from community labour without due permission or reasonable cause and abuse of power by officials. It could also hear cases of fraudulent breach of trust and any offenses referred to it by the Board.

Like the DPT, a duly constituted CPT comprised a maximum of seven and a minimum of three panel members. The same terms of tenure and grounds of expulsion applied in the CPTs as the DPTs.

### **Gold Tribunal**

In May 1990, a special Gold Tribunal was established in the mining town of Obuasi in the Ashanti Region "to deal with mounting cases of gold theft and other criminal offenses" (*West Africa*, 14-20 May 1990, p. 820). The Gold Tribunal comprised a three-member panel (a lawyer, a soldier and a lay woman). It was the only one of its kind in the country. The establishment of this special tribunal may reflect the extent to which the PNDC regime took the loss of foreign exchange revenue through theft and gold smuggling, and the importance it attached to the gold mining industry in its efforts at economic recovery.

### **The Creation of Special Offenses**

*PNDC Law 78* created two sets of special offenses. The first set, comprising chiefly of acts and omissions deemed unreasonable by a public tribunal or the government, were punishable by death. The intentions behind the criminalization of these acts were to discourage the destruction of the national economy, and to make political subversion particularly unpalatable so as to dissuade prospective coup makers. Thus, under Section 9(1) of *PNDC Law 78*, a person commits an offense who:

- (a) by any willful act or omission or recklessly causes or caused any loss, damage or injury to the property of any public body, whether monetary or otherwise;
- (b) in the course of any transaction or business with a public body intentionally or recklessly causes or caused any damage, injury or loss, whether economic or otherwise, to that public body;
- (c) incites or assists or procures any person to invade Ghana with armed force or unlawfully to subject any part of Ghana to attack by land, sea or air or assists in the perpetration of any such invasion or attack;
- (d) without lawful authority (proof of which shall be on him) imports into Ghana any explosive, firearm or ammunition;
- (e) unlawfully deals in any foreign currency in a manner likely to damage the economy of Ghana;

- (f) does any act with intent to sabotage the economy of Ghana;
- (g) prepares or endeavours in any manner to overthrow the Government or to usurp any powers of the Government;
- (h) prepares or endeavours to procure by force any alteration of the revolutionary path of the people of Ghana or of the law or the policies of the Government;
- (i) intimidates or coerces any citizen of Ghana into opposing or expressing hostility to the Government of Ghana and thereby lessens the effectiveness of acts, programmes and policies of the government designed to improve the welfare of the people of Ghana;
- (j) through false information about the Government of Ghana or its policies creates disaffection against the Government of Ghana and thereby lessens the effectiveness of acts, programmes and policies of the Government designed to improve the welfare of the people of Ghana;
- (k) being a public officer, citizen of Ghana or other person resident in Ghana, illegally or dishonestly (proof of which shall be on him) acquires property.

It is apparent from the nature of these offenses that the entrenchment of the existing distribution of political power was uppermost in the calculations of those who formulated this legislation. A firm grip on the power of criminal law is a *sine qua non* to the pursuit of a revolutionary programme. This is especially true of a fragile quasi-military regime concerned to downplay its military character and to project itself as a popular, mass-based and confident regime. Thus, the regime was forced to walk the fine line between riding high on the tide of populism with its attendant vulnerability, and strengthening its security apparatuses (including the extension of criminal law) in order to contain political dissent which could roll dangerously close to subversion during the teething days of the precarious revolutions.

The second set of "special offenses" were concerned with achieving the revolution's goals of social justice and social development. Crucial to the attainment of these ends was the purposeful conscientization (Freire, 1983) of the populace to the ideals of discipline, public-spiritedness, probity and accountability. A related lofty goal of the revolution was the eradication of corruption in all its forms from all spheres of life. Thirty-first December, as a continuation of June Fourth, was inspired by the Rawlingsian vision of a "clean house" - the logical conclusion of the house-cleaning exercise begun by the

erstwhile AFRC in 1979. The creation of these special crimes was to further this enduring dream. Consequently, *PNDC Law 78*, Section 9(2) provides that:

It is an offense for -

- (a) any person or group of persons who, while holding high office of State or any public office in Ghana, corruptly or dishonestly abuses or abused the office for private profit or benefit or any person or group of persons who, not being holders of such office, acts or acted in collaboration with any person or group of persons holding such office in respect of any acts specified under this paragraph;
- (b) any person or group of persons who acts or acted in breach of the mandatory provisions of any Constitution or Proclamation under which Ghana has been governed while that Constitution or Proclamation was or is in force;
- (c) any person or group of persons who acted or omitted to act, in breach of any enactment or other laws of Ghana whereby financial loss was caused to the State, or the security of State was endangered or damage was caused to the welfare of the sovereign people of Ghana;
- (d) any person or group of persons who intentionally did or does any other act or omission which is shown to be detrimental to the economy of Ghana or to the welfare of the sovereign people of Ghana.

The principle of *nullum crimen sine lege*, one of the cherished pillars of the common law tradition, makes it illegal and unjust to punish behaviour which occurred in the absence of a legal enactment prohibiting that behaviour. Pointing to the political nature of the criminal law, this principle also recognizes that not all evils are crimes. Indeed, some harmful acts are downplayed because of the balance of powers in a state (Brannigan, 1984:26), while many criminal violations by the powerful in some jurisdictions (such as Ghana) routinely go unpunished even when detected. Many of the offenses listed above are deliberately couched in retrospective terms, thereby enabling an *ex post facto* definition of past misdeeds as crimes and accordingly permitting the imposition of newly-prescribed punishments.

Significant shifts in the balance of power sometimes occasion the retroactive definition of previously non-criminal acts as crimes. As Brannigan (1984:26) points out,

Nearly all revolutions, whether from the political right or the left, have experienced this situation. Previously lawful activities are tirelessly redressed by the firing squad as the new revolutionary elites retrospectively define previously conventional activity as criminal.

Thus, the Public Tribunal Law represented an attempt by the PNDC to retrospectively cast consensually reprehensible (i.e. deviant) and injurious but non-criminal acts into a criminal mould in order to justify the punishment of those charged with such violations. The law also had the effect of rendering timeless the criminal liability of an individual so long as his/her alleged violation of a Ghanaian criminal law remained unadjudicated. This allowed for covered-up criminal cases and those deemed to have been closed by various police departments under suspicious circumstances (provided they occurred after 1957), to be reinvestigated and charges laid where possible. Beneficiaries of dubious or dishonest contracts, as well as persons suspected of abusing their public position for private gain were specifically targeted by this legislation. In this sense, the intention behind the passage of this law was two-fold: retribution and the achievement of general deterrence, and education of the public. The prospective wording of these offenses strongly suggests the political motive undergirding this enactment: it affords the state considerable political and legal latitude in proactive moving to contain or prevent the commission of such crimes.

Although such legal enactments are not unique to revolutionary states, the desire for political repression pursued in the name of national security concerns and the protection of the economy is a common tendency among fragile revolutions battling real and perceived acts of destabilization or counter-revolutionary activities. The Soviet Union, China, Cuba, Kampuchea, Ethiopia and Nicaragua have all evinced this tendency to remarkable degrees (Giddens, 1991:740-776).

The criminalization of acts or omissions that have the net effect of generally endangering the national economy or causing damage to the citizens of a country "reflects a dramatic reconception of criminal deviance" (Hagan, 1977:9). This is the crux of the human rights approach to the definition of crimes. As advocated by Herman and Julia Schwendinger, the human rights approach to the definition of criminal deviance holds that the creation of conditions that result in the denial or erosion of the fundamental prerequisites for well-being should be criminalized. This approach coincides with certain



fundamental provisions of the December 10, 1948 United Nations' *Universal Declaration of Human Rights*. The relevant provisions of the U.N. Declaration under consideration here are Articles 23 - 25 which state as follows:

Article 23

- (1) Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment
- (2) Everyone, without any discrimination, has the right to equal pay for equal work.
- (3) Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection.
- (4) Everyone has the right to form and to join trade unions for the protection of his interest.

Article 24

Everyone has the right to rest and leisure, including reasonable limitation of working hours and periodic holidays with pay.

Article 25

- (1) Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.
- (2) Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection.

Thus, as Julia and Herman Schwendinger point out, the basic prerequisites for well-being to which all persons must ineluctably be entitled include "food, shelter, clothing, medical services, challenging work, and recreational experiences as well as security from predatory individuals or repressive and imperialistic social elites" (cited in Hagan, 1977:9). According to the Schwendingers, these conditions are rights rather than privileges or rewards, and they should be guaranteed and protected by the criminal law. Hence, they note that

*the social conditions themselves must become the object of social policy...it is not an individual or a loose collection of atomistic individuals which is to be controlled, but rather the social relationships between individuals which give rise to criminal behaviour (cited in Hagan, 1977:10) [Italics in original].*

This human rights approach to the definition of crime would therefore contend that imperialism, racism, sexism, discrimination, poverty and forms of harassment (including sexual harassment) should be conceived as crimes, and those whose actions facilitate the existence of these indignities should be treated as criminal.

This radical view coincides with Quinney's (1970) call for the transformation of the study of crime into a study of larger political issues, a view which enjoys widespread currency and support among many students of criminology within the critical conflict school.

Despite its utopian undertones, the core argument articulated by the Schwendingers continues to surface in much neo-Marxian theorizing on crime and crime control. The Schwendingers pose the question:

*Isn't it time to raise serious questions about the assumptions underlying the definition of the field of criminology while agents of the state can, with impunity, legally reward men who destroy food so that price levels can be maintained while a sizable portion of the population suffers from malnutrition? (cited in Hagan, 1977:10). [Italics in original]*

This question also lies at the heart of the works of the "new criminologists" such as Ian Taylor, Paul Walton, and Jock Young (1973). More recently, Stephen Brickey and Elizabeth Comack (1989) have called for a "jurisprudence of insurgency" by which radical lawyers would actively champion the cause of the underclass and subordinated groups who are in conflict with unjust laws as part of a conscious effort to achieve an equitable, socialist legality.

It can be concluded from the foregoing analysis that the creation of the special offenses reflects the desire of the PNDC regime to broaden the scope of criminal definitions in Ghana in order to achieve the larger goal of social justice, public accountability and social development. The prosecution before public tribunals of persons whose crimes pre-dated the PNDC regime indicates the extension of criminal law and its usage by the state as an instrument of egalitarian social ordering, moral crusading, and the

pursuit of social justice through retribution. It also reflects an inclination for selective political repression.

### **Legitimation: The Revolution's Need for Political Control**

Public tribunals were established to meet a number of goals of the revolutionary state under Rawlings. These purposes can be determined through an examination of the structure and functions of the tribunals. Undoubtedly, the undisputed functions of courts are their duty to impose punishment upon offenders against the laws of the state, and the duty to decide disputes between contending parties (Amissah, 1981:3). Courts function primarily as indispensable instruments of the vindication of national authority. Indeed, in the context of some modern states built on a radical/militant political ideology (such as China, Cuba and the former Soviet Union) this role was expanded upon, with the courts not only upholding the power of the state but also actively propagating the extant ideology. To the Chinese regime, for example,

The 'people's courts' are no more than a useful instrument to implement its policies and enforce its control. In trying criminal and civil cases...the courts were to consolidate the People's Democratic Dictatorship, uphold the new Democratic social order, and safeguard the people's fruit of revolution and all lawful rights and interests (Leng, 1967:9).

In addition to the traditional role of courts, public tribunals in Ghana, during the early phase of the revolution, functioned to: a) implement the policies of the PNDC as they pertained to popular justice; b) consolidate the "gains of the people" (during the 1979 short-lived regime of the AFRC, and the "newly-won freedom" made possible by the December 31st revolution) by opposing and suppressing counter-revolutionary activities and ideologies; and c) serve the symbolic role of dramatic social revamping, that is, as symbols of the revolution.

Like the quarter sessions and assizes in seventeenth and early eighteenth century England which played significant educative roles (Beattie, 1986; Hay, 1982), the public

tribunals in Ghana were platforms for advancing novel principles of adjudication as well as a conception of justice that is broader in scope than the Westminster concept. In a way, all courts reflect the ideological beliefs of the state: in so far as they apply the mores of the society in deciding on wrongdoing, they advance the beliefs of that society (Amissah, 1981:4). Nonetheless, this does not imply a consensus-based set of norms: the values, beliefs and mores of the society were those of the state; that is, the government. Although these mores were widely shared, they were also widely opposed by the Ghanaian bourgeoisie which the revolution had just overthrown. The tribunals functioned to instil in the Ghanaian psyche, the idea that law was primarily an instrument to protect the political and social order rather than a guardian of private rights and interests. This ideological articulation of the role of law was in direct contra-distinction to the nature and purpose of law as advanced by preceding regimes in Ghana which had emphasized the individualistic, capitalistic ethos over the egalitarian principle.

Throughout its chequered political history prior to the advent of the PNDC regime, there has been a theoretical constancy undergirding Ghana's legal and judicial system. Like most of its common law counterparts elsewhere, Ghana's legal system was grounded in the pluralist assumption that both government and law are neutral arbiters of conflicting interests in society. The political and legal systems, in the most generalized view of this paradigm, are fundamentally neutral, and by the nature of competing interests groups, effectively insulated from the direct influence of economic elites. As Hall and Scraton note, "where society is crosscut by competitive interest, only the state and the law can claim to speak in the name of the 'general interest'" (1981: 472). According to pluralism, conflicts and disputes are resolved within the framework of legal procedure, and the law applies universally to all classes as well as the state; the law guarantees the rights and liberties of citizens, and "stands as a legal barrier against the exercise of arbitrary state power". It entails "due process," a body of formal protocols which must be observed in

the administration of justice and the adjudication of civil disputes. (Hall and Scraton, 1981:490).

Crucial components of the due process model of criminal justice are procedural fairness and the presumption of innocence (Packer, 1968). These protocols aim at protecting the accused and structuring and constraining the discretionary power of criminal justice decision-makers. This model of criminal justice evidences a concern for the rights of the individual in conflict with the law. As Griffiths and Verdun-Jones explain, in this model,

The onus is on the criminal justice system to prove guilt, and there is a requirement that agencies and decision makers follow proper procedures in making such a determination. The possibility exists that an accused person may be factually guilty, but legally innocent, if the proper procedures and rights of the accused have been violated (1989:10).

In the United States and Canada, the requirements of due process also include the famous Miranda Warnings or their equivalents. As spelt out in the celebrated 1976 U.S. Supreme Court landmark decision in *United States v. Mandujano*, these warnings

aimed at the evils seen by the Court as endemic to police interrogation... [They] sought to negate the 'compulsion' thought to be inherent in police interrogation (Fein, 1977:40-1).

In spite of official protestations to the contrary, the operation of the tribunals system in Ghana evinces a clear repudiation of the due process model in favour of the crime control model. In this model, the purpose of the criminal justice system is seen as

the protection of the public through the deterrence and incapacitation of offenders. Criminal offenders are responsible for their actions, and the administration of justice should be swift, sure, and efficient. There is a strong presumption of guilt, and confidence that an efficient justice system will screen out innocent persons at the police or prosecutorial stages. There is also an emphasis on compensation for victims of crime (Griffiths and Verdun-Jones, 1989:9-10).

Owing to their particular location within the justice process, different actors within the criminal justice system evince a tendency to gravitate toward one position or the other:

The police, for example, have long been identified with the crime control perspective, while the courts have traditionally been viewed as operating within a due process approach (Griffiths and Verdun-Jones, 1989:10).

The tendency for different components of the criminal justice system to subscribe to radically different and competing philosophies of justice, coupled with the pursuit of frequently conflicting goals, thwart attempts at system unity, and invariably heightens the prospects for organizational conflict (Griffiths and Verdun-Jones, 1989:10).

It must be remarked that inclination toward one or the other of these models is always a matter of degree rather than an absolute given. This is because while policing styles in general reflect clear patterns of reactivity and "criminal-busting mentality", the law and the badge, in order to maintain their majesty, require a significant show of public deference on the part of police officers. The public relations experts and image consultants in the service of police departments are in the business of impression management and the presentation of the police "self". Indeed, even the most rambunctious police officer who is heavily imbued with crime control philosophy, nonetheless publicly articulates the politically-correct rhetoric of due process as a reflection of the majesty of the law, and to lend the appearance that he/she has a fundamental faith in the legal system which he/she has sworn to uphold. The same is true of correctional officers.

Similarly, despite their general tendency to gravitate toward the due process model, judges, prosecution and defence counsels all share an overarching concern for 'efficiency' in the administration of justice. This working camaraderie is referred to by Eisenstein and Jacob (1977) as "courtroom workgroup". It describes the high degree of co-operation that exists among these actors to the virtual detriment of the accused, a practice which gravely undermines the adversarial character of the criminal justice system and highlights the high level of interdependence among its components.

In general, on the due process-crime control continuum, the Ghanaian criminal justice system has traditionally tilted heavily toward the crime control model. The police have traditionally shown little interest in the rights of the accused, and the judicial system

has generally not sought to uphold the rights of the common person unless an accused individual is implicated in a subversive attempt against a government with whom leading members of the judiciary have an axe to grind.

Largely used by the British colonial administration as an instrument of political legitimization and capital accumulation, this legacy of colonial class oppression and exploitation has persisted throughout Ghana's history. Police brutality against suspects in confinement, harassment of "uncooperative" witnesses and the use of torture by the police and state security personnel as devices for extracting "favourable", but dubious and heavily compromised confessions are fairly common occurrences in post- independence Ghana. Given the excessive concentration of both prosecutorial and adjudicatory powers in the public tribunals, these tribunals have demonstrated, to an even greater degree, the same peculiar judicial capriciousness and penchant for basic human rights violations that characterized the regular courts in pre-December 31st Ghana. These points require further clarification.

### **Tribunals as Agents of Control**

One way of determining the intentions behind the formulation of a given policy is to examine the functions of its procedures for implementation. Public tribunals were created as procedures for implementing the policy of popular justice. As shown in Chapter IX, there have been remarkable ideological and policy transformations as well as strategic shifts and reversals in the character of the Rawlings revolution to the extent that, by late 1992, the tribunals remained the only significant relic of the "revolutionary phase" of the PNDC regime. While the radical socialist rhetoric and policies of the revolutionary epoch were quickly abandoned due to their presumed irrelevance during the phase of pragmatism and trade liberalization in the 31st December Revolution - an issue which is addressed at length in Chapter IX - the tribunals endured because they served several essential social control functions for the regime.

All judicial systems are mechanisms of social control. In the period of colonial rule, as noted earlier, a Westminster judicial system was imposed on the Gold Coast colony as an effective means of maintaining social order. Thus, the colonial police service in the Gold Coast colony, as elsewhere, acted as the official instrument of coercion for Her Majesty's government while the courts served as the clearing-house for non-conformists and criminals. This is, of course, a universal function of criminal law in all state systems. John Beattie (1986) and Douglas Hay (1982) have documented the role of criminal law and authority structures in the control of the poor of England during the seventeenth and eighteenth centuries. The criminal law was important in ensuring that the opinion of the ruling class prevailed over the physical strength of the ordinary people (Hay, 1982:109) through the use of selective terror. The law was one of the ideological instruments at the mercy of the ruling class for moulding the consciousness of the public and achieving the subjugation of the many to the will of the few.

Although revolutions are typically staged in the name of freedom, they are characteristically followed by a period of massive deprivation of freedom. Revolutionary terror - the systematic application of violence in order to induce obedience to the new authorities (Giddens, 1991:763) - is routinely employed to liquidate real and perceived opposition. The tendency of revolutionaries to employ violence as a tool of control in the "transition" period of the "dictatorship of the proletariat" (Marx, 1964) accords with the law of dialectics, change and resistance. In the aftermath of the French Revolution of 1789, for example, large numbers of suspected enemies of the revolution or supporters of the old regime were viciously persecuted, hunted down, and publicly executed by the guillotine (Hobsbawm, 1975).

Severe political and social repression is a feature of nearly all revolutions. Virtually all revolutions, with the exception of the American Revolution and a few others, have been followed by periods of widespread political repression in the form of naked brutality, arbitrary imprisonment, executions, rigid censorship and other forms of human



rights violations. Revolutionary laws were enacted to augment or bolster the new social order, as well as the regime's own position. Special courts established by the new regimes were instrumental in furthering the goals of the revolution.

During the revolutionary period of the Rawlings regime, state-sanctioned violence wielded by the military, the police, commandos, and other para-military organs was used to entrench the PNDC in power and to legitimize its rule. Among other things, the public tribunals provided political support and legal grounding for the regime and thereby ensured its longevity and dominance. In the words of Kwaku Boakye Danquah, former Chairperson of a National Public Tribunal who defected to England in February 1992, "the tribunals are part of the system that underpins the PNDC. It is a political instrument ensuring PNDC dominance" (West Africa, 22 March 1992), and that,

The tribunals, as it were, have been established to try cases, particularly in which the government has interest. It would not be symptomatic of my tribunal alone. It is a problem which all tribunals in Ghana have experienced, particularly those at the national level, i.e. the national Public Tribunals (Ghana News, April 1992).

The public tribunals functioned first and foremost as "selective instruments of class justice" (Hay, 1982:120). While in seventeenth and eighteenth century England, the principal instruments of legal terror - the gallows - were in the hands of the propertied and powerful classes (represented in the justice system by the judges of the assize courts) for the purpose of dominating the poor (Beattie, 1986; Hay, 1982), in Rawlings' Ghana, the tool was the firing squad wielded by self-appointed representatives of the poor - revolutionary leaders (mainly socialist intellectuals and politicians, trade unionists and non-commissioned military officers). The regime used the death sentence to instill fear among would-be political dissidents, especially the middle and upper class civilian politicians and the business elites and their allies in the military and police establishment.

In the period 1982 to 1983, public tribunals routinely employed terror - the raw material of authority (Hay, 1982:102) - to achieve political purposes, such as the

containment of political opposition. They functioned primarily as instruments of political repression which is typical of the early phase of nearly all revolutionary social transformations. This was the case in the Soviet Union, Cuba and China. Chairman Mao Tse-tung justified the ruthlessness meted out to 'corrupt' landlords and counter-revolutionaries in China in these words:

a revolution is not the same as inviting people to dinner, or writing an essay, or painting a picture, or doing fancy needlework... A revolution is an uprising, an act of violence whereby one class overthrows another... To put it bluntly, it was necessary to bring about a brief reign of terror in every rural area; otherwise one could never suppress the activities of the counter-revolutionaries in the countryside or overthrow the authority of the gentry. To right a wrong it is necessary to exceed the proper limits and the wrong cannot be righted without the proper limits being exceeded (1953:27) [Emphasis added].<sup>7</sup>

Similarly, in Castro's Cuba, revolutionary justice entailed the use of terror and torture against the wealthy anti-revolutionaries prior to the phasing out of the Revolutionary Tribunals (Brady, 1982:282-5). Once vengeance had taken its course against former Batistianos and mobsters and the threat of counterrevolution had subsided, more democratic and humane justice institutions, such as the People's Courts, began to emerge. An important impetus for this development was the crisis of 1970, which resulted from "over-centralization of economic planning, militarisation of labour, bad weather and falling sugar prices". These factors, which capped a series of economic failures, impelled the revolutionary leadership to rethink and reorganize its strategies.

Prior to the Cuban economic depression and subsequent changes in the strategies for judges, the Revolutionary Tribunals employed sporadic terror and beatings. Rules of evidence and procedure were loose under a roughly defined code of military justice. The justice institutions created in the beginning had a pronounced military flavour, a situation which was duplicated in the radical phase of the Rawlings revolution in Ghana.

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<sup>7</sup> See also, Mao Tse-tung, "Report of an Investigation into the Peasant Movement in Hunan" in Selected Works, New York, 1954, Vol. 1, pp.35-59.

The deliberate use of state terrorism within the borders of a country was witnessed during the 1927 uprising in the Soviet Union. In this instance, the Communists allowed the peasants to maltreat and execute the counter-revolutionaries at will (Leng, 1967:2; Giddens, 1991:754). Indeed, terror as a weapon has been a property of virtually every dictatorship: monarchical, feudal, mercantilist, proletarian or republican.

In the context of Ghana, state-sanctioned violence wielded by, and expressed through, the public tribunals was directed at the "opposition forces", especially the middle and upper classes. As a former chairperson of one of the tribunals revealed in 1988, political opponents and wealthy people were favourite targets:

You see, initially we were given to the impression that as tribunal chairman we had to put fear of the devil in people especially the wealthy, the old noisy politicians, the playboys and their 'high time women'<sup>8</sup>. So we were

<sup>8</sup> This dissertation did not generate any specific data to suggest that women were selectively targeted for persecution by the public tribunals. However, based on my unscientific observations of the dispensation of "justice" in the two periods of Rawlings' reign (1979 and 1982), my distinct impression is that there were clear elements of gender and class discrimination. During the AFRC days (June - September 1979), the People's Courts (which were properly constituted tribunals), functioned side by side several kangaroo martial courts which were hastily convened by military bandits without formal authority. The non-formal, kangaroo courts displayed a vicious penchant for terrorizing two particular groups of women. The first group was the beautiful, well-educated, assertive and articulate women. They were often accused of being "caustic-mouthed" by their most frequent attackers and harassers - working-class men, non-commissioned soldiers and junior policemen. In particular, these women were blamed for virtually every moral failing in Ghanaian society. This was partly because during the kleptocratic regimes of Acheampong and Akufo in the 1970s, social and political power of young beautiful women was suddenly and greatly enhanced as senior military officers in government blatantly displayed their "new acquisitions" and traded cars, import licences, overseas business and vacation trips for sexual favours from high-school girls young enough to be their daughters and grand-daughters. The resentment of working-class men was heightened by the continuing downward drift of the economy and the accompanying belt-tightening which the working poor was frequently called upon to do. It was also augmented by popular television images of affluent young urban women depicted in questionable moral situations and dubious romantic and matrimonial liaisons with the politicians in mufti and the soldiers of fortune. Popular TV shows such as "Osofo Dadzie" - a moralizing weekly soap opera - and pungent lines or lyrics in Ghanaian highlife music played up the theme of the encircling moral decadence in Ghanaian society.

The second group was the rich, urban women, especially the successful-looking, property-owning entrepreneurs. After a mockery of a "trial" (consisting of a few double-barrel and impossible-to-answer questions) had been concluded, a sentence would be pronounced and instantly executed. Often, the victim would be stripped naked in public, stretched on a table and whipped mercilessly with cane, belt or leather strap. Invariably, the sentence also included the confiscation of the assets of the "prisoner". This meant keeping whatever valuables these men found on the victim's body (including her clothes, jewellery, merchandise, car and/or house). I witnessed many of these brutalities at the Odokor market (near Busia Junction), and at the Kaneshie Market in Accra. During

mischievously ... vindictive, unnecessarily vindictive as if the accused were our personal *bona fide* enemies who must be denied the chance to exist on earth. At the onset of the revolution...things were done without due care for the feelings of another human being. The human factor didn't mean anything to most of us. We wanted to be feared, as tribunal chairmen (West Africa, February 8, 1988.) [Emphasis added].

This confession suggests that the system was selectively targeted and that justice was not always the exclusive intent. To target the rich and powerful in an immediate post-coup situation can be politically expedient; as a matter of fact, it is a potent adaptive, assertive and entrenchment strategy.

The effective control of the wealthy - "some rich soldiers and their allies in trade and the bureaucracy" who had exploited the Ghanaian economy for their personal ends - was an important concern for the government. Not only did this class possess the financial resources for mobilizing and carrying out dissent against the government, but its very unchecked presence and continued status would indicate that nothing had changed. It was therefore necessary for the government to check the power of the wealthy people in the society. Besides, much of the economic woes and social degeneration of the country was blamed on this class which had exercised economic and political power in Ghana for most of the period since independence in 1957 (Ray, 1986).

The "old noisy politicians" were naturally the embodiment of the civilian democratic institutions and values which had allegedly deprived the ordinary Ghanaian of meaningful political participation. Such "noisy" elements were silenced via the imposition of stiff penalties such as jail terms of ridiculous lengths, heavy fines, confiscation assets, freezing of bank accounts, and forced "voluntary" exile.

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the early days of the PNDC revolution, these atrocities were repeated with careless abandon. To one extent, it was the intersection of social class and gender that determined canditure for instant "military" justice. Ethnicity also influenced the selectivity inherent in the "catching" and "prosecution" of "criminals" though the role of this factor was relatively minimal.

The "high-time" women were seen as the embodiment of western sophistication and Euro-centric lifestyles which the revolution sought to discourage. "High-time" tendencies were anathemas in the early phase of the revolution.

The early phase of the Rawlings' revolution exhibits similarities with the early phase of the Cuban revolutionary experience as it pertains to class justice. As Brady points out,

In the July 26th Movement, rebels, like all victorious revolutionaries, used justice as a political weapon in the consolidation of the new order, directing the force of law against former and potential enemies. In distinguishing between implacable enemies and errant offenders in the apportionment of sanctions from the firing squad to the labour camp or the public admonition, the leadership showed, even in the beginning, a consistent class perspective on crime and justice (1982:272.) [Emphasis added].

In this vein, the first to experience revolutionary justice as defendants were the former Batistianos and members of the elite corps and the leading figures of organized crime syndicates in Cuba. In dealing with ordinary criminals who committed offenses against property, life and morality, a distinction was made by the operators of the revolutionary justice apparatus, between gangster leaders and the great masses of lumpen proletariat underlings. For instance, prostitutes were treated leniently, and when convicted, were put through rehabilitation programmes, aimed at "conscientizing" (Freire, 1983) them to the ideals of the revolution. Recipients of this political education were referred to as students, not prisoners. Gangster leaders were harshly punished.

The differential treatment of these two categories of criminals is akin to an inverse formulation of Steven Spitzer's (1975:645) concepts of social junk and social dynamite and the types of social control mechanisms they encounter in capitalist societies. As social junks, prostitutes in revolutionary Cuba were primarily seen as victims of a decadent economic system:<sup>9</sup> the control objectives were education, containment and regulation.

<sup>9</sup> As the Cuban economy spirals downward following the collapse of the Soviet Union as its principal trading ally in 1991 and the tightening of economic sanctions against the island, there has been a great increase in prostitution and other forms of deviance.

Gangster leaders and counter-revolutionaries or political conservatives were regarded as social dynamites: they posed a threat to the emergent social order. The legal system (criminal law) was the primary instrument for the control of social dynamites.

### **Auxiliary Mechanisms of Justice**

Public tribunals were the judicial axis around which the revolutionary justice programme of the PNDC regime revolved. Notwithstanding its centrality to the popular justice agenda, the tribunals were neither the only mechanism of justice nor the foremost one created by the PNDC. While the promise to create these courts was among the first policy pronouncements of Rawlings upon seizing power on 31st December 1981, the legal technicalities involved in the drafting of such a legislation (even by a revolutionary government!) delayed the actual creation of this parallel judicial mechanism. Indeed, the first session of the public tribunals did not take place until August 26th, 1982 - eight months after the assumption of power by the PNDC - although by June 1983 (ten months after their inception), the tribunals had sentenced 7,000 people! (Agyekum, Interview, 1990). It was impossible to verify the accuracy of this statistic as I was unable to secure access to vital statistics on the tribunal system from the Office of the Registrar of Public Tribunals in Accra. Suffice it to say that the frequency of newspaper accounts of tribunal sittings and the coverage of sentences may serve to remove the authenticity of Agyekum's claim from the realm of conjecture into the domain of reliability.

The creation of the public tribunals was also delayed by the regime's initial pre-occupation with the establishment and consolidation of the People's Defence Committees (PDCs) and the Workers' Defence Committees (WDCs) as vanguards of the revolution. Given the sporadic and relatively frequent attempts to overthrow or destabilize the regime,

the PNDC found itself perennially compelled to devote its energies and scanty resources to the conscientization of the masses and the training of cadres as a means of consolidating its power base, as well as repelling internal and external aggression. Thus, immediate defence and security concerns, crisis management, the mobilization and political education of the masses, and urgent logistical considerations also combined to militate against the swift promulgation of the public tribunals law and the subsequent establishment of these special courts.

Internal opposition to the tribunal concept was another factor which served to delay the launching of the public tribunals. The chief legal architect of the tribunal system and chairperson of one of the National Public Tribunals, George Agyekum has observed that,

There is a lot of opposition to the Tribunal system from leading members of the Government, especially those who are lawyers. I think that this is a serious situation, but then I would 'nt say that these people initially supported the Tribunals and then turned against them, because right from 1982 their opposition was why it was difficult to set up the Tribunals in the first place. Some people were not interested to work towards the setting up of the Tribunals. On the part of these members of Government there has been little enthusiasm. I know we had to draft the laws setting up the Tribunals ourselves (Bankie, 1987:49.) [Emphasis added].

Opposition to the tribunal system was embodied in the person and personality of the Chief Justice, Mr. F.K. Apaloo. As a widely respected judge, a friend and a trusted fellow tribesman of Rawlings and the Tsikatas (a family of young brilliant lawyers with considerable influence in the intellectual community and the political left in Ghana), Justice Apaloo had a lot of personal influence over the PNDC leadership. During his tenure, he remained staunchly opposed to the establishment of the tribunals. Indeed, in a 14th March 1983 address marking the annual Legon (University of Ghana) Faculty of Law Week, Justice Apaloo roundly criticized the tribunals system, as well as the deliberately vague and ambiguous wording of many statutory offenses created by the PNDC. He cited the example of section 9(1)(h) of *PNDC Law 24* which made it a treasonable offense for any one to prepare or endeavour "to procure by force any alteration of the revolutionary path

of the people of Ghana". He observed that it was extremely unlikely that any of the many experienced judges of the ordinary courts in the country could, in an appropriate case, "distil the ingredients of the above quoted crime" (Quoted in Gyandoh, 1989:1159). The nebulous nature and inherent ambiguity of "alteration of the revolutionary path" and "alteration of the policies of the government" potentially render judgements in such cases highly subjective and unpredictable. Soon after the expiration of Apaloo's term of office, the PNDC passed the public tribunals law.

Apaloo's influence on the timing of the enactment of public tribunals law reflects the importance of human agency in the development of criminal law in Ghana as elsewhere. Especially in the context of junta administrations and despotic regimes, social-psychological variables such as ideological alliances, personality characteristics, cronyism, sycophancy, and tribal loyalties and self-interest significantly affect the content, timing and direction of public policy, including criminal justice policy decisions. For example, it is widely believed that the passage of the *Preventive Detention Act* (PDA) in July 1958 was heavily influenced by the dictatorial tendencies and overbearing personality of then Prime Minister Nkrumah who commanded both fear and veneration among his Convention People's Party faithfuls in Parliament. Nkrumah thus wielded both condign and compensatory power, and his political influence over the public policy decision-making process in Ghana was directly or indirectly overwhelming. Of course, a penchant for self-aggrandizement, a lack of political sagacity and foresight coupled with paranoia, gross stupidity and ignorance also played an important role in the enactment of this draconian law which empowered the Prime Minister, for any reason he deemed fit, to effect the arrest and detention of any person for any length of time without trial. In August 1962, the PDA was used to detain 500 people following the unsuccessful attempt at Kulungugu to assassinate President Kwame Nkrumah (Rooney, 1988:220). It remained a veritable instrument of political repression until the CPP regime was toppled on February 24th, 1966.



Similarly, it is commonly believed that Jerry Rawlings was the voice of moderation and reconciliation within the AFRC during the high tide of instantaneous justice and public executions which characterised the junta's reign. The building of personality-cults, recourse to despotic rule and repression of political opponents facilitate the achievement of "consensus" in different political contexts and serve to curtail freedom of expression which is fundamental to democracy.

The point here is that public policies may be as much a product of dubious motives and irrelevant factors as of sound and informed judgements. In effect, such extraneous variables as social-psychological factors and political considerations impinge on the context of policy-making in varying political systems to varying degrees. In Ghana's case, the PNDC's veneration of justice Apaloo's wisdom and influence heavily mediated the timing of the formal establishment of the tribunals system.

In spite of this delay, the regime's justice agenda did not suffer; indeed, a plethora of revolutionary enactments and quasi-judicial "committees" created by the PNDC ensured the advancement of revolutionary justice in lieu of the establishment of the public tribunals system. The regime created a number of auxiliary judicial mechanisms to deal with specific "justice" questions and issues. The following is a list of the most notable ones: (1) Citizens Vetting Committee (later renamed Office of the Revenue Commissioners); (2) National Investigations Committee; (3) National Defence Committee; (4) State Housing (Allocation, Policy and Implementation) Commission; and (5) Confiscated Assets Committee. A critical sequential analysis of the nature, composition and functions of these auxiliary mechanisms of justice form the substance of the following section.

### **The Citizens Vetting Committee**

The first law promulgated under the authority of the PNDC Proclamation was the *Citizens Vetting Committee Law, 1982, PNDC Law 1* (hereinafter PNDC Law 1). This law created a quasi-judicial investigatory body known as the Citizens Vetting Committee

(CVC). Section 4(i) and (ii) of PNDC Law 1 specified the statutory duty of the CVC as the investigations of persons

whose lifestyles and expenditures substantially exceed their known or declared incomes, or whose bank balances being in credit are in excess of such sum as the PNDC may specify.

In fulfilling its mandate, the CVC functioned as a judicial committee which sat in public, conducted investigations, demanded explanations and meted out punishment. Persons whose lifestyles were perceived as extravagant, gay or flamboyant came under suspicion as were those whose personal coffers showed a discrepancy between their legitimate incomes and expenditures. The personal lifestyles and economic and political affairs of such persons were meticulously scrutinized by the CVC.

The public policy intent behind the formation of the CVC was to stamp out private and public corruption, or failing this, to drastically reduce its incidence. It also aimed at instilling the ethic of probity, accountability and moderation in the Ghanaian psyche as a counter-veiling force against the pervasive tendencies of conspicuous consumption, self-aggrandizement and other indulgent lifestyles deemed morally repugnant by the regime. Thus, as Gyandoh (1989:1161) observes,

[A]n ostentatious lifestyle such as living in a big, well-appointed house, or riding in a luxury car, or even eating regularly at expensive restaurants, was clearly seen as a manifestation of public or private corruption.

The CVC was the regime's official organ for the regulation of morality. It also concerned itself with policing economic crimes, particularly tax evasion and cases of "over invoicing, fraudulent bank loans, offenses against the laws of the land relating to customs, currency, etc.(Oquaye 1990:17). Quite expectedly, the principal targets of its policing efforts were the bourgeois and compradorial classes.

So critical was the CVC to the pursuit and realization of the PNDC's revolutionary justice agenda and programme of economic transformation that, in 1982, the mandate of the CVC was broadened and invigorated via the *Citizens Vetting Committee (Amendment)*

*Law 1982*, PNDC Law 18 (hereinafter PNDC Law). This law vested the CVC with powers to order the confiscation of private property, with or without compensation, and to facilitate the prosecution before a public tribunal of all persons it investigates. Section 70 of PNDC Law 18 provided that

- The Committee may after investigation of any matter under this Law;
- a) Order the forfeiture to the state of any property;
  - b) Order the vesting in the state of any property subject to the payment of such compensation as the PNDC will determine;
  - c) Order payment to the state of any tax, customs or excise duty;
  - e) Recommend to an appropriate authority, the dismissal, removal, retirement from the public service on grounds of misconduct or negligence; and
  - f) Commit any person investigated by it to stand trial at a public tribunal.

Section 6(a)-(c) of the law also empowered the CVC to recommend the arrest and detention, by order of the PNDC, of any persons who were required to appear before it for any reason whatsoever. Compliance with the demands of the CVC was mandatory for any person of whom such demands were made. Persons declared guilty of "contempt of Committee" for either wilfully neglecting to present themselves or to provide any information or document requested by the committee could be legally committed by the CVC to stand trial before a public tribunal.

The CVC, like the public tribunals, was granted absolute immunity from any judicial proceedings pertaining to any aspect of its investigative work. This immunity also covered all subcommittees established by the CVC. The activities of the CVC were also expressly removed from the supervisory control of the regular courts.

As originally constituted, the CVC comprised a chairperson and ten other members all of whom were PNDC appointees. In order to pursue its mandate effectively and efficiently, the CVC was empowered to establish any number of sub-committees composed of both members and non-members of the CVC. Once created, such sub-committees automatically enjoyed the powers and functions vested in the CVC.

### **New Name for an Old Organ: The Office of Revenue Commissioners**

The CVC avidly continued to exercise its mandate until late 1984 when it was replaced by the Office of Revenue Commissioners (ORC). The *Revenue Commissioners Law, 1984*, PNDC Law 80 (hereinafter PNDC Law 80) repealed PNDC Law 1. Section 7 of PNDC Law 80 which outlines the statutory functions of the Revenue Commissioners effectively curtailed the powers enjoyed by the ORC's predecessor, the CVC. The principal functions of the ORC were to monitor the performance of the central revenue collecting agencies and to deal with serious cases of tax evasion.

Subsequent to the introduction of the Economic Recovery Programme (ERP) and the establishment of a free market economy (trade liberalization) by the PNDC in late 1983, there was a systematic "reconstruction" of the CVC designed to rid it of its dreaded draconian image. The change over from CVC to ORC in 1984 was not a mere rechristening affair; it constituted and embodied a substantial revamping of one of the regime's most radical, socialist revolutionary structures and symbols; it was a revolution within a revolution. The ORC concentrated on taxation, while the more radical and sensationalist investigative work of the CVC was performed by another organ of the revolution - The National Investigations Committee.

The CVC, perhaps more than any other structure, became the primary embodiment of the socialist revolutionary ideology of the regime. Undoubtedly, it was one of the principal bulwarks of the new politico-economic and judicial dispensation to which the regime pledged its commitment in January 1982.

By late 1984, the regime had apparently come to the realization that the CVC's manifestly pro-socialist, anti-capitalist and anti-western posture, together with many salient elements of the revolutionary package, was diametrically opposed to the new pro-capitalist image it was required to cultivate if it were to attract foreign and local investors and stimulate economic activity generally. The CVC's image as a radical institution adamantly hostile to imperialism became a perennial liability to the regime's ability to

court foreign investment. Indeed, such an institution could not be merely modified; it had to be completely abolished. The ORC was not nearly half as radical in outlook and far-reaching in its functions as its defunct ancestor. Like the dissolution of the Price Control Tribunals and the Rent Control Tribunals, the abolition of the CVC represented a dramatic departure from the regime's socialist revolutionary approach to a policy of accommodation.

The foregoing also reflects the susceptibility of neo-colonialist revolutionary states to manipulation by local and foreign capital. It underscores the ability of such states to visualize alternative possibilities for charting non-capitalist, non-imperialist paths to development in any realistic sense. It is also an indication that the autonomy of the state is indeed relative to capital needs and the compelling necessity for a populist revolutionary regime to urgently demonstrate concrete improvements in the material conditions of the people, in default of which it risks the loss of popular support, the very basis of its claim to power. In effect, it portends a crisis of legitimation.

### **The National Investigations Committee**

Perhaps the most ubiquitous para-judicial organ of the revolution, the National Investigations Committee (NIC) was established under the National Investigations Committee Law, 1982, PNDC Law 2 (hereinafter PNDC Law 2). Created on 5 February 1982, the NIC, consisting of such persons as the PNDC may appoint, is mandated by section 3 (a) - (f) of PNDC Law 2 to investigate

- (a) allegations of corruption, dishonesty or abuse of office for private profit against any person or group of persons who held high office of State on any public office in Ghana, or may be shown to have acted in collaboration with any such a person holding such high office of State or any public office in respect of any of the foregoing acts;
- (b) allegations of breaches by any person or group of persons of mandatory provisions of any Constitution or Proclamation under which Ghana has been governed while the said constitution or Proclamation was in force;
- (c) allegations of breaches of statutes or other laws whereby damage was caused to the national interest;
- (d) any person who may have wilfully and corruptly acted in such a manner as to cause financial loss or damage to the State, or who may have directly

- or indirectly acquired financial or material gain fraudulently or improperly or illegally to the detriment of the State;
- e) any other acts or omissions which may be shown to be detrimental to the economy of Ghana or to the welfare of the sovereign people of Ghana or in any other way to the national interest;
- f) any other matters which may be referred to it by the Council for investigation.

These sections of the law indicate that the principal mandate of the NIC was to combat economic crimes. Generally, this committee finickily investigated acts and omissions of an economic nature which it deems to be seriously criminal. Such cases typically included "over-invoicing, under-invoicing, evasion of duty, embezzlement and other crimes" (Bankie 1983:18).

The proceedings of the NIC were private. It was empowered under section 4(1) of the law to recommend to the PNDC the freezing of the assets and bank accounts of a guilty person, as well as his/her arrest and detention. Upon receipt of such a recommendation, section 4(2) stipulated that the Council could make such order or orders as it deemed fit. Similarly, Section 11 of the law mandated the NIC to refer incriminating evidence arising from its investigations to any appropriate body such as the office of the Attorney General or the office of the Special Public Prosecutor. In turn the recipient of such evidence was required to forward it to a public tribunal, or a regular court or some other judicial body for adjudication. The NIC, on its own, had no punitive powers.

The implication of this innocuous power which the NIC enjoyed with respect to where it channelled particular cases for adjudication is that different persons charged with identical offenses could be sent to radically different courts for trial, with the possibility of vastly different consequences. Predictably, "enemies of the revolution" were typically processed by the public tribunals.

Despite its name, the NIC was not merely an investigative body; it also played a quasi-judicial function when it recommended that the PNDC accept an offer of reparation made by a person under investigation. Section 8(1) of the law stipulated that

A person who appears before the Committee or is being investigated by the committee and who wishes to admit or confess matters which the committee is investigating in relation to him or any other matter which can give rise to an investigation under this Law may do so, and may further offer reparation to the state in respect of such matters.

The proceedings resulting in the offer of reparation in lieu of a "real" trial reflect some of the elements of judicial proceedings in traditional or regular courts, with the exception of a defence attorney. In this regard, the proceedings of the NIC were quasi-judicial. The acceptance of reparation precludes prosecution and has the net effect of reducing the criminal case load before the courts - public tribunals or otherwise.

Co-operation with the NIC in its investigative work, was a statutory obligation of all citizens who come under its finicky scrutiny. Section 10(1) of PNDC Law made it an offence punishable by a heavy fine and/or imprisonment up to one year for any individual to wilfully neglect or refuse to respond to the summons of the NIC, or to submit requested information, or to wilfully alter, suppress, conceal, or destroy any document required for investigation by the NIC.

Section 10(2) of the law aimed at thwarting malicious prosecution and the exploitation of the NIC to wreak vengeance or settle personal acrimonious scores. It prohibited any person from "wilfully and maliciously or recklessly" making a false allegation against another person. It also prescribed for violators, the same penalties as those provided for persons found guilty of non-cooperation with the Committee's investigative work.

The NIC enjoyed absolute immunity from legal proceedings in defamation or any other proceedings. Since the state-owned media were an integral part of the revolutionary process and the main instruments for giving publicity to government policies and actions, this immunity also covered the media. The People's Daily Graphic, the Ghanaian Times, and the Ghana Broadcasting Corporation are beneficiaries of this immunity. Also protected was the Verdict, the information journal of the revolutionary organs published by the PNDC Information Centre.

An inescapable observation pertaining to PNDC Law 2 was its vague and ambiguous phrasing. This vagueness, particularly noticeable in Section 3(e) of the law, accorded the NIC considerable legal and political latitude in deciding what and who to investigate. The vagueness of the legislation allowed for its diverse but convenient interpretation by its wielders to selectively police and investigate particular behaviours and individuals deemed 'detrimental to the economy of Ghana or to the welfare of the sovereign people of Ghana'. Evidently, this facilitated selective class justice.

The broad scope of section 3(e) in particular afforded the NIC the necessary legal and ideological space within which to vigorously police economic corruption. In the course of fulfilling its mandate, the NIC initially tended to target members of previous governments (both military and civilian with the exception of the AFRC), the petty-bourgeois class, the compradores, and their foreign associates with business or commercial interests in Ghana. The deliberately selective operational slant of the NIC was clearly in consonance with the avowed aim of the revolution as articulated in the PNDC's Policy Guidelines issued in January 1982. This document stated, *inter alia*,

The aim of this transformation must be first and foremost to break the existing foreign monopoly control over the economy and social life. We must restructure the country along nationalistic lines to lead us into economic self-sufficiency, self-dependency and genuine economic independence. This also means that we must examine the operations of all existing institutions under the various Ministries to find out how they promote the loss of capital resources and incomes to foreign national interest groups and to restructure them to satisfy solely the national interest. [Emphasis added].

Indeed, as a result of its investigations the NIC uncovered several economic crimes, fraud and embezzlement in the public sector generally (Oquaye, 1990:16). It conducted scrupulous investigations which revealed massive corruption, gross incompetence, ineptitude and acts of criminal negligence in the public service, including state corporations. Similar sordid acts were also uncovered in the private sector.

The net effects of these instances of economic corruption were colossal financial losses to the state and a weakening of the economy. Some of the NIC's findings resulted



in the radical restructuring of several national institutions, corporations and para-statal organization. The reshuffling of the Ghana Education service and the export sector of the timber industry due to the uncovering of a series of serious corrupt transactions involving high-ranking officials was a case in point. Furthermore, several people were convicted of fraud and corruption as a result of investigations carried out by the NIC.

The magnitude and pervasiveness of corruption had a deleterious and debilitating impact on the economy to the degree that such revelations were conveniently used to justify the extension of the criminal law and the imposition of draconian penalties as strategies for eradicating corruption. As Gyandoh aptly speculates, the revelations stemming from the NIC's investigations might have suggested the creation of "special offenses" under *PNDC Law 78* (1989:162).

In a zealous bid to fulfil its mandate of stamping out *kalabule* - an act of corruption, profiteering, dishonesty or abuse of public office for private gain - and to mop up the excess liquidity in the hands of the privileged few in the economic system, the NIC took a radical class measure that was unprecedented in the annals of justice and social control in Ghana. It ordered that anyone whose bank account showed a credit of fifty-thousand cedis or more must explain and justify, to the satisfaction of the NIC, the sources of that "fortune". Failure to do so resulted in the forfeiture of such monies to the state.

This class action was also intended to weaken the economic base of the bourgeoisie and the compradorial class whose interests were perceived by the regime to be at variance with the new economic, democratic and judicial dispensation the PNDC was seeking to foster. Implicitly, this policy was aimed at thwarting prospective counter-coup financiers in the country. As Oquaye notes, however, the policy tragically "boomeranged to undermine confidentiality in the banking system as a whole" (1990:16).

### **The National Defence Committee**

Another structure created by the PNDC as a machinery of justice and a vanguard of the revolution was the National Defence Committee (NDC). The formation of this organ of the revolution was provided for under section 5(1) of the *PNDC (Establishment) Proclamation*. Established in January 1983, the NDC derived its formal legal powers specifically from Section 31 of the *PNDC (Establishment) Proclamation (supplementary and consequential provisions) Law*, PNDC Law 42, 1982. It also inherited some of its powers from the Interim National Co-ordinating Committee (INCC) of PDCs and WDCs created in 1982. The INCC was dissolved in January 1983 subsequent to the formation of the NDC, which absorbed the powers of that provisional (interim) body. The NDC thus became the principal agency responsible for the administration of the PDCs and WDCs at the national level, as well as one of the machineries of revolutionary justice.

The NDC was dissolved in March 1984. It was re-established in June of the same year as NDC II. The re-organized NDC II was eventually abolished by a government directive in the first week of December 1984. This action also reflected a realignment of the PNDC's policies to coincide with the moderate, reconciliatory image the regime begun to carve by 1983/84 in order to attract foreign investment.

### **Structure and Composition of the NDC**

The NDC was composed of the National, Regional, District, Zonal and Unit Co-ordinating Committees. Structured pyramidally, the National Coordinating Committee was at the apex, below which existed ten Regional Co-ordinating Committees, at the base.

A principal component of the structure of the NDC was the Investigations and Complaints Department (ICD). The ICD was also the largest division in the INCC, NDC I and NDC II (Bankie, 1987:17). Each of the Co-ordinating Committees, from the National to the Unit level, was required to have an ICD. Indeed, the activities of the ICDs defined how the NDC was perceived by the Ghanaian public. (The head of the National

Investigations and Complaints Department of the INCC and NDCI was a Sociology Professor, Dr. Ansa Asamoah, with Mr. Yao Graham as its operative head). At the national level, this department had seven newly graduated-lawyers and some other staff (Bankie, 1987:17).

## ii. Functions and Operations of the NDC

In addition to its administrative responsibilities noted above, the NDC was also a para-judicial organ of the revolution. It was invested with immense powers to investigate offenses, conduct trials and administer punishment to convicted offenders.

Created prior to the establishment of public tribunals, this machinery of state played a vital role in the pursuit of the PNDC's revolutionary justice programme. The investigative powers of the police, the adjudicatory powers of the courts and the punitive mandate of the penal system converged in this para- statal organization. Notwithstanding this coalescence of powers, the exercise of the mandate of the NDC lay entirely beyond the purview of the regular courts. In essence, the NDC constituted a self-contained quasi-criminal justice system.

In practice, the criminal jurisdiction of the NDC was broad and nebulous, and the ICDs were capricious in their handling of many criminal matters. Section 31 of *PNDC Law 42* which defined the mandate of the NDC did not clearly articulate the type of criminal offenses justiciable by the NDC and which types should be referred to the police for prosecution. Thus, the NDC, through its ICDs, typically handled criminal cases that were of interest to it, and handed over some criminal matters to the police for prosecution in the traditional courts.

Pragmatism also characterized the operation of the ICDs. The referral of cases to the regular courts for instance, was marked by an overarching concern to avoid potentially lengthy litigation in the realms of tort and civil law. As Bankie notes, "some issues such as land cases, were referred back to the traditional courts because the Department could not

clear all pending cases" (1987:17). Such cases were notoriously taxing in time, logistics and human resources, and were a major bane of the traditional courts.<sup>10</sup>

The avoidance of land cases thus represented an attempt at resource maximization in a logistically constrained work milieu. As noted earlier, the intersection of investigative, adjudicatory and penal powers in the NDC constituted a remarkably onerous responsibility given its limited staff. The seriousness of this situation becomes even more apparent when it is recognized that celerity was both a goal and a characteristic of the ICDs. As Bankie explains

the mode of trial was expeditious, with both sides presenting their case [sic] with their witnesses in an informal setting. Within one, two, or a maximum three days the issues were disposed of. The swift nature of the justice attracted wide public interest and participation (1983:17).

Much of the ICDs' case loads was transferred to the Public Tribunals when they were established in August 1982, thereby allowing for a greater attention to the details of a minimum of cases. This practice also created the political space for the eventual dissolution of the NDC when mounting local and international backlash against its excesses became politically over-bearing and economically counter-productive for the PNDC which was poised for a dramatic change in its economic policies by late 1983.

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<sup>10</sup> Tort and civil law are also the site of immense judicial corruption. Part of this derives from the tension between British and traditional Ghanaian conceptions of gratitude and obligation, as well as class and property relations. The history of the Westminster judicial system's attempt to mediate the rapidly changing but largely, pre-capitalist, pre-modern and feudalistic relations in Ghana has been a history of judicial confusion.

The following quotation from Michael Lowy (1978:190) provides the proper context as well as a graphic illustration of the conflicting value systems of the Westminster court and traditional Ghanaian litigants who have to use it:

"The following exchange between a magistrate and a defendant accused of insulting his neighbour is an extreme example ... :

Magistrate:	Then why do you plead guilty?	
Defendant:	I am liable because I did not insult him	
Magistrate:	I don't understand	
Defendant:	If I had abused him, I would go and beg	him.
Magistrate:	Then why do you plead liable?	
Defendant:	Because I am before the court, I plead	liable
Magistrate:	Then you are liable!	
Defendant:	I say so because I have to give the court	respect.

Suffice it to say that, by June 1983, when the PNDC was at the high-tide of its revolutionary phase, the NDC played a leading role in the organization of the PDCs and WDCs; in the conscientization of the masses, and generally in advancing the image of the Rawlings Revolution. The NDC was also one of the torch-bearers of the PNDC's revolutionary justice agenda. Its dissolution therefore represents a dimming of the torch of socialist revolutionary justice in general, and class justice in particular.

### **The One-Man-One-House Committee**

Established in 1982 under section 50 of *PNDC Law 42*, this Committee was responsible for implementing the radical policy of ensuring that no individual had a legitimate ownership of more than one house. The Committee's mandate was ostensibly to curtail the rising tide of corruption and self-aggrandizement among officials of the Tema Development Corporation and the state Housing Corporation. Some of these officials and their cronies in business and politics owned several houses and the occasional mansion. The Committee was also responsible for inculcating, through its actions, the ethic of moderation in the Ghanaian psyche. It accomplished this goal by allocating to the homeless, the "extra" houses forcibly taken from individuals who owned more than one house. It was a mechanism for enforcing a central tenet of socialism - the eradication of class differences in Ghanaian society.

The PNDC's One-Man-One-House Committee was actually a reincarnation of the erstwhile One-Man-One-House Committee set up by the *State Housing and Tema Development Corporation (ownership of Houses) Decree*, AFRC Decree 50, 1979. With the second advent of Rawlings, Section 50 of the *PNDC Law 42* was a logical extension of *AFRC Decree 50*, 1979.

Nevertheless, in 1984, the PNDC promulgated the *State Housing Allocation Policy and Implementation Commission Law*, *PNDC LAW 83* which dissolved the One-Man-One-House Committee and created in its place, the *State Housing (Allocation, Policy and*

Implementation) Commission (SHAPIC). This Commission was a watered-down version of the One-Man-One-House Committee, and merely existed in name.

It must be noted that with the assistance of foreign capital, the PNDC vigorously pursued a national housing policy which was firmly grounded in the construction of affordable, low-cost, environmentally-friendly housing schemes for urban workers. There was a clear shift from the malicious, discontent-generating policy of confiscating and allocating to "the people", the extra houses of specially targeted members of the middle and upper classes to the more prudent policy of actually producing houses for the working class.

#### **The Confiscated Assets Committee**

This agency was established by section 31(6) of *PNDC Law 42*. The Confiscated Assets Committee was charged with the responsibility of maintaining and disposing of properties confiscated by the state.

Through this state machinery, many hectares of land, and several houses, vehicles and other equipment belonging to many prominent business persons and former civilian and military politicians were appropriated for "revolutionary" purposes.

#### **Office of the Special Public Prosecutor**

This office was first established in 1982 by Section 46 of *PNDC Law 24*, which was later repealed and replaced by Section 36 of the Public Tribunals Law *PNDC Law 78*, 1984. This law provided for the appointment by the PNDC of a Special Public Prosecutor (SPP) as the head of this office, and a number of Assistant Special Public Prosecutors (ASPPs) to assist the SPP in the performance of his/her duties at the national and regional levels. In turn, the SPP was empowered by Section 37(3) of the law to appoint a number of People's Public Prosecutors (PPPs) who were restricted to functioning at the district and community levels. The appointment of the PPPs was subject to their satisfying certain

conditions and qualifications specified by the Board in accordance with Section 37(2) of the law. Nevertheless, the Office of the SPP is independent of the Board.

The Office of the SPP was responsible for the prosecution of cases before the public tribunals. Further, all three categories of Special Prosecutors had responsibility to take a remanded person to prison, to bring him/her from prison to face the tribunal and to send the convicted person to begin his/her sentence. In addition to these prosecutorial and custodial functions, the SPP was mandated to dismiss a PPP from office on grounds of misconduct, counter-revolutionary activity, or incompetence.

Finally, Section 39(3) of *PNDC Law 78* authorizes a public prosecutor to apply to a public tribunal he/she is appearing before to have the state confiscate the assets and property of an accused person.

#### **The People's Defence Committees and the Worker's Defence Committees**

In its bid to transform Ghana into a socialist society along Marxist-Leninist lines and to create a broad-based, popular support for the revolution, the PNDC encouraged the formation of People's Defence Committees (PDCs) and Workers Defence Committees (WDCs). Virtually every community, from the opulent suburban neighbourhoods of Accra and Kumasi to the remotest villages of the Upper West region of Ghana, had a PDC. Every workplace also had a WDC, most of which were quite militant and vociferous in the pursuit of their mandate. As a platform for consolidating and articulating "people's power", PDCs and WDCs functioned as moral entrepreneurs, policed the privileged members of society, and organized self-help and community development projects.

The organs of the revolution were intended, among other things, as a framework for achieving a real "people's democracy". Donald Ray (1986:61-91) provides an excellent summary of the primary functions of the PDCs and WDCs. First, they served as vital vehicles for popular participation in the processes of government. Second, they served to broaden the base of the revolution by facilitating the penetration into the remote

areas of the country by cadres of the revolution. Third, the PDCs and WDCs, by virtue of their diligence and dedication to the revolutionary process, created the vital political breathing space indispensable to the survival of the PNDC during the critical days of the regime when attempted coups and conspiracies were virtually a monthly occurrence. These organs, through their numerous rallies and demonstrations of support for the PNDC and the revolutionary process, helped to convey a real sense of solidarity, political awareness and revolutionary vigilance which the regime badly needed.

PDCs and WDCs also played quasi-judicial roles when they investigated allegations of misconduct or wrongdoing and reported their findings to the SPP for appropriate action.

Many PDC/WDC chairpersons eventually transformed themselves into "tin-gods", especially at the village level, and usurped the powers of chiefs, police officers and civil servants. Cracks began to emerge in the wall of solidarity as many 'traditional' people became disillusioned and disenchanted with the flagrant abuse of power by PDC/WDC functionaries who had virtually become "untouchables".

By 1984, the PNDC had become convinced that the PDCs and WDCs had to be reorganized in a fundamental way. The regime became convinced that counter-revolutionary elements had penetrated the PDCs and WDCs. Some of the people implicated or arrested in the November 23, 1983 abortive coup were reputed to be members of the erstwhile Interim National Coordinating Committee of PDCs and WDCs.

Furthermore, the rambunctious and pugnacious attitude of the PDCs and WDCs was unbecoming to the new pragmatic, conciliatory image which the regime was actively striving to cultivate by early 1984. This effort also coincided with, and was largely a product of, the PNDC's courtship of foreign investment capital. By September 1984, the PDCs and WDCs had been dissolved; in their place was created Committees for the Defence of the Revolution (CDRs), which were less rambunctious, less anti-western and less generally detested by both the west and the broad mass of Ghanaians.



The actions carried out by this agency and the other auxiliary structures of justice, were predicated on the regime's "basic framework for the exercise of all powers of Government" (*PNDC Law 42*). This framework, as found in the Directive Principles of State Policy, section 1(1)(a) of *PNDC Law 42*, which stipulated as follows:

[A] basis of social justice and equality of opportunities is to be established, particular attention being paid to the deprived sections of the community, and to the reconstruction of the society in a revolutionary process directed against the previous structures of injustice and exploitation.

In pursuing the regime's socialist objective, several state functionaries and ideologues callously violated the primary principle of the 31st December process, namely, respect for the fundamental human rights and for the dignity of the human person, contrary to the intent articulated in the Directive Principles of State Policy, section 1(1)(b) of *PNDC Law 42*.

## CHAPTER VII

### VII. THE DEMOCRATIZATION OF JUSTICE UNDER THE PNDC REGIME

The policy of popular justice was developed with a view to improving and democratizing the administration of justice in Ghana. A principal goal of the policy was to expand the institutional base of justice in a novel manner in order to facilitate a substantive choice of avenues for justice in Ghana.

To the extent that the publicly-articulated goals of the policy can be determined, the tribunals were designed to become the fair, efficient, affordable and accessible apparatuses of justice considered by the PNDC regime to be wanting in the regular or Westminster judicial system. On the one hand, they were to incorporate the positive aspects of traditional Ghanaian conceptions of justice, and on the other hand, to counteract the negative tendencies of the regular courts bequeathed to the country by the colonial British administration.

At its inception, the tribunals were also conceptualised as instruments for the achievement of another cardinal goal embodied in the policy of popular justice, namely to ensure the involvement of ordinary citizens in the dispensation of this new brand of justice. The tribunals were to become the site of democratic struggles for popular victories in the administration of justice.

This chapter describes and assesses the forms and extent of public involvement in the dispensation of justice at public tribunals. The issues considered here include the extent of public attendance at hearings; the nature of public in-pur in the actual deliberations of the courts (such as language translation and the determination of appropriate sentences); the use of non-attorney judges; and finally, a description and analysis of the positions adopted by the critics of the tribunal system.

Between 1982 and 1984, public involvement in the judicial democratization process took two specific forms: (1) public in-puts in the actual deliberations of the tribunals, and (2) the inclusion of non-attorney or lay persons on tribunals panels. These judicial innovations ostensibly aimed at forging a closer link between the public and the justice enterprise, as well as carving a distinct role for non-lawyers in the administration of justice, quickly became hotbeds of controversy. The key players in the debate were the advocates of the tribunals system on the one hand, and the defenders of the conventional justice establishment such as the Ghana Bar Association, the International Commission of Jurists and Amnesty International, on the other hand.

### **The Nature of Public Involvement in the Administration of Justice**

One specific way in which the populist ethos of the PNDC regime expressed itself prior to 1984, was an open invitation sent by the regime to "the people" to become actively involved in the dispensation of justice. The core of the judicial democratization process consisted in encouraging ordinary citizens to freely express their views on matters of fact, law, morality and justice at tribunal hearings, and the involvement of lay persons on the tribunal panels.

### **Public Attendance**

Public tribunal sessions were occasions of great public spectacle. Though the force of their magnetism did not approach the crowd-drawing appeal of such events as soccer tournaments, political rallies, student demonstrations, traditional festivals, durbars and funerals, attendance at tribunal sessions became a routine past time of some urban Ghanaians. Also, the relative novelty of public tribunals and their potential for great drama made them one of the great informal domestic "tourist" attractions. In more ways than one, Ghanaians seemed to have responded favourably to the government's call to "get involved".

The sessions afforded many Ghanaians of all walks of life, an opportunity to become exposed to the dynamics of justice dispensation at the tribunals. Routine attendance at tribunal sessions was considerable. During the field research in summer 1990, it was found that public attendance at tribunal sessions was generally very high. For example, at all the Public Tribunal sittings in Accra that I attended in July 1990, I observed that the huge halls of the State House where the sessions took place were always filled to capacity without exception. Many people often stood in the corridors. This was especially the case when two tribunals were sitting simultaneously in the East and West wings of the State House Annex Complex which were the sites of these trials. (This building also housed the Offices of the Registrar of Public Tribunals). Each hall or courtroom had a seating capacity of approximately 250. On one occasion when public attendance at a tribunal session chaired by George Agyekum struck me as being particularly low, I did a headcount as people were still seated. There were 27 people, excluding the tribunal panelists.<sup>1</sup> This was the lowest attendance record I observed. At another time, during a session chaired by Kwesi Aggrey in Accra, I counted 76 people. At all other times, I observed that the number of attendees exceeded 100.

Although lacking in the usual courtroom fanfare, robes and majestic pagentry associated with the regular courts, tribunal sessions were characterized by high media visibility and considerable public anxiety fuelled by the certainty of dramatic uncertainty in sentencing, as well as the potential for great drama and excitement. Media publicity and rumours of impending "hot" cases helped to draw large crowds to tribunal sessions, while many people attended session after session due to the adjournment of cases in which they were interested.

The sessions usually took place in public lecture halls and large conference rooms. Particularly "juicy" or "hot" cases such as political subversion, economic sabotage, armed robbery and murder trials attracted large audiences.

Using an unsystematic random sampling technique, I interviewed 35 attendees at tribunal sessions in Accra and 19 in Kumasi, making a total of 54. In all, 59% of the attendees at tribunal hearings interviewed indicated that they were motivated to attend a given session out of vested interest in the administration of justice, 9% out of curiosity, while 4.28% said they were there to while away the time and 7% could not specify or say why they were attending. Most attendees had an interest in the cases being tried - a relative, a friend or a relative of a friend was party to a dispute before a tribunal.

**Table 3 Distribution of Reasons for Attendance at Tribunals**

Reasons	Accra		Kumasi		Total Sample	
	N	%	N	%	N	%
Vested Interest	24	68.57	8	42.0	32	59.0
Curiosity	6	17.4	7	37.0	13	25.0
Boredom	2	6.73	16	5.0	9	
Other	3	9.57	1	5.0	4	7
Total	35	100	19	100	54	100

Commenting on the extent of public attendance at tribunal sessions, Agyekum notes that:

Sometimes it is impossible for the public to get a place to sit and sometimes the main entry to the Tribunal building had to be closed in order to prevent an excess in the tribunal hall itself. This depends on the type of case being tried, but generally public attendance is high (Bankie, 1987:46).

Some people attended the tribunal sessions for the mere spectacle of it, while most attended for political reasons. It may be safe to speculate that that the high volume of public attendance at

tribunal hearings was related to the extent popular identification with the values which the tribunals embodied.

### **Public Values and Public In-put in the Deliberations of the Public Tribunals.**

On October 19, 1982, Mr Addo Aikins, chairman of one of the two public tribunals then operating in Accra declared at a tribunal sitting that the public tribunals should be seen as "people's courts", and therefore, unlike ordinary courts, "members of the audience can answer questions or make suggestions and contributions that will ensure fairness and impartiality" (Daily Graphic, October 20, 1982). This declaration followed a voluntary offer by a member of the audience, Mr. Samuel Keady, to interpret proceedings at the court when it became evident that the original interpreter attached to the tribunal was experiencing difficulty in interpreting Ewe into English. A member of the press corps had earlier drawn the prosecution's attention to the lack-lustre performance of the interpreter. Mr. Keady, described by the Daily Graphic as a student, raised his hand, and when signalled by the tribunal chairman to speak, remarked: "Mr. Chairman, I think there is a problem of translation here".

The Daily Graphic continues:

Mr. Addo Aikins therefore, invited him forward to help and when the tribunal had made sure that he was not connected to any of the parties appearing before it, Keady was made to swear an oath after which he took over the job... Mr Keady worked voluntarily for about three hours to the delight of the audience before the tribunal adjourned (Daily Graphic, October 20, 1982).

The opportunity afforded Mr. Keady to play the role of a language translator has a positive resonance with the dispute resolution practices found in traditional Ghanaian societies. The rationale for encouraging public participation in the adjudication process of the tribunals was apparently to permit the tribunals system to evolve in consonance with the community-based, participatory and reconciliatory nature of adjudication in traditional Ghanaian societies. While variations abound in the traditional modalities of justice dispensation in Ghana, the various

mechanisms are altogether holistic in nature. They all attempt to involve the general public or community, with a view to achieving communal balance and integration, as well as the restoration of positive inter-group relations. This is because disputes or conflicts between two individuals are perceived as conflicts between the two cognate lineages to which the individuals belong. The disputing process is vicariously a community event in which all community residents are necessarily involved, and the dispute resolution process is also a community venture.

In Ashanti society, for example, all adult members of the community or village have a right and a responsibility to participate in the dispute-settlement process, regardless of the nature of the dispute or the physical location of the proceedings. In other words, whether a given dispute settlement takes place in the courtyard of an elder's compound-house, or at the palace of the village chief, or the king of the political district (known as paramountcy), all adults can, and are actually expected and encouraged to participate in the process, with the implicit assumption that they will be fair and honest and speak the truth without regard to its personal consequences for any of the disputing parties.

Ashantis regard truth-telling as a noble obligation of community members. They demand that everyone speaks the truth because "ano kware sem na eye de (truthfulness is sweet and noble). Indeed, Ashantis place such a high value on truth and honesty in dispute resolution that they sometimes carry it to what "outsiders" may regard as extreme lengths. What for want of a better phrase I will call the *truthful absolutism* of the Ashantis finds lucid expression in this vulgar but oft-stated Ashanti proverb: *Sebe, se nokware da wo ni twe mu na se wo de wo kote ko yi a, na wo n'dii no.* (Pardon the expression, but if truth is concealed in your mother's vagina and you retrieve it with your penis, you have not had sexual intercourse with her"! And this, from a traditionally matrilineal society!

Despite the high value placed on truth in all areas of life in Ashanti society, truth is considered valuable only if it is in the service of the entire community. Thus, Ashantis also say that, *Enye nsem nyinaa na yeka* (literally, it is not all matters that are spoken. That is, one must sometimes be reserved since not all truths are to be declared or revealed; it is occasionally proper to conceal certain kinds of truths). This apparent contradiction in the kernel of Ashanti values regarding truth-telling is not a contradiction but a partial disclaimer on truth-telling; it is rarely invoked or acknowledged as valid, but it facilitates the occasional subordination of personal vindication to collective solidarity.

The pursuit of vindication and the attendant shaming of the "other" is not generally encouraged, because *anim gu ase enfata okani ba* (shamefulness does not befit a community member). The communal intent in all dispute resolution processes is to reconnect the disputants. Accordingly, a typical "afisem" method of adjudication aims not at the determination of guilt and innocence per se, and the apportionment of penalties and the award of costs or compensation but rather at the advancement of community healing and integration. This is one of the few stand-points from which the notions of fairness and impartiality make sense in Ashanti. Thus, the monetary value of a "fair and just compensation" in a civil case as understood in the Anglo- Canadian common law system is underplayed in Ashanti viz-a viz the value of a "good name". For example, the Akans of southern Ghana say that *Edin pa ye sen ahonya*. This highly popular and cherished proverb means "a good name is better than riches". A *good name* consists in being at peace and in communion with other members of one's community. Hence, the "victor" in a dispute is not expected to press for, or expect, handsome compensation.

A sign of peace-making at the conclusion of a dispute resolution process in a traditional Akan village typically takes the following format: one pot of palm-wine, a small quantity of kola nuts accompanied by a symbolic "three shillings" from the "guilty party" is given to the



arbitrators (that is, the entire community). Libation is then poured to invoke the blessings of *Onyankopong Kwame Orviediampong* (the Magnificent Almighty God), *Asaase Yaa* (Mother Earth), *Nananom nsamanfo* (the ancestors) and the *abosomfo* (the gods) who are the guardians of the living and who bear witness to the peace-making process and its amiable conclusion. These, coupled with the exchange of hand-shakes between the disputing individuals who are followed, procession-style, by members of their respective extended families, suffice as compensation and a gesture of goodwill and the cessation of hostility or anger, and hence the end of the conflict. The Akans say that *Se w'asem ye de a wo nni re nyinaa*, meaning, "You do not over-stretch your claim even if it is legitimate". In other words, the assertion of personal rights should not be overdone at the expense of community welfare.

The stress on a communocratic, homogeneous, well-integrated cosmology and way of life does not easily permit of protracted legal duels or litigations. As the Ashantis say, *Omanso twe ni ye oman bofoo*, which literally means a litigant is a traitor or community-destroyer. Litigation is traditionally conceived as an inherently disruptive, acrimonious and divisive phenomenon, and the mediation resources of the entire community are frequently mobilised in a concerted effort to avert prolonged disputing at all costs.

The basic values that underpin dispute-resolution mechanisms among the Ashantis and their other Akan affines of southern Ghana are shared by many other ethnic groups such as the Mamprusis, Ewes, Gas, Tallensi, Krobos and Dagartis of Ghana. In all these societies, fairness and impartiality are measured in terms of the rejuvenation of pacific relations within the entire community.

In the context of the modern bureaucratic judicial system it is practically impossible to maintain the traditional practice of involving the entire community in dispute resolution. In other words, contemporary demographic complexities in Ghana, coupled with the increasing rate of westernization, industrialization and urbanization consequent to colonialism have

impinged on the broad concept of justice. Furthermore, given the rapidly changing and ethnically pluralistic nature of Ghanaian society and the invidious and dismantling forces of acculturation (including specifically, christianization, westernization and islamization which invariably affect the value system of the people), the goals of the traditional judicial systems and their underlying notions of fairness and impartiality are increasingly at risk of not being realised.

Compounding the magnitude of the problem is the great multitude of languages spoken by the approximately 15.4 million Ghanaians. These goals for justice can be effectively thwarted by language or communication barriers in the absence of a widely- understood and popular *lingua franca* for Ghana. An incompetent court interpreter in a multi-lingual country like Ghana where English, spoken by less than one-third of the population, remains the official medium of communication, can inadvertently subvert the course of justice. A total of 46 languages and dialects are spoken by the people of Ghana, with Akan, Ga, Ewe, Hausa, Dagbani, Kasen, and Dagaare as the principal languages (Ghana Information Services Department, 1990:1). Language translation is a perennial problem in many sectors of service delivery in countries with multiple cultures and languages such as Ghana and Canada. As language is the primary repository of knowledge and vehicle of communication, language competence, or where necessary, effective translation is a basic and fundamental requirement for the operation of a just, effective and efficient judicial system.

In a narrow sense, the inclusion of the public in the adjudication process of the tribunals facilitates the over-coming of otherwise severe logistical and economic problems pertaining to the provision of competent language translators or interpreters. Like the provision of a defence counsel for the accused in the common law tradition, the provision of a competent interpreter, necessary arises, is a matter of right. This is crucial to the

administration of justice and reflects the critical role of language translators in our increasingly complex and modernizing world.

### **Public Participation In the Sentencing Process**

At its inception, the role of the public in the actual deliberations of the tribunals was, however, not limited to the offer of voluntary translation services. Members of the audience were also at liberty to comment on matters of law and morality, and to articulate to the tribunal panels their conceptions of justice and fairness, as well as their understanding of the case and the direction in which, in their opinion, the pendulum of justice should swing. This was particularly so in the determination of sentences.

The character of public participation in the sentencing process at public tribunals is best exemplified by the case of *People v. Joseph Ampah Kodwo*. On December 3, 1982, a London-based Ghanaian barrister-at-law, Mr Joseph Ampah Kodwo was arraigned before a National Public Tribunal chaired by Mr. Addo Aikens. Mr. Kodwo was charged with two counts of economic sabotage. He had allegedly attempted to smuggle gold out of the country (Daily Graphic, December 4, 1982:5). The court found him guilty of unlawful possession of gold and doing an act with the intent to sabotage the economy of Ghana.

At the trial, the Special Prosecutor, Mr. C.O. Lamptey stated that the accused, while returning to the United Kingdom, had passed the normal security checks at the Kotoka International Airport. He was, however, picked up for interrogation after officials of the National Defence Secretariat detected that he was among a number of Ghanaians who brought vehicles into the country. Upon searching his hand luggage three gold bars worth C130,000.00 were found hidden in some soap belonging to him. He had allegedly exchanged one Datsun car for the gold bars. He pleaded guilty to the two charges laid against him.

Prior to its abolition in 1984, the solicitation of public input in the determination of appropriate punishment for convicted persons was routine. In the case of the *People v. Joseph Ampah Kodwo*, a total of 19 people volunteered recommendations on appropriate penalties for the offender. A Correspondent for the Daily Graphic writes:

Before passing sentence Mr Addo Aikens, Chairman of the Tribunal invited the public to prescribe a sentence which in their opinion, would serve as a deterrent to gold smugglers. Five persons suggested that the accused who is a lawyer and should have known better, be given a jail term ranging between 10 and 15 years. Six other persons however demanded that two Datsun cars and three pieces of gold that were seized from him be confiscated to the state and the accused fined. Five other persons suggested that since the accused had pleaded guilty, he should be fined and set free because in their opinion, he, being a civil servant in Britain would repatriate his foreign exchange earnings to Ghana after he had retired from the services of the British Government. This suggestion met with an uproar from the public apparently showing disapproval for it. Three relatives of the accused pleaded with the tribunal to "temper justice with mercy" and impose a fine instead of a jail term (Daily Graphic, December 4, 1982).

The tribunal resumed sitting after a five-minute adjournment for the panel to consider suggestions for punishment. The Chairman echoed an earlier observation that the accused, who, as a lawyer had sworn to defend the interests of the people, should have known better. He observed that the accused should have been made to face the firing squad but considering his age and his family, the tribunal had decided to temper justice with mercy and was sentencing him to 17 years' imprisonment with hard labour. The tribunal further ruled that "the three seized gold bars as well as two Datsun cars which the accused brought into the country should be confiscated to the state" (Daily Graphic, December 4, 1982).

Apparently, the tribunal panel, in reaching its decision, took into account the sentiments expressed by ordinary citizens present at the trial. It would seem that the judgement was carefully tailored to mirror and balance the variety of contending views expressed by the public during the trial. The practice of pandering to populist sentiments helped to portray the tribunals as benign, fair, objective, and above all responsive to public

views. It is important to note that the tribunals sometimes permitted known family members and friends of accused persons to "voice their opinions" to the court. This situation, in effect, amounted to an opportunity for friends and families to provide lofty testimonials on the character of the accused and to plead for "mercy" on their behalf. Given the tribunals' tendency to impose draconian sanctions, this occasional allowance granted to known family members of accused persons to plead on their behalf also gave the tribunals the saintly image of the tolerant and merciful. It also served to highlight the notion that the tribunals are essentially democratic, and their claim to embody fundamental principles or aspects of traditional Ghanaian dispute resolution, legitimate. Above all, the practice also enhanced the public's belief in the rule of law and the quality of justice issuing from the tribunals.

It is in this domain of public participation in the administration of justice that several problems emerge. For one thing, in a multi-cultural country like Ghana, with a low level of literacy and several relatively distinct social formations in the sociological sense, numerous ethnic and class-specific conceptions of justice abound.

In spite of the existence of a set of commonly-shared values on the administration of justice among the peoples of Ghana, the determination of a universal standard of morality and common understandings of legal proceedings and conceptions of right and wrong is fundamentally problematic. The dessicating effects of ethnicity and the so-called tribalism common in such developing countries can combine with classism, political cleavages, family loyalties, cronyism and other spurious social affiliations to influence public perceptions of, and contributions to, the adjudication process. Of course, such problems are not restricted to developing countries as class, racial, ethnic or tribal and gender biases in the administration of justice are equally commonplace and virulent occurrences in so-called developed First World countries such as Canada, the United States, Britain and Japan (Gall, 1990; McCormick and Greene, 1990; Griffiths and Verdun-Jones, 1989; Reiman, 1979; Tepperman, 1979; Hogarth,

1971). The point here, however, is that with Ghana's relative lack of the fairly developed and institutionalized system of checks and balances and effective appeal mechanisms found in the so-called First World countries, the potential for spurious variables to effectively subvert justice in the tribunals system was considerably amplified and compounded by the solicitation of public in-puts in the actual deliberations of the courts.

The tribunals attempted to mitigate the role of extra-legal variables in their proceedings. They endeavoured to ensure that members of the public offering help in the form of translation services or juristic suggestions were not connected with the case under consideration. They policed the honesty of public participants about their backgrounds and ensured that they had no ties to either party, or any vested interests in the case. This can be a time-consuming activity. At an Accra public tribunal sitting in November 1982, I witnessed the meticulous, but tedious and lengthy, questioning that this screening process demanded; an average of seventeen minutes was spent per person, from questioning to swearing-in.

Given the ubiquitous nature of the extended family system in Ghana, the determination of family ties or the lack thereof could be, to say the least, difficult. It was dependent on the honesty of the would-be volunteer. But, of course, even the use of lie-detector tests in so-called developed western judicial systems is fraught with numerous problems and controversies. In the final analysis, judicial systems depend, among other things, on subjective judgments made by others about the honesty and integrity of others.

In 1984, the practice of inviting this form of public in-put in the dispensation of justice at the public tribunals was stopped. It continued to be a feature of the public tribunals system in Burkina Faso (formerly the Upper Volta) throughout the 1980s. According to George Agyekum, the Burkinabe public tribunals

still ask members of the public to give their opinions in terms of the sentence for the accused... In Burkina Faso members of the public can cross-examine the accused and this is recorded (Bankie, 1987:49).

The discontinuation of the practice of permitting lay involvement in judicial decision-making in Ghana may be related to several practical problems common to the conduct of public consultations or town-hall meetings in a large, modern "democratic" society. Presumably, the tribunal operators realized that neither the "Oprah Winfrey-Phil Donahue-Geraldo-talk-show" format nor any of its variants were suitable for the serious business of conducting judicial hearings or criminal trials in a complex urban society. The abolition of the practice may be seen as a further reflection of the regime's desire to prune down some of the overbearing populist trappings of the public tribunals system. I shall return to the subject of instituting procedural and substantive reforms in the tribunals system later in this chapter.

### **The Use of Non-Attorney Judges**

The second important way through which the PNDC regime sought to democratize justice was to legally provide for the inclusion of lay judges on the adjudicating panels of the public tribunals. From the national to the community levels, members of the public tribunal were not required to possess any professional legal qualifications, and only one out of the five to fifteen members of the Public Tribunals Board which oversaw the operation of the entire tribunal system was required to be a lawyer. Even so, section 1(1) of the *Public Tribunals Law, 1984*, PNDC Law 78 stipulated that this one lawyer did not have to be made the chair of the Board. Section 3(3) of PNDC Law 78 also stipulated that tribunal members sitting on each particular case must select one of their members to serve as the chair, unless the chair of the Board is a member of the panel, in which situation he/she was mandated to preside over the proceedings of the tribunal as its chair. There were more lay people on every tribunal panel, and they were supposed to cut a swathe through the mumbo-jumbo of court procedures commonly referred to as "legal technicalities".

According to George Agyekum, the foremost legal architect of the tribunals system in Ghana, prospective lay appointees to public tribunals were given a modicum of "legal education" prior to their confirmation as tribunal members. In an interview with Bankie (1987), Agyekum explained the process in this way:

We have a system. Before persons are appointed we give them some training; we have a lot of handouts we give them on law and procedural matters they are to follow. We have run two training programmes for them we did one in 1985, we had one in 1983. In one of these some of the lecturers came from outside the country. It was a two-month residential course for all Tribunal panel members (Bankie, 1987:45).

Thus, lay judges were given some semblance of legal education deemed by the senior architects of the tribunal system to be sufficient for the effective performances of their judicial duties. I was unable to procure copies of the course outlines, syllabus and hand-outs during my field research, and hence could not evaluate the nature, sufficiency or otherwise of their content.

Suffice it to say that the content of this preparatory "legal training" course could, given the ideological orientation of the PNDC regime and the expressed purpose of the tribunal system, be expected to conform more to the general principles of Socialist Law than either Common Law or the Roman-Germanic legal tradition. The identity and calibre of the external lecturers could also not be ascertained as Agyekum declined to be interviewed on specific matters pertaining to the tribunal system, and, instead, gave me hand-outs of some of his public lectures on human rights and the tribunal system in Ghana.

Lawyers slated for tribunal panel membership were also given special "training" before their appointment. According to Agyekum:

Before a lawyer chairman is able to sit on a Tribunal he understudies somebody for almost three months; sometimes it takes more than that before he is appointed. He goes through the mill - he does a lot of administrative understudying so that he can run a Tribunal on his own (Bankie, 1987:45).



The training given to lawyer appointees was designed not only to familiarize them with the administrative procedures of the tribunal system but also to conscientize them to the principles of the new "socialist" judicial dispensation. Positions on the tribunals were not advertised, and the selection process was therefore neither public nor open.

Since the first legal education course for lay appointees to the tribunal panels did not take place until 1983, it may be reasonable to surmise that all the lay judges who adjudicated cases in 1982 had no legal training. Yet, by June 1983 the public tribunals had tried and sentenced 7,000 people to various lengthy prison terms and some to death. Nevertheless, while several public tribunals were established after 1983, there were only two additional training courses provided for lay judges, in 1985 and 1987. Agyekum explains the anomaly the way:

We are supposed to have such training programmes each year. In practice this has not been possible as we have our problems. I am to run these courses but there has been so many problems (sic) I have not been able to do it (Bankie, 1987:46).

This situation reflects the failure of the PNDC regime to institutionalize the training programme for lay judges in the tribunal system. The provision of training for lay persons was entirely dependent on Agyekum, the intellectual back-bone and chief advocate of the tribunals system.

The failure to institutionalize legal training for lay judges may also be accounted for in terms of its low priority vis- a-vis the many serious demands on the tribunal functionaries (such as Agyekum) and the depth of opposition to the entire tribunals system from within certain quarters of the PNDC government itself. In an interview with George Agyekum on May 20, 1987, B.F. Bankie posed the following question: "What is the feeling of leading members of the Government on the Tribunal? Are they all generally in agreement?". Agyekum answered:

I don't think they are. There is a lot of opposition to the Tribunal system from leading members of the government, especially those who are lawyers. I think

that this is a serious situation, but then I would'nt say that these people initially supported the Tribunals and then turned against them, because right from 1982 their opposition was why it was difficult to set up the Tribunals in the first place. Some people were not interested to work towards the setting up of the Tribunals. On the part of these members of Government there had been little enthusiasm. I know we had to draft the laws setting up of the Tribunals ourselves (Bankie, 1987:49).

Apart from direct and indirect executive interference in the deliberations of the tribunals and opposition from certain PNDC members, the tribunals were also plagued by several logistical and human resource problems, notably an inadequate supply of typewriters, lack of computers, micro-cassette recorders and competent scenographer-secretaries. During my research, I observed the outmoded and inefficient typewriters and other equipment used by tribunal support staff. The proceedings of the tribunals were manually recorded. The use of professional court reporters, electronic recording and transcription of proceedings were simply absent from the tribunals system. These technical shortcomings had the potential to enlarge the scope for error and the opportunity for the doctoring of manuscripts.

### **Profile of Public Tribunal Procedures**

The procedural rules governing the operation of the tribunal system could not be easily determined. From one tribunal to another, there did not seem to be strict adherence to any rules of procedure. This haphazard quality gave each tribunal a degree of autonomy in side-stepping technical rules of due process. This practice was in keeping with one of the goals of the policy of popular justice, that is, to circumvent the maze of legal technicalities that allegedly saddle the regular Westminster courts. Yet as Peter Ala Adjetey points out:

The absence of technicalities leads to arbitrariness, because what after all is technicalities but following certain set patterns and legal procedures established in advance? The failure to follow patterns of behaviour leads to a complete breakdown of established procedures. That is not law but caprice. The attempt to eliminate technicalities from the legal process is an impossible task; you can eliminate unnecessary rigidity and unnecessary technicality. But if you are to administer justice at all some amount of rigidity is required. In fact, when it

serves their [the tribunals] interest they resort to technicalities ( Adjetej, Interview 1990).

Bankie (1987) provides an in-depth discussion of the case of *The People v. George Salami and Four Others*. This case is typical of the economic crimes frequently adjudicated by public tribunals. In view of my inability to gain access to original documents covering any of the cases decided by any of the public tribunals in Ghana, I am forced to rely on Bankie's account and discussion of this case and my observations of tribunal procedures during my 1990 field research on the tribunals system.

The People v. George Salami and Four Others. Case #27/85.

On May 17, 1985, a National Public Tribunal sitting at the Old State House in Accra gave judgement in the case of *People v. George Salami and Four Others*. In the dock with Salami were Ritz Kofi Osei, Augustus Owoo, Walter Adam Gbadegbe (alias Awuley) and Micheal Adam. The tribunal was presided over by George Agyekum, and consisted of Warrant Officer Class II Mumuni Seidu, Madam Comfort E. A. Do, and Messrs Jenkins Kofie and Atakuma Amexo as members. The accused were jointly charged with two counts of economic sabotage. The first count was conspiracy to commit a crime contrary to section 23(i)(f) and 16 of *Public Tribunals Law 1984 (PNDC L 78)*. The conspiracy consisted in their having agreed to an act with intent to sabotage the economy of Ghana. The second count consisted in the doing of an act with intent to sabotage the economy of Ghana contrary to sections 9(i)(f) and 16 of *Public Tribunals Law 1984 (PNDC L 78)*. The accused persons had allegedly defrauded the state of C67,000,000.00 (Bankie, 1987:50-51).

At the trial, Mr. J.C. Amonoo Monney, Special Public Prosecutor, and Mr. Ocran appeared for the People. Three of the accused persons were in attendance at the trial. The First Accused was represented by Mr. N.Y. Agbesi and Mr. Oteng. Counsel for the Second Accused was Mr. Okaija Adamafio, and Mr. Ellison Owusu-Fordjour and Ms. Abena Owusu appeared for the Third Accused. The Fourth and Fifth Accused were absent even through

"respective" notices had been given by way of personal service and through the public media (e.g. newspapers, radio, etc) (Bankie, 1987:51).

The Prosecution alleged that on April 26, 1985, the ledgers department staff of the Derby Avenue branch of the Ghana Commercial Bank (GCB) was given a "dash" of C100,000.00 by a customer, Mr. George Salami, who also "tipped" a messenger and other officials with such generous amounts. The same day, Salami had withdrawn C11m. in cash. A "patriotic" staff member who became suspicious filed a report with the Chief Security Officer of the GCB (West Africa, July 15, 1985).

The details of the case as reported by a West Africa special correspondent in Accra were as follows:

George Salami presented a cheque issued from Accra New Town branch of GCB at the Derby Avenue branch of GCB for an amount of 17.8m Cedis. He said he needed special clearance and a messenger was sent to the New Town branch to check whether there was money in the signatory's account. The second, accused, Ritz Kofi Osei, stole a number of Forms 450s in collusion with the first and third accused. (Form 450 is an advice from branch A to B confirming that a client had X amount in Branch A so B should honor the client's cheque). Ritz Kofi Osei worked at the New Town Branch and even though he was on leave, managed to be there when the messenger from Derby Avenue arrived. He collected the cheque, entered the bank and later returned with an answer to the query on Form 450. Augustus Owoo, the third accused and national chairman of GCB's defence committees got an expert forger in the person of the fourth accused. Walter Adem (at large) to forge the signatures of the authorising officials. During the investigations, it came to light that the second accused, on two earlier occasions, operating between the same two branches, had credited the amounts that Salami had withdrawn. On March 22, an amount of C20.35m. and March 25, another amount of C18.65m. were credited, using the same method as of the C17.8m. The total amount involved was C56.8m. (West Africa, July 15, 1985).

Commenting on the nature of the trial proceedings, Bankie (1987) notes that the Prosecution called fifteen witnesses while the Tribunal called one witness, and all the accused persons present gave evidence on their own behalf but called no witnesses. Bankie continues:

In the Judgement reference is made to nine British authoritative cases, three Ghanaian cases and one West African Court of Appeal case. The judgement carries the following subheads- PW1; PW2 (these refer to these two witnesses);

Defence of First Accused (being a statement of the Law as compared with the evidence adduced); the burden of proof (reference to the standard of proof with a weighing of the evidence; Observation and sentence (the First, Second, Third and Fourth Accused were sentenced to death by firing squad and the fifth Accused was sentenced to twenty-five years imprisonment with hard labour on both counts to run concurrently); and finally Orders (amongst others, all the assets of the First, Second, Third, Fourth and Fifth Accused were confiscated to the state (1987:51-52).

Bankie concludes that the presentation, forum and content of the judgement in this case "meets favourably the standard of judgements seen in the Higher Courts of the Republic of Ghana and the Republic of Botswana, as well as other jurisdictions".

It will be noted that the Fourth and Fifth Accused were tried and sentenced *in absentia*. The practice of trying and sentencing people *in absentia* is fairly common in Ghana and other countries with military or so-called revolutionary governments. It is a relatively seldom occurrence in other common law jurisdictions such as Canada, Australia, Bahamas and the U.K.

#### The People v. Bernard Odonkor and 4 others. Case No. 33\85

In 1985, an Accra public tribunal sentenced five persons it described as "economic saboteurs" to death by firing squad. Bernard Odonkor, a Senior Accountant in the Chief Accountant's Department of Social Security Bank (SSB) and Kobina Abban, the second accused, also an employee of the same bank, stole a quantity of the bank's Settlement Accounts Forms. (The forms serve the purpose of cheques and are used in either debiting or crediting accounts of SSB). The fourth accused, Nathan Addieo (who was at large at the time of the trial) forged the signatures of authorising officers of SSB. Joseph Kwame Adu, the third accused, was a businessman and owner of five companies. His accounts at Accra New Town and Tudu branches were used in the commission of the crimes which netted a total amount of C26.7m for the accused persons.

The accused were all found guilty by the tribunal which sentenced them to death by firing squad. The fifth accused, Tetteh Padi, appealed his conviction and was jailed for 10 years plus a fine of C10,000. In default, he would be required to serve another five years. All the sentences were promptly carried out.

As regards the trial procedures, my two-month observations of tribunals sittings in July-August 1990 tallies with the essential features of the tribunal mechanisms as described by Bankie above.

Based on my field and archival research, the following is my understanding of the underlying philosophy and procedure for trial in criminal matters before the tribunals. The panel members appeared to hold the belief that their fundamental duty in adjudicating a criminal case was to find out the truth, and that they were bound in their procedures by principles of "natural justice". Typically, the prosecution assembled the evidence; the accused opened his/her defence with a brief statement embodying the plea. He/she was sworn or affirmed once seated in the witness stand. This was followed by examination in-chief and cross-examination of both parties. Members of the panel could interrupt the proceedings at any point to seek clarification. Where they were not clear or thought that somebody should be called as a witness in order to enable them to get at the truth, an order was issued to that effect by the chairperson of the tribunal.

The pursuit of "truth" was the fundamental lever on which tribunal justice rested. Truth was understood by the architects of the tribunal system to be the cornerstone of natural justice. Accordingly, the pursuit of truth was the main principle guiding the operation of the tribunals. Owing to the high degree of importance that tribunal panellists attached to this consideration, that is, the primacy of truth to justice, the normal rules of procedural fairness which obtain in the regular courts (and which the tribunal architects perceived as legal obstacles to popular justice) were hardly followed in tribunal deliberations. Even the rules of

procedure formulated to guide the conduct of the tribunals were hardly followed with any degree of consistency. At an Ashanti Regional Public Tribunal sitting in July 1990 at the Prempeh Assembly Hall in Kumasi, I observed that the procedural rules established for the tribunals were not being adhered to by the adjudicating panel. There was little structure and regularity to the process of "truth-finding". This is probably because strict adherence to procedural rules was not required by law and clearly deemed by the regime to be antithetical to the ideals of popular justice. Indeed, the tribunals themselves were established partly as a counterpoint to the tendency of the regular courts to rigidly adhere to the maze of procedural rules and the multitude of legal technicalities handed down through the long history of the common law.

The law establishing the public tribunals was formulated in such a way as to validate, and indeed, encourage strategic departure from the tribunal's own rules of procedure as well as the normal rules of procedure applicable in the regular courts throughout the common law system. Thus, section 13 (17) of *PNDC Law 78*, stipulated that non-compliance with the procedural rules "shall not render a trial invalid unless a substantial miscarriage of justice had been occasioned". Of course, the determination of what constitutes "a substantial miscarriage of justice" is as problematic as winning an acquittal on this ground upon appealing a conviction by a public tribunal. This particular provision also permitted public tribunals to override the objections of defence counsel. According to Gyandoh, the provision may be:

meant to appeal to the popular masses, who often believe that procedural technicalities are sometimes used by those entrusted with operating the criminal justice system to obtain unfair acquittals of wealthy and privileged members of society (1989:1158).

The belief that legal technicalities subvert the course of justice is widely held in Ghana. During the three-month AFRC era in 1979, this belief was widely propagated to justify the establishment of the People's Courts which handed down the death penalty and other draconian

sentences like a piece of cake, and whose torpedo-speed of adjudication sharply contrasted with the proverbial snail-paced process at the regular courts. In all, the Ghanaian public seemed convinced that speedy justice and "truth" were more readily available at the people's courts than at the regular courts. The interesting story below reflects the extent to which some Ghanaians held the belief that justice is better served, and more expeditiously so at the "revolutionary" courts of the AFRC and PNDC regimes than at the ordinary courts of the land:

A Magistrate Grade Two at the Mampong District Court in Ashanti (Region) has been arrested and placed in military custody in Kumasi by the Interim Regional Co-ordinating Committee (IRCC) for PDCs for allegedly taking a bribe of C500 from an accused person standing trial before him. The magistrate, Mr Kwasi Atta Siaw, also known as Nana Ofoshene Appenteng II, chief of Asuom, near Kade in the Eastern Region has however pleaded that he should be tried by the People's Tribunal instead of the ordinary criminal court. His reasons? "Cases are tried expeditiously at the People's Tribunal without turmoils of technicalities". It is the safest, quickest and surest way of hearing my case and the duration of sentence is long and I will come back reformed". Narrating his own case to the press in Kumasi in the presence of the Ashanti Regional Secretary, his deputy and some members of the IRCC, Nana Appenteng II confirmed his guilt and pleaded that he should not be shot because he is the bread winner of a family of nine. Nana Appenteng also pleaded with the investigators to arrest his Registrar, one S.K. Boakye, for being an accomplice (Daily Graphic, October 1, 1982.) [Emphasis and parenthesis added].

Siaw's claim that long-term custodial sentences are efficacious for reforming convicted criminals may be a trifle exaggerated in light of the high rates of recidivism in Ghana and might have been an insincere, condescending and strategic pronouncement calculated at winning "mercy" and demonstrating an attitude of co-operation with the authorities. Nevertheless, his comparative assessment of the dual system of justice gave obvious comfort to, and vindication of, the tribunals system's advocates and architects. Of course, an equally plausible interpretation is that Siaw was coerced into making this statement, although I have no empirical evidence to substantiate this claim; it is mere speculation.



Despite the admission of guilt by a suspect, the rigorous, even if unprecedented and unorthodox procedures of the revolutionary justice organs such as the Citizen's Vetting Committee (CVC) and the public tribunals must run their full course in the quest for the precious "truth". Thus, continuing, the Daily Graphic reported that,

Mr Kwame Dwomoh Kesse, the Ashanti Regional PNDC Secretary ordered the Regional Investigations Committee to prepare a docket on the case for transfer to the People's Tribunal in Accra. He further instructed that the magistrate should appear before the Citizens' Vetting Committee.

Concern for the pursuit and discovery of truth appears to take precedence over all other juristic considerations at the tribunal. George Agyekum expresses the cardinal importance of this search for the truth when, in an interview with B.F. Bankie (1987) he states:

As much as possible we do not move into the arena of conflict (adversarial). Our duty is to get the truth. In that sense we could ask a lot of questions from each of the parties, be it the prosecution or the accused just to know what is going on, so that at the end of the day we can reach a just conclusion. (Bankie, 1987:46. Parenthesis mine).

Several of the key provisions of the Public Tribunals Law facilitate the pursuit of "truth" at the expense of strict adherence to other basic principles of the rule of law, the presumption of innocence, the right not to be deprived of liberty without the benefit of due process, the right to a fair trial and freedom from cruel and unusual punishment. The principles of justice also include "the rules of evidence which provide for protection against self-incrimination, establishment of all the elements of the offense by the prosecution" (Brannigan, 1984; 243).

The allowances built into the public tribunal system for the legal violation of these fundamental principles of justice reveal the instrumentality of criminal law to the advancement of the interests of the ruling elite, irrespective of its politico- economic orientation, whether capitalist, socialist or Marxist. They reflect the PNDC regime's attempt to control the commanding heights of the economic and political order of Ghanaian society. In this process, the ruling elites in Ghana under Rawlings employed the criminal law as a weapon to control,

subdue, regulate and subordinate groups and individuals whose activities they find problematic - dangerous, worrying, disturbing or threatening to its interest. Coercion and subjection are maintained through reliance on, and control of the legal apparatus. As Boakye-Danquah, a former National Public Tribunal chairman astutely observes, the tribunals "are part of the system that underpins the PNDC. It is a political instrument ensuring PNDC dominance" (West Africa, April 6, 1992)

Section 13(8) of *PNDC Law 78* mandated tribunals to "receive all relevant evidence in proof or disproof of a charge against the accused". This provision constitutes a significant counterfoil to one of the most basic principles and values of the common law judicial system, viz, the inadmissibility of hearsay evidence. The only restraining concession to this extraordinary procedural allowance is the clause contained in that provision to the effect that "the accused shall not be convicted on hearsay evidence alone".

The tribunals also appeared to operate according to the inquisitorial rather than the adversarial model of criminal justice. As Agyekum admits in an interview with Bankie (1987):

The burden of proof lies on the one who asserts except that there are some specific offences in law, which when the law created those offences said that it is for the accused to prove that he is not guilty. There are offences on the statute books which have altered the standard of proof, so that the burden is placed on the accused. (Bankie, 1987:46).

Furthermore, the original law which established the public tribunals did not initially provide for any appeals from the decisions of the tribunals.

On September 27, 1982, the Ghana Bar Association (GBA) declared a boycott of the tribunals (Daily Graphic, September 28, 1982). In its declaration of boycott, the GBA expressed grave concern about this significant anomaly in addition to other problems with the tribunals system. (The GBA's other concerns are discussed in Chapter VIII). By not including a provision for appeals, the architects of the *Public Tribunals Law* in 1982 seemed to

imply the belief that the tribunals were inherently infallible. The omission may might also be seen an indication of a determined intolerance for dissent. This significant anomaly cannot be attributed to juristic over-sight. On the contrary, it can be seen as a serious reflection of the PNDC regime's initial determination to override all forms of opposition to its effort to establish a new judicial dispensation. The regime, as it were, bravely marched forward with chivalric zeal, bulldozing its way through the jungle of dissension and subversion, with only one goal in mind: the significant reform of the criminal law as an integral part of the process of revolutionizing Ghanaian society, Stalinist-Maoist- Mengistu style, or somewhere in between.

It is axiomatic that revolutionary praxis evinces a radical departure from the institutionalized modalities of social, economic and politico-judicial organization. Some revolutions chart new paths while others follow existing models of social engineering. Among the several paths to revolutionary social reconstruction are the primary or classical models such as the French, American and Soviet revolutions. Some revolutions were essentially fashioned in accordance with these classical models. Among the several paths to revolutionary social reconstruction are the primary or classical models such as the French, American and Soviet revolutions. Other revolutions have essentially been fashioned in accordance with these classical models.

While most revolutions such as those of Kampuchea, Samora Machel's Mozambique and Mengistu Haile Mariam's Ethiopia, as well as the Romanian, Polish and Hungarian versions of Eastern Europe followed the classical Marxist model, the revolutions of Mao Tse Tung's China, Fidel Castro's Cuba, Kim Il Sung's North Korea, Muammar Khadaffi's Libya, Julius Nyerere's Tanzania and Jerry Rawlings' Ghana were remarkably different from one another, as well as from the parent model derived from the former Soviet Union. Needless to say, the approaches to social transformation adopted in most of these countries were tailored to

suit local historical experiences and the concrete existential realities of these societies, viz: the nature of class formations and political alliances, ethnicity and politico-economic conditions.

Among the several paths to revolutionary social reconstruction are the primary or classical models such as the French, American and Soviet revolutions. Other revolutions have essentially been fashioned in accordance with these classical models.

Irrespective of the particular ideological trajectory travelled by a given revolution, the development of alternative innovative mechanisms as a counterfoil to the traditional institutions is a *sine qua non* to the usurpers' claim to the legitimate use of the accolade "revolutionary". Prudent or misguided, revolutionary regimes manifest a remarkable contempt for the delatoriness and technicalities of established judicial systems; they also demonstrate a tendency to swiftly revamp pre-existing structures of economic and social organization. Indeed, the "violent" destruction and radical reconstruction of the social structure constitutes the very essence of such revolutions. This also means that revolutionary regimes aim to create a new political and judicial culture.

Like its counterparts elsewhere, Jerry Rawlings' socialist revolution aimed to institutionalize new legal norms and structures. Within the framework of the public tribunals system, the regime rejected as conservative and oppressive, nearly all the liberal democratic doctrines commonly held by adherents of the classical school of jurisprudence and criminology as constituting fundamental legal guarantees of the inalienable rights of the individual. Among the principles of legality are the following doctrines: the rule of law, habeas corpus, certiorari, mandamus, prohibition, and quo warranto.

Enshrined in the 1979 Ghana Constitution were a number of clauses aimed at providing general protection of the fundamental rights of the individual by the courts. Among these provisions were the following:

(a) Habeas Corpus

This is a specific relief demanding the production of a detained person before a competent court of law by the person detaining him/her so that the court can determine the justifiability of the grounds of detention;

(b) Certiorari

Designed to prevent authorities from acting ultra vires or exceeding their legitimate mandate, this relief demands that a matter be brought before the High Court to be quashed. It is a device used to curtail the abuse of power;

(c) Mandamus

A peremptory order issued from the courts, this relief commands a person or body to fulfil his/her duty as required by law. It seeks to secure the performance of any public duty. Any member of the public with sufficient legal interest in the performance of such a duty has the right to apply for this relief;

(d) Prohibition

This is an order generally issued by a superior court chiefly to prevent an inferior court from exceeding its mandate or acting in violation of the principles of natural justice. It is a mechanism for restraining public authorities exercising judicial or quasi-judicial functions;

(e) Quo Warranto

This device enables an individual to legally challenge a person who improperly usurps any authority. It can be issued against any person acting in an office or capacity to which he/she is not entitled, such as a person claiming to effect an arrest without legal authority. It poses the question: "By what authority do you act"?

By virtue of their methods of operation, the public tribunals demonstrated a clear repudiation of these principles of legality. The regime regarded these common law provisions as the levers of "bourgeois legality" which could not be allowed to limit the possibilities achieving popular justice or realizing the new judicial dispensation. To advocates

of the tribunals system, respecting these "bourgeois" principles is to permit a morally decadent and institutionalized legal philosophy to control the agenda for social change, and to expand the possibilities for the regime's failure and thereby constrict the political and legal aperture for effecting long-term revolutionary change. By failing to abide by these time-tested common law principles of legality, the PNDC regime was able to use all kinds of legal instruments and repressive tactics (including torture and brute force) to suppress forms of political opposition that it chose not to over-look. During the period 1982-1992, several Ghanaians and international political observers made numerous allegations of human rights abuses by the state. Among these allegations was the misuse by state functionaries of public tribunals, quasi-judicial bodies, military commandos and the state security machinery to settle personal scores. Accordingly, the regime's human rights record is widely held as the ugliest in Ghana's political history.

### **The Tribunals and Human Rights**

Operating under a state protectionist view of the role of law in social transformation, the PNDC's judicial policies tended to emphasize collective welfare over individual liberties. Thus, in 1984, the regime repealed the *Habeas Corpus Act 1964* (Act 244). Through the Habeas Corpus (Amendment) Law 1984 PNDC Law 91, (hereafter PNDC Law 91), Section 2 of the old law was replaced with a new section 2. Subsections 1(a) to (e) and 2 of PNDC Law 91 provided as follows:

(1) The High Court or Judge thereof to whom an application is made under section 1 of this Act shall immediately enquire into the allegation of unlawful detention and may make an order requiring the person in whose custody the applicant (or the person on whose behalf the application is made) is detained,

(a) to produce the body of the person so detained before the High Court on a day specified in the order, and

(b) to submit a report in writing stating the grounds of detention.

(2) For the avoidance of doubt, where a person is detained under the Preventative Custody Law, 1982 (PNDCL 4) it shall be sufficient for the purposes of subsection (1)(b) of this section without giving the reasons thereof to state in the reports the grounds stated in the executive instrument by which the detention of that person is authorised, as the High Court or the Judge thereof shall have the power to enquire into such grounds.

Quite naturally, opposition to the absence of appeals and other shortcomings of the tribunals system was swift and concerted. Among others, the Ghana Bar Association (GBA), the International Commission of Jurists (ICJ), Amnesty International (Amnesty) and the Government of the United States (through the American Embassy in Accra) strongly protested this situation. The next chapter offers a detailed exploration and critical examination of the context and content of the criticisms levelled against the tribunals system, as well as the counter-arguments advanced by supporters of the new judicial system.

## Chapter VIII

### THE VOICES OF DISSENT

#### Background

The policy of popular justice and the established procedures for its articulation and achievement are among the most hotly contested policy decisions and actions of the PNDC regime. The PNDC declared its intent to establish public tribunals in early January 1982 (West Africa, January 18, 1982). The first public tribunal session in Ghana was held on August 26, 1982, and the inaugural sitting of the Board of Public Tribunals took place in Accra on September 15, 1982. The London branch of the International Commission of Jurists attacked the tribunals system even before the legislation creating it was drafted. Once the tribunals system became operative and its *modus operandi* slowly began to crystallize, more criticisms were raised against it from several quarters. Indeed, while the auxiliary structures of justice such as the Citizens Vetting Committee and the National Investigations Committee have come under criticism, the most vehement and persistent against the PNDC's entire popular justice policy have mainly focused on the public tribunals system.<sup>1</sup>

<sup>1</sup> Also severely criticized by both the left and the right in Ghana were the regime's Structural Adjustment Program (SAP), its courtship of World Bank and IMF financial backing, and the establishment of the National Commission For Democracy (NCD) with a mandate, among other things, to generate a national debate on a future democratic political system for Ghana.

While the radical left generally saw the SAP and IMF involvement in Ghana's economy as a sell-out of the socialist revolutionary ideals which were considered to underpin the December 31st action, the right saw it as an eventual vindication of the economic policies of Limann's civilian administration which Rawlings toppled. The "revolution" was consequently seen retrospectively by those on the right as an unnecessary, costly, unjustifiable and retrogressive interruption in Ghana's economic and political recovery process. In fact, members of The Friends of Busia Benevolent Society (FBBS), an organization dedicated to the promotion of constitutional democracy and the preservation of the ideals and policies of the late Dr. Kofi Busia, former Prime Minister of Ghana, perceived the post-1983 economic policies of the PNDC as a carbon copy of the policies pursued by Kofi Busia's Progress Party government (1969-1972). A coalition calling itself the Danquah/Busia Memorial Club (DBMC) emerged in the late 1980s, waited in the wings and eventually metamorphosed into a full-fledged political party once the PNDC lifted the ban on party politics in 1992. The DBMC was an amalgamation of all the Akan-based, decidedly conservative, pro-capitalist and pro-western (particularly pro-British and American) political forces in the country. They mobilized around their icon, martyr and saint, the enigmatic Dr. J.B. Danquah, a brilliant and venerated intellectual, a great democrat and political stalwart who died in one of Nkrumah's prison



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cells. (To the Nkrumahist forces on the left, Danquah is a shameless CIA agent and traitor). The FBBS heaps similar accolades on the late Dr. K.A. Busia who died in exile in Britain after his overthrow by Lt. Col. (later General) Kutu Acheampong in 1972. The DBMC seeks to articulate and preserve the memory of these two Ghanaians, and to implement their political platform which it regards as the only viable blue-print for lasting peace and prosperity for Ghana.

The left's opposition to the PNDC's agenda for "democracy" issued from two discordant sources. First, there are those who considered the activities of the NCD and the debates on democracy as unnecessary and expensive exercises in mass deception and palliative control. To these people, the PDCs/WDCs, CDRs and the District Assemblies established by the regime were the only true and viable structures for ensuring a genuine broad-based and grass-root democratic system in Ghana, i.e., guaranteeing "power to the people". Second, others on the left, who fell out of favour with the regime for various reasons insisted that the PNDC return the country to a civilian constitutional system of government which would afford them the opportunity to contest for elections and possibly form a socialist government.

Those on the political right in Ghana also saw the whole debate on democracy in Ghana either as an unnecessary and unwarranted stalling tactic designed to ensure the permanence of the "provisional" regime, or an attempt to create a pseudo-constitutional regime in which the PNDC will guarantee for itself a partnership in a future government. In the meantime, it was claimed that the democratization process would serve to appease western human rights watch-dogs, donor agencies and other economic collaborators concerned with human rights and the sustainability of the regime's economic recovery program and its eventual fruition.

This cynicism had a historical precedent in Ghana: the SMC government of General Acheampong attempted to introduce a non-party political system called Union Government (UNIGOV) in which the armed forces, the police and civilians would share political power. In mid-1978, General Acheampong's successor, General F.W.K. Akuffo also talked briefly of a desire to institute a Transitional Interim National Government (TINAGOV), another version of the ill-fated UNIGOV formula of institutional power-sharing. The divisiveness, bitterness, rancour, acrimony and political conflicts which the Generals saw as endemic to party politics were most acutely dramatized in the UNIGOV debates and subsequent referendum of March 30, 1978. Acheampong's SMCI muzzled the state-controlled press even more tightly, and attempted to pre-judge the results of the referendum, among other things, via a bungled operation to kidnap Mr. Justice I.K. Abban, the Electoral Commissioner. The results released by the government showed a clear win for the pro-UNIGOV forces led by the SMC, while the Electoral Commission's version of the Referendum outcome indicated victory for the adversaries led by the late General A.A. Afrifa's Movement for Justice in Africa (MOJA), Dr. Bilson's Third Force Party and the National Union of Ghanaian Students (NUGS).

It must be emphasized that the Rawlings "democratic" formula also mirrors Acheampong's in its initial proscription of party political activities. The ban on party politics was lifted only in May 1992. While all former political parties remained banned and the launching of new ones made illegal, a retinue of state-sponsored political associations, special interest groups and other "organs of the revolution" actively canvass support for the PNDC regime throughout the 1980s. The PNDC orchestrated and organized mobilization of support through the Egle's Club of Ghana, a quasi-political party headed by Michael Agbotui Soussoudis, a first-cousin of Ft. Lt. Rawlings, and Capt. (ret.) Felix Okai. When the ban on party politics was lifted in May 1992, the Egle's Club openly declared itself a political party, with the name, Egle's Party. (The abbreviated version of the acronym is said to be "Every Ghanaian Living Everywhere". The eagle Party soon found itself entangled in a messy war of words and guns with a rival PNDC-approved political party over which of them had the legitimate right to claim Jerry Rawlings as its candidate in the November 1992 presidential elections.

### **The Substance of Critics' Concerns**

The justifications for the creation of the public tribunals system, its structure and the constitutive rules of law governing its operation have all been roundly criticised by many local champions of the traditional legal establishment, notably the GBA and the Association of Recognized Professional Bodies (ARPB). The Governments of Britain, France, United States and Canada, as well as international human rights watch-dogs and advocacy groups such as Amnesty and the International Commission of Jurists (ICJ) condemned the tribunals system for various reasons. Even "radical" bodies such as the National Union of Ghanaian students (NUGS), several leftist ideologues and serving and defected (former) tribunal chairpersons raised their voices of dissent against the PNDC's justice policy agenda and its enforcement mechanisms. The grounds of dissent range from the initial lack of appeals in the tribunals system through the imposition of stiff penalties to the swift use of the death penalty as a form of retributive justice and a mechanism for achieving general deterrence.

In this chapter, I present and analyze the various positions taken by a number of organizations opposed to the public tribunals system, as well as the responses of the tribunals system's supporters. The primary organizations under consideration here are: (1) Ghana Bar Association, (2) Amnesty International and (3) the International Commission of Jurists. From a preliminary assessment of the data obtained from the interviews and archival research (letters, speeches, government documents, memoranda and newspaper articles), these were the most consistent, ardent, vociferous, thorough and articulate organised critics of the tribunals system during the period 1982-1992.

Understanding the breadth and depth of the criticisms made against the establishment of public tribunals and the actual operation of these novel structures of justice requires a deeper and thorough exploration of the background, motives and context of PNDC rule. In other words, the analysis must be pursued against the backdrop of the PNDC's overall goals, revolutionary agenda and strategies.

The most authoritative articulation of the motives of the December 31st revolutionaries is found in the document which legally created the PNDC Government, the *PNDC Establishment Proclamation, 1981*. A brief examination of the political vision embodied in this document will serve to provide a better understanding of what the regime sought to accomplish through the establishment of the tribunals. The preamble to the *PNDC Proclamation, 1981*, the constitutive document which established the PNDC government, contains a crucial phrase that sheds light on the long-term goal of the regime.

It is necessary that a machinery should be established for the proper administration of the Republic of Ghana and for the due establishment of true democracy [Emphasis added].

In order to facilitate the creation of "true democracy", the PNDC Proclamation, 1981 assigns the exercise of "all powers of government" to the PNDC. A subsequent amendment to the Proclamation in February 1983 further provided, *inter alia*, that:

Any reference in this law, the Proclamation or any other Law to 'powers of government' shall be construed to include legislative, executive, administrative and judicial powers [Emphasis in original].

Thus, by this law, the PNDC assigned to itself all governmental powers of state, including judicial powers traditionally exercised by a relatively independent judiciary. The government effectively rode rough shod over the notion of separation of powers and functions of the three branches of government - legislative, executive and judicial. Of course, separation of powers is an ideal of checks and balances and which different democracies, through various institutional arrangements, approximate to varying degrees, but never absolutely. Nevertheless absolute fusion of powers provides an important set of the social and legal basis for the emergence or entrenchment of absolute dictatorship.

The formal and practical investment of all powers of state in the executive arm of government was a novel development in Ghana's political history. Although various civilian and military dictators had effectively achieved this goal, none had hitherto formalized their control of the judiciary in this way. By creating this situation, the PNDC

reallocated judicial power in a novel way (Gyandoh, 1989). Yet, it is not as if the PNDC did not understand that the phrase "judicial power" has a technical and legal meaning which has been

authoritatively interpreted at the highest level in Ghana (and one might add, elsewhere in the jurisprudential orbit of the common law) to include not only a power to perform the judicial function but also a power to give final and binding decisions between parties in litigation and the correlative power to enforce those decisions (Gyandoh, 1989:1166.) [Parenthesis original].

By virtue of this legislative redefinition of "judicial power", the PNDC, for all intents and purposes, became the highest court of the land. Thus, not only did it freely interfere in the administration of justice but it actually remained the repository of judicial power during the period 1982-1992. To some extent, the PNDC government saw the judiciary as an integral part of the executive machinery.

#### **Amnesty International and the Public Tribunals in Ghana**

Ghana's Public tribunals were established in August 1982 pursuant to the enactment in July 1982 of *PNDC Law 24 (Public Tribunals Law 1982)*. Since then, the most concerted and formidable external opposition to the tribunals system has come from Amnesty, the world-wide human rights lobby group and watch-dog.

On April 8, 1993, the Chairman of the Board of Public Tribunals, Mr. George Agyekum, invited Amnesty to send a delegate to attend sessions of the public tribunals and to collect data from relevant Ghanaian officials on the operation of the tribunals system (Agyekum, Interview, 1990). This followed repeated requests from Amnesty for permission from the Ghanaian authorities to visit and observe the tribunals system and the human rights situation in the country. Subsequent to this invitation, Amnesty delegated the task to Wesley Gryk, a member of the Bar of New York and staff of Amnesty's research department in London (Bankie, 1987:23). Arriving in Ghana on August 14, 1983, Gryk

was able to observe proceedings of public tribunals and to conduct interviews with key Government and tribunal officials, including Agyekum.

Amnesty derives its advocacy role from its principal legal document. Under Article 1(b) of its Statute, Amnesty "opposes by all appropriate means the detention of any Prisoners of Conscience" or any political prisoners without trials within a reasonable time or any trial procedures relating to such prisoners that do not conform to internationally recognized norms".

Accordingly, under its mandate, Amnesty was committed to ensuring that trials taking place before the Public Tribunals with respect to political or politically-motivated offenses were conducted according to standards of fair trial prescribed by international law. Furthermore, as set out in Article 1(c) of its Statute, Amnesty unconditionally opposes the imposition and infliction of the death penalty in all cases. Without exception, the organization believes that the death penalty should never be imposed. It recognizes, however, that this ideal is a far cry from the reality in most countries in the world, and that even the United States, the self-declared foremost champion and defender of human rights throughout the world, still maintains the death penalty as a "punitive" option in its criminal justice system. Amnesty therefore routinely insists that it is of utmost importance that particularly stringent international legal standards with respect to the imposition of the death penalty be scrupulously followed in the jurisdictions which continue to employ the death penalty.

Amnesty monitored and commented on proceedings of Ghana's Public Tribunals in consonance with its conviction that all "revolutionary" situations present real and potential occasions for significant human rights violations. It also advised the Ghana Government on its views regarding the operations of the public tribunals, as well as on specific cases adjudicated by the public tribunals in which the death penalty was been invoked and applied.

In October 1983, Amnesty sent a memorandum to the Government of the Republic of Ghana articulating its concerns about the public tribunal system, and calling for several significant reforms in the law and operations of the tribunals. In this memorandum, Amnesty expressed grave concerns about specific sections of the *Public Tribunals Law*, (PNDC Law 24), and the actual operations of the public tribunals in Ghana. The organization's concerns centred around six key sections of *Public Tribunals Law*, (PNDC Law 24), namely sections 2(1), 2(2), 7(22), 7(14), 7(19) and 8(1).

As discussed in Chapter VII, the composition of public tribunals is spelled out in section 2(1) of PNDC Law 24 (prior to its repeal in 1984). Section 2(2) mandated the PNDC to appoint members of the public tribunals, while section 7(22) articulated the principle of majority vote in tribunal panel decision-making in adjudication. According to this principle, all decisions regarding trial outcomes were to be made by voting; a simple majority vote was required for a decision to be legitimate; no one member, lawyer or non-lawyer, could overrule a majority decision on any matter, legal or factual. Section 7(14) addressed the standard of proof used by the tribunals. Section 7(19) concerned the absence of the presumption of innocence, the right to legal counsel, and other due process requirements, and section 8(1) articulated the tribunals' jurisdiction to hear capital cases and to impose the death sentence.

According to Amnesty, these sections of the *Public Tribunals Law*, (PNDC Law 24), served cumulatively to pervert justice and substantiate the perception that the tribunals were no more than pliant tools of political repression for the PNDC. The organization's central point was that the tribunals system was in urgent need of major reconstruction to bring it in line with internationally-recognized principles, standards and procedures of justice.

Accordingly, Amnesty's memorandum to the Ghana Government also included a ten-point recommendation for improving the tribunals system. Amnesty called on the PNDC Government to: 1) institute the right of appeal for every case decided before public

tribunals; 2) remove the competence of public tribunals to impose death penalties. (Failing this, the government should explicitly clarify the law to ensure that tribunals would be unable to arbitrarily increase the number of crimes punishable by death); 3) clarify the procedures for confirming death sentences; 4) ensure that at least one qualified and experienced lawyer would sit on each tribunal; 5) ensure that only the legally- trained panel member would decide questions of law coming before a public tribunal; 6) guarantee that the dismissal of members of public tribunals would be for just cause and in accordance with specifically designated reasons that are articulated in law; 7) clarify the criteria by which cases are referred to public tribunals rather than the traditional courts. The criteria for applying penalties must also be clearly stated; 8) clarify the status of the notion of presumption of innocence in the tribunals system and ensure that this fundamental principle is respected in all cases justiciable by the tribunals; 9) clarify the precise standard of proof applied by the public tribunals; and 10) provide legal counsel for defendants who wished for such representation.

The full text of Amnesty's memorandum is presented in Appendix B.

#### **Answering Critics' Questions: George Kwaku Agyekum on the PNDC, Public Tribunals and Human Rights in Ghana**

In the following section, Mr. George Kwaku Agyekum, one of the foremost advocates of the public tribunals system, responds to Amnesty and the GBA's criticisms levelled against the constitutive law, *modus operandi*, lay participation in adjudication, sentencing procedures, lack of supervision, human rights violations, and other aspects of the tribunals system.

In a public address entitled "Human Rights in Africa" delivered in the Netherlands on December 20, 1986, Agyekum attempted to refute these criticisms and to redefine the framework for a "fair" assessment of the public tribunals system and the PNDC's human rights record. He argued that a proper assessment of the PNDC's human rights record (including that of other African governments) must be situated in the specific context of the

historical antecedents, material or economic conditions, political circumstances and socio-cultural formation in which the phenomena of life and living occur. More importantly, Agyekum stressed the critical interconnection between the international politico-economic order and the level of social development in a given country, on the one hand, and the general state of human rights promotion, protection and observance, on the other.

Agyekum highlighted several important issues related to the temporal and cultural relativity of human rights conceptions, and contrasts the Euro-American value system which forms the foundation of western notions of human rights as well as the UN Declaration of Human Rights, both of which are grounded in the western liberal philosophy of individualism, with an African conception of rights based on a collectivist philosophy. Further, he examined the impact, possibilities and limitations of European models of rights (including the 1948 *United Nations Declaration of Human Rights*) on African peoples. He also explored the relevance of the Organization of African Unity's Charter of Human and People's Rights for Africa's social development. The lecture also afforded an opportunity for Agyekum to defend the public tribunals system, as well as the PNDC's human rights record. What follows is a summary of the salient points of Agyekum's December 20, 1986 address.

### **Human Rights in Africa**

The *Charter* of the United Nations makes reference to human rights and fundamental freedoms in a number of clauses. In the preamble, the peoples of the United Nations express their determination to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small.

When the Universal Declaration of Human Rights (UDHR) was proclaimed by the General Assembly on December 10, 1948, it was viewed as the first step in the formulation of an International Bill of Human Rights that would have legal as well as moral force.



Although it has had a wide impact throughout the world and inspired national constitutions, laws and conventions on various specific rights, it did not have the force of law at the time of its adoption. Since then, however, it has had a powerful influence on the development of contemporary international law.

At the time of the proclamation, several African countries were under colonial rule dominated and oppressed by some of the very countries which signed the *Charter*. This was in spite of the fact that Article 1 of the UN *Charter* articulates its purpose as the development of friendly relations among nations based on respect for the principles of equal rights and self determination of peoples.

Agyekum stressed that in practice, Article 1 has functioned to facilitate the oppression of Africa and other former colonial peoples. He observed that the environmental, political and civil aspects of most of the rights contained in the *Charter* manifest an European character and type of society and development.

He pointed to aspects of the *Charter* which continue to manifest its continuing Eurocentric focus as well as noticeable "dark spots" in respect of human rights in Africa. He identified human rights policy implementation and assessment in Africa as examples of bias in the western world's commitment to international brotherhood, and expressed the hope that this trend could be reversed with the adoption of the Organization of African Unity's *Charter on Human Rights*.

Agyekum cited two documents as confirming his views about western or European approaches to the UDHR and other subsequent instruments. These are: 1) the Final Act of the Conference on Security and Cooperation in Europe which was concluded in Helsinki on August 1, 1985 (the Helsinki Accord), and 2) the OAU *Charter on Human and Peoples Rights* adopted by the OAU Ministerial meeting in Banjul, Gambia, on January 7 - 19, 1981.

He emphasised that, the OAU *Charter* is originally African in character. Certain of its clauses are grounded in, and recognize African cultural values and traditions which

were glossed over by previous so-called universal instruments. He cited Articles 27, 28 and 29 of the OAU *Charter* which impose elaborate duties on citizens (See Appendix C).

Agyekum observed that the *Charter's* primary purpose is to contextualize human rights and to conjoin the notion of rights with virtues such as honesty and integrity, as well as obligations, duties and responsibilities.

### **Human Rights Violation In Africa**

According to Agyekum, most of the criticisms on the violations of human rights in Africa have been centred on alleged violations of civil and political rights, violations of the dignity of man, protection of rights by an impartial tribunal, rights to nationality, asylum, freedom of association, religion and right to conscience and universal and equal suffrage by secret ballot. He noted, however, that the critics hardly voice any criticism of gross violations of economic, social and cultural rights of millions of ordinary people. Such rights include the right to work and to equal pay for work of equal value, the right to form trade unions (only mentioned when it affects freedom of association), the right to rest and leisure, the right to social security, the right to education and the right to participate in the cultural life of the community.

The architect of Ghana's public tribunals system noted further that a proper assessment of human rights in Africa requires the capacity to contextualize the analysis - to place it in its African perspective - in terms of the African social, cultural, historical, economic and political values and development.

He drew attention to the colonial and class background of criminal law and human rights development in Africa, and the perpetuation of the inherently alien judicial values and practices by the new African intelligentsia who found the maintenance of the neo-colonial edifice to be in their best class interest. These groupings in Africa have since wielded both political and economic power. Yet, by virtue of their background and connections, the elites lacked alternative perspectives for socio-economic development, and

saw the maintenance of their class interest as the primary element of the social contract, and the role of the masses as providing for the needs of the elites. Through the legal system, illiteracy and ignorance, the majority of the people continue to be dominated and exploited by the "elite" who maintain unprecedented corrupt and insensitive regimes. Only a violent and bloody revolution would shatter and reverse the system of oligarchy- or what he calls the "perpetual pyramid".

### **Popular Participation and Human Rights**

Agyekum noted that the PNDC's grass-root political conscientization programmes were part and parcel of the process of political empowerment of the masses. Public involvement in the dispensation of justice was an instance of this popular participation. He stated that such actions were in accordance with specific exhortations from the United Nations. The UN General Assembly recognizes that to be effective, popular participation should be consciously promoted by Governments. He cited the *Declaration on Social Progress and Development* proclaimed on December 11, 1969 by the UN General Assembly which called for the adoption of measures to ensure the effective participation, as appropriate, of all the elements of society in the preparation and execution of national plans and programmes of economic and social development. After considering, at the request of the UN General Assembly, the question of popular participation at its 1983 session, the international Commission on Human Rights concluded that the full exercise of the right to popular participation is an important factor not only in the development process but also in the realization of the full range of human rights - civil and political - as well as economic, social and cultural.

The PNDC, he implied, was doing no more than empowering the people through the creation of innovative political organs which supported and gave meaning and framework to the people's aspirations. He stated that full grassroots participation is the true pillar of democracy and stability in Africa, and no hinderance should be put in the way

of African nations researching, experimenting or formulating political systems based on improved forms of their national heritage and popular participation.

### **Economic Development and Human Rights**

Agyekum argued that the debt problem faced by African and other Third World countries causes far more serious violations of human rights in the form of less education, housing, medical care and the curtailment of the right to development, than does "lack of due process". He drew attention to the gap between formal and substantive political independence, noting that flag and anthem independence without economic independence is meaningless. He focused on Africa's precarious economic situation and the monstrous and mounting debt burden which cripples the continent's ability to extricate itself from further debt and inhuman exploitation by western nations and multi-national corporations. He cited a resolution adopted by the International conference on Human Rights held in Teheran, Iran, in 1968, which pointed out that "the enjoyment of economic and social rights is inherently linked with any meaningful enjoyment of civil and political rights", and that "there is profound interconnection between the realization of human rights and economic development". While the conference noted that

the vast majority of mankind continues to live in poverty, suffers from squalor, disease and illiteracy and thus leads a sub-human existence, constituting in itself a denial of human dignity,

the western world refuses to take the most important and decisive actions that would bring about substantive improvement in the living conditions and human rights of people - to write off the debts of Third world nations and renegotiate new and fair trade relations within the framework of a new international economic order. The conference also noted that the ever-widening economic gap between the two polarities, north and south, was detrimental to international human rights advancement, and that

the universal enjoyment of human rights and fundamental freedoms would remain a pious hope unless the international community succeeds in narrowing the gap.

In this regard, it further recognized the duty of the world community to address the problems, noting that it was

the collective responsibility of the international community to ensure the attainment of the minimum standard of living necessary for the enjoyment of the economic, social, and cultural rights set forth in the Universal Declaration of Human Rights depends, to a very large degree, on the rapid economic and social development of developing countries which are inhabited by more than one half of the world's populations whose lot continues to deteriorate as a result of tendencies which characterize international economic relations.

Agyekum criticised the present International Economic Order as unjust. He said that the current order is seriously undermining the right to development. He noted that the UN Commission on Human Rights has studied and agreed that matters related to the scope and content of the right to development are human rights. He lambasted the multitude of known or active human rights organizations, none of which have criticised or brought any pressure to bear on their governments to depart from their unjust economic path. Agyekum attributed the silence to the obvious benefits which all peoples in the western world collectively derive and enjoy from the structural inequalities built into the international trade and development arena. He stated that the crisis of the third world debts is summed up in the following equation: "for every pound put in a charity tin, the western financial institutions take out nine pounds."

He also criticised the attitude and role of some western governments in the maintenance of tax havens and in respect of the ability of corrupt and authoritarian governments and officials to line their pockets. For example, he cited Swiss municipal laws which give protection to tax havens. The west refuses to extradite corrupt and influential politicians who steal millions from their people, on the grounds that the offence committed are of a political nature and therefore that the accused could not be expected to get fair trials. The funds, sometimes running into billions of dollars, are kept in western

banks, with some of the aggrieved countries going back under desperation to borrow their own stolen monies.

### **Reforming the Colonial African Legal Systems**

Agyekum emphasised the superficial nature of attempts to incorporate customary or other African values into the inherited legal systems. He noted that, despite these efforts, the legal systems in Africa remain basically foreign and colonially-imposed. He observed that an ineffective court structure can undermine aims and objectives of the best legislation enacted by the most democratic political system, and that structures, values and attitudes operative in a system are as important as, if not more important than, the structures. He explained that the public lost confidence in the judicial system which functioned to suit sectional and other interest groups, and that in Ghana, a stop-gap was needed to fill a deep vacuum created by the loss of confidence by the populace in the legal system.

According to Agyekum, the Public Tribunals system was introduced in 1982 in order to stabilise the situation and prevent the rule of the might as against the rule of law. He also noted that the system was a serious attempt to restructure a colonially-imposed legal system and to modify or replace the jury system. He stated that the tribunals system stands out as "the most innovative legal institution in Africa or probably the Commonwealth". He pointed to the ineffectiveness and lapse of colonially-imposed legal systems in other parts of Africa and the Third World, and the contemplation of special tribunals in India, Sierra Leone, Zimbabwe and Burkina Faso. He also referred to Lord Roskill's report on Fraud Trials in Britain which suggested, after considering several other options, fraud trial tribunals where the judge will sit with two lay persons.

Agyekum focused attention on some of the key criticisms of the public tribunals system in Ghana. These included the composition of the tribunals; appointments to, and dismissals from, a tribunal; and the initial lack of a right of appeal and right to counsel. He observed that the argument against the existence of the tribunals *per se* had been

abandoned. Instead, the critics were calling for the placement of the tribunals under the supervision and control of the Chief Justice of Ghana the Board of Public Tribunals.

He stated that, both in practice and by law, the tribunals have always given opportunity for legal representation, and that despite the official boycott of the tribunals by the Ghana Bar Association (GBA), more than a hundred lawyers had appeared before the tribunals.

Agyekum also stated that, while the GBA insists on the boycott, many of its leading members still officially appear before special Military tribunals, National and Regional Investigation Committees and other quasi-judicial structures where there are no formal procedures. He added that, in the legal and political history of Ghana, there have been several tribunals, mostly military, with limited rights for accused, including no right of appeal and yet several leading members of the GBA participated, including some of the present leaders. He criticised the hypocrisy of certain "senior" lawyers who apparently take a case, charge exorbitant fees, prepare the defence (including arguments and submissions), give a small fraction of the fees to another lawyer who has not boycotted the tribunals to go and argue the case.

Agyekum responded to the charge that the tribunals lower the standard of proof recognized as valid and crucial to the administration of justice in all common law countries. With respect to the standard of proof required for finding an accused guilty, Agyekum stated that the standard used in the public tribunal law "satisfaction of the tribunal" was synonymous with the standard "beyond reasonable doubt". He dismissed the distinctions which some critics make between the two concepts as merely semantic and spurious. He noted that, in summing up to the jury, the English judge does not tell the jurors that "they should establish the guilt of the accused by proof beyond reasonable doubt". The judge only advises that they should be satisfied to the extent that they are sure

of the guilt of the accused.<sup>2</sup> He argued that it would be frivolous and vexatious if an appeal was lodged against such a direction by a judge on the grounds that he had lowered the standard of proof.

He explained that the tribunals law was drafted bearing in mind the participation of ordinary people in the administration of justice. The non-use of catchy legal phrases or jargons in the law did not by itself suggest in anyway a departure from, and derogation of, recognized international standards.

He also spoke of the training given to all tribunal panellists before they sit on any case as a panel of assessors. He indicated that lay panellists sitting day-to-day on various cases acquire far richer experiences in adjudication than do jurors.

On the future of the administration of justice in Ghana, Agyekum stressed that the tribunals were a stop-gap towards the restructuring of the legal system to reflect our genuine national goals and aspirations of the majority of Ghanaians.

Commenting on logistical constraints within which the tribunals have to function, Agyekum observed that the tribunals had made a significant impact within a short time of their set up, and that this was largely due to hard work, honesty and justice, and not because they have full logistic support.

### **Death Penalty**

With regard to the use of the death penalty, Agyekum state that while he was personally opposed to the practice, he believed it was imperative in the current stage of the nation's development efforts to maintain it. He stated that the social consequence of abolishing the death penalty, an escalation in crime, was too remotely related to the

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<sup>2</sup> This, of course, is not accurate. In criminal matters, "proof beyond a reasonable doubt" is a cardinal principle of the English criminal justice system. The test of finding liability "on a balance of probabilities" obtains in the civil realm of the English judicial system.



experiences of "those who live in Europe and condemn death penalty for murderers, armed robbers and for treason" in Ghana.

He pointed to mob justice visited on those who engage in certain categories of crimes as a reflection of popular revulsion to these crimes. In the cities, ordinary Ghanaians typically throw stones at thieves and robbers and instantly kill some of them in the open, in broad day-light. Sometimes, suspected criminals are "necklaced", that is, a tire soaked in gasoline is placed around their necks and they are set on fire and burnt alive. While he personally condemns the practice, it suggests to him that the public deems the offenses which attract it as repulsive and deserving of the severest punishment possible - death! Accordingly, he stressed that the mood of the country is a factor that policy-makers must take into account in developing solutions to problems. He also pointed out that general deterrence is not the only basis for imposing the death penalty; in addition to preventing further crimes by the convicted criminal, pure and simple vengeance was an important motivation. He argued that society ought to be able to engage in social retribution against persons who commit excessive, dangerous and very grave criminal acts!

He observed further that the criticism of the tribunals system was often made in bad faith. As an illustration, he stated that as soon as the PNDC hinted in January 1982 that it would set up Public Tribunals alongside the traditional courts, the British section of the International Commission of Jurist came out in opposition when in fact the law setting up the tribunals and its operations had not even been drafted, let alone passed.

Agyekum concluded his address by emphasizing that the evaluation of human rights in Africa must be pursued in an African context, paying regard to the history, environment, peculiarities and aspirations of the people. European values, criteria and yardsticks may not be suitable for assessing "human rights" in a universal context<sup>3</sup>. He

<sup>3</sup> At the recent World Conference on Human Rights held in Vienna, Austria, from June 14 - 25, 1993, the issue of particularity versus universality of human rights was forced to centre-stage by a number of countries in the South, notably China, Pakistan, Burma, Iraq, Iran and

noted further that the bias in favour of civil and political rights by several human rights groups, at the expense of economic, social and cultural rights is misplaced and detrimental to Africans. He urged the critics to extend their concerns to cover social, economic and cultural rights which constitute, in the first instance, the real substance and business of "living" as human beings.

The full text of Agyekum's address appears in Appendix C.

### **The Ghana Bar Association**

The concerns expressed by Amnesty, the ICJ and various western Governments with respect to the tribunals system are generally shared by the system's local critics. What follows is a detailed presentation, illustration and analysis of the substantive arguments raised by the major domestic opponent of the tribunals system, namely the

Yemen. The concept of universality was strongly attacked, with many southern countries calling for a recognition of regional and cultural diversity and particularity in the conceptualization of human rights. These countries perceived western nations' insistence on a universal conception of human rights as Euro-centric and biased in favour of narrowly-defined civil and political rights at the expense of economic, social and cultural rights. Proponents and supporters of the universality argument countered that advocates of particularity were hiding behind culture and the developmental drive to secure a leeway for the continued violation of the basic rights of their citizens.

In its final declaration, the Conference endorsed the concept of universality, asserting that "all human rights are universal, indivisible and inter-dependent and inter-related", and the international community must "treat human rights globally in a fair and equal manner, on the same footing and with the same emphasis". In the end, the Conference did not deal with the substantive issue of the interconnections between economic conditions and the enjoyment of human rights. The grave economic inequalities between North and South which are deeply embedded in the current world economic order, and which seriously violate most of the basic rights of people in the South, was left unaddressed.

GBA. Its criticisms of the tribunals system provide further elaboration on Amnesty's concerns. The counter-arguments raised by George Agyekum are also used to inform the subsequent analysis.

At the domestic front, the most ardent critic of the tribunals system has been the GBA. Until the establishment of the public tribunals in Ghana, the GBA was the sole authority with statutory powers to regulate legal practice in Ghana. As a regulatory professional body, membership in the GBA was a mandatory requirement for all legal practitioners in the country. The GBA's opposition to the tribunals system was nurtured in the crucible of Ghanaian politics. Thus, while the substance of its concerns were identical to those of Amnesty, the articulation of the concerns had a distinctive Ghanaian flavour, wrapped as it were in the intricacies of local politics, personality conflicts, class cleavages and, to a limited extent, perceived ethnic factionalism. At any rate, like Amnesty, the central concerns of the GBA regarding the tribunal system relate to five crucial issues, namely: (1) the death penalty; (2) the lack of appeals; (3) the use of lay judges; (4) the unclear rules of evidence; and (5) the inadequate procedures for commuting death sentences.

Following the conclusion of its Annual General Meeting held in Kumasi on September 27, 1982, the GBA issued a public statement to the effect that its members would boycott the proceedings of the tribunals. The GBA's reasons for this decision were contained in a statement published in the September 28, 1982 issue of the Daily Graphic.

### **A Less Than Noble Motive?**

In its declaration of boycott of the tribunals, the GBA argued that the creation of the public tribunals was a misguided attempt to supplant the ordinary criminal courts of Ghana. During my field research in 1990, Mr Peter Ala Adjetey, immediate past-president

of the GBA (1985-1989), explained the complex mixture of "feelings and intentions and motivations" that influenced the creation of the public tribunals system as follows:

The fundamental reason publicly articulated by the government for the establishment of public tribunals is the inordinate delays which were alleged to characterize the traditional courts. There was the feeling that too much technicalities bogged the regular courts. There was also a feeling that 'justice' should be administered by ordinary people so that it is people's justice- a view which implies that the personnel of the existing judiciary are not part of the people. Somewhere along the line, there has been a dislike of lawyers as a profession, and it was considered that the administration of law should be taken away from lawyers...Indeed, there was an intense dislike of professional people as a whole, especially doctors, engineers, architects, etc. Lawyers were targeted for exclusion and persecution. There may be a deliberate intention to destroy lawyers as a class, and the establishment of public tribunals was an instrument for this intended destruction. Thus, it is a complex of feelings and intentions and motivations, not just one reason for the establishment of public tribunals (Adjetej, 1990, Interview. [Emphasis added]).

The suggestion that the creation of the public tribunals system was partially the result of frustrations with excessive technicalities and delays in the traditional court system has already received considerable attention in this work.

It is pertinent to point out, as Ala Adjetej observes, that the GBA also saw the creation of the tribunals as a reflection of a misguided class struggle born out of a lack of political and ideological maturity and sophistication on the part of certain elements within the PNDC regime:

Public tribunals were also a product of the philosophical predispositions and ideological bent which characterized the government... There were also those vanguards of the revolution who believed passionately in socialism - even in communism - and as a result of misunderstanding what was happening in the Eastern-bloc countries, insisted that some version of socialism and socialist justice should be instituted in Ghana (Adjetej, 1990, Interview).

While the charge that the advocates of socialist legality do not have an adequate grasp of political ideologies and the complex issues involved in the administration of justice is debatable, there is validity to the claim that the introduction of the tribunals was partly a product of deep-seated commitment to socialist ideology on the part of an influential segment of the PNDC regime.

As pointed out earlier, the regime's predominant inclination to socialism and its populist tendencies were major factors in the creation of the tribunals, as was the overall influence of leftist interest groups and working-class demands for social justice. Socialist justice, euphemistically known as "popular justice", was to become the counter-force that would check the excesses, power and inefficiency of judges, the technicalities of the common law and the contradictory pre-eminence and aloofness of the Westminster courts system which, more than anything else, symbolised "capitalist justice".

### **Initial Lack of Appeal**

The GBA also raised serious objections to the absence of a right of appeal from the tribunals. It also complained that by making it impossible for the High Court to supervise the tribunals and review their decisions, the ordinary person appearing before the tribunals was being deprived of judicial protections against violations of due process of law, including errors of law and excess of jurisdiction by the tribunals.

### **Lack of Supervision**

Under the tribunals system, the usual supervisory jurisdiction exercised by the High Court over the traditional inferior courts is eliminated. Section 10 of *PNDC Proclamation 1981* stipulates that the tribunals "shall not be subject to the supervisory jurisdiction of any court", and the 1984 version of the public tribunals law affirms the exclusion of the proceedings and rulings of public tribunals from any court review. According to the *PNDC Proclamation, 1984, Law 78*, section 24(1):

No court or other tribunal shall have jurisdiction to entertain any action or proceeding whatsoever for the purpose of questioning any decision, finding, ruling, order or proceeding of a Public Tribunal set under this Law; and for the removal of doubt, it shall not be lawful for any court to entertain any application for an order or writ in the nature of *habeas corpus*, *certiorari*, *mandamus*, prohibition, *quo warranto*, injunction or declaration in respect of any decision, order, finding, ruling or proceeding of any such Public Tribunal.

It must be noted that, prior to the advent of the PNDC, the SMC and the AFRC had also passed statutes which removed the right to appeal and the supervisory powers of the superior court over military tribunals and other judicial and quasi-judicial bodies established by such regimes. As Gyandoh points out, however, military tribunals have traditionally been held to constitute inferior tribunals and consequently subject to the supervisory jurisdiction of the High Court (1989:1140). The introduction of these military statutes was manifestly intended to effectively neutralize and prevent the High Court's supervisory jurisdiction over the tribunals. Indeed section 24, sub-section 2 of the *PNDC Proclamation, 1984, Law 78* provides further that:

No decision, order, finding, ruling or proceeding of a Public Tribunal set up under this Law shall be regarded as invalid by reason of any defect in the composition of the Tribunal or the appointment of any member thereof.

Thus, The GBA objected to the complete autonomy from supervision by the High Court granted to the public tribunals. Such autonomy, the GBA held, precluded the reversal of unjust decisions handed down by the tribunals.

The possibility of judicial review is thwarted by the fact that the normal prerogative orders or judicial remedies of *certiorari*, injunction, *mandamus* and *quo warranto* by means of which the superior courts exercise control over administrative actions of inferior judicial or quasi-judicial bodies are inoperable under the public tribunals system. Peter Ala Adjetey observes that:

There is hardly any relationship between the regular courts and the public tribunals. The tribunals and the regular courts run like parallel streams, the waters of which never mix. And that is a fundamental objection of the GBA because it makes for two systems of justice which is contrary to the spirit of the PNDC's own law. PNDC Law 42 advocates one system of justice (1990, Interview).

Consequently, Adjetey recommends the integration of the dual systems of law into a cohesive and comprehensive whole:

There should be a linkage between the tribunals and the regular courts to ensure the surveillance or control of the tribunals, and that the same system

of justice is brought into play at the end of the day so that we have one corpus of law in the country (1990, Interview).

### **Tribunals' Lack of Autonomy**

The GBA has objected to what it perceives as the tribunals' lack of autonomy from governmental control. According to the GBA the personnel of the public tribunals in Ghana do not have the degree of independence traditionally enjoyed by their counterparts in the regular courts. Tribunal chairpersons and panel members, all of whom are essentially government appointees, serve their term at the mercy of the PNDC. The GBA sees this situation as amounting not only to governmental control of the judicial machinery but also as thwarting all possibilities for free and independent judicial decision-making, the building of rational and effective case law, the accumulation of experience, and most importantly, eroding public confidence in the integrity of the judiciary. Peter Ala Adjetey succinctly makes the point when he says:

Another objection to the tribunals system is the lack of security of tenure. The personnel are appointed and removed by executive fiat - without going through any established procedures. In other words, they lack independence, and the tendency will be for them to become convicting judges (Interview, 1990).

Arbitrary dismissals, interdictions and "retirement" of tribunal personnel both attorney and lay have been quite common. Very often, this has been justified on the grounds that such personnel have become peccant or corrupt; in some instances (such as that of Kwame Arhin, former Chairman of the Ashanti Regional Public Tribunal) criminal charges have been laid against incumbents to force their exit and bring them shame and obloquy. No systematic procedure for the removal of tribunal personnel was ever established. This anomalous situation requires further elaboration.

Throughout the common law, judicial independence has been held to constitute an essential precondition for the judicial impartiality and objectivity deemed necessary for ensuring fairness or an absence of bias and hence justice. Thus, judges are typically

provided with security of tenure, and a number of special constraints placed upon them both during and after their tenure of office. These constraints are intended to provide for a special integrity on the part of the judiciary. The removal of judges from office is purposively made difficult in order to assure them immunity from fear of governmental retribution (Barnhost et al, 1992:28; Gall, 1990:245). In the Canadian context, for example, the independence of judges is considered crucial for the effective operation of the judiciary. Judges are able to make their decisions without the fear or influence of public opinion or of the government which appoints them. And judges can only be removed from the bench for a serious breach of duty, or a debilitating infirmity affecting their judicial role performance. In England, "a judge of the high court can be removed only by a joint resolution of both houses of parliament. This has not happened in centuries" (The Economist, August 13, 1983:51).

Judicial independence is one of the most important principles and foundations of the common law tradition. In Canada, for example, following the so-called "judges-revolt" over the meaning of judicial independence in 1985, the Supreme Court of Canada held that the major bench-marks of judicial independence were (a) security of tenure; (b) financial security; and (c) "the institutional independence of the tribunal with respect to matters of administration bearing directly on the exercise of its judicial function" (Gall, 1990:247).

The *Bitars-Fordjour* and the *Safo Adu* cases (discussed below) demonstrate the several important respects in which these pillars of judicial independence were lacking in the public tribunal system in Ghana. Commenting on the tribunals system's lack of autonomy from executive interference, Gyandoh (1989) notes that:

excessive politicization of the legal process, as typified by the PNDC's arrogation of judicial power to itself, also raises some serious problems. Although the legal and political processes are necessarily complementary to each other, the Usurpation of the judicial power by the government clearly creates the conditions for arbitrariness in the administration of justice. Since the limits of, and control over, official power are indeterminate in such a political culture, individual cases are more than likely to be decided according to the whims and caprices of the ruling elite. This creates fertile grounds for the abuse of human rights. The reasons for this are quite clear.



Such a political culture simply breeds lawlessness and arbitrariness everywhere. The pretence that legality exists because of the formal existence of law rings hollow. It is a throw back to the age of absolute monarchs and unenlightened despots. Africa deserves to be rid of such obscurantist and absolute notions of aggrandizement of power (Gyandoh, 1989:1172- 1173).

Another objection raised by the GBA concerned the deliberate absence of the normal protective rules of admissibility and exclusion of evidence from the law governing the public tribunals system. In serious cases such as sexual assault, treason, homicide and armed robbery, the rule against the admissibility of hearsay evidence is widely perceived as one of the fundamental protections available in the common law against a careless and hasty conviction of an accused person. This situation is further compounded by the involvement of lay persons on tribunal panels. As indicated earlier, the GBA and AI have both been particularly critical of lay participation in the adjudication of cases before the tribunals.

#### **Executive Control of Public Tribunals**

Although the tribunals enjoyed complete autonomy from the supervisory jurisdiction of the High court, this does not mean they were independent of governmental control. Indeed, the tribunals were intended as political instruments for advancing the PNDC's brand of popular justice and functioned as part and parcel of the grand political machinery for entrenching the regime in power. The GBA regarded the quintessential politicality of the tribunal system as inappropriate for the administration of justice, and consequently rejected it. Peter Ala Adjetey articulates the GBA's objections as follows:

Public tribunals lack the independence which the ordinary courts, to some extent, have. Recent events have proved there's hardly any vestige of independence in the public tribunals. Apart from everything else, we also think that the public tribunals are also objectionable from another point of view, namely the blatant interference from the Executive with the decisions of the public tribunals. Some decisions of the public tribunals are set at naught by the Executive. For example, the Tema public tribunal acquitted and discharged a man. The decision was openly and strongly attacked by a member of the ruling PNDC.... The man was arrested, tried, convicted and

executed. We also know from the trial of Mr. Owusu- Fordjour that the personnel of public tribunals are influenced by the government (1990, Interview).

### **Executive Interference, Corruption and Intrigues in the Public Tribunal System**

One fundamental criticism levelled by the GBA against the PNDC regime is that it frequently interfered with the administration of justice in Ghana and undercut the autonomy of tribunal judges through intimidation, harassment, manipulation, dismissals and other cover intrigues. Apart from the specific charge that tribunal judges lacked legal training and judicial acumen, tribunal personnel were also accused of corruption and vindictiveness, petty moral peccadilloes, and a lack of judicial integrity. In this section, I review and discuss a number of actual cases bearing on these serious allegations, and explore their implications for the administration of justice in Ghana

#### **i. The People v. Ellison Owusu-Fordjour**

The *Ellison Owusu-Fordjour* trial, also known as the *Bittars case*, provides an excellent example of the kind of controversy over alleged governmental interference and intimidation, judicial peccancies, bribery, political intrigue and chicanery that surround the tribunals system. On August 23, 1989, an Accra public tribunal chaired by Mr. Kwaku Boakye-Danquah gave judgement in a case in which a lumbering firm, Logs and Lumber Ltd (LLL), its Lebanese owners and two foreign firms had been charged with conspiracy to commit acts intended to sabotage the economy of Ghana (*West Africa*, September 4, 1989:1488). The accused had allegedly conspired to deny the Ghanaian state of foreign exchange from timber exports between 1985 and 1988.

The tribunal found LLL guilty and ordered it to pay 4.2m deutsche marks (DM) and 1.3m pounds to the state within 18 months, or in default be confiscated to the state. One of the foreign firms, the U.K.-based Crane Bouquet, which allegedly acted as LLL's agent was fined \$2.5 m (US). A ban was imposed on the operations of Crane Bouquet in Ghana

pending payment of the fine. Additionally, Mr. W. J. Bittar, Executive Director of LLL was sentenced to a three-year prison term with hard labour and a fine of 300, 000 DM. Failure to pay the fine would result in 15 years' imprisonment. Another Director of Fyne Ltd, a furniture manufacturing firm was sentenced to 18 months' imprisonment and a C10m fine or in default, 10 years in prison. J. Bittar, chairperson of LLL was given a fine of C20m or 15 years imprisonment in default, while the Operations Manager of LLL, Mr. Kwasi Obeng received a four-month jail term plus a fine of C5m or an eight-year prison term in default for forgery. In the opinion of the tribunal, Obeng acted on the instructions of W.J. Bittar, so it accordingly ordered LLL to pay Obeng's fine. For lack of evidence, the second foreign firm involved in the case, Timber and Trading Agency of the U.K. was acquitted and discharged on a conspiracy charge (West Africa, September 4, 1989).

In principle, this might seem like a regular open-and-shut case except for the gory and embarrassing details that subsequently followed during the course of the trial and its aftermath. The case took a rather dramatic and quirky turn of events when, on the day of the judgment, Lt. Comdr. Assasie Gyimah of the PNDC headquarters announced that seven unnamed persons, including two lawyers, had been arrested for attempting to bribe members of the public tribunal trying the *Bittars* case.

In what was apparently a related move, the PNDC froze the bank accounts of seven persons including the convicted N. Bittar and counsel for the Bittars and LLL, Mr. Ellison Owusu-Fordjour and Mr. S.A. Arthur (West Africa, September 4, 1989). In the course of the *Bittars* case, the chairman of the tribunal, Mr. Boakye Danquah alleged that the defense--accused and counsel-- tried to bribe him and Alhaji Staff Sergeant Abdul Tonka, one of the panellists. As a result, eight persons were arraigned before a National Public Tribunal on various counts of conspiracy, corruption and giving of bribes to influence the chairman and members of a public tribunal in order to pervert the course of justice (West Africa, January 8, 1990).

The first accused was Ellison Owusu-Fordjour, a private legal practitioner, retired Commissioner of Police and former Commissioner for Education under the SMC regime. Also charged were Messrs Emmanuel Arthur-Mensah, a private legal practitioner; Solomon Quandzie and Victor Dotse, both lawyers and legal officers at the Office of the Co-ordinator, Revenue Commissioners and Investigations in Accra; Nadim and William Bittar; Alhaji Alidu Abukari, an employee of the Bittars, and Elias Joseph, a friend of the Bittars. All eight accused persons were found guilty and sentenced to various prison terms and fines. The eight accused persons were sentenced to a total of 98 months (8.166 years) or an average of 12.25 months plus a total fine of C15m (approximately \$50,000 (US) calculated at April 1990 exchange rate of the Cedi). The sentences were as follows:

**Table 4. Sample of Tribunal Sentences in a Bribery Case.**

Name of Accused Person	Sentence Imposed Prison	Fine	Default Penalty Prison	Fine
E. Owusu-Fordjour	16 Months	C2m	3 Years	C1.5m
E. Arthur-Mensah	16 Months	C2m	2 Years	-
S. Quandzie	10 Months	C300,000	1 Year	-
V. Dotse	10 Months	C300,000	1 Year	-
N. Bittar	12 Months	C5m	5 Years	-
W. Bittar	12 Months	C3m	5 Years	-
A. Abukari	12 Months	C1m	1.5 Years	-
E. Joseph	10 Months	C2m	3 Years	-

In the course of the trial, the defense led evidence to show that the tribunal chairman in the *Bittars* case, Mr. Boakye- Danquah had persistently sought and received various sums of money and favours from the defense counsel. The defense alleged that Boakye-Danquah pitifully requested and received monetary assistance to facilitate his wedding. In soliciting monies and favours, Boakye-Danquah had allegedly portrayed himself as a financial wretch deserving compassion and put the defense in a difficult and equally compromising situation. As Oquae observes:

Apparently, Mr. Boakye-Danquah had not distanced himself in a way that is expected of a Judge who sat on serious cases including murder and treason and appeals that constituted final verdict in several cases- indeed the equivalent of a Supreme Court Judge (1990:31-32).

It seemed obvious that it was Boakye-Danquah who actually pursued the accused by visiting their homes and offices, laying bare his matrimonial and pecuniary difficulties and begging for money from them. Not surprisingly, on April 17, 1990, the PNDC government announced that Mr. Boakye-Danquah had been asked to proceed on leave pending an inquiry into allegations of misconduct incompatible with his status as tribunal chairman. The following individuals were also fired and ordered to "revert to their former employment": Mr. A.K. Agbesi and Miss Rita Osumanu of the Greater Accra Regional Public Tribunal; Alhaji Staff Sergeant Abdul Tonka of the National Public Tribunal, and Messrs K. Poku- Buah and E.E.K. Ampim of the Tema Public Tribunal (West Africa, April 30, 1990).

Boakye-Danquah was allowed to continue with his duties as chairman of a reconstituted public tribunal until early March 1992, when he appeared in London. On March 14, 1992, he gave a damning indictment of the tribunal system of which he had been a part since 1986. Granted a voice in British Broadcasting Corporation (BBC) and Voice of America (VOA) feature interviews, Boakye-Danquah claimed that he had fled Ghana to the United Kingdom because his life was in danger. Interviewed by Robin White of BBC's Focus on Africa program, Boakye-Danquah claimed that he fled Ghana through the bush to Cote d'Ivoire and subsequently to London, having received various intelligence reports that his house was slated for attack by supposed armed robbers who would shoot him in the course of the attack (West Africa, April 6, 1992; Ghana News, April 1992). According to the former tribunal chairman, what led to his eventual defection was the trial of Dr. Kwame Safo Adu, managing director of a private pharmaceutical company in Ghana.

ii). The People v. Dr. Kwame Safo Adu

In early November 1990, the managing director of Industrial Chemical Laboratories Ltd (ICL), Dr. Kwame Safo-Adu, was charged, together with two others, with misapplication of public property and abetment of fraud. He is a prominent Ghanaian physician and politician, and was formerly a cabinet minister in the Government of the Second Republic (1969-72). He previously served as a member of the Council of State in the Third Republic. Safo-Adu was alleged to have misapplied a portion of a \$700,000 loan he procured from two multilateral banks - the World Bank and the African Development Bank - to build a chemical plant for the manufacture of pharmaceutical products in Ghana. (In early 1990, the nearly-completed factory located in Kwamo near Ejisu in the Ashanti Region was seized by armed troops, allegedly accompanied by the Head of State himself (Ghana News, April 1992:9) ). Safo- Adu pleaded not guilty to the charges when he appeared before a national tribunal chaired by Mr. Boakye-Danquah.

Andrews Kumi Wontumi, senior director of the National Investment Bank and Frank Kwaku Bruce, acting director of Pharmaceutical Services at the Ministry of Health who were charged with aiding and abetting Safo-Adu also pleaded not guilty. They were remanded in custody till November 9, after the tribunal rejected an application for bail submitted by Safo- Adu's counsel contending that the charges were misconceived. The charges were based on the report of a sub-committee of the National Investigations Committee set up in November 1989 to look into the circumstances surrounding the acquisition of funds to set up ICL. The prosecution alleged that \$2, 522.09 out of \$616, 000 drawn by ICL out of the loan was diverted and used for the importation of shampoo (West Africa, November 5, 1990).

In the course of the trial, Kwame Safo-Adu's defence counsel was arrested and charged with the same offence of economic sabotage, and he was subsequently defended by a British lawyer. The London-based Democratic Alliance of Ghana (DAG) expressed

concern about the arrest, detention and trial of Dr. Kwame Safo- Adu on the grounds that the charges preferred against him were baseless, and his trial politically motivated as the accused had joined the national executive committee of the pro-democracy Movement for Freedom and Justice (MFJ) just a week before his arrest (West Africa, November 12, 1990). In any event, Safo-Adu was acquitted and discharged by the national public tribunal chaired by Boakye-Danquah.

In his BBC and VOA feature interviews on March 14, 1992, Boakye-Danquah claimed that the Chairman of the PNDC, Flt. Lt. Rawlings had a putative "personal interest" in the Safo-Adu case. During the interview, he spoke of the "sorting out of the bric-a brac (sic) that took place in the back-rooms of the PNDC to fix the case", and that it was "JJ Rawlings who had initiated and insisted on the prosecution of the case particularly of Dr. Safo Adu".

Similarly, in a special feature interview with Ghana News, Boakye-Danquah points out that the tribunals were created to do "a dirty job for the PNDC, particularly for two personalities- Capt. Kojo Tsikata and Chairman J.J. Rawlings", and provides the following illustration of executive control of the tribunals through the selection of courts and the issuing of direct instructions to the tribunal chairman:

On October 19, 1990, at about 11:30 am, I received telephone call from the Ministry of Interior. A female voice informed me that the then Secretary for the Interior Nii Okaija Adammافیo was on the line. I was instructed by Mr. Adamافیo to inform my Tribunal panel to stand by to try a case said by him to be of "great public interest and one in which the Head of State and the Chairman of the PNDC, Flt. Lt. J.J. Rawlings himself, had a personal interest (Ghana News, April 1992).

Boakye-Danquah further alleged that following the "not guilty" verdict, the government made his life so unbearable that he had to bolt from the country. He denied a suggestion from BBC's Robin White that he fled Ghana due to his shady deals in timber transactions, claiming that he in fact handed over cash of nearly 50,000 pounds sterling, C5m and gold wrist watches to national security personnel in Ghana (West Africa, April 6, 1992).

Boakye-Danquah claimed that from the very inception of the Safo-Adu case to its conclusion, everything reeked of intrigue and manipulation. Even the choice of tribunal was allegedly determined on purely political grounds. Boakye-Danquah claims that he was "hijacked" to adjudicate the Safo-Adu case. He alleged that Mr. George Agyekum, a more senior tribunal chairman, refused to take the case as a result of an "ego duel with Mr. Ato Dadzie, the PNDC secretary who has oversight functions (sic) for the tribunals from the Castle" (West Africa, April 6, 1992). According to his version, Chairman Rawlings had such intense personal interest in the case that "he gave a deadline for the trial to commence or else". Fearing that he might lose his job at the Castle (the seat of Government in Ghana), Ato Dadzie pressurized his friend, the then Interior Minister Okaidja Adamafio, to "hijack the Boakye-Danquah panel for the Safo-Adu trial (West Africa, April 6, 1992). He adds:

Apparently, I had been hijacked to try **DR SAFO ADU AND OTHERS**, to save Ato Dadzie, deflate the irritable disposition of Jerry Rawlings and as Mr. Bright Akwetey later explained to me to rehabilitate my image which had taken a vicious battering in the **OWUSU FORDWOUR** Case and which aftermath, the perfect Machiavellian deviousness and duplicity characteristic of the PNDC Secretariat had been voraciously seized upon by that incarnation of Machiavelli himself at the PNDC Secretariat to embarrass me after his coalition of forces and personalities had failed to save their surrogates in the **OWUSU FORDWOUR** trial (Ghana News, April 1992) [Emphasis original].

Once a panel had been secured, Boakye-Danquah alleges that he was frequently cajoled and pressured to hand down a decision that would please his political lords:

In the latter part of November 1990, it was clear that I was being cajoled into taking a position, even at that early part of the trial, which will give the government the satisfaction that they were going to secure a conviction against the accused persons (Ghana News, April 1992).

The alleged whimsical or capricious selection by government agents of a given tribunal for the adjudication of a particular case departs somewhat from the official profile of the selection process. In the statement below, George Agyekum, the chief legal architect of the tribunal system, answers a series of questions put to him in an interview with B.F.



Bankie on May 20, 1987 ("How are cases prepared for trial? When you receive a docket is it ready for trial? Can you explain the stages that docket might have gone through or how the investigations might have been conducted?"):

None of these matters come to us. As far as we are concerned the cases are presented by the Office of Special Public Prosecutor (OSPP) whether it was investigated by the Police or the National Investigations Committee (NIC). It is the OSPP which prefers charges against the person and they come and prosecute before us. The OSPP will come and file a charge in Registry where it is recorded, then the Register will direct the case to a particular court. When I was chairman of the Board of Public Tribunals, (August 1982 to September 1984) I directed which court a particular case should be sent to... As regards the trial- the SPP files the charges. The charges are brought to the court room, they are read out to the accused person. The plea of guilty or not guilty is taken. The Prosecutor calls his witnesses and tenders his exhibits as his case goes along, to prove his case based on the charges as preferred against the accused person. So the agency which did the preliminary investigation presents its report to the OSPP (Bankie, 1987:40). [Parenthesis and emphasis mine].

During my field research in the summer of 1990, the Registrar of Public Tribunals refused my request for an interview but referred me to Mr. George Agyekum who in turn gave me a copy of his interviews with Mr. B.F. Bankie from which the above quotation is taken. The trial procedure as described above fits my observations of the tribunal proceedings. I was, however, unable to verify the account of the process by which cases were referred to particular tribunals, nor the crucial variables which ultimately determined or influenced which tribunals received which dockets.

From Agyekum's own statements above, it would appear that personal opinions and political values and interests rather than some formalized guidelines were implicated in the channelling of dockets to particular tribunals. This contention is given further validation by the following statement from Boakye-Danquah concerning the Safo-Adu trial:

Throughout the trial I was subjected to intense and close surveillance and my every movement was monitored by intelligence agents of the state... In terms of the manipulation, deviousness, chicanery, interference, intervention, threats and all that is unsavoury which the PNDC organization visits on the tribunals; inviting them to justify the extra-judicial acts and whimsical conduct of key actors of the regime particularly Jerry Rawlings; the combination and orchestration of all anarchic forces in CASE No

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is without precedent. (Ghana News, April 1992) [Emphasis in original].

To the extent that the above statements have any merit, they can be seen as acutely reflecting the nature and degree of governmental intervention in the tribunal system as well as the obtuseness and farcical quality of judicial independence enjoyed by public tribunal personnel. As an integral part of the PNDC political machinery for ensuring its dominance, tribunals enjoyed autonomy to the extent that their decisions pleased their political lords. Failure to produce a PNDC-anticipated verdict in particular cases invited serious governmental interventions and reprisals. When the judgments of tribunal personnel gave joy or satisfaction to their political masters, the former could hope to retain their jobs a bit longer.

Perhaps, it is the political correctness of tribunal judgments that determined the longevity of tribunal panellists and chairpersons. This may explain why Boakye-Danquah was briefly suspended and later allowed to continue as a tribunal chairman despite the ugly allegations levelled against him in the *Bittars* and *Owusu Fordjour's* cases. His brief leave of absence might seem as a temporary stop-gap that gave the PNDC the aura of objectivity and accorded a majesty to the rule of law in Ghana. In a written statement issued in London on March 14, 1992, Boakye- Danquah makes the following observations on the *Bittars* case:

I tried the Bittars. I bore them no ill-will. I convicted them on the basis of the evidence on record. It is only coincidental that their conviction gave the PNDC smug satisfaction, having regard to the background of intrigues from high places within the PNDC itself, the National Investigations Committee (NIC), the timber sub-committee and elsewhere from the moment the charade of timber investigations and the wheeling and dealing at the PNDC Information Center begun through the fixing of the matter for trial, the preparation of an appropriate tribunal to try the case, the sanitization of witnesses for the prosecution to adduce 'clean evidence', and the careful travail of prosecutors...through all pressures exerted on me personally throughout the trial and its inevitable denouncement (West Africa, April 6, 1992).

Once again, to the extent that Boakye-Danquah is credible, his statements highlight the diabolical nature of governmental interventions and political machinations and intrigues operative in the public tribunals system in Ghana.

These claims, if true, must be seen not as isolated instances of judicial and administrative peccadilloes; they must be seen as a crucial part of the techniques of subordination by which despotic and totalitarian regimes maintain their hegemony over key sectors of the politico-economic system. Quite significantly, the *Bittars-Owusu Fordjour* and *Safo-Adu* cases are only the "juiciest", and hence most highly publicised episodes revealing the extent of political interference in the work of public tribunals. Indeed, the two cases are part and parcel of a larger phenomenon operating on a continuum ranging from no interference through minimal to maximum or absolute interference.

The specific character and modality of interference is dependent on the "juiciness" or political stature of a case, the regime's perception of the political orientation of the accused (if any), and the degree of governmental antipathy or affection towards the accused. While the factors influencing the likelihood of governmental interference in the tribunal operations are matters begging for empirical exploration and analyses which lie outside the scope of this dissertation, it can be safely inferred from the available evidence that political interventions are quite common in the tribunal system.

If Boakye-Danquah's indictment of the PNDC's machinations in the People v. Dr. Kwame Safo-Adu and Four Others (Case No. 119/90) has any merit, the extent of governmental interference in the tribunals system can be perceived as wide and pernicious indeed. The intimidation strategies entail both covert and overt application of pressure tactics ranging from blatant psychological manipulation (including the use of voodoo or the occult), to threats of military abduction:

Very early in the course of the trial, my wife who was nursing a baby told me several times that she met people she could identify as operatives of the intelligence system who warned her to advise me to do the proper thing. They were telling you that you better take care and not embarrass the Head of State otherwise you would have trouble. My house was subjected to very

suspicious burglaries. My wife would wash shirts, baby napkins. These people would come and take baby napkins, my pants (underwear), towels, and leave the rest. There was a great deal of psychological pressure. Sometimes you wake up and see that three mice have been killed and left in front of the main door. My wife was traumatized when several times particularly worthless articles were pinched and messages scribbled that I and my family would be abducted by armed robbers. My wife was followed almost anytime she went to town (downtown) by strange people asking whether she was safe staying with me. She had to leave the matrimonial home to live with her mother. Even then the harassment did not stop. She would suddenly wake up in the night and scream..... Throughout the trial my movements were monitored. At the trial security agents made you feel their presence. Several times in the course of the trial, attempts were made ... to create discord between me and my panel, to portray me as anti-establishment (Ghana News, April 1992). [Parenthesis mine].

The abduction and subsequent cold-blooded murder and burning of three High Court judges (Mrs. Justice Cecilia Koranteng-Addo, Mr. Justice Kwadwo Agyei Agyepong and Justice Fred Poku Sarkodee) and a retired army officer (Major Sam Acquah) on June 30, 1982, provide ample justification for anyone to take threats of abductions issuing from government circles seriously. Mr. Joachim Amartey Kwei, former trade unionist, PNDC member, and long-standing friend of Chairman J.J. Rawlings, together with five others, was arrested, tried, convicted and subsequently executed on August 10, 1983 for the abduction and murder of the four people whose charred bodies were found in the Dodowa plains (near Accra) three days after their disappearance from their homes (West Africa, September 8, 1983).

It is impossible to tell how many "ordinary" people have "evaporated" or "disappeared" under mysterious circumstances since the onset of the revolution. It is safe to surmise that in the heat of the revolutionary frenzy that gripped the nation, many hundreds of people lost their lives through the process of evaporation - unrecorded capture, torture and murder of serious problem people, including common criminals such as armed robbers, and personal and political enemies of government functionaries, On July 28, 1983, behind the busy Airport Motel opposite the old Passport Office Legon-Madina road, I was witness to the "unauthorized" public execution of five young men who were later rumoured to be "airport baggage thieves". Their bodies were left behind for several

patrons of the motel and the hundreds of aspiring travellers and passport contractors gathered at the Passport Office to feed their curious eyes on. An hour later, the three soldiers who carried out the execution returned in two taxi cabs, hauled the bodies into the trunks and drove away. There was no mention of the incident by any media outlet in Ghana. No record of it was filed at the Airport Police Station located within 300 meters of the site. An officer at the counter told me a week later, "We have no record of nothing like that. We don't know nothing".

It is probable that the venue of the execution was deliberately chosen for its high visibility, the intent being the provision of a public spectacle. The spectacle of public executions, authorized or otherwise, accomplishes the same goal: the inculcation of fear in the citizenry. This is a form of terrorism which aims at controlling people by instilling fear in them, the ultimate exercise of condign power.

In any event, even the cautious George Agyekum admits that governmental interventions in the tribunals system occur. In an interview with a Dutch legal scholar, Peter Hermes, published in the Ghana Newsletter No. 11 in the Autumn of 1984 and cited by B.F. Bankie (1987), Agyekum allegedly admits that Rawlings had personally intervened in two criminal case adjudicated by the tribunals:

The interview referred to two interventions by the Head of State who had ordered the re-opening of two cases. Here Agyekum reminded Hermes that it was the Head of State who had initiated the foundation (sic) of Public Tribunals and that he feared, in these two instances, a departure from the original objectives of these courts. Agyekum admitted that there had been a miscarriage of justice but that an appeal system was in place (Bankie, 1987:55).

Agyekum is quoted as saying that the system is "not perfect", and that "it needs assistance and improvement." It must be noted here that the appeal process hinted at by Agyekum does not apply to individuals whose cases were adjudicated by public tribunals prior to December 22, 1983 when the legislation allowing for appeals of tribunal decisions came

into effect. Such individuals are only given a chance to apply to a Review Committee to have their cases reviewed.

There was a fundamental difference between an appeal and a review as they operate in Rawlings' Ghana. In the case of an appeal, one could contest a sentence, the substance of the law, as well as the facts of the case. On the contrary, a review only permitted a contest of the facts but not the law. Appeals were therefore a more effective and stronger way of seeking legal redress in a criminal case. Beyond the review process, only the Head of State could exercise his prerogative powers of mercy to commute a death sentence, free a convicted person from prison or reduce a sentence imposed by a court or public tribunal.

### **Executive Interventions in the Regular Court System**

Executive interventions in the administration of justice is not limited to the public tribunals system but also extends into the domain of the regular courts. Oquaye (1990) provides an interesting illustration of judicial intervention by Chairman Rawlings in "The two Fishermen Case":

Two cadres of the revolution - Korle and Akpe -confronted the two fishermen who had broken regulations against the use of prohibited fishing nets in the Volta Lake. By an alleged manipulation of the system, the two fishermen reported the cadres to the police to the effect that the cadres have (sic) assaulted them. The police promptly proceeded to charge the cadres who were sentenced to various terms of imprisonment and fines in a Magistrate court. The revolutionary organs at Amankwakrom later complained to the chairman of the PNDC himself, who, in a typical populist government mood, had held a meeting with a cross-section of farmers. In the view of the chairman of the PNDC, in the discharge of their civic responsibilities the two cadres had become victims of injustice. While the cadres were released from prison, the two fisherman were tried and convicted by the Nkawkaw Circuit Court for use of prohibited nets in the Volta Lakes. They were fined and their nets confiscated. (Oquaye, 1990:28-29.) [Emphasis added].

According to Oquaye, the matter was seen as "an abuse of the legal process by the ordinary court". Chairman Rawlings is reported to have directed the Inspector-General of Police (IGP) to take disciplinary action against the three police officers involved in the case,

namely, Chief Inspector Takyi, Inspector Issifu and Corporal S.S. Opoku. Furthermore, Chairman Rawlings ordered the Attorney-General to investigate the conduct of the presiding Magistrate, Mr. J.W.K. Obrenya, who allegedly said in public that he was "ignorant of the existence of the *AFRC Decree 30 of 1979* that prohibited the use of certain types of fishing nets in the Volta Lake. He said the police should have served him with a copy of the law" (Oquaye, 1990: 29).

This case serves an instance of the dynamic role of the executive in the dispensation of justice. It also provides one of the regime's justifications for the creation of the public tribunals, namely, that the regular courts are either largely ignorant of, or unwilling to apply or uphold, "revolutionary" laws. The PNDC plainly admits that the tribunal system is fundamental to the attainment of its revolutionary justice ideals. Captain (rt.d.) Kojo Tsikata, PNDC member responsible for national security, articulates the view eloquently:

To carry out a revolution is to straighten twisted justice, to shatter the chains of reactionary power with which the unjust shackle the just (West Africa, August 22, 1988:1551).

It is also quite apparent that Chairman Rawlings, as an individual, became not only one of the crucial sources of law but also the putative final authority on justice and the administration of justice in Ghana. Unlike Moses of Egypt, Confucius of China, King Solomon of Israel, Mohammed of Arabia, Solon of Greece, Augustus of Rome, Blackstone of England or Marshall of the United States, Rawlings has not created any legal codes nor has he been a great legislator. Rawlings, the populist soldier-politician, is the very antithesis of the great Hammurabi of Babylon. Yet, to some extent, his views were the standard by which the "correctness" of judicial outcomes were measured, especially in the tribunals system. Sometimes, his publicly-articulated juristic ideas override judicial decisions of both the regular courts and the public tribunals.

Kwaku Boakye-Danquah also alleged that Mrs. Nana Konadu Agyemang Rawlings, the Ghanaian First Lady, shared her husband's tendency for extra-judicial intrusions into the administration of justice at the public tribunals. In the VOA interview of March 14,

1992, Boakye-Danquah claimed that Mrs. Rawlings had made extra-legal incursions into the controversial murder trial of Warrant officer Salifu Amankwah, accused of murdering an old man (West Africa, April 6, 1992). Boakye-Danquah alleged that Mrs Rawlings persistently went to George Agyekum, Chairman of the public tribunal adjudicating the Amankwah case, begging and weeping for Amankwah's freedom. The accused was convicted nonetheless and sentenced to death. He was quietly pardoned by the Head of State, Flt. Lt. Rawlings while an appeal of the conviction was pending.

The Registrar of the Board of Public Tribunals, Mr. I. K. Douse, denied the allegations at a press conference in Accra on March 20, 1992, describing them as "a figment of Boakye-Danquah's imagination". According to Mr. Duose, the former tribunal chairman fled the country due to his fear of possible exposure resulting from, and imminent investigation into, his alleged misconduct in the Safo-Adu case, based on complaints from two other members of the tribunal panel. According to Duose:

We are now persuaded that it was the knowledge of pending investigations and the risks of exposure that prompted Mr. Boakye Danquah to flee the country (West Africa, April 6, 1992).

### **Corruption and Political Interference**

During the period 1982 - 1992, several allegations of corruption on the part of public tribunal personnel surfaced in both Ghanaian and foreign media. Among the most notable cases is that of Mr. Kwame Arhin, former Chairman of the Ashanti Regional Public Tribunal. In July 1984, Mr. Arhin was acquitted by a public tribunal on charges of stealing and corruption. The state appealed the acquittal and impounded Arhin's passport and other travel documents which were subsequently lodged with the office of the Co-ordinator of Investigations, Vettings and Tribunals, Mr. Kwamena Ahwoi (The Pioneer, November 5, 1984).

In July, 1990, the Chairman of the Central and Western Regional Public Tribunals, Mr. Eric Nyavor was queried and formally interdicted by the National Board of Public



Tribunals (NBPT) over financial impropriety. The Internal Audit Group of the NBPT, upon inspection of the current books of the Central Regional Tribunal, discovered that one million cedis was mysteriously missing. The chairman subsequently refunded the C1m; he was also given strict conditions by the NBPT with respect to the payment of other related monies he was required to refund to the state (The Pioneer, August 1, 1990).

The two cases cited above represent actual instances where the government or the NBPT felt convinced that public tribunal chairpersons had committed crimes or acted in dubious ways inviting reproach. In fact, allegations of theft or embezzlement of funds and corruption were also made against other officers of public tribunals. In July 1990, the Internal Audit Report of the 1989 records of the Northern Regional Public Tribunal revealed that the tribunals Accounts Officer, Mr. Alfred Adu, had embezzled C601, 800.00. The report showed that Account No.4 covering the Board proceedings, judgements, and similar court processes contained significant omissions:

An amount of C200,000 was received and receipted on 16/1/89, vide (sic) receipt NO.630, but was not entered on the cash book or paid into the bank. On 27/2/89 the amount of C400,000 was receipted with receipt No.631, but was not paid into the bank. On the same date C1,800 with receipt No.632 was collected but not paid to the bank (The Pioneer, August 1, 1990:1).

Alfred Adu was suspended and subsequently taken into custody.

### **Lay Judges and the Administration of Justice**

The thrust of the strident criticisms levelled against the use of lay judges in the public tribunals system in Ghana accords with both the perceived and real shortcomings of the experience with non-attorney justices in other common law jurisdictions such as the U.S., England and Canada. In general, the criticisms centre on the constitutionality of lay involvement in legal adjudication - a task which, in the common law tradition, had been taken on by trained experts, except magistrates in the English court systems, since the seventeenth century - and the inherent penchant of such courts for violating the due process rights of defendants.

In the United States for example, opponents of non-attorney judges scored a major victory in the 1974 California Supreme Court decision in *Gordon v. Justice Court* which held that, when charged with a criminal offense punishable by a jail sentence, the Constitutional right of a defendant to legal counsel was effectively denied if he/she was tried before a non-attorney judge. In fact, twentieth century judicial reform in the United States has been punctuated by efforts aimed at the reduction or elimination of the role of non-attorney judges (Silberman, 1979). Thus, by the 1930s, the predominantly non-attorney justice of the peace courts existing in many states had been completely revamped, and the following decade witnessed the introduction in several states of the requirement that lower court judges must be lawyers.

These and many other reforms, including the implementation of selection procedures, revision of compensation structures, and the placement of these courts of limited jurisdiction under the supervision or control of administrative bodies, have ensured that while non-attorney judges have persisted in the American judicial system their jurisdiction has been significantly curtailed.

Critics of non-lawyer judges express concern over the "undesirable possibilities raised by the diminished rule-mindedness of lay judges" (Provine, 1981). This has been a long-enduring concern for some lawyers who, since the mid-eighteenth century when the legal profession was steadfastly seeking to establish itself via the erection of barriers to entry, vehemently condemned lay judges for blocking professional aspirations.

This disdain for lay judges who held virtually all judicial posts in the colonies (Provine, 1981) reflected the frustration of lawyers as the former refused to limit advocacy to the latter despite loud complaints from lawyers about the evils of permitting untrained "pettifoggers" to represent litigants (Adams, 1856; Provine, 1981:30). Thus, economic considerations and concerns over the negative consequences of legal ignorance underpinned the legal profession's opposition to lay judges.

Today, however, most practising lawyers tolerate lay judges although the continued persistence of this antediluvian legacy of settlement-era provisional arrangement would seem, in the words of Marie Provine,

to detract from the image of law as a specialized subject understandable only to the trained professional, an image lawyers have steadily promoted to justify their fees and their monopoly on the practice of the law (1981:28).

In fact, although countless lawsuits have been filed alleging that the constitutional rights of defendants are not protected by lay judges, even the appellate bench, like the bar, has largely been unmoved or unresponsive. In an era of great legislative complexity, rights consciousness and abundant lawyers, it appears strikingly anomalous that lay judges have become an entrenched aspect of the U.S. justice system.

Lay judges are an essential element of most contemporary American state court systems, staffing "courts of limited jurisdiction across the nation where "they adjudicate minor traffic and criminal law violations and small civil claims"(Provine, 1981:28). In New York state, for example, approximately 2,000 lay judges handle over a million cases annually (Provine, 1981:28). Indeed, as Silberman points out, other than the jury system,

the constitutional and statutory schemes of forty-four states permit the use of non-attorney judges in some judicial proceedings. Only six states-California, Hawaii, Illinois, Kentucky, Maine, and Massachusetts - and the District of Columbia presently require that all judges of all courts have attorney status (1980:508).

A study released by the Institute of Judicial Administration (IJA) in 1979 revealed that non-lawyer judges are authorized in an estimated 20,280 state judicial posts and that 13, 329 of these positions are in fact, filled by non-lawyers (Silberman *et al*, 1979; Silberman, 1980:509; Provine, 1981:28). Silberman (1980) points out that the actual figure may be somewhat higher as precise information about the number of lay judges on local and municipal courts was unavailable from several state court administrative offices. A possible total of 14,000 non-attorney judges was projected by the 1979 IJA study.

There is, however, a continuing debate over the question of non-attorney justice. Recent legislative developments in the United States reflect a serious attempt to under-cut, reduce or eliminate the role of lay judges. Florida, Minnesota and New Jersey require all new judges in all courts to be attorneys, although incumbent lay judges may be reappointed or re-elected. In 1980, Virginia abolished the position of the non-attorney judge, though non-attorneys may sit as magistrates to handle uncontested matters, and Indiana abolished non-attorney judgeship in 1983.

These legislative developments reflect a gradual erosion of lay judgeship in some states in the United States, Silberman (1980) provides the following profile of the state of lay judgeship in contemporary American society:

In some of the remaining forty states, the lay judges have a relatively limited judicial role. For example, in Alabama, Connecticut, and Maryland, non-attorney judges sit as probate judges and exercise limited jurisdiction. In several states, non-attorneys function as magistrates and handle only preliminary or uncontested matters. In other states, the non-attorneys exercise only local traffic and municipal jurisdiction. And, in a few states, though non-attorney judges are authorized to hold judicial positions, few - if indeed any - actually serve (1980:509).

In spite of this downward trend in lay judgeship, twenty-nine states still grant substantial jurisdiction to non-attorney judges in the United States (Silberman, 1980:509). An attempt to eliminate the role of non-lawyer judges in the Florida justice system was defeated in a 1978 constitutional amendment referendum, and an effort to reduce the role of non-lawyer assistant judges in Vermont also met with defeat. In a rather significant development in 1979, Utah eliminated a criminal defendant's right to have a case transferred from the magistrate to a legally trained judge, even when the defendant faces a possible jail sentence (Silberman, 1980:510-511).

The jurisdictional parameters of lay judges in the United States are defined by the respective state statutes. Lay judges are typically mandated to hear both civil and criminal cases within some outer bound on size and complexity, with the relevant statute imposing an amount-in-controversy limit in civil cases and restricting lay judges' criminal

jurisdiction to misdemeanours carrying limited penalties (Provine, 1981:29, Silberman, 1980:511). In several courts, lay judges do not have the power to impose prison sentences at all, and where they are granted such powers, the usual maximum prison sentences range from 30 days to one year, with six months being the typical limit (Silberman, 1980:512-513).

With the exception of Vermont, non-attorney judges in all states sit in their own right to determine facts and rule on questions of law without benefit of any legally trained counsel. In Vermont, a three-person tribunal comprising two lay judges and one attorney sit to adjudicate all civil and criminal matters including felonies, with the qualification that in criminal cases, lay judges participate only in deciding the facts, not in determining the points of law (Silberman, 1980:513-514). The position of the lay judge in Vermont probably reflects not so much a desire to regulate lay judgeship as a possible desire to curtail the tendency of trained lawyers to monopolize the judicial machinery and exploit it for personal gain. Witness the following statement attributed to George Allen, Vermont's long-time Governor and Senator:

The love of liberty prompted the State's founders to draft its constitution without lawyers, and the first act of its legislature was to regulate the activities and fees of lawyers (Quoted in Bankie, 1987:35).

Sometimes known as Assistant or Side Judges, most lay judges are appointed for a four-year term by a state Governor, or by local government officials, or by the Chief Judge in a Superior Court as the case may be. Most of them are salaried or receive allowances, and practice in the communities in which they have resided most of their lives, especially in remote or rural areas where many trained attorneys refuse to practice. Lay adjudication has the net effect of reducing costs in the administration of justice, and "humanizing" justice as a community-based endeavour.

Lay judges are also a critical component of the English criminal justice system. Although attorney judges are at the apex of the system the bulk of criminal adjudication is

handled by lay judges. As the conservative British weekly magazine, The Economist, points out:

The judges are the professional squad of English justice, but most judicial work is done by unpaid, hardly-trained volunteer amateurs. Some 25,600 lay magistrates deal with over 97% of all criminal cases, involving more than 2m defendants. Serious charges are heard by the higher courts, and most of the offences magistrates deal with are relatively trivial- very often to do with motor cars. But magistrates (or justices of the peace, JPs) send 20,000 people a year to prison for up to six months ... the English system of criminal justice would collapse without lay magistrates, and on the whole they give satisfaction. The justice they dispense may be crude, but it is cheap and effective. They give good value for little money. In any event, it would be impossible to replace them by professional magistrates even if it was thought desirable. There are just not enough competent and legally-qualified people to man the courts without unpaid volunteers (The Economist, August 13, 1983:51).

Lay judgeship in England received a positive evaluation and validation from the Roskill Committee in 1983 which recommended the use of joint lay-attorney tribunals in the processing of fraud cases. In late 1983, following widespread conviction in British judicial circles that the public had lost confidence in the English legal system's ability to bring the perpetrators of serious frauds expeditiously and effectively to book, the Thatcher government appointed an eight-member judicial committee to consider ways for improving the conduct of criminal proceedings arising from fraud. Chaired by an Appeal Court Judge, Lord Roskill, the committee was also charged with the responsibility of determining what changes in the existing law and procedure would be desirable to secure the just, expeditious and economical disposal of such proceedings (The Ghanaian Times, June 22, 1987:1).

The Roskill Committee which included a Circuit Court Judge and a solicitor who was also Secretary of the British Law Society, submitted its report in December 1985. In its report, the Committee noted that, while its terms of reference pertained only to fraud, the implications of its findings and the proposed reforms contained therein were applicable to a wider range of criminal cases. Bankie (1987) sums up the key recommendations of the Roskill Report as contained in the June 23, 1987 editorial of The Ghanaian Times:

According to the Committee's report, the form of court which should try these cases should be a judge sitting with laymen. Trial by Judge and a special jury; trial by a judge alone; and trial by a panel of judges, were rejected for various shortcomings. The Committee concluded that a court comprising a Judge and lay members would be "the most appropriate Tribunal" to try such cases. In this regard the Committee also recommended that the judge might be a High Court Judge or below. It recommended that the number of lay members should be limited to two and went on to explain the advantages in adopting the Tribunal system and in using laymen in composing the Tribunals (Bankie, 1987:36.) [Emphasis added].

The Roskill recommendation of a lay-cum-attorney judgeship mirrors the Vermont (USA) situation where a three-person tribunal composed of two lay persons and one attorney adjudicate all civil and criminal matters including felony. The Committee recommended that selection of lay judges should be based on the prospective appointee's integrity which should be beyond doubt and their ability to devote time and energy to the tribunal. It also recommended that such lay judges should be drawn from different age groups and not confined to retired people.

The Committee also took the view that the use of the tribunals system would help tip the balance in favour of justice, economy and expedition and against injustice, waste and delay".

It must be pointed out that the Roskill Committee based its recommendations partly on the British experience with lay judges. While Roskill and his associates held a benign view of lay participation in the administration of justice, the celebrated British jurist and political scientist, Harold Laski, believes that lay judges are ignorant about the law and that they are "a weak reed in resisting both unfair community pressures and forceful advocacy by courtroom insiders" (Provine, 1981:40). As far as back as 1937, Laski advocated the abolition of the institution of lay judges:

On the basis of the British experience it must be concluded that the place for the lay mind is emphatically on the jury, not on the bench (Laski, 1937:465).

The Roskill Committee in 1985 evidently disagreed with Laski's assessment of the utility of lay judges, at least in regards to its relevance for criminal fraud trials in contemporary Britain.

In spite of Judge Roskill's positive and laudatory evaluation, the pessimism of Harold Laski toward lay judges has recently been affirmed with regard to the tribunal system in Ghana. The malleability of lay judges to political pressures and their tendency to uncritically accept the views of their law-trained colleagues and clerks which Laski pointed out, have been identified by Kwaku Boakye-Danquah, a former chairman of a National Public Tribunal in Ghana, as some of the serious problems plaguing the tribunal system. Boakye-Danquah defected to the United Kingdom in February 1992. Speaking in reference to the infamous *People v. Safo Adu and Four Others*, in particular, and the tribunals, in general, Boakye-Danquah portrays non-lawyer judges as more verbal and particularly more susceptible to direct governmental intrigues and manipulation than attorney-judges:

Long after both the prosecution and defence had closed their case, the prosecution made a submission to call fresh witnesses. But the case had dragged on for more than a year. It was a bizarre submission so I overruled it. A week after I had overruled the submission, my panel members, who have no legal training at all, produced a statement dissociating themselves from the ruling. They said they did not agree with the ruling I made. It was one of the most bizarre situations. Obviously, the state powers knew they were losing the case. They could not come to me, so they had to attack from the flanks...it was patently clear that these two members of the tribunal had been prevailed by government officials to undermine the integrity of my tribunal, isolate me to attack by the state and throw the whole trial into a quandrum. The action of Madam Do<sup>1</sup> and Dartey came in for very harsh

<sup>4</sup> There was nothing near gender equality in the tribunals system with respect to the composition of the panels. Of the 11 tribunal sessions I observed during the field research, only three had any female members. Of those three, each had only one woman. Not one tribunal had a woman as chairperson. Two of the women were members of two National Public Tribunals in Accra, while one served on a Regional Public tribunal in Kumasi. When exercising its original jurisdiction, a National Public Tribunal was required to have not more than five and not less than three members; when it sits as an appellate tribunal or to review its own decisions or orders, it had to have five members. None of the tribunals I observed was sitting as an appellate court, and all of them were consistently made up of three members.

To my knowledge, a woman was never appointed chairperson of a public tribunal at any level (Board, National, Regional, District or Community) throughout the entire decade the system was in operation. This is quite a curious anomaly given the PNDC government's overall record on gender equality and its demonstrated support for the women's movement in Ghana. Quite apart from the fact that Ghana has many brilliant female lawyers with the "appropriate" ideological orientation,



indictment in the independent media as completely outlandish and ill-motivated. Throughout the trial, my panel members conducted themselves in such a manner as to sabotage proceedings. They absented themselves from the trial with the excuse (sic) that they had other commitments elsewhere (Ghana News, April 1992:10.) [Emphasis added].

Boakye-Danquah alleges further that the selection of lay judges did not conform to any objective criteria; the suitability of lay persons to serve as tribunal panellists was determined on such grounds as loyalty and affiliations to key government officials. He portrays lay judges in Ghana as a hand-picked crop of obsequious sycophants selected more for their ability to please their political lords than to dispense justice impartially. Connections, cronyism and political loyalties are, in Boakye-Danquah's estimation, key variables in the selection of lay judges, and their subsequent conduct on particular cases:

It becomes necessary to state that Madam Do, who hails from the same ethnic background as the Head of State, is from the Volta Region, has close association with senior members of government particularly Capt. Tsikata; Mr. Dartey, a former police intelligent (sic) officer, has a direct and unrestrained access to the Chairman of the PNDC Ft. Lt. Rawlings (Ghana News, April 1992:10).

I am unaware of any statistics on the ethnic distribution of lay judges in the Ghana's public tribunals system, and it is doubtful whether such data exists. While ethnicity is a crucial factor in Ghanaian politics, including the judiciary, it would be difficult indeed for a researcher to determine the ethnic profiles of tribunal panels without the benefit of direct interviews with them.<sup>2</sup> It is also doubtful whether the Office of the Registrar of Public Tribunals compiles such statistics. The situation makes it difficult to verify the accuracy of

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the fact that lay persons were welcome on tribunal panels made the virtual absence of women seemingly inexplicable, and inexcusable.

<sup>5</sup> Some people claim to possess the capacity to ascertain with accuracy, the ethnic background of speakers of English language whose mother tongue is not English, simply by hearing them speak English. While I have, on occasion, been able to tell an Ewe from an Ashanti, and a Fanti from a Ga, I must admit that my brushes with success in this domain have been rather modest, and my store of knowledge very impressionistic. Generally speaking, I have a hard time distinguishing between Brong, Ashanti, Nzima, Kwahu and Ga speakers of English, while I have little difficulty telling a Fanti and an Ashanti apart in this regard. In any event, such abilities, and the information flowing from them, can hardly be considered "scientific". For non-linguists, I suspect that guess-work, sheer luck and some profound experience of specific ethnic languages may be crucial in telling a Dagarti from a Kussase, or a Mamprusi from a Tallensi, simply by their accents and picking up cues from these linguistic nuances.

Boakye-Danquah's implied conclusions on the ethnic backgrounds of lay judges. On face value alone, and judging by the last names of the panel itself - it can be said that Boakye-Danquah's panel was multi-ethnic: "Do" is most probably an Ewe name; "Dartey" is possibly a Ga or Fanti name, and "Boakye-Danquah" is probably an Ashanti or Akyim (Abuakwa) name. While this is an empirical question, it would appear that ethnic affiliation and ethnic calculations possibly played a lesser role in the operations of the public tribunals than political orientation, alliances, cronyism and sycophancy. Indeed, the PNDC government was itself ethnically diverse, assembling Ghanaians from all regions, ethnic groups, religious and political persuasions in the country. This became particularly more evident after 1983/84 when the government started to be more politically inclusive and tolerant of opposition as it began to embrace the IMF-World Bank conditions for loan guarantees in support of its Economic Recovery Program.

Reform-minded supporters of lay judges also contend that there are enormous financial difficulties entailed in the replacement of justices of the peace with a more centralized, professional judiciary in all jurisdictions in the U.S. In comparative terms, lay judges operate with relatively inadequate staff and facilities, and draw considerably lower salaries than do attorney judges. While consolidation of the judiciary would reduce the overall number of judges in the system, the social and financial cost would remain high as lawyers are unlikely to accept the meagre pay and sorry conditions of service endured by their lay counterparts (Provine, 1981:29).

Supporters also point to problems in securing the necessary constitutional amendments required for the abolition of lay judges as the voting public who must give approval to such proposals in a referendum "shows only a limited enthusiasm for changing traditional court structures, and even less for the abolition of lay judges"(Provine, 1981:30). As a result of the perceived obstacles involved in revamping the judiciary, calls for the eradication of this antiquated step-child in the colonial judicial system have largely remained "at the discussion stage in law reviews and bar publications" (Provine, 1981:30; Knab, 1977).

George Agyekum asserts that the tribunal system has shown that

the involvement of ordinary people in the administration of justice is quite good and effective. It is a very great innovation of jurisdiction in Ghana, and a very remarkable experience so far (Ghana Newsletter 11, Autumn 1984. Quoted in Bankie, 1987:55).

Nevertheless, the GBA does not share this positive and benign assessment of lay involvement in the dispensation of justice. On the contrary, the august body regarded lay participation in justice administration as a reflection of a concerted attempt on the part of the PNDC government to subvert the traditional legal establishment in Ghana. Peter Ala Adjetey articulates this conception of the tribunal system and lay involvement in justice administration:

Somewhere along the line, there has been some dislike of lawyers as a profession, and it was considered that the administration of law should be taken away from lawyers. Lawyers were seen as a critical minority, and alleged to be living comfortably through the exploitation of the ordinary people .... There was an intense dislike of professional people as a whole - especially doctors, engineers, architects, etc. Lawyers were targeted for exclusion and persecution (Adjetey, Interview, 1990).

Adjetey's perceptions regarding the depth of public disdain toward lawyers is given considerable credence by the actions of several populist organizations following the GBA's announcement that it would boycott proceedings of the public tribunal. For example, in a front-page story carried by the Daily Graphic of October 1, 1982, under the caption, "Students Condemn Bar Association", Ayikwei Armah, a Daily Graphic Reporter writes:

Several hundreds of students and young people, chanting revolutionary songs, marched through some principal streets of Accra yesterday condemning the Ghana Bar Association for its recent pronouncements. The group, called Future Leaders Organization (FLO) carried placards some of which read: "To hell with the Bar Association", "Secret Societies Must be Banned", "The Revolution is For the Poor," "The Struggle is Our Struggle". Master Abu Mohammed Lawal, a form four student of the West Africa Secondary School and one of the leaders of the group, accused the lawyers of attempting to frustrate the pace of the revolution. He told the "Graphic" that the revolution has had enough from the "arrogant people" in the society. Another student urged the PNDC to carry forward its programme to give the country a permanent revolution "We back the PNDC to carry forward its programme to give the country a permanent revolution. "We back the PNDC and we urge Chairman Rawlings not to be deterred by the imprudence of the leadership of the Bar Association", the leaders said.

Chanting more slogans, the students pledged to support the revolution to the hilt (Daily Graphic, October 1, 1982.) [Parenthesis added].

The actions and pronouncements of the so-called FLO and its leadership dwindled in comparison to the demands of a group calling itself "The Progressives of Eastern Region" which called on all lawyers in private practice in the region to close down their chambers within three days until further notice" (Daily Graphic, October 1, 1982:1). Writing under the caption "CLOSE DOWN CHAMBERS...Lawyers Ordered", The Daily Graphic continues:

In a statement issued at Koforidua (Eastern Regional Capital) on Wednesday night, the progressives, comprising the June Four Movement, The People's Revolutionary League of Ghana and the African Youth Command, warned that failure by any private lawyer to close down "will be met with the severest formidable force and destruction"... The statement said that the Bar Association was taking undue advantage of the "political freedom and peaceful atmosphere" the PNDC has allowed the members and that the rather inflammatory language of the Bar Association might lead the "already alerted and awakened revolutionary forces to react". It said the people had enough of "such a myriad of cock and bull statements" from the association (sic) and described its decision to boycott the tribunals as a "display of absolute naivety in modern jurisdiction". The group finally called on all recognized progressive organizations to unite now for the final onslaught on the enemy [Emphasis and parenthesis added].

Agyekum (1986) similarly portrays the regular judicial system as an institution clothed in the mystique of invincibility, a mystique which the tribunals had shattered:

The tribunals have shaken the myth surrounding legal invincibility and has shown that laymen have the ability to know the difference between truth and lies, honesty and dishonesty and that these virtues are in-built in man who in his wisdom created rules on conduct to guide society and that law in itself is not different from ordinary thought. (Agyekum, 1986:6).

The demystification of law and lawyering through lay involvement is also conjoined with an overriding concern to apply adjudication procedures which aim at "discovering and upholding "truth" as justice:

The duty of a tribunal ... is to do justice to all parties without fear or favour according to law. This duty also enjoins us to assist either the accused or the prosecution to present their case adequately to the tribunal so that at the end of the day we can evaluate the evidence before us on its merit and come to a just conclusion. We have to objectively see to it that justice is not only done but seen to be done. Even though panellists are not to move into the

arena of conflict they are also not entitled to preside over injustice and compound injustice under the so-called concept of impartial stance and punish adequately when necessary. The principles are the pillars of justice, the threshold of the quest for popular justice (Agyekum, 1986:6-7).

Lay involvement in the dispensation of justice, according to this view, facilitates the discovery of truth, and hence the advancement of "true social justice". Lay judges' lack of legal training, in Agyekum's view, makes them an asset rather than a bane to the justice system. Not fettered by the constraints of the "legal mind", their commitment is to social justice as understood by the lay person. In this regard, Kress and Stanley (1973), speaking to the issue of lay participation in the administration of justice in the United States, advance the view that lay judges play a crucial role in defending the legal system from abuse by lawyers:

We should perhaps here elaborate a bit on the concept of citizen justice as a necessary lay input to ensure that lawyers do not usurp the law. Ours, after all, should be a government of laws and not of lawyers. (Cited in Provine, 1983:33).

Opponents of lay judges, however, contend that the lack of legal training adversely affects the capacity of lay judges to exercise judicial power:

One of the darkest blots on Pennsylvania's escutcheon is that we will still permit persons without any training in the law or otherwise, without any knowledge of the basic requirements of the office, to pretend to administer justice and to have jurisdiction over the life, liberty, and property of the people of this state. (Pomeroy, 1971:134. Cited in Provine, 1981:33).

In a similar vein, MacDonald (1961:429) attacks lay judges as fundamentally unfit for adjudication, stressing the technical aspects of the judicial function:

Law being one of the great - and one of the most complex - professions, justice should no more be dispensed by amateurs or part-time judges than should surgery be practised by butchers or grocers (Quoted in Provine, 1981:36).

Other critics point out that, when charged with a criminal offense, the individual's right to legal counsel is violated by the practice of adjudication by lay judges. This is especially serious as the right to legal counsel is not always upheld in cases adjudicated by lay judges.

As Provine points out, however, "the right to assigned counsel is generally construed to apply only when there is a realistic possibility of incarceration" (1981:29). This possibility, however, arises rather infrequently, and the courts have generally upheld the constitutionality of lay adjudication in criminal matters. In the 1976 U.S. Supreme Court decision in *North v. Russel*, where the Court considered for the first time the constitutionality of a state's non-attorney judge system, the Court upheld a Kentucky provision that trial of minor offences by non-lawyers did not constitute a violation of the constitutional guarantees of due process or equal protection (Fein, 1977:56). Even though the Court fell short of a broad endorsement, its decision carved a constitutional niche for lay judges in the U.S. criminal justice system (Silberman, 1980:520-524; Provine, 1981:31 Fein, 1977:56).

The Kentucky state law system permits lay adjudication in minor criminal cases in cities of 30, 000 or fewer (Fein, 1977:56). In Lynch, Kentucky, Judge Russel, a retired coal miner without formal education, found North guilty of drunk driving and sentenced him to 30 days in jail. Although Kentucky law gave North the right to a jury trial, his request for a jury was denied by lay police judge Russel. Under Kentucky's two-tier system North had a right to request a *de novo* trial on appeal before an attorney judge. North, however, did not exercise this right but instead sought a writ of *habeas corpus*, contending that his conviction by a non-attorney judge, Russel, amounted to an abridgement of his federal constitutional rights of due process and equal protection (Silberman, 1980:520). The Circuit Court of Kentucky denied relief for North who subsequently appealed to the Supreme Court of the United States.

By majority decision, the Court ruled that Kentucky's offer of trial on appeal remedied Petitioner North's due process concerns since it afforded him the chance to have his case heard by an attorney judge without prejudice, regardless of whether he pled guilty or not guilty at the first trial. The Court's conclusion was not altered by the jail sentence possibility North faced (Fein, 1977:56).

A New Hampshire decision in *Jenkins v. Canaan Municipal Court* also upheld the use of a non-attorney municipal court judge in a misdemeanour drunken-driving case through a direct application of the rationale in North. Other cases in Washington and California have upheld the spirit of the North decision (Silberman, 1980).

The legislative in-roads into lay adjudication highlight the perennial tension between an understandable desire for affordable and community-oriented decision-making and adjudication by qualified attorneys. Yet, while empirical evidence on differences between lay and lawyer judges is meagre and inconclusive, Provine points out that:

No one has found convincing evidence that lay judges are less aware of the criminal defendant's basic constitutional rights to counsel, notice, and hearing than lawyer judges. Silberman *et al* whose published material on lay/lawyer judges differences is unique in including courtroom observation, found no significant differences between lay and lawyer criminal case processing (1981:33).

Thus, in terms of rule-mindedness, rationality and formality, the available empirical research finds no disparities between lay and attorney judges (Silberman, 1980; 533; IJA, 1979). Similarly, no differences were found between the two types of judges with regard to sentencing, although the perceptions of attorney and non-attorney judges differed somewhat, with many non-attorney judges believing that they were basically more "compassionate" than their attorney colleagues in sentencing, while the attorney judges characterized their non-attorney counterparts as being "overharsh" in sentencing (Silberman, 1980:537).

In spite of the perceived differences, the definitive judgement of the U.S. Supreme Court on lay adjudication is that lay participation in the judicial system does not in any way undermine justice or the due process (Fein, 1977:56-57). Indeed, even in Washington, where non-attorney judges are rarely used except in small, sparsely populated areas and only in cases of misdemeanour or gross misdemeanour (Silberman, 1980:523), the Washington Supreme Court, in *Young v. Konz*, reiterated the view that lay judge adjudication does not amount to due process violation. The Court stated:

Due process of the law requires a fair trial of each defendant; the fair guarantor is protected through the appeals process. It is conceded that a fair trial may in certain cases not be afforded by a non-lawyer judge; but we may properly point out that it is also true that a lawyer judge may commit error and thereby deny a fair trial. The due process safeguard in both cases is appeal, the one critical difference being that a defendant in a court of limited jurisdiction has the automatic right to a new trial, irrespective of error in the first trial (Quoted in Silberman, 1980: 524.) [Emphasis original].

In spite of this conclusion, the use of lay judges in Ghana's tribunals system is criticised on the grounds that it infringes on the fundamental common law value that an accused person should be brought before a competent court of law. Traditionally, such a court has been deemed to be one staffed with trained and experienced lawyers who have successfully completed examination and articling requirements of a professional legal regulatory body such as the Bar Association, and been called to the bar. The U.S. Supreme Court in *North v. Russel* (1976), while not fully endorsing lay judgeship, clearly established that the constitutional guarantees to due process and protection of the individual are not abridged simply because a non-attorney judge adjudicates a criminal case. This important legal development, as well as the Roskill recommendations, are ignored by the critics of the tribunals system who are nonetheless all too eager to refer to British and American criminal laws and judicial traditions.

The point is that in many common law jurisdictions, lay judges are used to dispense justice under several different conditions and circumstances deemed by the ruling elite to necessitate such arrangements. In Canada, there are still some judges who are not lawyers, though their number is small and dwindling, and they sit exclusively on lower court benches (Gall, 1990:185).

Lay judges are involved in the dispensation of justice at several different levels, including numerous administrative tribunals such as Workers' Compensation Boards, Boards of Inquiry, and Human Rights tribunals. For example, the British Columbia Council of Human Rights (BCCHR) is a quasi-judicial body with the mandate to enforce the British Columbia *Human Rights Act*. The BCCHR is currently made up of five



Council Members (including myself). A civil service staff provides administrative and clerical support for the work of Council Members who are permanent adjudicators of complaints of discrimination. A Member sits alone as an adjudicator to conduct a public hearing into an unresolved complaint of discrimination and to issue a written or an oral decision. The proceedings are somewhat less formal than criminal or civil court proceedings, yet the same principles of natural justice and procedural fairness apply. Where a Council Member designated to conduct a hearing into a complaint of discrimination finds that the complaint is justified, he/she has broad remedial powers including cease and desist orders, and the power to order the respondent to pay monetary compensation to the complainant for the humiliation, hurt feelings, and injury to dignity and self-esteem suffered as a result of the discrimination. A legislative amendment which came into force in July 1992 removed the \$2000.00 ceiling that previously existed, so that there is now no limit on the amount of compensation which a Member may award to a victim of discrimination. This power is greater than the powers enjoyed by other administrative tribunals, including judges of Small Claims Courts who have a \$10,000.00 limit. Yet, while three Council Members are lawyers, the other two (including the Chairperson and myself) are non-lawyers.

The use of lay judges in Ghana under Rawlings' Ghana was no different from the practice in other common law jurisdictions, with two important qualifications. First, lay judges in Ghana participated, as tribunal panel members, in the adjudication of a wide range of criminal offenses, including those that carry the death penalty, the ultimate punishment. In this regard, it is important to point out that the death penalty is still a common form of punishment in the United States which claims to be, in spite of evidence to the contrary, the foremost international champion of human rights, freedom, justice and mercy.

Second, unlike their counterparts in other common law jurisdictions, lay judges in Ghana operated in a non-constitutional political context in that the Rawlings regime was

an unelected one. This point, however, is a rather moot one. A political system, democratic or otherwise, does not in and of itself erect and define the parameters of justice; it is neither central to the administration of justice nor the quality of justice in a given social formation. Different types of injustice occur under both dictatorial and constitutional democratic governments.

It must be pointed out that the focus of Amnesty's and the Ghana Bar Association's critique of the tribunals system was primarily on the promotion, entrenchment and realization of "fundamental human rights". Often, this meant no more than the entrenchment of the concept of legalism and the legalist' conception of what constitutes fundamental rights. The social values of the conservative libertarian wing of the legal profession become implicitly promoted and entrenched. Conservative lawyers are more likely to view as "fundamental", a right to a trial, but no right to a job, a right against self-incrimination, but no right to be free from poverty; or the right to equal protection of the law, but no right to equal wages.

### **The International Community's Changing Perception of the Tribunal System**

As the general socio-economic situation in Ghana improved during the late 1980s, the quality of justice dispensed at the public tribunals ceased to be a primary issue of concern to western governments and human rights advocacy groups. On the reaction of international observers to the tribunals, George Agyekum makes the following comment:

There has (sic) been more than fifty to sixty observers of the Tribunals, especially in 1982, 1983 and 1984, mainly from the West, coming to observe the tribunals, writing and publishing on the Tribunals. Generally they seem to be surprised at what they hear. Sometimes they write reports. Some have argued that may be a scenario was enacted for their special observation (so that they would write favourable reports)... Nowadays these observers rarely come to the Tribunals. Some diplomats have come to the Tribunal to complain about their nationals being robbed and wanting to know when their cases would come on and some also heard that people had been sentenced to death and wanted to know when they would be executed. (Bankie, 1987:50.) [Emphasis added].

Agyekum implies that while some western observers of the tribunals system remained sceptical, an unspecified number of them appeared positively impressed. During the field research, I found it impossible to verify the claim that certain foreign diplomats had favourable impressions of the tribunals and had actually made enquiries regarding the tribunals' expeditious disposition of cases involving their nationals. Nor could the implication that some of these diplomats endorsed the death penalty for robbery be confirmed. These difficulties stemmed from the lack of specificity with respect to the identity of the diplomats in question.

In any event, during the late 1980s and early 1990s, there was a fundamental shift in the focus of human rights agencies from the tribunals *per se*, to human rights violations in general. The complaints subsequently focussed mainly on the harrassment of political opponents, the maintenance of prisoners of conscience, the detention of "suspects" without charge or trial, the imposition of death sentences and the execution of convicted criminals sentenced to death (Amnesty Report, 1991:97). No western observers visited Ghana to expressly to observe proceedings of the public tribunals during the period 1984 - 1992.

This change may be a reflection of the dissipation of the initial concerns of western governments and agencies, and their satisfaction with the piecemeal, but noticeable, improvements in the tribunal system, and in the restoration of social order generally. The factors accounting for, and reflecting, this change included the following: (1) the institutionalization of an appeals system in the tribunals; (2) the increasing representation of accused persons by defense attorneys; (3) the increasing tendency of tribunals to impose relatively less severe sentences than was previously the case; (4) the PNDC regime's purging and subsequent neutralization of the capacity of PDCs and WDCs and other para-judicial organs of the state to mount malicious prosecutions; (5) the PNDC's relative tolerance of opposition and reconciliatory gestures towards its political opponents; (6) the government's introduction of, and commitment to, a programme for return to constitutional rule; (7) the remarkable success of the regime's Economic Recovery Program (see Chapter

DX); and, finally, (8) the emergence of a pervasive sense of hope and optimism for the future. One composite result of these changes is that Rawlings remained a popular national hero, and the PNDC continued to enjoy the support of many Ghanaians from all social classes. Indeed, so dear was Rawlings to the masses, and so fundamental and far-reaching the changes instigated under his leadership that, a correspondent of London's conservative weekly magazine, The Economist, was recently able to report that,

His [Rawlings'] reputation is for frankness and honesty, his leanings are to the romantic left. Crowds (especially female crowds) adore him. But the radical economic changes he has wrought in Ghana have been of the free-market, small-government variety. Stiff cuts in government spending have spurred economic growth and attracted \$500m a year in foreign aid and soft loans. The Rawlings regime has cut graft in the civil service, and abolished many of the restrictions that gave life to the *kalabule*, the black market. The IMF and the World Bank point to Ghana's economy as a model for Africa. With rich gold-mines, high-quality cocoa production and good land, the country is on the road to the prosperity nature qualifies it for (The Economist, May 2-8, 1992:54). [Italics original. Parenthesis added].

Contrary to the initial negative reactions of western governments and human rights agencies to the tribunals system, the former Eastern bloc countries were generally 'neutral' or positive. The "bad press" given the tribunals in western media outlets were unknown in Eastern circles. According to Agyekum, the reactions of the (former) Socialist bloc countries to the tribunal system was positive:

Some sent observers such as the German Democratic Republic (GAR) and conducted an interview which was aired on their radio. Other socialist countries conducted interviews. They sent participants to some of the induction training courses which the tribunals ran (Quoted in Bankie, 1987:50. ) [Parenthesis added].

The nonchalance and sometimes automatic positive attitude of the eastern-bloc countries toward the tribunals can reasonably be explained in terms of ideological consistency. The revolutionary rhetoric and Marxist-flavoured slogans bandied around in the name of social justice and "people's power" that accompanied the creation of the tribunals would be sufficient justifications for many Soviet-bloc countries to render unflinching support for the tribunals system.

## CHAPTER IX

### THE POLITICAL ECONOMY OF REVOLUTIONARY CHANGE

#### An Overview

The purpose of this chapter is to explore the political and economic context of radical shifts in the PNDC regime's approach to social change and social justice in Ghana from the socialist revolutionary orientation of 1982/3 to a pragmatic populist posture embedded in capitalism in the period since 1983. It begins with an overview of the political conflicts between the leadership of the retired AFRC and the PNP regime after September 1979. These political challenges, coupled with the continuing economic decline, it is argued, created a severe crisis of confidence in the civilian administration and thereby provided the occasion and rationalization for disillusioned "leftist patriots" under the leadership of Jerry Rawlings to seize power from the civilian petite-bourgeois oligarchy. The PNDC soon unveiled a radical, socialist platform for economic transformation, vowing to extricate the economy and society from imperialist domination. Its revolutionary agenda also included the creation of new structures for justice.

Finally, proceeding along the neo-Marxian structuralist trajectory and borrowing ideas from other neo-Marxian perspectives, the chapter critically examines the limitations imposed on the neo-colonialist state under Rawlings by a number of internal and external forces which effectively constrained its capacity to pursue socio-economic development and political emancipation in accordance with its publicly-stated socialist ideology. It is argued that the dramatic reversal in the regime's socialist revolutionary policies was a function of these economic constraints.

The chapter demonstrates that the autonomy of the neo-colonial state was indeed relative to its capacity to mobilize financial support to implement its economic recovery programme. To the extent that such vital capital in-flows emanate from foreign donor agencies, the autonomy of the state to advance its goals of creating a truly independent, self-reliant socialist society unfettered to the apron strings of foreign economic domination

or imperialism was heavily constrained. This constriction narrowed the possibility of implementing full-fledged criminal law reforms that run counter to the conventional principles and standards of legality and judicial administration accepted as gospel by the donor agencies.

In order to secure foreign capital investments from the west to back its economic development efforts, the state under Rawlings made a remarkable u-turn in its ideology, watered-down most of its revolutionary policies, programmes and rhetoric, and acceded to demands to reform its public tribunals system as a mechanism for achieving the goal of popular justice.

### **Political Challenges: A General Background to the 31st December Revolution**

Between June and September 1979, Flt. Lt. Jerry Rawlings and the AFRC insisted on the necessity for the house-cleaning exercise and "moral revolution" sparked by the events of 4 June 1979 to continue beyond the repair of the soldiers to the barracks and the return of the civilians to parliament. For example, on 10 August 1979, during the inauguration of the Joint-Commission of the in-coming civilian administration, Rawlings expressed the hope that

The Commission will make it possible for the Armed Forces and the Nation in general to rest assured that the moral revolution that has been initiated since June 4th will not die with the departure of the AFRC. (Quoted in Yankah, 1986:50).<sup>1</sup>

He added the stern warning that

If the slightest indication were to be given that the new administration would put out the flames of moral regeneration lit by the AFRC, it would demoralize the Nation and bring about untold confusion (Quoted in Yankah, 1986:50).

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1 Address by Flt. Lt. J.J. Rawlings at the inauguration of the Joint Commission of the Third Republican Government, 10 August 1979. See Kojo Yankah (1986) The Trial of J.J. Rawlings: Echoes of the 31st December Revolution. Tema: Ghana Publishing Corporation. p.50.

This theme was repeated by Rawlings on the occasion of the inauguration of the Third Republican government on 24 September 1979.<sup>2</sup> In his hand-over address he said:

To you, Mr. President, your Government and members of this Honourable House, we of the AFRC, in the light of our reading of the situation, make a fervent appeal never to lose sight of this new consciousness of the Ghanaian people. Never before have the eyes of so many been focused on so few, Mr. President. The few are you, the illustrious members of our new civilian administration. The many are those in the factories and on the farms, in the dormitories and junior quarters, who will be watching you, with eagle's eyes to see whether the change they are hoping for will actually materialize in their life-time. (Quoted in Yankah, 1986:50).

The in-coming President, Dr. Hilla Limann, echoed these sentiments and emphasized the importance of maintaining the momentum and ideals of the AFRC era when he lucidly observed that:

The measures initiated by the AFRC must lead to continuous progress of the aspirations of all Ghanaians and not just make another phase of temporary expediency after which we may relapse into the same old ways which have destroyed our economy and our image as a people. There can be no turning back (Quoted in Yankah, 1986: 52).

From the perspective of Rawlings and quite possibly the broad mass of Ghanaians, the PNP government systematically and blatantly reneged on its promises throughout its short life-span. The total lack of local public outrage at the PNP's removal, contrasted with the large-scale popular support which greeted the PNDC's rise to power in 1981, may be ample measure of the pervasive unpopularity of the PNP administration and the entire civilian democratic order.

On the second anniversary of the June 4th uprising in 1981, Rawlings held a press conference at which he spoke of his disillusionment with the PNP administration's apparent failures in taking decisive steps to resuscitate the economy. He also complained of the ruling regime's persistent efforts to castrate the spirit of the June 4th movement, slander

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<sup>2</sup> The original date for the inauguration of Ghana's Third Republican civilian government was 1st October 1979. The date was changed to 24th September 1979 when it became apparent that the event would coincide with a similar one in Nigeria.

and silence its leadership, and to present the entire June 4th phenomenon as a gigantic political hoax; a horrid, transient nightmare. He lamented that

As if it were by design, the practical achievement of the June 4th have (sic) consciously been wiped off into thin air. The little benefits that were opened to the ordinary man have evaporated, leaving us once again in the unsympathetic hand of the economic vampires in our society (Quoted in Yankah, 1986:61).<sup>3</sup>

The "little benefits" of the June 4th era that were being rapidly eroded included the return of property confiscated by the AFRC to their previous owners; the emergence of discussions pertaining to the possible elimination of the Transitional Provisions from the 1979 constitution; the PNP regime's failure to effectively respond to the economic crises and to continue with the house-cleaning exercise begun by the AFRC, and the prevalence of graft and corruption in the political parties and throughout the country. (Yankah 1986:62; Ray, 1986:21; Chazan, 1983:311-2).

Rawlings emphasized that the denial of practical economic democracy to the people constituted the greatest injustice ever witnessed. Economic democracy, he stressed,

serves as the only guarantee for the enjoyment of the meagre democracy (sic) like freedom of movement, of speech, freedom of association and the rest of them. It appears to me that this empty democracy which we are witnessing today is a way of preserving the exploiter class against the exploited (Quoted in Yankah, 1986:62) [Emphasis added].

In a poignant, prophetic and populist tone, Rawlings exhorted the masses to be vigilant and hopeful:

We should not nurse in our hearts too much sorrow, for there is every indication to assure a better tomorrow. The frustrating tide shall by all means change, yielding place to a period of smiles and propriety. But I believe that the long expected salvation should come through the people -- the people of Ghana themselves (Quoted in Yankah, 1986:62).

Rawlings continued to enjoy as much enormous public support outside the state political machinery as he did while in power. Despite several attempts by the state security police -

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<sup>3</sup> Address delivered at a press conference in Accra on 4 June 1981 by Flt. Lt. Jerry John Rawlings (rd.), Leader of the June 4th Movement on the Occasion of the Second Anniversary of the June 4th Revolution. Also see Yankah (1986:61).



Special Branch (SB) - to discredit him, to isolate him from Ghanaians and his close associates, to intimidate and harass him into silence, and even to "eliminate" him (Yankah 1986; Ray, 1986:24), Rawlings remained popular and his public lectures were always well attended. Several radical interest groups sprung up to maintain and advance the ideals and gains of the June 4th uprising. Among them were the People's Revolutionary Youth League of Ghana (PRYLG), the June 4th movement and the Kwame Nkrumah Revolutionary Guards (KNRG) and the New Democratic Movement (NDM). The emergence of these radical leftist groupings reflected and intensified the political crisis in the country - the ideological conflict between the left and the right.

#### **Pre 31st December (1981) Ghana: An Economic Profile**

Ghana's economy performed terribly throughout the late 1960s and 1970s as a result of ill-conceived economic policies, economic mismanagement and corruption, active and latent political instabilities, falling world cocoa prices, lack of foreign and domestic investments in the productive sectors of the economy, and inadequate maintenance or replenishment of the aging factories and the entire economic infrastructure. Large scale smuggling of cocoa, timber, gold and other precious minerals meant a substantial loss of foreign exchange to the export-oriented, cash crop-dependent economy. As with nearly every Third World country, the prices of Ghana's export commodities are determined in the world metropolitan centres of London, New York, Bonn, Tokyo and Paris. These points require further elaboration.

By the end of 1981, the petite-bourgeoisie in Ghana who have exercised political power either as military or civilian regimes since 1966 (with the exception of the three month AFRC rule in 1979 had failed to mediate effectively between national capital and imperialism, as well as to consolidate its hegemony (Ninsin, 1982:40). The manifestation of this failure took two specific forms. The first consisted in the persistent inability of the petite-bourgeois state to negate the imperialist domination of the woefully distorted

Ghanaian economy.<sup>4</sup> There was also a sustained tendency toward the pauperization of the mass of Ghanaians. It is arguable that the disengagement of the economy from the imperialist stranglehold could have opened up the possibility for creating "an internal capacity to cope with and eventually transcend the instability which inheres in its present state" (Ninsin, 1982:40).

The second was the increasing splintering of the ruling petite-bourgeois class itself. A direct product of its weak material base, this fragmentation was a major weakness of the petite-bourgeoisie as it could hardly act in concert, despite its possession of a class consciousness. The degree of political rancour, acrimony, bickering and division between the pro-Nkrumah and pro-Busia political factions within this class is legendary. Many of these structural problems of the pre-31st December 1981 Ghanaian state, it must be noted, stem largely from its neo-colonial status and role within the international capitalist commodity market system. As Ninsin eruditely explains:

The retention of the colonial political and economic structures has been a source of unsurmountable weakness. For a neo-colonial economy is by nature a weak economy, and is prone to severe crises. Each bout of the crises jeopardizes the dominant position of the ruling class economically and politically. In the first instance, it becomes weaker as its material base contracts progressively and becomes increasingly unstable, and in the second, it becomes more and more fragmented as the dwindling economic base seems to return ineluctably to a Hobbesian state of nature (1982).

Thus, by 1981, the encircling gloom of economic decay had deepened to a point where loans to Ghana had ceased, owing to the inability of the state to service existing debts. Indeed, during the 1970s and early 1980s, economic development in Ghana was gravely

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A basic tenet guiding economic management in Ghana has been the faith of successive governments in administered allocative mechanisms rather than market mechanisms. Some of the policies resulted in a sharp reduction in the real interest rates, negative contributions by state enterprises and unrealistically low controlled prices of imported goods (Huq, 1989:20).

A World Bank (1983) study found a close inverse relationship between price distortions and economic growth in less developed countries (LDC). Of the 31 LDCs examined in this World Bank study, Ghana came out as the country with the highest level of distortions and a very low annual Gross Domestic Product (GDP) growth rate during the 1970s (-0.1 per cent GDP growth for Ghana against the overall average of 5.0 per cent for the selected developing countries). Such low, in fact negative, growth meant Ghana had to increasingly rely on external sources for funding. As Huq points out, "Ghana's debt service payments by 1981 were as high \$251 million or 43 per cent of her much reduced exports" (1989:25).

hampered by deep-rooted structural imbalances. The consequence of this situation, as Arhin (1987:351) poignantly points out, was that:

Ghana suffered a continuous decline in output and export earnings, aggravated by a deterioration in its external terms of trade and two periods of severe drought in 1975-77 and 1981-83, leading to the amassing of considerable external debts. By 1980 total short-term debt amounted to \$358.4 million, of which the most important was arrears on current payments, accounting for 62 per cent (\$221.3 million) of this type of debt. Medium-term debts were \$336.3 million, consisting largely of pre-1966 suppliers' credits... Long-term debts amounted to \$662.3 million; external total debt was \$1370.0 million, with a debt service ratio estimated officially at 5-6 per cent of total exports of goods and services. The external medium- and long-term debt grew at an average rate of 11 per cent per annum in the decade 1970-80, declining between 1980-84 to an annual growth rate of four per cent. Total debt outstanding (disbursed only) stood at \$1120.0 million at December 1984, equivalent to some 35 per cent of GDP at 'parallel' exchange rates (1987:351).

The size of the external debt owed to official creditors increased from 54% of GDP in 1970 to 72% in 1979, to 85% in 1982. (Arhin 1987: 351). The bulk of this ever-surging debt - 36% by 1982 - was owed to the World Bank and its soft-loan affiliate, the International Development Agency, (IDA). The Ghana government's share of the debt, meanwhile, rose from 42% in 1970 to 75% in 1983 (Arhin, 1987:351).

At least three fundamental reasons can be cited for Ghana's dramatic economic decline during the 1970s. Ghana's growing indebtedness during this period was partly due to policy failures. A spiral of large fiscal deficits, too rapid monetary growth resulting in high inflationary rates, hopeless price control measures designed to hold down prices, a mushrooming real effective exchange rate and rapid drops in real producer prices and wages accompanied virtually every economic policy implemented in Ghana (Arhin, 1985:351). One ineluctable consequence of this situation was the persistent depletion of the country's tax base.

A second factor was the propensity of petite bourgeois governments in Ghana to over-value the precarious local currency - the cedi - in relation to most foreign currencies.

The predictable result was a precipitous decline in the "real" producer price of cocoa, Ghana's main export commodity and foreign exchange earner.

Finally, cognate to this tendency was a penchant for external financing, a course of action which becomes necessary under conditions of declining economic performance, worsening terms of trade and falling world cocoa prices for a country so dependent on foreign exchange earnings from cocoa. As Table 4 shows, there was a pronounced deterioration in Ghana's balance of payments position during this period. In addition, the prices of most imported petroleum products and crude oil sky-rocketed from 1973/74 onwards.

**Table 4: Ghana's Balance of Payments: Current Account (million cedis in Current Prices) 1970-90**

Year	Current Account Balance
1971	-202.0
1972	+125.9
1973	+157.9
1974	-188.3
1975	+7.3
1976	-70.2
1977	-167.9
1978	-511.2
1979	-125.1
1980	-472.7
1981	-1387.9
1982	-431.0
1983	-7430.0
1984	-10221.2

**Source:** CBS Economic Survey (1970 - 78); CBS Quarterly Digest of Statistics (1979 - 85).

These external factors, more than anything else, superseded any internal factors in creating substantial distortions in the Ghanaian economy. Indeed, they heavily circumscribed the options of the neo-colonialist, petite-bourgeois state in effectively

responding to these crises. By December 1981, the eve of Rawlings' "second coming", the petite-bourgeois state had virtually lost control of the economy which ex-President Limann had described in his inaugural address as "simply abysmal". According to Ninsin (1982:32) "the real index of a dependent economy's strength, is its external financial position". By 1979, Ghana's external financial position was perilously close to bankruptcy, a situation which only got worse by 1981. In the context of Ghanaian politics, the coup that toppled the Limann government was almost inevitable.

It was in this atmosphere of economic quagmire and general social decadence and despair that Rawlings seized power and launched his 'National Democratic Revolution'. As Pelow and Charzan observe, Jerry Rawlings returned to power with a vision of, and ideology for, social revolution:

He saw the transformation of the country into a participatory democracy as the driving force for change. People's power, in the PNDC worldview, translated into popular involvement in overseeing the affairs of state. Every citizen was charged with eradicating wasteful institutions, supervising public officials, judging offenders; through constant vigilance inequality and exploitation could be eliminated. The regime was socialist-revolutionary and characterized by populist aspirations and tendencies (Pelow and Charzan, 1986:62) [Emphasis added].

In sum, Ghana is an essentially monocultural primary commodity producer. Although gold, timber, bauxite, diamond, cotton and electricity are among its annual exports, cocoa remains her major export, accounting for over 70% of its foreign exchange earnings. As a consequence of the constantly fluctuating but definitely declining price of cocoa on the international commodity market, Ghana's economy is prone to balance of payments deficits. Its problems have been seriously exacerbated by both endogenous and exogenous factors.

Internally, rapacious corruption and economic mismanagement have contributed to the depletion of the national coffers since independence. For instance, state-supervised corruption under the *kalabule* (corrupt) Bonapartist regime of Kutu Acheampong added to

the erosion of investor confidence in the economy throughout the 1970s. Jeffries (1986) sums this up as follows:

Acheampong and his henchmen encouraged smuggling by fairly openly engaging in it themselves. They not only condoned but actually ordered the allocation of import licences and scarce foreign exchange to girlfriends and cronies intent either on making monopoly profits in the domestic black market or else on diverting already scarce imported items into neighbouring territories. (It became a common, if heavily ironic, joke during this period that the most important qualification for obtaining an important licence was the possession of a beautiful body and a coiffured wig) (1986:314).

The tendency to loot the national treasury must be offset against external factors such as fluctuating world cocoa prices and the OPEC price hikes of the late 1970s. One result of this economic crisis was the progressive development of a parallel economy, commonly known as the "black" market. In turn, the growth of the parallel economy was reflected in increasing rates of smuggling and the existence of a popularly patronized unofficial exchange rate market that seriously contributed to the fiscal crisis of the state. With the exception of the AFRC and the PNDC the policies of Ghanaian governments in the post-Acheamponic era have only served to aggravate the fiscal crisis of the state.

#### **A National Democratic Revolution: A socialist Programme of National Reconstruction.**

A critical reading of the preamble to the PNDC's policy guidelines issued in January 1982 reveals the socialist- revolutionary character of the regime and its populist aspirations. It squarely located the source of Ghana's socio-economic despondency in imperialism and neo-colonialism, and vowed to undertake a "National Democratic Revolution" to redress the situation. Paragraph one of the preamble states:

Ghanaians have been confronted with the riddle of how a nation so endowed with such resources could be entangled in an ever-deepening economic crisis. This crisis expressed itself in general shortages in all basic goods, diminishing agricultural and industrial production, trade malpractices, wastage of resources, indiscipline, lawlessness and general mismanagement in all sectors of our national life. The period of the Limann administration certainly represented the most vivid manifestation of this crisis. The oligarchy lacked direction and the economy became uncontrollable under the

weight of neo-colonialism which promotes local mismanagement corruption and exploitation. The 31st December Revolution stands determined to break the monotony of under-development and launch a fresh start in the task of national reconstruction (Quoted in Yankah, 1986:88-90.) [Emphasis added].<sup>5</sup>

The entire burden of responsibility for the sorry state of virtually every facet of Ghana's national life was thus seen by the PNDC as either a direct or indirect consequence of the twin forces of colonialist and imperialist domination. This blanket attribution of blame for Ghana's miserable predicament on "outsiders" was tantamount to scape-goating and found its most lucid articulation in the following statement,

as we begin to tackle the problems of the country we shall be confronted with the more obvious social evils, which are inevitably the effects of much more deep-seated distortions in the existing neo-colonial economic and industrial structures. It is only when we effect concrete and revolutionary changes in these structures that we can make definite progress (Quoted in Yankah, 1986:89) [Emphasis added].

The effective confrontation of the challenges of national reconstruction, perceived as they were by the PNDC in a Marxist-Leninist ideological trajectory, required the mobilization of the energies of the nation to debunk and annihilate the inherited colonial social structure and its systems of thought. The primary target, predictably, was the economic system:

We must make a preliminary admission that Ghana today is a neo-colony, and just as we fought relentlessly in the past to achieve "Self-Government" so should we commit the 31st December Revolution to direct the task of achieving economic independence by ensuring a fundamental break from the existing neo-colonial relations (Quoted in Yankah, 1986:89).

In order to disengage the country from the strangle-hold of neo-colonialism and imperialism, the PNDC regime recognized that not only would it have to renegotiate the nature of the state's relation with foreign and domestic capital, but it would also have to confront the colonial psyche of the Ghanaian oligarchy especially, and the broad masses generally. The latter process, which Paulo Freire (1970) refers to as conscientization, was

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"Preamble to the Policy Guidelines of the PNDC". Cited in Kojo Yankah. The Trial of J.J. Rawlings: Echoes of the 31st December Revolution. Tema: Ghana Publishing Corporation. 1986. pp. 88-90.

deemed as vital to the success of the revolution as the former process of disengagement and economic emancipation, both of which are critically inter-connected in Marxist theory of revolution and the creation of a democratic social order. The PNDC's Policy Guidelines clearly states in part:

In the attempt to change the existing neo-colonial institution it is important to note that the state machinery imposed by imperialism, and its methods of operation, are inherently undemocratic. The danger is that there already exists an identifiable elite whose miseducation and misorientation have made them to believe that the system is the only possible way of exercising democratic authority. On the contrary past political systems have never expressed the popular will of the people (Quoted in Yankah, 1986:90).

The conscientization of the people of Ghana by the regime took two specific forms. First, a series of workshops were organized throughout the country for cadres of the revolution drawn from the several People's Defence Committees (PDCs) and Workers' Defence Committees (WDCs) which sprang up in all corners of Ghana as vanguards of the revolution. Second, the state-controlled media was mobilized to propagate the ideals of the revolution and justify its *raison d'être*. The objectives of these two simultaneous processes were first and foremost, to deconstruct the negative image of revolutions and revolutionaries which the previous PNP regime had fostered<sup>6</sup>, and second, to assert the moral validity and superiority of revolutionary social transformation over civilian constitutional rule which the PNDC saw as inherently alien, undemocratic and oppressive.

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<sup>6</sup> Several campaigns of vilification and contempt were waged by the PNP regime to discredit the leadership of the AFRC. In 1982, the Editor-In-Chief of an Accra daily tabloid, The Palaver Tribune, Mr. Chris Archer, revealed how the Limann Government had paid him with generous access to newspaper to launch a slanderous campaign against Jerry Rawlings. Mr. Archer vigorously pursued this task in his capacity as journalist and a self-styled Commander-In-Chief of the National Anti-Coup Crusade in Ghana. Many key functionalities of the AFRC era were portrayed by the Palaver Tribune as dishonest, disgruntled, empty-headed and power-hungry rascals.



### **From Socialism to Pragmatic Populism: Ideological Shifts in the Character of Tribunal Justice**

The period between January, 1982 and August, 1983 can be safely regarded as the radical socialist phase of Rawlings' revolution. A revolution here is conceived as entailing, among other things, a radical revamping of the social structure of a society. In the context of Ghana, this meant the adoption of a transformationist approach to socio-economic development.

The salient features of this process were the elimination of the imperialist stranglehold of Western capital on the neo-colonial economy via the nationalization of key sectors of the economy; the transfer of political power from the local bourgeoisie and their foreign allies into the hands of labour; and the improvement of the socio-economic well-being of the working classes. It also meant the systematic re-inculcation of traditional Ghanaian values into public life and the elimination of the corrupting influences of foreign domination and cultural imperialism.

The PNDC adopted and implemented policies which were radical in outlook and sought to transform the country into a self-reliant nation in control of its resources and productive capacities. According to Ray (1986:118-150), the economic and labour policies, foreign policy, and domestic policies in the areas of education, culture, religion, military affairs and women's rights adopted by the PNDC were clearly revolutionary.

Nevertheless, most of these policies were either abandoned or significantly watered-down to accord with the present accommodationist stance of the government subsequent to August 1983. To the list of neutralized policies can be added the policy of popular justice and its public tribunals.

The task here is to provide a coherent theoretical framework for understanding these apparent ideological shifts in policies. Structuralism is used to guide the analysis which explores the true character of the revolution and its interface with the international politico-economic system as a means of understanding the constraints and contradictions

imposed on the revolution from without, as well as the inherent limitations of the revolutionary experience.

The shift from socialist transformation to capitalist accommodation was all the more dramatic given the PNDC's initial hostility toward the economic prescriptions of western financial institutions such as the International Monetary Fund (IMF) and the World Bank. As noted earlier, the PNDC regime initially blamed much of Ghana's economic woes on its 'neo-colonialist' structure, and an IMF package, with its attendant currency devaluation and cuts in public spending, were deemed particularly inimical to Ghana's interests, and highly reprehensible to the regime. Thus "on the face of it, it is highly remarkable that an IMF loan was sought" (Arhin, 1987:353) by the same regime. In December 1982, it was announced that an Economic Recovery Programme (ERP) was to be implemented. The ERP was a package of comprehensive economic and social development programmes, policy reforms and structural adjustment. The key objectives of the ERP were:

realignment of the price and incentives system in favour of the productive sectors, particularly the export sector; reduction in government intervention in the economy and gradual liberalization of the economy; restoration of monetary and fiscal discipline; encouragement of private sector development and rehabilitation of the country's economic and social infrastructure (Information Services Department, An Official Handbook of Ghana, 1991:41).

Within the scope of the ERP, the measures implemented toward the achievement of these objectives fell under three broad headings:

policy reforms in such areas as public sector management, import-trade and internal distribution, external value of the Cedi and foreign exchange regime and budgetary policy on deficit financing; sectoral/institutional restructuring, such as the financial sector reform, divestiture of state owned enterprises and strengthening of public investment programming; programmes of physical rehabilitation and development of the economic and social infrastructure, such as roads, schools and public buildings (Information Services Department, An Official Handbook of Ghana, 1991:41).

The ERP was implemented in two phases. The first phase, dubbed ERP I, was concerned with the stabilization of the economy over the period 1983-86. The second

phase, ERP II, was the structural and development phase of the programme, and consisted of several sub-phases implemented from 1987 to 1990.

The results of Ghana's ERP have been outstanding:

Real GDP yearly growth averaged six per cent in 1984-88 and five percent over the period to 1990; export receipts have more than doubled leading to favourable balance of trade and of payments; government budget has achieved surplus revenue since 1985 from a deficit amounting to 4.6 per cent of GDP in 1982; inflation is down from the high 123 per cent in 1983 to something in the region of 27 per cent in 1988; agricultural, mining, and manufacturing outputs have all expanded at a fast rate. (Information Services Department, An Official Handbook of Ghana, 1991:41)

When it was launched in the April 1983 budget, the ERP was virtually a standard IMF package! Indeed, so controversial was this move, and so incongruous was the budget to the regime's pro- worker rhetoric to date that the Chairman of the PNDC, Flt. Lt. Jerry John Rawlings found it necessary to explain the motives behind the 1983 Budget Statement in a radio and television broadcast to the nation on May 2nd, 1983. A special two-day seminar on the budget began at the Kwame Nkrumah Conference Centre in Accra the next day. According to Rawlings, the seminar was to "provide an opportunity for members of identifiable bodies, PDCs, WDCs and the general public to examine and exchange ideas on different aspects of the budget" (Selected Speeches, 1983:21). Similar "democratic consultations" and meetings were organized throughout the country, with an especial emphasis placed on university students and the Trades Union Congress (TUC) from whose ranks the most vociferous criticisms had emanated.

The point here is that, despite its clearly revolutionary socialist leanings, the state under the PNDC did not become a slave to socialist ideology. The relative autonomy of the state allowed it to break away from the hegemonic control of the ideological left in general, and the socialist world in particular, at the same time as it permitted it to court capital from the western donor community. By late 1983, a combination of frequent subversive activities against the regime, a severe Sahelian drought, sporadic bush-fires, the flight of capital from the country, and the continuing miserable performance of the

economy had threatened the very existence of the country and the regime. This precarious situation was compounded by the mass expulsion of over one million Ghanaians from Nigeria in 1983.

By August 1982, the Rawlings regime had become convinced that the best possible solution to the challenge posed to its survival by subversive political activities and the appalling economic situation was to seek an IMF package. The apparent failure of the left to offer a sound and realistic alternative to the IMF option (Ray, 1986), coupled with the alleged involvement of the left in the two serious coup attempts of October and November 1982 resulted in a series of measures designed to isolate the left from policy-making circles.

In responding to its debt problems, Ghana under Rawlings sought further loans, mainly from the IMF, to stem the tide of economic, social and political difficulties which confronted it. Rawlings over-ruled the anti-IMF rhetoric of his erstwhile socialist supporters, and whole-heartedly endorsed a package of austere economic measures jointly worked out by the PNDC Finance Secretary, Dr. Kwesi Botchway, the IMF and the World Bank. The decision to go to the IMF was partly a product of the unwillingness of alternative creditors to give support, coupled with Ghana's waning geo-political influence in the West African sub-region.

It must also be noted that, Ghana's acceptance of IMF economic stabilization prescriptions opened the hitherto tightly sealed doors to her acquisition of bilateral and multilateral aid from the West. Britain, France, Germany, Japan, USA and Canada are all doing brisk business with Ghana, a country which was seen in Western financial circles as a basket case in 1981.

The economic policy directions of the Rawlings regime were fundamentally altered subsequent to the adoption of the IMF/World Bank austerity measures. Among the persistent demands with which the regime had to comply were the following: (1) substantial devaluation or flotation of the exchange rate of the cedi; (2) the abolition of

government subsidies; and (3) cuts and/or privatisation/divestiture of the para-statal sector. These measures are in keeping with the traditional IMF prescriptions and conditionalities for the granting of "development" aid. They are the cornerstone of what the IMF calls "financial discipline".

Rising rates of inflation, shortages and unemployment are among the traditionally unmistakable consequences of acquiescence to IMF economic revival packages. And Ghana has not escaped these. They result chiefly from cuts in government funding and the placement of moratoriums on employment. While they help eliminate the superfluous segment of the civil service - the thousands of redundant "workers" who are paid precisely for doing nothing - the expected benefits of these measures remain largely fragmentary. For example, agricultural production has not increased appreciably.

The social costs of these measures are quite debilitating: they include an acute erosion of the capacity of many Ghanaians to stay above the national "poverty line". The increased volumes of economic refugees annually produced by Ghana since 1983 is a living testimony to the depth of frustration experienced by many Ghanaians under the Rawlings regime. While international migration has traditionally been a favoured Ghanaian response to local economic difficulties - and the latent and active political instabilities in Ghana provide a plethora of genuine and sleazy political justifications for Ghanaian refugee claimants abroad - bogus political refugee claims (made in countries like Canada, France, Italy, Germany, Britain and the United States) grounded in economic factors have sky-rocketed significantly since the implementation of IMF conditionalities in Ghana.<sup>7</sup> In a

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The Inter-Governmental Consultations on Asylum, Refugee and Migration Policies in Europe, North America and Australia (IGCA) estimates in its 1992 "Report of Country Assessment Approach Working Group on Ghana" that, "Ghanaian asylum-seekers figured among the top 10 nationalities in Western countries during the last six years. Over 50,000 of them sought asylum in one of the 16 countries of the Inter-governmental Consultations, the majority in Belgium, Canada, France, Germany, the Netherlands, Switzerland and the United Kingdom. The lowest among major asylum-seeker groups (IGCA, June-July 1992:2)

I do not have any objective research data to support the claim that there has been an increase in the number of Ghanaian refugee claimants in Canada subsequent to the implementation of the PNDC's Economic Recovery Program since 1983, or that the broad majority of them are bogus. However, in my capacity as a former President of the Ghanaian Union of Manitoba and Vice-President of the National Council of Ghanaian-Canadians (NCGC), I dealt with numerous situations involving Ghanaian refugee claimants in Canada. I know from personal experiences since 1985 that there has been a great

bid to neutralize the negative effects of these measures, the regime has instituted an elaborate, humane set of palliative actions appropriately called **Programme of Actions to Mitigate the Social Costs of Adjustments (PAMSCAD)**. They are designed to cushion the average Ghanaian. The personal integrity of members of the PNDC, especially that of Jerry Rawlings, remains one of the regime's major assets; its populist appeal is still

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increase in the number of refugee claims. The NCGC and its chapter associations are frequently called upon by Immigration Canada officials and refugee support groups to assist such claimants in many diverse areas including the provision of language interpretation and survival skills.

Persecution based on political conviction, ethnic origin and religious persuasion are the three common grounds cited by Ghanaian refugees as factors compelling them to seek asylum in Canada. The majority of refugees assert that they are fleeing persecution by the Rawlings regime due to their political convictions and activities.

Some refugees claim to be soldiers; ex-soldiers; former politicians; leaders or key members of "opposition" political parties; key leaders of the National Union of Ghanaian Students (NUGS); persons tried in absentia or convicted by Ghana's public tribunals for perceived anti-government political activities; or "relatives" of such persons. Political activities frequently cited as the governments grounds of persecution are the following: staging or conspiring to stage a military coup expressing dissenting or unpopular political views and staging an anti-PNDC political demonstration.

Since the PNDC promulgated the Religious Bodies Registration Decree in 1990, a few refugees have claimed that they were being persecuted for their religious persuasion or activities. The majority of refugees in this category claim to be members of either the Jehovah Witnesses or the Church of Jesus Christ of Latter Day Saints (Mormons).

While some of these claims are well-founded in the technical sense of people fleeing their home country because of experience or fear of persecution, a great number of them are simply bogus. I know several Ghanaian refugees who never went to secondary school let alone university, and nonetheless claim that Rawlings wanted to kill them because they were student leaders or leaders of a so-called students' "pro-democracy" movement actively opposed to the Rawlings "dictatorship". One of my former class-mates at the University of Ghana who managed to escape from police custody in Ghana, after an abortive attempt to smuggle two suitcases of marijuana into the United Kingdom, ended up in Montreal and claimed that he was a junior brother of a military officer wanted by the Ghanaian authorities for political subversion. Yet another high school mate who later became a Secretary of state in the early days of the Rawlings regime and was blatantly corrupt, fled the country after he was arrested and charged with various counts of misappropriation of state funds. He claimed that he was being persecuted for disagreeing with the economic policies of the regime. And there was this fellow who said he was persecuted for being a Mormon but couldn't correctly state any factual thing or say anything whatsoever about the Mormon faith. And then there was the famous 1991 case widely reported in the Canadian media, of the Ghanaian in Toronto who claimed that, in keeping with custom, "the Ashantis were looking for him to cut off his head to accompany the body of his deceased father who was a traditional chief"!! (I am an Ashanti from a traditional royal background, and I know this claim to be totally false, wild and self-serving). I can cite several more examples of persons who I know in the context of Ghana to have been politically inconsequential, and not pursued by anyone for anything, who have successfully claimed refugee status.

My point is that the ranks of the Ghanaian refugees in Canada, as elsewhere, include the genuine, the economic migrant and the common criminal. The broad majority of refugee claimants are, in my opinion, economic migrants. Nevertheless, I consider migrating for compelling economic reasons *bona fide* grounds no less "noble" than some of the grounds conventionally accepted as valid. In private conversations, many refugees and "immigrant students" speak of "efie aye den" (times are hard in Ghana) as the key and obvious reason for immigrating, while the prestige of being in "aburokyire" (overseas) is a significant factor for others. Quite simply, a significant portion of Ghanaian refugee outflows results from the combined effects of traditional push-pull factors which underlie international migration everywhere. Political persecution or repression, in Ghana's case, is largely a convenient and timely excuse used by many Ghanaians.

relatively intact. It has succeeded, by and large, in mobilizing popular support and maintaining political control.

The Ghanaian experience with IMF prescriptions has both historical precedents and contemporary parallels. The notorious case of Mexico's gigantic indebtedness mainly resulting from IMF economic measures is well-known. Kenya, Ivory Coast, Brazil and Ghana (1969-1972) have all swallowed the bitter IMF economic recovery pill with devastating consequences. Adjustment, by definition, is not a long-term solution but a temporary re-arrangement of desk chairs. Nevertheless, Ghana appears to be in a far better shape than any other country pursuing economic recovery via structural adjustment.

#### **From Decolonization and Poverty to Recolonization and Uncertainty: The Role of Western Finance Capital**

As with decolonization elsewhere in the Third World, Africa's attainment of political emancipation in the 1960s did not produce the much-anticipated economic prosperity and social development generally. The promise of socio-economic development consequent to the attainment of political independence was most eloquently articulated in Kwame Nkrumah's famous aphorism, "**Seek ye the political kingdom first, and the rest shall be added unto you**" (1957). Adherence to this injunction did not seem to have made any difference. But then again, Nkrumah also recognized the possibility that political independence may not necessarily produce a bed of roses. In September 1948, he printed the following statement in his newspaper, the Accra Evening News: "**We prefer self-government with danger to servitude in tranquillity**" (Nkrumah, 1957:93). This apothegm subsequently became the motto of his Convention People's Party which eventually won independence for the country on March 6th, 1957.

In any event, the dream of prosperity did not materialize. A weak and inadequate human resource base, ill-conceived grandiose development plans and strategies, gross economic mismanagement and corruption combined with administrative and political inexperience, among other factors, to shatter the hopes of prosperity. The expectation of

massive foreign aid that would fuel the development agenda was realized, but not without the usual strings attached. Many African countries became pawns in the debilitating super-power politics of the 1960s. Largely motivated by a political desire to strategically under-cut Soviet expansionism, a string of Western aid packages poured into the Third World as the decade progressed. America's golden decade of consumerism occasioned by the Marshall Plan which helped reconstruct post-World War II Europe and Japan continued into the 1960s, underpinned by the same political consideration - the containment of communist Soviet influence. The World Bank, USAID and other western aid agencies pumped billions into the Third World in the name of development. For instance, US aid financed the construction of Ghana's hydro electric dam at Akosombo. Mainly earmarked for big infrastructural projects like roads, power grids, dams and ports, absolutist kleptocracies such as Mobutu's regime in Zaire, and other grossly incompetent neo-colonialist regimes in Africa supervised the manic squandering of the vast sums floating around, aided and abetted by cynical western businesses. Dreams of prosperity crystallized chiefly in three forms: 1) the bloating stomachs and foreign (largely Swiss) bank accounts of the ruling elites; 2) numerous ill-conceived mega-projects-doomed at their inception to become white elephants; and 3) Bolivian-style political instability.

Political sovereignty failed to bring the naively expected economic independence. Even Latin American countries which achieved independence more than a century earlier became trapped in a global economic system established over centuries of colonial pillage. Raw materials were exported at cut-rate prices while manufactured goods were imported from ex-colonial powers at cut-throat prices.

In the 1970s, Third World export revenues danced to the tune of Western-operated price fluctuations like a roller-coaster; most of the time the price the Third World received for basic exports was too low to cover the cost of manufactured imports. The quadrupling of crude oil prices by the newly-formed Organization of Oil Exporting Countries (OPEC)



in 1973 worsened the balance of payment deficits of non-oil producing Third World countries like Ghana.

Nevertheless, interest rates were quite low and terms fairly easy. Money was needed to cushion the blow of high oil prices; sometimes they were "needed" to pay for grandiose "development" projects such as a nuclear reactor in Ferdinand Morcos' impoverished Philippines, or Mirage jets in Peru. Between 1973-1980, Commercial bank loans to the Third World increased by over 550 per cent. Indeed,

[t]he leading banks systematically increased their lending to developing countries by remarkable amounts. Some major banks lent more than 100 per cent of their capital to a few developing countries (Sachs and Larrain, 1992:695).

As evidenced by Ghana's terms of trade, there was a slow and steady rise in the price of Third World exports in the 1970s (Huq, 189:22), reflecting the general economic buoyancy of the decade. In this optimistic economic atmosphere, Jamaica's Michael Manley and Tanzania's Julius Nyerere called for the establishment of a New International Economic Order (NIEO), a code of conduct to regulate the conduct of multinational corporations (MNCs) in the Third World - a call most vehemently being championed today by Ghana's Jerry Rawlings - and a Common Fund to insulate Third World commodity producers from the vagaries of the global market. The up-beat times of the 1970s, however, did not last long.

By the beginning of the 1980s, the new economic doctrine of monetarism had become quite fashionable. OPEC had bumped oil prices once again in 1979, setting in motion a spiralling and debilitating inflation. Inflation was combatted with high interest rates, unemployment and a deliberate recession. These "solutions" jointly triggered the debt crisis of the 1980s. Third World commodity prices fell as western markets collapsed under the weight of Reaganomics and Thatcherite monetarist policies; the rapid rise in interest rates doubled and even tripled in some cases the cost of debt servicing. The combined Third World debt hit a trillion dollars. Table 5

shows the increasing debt burden and inflationary trends which characterized many African countries in the 1970s and 1980s.

**Table 5. The Debt and Consumer Price Index in Selected African Countries**

Country	Consumer Price Index		The Debt (in Million US\$)	
	1974	1982	1971	1981
Egypt	122	310	1982.4	13887.4
Ghana	168	7812	558.0	978.7
Kenya	124	335	366.2	2228.2
Nigeria	N/A	226	680.0	4651.8
Ethiopia	112	277	226.2	830.4
Ivory Coast	130	364	399.2	4496.0

**Source:** United Nations Statistical Yearbook (1982), pp. 174-182 and pp. 332-333.

The bulk of the abundant money was squandered on armaments, while a great deal was also literally stolen by local elites and diverted into overseas bank accounts. Globally, new loans were contracted simply to service mounting interest payments on past debts.

Between 1979 and 1983, capital flight from Mexico alone totalled \$90 billion - more than the entire Mexican debt. During the 1970s and early 1980s, Venezuela accumulated a huge debt. As Edwards and Larrain (1989) point out, Venezuela's debt is more than fully explained by capital flight! In Argentina and Mexico, capital flight also accounts for more than 60% of the increase in debt.

**Table 6. Capital Flight In Selected Latin American Countries**

Country 1976-82	1983-85	1976-85	CF% *	
Argentina	27	-1	31	62.7
Mexico	36	17	53	64.8
Venezuela	25	63	1	101.3

Note: CF\* indicates capital flight divided by changes in external debt (percentage).

Source: Sebastian Edwards and Filipe Larrain (1989), Debt Adjustment and Recovery: Latin American Prospects for Growth and Development. Oxford and Cambridge: Basil Blackwell.

### **The Birth of Structural Adjustment Programmes (SAP)**

In 1982, a beleaguered, Mexico refused to service its debt obligations, causing panic in western financial circles. The IMF jumped into the fray with its first structural adjustment' loans by which debtor countries are advised to boost exports and cut local consumption as a means of increasing foreign exchange earnings. The objective is ultimately to accumulate enough funds to pay foreign creditors. While the Mexican experience was still underway, more Third World countries were forced to take the IMF medicine. The World Bank also entered the structural adjustment business, and by 1988, nearly a third of World Bank loans had strict "adjustment" conditions attached to them. Today, Ghana's experience with structural adjustment is hailed by the IMF and the World Bank as a resounding success.

By 1990, much of the Third World had "embraced" SAP. Among the results has been a massive haemorrhage of wealth from the poor countries to the rich ones. In 1985 alone, some \$50 billion were siphoned off from the Third World (Ecumenical Council, 1989). Close cooperation between the IMF and the World Bank has meant that Third World countries continue to pay the interest on their debts even as they accumulate new

ones. The social effects of SAPs have been catastrophic: increased malnutrition, illiteracy, infant mortality and poverty. The United Nations Children and Educational Fund (UNICEF) estimates that half a million children died in 1988 alone as a result of debt-induced austerity measures. In Ghana, so devastating were the effects of SAP that, mainly with the assistance of the World Bank and the IMF, the PNDC instituted a Program of Action to Mitigate the Social Costs of Adjustment (PAMSCAD). It aimed to alleviate the negative impact of the SAP.

Meanwhile, IMF and World Bank officials seem to wield more power in some Third World countries than government ministers. Indeed, there is very little proof that their policies do anything more than assist bankers to collect interest. Western consumers and MNCs have been the main beneficiaries, gaining from both low commodity prices and low Third World wages. Evidently, competition for scarce export markets holds down prices and depresses wages.

In the final analysis, IMF/World Bank policies are increasing the drain of wealth from South to North and reinforcing the inequality of the global system. SAPs ultimately facilitate the "recolonization" of Africa and the rest of the hitherto 'decolonized' Third World; indeed, SAP has assured the continued domination of Third World economies by foreign financial interests.

In 1982, the PNDC government was well aware of the subtleties of recolonization and neo-colonialism assured through the operation of foreign financial interests and World Bank support. In its Policy Guidelines, the PNDC articulated this understanding when it stated that:

The historical roots of our present state of under-development stem from British colonialism which bequeathed a set pattern of economic development, social structures, attitudes and an oppressive and parasitic state machinery. The retention of the structures of colonialism has assured the continued domination of our economy by foreign financial interests, with the attendant losses of the country's resources and hard-earned wealth in a new phase of colonialism, which has been aptly described as neo-colonialism [Emphasis added].

In light of this manifest appreciation of the dangers of ill-considered flirtation with western finance capital, and the PNDC's own initial traducement of the World Bank and the IMF, it is pertinent to explore how the regime arrived at the policy decision to woo these financiers, as well as how it managed the resultant discontent within its ranks.

### **The Management of Dramatic Policy Reversals**

The foregoing sections illustrate the difficult policy decisions which faced the Rawlings regime by late 1982 and its decision to seek IMF/World Bank support. What follows is an analysis of the dynamics of managing a critical policy reversal by a revolutionary government. The crucial political question to be answered is the following: How did the state under Rawlings manage this remarkable U-turn in its policy orientation to socio-economic development? How did it deal with the tensions between the right and the left epitomized by the manifest divergence of ideological positions within the ranks of the ruling PNDC?<sup>8</sup> Finally, how was the PNDC able to successfully implement the IMF/World Bank-engineered SAP that other Third world governments have been unable to apply with any appreciable degree of success?

### **The Great Turning-Point**

On 28 August 1983, Chairman Rawlings delivered an address on national radio and television to the people of Ghana. The speech was essentially a close-up analysis and critique of the populist and economically unproductive elements in the 31st December Revolution as it had evolved to date:

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8 As composed in 1982, the seven-member PNDC contained three distinct factions. These were: (1) the middle classes represented by a retired Army Officer (General Arnold Quainoo), a liberal feminist (Anna Ennin) and a Catholic priest (Rev. Dr. Kwabena Damuah); (2) the discontented, radical, urban workers represented by a trade union leader (Mr. Amartey Kwei); (3) the rank and file soldiers and socialist revolutionaries represented by an army private (Adjei-Boadi); (4) the socialist intellectuals represented by a student cum-army sergeant (Aolga-Akata Pore); and (5) a charismatic, pragmatic populist (Jerry John Rawlings).

We can no longer postpone the time for halting the populist nonsense and for consolidating the gains of the past 20 months and making a noticeable leap forward .... Production and efficiency must be our watchwords. Populist nonsense must give way to popular or unpopular sense ... to scientific sense, whether it is popular or not. Many of us have spent too much time worrying about who owns what. But there can be no ownership without production first. The only resources which do not have to be produced are those given to us by nature, and these must be used for the benefit of all the people of today and tomorrow. Everything else has to be produced, and until we all fully recognize and act upon this fact, we shall be deceiving ourselves with empty theories. (West Africa, September 12, 1983.) [Emphasis added].

Rawlings' rejection of "popular nonsense" reflects a timely recognition of the simple truth, that revolutionary rhetoric and "mobilization" are by themselves inherently unproductive, and are inadequate vehicles for sustaining a revolution. There was an urgent need to win some economic victories in the short term in order to contain the people's mounting disillusionment with the revolution. Economic productivity was subsequently moved to the top of the PNDC's revolutionary agenda.

In other words, the regime had to concretely demonstrate not only a commitment but also a real capacity to effect positive or noticeable improvements in the living conditions of the masses. Hence, Rawlings declared that unless lessons were drawn and new ground broken, it was clear

from all indications, particularly the lag in production and the persistently unfavourable climatic conditions, that we will be adding to the already intolerable suffering of our people. We have no right to do this, and we do not intend to do so (West Africa, September 12, 1983).

The significance of the speech lies not only in the fact that it constituted an open admission by the PNDC that its economic performance had thus far been virtually atrocious but also it represented the first real indication of impending policy decisions that would significantly alter the course of the revolution and remove the protective armour which had hitherto insulated the slogan-shouting intellectuals and idle workers from scrutiny. Thus, focusing on the barriers to progress in the revolution, Rawlings vehemently attacked the "in-built traditions of waste, red tape and inertia" in government agencies and criticised the lack of initiative and the pervasive insensitivity to the

"seriousness of our economic situation". He observed that these tendencies have sometimes been a "mark of sheer disloyalty if not downright sabotage of government policy".

### **New Policy Directions In Criminal Justice Administration**

One response of the PNDC to these negative and unproductive tendencies in Ghanaian society was to expand the ambit of the criminal law to facilitate change:

It is time...for negligence to be regarded as a crime, and to be punished as the law demands....The responsibility for any lapse, any lack of urgency, and any omission of duty will be traced to the individual concerned, and he or she will have to face the consequences. (West Africa, September 12, 1983).

It would henceforth be criminal for anyone to delay the implementation of programmes designed to benefit the people, where such delay derived from incompetence, inefficiency or nonchalance. The worker who idled for the whole working day and still expected to be paid also committed a crime against the state. Rawlings subsequently revealed that a "weeding-out" process had begun and would continue against "those who cannot meet the new standards of efficiency and responsibility". The "workers", who had until then remained the darling untouchable of the regime were now to be subjected to close scrutiny in order to leap the revolution forward. They were to lose their favourite idealized and romanticized status as victims of economic and political crimes; they were also perpetrators of such crimes. The populist rhetoric which typically celebrates and glorifies ordinariness and ascribes innocence to the average worker of agrarian peasant farmer was being rejected by the PNDC as no longer appropriate to the current stage and ideological ethos of the revolution.

The cosy relationship between leftist intellectuals and the PNDC government that had hitherto been institutionalized through the various revolutionary organs or structures also came under attack in this famous speech. Rawlings chastised the new crop of parasitic

intellectuals. Referring sarcastically to what he described as exponents of "Ph.D" (Pull Her Down), Rawlings noted that:

Opportunists are present among the ranks of the revolutionary organs, attracted by the feeling of power and authority and sometimes by the chance of material advantages. Although these people are fond of pointing out others as reactionaries, I think they are in fact the real reactionaries. They must be identified and their intrigues exposed. Service and commitment are the foremost qualities we need. (West Africa, September 12 1983).

Chairman Rawlings also questioned the value of higher education in Ghana if it was not directed toward the provision of beneficial service to the nation, and criticised the arrogant attitudes of some intellectuals:

Those who have had more opportunities to learn too often show a deep-seated mental arrogance, a distorted intellectual dictatorship, too quick to call others reactionaries... Intellectuals are very much needed...they do know quite a bit, but can they compete with any illiterate farmer, mason or fisherman when it comes to practical experience in the mechanics of achieving the objectives of production of our revolution? ...The merits of an intellectual lie not in what he thinks, but in the relationship between what he thinks and what he does. (West Africa, September 12, 1983).

The PNDC was subsequently to disengage itself from the leftist intellectuals who had hitherto constituted its main ideological mill. By publicly lambasting these elements within the ranks of the regime the PNDC government was set on an irreversible collision course with certain key ideologies and revolutionary functionaries who would later organize in an effort to dislodge it from power.

On national security, the PNDC chairman declared that the events of June 19, 1983 had shown that the time was not yet ripe for what he described as "suicidal generosity" or leniency toward political subvertionists. The government was apparently sternly set on the path of vigorous crime, control via the public tribunals. Political dissent was also to be considerably stifled. Yet, as will become clear later on, resort to repressive measures and greater use of the death penalty were to impair the government's capability to woo foreign capital investments and donor aid in support of its economic recovery programme. The administration of justice in Ghana, as elsewhere (such as Canada), was to be critically



influenced by macro economic forces and circumstances. The development of the tribunal system was to be similarly affected. While promising greater political repression and intolerance for dissent and dissidents - a feat which was diligently accomplished through the criminal law (specifically via the promulgation of more repressive decrees, the strengthening of the public tribunals and the other related organs of mass policing) and the muzzling of the press - the PNDC also announced the opening of a national debate on the political future of Ghana.

The compelling policy pronouncements contained in the August 28, 1983 national broadcast by Jerry Rawlings signified a fundamental conceptual and strategic reversal of certain key policies developed by the regime in the period of great revolutionary frenzy and rhetoric. The speech was a lucid articulation of a new vision, a shift in emphasis, and a new revolutionary trajectory along which Ghana under the PNDC would travel; it was a historic watershed within the revolution. It opened up the political space for the monetarist economic policies subsequently pursued by the PNDC with the active backing of the IMF, the World Bank and western capitalist donor countries.

Thus, Rawlings regime responded to these challenges within its ranks by partially disengaging itself from socialism and courting the favours of western capital. In so doing, the state revealed its pragmatic populist character far more substantively than the rhetoric of its functionaries had portrayed. Thus, much later in 1989, Dr. Obed Asamoah, the Foreign Affairs Secretary, could opine to a six-member team of Austrian journalists visiting Ghana that the country was "sort of practising pragmatism with a populist content" and not interested in any ideological doctrines that will tie it down to any straight-jacket political system. He stressed that, Ghana was interested in "good ideas that will take into account our circumstances and make good what we have" (West Africa, February 20, 1989:292).

What happened in Ghana was not a change in the PNDC's populist aspirations but a repudiation of its socialist economic policies, insulting rhetoric and over-romanticization of

rural life and its associated virtues. By distancing itself from radical, high-sounding socialist academics while embracing some moderate elements in the society, the state under Rawlings effectively manoeuvred itself into a pragmatic populist political platform of its own creation. This allowed it the political and moral niche within which to operate and to pursue its policy of economic recovery via SAP, and yet remain fairly popular.

Nevertheless, this strategy cultivated for the regime an army of new political foes, mainly from the left in Ghana. Thus, for example, on January 25, 1985, the left-wing New Democratic Movement (NDM) and the Catholic Graduates for Action (CGA) issued a joint statement in which they charged that the governmental policy changes in Ghana over the preceding eighteen months had essentially been "anti-people" and deliberately orchestrated to discredit PDC/WDC executives, allow the infiltration of rightist elements into government, and generally reverse the popular democratic process initiated on 31 December 1981 (West Africa, February 4, 1985:201). The PNDC responded to the challenge from the disgruntled left by detaining several of its self-styled leaders without charge or trial. Among the many revolutionaries detained without charge and subsequently released since 1983 are the following: (1) Mr. Kwame Karikari, Chairman of the New Democratic Movement (NDM) and former head of the Ghana Broadcasting Corporation; (2) Mr. Yaw Graham, former head of monitoring and coordination of the erstwhile National Defence Committee, and press and information secretary of the NDM; (3) Mr. Ralph Kugbe, former member of the Accra District Council of Labour, and member of the NDM; (4) Mr. Kwesi Pratt, executive member and co-founder of the Kwame Nkrumah Revolutionary Guards (KNRG); (5) Mr. Kwaku Baako, executive member of the KNRG; and (6) Mr. Yaw Adu Larbi, executive member, intellectual back-bone and chief ideologue of the People's Revolutionary Youth League of Ghana (PRYLG).

These individuals were all former political allies of Flt.Lt. J.J. Rawlings. Detained between May and July 1987, they were released on December 28, 1988. An editorial in

the People's Daily Graphic of May 11, 1989, titled 'Dishonest Poison' described them as "pseudo-intellectuals, super-leftists and pretentious talkers who had become campus fixtures over the past decade" - an apparent reference to their commitment to a proletariat revolution and their continued enrolment in graduate studies at the University of Ghana. They fell out of favour with the Rawlings regime after the PNDC embarked upon the SAP in 1983, under the aegis of the World Bank and the IMF. The PNDC's Economic Recovery Program came to be seen increasingly by these leftist elements as an inglorious sell-out of the country to imperialism. As the government moved the state along the path of what its secretary of Foreign Affairs, Dr. Obed Asamoah described as "pragmatism with a populist content" (West Africa, February 20, 1989:292), the rift between these radical leftists and the neo-pragmatists within the socialist camp in Ghana widened. The PNDC resolved the internal contradictions and ideological bickerings within the regime over the role of foreign capital and imperialism in the socio-economic development of Ghana in two main ways.

First, it gently orchestrated the resignation or removal of the Marx-quoting intellectuals and the liberation theologian within its ranks. Thus, by late 1984, the young, radical soldier-cum-intellectual, Sgt. Aloka Akata-Pore, and the populist Catholic priest, Rev. Dr. Kwabena Damuah had been axed from the Council. Akata-Pore was arrested on suspicion of conspiracy to overthrow the regime by "press conference" (Ray, 1986: 104) in November 1983, and eventually "allowed" to emigrate to London. As for Rev. Damuah, he returned to the pulpit in Madina, a suburb of Accra from where he had been catapulted to the national political scene.

Second, with the apparent connivance of the regime, a series of campaigns of vilification mounted by the state-controlled media ensured that certain vociferous, dissenting leftist intellectuals were effectively silenced, and widely perceived as disgruntled, immature and highly opinionated book-worms who only sought to use Ghana as an experimental laboratory for their abstract Marxist-Leninist revolutionary ideas. The

untested idealism of these quixotic elements was contrasted with the seasoned, demonstrated pragmatism of a number of judges and politicians such as Justice D.F. Annan who were appointed to the Council. Many of these ousted intellectuals later collaborated with old political enemies under the auspices of the Movement for Freedom and Justice in Ghana (MFJG). Formed in July 1989, the MFJG was committed to opposing the PNDC's political domination of the country and to demand a voice in the national debates organized by the National Commission for Democracy (NCD) on the evolution of a future democratic system for Ghana.

One of the first populist actions of the PNDC regime ostensibly aimed at rallying working-class support behind the fragile 31st December Revolution was the enactment of the *Rent Control Law 1982* (PNDC5) which effectively repealed all hitherto existing rent legislation in the country. The decree provided under section 1(1) that notwithstanding the provision of any enactment or any lease or tenancy agreement, the rents of any residential premises had been reduced by fifty per cent. It provided further that rent in respect of any single room accommodation commonly known as "chamber and hall" should not exceed C50.00 per month. The legislation further directed that tenants whose rents were lower than C50.00 a month prior to 31 December 1981 should continue to pay the same rent.

The most draconian aspect of this decree was section 2(3) which provided that all landlords receiving rent in excess of C1,000.00 a month for any premises whatsoever should pay a tax of fifty per cent of the rent to the state!

Chronic housing shortages and incommensurate accommodation have undoubtedly been a feature of urbanization and urban life in Africa (Busia, 1950; Little, 1974). Indeed very few city and town residents in Ghana own the houses in which they live. Busia (1950) reports in his survey of the Sekondi-Takoradi municipality that so acute was the housing problem that some landlords had resorted to converting lavatories and kitchens into living rooms in order to accommodate increased tenant demands. Over crowding in poorly-ventilated, unhygienic and altogether substandard houses was the norm for most

urban dwellers. Busia notes a particularly deplorable situation in which 45 occupants shared 11 bedrooms, one kitchen, one bath and no in-house toilet with exorbitant rent rates!

The housing problem is severely compounded by Ghana's rapid population growth. The approximate population of Ghana according to the July 1990 population census, was 15 million, with high densities in the urban centre. With a current annual growth rate of 2.7%, the country's galloping population is a major source of distress for the PNDC regime:

Ghana has had her own measure of the "nightmare scenario" created by among others, the extremely rapid and immense increase in the population size. According to the national population census in 1984, the annual population growth rate is currently 2.7 per cent, up from 2.6 per cent as known from the previous census in 1970. This is an already unbearable rate which UN sources estimate will itself increase to 3.2 per cent per annum between 1990-2000 (Information Services Department, Ghana, 1991:44).

Given the increasing rate of population growth coupled with other factors (noted below), the housing situation in Ghana has generally remained atrocious over the years despite a noticeable improvement in the housing standards for a small minority who live in mansions and other well-appointed houses that would be the envy of many middle-class people in Europe and North America. Overall, low to zero tenancy rates combine with high rental fees to make decent, affordable housing only a fanciful dream of most urban workers. Various post-colonial governments have embarked upon new housing programmes aimed at grappling with the problem to no avail. The teeming population growth conjoins with the phenomenal rural-urban migration, official corruption, building-materials shortages, political nonchalance, the inability of the National Bank for Housing and Reconstruction and other financial institutions to provide adequate loans for private housing, and the penchant of the average Ghanaian for mansion-size houses, to aggravate an already unbearable situation.

In view of the magnitude of the housing problem which had plagued urban Ghana since the colonial days it is doubtful whether the PNDC sincerely believed that the obnoxious *Rent Control Law* (PNDC L5) was the answer. Indeed, as the ERP and the World Bank-cum-IMF-backed SAP got under-way, this "pro-worker" legislation became morally and politically unenforceable and was quickly repealed. A more moderate law, - the *Rent Control Law 1985* - was enacted in its place. This new law in turn became effectively obsolete, overtaken by the free market forces unleashed by the government's own economic policies.

Another classic illustration of the populist character of the PNDC can be found in its enactment of the *Compulsory Letting of Unoccupied Rooms and Houses Law* (PNDC Law 7). This law provides that if any unoccupied room was identified in rental premises or unoccupied house and the owner refused to rent the said room or house; or in the event that the owner could not be traced after interested parties or prospective tenants had made reasonable efforts to trace the owner, the premises could be let out lawfully by the local community PDC (now CDR) and the local Rental Control Unit (RCU) to persons who had no dwelling places.

A person who identified such premises in which she/he was interested was required to report to the local PDC and RCU charged with the responsibility for conducting an inspection of the premises and determining its suitability for human occupation. The PDC and RCU were to negotiate the letting of the premises where possible. Where this was impossible or the negotiation fell through, the PDC and RCU working jointly were to rent out the premises to the prospective tenant. The recoverable rents in respect of such rental were to be assessed by the appropriate Rent Officer under Section 5 of the *Rent Act, 1963* (Act 220) or by the appropriate Rent Assessment Committee established under section 10(a) of the *Rent (Amendment) Decree 1979* (AFRCDS).

By virtue of *PNDC Law 7*, several well-appointed houses in Accra's rich suburbs such as MacCarthy Hill, Dzorwulu, New Achimota, Airport Residential Area and

Agbwelenkpe were occupied by "the people's workers" and "cadres of the Revolution", some of whom fixed their own rents. Some of the premises were transferred to various organs of the revolution such as PDCs for their operations. As many opulent landlords bolted from the country in the wake of the June 4th and 31st December Revolutions, more and more such "unoccupied" premises became readily available, and their occupation made much easier.

As "populist nonsense" gradually gave way to pragmatism and common sense - following the PNDC's economic and political flirtations with the IMF, the world Bank and other western donor countries which demand respect for fundamental human rights including the sanctity of private property as a precondition for loan guarantees - this populist piece of legislation increasingly became a mere socialist decoration in the statute books reflecting the high-tide mark of the PNDC's revolutionary populism. Indeed, most of the landlords who fled the country subsequently returned to claim their properties, many of them taking advantage of a PNDC law that allowed certain convicted persons to make reparations to the state and have their properties returned to them. This law was promulgated ostensibly to emphasize the regime's commitment to a policy of reconciliation and inclusivity.

Similarly, the government released several private assets confiscated from many Ghanaians during the reign of the various military regimes since February 24, 1966. This action followed the recommendations of a special committee set up by the PNDC to review the cases of persons who had petitioned the government on either confiscated assets or unlawful imprisonment or related cases. Assets returned so far include Nyaniba Estate, a house in Accra which the late President Dr. Kwame Nkrumah purchased for his mother, and the house of the former Head of State Mr. I.K. Acheampong (executed in 1979) at Atwima Hwidiem in the Ashanti Region. Others include the properties of Mr. Issifu Adjani, Col (rtd) K.A. Takyi, Col. (rtd) R.K. Kujiku, Col. (rtd) S.M. Akwagyiram, Mr. Solomon Quadmdzie, Mr. Victor Ofoe, Mr. Emmanuel Arthur-Mensah, Mr. Ellison

Owusu-Fodjour, Baafour Owusu Amankwaita IV, Lt-Col. Simpe-Asante, Major General Charles Beausoloilo and Madam Dora Kwakye all prominent Ghanaians who had come into conflict with the law (West Africa, April 27, 1992:726). In a radio and television broadcast to the nation on Independence Day, March 6, 1992, Ft. Lt. Rawlings explained that the return of the confiscated assets to the affected individuals or their families was a reflection of the PNDC's policy of reconciliation deemed crucial to the unity and future development of the country.

### **Populism and Social Change**

An understanding of the shifts in the PNDC's politico-economic and criminal justice policy orientation from a transformationist to an accommodationist approach is enhanced when the analysis is situated in the context of the political phenomenon of populism. Populist regimes have a number of characteristic problems which, throughout the world, sooner or later, either spell their demise or compel them to compromise. This section briefly outlines the essential formative characteristics, functions and limitations of populism and connects them to Ghana's experience with populism under Rawlings.

Conway (1978:118) defines populism as "the political expression of a critique of capitalism and a proposed developmental alternative from the point of view of the agrarian petite bourgeoisie". Throughout the world populist regimes have typically stood for social reforms in the interest of farmers and workers, the common people.

Although contemporary students of populism divide populist movements into two distinct phases namely the classical and the modern (Van Niekerk, 1974), or the reformist era and the national developmentalist era (Tamarin, 1982), populism worldwide is driven by a common passion: the desire to create new societies unfettered by the political control of elitist or agrarian oligarchy. In other words, a populist regime aims at establishing a society that is economically independent and characterized by social justice. Populist movements advocate the creation of societies "unencumbered by class conflict, and



culturally emancipated from the dominance of imported values and styles" (Tamarin, 1982: 31-2).

In Ghana, the theme of "cultural emancipation" was taken so seriously by the PNDC that on 4 March 1982, the Secretary for Culture and Tourism, Mr. Asiedu-Yirenkyi announced plans by the government to institutionalize "cultural education" in the pre-university school system. A front page news item carried by the Daily Graphic of March 5, 1982, under the caption "Culture to be Compulsory", read in part:

The teaching of Ghanaian culture will be made compulsory in all elementary schools in the country as from next academic year. The move is to ensure that the youth live and grow with their culture and also to project the Ghanaian personality.

Indeed, wherever they crop up, populist movements seek to represent and articulate the struggle for the vindication of the national essence, whatever its advocates may construe it to be, in virtually every domain of national life. Thus, the cultural emancipation platform announced by the Secretary of Culture and Tourism at a reorientation seminar for leaders and members of concert parties at the Accra Arts Centre also included encouraging middle school pupils to "compete yearly in the singing of patriotic songs" while secondary school students would be encouraged to "compete in drama and dancing". Mr. Yirenkyi further urged participants in the seminar to "critically examine the contents of their shows, their life-styles and their effects on their audience." He pointed out that, "no effort should be spared in eliminating downgrading aspects in their performances", citing as an example the smearing of faces of actors which he described as a ruse" initially introduced to ridicule the blackman". He advised that "any performance which is designed to provoke laughter should not be done in a way as to ridicule the African". This populist exhortation also had a nationalist appeal as well as negritude sentiments and pan-Africanist overtones.

Youth political mobilization subsequently became an integral part of the process of cultural emancipation in Rawlings' Ghana. On 19 November 1982, the PNDC launched the Democratic Youth League of Ghana (DYLG) at the Independence Square in Accra. In an

inaugural speech read on his behalf by Mr. Ebo Tawiah, a member of the PNDC, Flt. Lt. J.J. Rawlings, national patron of the movement, observed that,

it is only a patriotic, politically aware, militant and disciplined mass youth movement that can resist attempts by both internal and external forces to dominate the lives of Ghanaians ... It is only such young people who can effectively and meaningfully engage in the struggle to liberate the underprivileged in the Ghanaian society from ignorance, poverty, hunger, thirst and disease. (Daily Graphic, November 20, 1982. p. 1)

By politically mobilizing and conscientizing the youth the PNDC hoped to create an army of young loyal and sympathetic cadres who will champion the cause of the revolution. This initiative was reminiscent of the infamous Young Pioneers' Movement established by President Kwame Nkrumah and his Convention People's Party (CPP) government during the 1960s.

Despite the exhortatory rhetoric of the PNDC, youth mobilization and the DYLG were peripheral to Ghanaian politics throughout the Rawlings years. The drive toward cultural emancipation, however, continued unabated throughout the 1980s. There was a special focus on cleansing Ghanaian society of particular strands of foreign religious influences.

During the 1982/83 period, Lodges and other secret religious societies were particularly targeted by elements within the "People's Army". For example, on March 4, 1982, in what the March 5 issue of the Daily Graphic described as an "intensive military-cum-police clamp down on secret societies" in Koforidua, capital of the Eastern Region, "ritual paraphernalia, including four coffins of various sizes, hoods, toy snakes and 40 frightening masks" were seized from the Perseverance Lodge of the Grand United Order of Odd Fellows. The raid also yielded "22 bows and arrows, miniature statues, an unusual cupboard with death signs and balls of white clay." A 78-year-old member of the lodge said to be the vice-president was held for questioning by the authorities (Daily Graphic, March 5, 1982). In a similar raid on March 2, 1982, the Daily Graphic reported that

miniature wooden boxes containing eight human skulls and eight pairs of skin bones, properties of the harmonic Lodge of Odd Fellows, a secret society of Asamankese in the Eastern Region were impounded by members of the People's Army. Two members of the lodge were arrested in connection with the skeletal parts alleged to be those of some dead members of that lodge" (Daily Graphic, March 5, 1982).

In another related move, the Daily Graphic of October 20, 1982 reported that

HUNDREDS OF PDC/WDC members in the greater Accra Region have taken over the buildings of two Masonic Lodges and the "KIKO" Restaurant belonging to Mr. Kofi Batsa at Adabraka. During a rally organised by the Official Town PDC with assistance from other Defence Committees including the Special Operations Unit of the People's Police Force, Mr. Kodzo Djamesi of the INCC declared that the Lodge buildings would be converted to "people's Social Centres"......Mr. Djamesi noted that the time has come for Ghanaians to do away with "suspicious bodies of worshippers" who do not have the interest of the nation at heart. The revolution does not have any quarrel with any religion and everybody is free to worship his God, but when secret societies come in "we wont allow it", he emphasised (Daily Graphic, October 20, 1982).

In the mid-1980s, the Church of Jesus Christ of Latter Day Saints and the Jehovah Witnesses were banned from practising in Ghana, ostensibly for exhibiting unpatriotic, snobbish, racist and exploitative tendencies and attitudes.

In this sense, the essence of populism is the deconstruction of a dominated national consciousness and all the social structures emanating from it so as to free the creative capacities of the oppressed for the task of rebuilding the national essence. Populism therefore, by definition, encompasses virtually all provinces of meaning, it leaves no item of socially constructed reality unaffected.

Hall (1968) describes populism and the essential characteristics of populist movements as follows:

Populist movements are movements aimed at power for the benefit of the people as a whole which result from the reaction of those, usually intellectuals, alienated from the existing power structure, to the stresses of rapid economic, social, cultural, or political change. These movements are characterized by a belief in a return to, or adaptation of, more simple and traditional forms and values emanating from the people, particularly the more archaic sections of the people who are taken to be the repository of virtue.

Despite these tendencies, populist movements are unfettered to any ideological dogmas, although they cannot be denied ideological elements. As van Niekerk (1974: 29) points out, the populist scheme of thought is too simple and rudimentary, lacking the high degree of sophistication and consistency possessed by other schemes of thought such as socialism or liberalism.

The lack of consistency which characterizes populism is a derivative of its essentially integrative purpose. Populist adherents often constitute an amorphous mass rather than a structured class, and nearly every populist leadership evinces a tendency to be conciliatory and fairly labile in its ideological leanings depending on the purpose and circumstances at hand. Peter Wiels (1969) succinctly sums up the pacific intentions of populism in these words:

populism avoids class-war in the marxist sense. Though certainly class-conscious, it is basically conciliatory and hopes to convert the Establishment. It is seldom revolutionary.

The most essential characteristics of populism, however, are its adherents' fundamental belief in "the will of the people". As Mazrui (1978:123) points out, "the populist ethic tends to glorify the ordinary individual", and populism is often a romanticization of the ordinary. Populism as enunciated in the writings of Jean Jacques Rousseau (1712-78), espouses self- government for each individual, that is, participation by the individual in the political decision-making process. Although Rousseau recognized the dangers of collective mediocrity, for him "the intellectually gullible can still be morally glorious" (Mazrui, 1978; 124), and that ignorance is not ignominy.

Contemporary populism is not only characterized by the cult of ordinariness and the myth of innocence but also a fundamental belief in the maintenance of direct contact between the people and the political leadership. In this regard, Niekerk (1974: 31) argues that the populist leadership, by identifying itself directly with the people, seeks to give expression to the resentment against the privileged, and the hope for equality and justice.

Yet, precisely because it is unencumbered by class associations and constitutional principles, such a leadership is capable of retaining popular legitimacy while simultaneously flirting with both ideological rivals of the right and the left.

The cult of ordinariness where necessary, aids the reconciliation process by encouraging demonstrative identification. Julius Nyerere of Tanzania, the late Kwame Nkrumah of Ghana, the late Thomas Sankara of Burkina Faso (formerly the Upper Volta), and Jerry Rawlings, among others, have all maintained close ties with different classes by the ritual of participating with the people in worthwhile community ventures. The media frequently showed pictures of Jerry Rawlings in ordinary contexts such as donating blood at a polyclinic, busily harvesting vegetables, fishing at the high seas, shovelling gravel in the scorching sun, pushing heavily-loaded wheel barrows, repairing bridges or loading cocoa at the docks. For example, the Daily Graphic of July 16, 1979, carried a front-page news item under the caption "Feeding Centres for Workers", with a full-length photograph of Flt. Lt. Rawlings, then chairman of the AFRC, shovelling sand at a sod-cutting ceremony for the construction of a feeding centre at the Ring Road West Industrial Area in Accra. Beneath the picture were the following words in italics:

*There's dignity in labour, a bare-chested Flt. Lt. Rawlings, demonstrates as he shovels sand, setting a new trend in the hitherto purely ceremonial sod cutting occasions we used to know.*

Although Jerry Rawlings' participation in the actual construction of the centre was limited, it was of great symbolic significance. By going beyond the mere formality of sod-cutting, Rawlings was conveying the message that construction work, which is a fairly demeaned occupation in Ghana, was not beneath the Head of State, and therefore, by implication, any citizen for that matter, and ought to be respected and valued. Such deconstructive actions had a tremendous populist appeal, and helped to endear J.J. Rawlings to the rank and file who heaped on him many catchy accolades such as "J.J. - Junior Jesus", "A Man of the People", "The Common Man's Buddy", and "Leader of the Revolution".

Undoubtedly, Jerry Rawlings is the quintessential charismatic leader, and his involvement with the ordinary people at the grass-root level helped to broaden the support of the masses for both regimes over which he has presided in Ghana.<sup>8</sup> Mike Oquaye (1980) describes an episode which captures Rawlings' populist appeal and influence on the ordinary Ghanaian during the AFRC reign:

In office, Ft. Lt. Rawlings gave his countrymen glaring lessons in simplicity, humility and a feeling for others. When on election day - Monday 18th July, 1979 - Rawlings went to vote at the Air Force Officers' Mess polling station in the Kpeshie Constituency, Accra, he joined the normal queue at 7 a.m. and awaited his turn. When asked about this, he replied: "First come, first served". During his historic visit to the North where Rawlings said prayers together with Muslims and restored peace in the explosive Yendi Traditional Area, he took on toward the, Air Force plane, all passengers waiting for transport from Bolgatanga to Tamale even though only himself and his encourage were entitled to the use of the plane. Protocol and unnecessary security were definitely not necessary for a man so simple, so humble, so affable and so openly loved. On arrival at Tamale, Rawlings bought some bread to eat with cold water instead of going to the V.I.P. lounge to demand special refreshment. As Rawlings ate, one boy asked: "Brother Jerry, can I have some of your bread?" Rawlings replied: "Sure, and pass it on to theirs - if anyone wants to eat." As the crowd pressed on, a man asked Rawlings for a stick of cigarette (sic). The man was given one which he promptly lighted but not long after he cursed himself saying: "I should have kept Rawlings' cigarette (sic) to show it to my children's children". At a subsequent durbar, Rawlings refused to sit on the decorated dias: "I will stand in the sun with the people", he said. These lessons are not trifle They constitute the genuine qualities that have aided men like Fidel Castro lead their people to prosperity and it takes a great deal to attain (Oquaye, 1980: 156). [Emphasis added].

While Oquaye's inference about Cuban prosperity and the important role of charismatic attributes in socio-economic development are a little over-drawn and exaggerated, there is no doubt that both Rawlings and Castro, by their public identification with, and demonstrated affection for the ordinary people, command popular support, loyalty and legitimacy. This is the primary essence of charisma: the articulation of the yearnings and aspirations of the masses, and the capacity to hold a magnetic appeal.

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<sup>9</sup> As noted in Chapter I, Jerry Rawlings is currently presiding over his third regime. The civilian government of the National Democratic Congress of which he is leader, is his first elected national office.

Rawlings maintained his penchant for demonstrative identification with the ordinary people throughout the PNDC era, and the state-controlled media steadfastly conveyed images of the down-to-earth Head of State publicly interacting with ordinary folks. On April 26, 1982, the Daily Graphic carried a front-page story and picture of Rawlings sharing breakfast at sea with a crew of fishermen with whom he had gone fishing. This genre of charismatic depiction, of which there was no shortage in the Ghanaian press during the early days of the revolution (despite the pervasive security risks), served to sustain an image of a political leadership that was properly in tune with the popular sentiments in the country, even if its economic policies appeared to serve the interests of the middle and upper classes better.

Consequently, the populist regime of Jerry Rawlings was able to effectively maintain the relative support of rural wage earners, students and urban labour, and yet cooperate with the petite-bourgeoisie, the middle-class and foreign economic interests and capital, within a constricted developmental aperture. In effect, the populism of the Rawlings regime was multi-class in the sense that it recruited and won the support of people from all strata of Ghanaian society. This support, however, was not won merely on the platform of charisma, patriotic exhortations and promise of economic advancement. It was won through the state's use of both condign and compensatory power (Galbraith, 1984) which secure submission via coercion and rewards respectively. Of course, the criminal justice system is the paramount coercive instrument used by the state to win the submission of dissidents.

By their very nature, populist regimes such as that of Rawlings are perennially vulnerable to local and international politico-economic influences. This is because they eschew party organization; lack a solid ideological foundation, and hence are unable to adequately cultivate a committed vanguard of cadres to defend them.

Furthermore, populist regimes tend to rely excessively on the charisma of the leader for mobilizations and hence are incapable of synchronizing their support base and rhetoric

of legitimation during transitional phases occasioned by the demise of the leader. By failing to effectively synchronize and bureaucratize the movement, populist regimes undercut their own longevity, and even at the best of moments, are saddled with role duplications or undifferentiated levels of competing and sometimes conflicting authorities and loyalties. These internal weaknesses, coupled with a lack of firm financial base, render populist movements highly susceptible to both internal and external political manoeuvres.

The Rawlings' revolution was essentially populist in character. At its inception, the regime sought to extol rural society as representing the authentic virtues of the nation, while portraying the city as not just the negation of sacred rural virtues but also as parasitic, if not downright exploitative. It also propagated anti-modernist ideas in its emphasis on traditional, rudimentary implements for agricultural self-sufficiency.

The anti-modernism of the Rawlings revolution took the specific form of anti-capitalism, as capitalism was perceived as the epitome of the forces which negate the primitive ideal (Ninsin, 1987:35). The regime tended to emphasize concepts of ruralism, anti-modernism and anti-capitalism - concepts which lie at the heart of the phenomenon of populism around the world. Many "high-time" women in Ghana were caricatured as immoral, ultra-westernized degenerates, and accordingly disciplined by the public tribunals. Trials for economic crimes against the people included charges of trade malpractices which largely involved women.

Simplicity and poverty were romanticized by the regime, and the rich, the well-educated, and the westernized were made regular candidates for special moral and economic policing. According to Nkrumah (1970:12) such people are:

committed to capitalism because of their background, their western education, and their shared experiences and enjoyment of positions of privilege. They are mesmerized by capitalist institutions and organizations. They ape the way of life of their old colonial masters, and are determined to preserve the status and power inherited from them.



The public tribunals tended to take a grim view of such people and sternly dealt with them when they came into conflict with the law.

The repressive functions of the tribunals were, however, most evident in the prosecution of political dissidents and subversionists who were classified as enemies of the revolution. Execution (by firing squad) of convicted dissidents was swift and certain, the purpose of which was to assure the populace that such treasonable acts would not be condoned, or forgiven. Thus, to some extent, at least, the practice of executing certain convicted criminals was clearly underpinned by the motive of deterrence. Whether these executions actually served to deter would-be criminals is another question. Yet, as Beattie points out, the forms of punishment employed by a society at any moment are shaped by a variety of interests and intentions (1986:470).

#### **Shifts In Tribunal Sentencing Policy**

Among the changes instituted in the public tribunals system is the increasing trend toward the imposition of less severe custodial penalties on convicted persons. There is a clear shift away from custodial sentences to heavy fines and relatively minor custodial penalties rather than heavy prison terms combined with minor fines. The following random sample of cases between October and December 1982 reflect the draconian custodial approach to punishment initially favoured by the public tribunals.

On October 18, 1982, Nana Okutwer Bekoe III, (alias James Quartey) a traditional chief and former chairman of the People's National Party was convicted of illegal currency transfer. He was sentenced to seven years in prison, the first six months of which consisted in his performance of conservancy labour (primarily cleaning and disposing of latrines). He was also fined C500,000. The PNDC subsequently confirmed the sentence but quashed the fine. One week later, on October 22, 1982, Nana Okutwer Bekoe and two other top functionaries of the proscribed People's National Party were sentenced to 31 years' imprisonment for demanding and accepting a loan of \$1 million from "an alien", the

Italian businessman Dr. Chiavelli, on behalf of the party in contravention of the Political Parties Decree. Nana Okutwer Bekoe and Mr. Krobo Edusie were given 11 years each in addition to the forfeiture to the state of \$50,000 and \$70,000 they respectively took from the loan, while Kwesi Armah was sentenced to nine years in prison plus a payment to the state of \$30,000 he took as legal fees for facilitating the acquisition of the loan (Daily Graphic, October 23, 1982).

Another Public Tribunal sentenced one person to 60 years in jail on 15 charges pertaining to the forging of official documents to dupe the Bank of Ghana millions of cedis in foreign exchange. The first 10 years of the sentence were to be served in doing menial jobs and working in penal farms.

Captain Emmanuel Kow Bonney, a 22 year veteran of the Ghana Armed Forces and former Commanding Officer of the PNDC Information Centre was sentenced by an Accra Public Tribunal to 15 years in prison with hard labour on two counts of conspiracy to steal and stealing C1.3 million belonging to two Dutch businessmen based in Accra. Captain Bonney was allegedly involved in a robbery operation with two junior-rank soldiers, Lance Corporal Yankey and Sergeant Nyarko. The two accomplices were committed to 13 years' imprisonment each. The tribunal noted that but for his age and family circumstances, Bonney would have received a higher sentence. Chaired by Mr. Addo Aikens, the tribunal further ordered that cars impounded from the accused persons be sold and the proceeds paid to the complainants to defray the losses they had incurred (Daily Graphic, December 3, 1982).

A London-based Ghanaian barrister-at-law, Mr. Joseph Ampah Kodwo, was jailed 17 years with hard labour by a National Public Tribunal in Accra on December 3, 1982 for attempting to smuggle three gold bars out of the country (Daily Graphic, December 4, 1982). Numerous examples of this kind could be found in the pages of Ghanaian newspapers.

Around 1986, and roughly coinciding with the implementation of the second phase of the PNDC's Structural Adjustment Programme, however, public tribunals increased the frequency with which they handed down less severe custodial penalties for convicted criminals. As Peter Ala Adjetey, the GBA's former Chairman points out,

Sentences imposed by the tribunals have tended to be less severe, especially custodial sentences. In the early days most of these sentences were draconian - forty years, fifty years etc. There is, however, an increasing tendency to couple heavy fines with relatively minor sentences (Interview, 1990).

This shift in sentencing policy within the tribunal system is a function of three interrelated factors: economic difficulties, prison congestion and human rights violations.

### **Economic Considerations**

The tribunals' resort to a greater use of fines or reparation to the state and the simultaneous reduction in their use of custodial sentences was an attempt to raise much-needed revenue for the state. In October 1982, Mr Johnny Hansen, then Secretary for Interior, disclosed in a weekly "Meet the Press" briefing in Accra that the cost of feeding the 6,914 inmate population in the country's 37 prisons stood at 50 million cedes (Daily Graphic, October 23, 1982). Mr Hansen admitted the grave over-crowding in the prison system, especially at the Medium Security Prison at Nsawam, and lamented, in a classic under-statement, that "the food for prisoners is not as palatable as what one would want to eat in one's home". Mr. Hansen further revealed that the Ministry of Internal Affairs, in conjunction with the Ghana Prison Service, had initiated, upon consultation with the Ministry of Agriculture, a number of farming ventures aimed at reducing the cost of feeding inmates who would provide the labour. Fish farms were also to be established in every prison to provide part of the protein requirements for inmates and Service personnel. The anticipated surplus would be sold to the public to generate funds for the Service. The government also planned to provide the Prison Service with outboard motors to enable

inmates to intensify their fishing activities at the Chokor fishing camp near Accra (Daily Graphic, October 23, 1982). The additional cost of providing clothing, bedding, medical supplies, toiletries and other basic necessities, coupled with administrative expenses, acutely compounded the fiscal crisis of the state-funded Ghana Prisons Service.

Despite the realization that the prison system was congested and that the state lacked the financial wherewithal to construct new facilities, the public tribunals initially demonstrated an inordinate penchant for lengthy custodial sentences during the first three years of their operation. While this initial sentencing policy reflected the regime's desire to severely punish criminals and deter anti-revolutionary acts, it is also quite plausible that the change in policy was a reaction to the backlash against executions by firing squad which followed the PNDC's precursor, the AFRC.

In any event, the heavy use of long custodial sentences proved to be an expensive exercise in futility: it was not been an effective crime prevention technique nor was the practice of executing embezzlers of state funds an effective antidote to economic crimes. It became increasingly manifest that long-term custodial sentences were essentially useless as methods of achieving general deterrence. Lengthy custodial sentences aggravated the congestion problems in the prisons and contributed to the depletion of the scanty coffers of the state.

Thus, there seems to have been a *de facto* admission that the general deterrence policies of the criminal justice system pursued through the imposition of the death penalty and lengthy periods of incarceration with hard labour, as well as other draconian measures such as assets confiscation, failed to stem the tide of mounting crime, especially armed robberies and grisly ritual murders. Of course, the purposeful and widespread use of the death penalty probably helped to discourage coup attempts and helped sustain the PNDC regime in power for a whole decade (1982- 1992), the longest, uninterrupted reign of any government in Ghana's thirty-six years of independence.

The cessation of dissident attempts to topple the regime from power since 1987 may be due in part to the tribunals' imposition of stiff sentences, especially the death penalty, as well as the noticeable economic improvements and the steady progress of the country toward a civilian constitutional democracy (the Fourth Republic) by January 7, 1993.<sup>9</sup> Nevertheless, the death penalty did not deter serious economic crimes, armed robbery and other crimes of violence. It is doubtful if it ever can.

The cost of maintaining the rapidly deteriorating prison system even at the barest level of operation was: not only exorbitant but simply unbearable for the state. The inability of the state to support the teeming prison population, despite the fact that most inmates were also sentenced to "hard labour" on prison farms and other supervised economic ventures, coupled with the state's need to replenish its depleted coffers, resulted in a serious rethinking of tribunal sentencing policies. Consequently, the public tribunals gravitated toward a greater preference for heavy fines over long penal sentences. This trend continued till the end of the PNDC rule on January 7, 1993. as fines generated some income into the meagre state exchequer.

Explaining the reasons for this policy change, Peter Ala Adjetey stated:

\*\*\* Indent this quotation \*\*\* In recent years, sentences imposed by the public tribunals have tended to be less severe. In the early days, most custodial sentences were draconian - 40 years, 50 years, 60 years, etc. There is, however, an increasing tendency to couple heavy fines with relatively minor sentences (Adjetey, Interview, 1990).

### **Prison Decongestion**

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<sup>9</sup> Jerry Rawlings and his National Democratic Congress (NDC) won the Presidential and Parliamentary elections organized in November and December 1992 respectively. The new government has since been installed.

As a corollary to the economic motif, the regime placed a greater premium on the necessity to decongest Ghana's over-filled gaols. The penal system mirrors the general societal decadence and institutional disintegration which have long gnawed at the fabric of independent Ghana. Conceived, like nearly all gaols as the dumping pits, holding tanks and punishment centres for sanctioned criminals and other disreputable persons (official and popular declarations of benign rehabilitative or reformatory intents notwithstanding), Ghana's prisons have not been as humane as they could be. They may not be among the worst in Africa, and none is half as close to the intolerable congestion and atrocity of some African prisons. For example, while Ghana's Medium Security Prison at Nsawam was built to hold 855 inmates but now holds approximately 3,000, Nigeria's infamous Kirikiri gaol with a capacity of 785 was actually holding 8,310 inmates by 1980, a situation which remains virtually unchanged today (Igbinovia, 1985:129).

As economic conditions on the outside worsened, the rate and extent of deprivation of several basic necessities, including the most minimum of human rights such as the right to breathe clean air, became simply unaffordable. Rampant abuse and exploitation of inmates are also enduring features of the prison system. These observations are based on my visits between 1982-1984 to the Maximum Security Prison at James Fort and Usher Fort in Accra; the Medium Security Prison at Nsawam, Eastern Region; the Kumasi Central Prison; cells at Juaso (my home town) and Asankare in Ashanti Region; the Achimota, Keneshie and Buwashie Police stations in Accra. The stench, logistical deprivations (including the lack of adequate food, clothing, blankets and medical facilities) and the grossly demeaning and abusive treatment of inmates, are simply beyond my ken and description.

The increased use of long and vicious custodial sentences in the two periods of Rawlings' rule only aggravated the deplorable subhuman conditions within the Ghanaian prison system. Although the PNDC regime, like the AFRC before it, offered clemency to most of the political convicts and detainees, the prisons still brim with economic and other

common criminals such as armed robbers sentenced by both the regular courts and the tribunals. Sandwiched between these two revolutionary regimes, the Hilla Limann administration's brief interlude on the stage of Ghanaian political theatre also worsened the prison situation, with its initial "get tough on criminals" posture actively pursued through "vigilantes".

Long before these three regimes, there had been a lot of talk about the need to decongest the over-filled prison system. It seems that, somewhere along the line, the PNDC came to the realization that if decongestion of the prison system was to be achieved, then relatively short sentences were to be preferred over long ones, and fines over custodial sentences.

### **Human Rights Concerns**

Third, the shift in sentencing policy was partly a response to the unequivocal condemnation of the tribunals' draconian penalties by some powerful voices in the international community during the early phase of the revolution. Among the critics of the tribunals' sentencing policy and practices were the governments of the United States, Canada, United Kingdom, France, the Netherlands and the former Federal Republic of Germany (West Germany). The world-wide human rights watch-dog and advocacy group, Amnesty International, also expressed concerns over the tribunals' sentencing practices. The IMF and prospective investors also presumably joined the chorus of protests:

Naturally, donor agencies have serious misgivings about the tribunals system, and some have been known to express these concerns to the authorities. Indeed, conditionality to aid giving is now being articulated, and this may be directly or indirectly influencing the government's justice initiatives! (Adjetei, Interview, 1990).

In my research I was unable to verify the authenticity of Adjetei's claim, although in June 1990, Mr. Herman Cohen, American Assistant Secretary of State for African Affairs stated on the June 16 edition of British Television's Channel 4 Weekly news program 'The

World This Week' that, sometime in the future democratization would become an issue "taken into account for the granting of aid". The focus of the discussion was an examination of the likely consequences for Ghana of the new Western political conditionality for aid (West Africa June 25, 1990). More recently, at the last Commonwealth Summit in Harare, Zimbabwe, Canadian Prime Minister Brian Mulroney expressed the same sentiment much more vociferously when he stated that "Canada will not subsidize repression" and that Canada's foreign assistance to Third world nations would henceforth be closely tied to the recipient nation's human rights record and the pace of democratization.

At any rate, these expressions of concern from international circles apparently proved effective, eventually. The dynamics and combined impact of these pressures for reform are summed up in the following statement by Peter Ala Adjetey:

There isn't much in the exchequer and there's a feeling that they are trying to replenish government coffers... Further, there's been a lot of talk about decongestion of the overfilled prisons the conditions in the prison system are simply atrocious; indeed, the task of feeding, clothing and housing the teeming inmate population has posed serious logistical and health problems for the state. There has also been quite some outcry, especially from international circles such as the U.S. government, IMF and Amnesty International, against the sentences. Burdened by these logistical problems, and mounting international pressures against the state of justice, the Government was compelled to liaise with the Criminal Justice, on alternatives to custodial sentences. Subsequently, the extent of custodial sentences have been significantly reduced (Interview, 1990).

In spite of this apparent change in the regime's penal orientation, the death penalty continued to be a popular punishment of choice among tribunal personnel for several offenses classified as serious. During my field research in 1990, I was unable to obtain official statistics on the number of criminals officially executed. A tally of executions reported in the London-based West Africa magazine for the period August 1982 to August 1987 indicates that approximately 60 people were executed by firing squad for subversion, armed robbery, serious economic crimes and grisly ritual murders. Indeed, in 1987 alone,



28 people were sentenced to death by various public tribunals throughout the country. Eleven convicted criminals were executed by firing squad in 1988.

### **Pardons, Mercy and Moderation**

A crucial change in the tribunals system is the noticeable but yet unresearched increase in the granting of pardons by the PNDC. A noticeable moderation in the punitive bite of the law, coupled with an increase in the granting of mercy, provides an interesting barometer of changes in the state's perception of the efficacy of its criminal law, as well as a demonstration of its magnanimity and majesty.

Around 1984, and especially after 1986, the exercise of pardons for treason became common in Ghana. By the mid-1980s, the government had consolidated its tenuous hold on political power and the economy was rapidly showing tentative signs of improvement. There was thus a lessened need for the government to employ executions as a deterrent to political crimes, especially treason. Yet the power of pardon helped the government to maintain the fabric of obedience, gratitude (for spared lives) and deference. As Douglas Hay points out, these are the major goals of the exercise of pardon; it demonstrates magnanimity at the same time as it wins obedience and legitimacy (1982:120). In spite of this change, the tribunals continued to hand down verdicts of death sentences and other stiffer penalties. According to Beattie (1986) and Hay (1982) such a contradiction serves an important political function: the subsequent pardoning of convicted felons and subversionists presents the government as merciful and benevolent and hence wins it gratitude and legitimacy. The contradiction inherent in the neutralization of the tribunals had both crippling and enabling features.

The attitude of the PNDC also reflected a shift in consonance with prevailing public sentiments on capital punishment. It is plainly more advisable to execute those whose death would confirm the wisdom and justice of the law, rather than those whose suffering might excite pity, or perhaps even hostility (Beattie, 1986:436). Thus, the malicious

persecution and prosecution of 'high-time' women and the 'old noisy politicians' decreased substantially, while the granting of pardons for political crimes increased. Economic crimes and felonies such as murders and armed robberies, however, continued to be severely punished.

The role of economic pragmatism and international pressures in neutralizing the ideal and practice of alternative (revolutionary) justice is not unique to the Ghanaian experience. Cuba, Liberia, Kampuchea, and to some extent the Soviet Union, among others, have all had to make crucial adjustments to their revolutionary justice agenda, as a result of internal demands for democratic changes, as well as pressure from the international community.<sup>10</sup>

In Cuba, the Revolutionary Tribunals and the Audencia<sup>10</sup> have been abolished and the new legal system now incorporates the informal styles and educational emphasis of the early People's Courts (Brady, 1982:287). In general, sentencing is now less severe. The causes of this change lay in the economic depression of 1970; the criticisms of the tactics of Cuban justice by Amnesty International and the International Commission of Jurists; the successful repression or forced exile of the Batistianos and counter-revolutionaries; and the stabilization of the regime and the economy. In China, economic decline and the calls of liberal, westernized intellectuals and radical students for democratic changes in the post-Maoist era (which culminated in the occupation of Tianamen Square on June 4, 1989 by pro-democracy students) have not yet paved the way for major judicial reforms. Nevertheless, Poland, East Germany, Romania, and many Eastern-bloc countries have witnessed political changes which are likely to affect their justice systems. In Mikhail Gorbachev's Soviet Union, continuing economic stagnation and bureaucratic inertia, among other things, spurred the policies of glasnost and perestroika which jointly impinged on the judicial system and opened up more opportunities for dissidents and

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"counter-revolutionaries" to immigrate to the West.<sup>10</sup> In all these countries, "justice" is being tempered more and more with "mercy", even if it is a forced mercy. Even the Albanian political system, including its justice apparatus is now under severe attack. Perhaps, Libya and North Korea remain the only socialist systems whose justice institutions have not yet been affected by capital needs and western democratic influences. This is plausibly due to their high degrees of closure from the outside world.

Despite the obvious similarities between Ghana and the experiences of other socialist social formations - historical societies at specified times - (Poulantzas, 1973) in the establishment and development of mechanisms for popular justice, their respective histories are different, as are the specific nature and forms of the compelling forces that impinge on the criminal law and justice of these societies.

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<sup>10</sup> The Soviet Union has since collapsed as a unified country since the August 1991 abortive coup aimed at toppling Gorbachev. Russian President Boris Yeltsin, an arch rival of Gorbachev, has emerged as the most powerful leader of the new commonwealth of former Soviet republics (Time, 2 September 1991).

## Chapter X

### CONCLUSION

The creation of public tribunals in Ghana in 1982 served the triple purpose of expanding the framework and mechanisms of justice, repressing political dissent and legitimating the PNDC regime and the fragile December 31st Revolution. A central element of the revolution was the entrenchment of the policy of popular justice. The policy was grounded in the regime's belief that the "bourgeois legality" and its parent common law system inherited from the British colonialists had failed to serve the interests of ordinary Ghanaians and facilitated their exploitation by unscrupulous lawyers. The policy also reflected the regime's ideology of social transformation via a revolutionary socialist trajectory as a panacea for the hydra-headed socio-political and economic problems of the country.

Officially, the creation of the public tribunals system to co-exist with both the pre-colonial and regular (Westminster) structures of justice was intended to advance the policy of popular justice and increase the mechanisms of justice delivery. It also aimed at making the dispensation of justice more just, more equitable and more readily accessible. Further, the tribunals were to serve as one of the regime's key platforms for achieving the goals of social justice embodied in the policy.

#### **Public Tribunals: Goals and Strategies for Justice**

The architects of the tribunals system sought to accomplish these goals through three specific strategies: 1) a distinct role for non-attorney judges, 2) public in-put in judicial decision-making with respect to the determination of appropriate penalties for convicted persons, and 3) the provision of efficient, simple and affordable trials. In practice, the latter strategy entailed, to some degree, the abrogation of certain long-standing principles of common law such as the presumption of innocence, due process, equality before the law and the right to legal counsel.

The attempt to expand the institutional or structural base of justice as a means of creating real choice in, and access to, justice was successful to a limited degree. While the policy succeeded in creating alternative judicial structures in the form of public tribunals, it was not nearly as successful in making these structures readily accessible to the broad mass of ordinary Ghanaians. In many rural areas, for example, public tribunals were virtually unknown. And the majority of Ghanaians live in rural areas.

The policy also aimed to incorporate some of the customs, values, norms and practices associated with the pre-colonial systems of justice dispensation in the construction of a new model of justice. However, despite significant pontifications on the necessity to imbue the new system with traditional values, the ideology, principles and methods of the public tribunals did not reflect the participatory, reconciliatory and community-oriented values characteristic of the traditional, pre-colonial courts. The tribunals were essentially brutal and repressive, while the traditional modalities of justice were primarily restorative and reconciliatory. Unlike the traditional, pre-colonial systems of justice, the public tribunals sometimes functioned as instruments of malicious prosecution and vindictiveness.

Yet, the tribunals system was far more complex than that; it was a paradox of deconstruction, creation and reconstruction, as well as the embodiment of revolutionary promise and failure. On one hand, the operation of the public tribunals served to deconstruct the hegemony of western classist conceptions of justice in Ghana. It also served to challenge the traditional dominance of the judicial market-place by the middle and upper-class lawyering elite represented by the Ghana Bar Association. It was probably the first state-organized and systematic judicial institution in post-independent Africa to have involved lay people in the dispensation of criminal justice. To some extent, the tribunals system itself was introduced in response to demands by leftist interest groups for an alternative national policy and instrument of popular justice in Ghana. On the other hand, the tribunals system became a dreaded instrument of class repression especially dedicated to the policing and control of the "old noisy politicians", both civilian and military, as well as "high-time" citizens.

Though classist in focus, the tribunals were not biased in favour of the working class or urban poor. In this regard, they could lay a legitimate claim to moral superiority over the Westminster courts which have, throughout the common law system, shown a consistent tendency to favour the rich over the poor. The tribunals' treatment of poor thieves, armed robbers and petty-forgers was as even-handed as their handling of rich embezzlers, insider traders, traitors and subversives. The regime treated them all as "social dynamites" whose activities challenged the *status quo*. Thus, the tribunals did not differentiate between crimes on ideological grounds: there were no left and right crimes.

To a limited extent, the public tribunals made it possible for ordinary citizens to become directly involved in the process of dispensing a new brand of justice in which legal technicalities had little or no place. Nevertheless, for several logistical and practical considerations, this novel experiment in popular participation in the dispensation of justice fizzled away no sooner than it began. The failure of this ideal to crystallize in the tribunals system reflects the problems associated with any attempt to institute a Greek city-state-style democracy in a contemporary, demographically and technologically complex society.

Though the public tribunals were created to achieve popular justice, in their actual day-to-day operations, they functioned as tools of coercion and repression of many forms of political and economic opposition. As an extension of this repressive function, they also served as instruments for the political legitimization of the PNDC regime. Internal and external opposition to the tribunals system was swift, definite and concerted.

### **Objections to the Tribunals System**

In general, objections to the public tribunals system centred around the following issues: 1) the admissibility of hearsay evidence; 2) the tribunals' non-adherence to the normal rules of procedure applicable in the regular courts; 3) the removal of public tribunals from the supervision of the regular courts; 4) the initial absence of appeals in the tribunals system; 5) the unevenness of justice between the tribunal and the regular courts; 6) the imposition of

mandatory sentences and hence the lack of discretion in the tribunals; 7) the vague and ambiguous offenses created by the PNDC and justiciable only by the tribunals; 8) the lack of judicial impartiality; and 9) the vague standard of proof employed by the tribunals. The regime subsequently addressed some of the criticisms through the reform of the tribunals system, though not to the satisfaction of all the system's critics.

Once the tribunal system was under way, the IMF, the World Bank, the Ghana Bar Association, Amnesty International, the International Commission of Jurists, the United States Government, and other western donor agencies exerted considerable pressure that collectively impinged on the character and operations of the tribunal system. The net effect of these pressures was that they forced the PNDC regime to institute a wide range of judicial, political and economic reforms in Ghana. On the judicial front, the introduction of an appeal process in the tribunals system was the most significant legislative response of the PNDC to the pressures for the reform of the draconian aspects of the system.

### **The Great U-turn**

In order to generate funds for socio-economic reconstruction, the PNDC was compelled to seek the financial backing of donor agencies which had been initially hostile to the aims and strategies of the revolution. As a consequence of having been bombarded by frequent acts of destabilization, and being constantly under siege from the Western world whose financial institutions would not negotiate with "a bunch of military rascals, college boys and a dubious priest," the state under the PNDC made a u-turn in both its rhetoric and policies. It must be noted that the PNDC had also been fairly hostile to "exploitative western capitalists and imperialist financiers" during the heady days of the revolution. The targets of the PNDC's initial anger included such donor institutions as the IMF, the World Bank and the Citibank of New York, as well as such countries as France, Canada, Switzerland, United Kingdom, the United States, and the erstwhile Federal Republic of Germany, most of which placed an economic embargo on the regime. To entice the support of these entities for its Economic

Recovery Programme, the state under Rawlings felt compelled to "review" its socialist revolutionary rhetoric, policies and programs. Once the regime began to implement economic, political and judicial reforms, the much-needed investment dollars began to pour into the country.

Moreover, the shift from a socialist to a capitalist path of economic development was partially a response to the inability of the former Soviet-bloc nations (with the notable exception of Algeria, Libya and Cuba) to extend credit facilities and generous terms of trade to the unstable regime. In August, 1983, Rawlings declared that "populist nonsense must give way to common sense." This declaration was not a rejection of populism *per se*, but rather a clear rejection of vulgar Marxist-Leninist rhetoric and its associated socialist path to economic and social reconstruction. It marked a radical shift from textbook socialist social engineering to a greater focus on the pragmatic aspects of the regime's populist stance. This ushered in a period of pragmatism and capitalist accommodation which continued throughout the rest of the decade of PNDC rule. The regime steadfastly pursued a Structural Adjustment Program as the cornerstone of its strategy to resuscitate the Ghanaian economy.

Economically, the regime's reformist policies included massive devaluations of the local currency, liberalization of the economy, divestiture of state-owned enterprises, and retrenchment of workers. On the whole, the program was quite successful. The regime won the acclaim of international donor agencies which proudly prescribed Ghana's economic path as a model for Third World socio-economic development.

The PNDC subsequently abandoned its romanticization of primitivism, advocacy of the moral and spiritual superiority of proletarian values and lifestyle, and incessant criticism of the western world as the epitome of evil *par excellence*.<sup>1</sup>

Throughout the period 1982 - 1992, the regime maintained its populist appeal largely through direct contact with the people and the delivery of limited but noticeable economic

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<sup>1</sup> In spite of this change, or perhaps because of it, Rawlings prefers to rail against the giant environmental polluters from the so-called developed world whose nefarious and irresponsible activities are causing the depletion of the ozone layer and spelling the doom of life on planet earth.



benefits. At the political level, it made concrete moves toward the effective democratization of the society. After a brief phase of carefully- programmed, gradual and pragmatic tinkering with the political system through the introduction of District Assemblies and other structures cognate with democratic legitimation techniques, the regime effectively demonstrated its commitment to the transfer of political power to a constitutionally-elected government. In July 1990, the National Commission on Democracy (NCD) launched a "national debate" on the search for a future democratic system of government for Ghana. The debate indicated that Ghanaians wanted a democratic order, and that they preferred a Presidential system of government to other forms. The institutionalization of democracy begun with the lifting of the ban on political parties in May 1992 and the scheduling of national democratic elections for November 1992. The PNDC subsequently broadened the mandate of the NCD. In a national referendum organized in May 1992, Ghanaians overwhelmingly approved a constitution drafted by a Constituent Assembly convened by the NCD. The NCD was later converted into an Interim National Electoral Commission (INEC) with the duty of overseeing the conduct of Presidential and Parliamentary elections which were slated for November and December 1992 respectively. In summer 1992, election campaigns feverishly got under way. Six political parties sprang up to contest for seats in the National Assembly of the Fourth Republic. Jerry Rawlings retired from the Ghana Armed Forces and declared his candidature (on the ticket of the National Democratic Congress) in the Presidential elections. Having won the elections, Rawlings and his party assumed the mantle of leadership on January 7th, 1993.

Along with these broader structural changes, the tribunals system was also significantly reformed. The public tribunals and the entire popular justice structures of the revolution were affected by the purges instituted since 1984. On the eve of Ghana's Fourth Republican government, the tribunals were still in place, but had been considerably stripped of their revolutionary characteristics and goals.

A reformed and scaled-down version of the tribunals system has been incorporated into the judiciary of the Fourth Republic. Article 142(1) of the Constitution of the Fourth Republic

of Ghana (1992) provides for the creation of Regional Tribunals by the Chief Justice in each of the country's ten administrative regions. Article 142(2)(a)-(c) provides that a Regional Tribunal shall consist of the Chief Justice, one chairperson and at least two panel members as the Chief Justice shall designate. Only persons who qualify to be appointed a Justice of the High Court may be appointed to chair a Regional Tribunal. According to Article 139(4) of the 1992 Constitution,

A person shall not be qualified for appointment as a Justice of the High Court unless he is a person of high moral character and proven integrity and is at least ten years' standing as a lawyer.

Thus, a non-lawyer cannot be appointed as a Chairperson of a Regional Tribunal. However, "high moral character and proven integrity" are required of prospective appointees to a Regional Tribunal panel.

As stipulated in Article 143(1)-(2) of the constitution, the original and appellate jurisdictions of a Regional Tribunal shall cover such offences against the State and the public interest as Parliament may prescribe by law.

The Ghana Bar Association started calling for this form of "integration" right from the inception of the tribunals system. The co-optation of only one element of the tribunals system - Regional Tribunals - into the Fourth Republican judiciary and its placement under the supervision of the Chief Justice means that, the independent life of the tribunals system as originally conceived by the December 31st revolutionaries has effectively come to an end. It means the effective abrogation of the other structures of the tribunals system and the broad social justice goals which underpinned them.

Nevertheless, it would be naive and incorrect to assert that the inclusion of Regional Tribunals in the judicial system of the Fourth Republic represents a mere placation of the radical left in Ghana. A new legislative enactment by the young Parliament now provides for the establishment of Community Tribunals to replace District Magistrates in rural areas (West Africa, July 25th, 1993). Further, the law provides that the Community Tribunals may be

Africa, July 25th, 1993). Further, the law provides that the Community Tribunals may be chaired by non-lawyers in situations where attorney judges are unavailable or unwilling to accept judicial postings. This development represents a partial vindication of some of the pragmatic bases for the tribunals system's assignment of judicial roles to non-attorney judges in the dispensation of justice in Ghana. It also signifies that the justice system will probably continue to evolve in ways that will reflect and incorporate some of the philosophical bases and policy goals of the erstwhile public tribunals system. There is little doubt, however, that powerful, over-arching economic and political forces impinged on the PNDC regime, the policy of popular justice, and the evolution and operations of the tribunals system.

#### **Theoretical Considerations: Structuralism, the State and Criminal Law in Rawlings' Ghana**

The foregoing findings of the dissertation lend credence to the neo-Marxian structuralist theory which was used to guide the inquiry into the origins, nature and functions of criminal law and state-society relations in Rawlings' Ghana. Structuralism considers the state to be partially independent of the capitalist class and yet acting on behalf (not at the behest) of capital. In this framework, the state is not conceptualized as a pliant tool of the ruling class that is alternately concealed, misrepresented and brandished on behalf of capital (Burch, 1992:36).

According to structuralists, the state in capitalist society assumes and maintains greater autonomy in addressing the diverse and sometimes conflicting interests of its various constituents, including social groups (Burch, 1992:36). In this sense, the state is a relatively autonomous "organizer" mediating between conflicts in society, though primarily between the two conflicting classes - capital and labour.

Although the state is not controlled by capital, its mediation role serves to facilitate capital accumulation and legitimation. The partial independence of the state guarantees the longevity of the process of capital accumulation as a whole (Brickey and Comack, 1989:318).

It also ensures that legal and judicial institutions within the state also maintain and reflect their own internal cohesion and degree of autonomy (Ratner *et al.* 1987:104-5). Therefore, the capitalist state sometimes enacts legislation that benefits labour but negatively affects the immediate interests of capital (Gavigan, 1986; Smandych, 1986; Thompson, 1977). It is also observed that the capitalist class is not immune from legal sanctions, reflecting the relative autonomy of the criminal justice system and its component parts (Ratner *et al.* 1987:114). By virtue of this "relative autonomy", the state is able "to transcend the parochialized interests of particular capitalist class members" (Brickey and Comack, 1986:19) in order to ensure that the long-term interests of capital are protected.

The state under Rawlings manifests its relative autonomy in the unpredictable and "balanced" manner in which it mediates capital-labour conflicts, as well as its ability to deal severely with individual capitalists (and labour representatives) whose actions apparently threaten the legitimacy of the regime and the accumulation of capital in the long-term.

The structuralist argument that the essential determinants of social life are not a function of economic forces exclusively but of a multiplicity of forces, motives and imperatives found support in this work. The dissertation demonstrates that the formulation, development and repeal of criminal law are affected by a complex mixture of variables that may only be remotely connected with the phenomenon of crime. Among them are the following: the nature of the criminal justice policy-making environment, personality characteristics, ideological issues, and domestic and international political and economic considerations.

A variety of motives and influences affect the introduction of a given criminal law. They include human agency, the ideological orientation of the ruling elite, media role performance, interest group politics, domestic and international political and economic influences, as well as the relative autonomy of the state. Other factors impinging on the life-cycle of criminal law are crime rates and the fear of crime, the ruling elite's need to exert political control and to legitimize itself, local and international pressures for law reform,

popular perceptions of the relevance and relative effectiveness of the prevailing criminal justice system, and the nature of public attitudes toward the political leadership.

### **Human Agency**

In the case of Rawlings' Ghana (1982-1992), the role of individual human agency in the formulation and development of the policy of popular justice and the tribunals system as its structures of implementation was manifest in the activities of three prominent persons: (1) Lt. Jerry John Rawlings, (2) Mr. George Agyekum, and (3) Mr. Justice F.K. Apaloo.

Rawlings was the foremost public advocate of the concept of popular justice. Before his first assumption of power as Head of State of Ghana in June 1979, Rawlings had developed a profound belief that the existing criminal justice system was fundamentally biased in favour of the rich and powerful and dangerously inimical to the interests of working class people. He was committed to eradicating this institutionalized injustice within the justice system and introducing the policy of popular justice.

George Agyekum was instrumental in the legal formulation of the Public Tribunals Law and its subsequent development and reform. Indeed, he was personally involved in the actual drafting of the legislation. As the first Chairman of the Board of Public Tribunals, Agyekum also superintended the operations of the tribunals during the impetuous days of the December 31st Revolution. He subsequently guided the piecemeal reforms instituted by the regime since 1983.

For his part, Mr. Justice Apaloo, Chief Justice of Ghana in December 1981 when the PNDC came to power, greatly affected the timing of the introduction and implementation of the public tribunal law. Apaloo was vehemently opposed to the tribunals system, yet he was very closely connected to, and highly regarded by Rawlings and the PNDC regime. By virtue of his opposition, the enactment of the public tribunals law and the creation of the tribunals system were considerably delayed.

### **Interest Group Politics**

The PNDC regime's decision to introduce the tribunals system was influenced by the lobbying activities of leftist interest groups. Among these were the June Fourth Movement, the National Union of Ghanaian Students, the People's Revolutionary Youth League of Ghana, the National Association of Democratic Lawyers of Ghana, the Trades Union Congress, and state-orchestrated working-class political bodies such as the PDCs and WDCs influenced.

### **Political Ideology**

The demands articulated by the lobby groups were in harmony with the Rawlings regime's socialist ideological perspective on the nature of society and the "appropriate" path to, and strategies for, Ghana's socio-economic development.

### **Media Role Performance**

The state-controlled Ghanaian media (the Ghana Broadcasting Corporation, the Ghanaian Times and the People's Daily Graphic) played a crucial role in ensuring the propagation of the "proper" diagnosis of the country's problems, the "necessary" prescriptions, methods of dispensing and the "right" vision of health. With their monopoly of press power and the graces and benefits of alliance with the regime, the media served to inhibit the expression of serious and meaningful dissent, and to legitimize the regime and its policies and programs, including the policy of popular justice and the public tribunals system.

### **Public Perception**

Closely related to these factors was the prevailing perception frequently articulated in the media that the traditional common law system had failed the nation. Serious concerns about the class nature of justice in Ghana and public disenchantment with the legal system and "legal technicalities" pre-dated the December 31st and June 4th, 1979 revolutions.

The precise impact of any one of these variables on the introduction and reform of the public tribunals system cannot be determined in isolation from the others. Nevertheless, this dissertation demonstrates the composite effect of individual human agency in the creation of a particular criminal law when it intersects with a concordant elite political ideology, interest group politics and media role performance in "appropriate" socio-political milieux.

### **Relevance of the Theoretical Framework**

One of the aims of this exploratory study was to advance a conceptual framework for understanding the establishment, development and reform of the public tribunals system in Rawlings' Ghana. Of all the theoretical perspectives surveyed in this dissertation, the neo-Marxian structuralist approach, informed by elements of populist theory and Colin Sumner's developmentalist perspective, was the most useful. By paying attention to elements of populism and the Sumnerian approach, the discourse on the sources, nature and operation of law can be adequately situated within an appropriate historical context.

The foregoing analyses of the Ghanaian judicial experiences with regard to public tribunals have demonstrated that a mature sociology of law approach is required for an adequate understanding of the dialectics of the emergence, development and operation of legal responses to the problem of crime and justice in developing countries. The extant orthodox criminological perspectives, notably modernization theory, legal realism and pluralism are simply too parochial and inadequate frameworks for grappling with this task. While feminist perspectives and neo-Marxian theories of law and justice such as instrumentalism, capital logic and class conflict theory shed some light on aspects of the problem of understanding the emergence, development and repeal of criminal law and judicial structures in developing countries, they fail to answer crucial questions about the behaviour of legal systems brewed in the African pot and impinged upon by larger international economic and political forces.

Structuralism is a theoretical approach that is useful in facilitating a deeper understanding of the reasons for, and the relationships between the emergent and the extant

legal forms in Ghana, and possibly in other so-called developing countries. It is also a useful framework for revealing and explicating the broader ramifications of a particular "instance study" such as this dissertation.

Structuralism is useful in contributing to a wider appreciation of law that is historically specific and culturally sensitive; it is flexible enough to be applied in a variety of multi-disciplinary studies; it eschews the excessive economism of the capital-logic approach while stressing the value of Marxian analyses, historical inquiry, comparison, and internationalism as Sumner (1982:3) suggests. Thus, while structuralism remains the central theoretical focus, awareness of the necessity for comparative analyses also allows for other perspectives to be borrowed and incorporated, and for the findings of specific instance studies to be compared and contrasted with other instances around the world. The implied internationalism here also has the advantage of allowing for the revelation of the wider social, economic and geo-political forces (as in the case of Cuba) that may affect the nature of criminal law in the particular social formation of interest.

This then is essentially a neo-Marxian *structuralist approach* that pays attention to development issues; it is an approach to the study of law which discounts porous, ahistorical and Eurocentric modernization perspectives on crime and justice in the developing world. Sumner (1982) has provided the rudiments of such a theoretical possibility, and this exploratory dissertation has demonstrated, to some degree, the viability and potential value of such an *internationalist, developmentalist* approach grounded in neo-Marxism. Nevertheless, much more theoretical work needs to be done before this approach becomes a full-fledged theory of law and justice in developing countries. Indeed, the key problem with the Sumner approach is that it cannot be conceptualized. On the contrary, structuralism conceptualizes law as legal pluralism, state law and dispute processing (Cotterrell, 1984:40-47), while at the same time recognizing the value of individual human agency in the creation and alteration of criminal law and judicial structures.



## **Theoretical Contributions of the Dissertation**

This dissertation makes important scholastic and theoretical contributions to the sociology of law. It contributes to a wider appreciation of the sociology of law. While emphasizing the specific nature and functions of public tribunals in Rawlings' Ghana, the dissertation connects the role of criminal law and the state in this neo-colonial country to the broader social control and legitimation experiences of other countries.

Due to its comparative approach, the findings of this dissertation can be generalized to cover other situations. Although the research was located in a specific socio-cultural context - the contemporary Ghanaian social formation - there are significant similarities and patterns between Ghana's experiences and other countries'.

Theoretically, this dissertation shows that the structuralist approach is useful in understanding the nature of law as well as state-society relations in a neo-colonial country like Ghana. Given the already wide application of structuralist theory in Canadian and other western countries, this dissertation permits a modest conclusion that structuralism is a valuable theoretical framework irrespective of the particular social formation in which the analysis is situated.

Thus, the main theoretical contribution of this dissertation is that it marks a significant empirical advance in the extension of the range of application of the structuralist approach. Whether in a neo-colonial society or an advanced capitalist, industrial society such as Canada, Britain or the US, the legitimation functions of the law are essentially the same, although the specific techniques may vary. Ghana used the public tribunals as described in this dissertation; the British used similar structures of repression and legitimation in Northern Ireland, although the use of the public tribunals system is inconceivable in Canada.

Another important implication of this dissertation pertains to the perennial interrelationship between the political economy and criminal law, on one hand, and economic stability and the nature of international responses to human rights abuses by a state on the other hand. From its inception in January 1982, the PNDC faced an acute crisis of legitimacy

reflected in a barrage of destabilization efforts. Over and above its official garb of nobility, the tribunals system provided a swift, brutal and effective mechanism of repressing and punishing "social dynamites" such as dissidents and "enemies of the revolution". Inevitably, in the process of reproducing order and legitimizing itself, the PNDC regime, wilfully and otherwise, violated the basic human rights of many Ghanaians. By early 1983, the regime had begun to recognize the true nature of its legitimacy crisis.

The Rawlings regime's crisis of legitimacy was critically linked to the economic stability of the Ghanaian economy, and the regime's political opponents heavily exploited the dire economic conditions then prevailing in the country, in an effort to dislodge it from power. However, with the introduction of the Structural Adjustment Program as the foundation of the government's Economic Recovery Program, the political crisis facing the regime began to wither away. Altogether, the PNDC's Economic Recovery Program worked quite successfully<sup>2</sup>, and with it, the level of domestic discontent subsided considerably. Conjunctively, after 1985, there were hardly any criticisms of the regime by foreign governments and the international press. Indeed, buoyed by the regime's forgiving attitude and greater exercise of pardons as well as the imposition of less severe penalties by the tribunals, the international press replaced its staple excoriation of the regime's deplorable human rights record with a new diet: a positive focus on the PNDC's economic, political and social accomplishments. Nonetheless, human rights violation by the regime, chiefly through the arbitrary and capricious use of the public tribunals, continued well beyond 1985.

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<sup>2</sup> As pointed out in Chapter IX, one down side of the regime's economic policies is the considerable bloating of the national debt owed to foreign creditors. This assures the continued domination of the economy by foreign financial interests. The nation's increased indebtedness to foreign creditors represents a new phase of dependency known as recolonization.

Ghana's experience with the use of criminal law (the public tribunals system) as an instrument of social control and political legitimation, on one hand, and the country's continuing economic recovery, coupled with the declining chastisement of the PNDC's human rights abuses, on the other hand, illustrate two fundamental points of this dissertation. First, maintaining a stable and relatively prosperous internal economic and political order is an effective way of staving off criticism by the international community, of a regime's human rights record and for achieving legitimacy and/or down-playing a crisis of legitimacy. Second, it demonstrates the critical link between the data presented in this dissertation and the structural Marxist theory of law which guided the research and analyses. Structural Marxism is thus seen as a relevant theoretical framework for understanding the specific issue of the evolution, functioning and repeal of criminal law in a neo-colonialist country, as well as for appreciating the general problem of the link between economic stability, political legitimacy and international focus on a country's human rights record.

### Summary

In sum, the structuralist approach is useful for understanding the legitimation systems used by the ruling elites of states. However, the specific ways in which regimes are legitimated owe much to the autonomy of the state and the skills and political acumen of the leadership.

The point here is that, states are relatively autonomous with respect to the legitimation techniques they construct or choose to use. States will use such legitimation devices as public tribunals whenever they can. Legitimation techniques may vary from state to state. In the case of Ghana, a key legitimation device used by the state under Rawlings to advance the revolutionary process was the public tribunals system.

Further, the success of the revolution was also related to the popularity, personality and political skills of Jerry Rawlings. He is a charismatic shrewd and skillful politician who knows how to legitimize what he does. Rawlings and his regime made effective use of the public tribunals in the political legitimation process. Indeed, the tribunals in Ghana were

popular because they initially went after those who were unpopular. For example, Rawlings' political dexterity contrasts sharply with Salvador Alande's lack of political skills. Although there was an excellent democratic tradition in Chile, Alande failed because he lacked political skills - parading Cuba's Fidel Castro was a mistake which served to alienate him from his support base, the masses. President Deng Xiaoping of China is successful because he uses the logic and rationale that the military generals and the masses can understand - the universal logic of capitalism.

In a broad sense then, this dissertation situates the emergence of the phenomenon of public tribunals in Ghana within the broader socio-historical context of colonialism, capital accumulation and revolutionary social change in a vulnerable neo-colonial economy, and the products of these specific but interrelated processes in Ghana. In a narrow sense, it demonstrates that the tribunals system was the cornerstone of the PNDC's policy of popular justice as well as its most reliable machinery of political repression and legitimation.

The legitimation process is critically connected to three key factors: the maintenance of internal order, the creation of opportunities for relative prosperity and the capacity to "stay out of trouble", that is, to avoid international conflicts. The tribunals system was the most effective instrument of political repression while Jerry Rawlings was the most effective instrument of legitimation for the PNDC regime. The tribunals system was, however, a bold and sincere attempt to challenge and deconstruct the dominance of the traditional notions of justice that have issued from Westminster and Buckingham Palace, and to construct a radical, made-in-Africa justice system that will truly serve Ghanaians in an efficient, just, and fair manner.

To the extent that the PNDC regime tackled the latter goal - a difficult and herculean undertaking by every means, and especially over the objections of the traditional power elites, both locally and internationally - it demonstrated through the tribunals system that the state under Rawlings had the autonomy to act within and outside established local and international institutional frameworks. Under the weight of significant international and domestic calls for

reform, as well as economic and political challenges to its own legitimacy, the regime repealed several aspects of the tribunals system, incrementally reforming it in response to degrees of pressure, while keeping enough teeth in its mouth to make its bite as deadly as it always had been. Even so, to the extent that it reformed, neutralized or repealed key aspects of the tribunals program in response to pressure, the autonomy of the state was indeed relative.

The dough of public tribunals was kneaded with noble intentions, baked in Ghana's perennially super-heated atmosphere of political urgency and dispensed with a mixed heart: kindness and blind fury.

### **Suggestions For Future Research**

The main drawback of this dissertation is that only a few of the prospective interviewees actually participated in the research. This problem derived from the politically-sensitive nature of the subject matter of the research - the public tribunals system in Ghana. Many were simply reluctant to discuss this "touchy and controversial topic", as one respondent put it. Yet, short of relying exclusively on secondary sources, some of the targeted respondents had to be interviewed. Their willing participation was essential to the success of the work.

As with nearly all survey research, the conclusions of this dissertation are tentative. Also, considerable reliance on secondary sources limits the degree of confidence in the research outcome and the extent to which the findings can be generalized.

The limitations of this dissertation are understandable in light of the logistical constraints and political circumstances under which the research was carried out. Many prospective respondents did not participate in the research due, among other things, to fear of political reprisals.

More research needs to be done into the phenomenon of crime and criminal law with particular reference to public tribunals in Ghana. In an ideal world, two types of research could be undertaken.

1). One year of concentrated observation of the public tribunals augmented with intensive interviews with several tribunal panelist would provide the best opportunity for a thorough understanding of the tribunal system. Through such intensive observation and interviews, the researcher would be able to capture the interactive social processes which lie behind the social construction of reality, including the production of judicial decisions. It would also enable the researcher to focus attention on certain crucial aspects of the tribunals system, including the adjudication and decision-making procedures used by tribunal panellists. In addition, the researcher would be able to determine the extent to which basic principles of procedural fairness were respected and upheld, as well as the quality of judicial outcomes.

It would also be advantageous for the researcher to gain unimpeded access to all documents, files and records of all public tribunals since their inception in 1982. These archival materials were kept by the Registrar of Public Tribunals. Unrestrained access would permit the researcher to determine, quantify and analyze the nature and outcomes of all offences adjudicated by the tribunals; the sentences imposed by tribunals for different categories of offences; the class, ethnic and gender backgrounds of persons who appeared before the tribunals.

The research could also focus special attention on the frequency or extent to which the death penalty was imposed and carried out; the total number of death penalties that were commuted to life imprisonment and the extent to which the death penalty was actually carried out. This would enable the researcher to explore the extent of the tribunals' use of alternative penalties such as fines, imprisonment (with or without hard labour) and community service orders. One of the findings of this dissertation is that there was a noticeable reduction in the degree of severity of punishment given by the tribunals since the PNDC's Structural Adjustment Programme swung into full gear. The extent to which sanctions for criminal offences adjudicated by the tribunals changed over time could also be empirically explored and tested. A more rigorous empirical testing of this finding would permit a more solid conclusion with respect to the relationship between economic imperatives and criminal law reforms in

Rawlings' Ghana. Such a concentrated research agenda would also allow for a deeper examination of the gender, ethnic and religious composition of tribunal members. This measure could serve to compliment the other indices of the PNDC regime's openness and inclination for "justice". The study would also enable the researcher to enquire into the minimum educational and experiential qualifications possessed by the members.

2). There is a need for a focused empirical research into the similarities and differences between the public tribunals and the regular courts. A comparative study of that kind would be useful in determining the degree of variation between the two systems with respect to philosophies, principles and procedures of justice.

The suggested research projects could be useful in an ideal situation: one where political considerations, money and time limitations do not obtain. For now, the reality is that they do. And worst of all, the tribunals system has been effectively abolished since January 7th, 1993. Perhaps, a comparative analysis of the new Regional Tribunals with the old ones will help address some of the issues raised in this dissertation.

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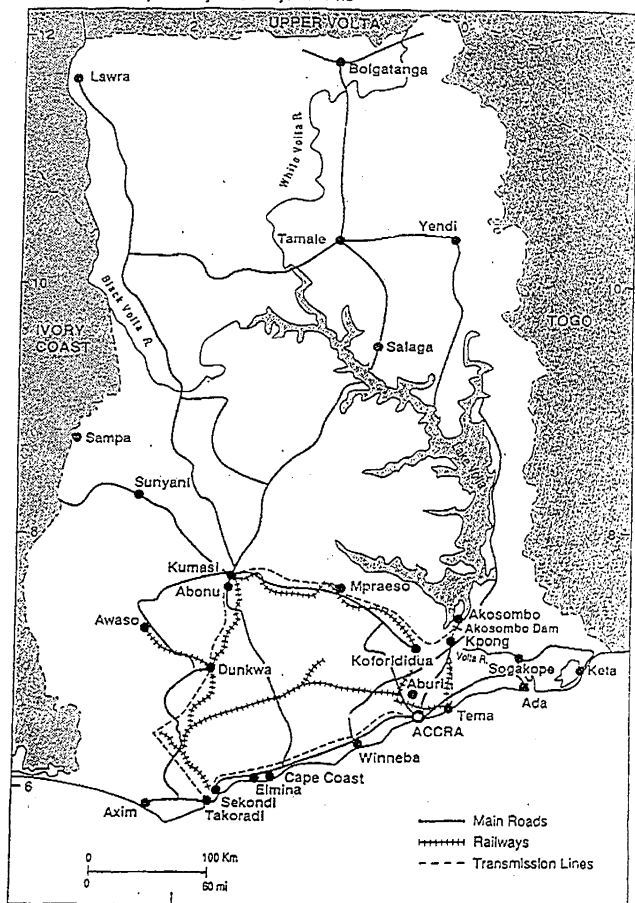


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## APPENDIX A

### GHANA : Roads, Railways and Major Towns



## APPENDIX B

### MEMORANDUM TO THE GOVERNMENT OF THE REPUBLIC OF GHANA ON AMNESTY INTERNATIONAL'S CONCERNS RELATING TO THE PUBLIC TRIBUNALS ESTABLISHED PURSUANT TO PNDC LAW 24

#### Basis of Amnesty International's Concerns

Amnesty International has monitored proceedings of the Public Tribunals in Ghana since their establishment pursuant to PNDC Law 24 (Public Tribunals Law 1982) enacted in July, 1982.

Under Article 1 (b) of its Statute, Amnesty International "opposes by all appropriate means the detention of any Prisoners of Conscience" or any political prisoners without trials within a reasonable time or any trial procedures relating to such prisoners that do not conform to internationally recognized norms". Accordingly, under its mandate, the organization is concerned that trials taking place before the Public Tribunals with respect to political or politically motivated offences be conducted according to standards of fair trial prescribed by international law.

As set out in Article 1(c) of its Statute, Amnesty International also unconditionally opposes the imposition and infliction of the death penalty in all cases. The fact, therefore, that the Public Tribunals have the jurisdiction to hear capital cases and to impose the sentence of death is of the serious concern to the organization. While the organization believes that the death penalty should never be imposed, in the jurisdictions which continue to do so, Amnesty International believes that it is of utmost importance that the particularly stringent international legal standards with respect to imposition of the death penalty should be scrupulously followed.

#### Previous Attempts to Observe Public Tribunals Sessions

In light of these concerns, Amnesty International sought to send an observer to attend session of the Public Tribunals soon after they were constituted. Certain aspects of the constitution

and procedures of the Public Tribunals, such as the absence of a requirement that legally trained individuals sit on tribunal panels, the absence of any right of appeal and lack of clarity regarding the rules of evidence, to be concern to Amnesty International, but the organization wished to send a delegate to Ghana to collect first-hand information about the functioning of the Public Tribunals before drawing conclusions.

The term "prisoners of conscience" is used by Amnesty International to denote persons imprisoned, detained or otherwise physically restricted by reason of their political, religious or other conscientiously held beliefs or by reason of ethnic origin, sex, colour or language, provided that they had not used or advocated violence. The organization works for the unconditional release of all prisoners of conscience.

The Secretary General of Amnesty International wrote to Flight-Lt. J.J. Rawlings, the Chairman of the Provisional National Defence Council (PNDC) on 25 October 1982 to inform him of Amnesty International's wish to send a delegate. The organization's nominated delegate, Mrs Emma Walser, a former Judge of the Circuit Court of the Republic of Liberia, was, however, unsuccessful in obtaining a visa at the Ghanaian embassy in Switzerland. On 6 December 1982 the Secretary General of Amnesty International made a telex request to the embassy for a visa to be granted. On 8 December similar requests were made by telex to Flight-Lt Rawlings and to Dr. Obed Asamoah, PNDC Secretary for Foreign Affairs. No replies were received on these requests.

On 11 March 1983, after receiving reports that a group of individuals were to be tried by a Public Tribunal on a charge of preparing and endeavouring to overthrow the government and faced the possible imposition of the death penalty, Amnesty International again telexed Flight-Lt Rawlings requesting a visa for its delegate. In the absence of any response, the organization, in a document dated 14 March 1983, for the first time commented publicly on the Public

Tribunals, stating that Amnesty International was concerned that the proceedings of the Public Tribunals might not conform to internationally established standards.

Subsequently, on 8 April 1983, George Kwaku Agyekum, Chairman of the Board of Public Tribunals, responded to a letter from Amnesty International dated 10 March 1983, in which the organization had sought clarification as to press reports of statements he had made, by suggesting that the organisation send a delegate to attend Public Tribunal sessions and collect information from relevant officials.

#### Visit by Amnesty International Delegate in August 1983

A decision to renew efforts to send a delegate to Ghana to observe the Public Tribunals and to collect information about them was taken by Amnesty International in early August 1983. The organization was particularly concerned that on 3 and 4 August death sentences had been imposed upon 20 people by the Public Tribunals. Telexes were sent to Flight-Lt. Rawlings on 3 and 9 August urging him to commute these sentences. The organization made these communications with a great sense of urgency in light of the fact that, in a previous case concluded earlier in 1983 where the death penalty had been prescribed by the Public Tribunal, the convicted individual Emmanuel Boadi, had been executed within three days of sentencing. The 9 August telex also stated that the organization's desire to send an observer to attend the then ongoing trial before a Public Tribunal of Joachim Amartey Kwei and others on capital charges of murder or conspiracy to murder in connection with the killing of three High Court Judges and a retired army officer.

The organization's designated delegate, Wesley Gryk, a member of the bar of New York and a staff member of Amnesty International's Research Dept. in London, applied to the Ghanaian High Commission in London for a visa which was granted on 12 August 1983. He departed from Ghana on 14 August. By the time of his arrival on Accra on 15 August, however, the trial of Amartey Kwei and his co- defendants had been completed, five death sentences having

been imposed. In addition, two days prior to his arrival, on 13 August, four individuals previously sentenced to death by the Public Tribunal had been executed. Amnesty International's delegate delivered personally to the PNDC's headquarters at the Castle letters from the Secretary - General of Amnesty International to Flight-Lt. Rawlings expressing regrets at the executions which had taken place and calling upon the chairman of the PNDC to commute those death sentences which had not as yet been carried out.

While Amnesty International's delegate was unable to observe the proceedings against Amartey Kwei and his co-defendants, he was able to take the opportunity of his presence in Ghana to collect considerable information regarding the constitution of, and the procedures followed by, the Public Tribunals. Amnesty International would in the first instance like to acknowledge the assistance afforded its delegate in this regard by government officials connected with the Public Tribunals. The delegate sought and was granted meetings with George Kwaku Agyekum, Chairman of the Board of Public Tribunals, J.C. Amonoo-Monny, Special Public Prosecutor; and Kwamena Ahwoi, coordinator of Investigations, Vetting and Tribunals. Each responded in detail to questions put to him during the course of these interviews. The delegate was also able to speak with lawyers and to collect relevant documentation while in Accra.

Finally, Amnesty International's representative attended sessions on two different tribunal panels, one chaired by George Kwaku Agyekum, and the second, by Mr. Addo-Aikins. The first of these sessions included proceedings on two non-political cases involving charges of stealing and conspiracy to steal. The second was a session of the trial of individuals accused of having aided and /the escape of those implicated in the 23 November 1982 coup attempt. The impressions obtained from attendance at these sessions were of necessity fragmentary since in each instance the proceedings viewed were only a single hearing in a much longer

case. At the time, they afforded the delegate increased understanding of the procedures followed by the Public Tribunals.

Amnesty International's Specific Concerns with Respect to the Public Tribunals.

On the basis of the information collected during the delegates stay in Accra and additional information obtained by Amnesty International with respect to the Public Tribunals, the organization would like to address to the Government of the Republic of Ghana the following specific concerns relating to the Public Tribunals. In doing so, the organization takes particular note of the fact that government officials whom the Amnesty International delegate met in the procedures they follow were established, is currently under review and may be amended. In the context of this review, Amnesty International would call upon the Government to make appropriate changes in PNDC Law 24 to assure that the procedures followed are in compliance with international standards relating to a fair trial. The following comments and suggestions are made with this end in mind.

(1) Right of Appeal; Commutation of Death Sentences; Other Special Concerns with respect to Death Penalty Cases.

Article 14(5) of the International Covenant and Political Rights articulates the fundamental international legal standard relating to appeals from criminal convictions:

"Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law".

A fundamental flaw of the Public Tribunal System in Ghana is its failure to provide the right to appeal to those convicted of criminal offenses by the Public Tribunals. It is imperative, in Amnesty International's view, that such a right of appeal be instituted. Such appeal should be before a judicial body established by law with a membership different from the convicting Public Tribunal and including one or more legally trained individuals. The convicted individual should have adequate opportunity to receive, review and respond to the judgement



against him or her in the context of the appellate proceedings and should have the right to legal representation. The procedure to be followed by the appellate body should be clearly set out in law.

Although the PNDC is reported to have received petitions from people convicted by Public Tribunals officials have stated that there is no right of petition. Mr. Addo-Aikins is reported to have declared in April 1983 in response to a newspaper article, that people convicted by Public Tribunal do not have a right of appeal or petition, although they may seek leave to petition.

Government officials with whom the Amnesty International delegate spoke pointed out that the PNDC itself must confirm death sentences imposed by the Public Tribunals and may commute such sentence. The right to seek commutation of a death sentence is, however, separated from the right to judicial appeal. In addition to specifying a right of appeal as described above, the International Covenant on Civil and Political Rights, in Article 6 (4) states:

"Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases".

Amnesty International is in fact gravely concerned that the procedures currently followed by the PNDC in considering the commutation of death sentence may be seriously inadequate. As was noted in an introductory section to this memorandum, Joachim Amartey Kwei and four of his co-defendants were sentenced to death by a Public Tribunal on 15 August 1983. On 17 August, during the course of meetings with officials, it was confirmed to the Amnesty International delegate the written judgement in case had been prepared and would be forwarded to the PNDC to consider whether the death sentences should be confirmed or commuted. As of 4.45 p.m. on the afternoon of 17 August, the official with whom the delegate was then speaking, who said that he was responsible for forwarding the judgement to

PNDC, stated that he had not yet done so. Yet, the death sentence against three of the convicted individuals is reported to have been carried out the following morning at dawn.

Amnesty International believes that this sequence of events indicates that the PNDC did not have adequate time to give due consideration to the contents of the judgement before confirming the death penalties therein. The organisation is also concerned that the defendants themselves appear not to have been given copies of such judgements so that they might address specific points included therein. In the light of these concerns, Amnesty International would call upon the Government to clarify the procedures followed with respect to confirmation of death sentences by the PNDC and to take all necessary steps to bring such procedures into conformity with United Nations General Assembly resolution 35/177 of 15 December 1980 on arbitrary or summary executions, which provides that "no death sentence shall be carried out until the procedures of appeal and pardon have been terminated and, in any case, not until a reasonable time after the passing of the sentencing in the court of first instance".

Amnesty International, as an organization unconditionally oppose [sic] to the death penalty in all cases, would also seek the Government's clarification with respect to Section 8(1) of PNDC Law 24 which provides:

"The death penalty may be imposed by a tribunal for such offenses as may be specified in writing by the Council and in respect of cases where the tribunal is satisfied that very grave circumstances meriting such a penalty have been revealed".

The wording of the second half of this provision is ambiguous as to whether a Public Tribunal might in some cases apply the death penalty at its own discretion, regardless of whether the offence in question has been specified in writing by the PNDC or indeed, otherwise specified in law as a capital offence. Such a practice would be directly contrary to the fundamental principle of international law that a heavier penalty may be imposed on a criminal defendant

than was applicable at the time when the criminal offence was committed. It would also be contrary to the United Nations General Assembly resolution 32/61 of 8 December 1977 which:

"Reaffirms that... the main objective to be pursued in the field of capital punishment is progressively restricting the number of offenses for which the death penalty may be imposed with a view to the desirability of abolishing this punishment...."

While officials with whom the Amnesty International delegate spoke stated that PNDC Law 24 was not meant to give the Public Tribunals discretion to impose the death penalty for crimes not previously designated by the PNDC; Amnesty International has noted with concern that the Public Tribunal (Procedure) Rules 1982, apparently promulgated after PNDC Law 24, state, in Section 13(4)

"The death penalty may only be imposed by a tribunal for such offenses may be specified in writing by the Council or in respect of cases where the tribunal is satisfied that very grave circumstance meriting such a penalty have been revealed" [Emphasis added].

Amnesty International would of course call upon the Government of the Republic of Ghana unconditionally to abolish the death penalty in all cases. Failing this, it is incumbent upon the Government to clarify that the Public Tribunals may not in their discretion increase the number of offenses for which the death penalty may be applied.

## (2) Legal Training of Public Tribunal Members

Individuals being tried on criminal charges are entitled, as fundamental principle of international law, to a fair and public hearing by a competent, independent and impartial tribunal established by law. The competence of such tribunal must of necessity extend to the ability of that body to comprehend, interpret and apply both the substantive and procedural laws relevant to the case under consideration. Yet, PNDC Law 24, as presently drafted, includes no prerequisite for the legal training of the members of Public Tribunal panels. Section 2(1) of PNDC Law 24 provides that the Board of Public Tribunal, responsible for

administering the Public Tribunals, must include at least one "lawyer of not less than five years' standing as a lawyer" amongst its five to 15 members. With respect to the Public Tribunals panels responsible for the actual hearing of cases, however, Section 2(2) provides only that these three to five member bodies "shall consist of such members of the public as may be appointed by the Council".

The Chairman of the Board of Public Tribunals explained to Amnesty International's delegate that the Board's current practice is to ensure that at least one qualified lawyer sits on each Public Tribunal which is constituted. This practice, he stated, was followed both in Accra and in all the provinces where Public Tribunals have been set up. The presiding chairmen of the two Public Tribunals which the Amnesty International delegate observed were in fact experienced lawyers. The Chairman of the Board of Public Tribunals also suggested the possibility of increasing the number of trained lawyers serving on the Board of Public Tribunals as a step towards having more lawyers available to serve on Public Tribunals. He also referred to his desire to provide some basis legal training for non-lawyer members of the Public Tribunals.

While welcoming the assurance that current practice is to require each Public Tribunal to include at least one qualified lawyer, Amnesty International believes that it is imperative that the relevant law itself reflect this arrangement as a minimum prerequisite for the establishment of a Public Tribunal. Furthermore, the law should specify explicitly the minimum level of experience (e.g. number of years of practice as a lawyer) required of lawyers sitting on Public Tribunals.

An additional concern is the fact that, even where one or more members of a Public Tribunal may be legally trained, the other lay members of the panel will lack such training. When Amnesty International's delegate raised this concern with government officials, they responded

that this was not different from Ghana's traditional court system where criminal cases may be decided by a legally trained judge, who takes decision of law, and a lay jury, which makes determinations of fact. The flaw in this argumentation, however, is that Section 7(22) of PNDC Law 24 provides that decisions of a Public Tribunal may be taken by a mere majority vote by members of the Public Tribunal, except in cases involving a decision to impose the death penalty, which requires a unanimous decision. It is conceivable, therefore, that a lawyer sitting on non-capital cases before the Public Tribunal may make a determination that a certain outcome is required as a matter of law and yet be overruled by a majority of his or her colleagues untrained in the law. In order to overcome this potential problem, Amnesty International believes that any amendment of PNDC Law 24 should include reference to the fact that questions of law coming before a Public Tribunal are to be decided by the legally trained member of that Public Tribunal and not by the body as a whole.

### (3) Independence and Impartiality of the Public Tribunals

As noted above, international legal standards provide that criminal charges against an individual are to be heard before a tribunal which is independent and impartial. A determination whether a particular tribunal is in fact operating independently and impartiality requires detailed and specific information regarding the actual basis on which the tribunal is taking decisions and the nature of its interdependence with other parts of the government. Amnesty International does not have sufficient information available to it to make such a determination with respect to the Public Tribunals in Ghana.

At the same time, however, the organization is concerned that certain elements of the law and procedural practices relating to the Public Tribunals would give at least the appearance that due independence and impartiality is not maintained. Amnesty International would call upon the Government of the Republic of Ghana to make appropriate changes in the law and procedural rules relating to the Public Tribunals so as to allay such concerns.

In the first place, Amnesty International notes that Section 2 of PNDC Law 24 provides that both members of the Board of the Public Tribunals and members of the Public Tribunals themselves are appointed by the PNDC. It is of course not unheard of that judicial officers are appointed by the executive branch of the government. What is of more serious concern is that, under the law as presently enacted, members of the Board of Public Tribunals and of the Public Tribunals would appear to serve at the will of the PNDC. The period and terms of service of such officials are not designated, nor are procedures and grounds set down for potential dismissal. Arbitrary dismissal by the PNDC on any or no grounds would seem to be a possibility. This is in contrast to the traditional court system in Ghana where judges serve until retirement unless a cause is found for their dismissal under a particular procedure laid down in law.

Government officials with whom the Amnesty International delegate spoke indicated that no dismissals had in fact taken place and further stated that while the PNDC did in fact have the right to dismiss Public Tribunal officials, it would only do so for "just cause" such as manifest incompetence, corruption, etc. Amnesty International nevertheless believes that it is important that the law relating to Public Tribunals be amended to reflect the fact that dismissal may be only for just cause according to specifically designated reasons and further believes it imperative that an amended law establish procedures independent of the PNDC for the determination of such dismissals.

Two further provisions of current PNDC Law 24 would on their face raise doubts in the minds of an objective observer regarding the independence and impartiality of the Public Tribunals. The first relates to how decisions are taken to bring a particular prosecution before the Public Tribunals rather than before the traditional courts. The system as it presently operates would appear to be somewhat arbitrary. Section 3 (1) (d) provides that the Public Tribunals may "try

any offence under any enactment which may be referred to it by the Council". Subsequent to the promulgation of PNDC Law 24, the Council has designated certain crimes as falling within the jurisdiction of the Public Tribunals and may designate others at will. At the same time, the traditional courts in Ghana maintain concurrent jurisdiction over crimes defined in the Criminal Code. The decision as to which judicial body will hear a particular case would in many cases therefore seem to be in the hands of the investigating authorities- be they the police or the National Investigating (authorities) Committee or in some cases even the Peoples Defence Committee- and no basis for the choice to be made is provided in law.

This particular concern is increased by the fact that the sentencing provisions applicable to the Public Tribunals vary considerably from those applied by the traditional court system. The traditional courts are bound by those provisions of the Criminal Code and Criminal Procedural Code setting out particular penalties for certain crimes and categories of crimes. Section 8(5) of PNDC Law 24, by contract, says that, in cases where pre- existing criminal law designates particular penalties. A Public Tribunal "may in its discretion apply such penalties with the terms, effect and purposes of this Law" [Emphasis added]. At the same time, however, Section 8(2)-(3) suggests a minimum term of imprisonment of not less than three years except where the Public Tribunal deems this too harsh.

The apparent arbitrariness with which cases may be referred to the Public Tribunals with which sentencing may be carried out by these bodies can, in Amnesty International's views, raises doubts as to the independence and impartiality of the Public Tribunals. It would also appear contrary to the international legal requirement that every individual be entitled to equal treatment before the law and the courts. The organization would therefore call upon the Government of the Republic of Ghana, in any amendment to PNDC Law 24, to clarify the specific criteria for referral of cases to the Public Tribunals and for the application of penalties by the Public Tribunals.

#### (4) Burden and Standard of Proof

The right of a criminal defendant to be presumed innocent until proven guilty according to the law is enshrined in all major international human rights instruments. While officials with whom Amnesty International's delegate spoke confirmed that the presumption of innocence was a fundamental principle of the Public Tribunals, the organization notes with concern that section 7(14) of the PNDC Law 24 provides:

"In every trial arising out of an adverse finding of a committee against the accused the findings shall be deemed to be prima facie evidence of the facts found and the accused shall be called upon to show cause why he should not be sentenced according to law for the commission of the offence charged".

This same shifting of the burden of proof is not specified in PNDC Law 24 with respect to trials which do not arise from the findings of committee. However, Amnesty International has been informed by lawyers who have appeared before and observed the Public Tribunals that, in cases where the prosecution has in their estimation clearly failed to make a prima facie case, the Public Tribunals have nonetheless refused to allow defence motions of "no case" at the end of the prosecution case. If true, this would appear to indicate that the presumption of innocence may not be operating in such cases. The Government should make clear that the presumption of innocence is a fundamental principle in all cases before the Public Tribunals, including those arising out of adverse findings by committee, and should ensure that procedures followed by the Public Tribunals bear witness to the application of this principle.

With respect to the standard of proof applied by the Public Tribunals, Section 7 (19) of PNDC Law 24 provides that, upon hearing all relevant evidence, the Public Tribunal shall convict the accused "where it is satisfied that all things considered, the offence was committed by the accused". On its face, this formulation appears considerably weaker than the standard of "beyond a reasonable doubt" applied by the traditional courts in Ghana and in various other



legal systems. The Chairman of the Board of Public Tribunals indicated to Amnesty International's delegate that the traditional formula was omitted from PNDC Law 24 not because it was inapplicable before the Public Tribunal, but rather because the drafters were seeking to explain a complex legal concept in laymen's language. It is not clear whether the Public Tribunals themselves have interpreted Section 7 (19) in this way. In the 2 August 1983 judgement against Major Seidu Musa and 25 others, the Public Tribunal wrote:

"PNDC Law 24 in Section 7(19) requires the Tribunal to be satisfied after consideration of all things about the guilt of the accused before it convicts. This provision avoids the usual legal phrases about 'burden of proof' and it makes it the Tribunal's duty to look at the case as a whole before deciding. Indeed, deciding the weighty issues at stake under this law it would be unreasonable not to take the totality of the situation as it emerges from the trial into account. Accordingly, we shall examine the evidence before this tribunal and relate it to the case against each accused person in turn".

Amnesty International believes that it is necessary for the Government to clarify the precise standard of proof to be applied by the Public Tribunals and, if it is proof "beyond a reasonable doubt", to state so explicitly.

#### (5) Right to Legal Counsel

Fundamental international legal standards with respect to a criminal defendant's right to legal counsel are articulated in Article 14(3) of the International Covenant on Civil and Political Rights which describes in sub-paragraphs (b) and (d), the defendant's right:

"(b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing" and

"(d) To be tried in his presence, and to defend himself in through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where interest of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it".

The Amnesty International delegate was told that arresting authorities in Ghana are legally required to advise those arrested of their right to legal counsel. In one of the Public Tribunal proceedings which the delegate observed, several of the defendants claimed not to have been advised though the fact that these defendants were themselves police officers detracted from the force of their argument. The Chairman of the Public Tribunal nonetheless agreed to afford the defendants in this proceeding the opportunity to obtain legal counsel and allowed a somewhat extended postponement of the case for this purpose.

In instances where defendants are unrepresented, the Amnesty International delegate was advised that the Public Tribunal itself makes a special effort to ensure that their rights of defence are fully preserved. Indeed, in proceedings which the delegate observed, the Chairman of the Public Tribunals assisted such defendants in the framing of questions in the cross-examination of prosecution witnesses. Nonetheless, it seemed clear to the delegate that those defendants without legal counsel were presenting their own cases to the Public Tribunal less effectively than would be done if they were legally represented. In one of the cases which the delegate observed, for example, unrepresented defendants had particular difficulty in questioning prosecution witnesses effectively in such a way as to elicit information useful for the defence.

Such observations are particularly serious given that, in some cases before the Public Tribunal including capital cases, it has been unable to obtain any such representation. Amnesty International believes that it is incumbent upon the Government of the Republic of Ghana to ensure that all such defendants be afforded legal representation. In saying this, the organization is mindful of the current boycott by members of the Ghana Bar Association of proceedings before the Public Tribunals and recognizes that this boycott is having a serious effect on the availability of legal counsel. At the same time, Amnesty International believes that the provision of defence counsel is of extreme importance in order that justice may be

done and calls upon the Government to make every effort to seek to reach an understanding with members of the legal profession in Ghana whereby they would be willing to represent defendants before the Public Tribunals. The organization is particularly hopeful that such an understanding could be reached in the context of the proposed amendment to PNDC Law 24 along the lines set out in this memorandum.

#### Summary of Amnesty International's Concerns and Recommendations

In conclusion, Amnesty International would like to reiterate its hope that a review of PNDC Law 24 be undertaken by the Government of the Republic of Ghana with a view to bringing the structures and procedures of the Public Tribunals into conformity with the international legal standards relating to the conduct of fair trials. To that end, the organization believes that the following changes should be made in PNDC Law 24:

- (1) There should be a right of appeal for every case decided by a Public Tribunal. Appeal should be to a judicial body established by law with a membership different from the convicting Public Tribunal and including one or more legally trained individuals. Defendants convicted by a Public Tribunal should have adequate opportunity to receive, review and respond to the judgement against them and should have the right to legal representation. The procedures of appeal should be clearly and precisely set out in the law.
- (2) In light of its unconditional opposition to the death penalty, Amnesty International believes that the competence of the Public Tribunals to impose death penalties should be removed. Failing this, the law should be clarified to make explicit that Public Tribunals may not in their discretion increase the number of crimes for which the death penalty can be applied.
- (3) Also in the event that Public Tribunals continue to impose death sentences, the procedures followed with respect to confirmation of death sentences by the PNDC should be clarified. In particular it is essential that defendants sentenced to death have reasonable time after the passing of the sentence to review the written judgement against them, to pursue all available appeals and to make representations to the PNDC prior to the PNDC's considering confirmation of any death sentence.
- (4) It should be explicitly stated in the law that at least one qualified lawyer having a specific level of experience must sit on each Public Tribunal.

- (5) Questions of law coming before the Public Tribunal should be decided by the legally trained member or members of the Tribunal and not by the body as a whole.
- (6) Members of the Board of Public Tribunals and Public Tribunal members should be liable to dismissal only for just cause according to specifically designated reasons set out in law, and procedures independent of the PNDC should be established for considering such dismissal.
- (7) The specific criteria for referring cases to the Public Tribunals rather than to the traditional courts should be clarified and specifically stated, as should the criteria for application of penalties by the Public Tribunals.
- (8) It should be clarified that the presumption of innocence is a fundamental principle in all cases before the Public Tribunals, including those arising out of adverse findings by committees. All procedures followed by Public Tribunals should bear witness to this principle.
- (9) The precise standard of proof to be applied by the Public Tribunals should be clarified and, if it is "proof beyond a reasonable doubt", this should be stated explicitly.
- (10) All necessary steps should be taken to ensure that legal counsel is provided for defendants appearing before Public Tribunals who wish such representation.

Amnesty International, October 1983

## APPENDIX c

SPEECH BY MR. GEORGE AGYEKUM, OF THE NATIONAL PUBLIC TRIBUNALS IN ACCRA, GHANA - AS GUEST SPEAKER - ON THE OCCASION OF A STUDY SESSION ORGANISED BY THE AFRICA CENTRE IN CADIEREN KEER AND THE LAW FACULTY OF THE UNIVERSITY OF LIMBURG, MASSTRICHT, NETHERLANDS, UNDER THE THEME "HUMAN RIGHTS IN AFRICA" ON SATURDAY, 20TH DECEMBER 1986 AT MASSTRICHT UNIVERSITY

TOPIC:-

### HUMAN RIGHTS IN AFRICA

The Charter of the United Nations makes reference to human rights and Fundamental Freedoms in a number of clauses.

In the preamble, the peoples of the United Nations express their determination to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small.

The Universal Declaration of Human Rights was proclaimed by the General Assembly on 10th December 1948. It was viewed as the first step in the formulation of an International Bill of Human Rights "that would have legal as well as moral force".

The declaration has had a wide impact throughout the world inspiring national constitutions and laws as well as conventions on various specific rights.

It did not have the force of law at the time of its adoption, but since then it has had a powerful influence on the development of contemporary International law.

In 1976 three important instruments came into force:

1. The International Covenant on Economic Social and Cultural Rights.
2. The International Covenant on Civil and Political Rights.
3. The optional protocol to the latter covenant.

I would like to comment that at the time of the proclamation of the United Nations Declaration of Human Rights, several African countries were under colonial rule dominated and oppressed by some of the countries which signed the U.N. Charter.

We all know that Article I of the United Nations Charter sets out that its purpose is to develop friendly relations among nations based on respect for the principles of equal rights and self determination of peoples.

We are all witnesses, as citizens of this universe, to how Article (1) has functioned in practice.

The environmental, political and civil aspects of most of the rights contained in the charter manifest an European character and type of society and development.

In this presentation, I will show and analyse some of these elements and why these aspects in the charter continue to show 'dark spots' in respect of human rights in Africa both in implementation and assessment, and further whether with the adoption of the Organization of African Unity charter on human rights this trend could be reversed.

My views about western and European approaches to the Universal Declarations of Human Rights (U.D.H.R.) and other subsequent instruments are confirmed by the Final Act of the Conference on Security and Cooperation in Europe which was concluded in Helsinki on 1st August 1985, popularly referred to as the Helsinki Accord and the Organization of African Unity (O.A.U.) Charter on Human and Peoples rights which was adopted by the O.A.U. Ministerial meeting in BANJUL, 7 - 19th January 1981 and now in force.

It is unquestionably originally African in character and certain of its clauses recognized African culture, values and traditions glossed over by previous instruments. Articles 27, 28 and 29 of the O.A.U. Charter impose elaborate duties on citizens. Article 29 says:—

The individual shall also have a duty:

- (1) To preserve the harmonious development of the family and to work for the cohesion and respect of the family; to respect his parents at all times to maintain them in case of need;
- (2) To serve his national community by placing his physical and intellectual abilities at its service;
- (3) Not to compromise the security of the state whose national or resident he is;

- (5) To preserve and strengthen the national independence and the territorial integrity of his country and to contribute to its defence in accordance with the law;
- (6) To work to the best of his abilities and competence, and to pay taxes imposed by law and in the interest of society;
- (7) To preserve and strengthen positive African values in his relations with other members of society, in the spirit of tolerance, dialogue and consultation and in general to contribute to the promotion of the moral well being of society;
- (8) To contribute to the best of his abilities, at all times and at all levels to the promotion and achievement of African Unity.

This Charter fits more in an African character and traditions. In a nutshell, it says, he who goes to equity must go with clean hands. Our societies are urged to strive and protect our rights but we must fulfil all our duties, pay our taxes, use our skills and abilities to develop our country and society, not to compromise or undermine National security, help to develop and operate positively African values.

Most of the criticisms on the violations of human rights in Africa have been centred on alleged violations of civil and political rights, violations of the dignity of man, protection of rights by an impartial tribunal, rights to nationality, asylum, freedom of association, religion and right to conscience and universal and equal suffrage by secret ballot, but little or no criticism of alleged violations of Economic, Social and Cultural rights such as the right to work and to equal pay for equal work, the right to form trade unions (only mentioned when it affects freedom of association), the right to rest and leisure, right to social security, the right to education and the right to participate in the cultural life of the community.

It is important to point out that the ability to assess and consider human rights in Africa in its right perspective is when it is evaluated in terms of the African social, cultural, historical, economic and political values and development.

Any attempt to evaluate without using the factors aforementioned only produces subjective and unfair analysis and conclusions.

Historically and politically, the African colonial background created an `elite' in all the colonies, who by their background and social connections, stepped into the vacuum created by the departures of the colonial master.

These groupings in Africa have since wielded both political and economic power to the detriment and against the interest of the majority of the people who through illiteracy and ignorance continue to be dominated and exploited by the `elite' in an unprecedented corrupt and insensitive manner so that to reverse this trend -the oligarchy- or what I call a `perpetual pyramid' is only through a struggle, sometimes unfortunately violent.

The sad aspect is that the various attempts at liberation to reverse this oppressive and exploitative order creates conditions for more deprivation of civil and political rights, worsening already precarious and volatile economic conditions, thus fomenting further instability, social disorder, political opportunism and military adventurism.

Modern African political structures are basically inherited left-overs of colonial and foreign concepts which were either imposed or slightly modified to sustain stability and development on a people very alien to those structures and who previously had their own ways of choosing their rules before the imposition.

Even though I agree society is changing and dynamic and therefore should develop and reflect changes and development, this should be done only in a manner that will reflect the involvement of the majority of the people, their aspirations and also serve their popular and collective interests.

The vulnerability and the continuous collapse of these imposed political structures are not surprising. Talking about governments, and democracy in Africa with regard to instruments on human rights, it is necessary for us to identify the roots and forms of which democracy has taken, including its historical and present dimensions.

Creation of modern nation states from tribal groupings which only yesterday were divided by colonial rulers, a system of division which enabled them maintain their political power and stabilised a colonial order is the situation of fact in which several African countries



are in today; to the extent that many of their nationals see the concept of nation-state as an abstraction or something still representing the colonial order.

The unfortunate aspect was that in our struggle for political independence, to enable us undermine colonial rule the concept of state was undermined to displace colonial power.

The task of reversing this feature immediately after independence is not only going to be difficult but it will take time to accomplish.

Democracy and elections have always been seen and evaluated from a pluralistic approach by Europeans. Even though this is not a bad idea in itself, it should be recognized that in some African countries, one party systems presenting several candidates with different backgrounds for elections in each constituency has been effective and provided real democracy, genuine representation and stability, than other countries which purported to operate on Western concepts of pluralistic democracies.

A system which had no roots or connections with the people and was just a manipulation of the multiparty and electoral system by a few.

Whereas in many western countries the established political parties, by their traditions and development, have a collective loyalty to their national institutions and systems, so that politically even though they may be of different groupings national, goals and security are collectively safeguarded.

Most of the time their area of dissent is not the national order but of some policies and ways of implementing them. This cannot be said positively of various African countries which attempted pluralistic democracy.

The opposition did not only undermine sometimes fundamental national policies but even plotted to overthrow constitutionally the legal governments.

The declaration on Social Progress and Development proclaimed on 11th December 1969 by the General Assembly called for the adoption of measures to ensure the effective participation, as appropriate, of all the elements of society in the preparation and execution of national plans and programmes of economic and social development.

The council noted that to be effective popular participation should be consciously promoted by Governments.

In 1982, the General Assembly requested the Commission on Human Rights to consider the question of popular participation in its various forms as an important factor in development and in the realization of human rights, taking into account the result of the deliberations of the International Seminar on Popular participation which had been held in Ljubljana, Yugoslavia from 17-25th May 1982.

After considering the question at its 1983 session, the Commission on Human Rights concluded that the full exercise of the right to popular participation is an important factor not only in the development process but also in the realization of the full range of human rights - civil and political - as well as economic, social and cultural rights.

In this line, all African governments creating or innovating political organs which support and hinge on popular participation should be encouraged.

Full grassroots participation is the true pillar of democracy and stability in Africa, and no hindrance should be put in the way of African nations researching, experimenting or formulating political systems based on improved forms of their national heritage and popular participation.

#### ECONOMIC DEVELOPMENT AND HUMAN RIGHTS:-

Even though most African countries are politically independent, they are not economically so. Their economies are either tied to their former colonial rulers or some western aid agencies by infrastructure, investment or otherwise. In a resolution adopted by the International conference on Human Rights held at Tehran, Iran, in 1968, it was pointed out that "the enjoyment of economic and social rights is inherently linked with any meaningful enjoyment of civil and political rights", and that "there is profound interconnection between the realization of human rights and economic development".

The conference noted "that the vast majority of mankind continues to live in poverty, suffers from squalor, disease and illiteracy and thus leads a sub-human existence, constituting in itself a denial of human dignity".

It recognized that there was an ever-widening gap between the standards of living in the economically developed and developing countries and recognized "that universal enjoyment of human rights and fundamental freedoms would remain a pious hope unless the international community succeeds in narrowing the gap".

It further recognized "the collective responsibility of the International community to ensure the attainment of the minimum standard of living necessary for the enjoyment of the economic, social, and cultural rights set forth in the Universal Declaration of Human Rights depends, to a very large degree, on the rapid economic and social development of developing countries which are inhabited by more than one half of the world's populations whose lot continues to deteriorate as a result of tendencies which characterize international economic relations".

At present several African governments are heavily indebted. The present unjust International Economic Order is seriously undermining the Right to development which the Commission on Human Rights, at the request of the U.N. General Assembly have studied, and agreed that matters related to the scope and content of the right to development are human rights.

Yet none of the known or active human rights organizations have criticised or brought any pressure to bear on their governments to depart from this unjust economic path, neither have they even accused African governments for not fulfilling this right to development.

We may pause to ask why this silence or inaction? Perhaps some further analysis could come up with the answer.

In a recent report by OXFAM, a British Charity Organization released in October 1986, it was actually revealed that the battle against poverty was being lost. It said that the

policies of the industrialised countries and their multinational companies and banks are actively worsening the plight of the poor.

It was alarmingly concluded that this year Africa is set to join Latin America in paying more interest charges and capital repayments than it receives in aid investment.

Britain was singled out as a contributor to this decline in the way its aid program was being cut back, misdirected and tied to domestic economical interest.

The report examines five areas in which western governments can become part of the solution rather than part of the problem:- i.e. aid, trade debt, northern agriculture and arms.

The report criticised aid programmes being too tied to the donors' commercial interests, being too politically directed and for concentrating large urban projects at the expense of agricultural development for the poor which normally enabled the poor to decide priorities.

The report says that a remarkable 95% of all commodity trading is by speculators which does not involve the physical movement of goods and estimates that up to one half of all world trade is concerned with transfer pricing - inter-company trade to move profits into tax havens.

The crisis of the third world debts is summed up in another equation, "for every pound put in a charity tin, the western financial institutions take out nine pounds.

The economic recession, the report argued, has been exported from the west so that poor countries faced with falling commodity prices and less foreign exchange have had to borrow more at higher interest rates.

The report also emphasises that some third world governments and their small middle class - "the elite" - in the development jargon, have to share the blame by ignoring the poor and lining their own pockets.

This analysis by the report no doubt supports my observation about the role the "elite" plays in the political destabilization by their established "perpetual pyramid".

In respect of tax havens and the ability of corrupt and authoritarian governments and officials to line their pockets, this is largely due to the attitude of some western governments.

Swiss municipal laws give protection to tax havens. The MARCOS affairs have implicated some swiss banks opening accounts in different names for MARCOS including subventions coming from the United States and Japan to the Philippines.

The second aspect is that because most of the corrupt and authoritarian government officials manage to line their pockets through political positions and influence, they are protected by Western municipal laws; extraditions are refused on the grounds that the offence committed are of a political nature and are therefore not expected to get fair trials.

Meanwhile the funds sometimes running into billions of dollars are kept in western banks, with some of the aggrieved countries going back under desperation to borrow their own stolen monies.

The sad aspect is that it is a reflection of the nature of the debts being paid by third world countries. Millions of people suffering and using hard earned national resource over lengthy periods to pay illegal debts they never benefited from.

Western insensitivity to the plight of the developing countries is further highlighted by the OXFAM report that "Fresh carnations grown by Books Bond for European button holes are refrigerated and flown from Kenya which has one of the highest rates of malnutrition in the world, and European taste for frog legs supported by the European Economic Community (E.E.C.) aid is ruining crops in Bangladesh because frogs live on marauding insects; the more the frogs are taken away the more their crop production is affected".

Later, Bangladesh will have to seek aid to eradicate the spread of those insects from either the E.E.C. or other western aid agencies at the usual high interest rates.

By this analysis even though we know the debt problems in causing very serious violations of human rights - i.e. less education, housing, medical care, curtailment of the right to development, we know why there is little or no criticism from active human rights organizations in this area.

### THE AFRICAN LEGAL SYSTEMS:-

The legal, like the political structures in Africa, are also inherited; they have the flair of Roman Dutch Law, English Common Law, French or continental system by origin.

There have been attempts of a sort to superficially incorporate customary or other African blends into the legal systems but it is basically foreign and colonially imposed.

At a recent symposium held at the University of Ghana, Legon, under the theme "SOCIAL ORDER AND THE COURTS" in which I participated, it was agreed that no matter how best laws were drafted and passed an ineffective court structure could undermine the aims and objective of these laws.

In this wise, the attitude of the personnel operating the judicial structures were quite important.

The inherited colonially imposed legal system in Ghana like in other African and third world countries failed to live up to the expectations of the people and rather operated against national aspiration and social order.

Rules were interpreted to suit sectional and other interest groups, thereby seriously eroding the confidence the society had in the legal system.

In Ghana, to fill a deep vacuum created by the loss of confidence by the populace in the legal system, a stop gap was required. The Public Tribunals system was introduced in order to stabilise the situation and prevent the rule of the might as against the rule of law.

A system was needed to make the society accept courts as the traditional forum for the adjudication and settlement of disputes.

The Tribunal system was also a very serious attempt to restructure a colonially imposed legal system and also to modify or replace the jury system.

Even though in this experiment the public tribunals system in Ghana has been attacked, undermined, misrepresented, praised and given all sorts of images, it still stands out as the most innovative legal institution in Africa or probably the Commonwealth.

At present the ineffectiveness and lapse of colonially imposed legal systems in Africa and the third world are the echoes of the leaders of INDIA, SIERRA LEONE, ZIMBABWE, and BURKINA FASO opting for special tribunals or other ways of restoring confidence in order to stabilise their various legal orders.

From time to time, there has been different criticisms of the Public Tribunals system in Ghana. It had included its composition, appointments and dismissals to it, right of appeal and right to counsel.

The topical issue at the moment is that the argument against the existence of the tribunals per se is abandoned but that it should be put under the control of the Chief Justice of Ghana instead of it being administered by the Board of Public Tribunals.

The tribunals, both in practice and by law, have always given opportunity for legal representation. Even though there has been an official boycott by the Ghana Bar Association, at present more than a hundred lawyers have appeared before the tribunals, a number which far exceeds the number of lawyers who met in Kumasi in 1982 and decided the boycott.

Meanwhile the Bar Association from time to time threatens them with sanctions, from dismissals to suspensions and fines, yet the number continues to increase.

At their last annual general meeting in Kumasi they resolved not to officially have anything to do with the tribunal unless it was put under the Chief Justice.

In the legal and political history of Ghana, there have been several tribunals, mostly military, with limited rights for accused, including no right of appeal and yet several leading members of the Bar Association participated, including some of the present leaders.

What is interesting is that they still officially appear before special Military tribunals, National and Regional Investigation Committees and other quasi-judicial structures where there are no formal procedures.

The irony is that some of these Senior lawyers take the case, charge exorbitant fees, prepare the defence including arguments and submissions, give a small fraction of the fees to another lawyer who has not boycotted the tribunals to go and argue the case.

It is acceptable in most common law systems that the guilt of an accused person must be established by proof beyond reasonable doubt.

It argued that on this standard of proof the tribunal may be operating on a lower standard than the traditional courts because they don't know whether the standard used in the tribunal law "SATISFACTION OF THE TRIBUNAL" is synonymous with the standard "BEYOND REASONABLE DOUBT".

I find these arguments petty and a matter of words. The English judge, in summing up to the jury does not tell the jury "they should establish the guilt of the accused by proof beyond reasonable doubt".

He advises that they should be satisfied to the extent that they are sure of the guilt of the accused.

It will be frivolous and vexatious if an appeal was lodged against such a direction by a judge on the grounds that he has lowered the standard of proof.

The tribunals law was drafted bearing in mind the participation of ordinary people in the administration of justice. The non-use of catchy legal phrases or jargons in the law does not by itself suggest in anyway a derogation from recognized international standards.

All tribunal panellists undergo some training before sitting on any case as a panel of assessors and annually there are review training programmes where all meet together for discussions on laws, procedures and sentencing.

I will submit that lay panellists sitting day-to-day on various cases acquire far richer experiences than jurors in adjudication.

Sometimes it is not the criticism that I worry about since any system could best be improved by criticisms and advice, but when facts are distorted or twisted to generate unfounded rumours, I get disturbed.

On page 26 of the Human Rights report on a report on a mission to Ghana by Professor Cees Flinterman talking about the new tribunals appeal structure, he wrote:-



"As one of the informants of the author put it, the introduction of the right to appeal makes very little difference to the human rights situation because the qualifications of the appeal panel remain the same; recently in one such appeal tribunal the Chairman was also the Chairman of the tribunal from which the appeals were coming from." Even though the author says it was from an informant he does not state for example that the information was not the true position or that he contacted or did not contact the appropriate authority to deny or confirm the information.

At that time, the Appeal Tribunal had just started functioning and had heard only four such appeals so a verification was easy. Meanwhile no such clarification is sought but the information is published; the damage is irreparable even though untrue.

On the future of the administration of justice in Ghana, we have made it clear that the tribunals were a stop-gap towards the restructuring of the legal system to reflect our genuine national goals and aspirations.

To this end, we have advocated a Commission of Enquiry to study and come out with proposals on the reforms required in our legal system and the terms of reference should include, legal education, the legal profession, the bench and appointments to it, the tribunal system including the question of lay participation in the administration of justice, legal aid and legal services.

It is interesting to note that recent British report on Fraud Trials by LORD ROSKILL had suggested, in considering several other options, FRAUD TRIAL TRIBUNALS where the judge will sit with two lay persons. I will say that the impact the tribunals made within a short time of their set up is through hard work, honesty and justice and not because they have full logistic support. It is incorrect that our system is mechanised, and that that enables proceedings to be fast.

We write out everything in the long hand, and on the question of logistics, there have been occasions where we fell on the traditional courts for stationery and other judicial forms.

Even in one or two Regional Tribunals they don't have their own typewriter and they benefit from the use of the traditional courts' typewriter and typist.

On the condition of prisons in Ghana, I will be the first to condemn some of the deplorable conditions which existed but it should not be forgotten that the rules and operations were formulated by the British colonial rulers.

The present government has actually done a lot to improve prison conditions in the short-term and also to restructure its workings and operations. They set up a Prison Service Council, and recently, a committee to decongest the prisons of which I was, incidentally, the Chairman.

We made very far-reaching proposals for reform which, I believe, if implemented, will go a long way to improve prison conditions and also give a new look to custodial punishment and reformation of offenders.

#### Death Penalty:-

Myself, like most of my colleagues, agree that ultimately the death penalty should be abolished. We also accept the safeguards guaranteeing protection of the Rights of those facing the death penalty ANNEX to United Nations Resolution 1984/50 adopted by the Economic and Social Council on 28th May 1984, and as much as possible nations which have not abolished the death penalty should do so.

The real issue in Ghana is whether we, at this stage of our national development, could afford to abolish the death penalty. The social consequence of such an abolition, I am afraid, is remotely related to those who live in Europe and condemn death penalty for murderers, armed robbers and for treason.

The revulsion of the ordinary people to these crimes is reflected by people throwing stones at thieves and robbers, instantly killing some of them in the open in our cities in broad day-light (a practice I strongly disapprove of). The extremes is where they are set on fire with

lorry tyres instantly, and I am sure you all know the effort including actual threats the police had to use to reverse this practice.

The mood of the country is a factor to be taken into account in this analysis.

There have been several arguments that the death penalty is not a deterrent and that even though murder carried the death penalty in Ghana yet it is one of the most commonly committed crimes. My answer is that deterrence is not the only criterion under which death sentences are imposed; we are all parties to a social contract by birth, by that contract we expect protection from the society, in turn we also have to observe some norms of behaviour to be guaranteed this protection.

Where we act in a manner that is so reprehensible we lose this protection under the social contract; our peers decide that our behaviour is such a revulsion that the ultimate penalty is activated. It is a social retribution against excessive, dangerous and very grave criminal acts.

The Ghana Bar Association, at its last annual general meeting, discussed this issue of the abolition of the death penalty in Ghana but couldn't come to a consensus. There were general disagreements; some were for total abolition whereas others wanted it abolished for some offences but retained for others.

In 1980 and 1981, under the LIMANN administration, I wrote newspaper articles in the Ashanti PIONEER published in Kumasi, against the extra-judicial killings of alleged pick-pockets. Several people were shot in Kumasi and later in Accra and Tema. I wanted to know the criteria by which the shootings were done; that is whether it was when the hand was entering the pocket or when it was coming out. No human rights group in both inside and outside Ghana raised any finger or protested about the situation.

In 1982 January, as soon as the P.N.D.C. hinted that Public Tribunals will be set up alongside the traditional courts 'JUSTICE' the British section of the International Commission of Jurist came out in opposition when in fact the law setting up the tribunals and its operations had not even been passed or even drafted. In a hasty condemnation, their objectivity was lost,

but this is just a reflection of several groups criticising as a result of an information gap or misinformation.

I submit that human rights evaluation must be seen in an African context; our history, environment peculiarities and aspirations are all factors to be taken into consideration in any such evaluation. Further, the bias in favour of civil and political rights by several human rights groups should be equally extended to social, economic and cultural rights.

And European values even if thought to be the best may not be the right yardstick and a universal criterion for African peoples who see them as alien and foreign in outlook.

We should all give support, both morally and materially, to enable the O.A.U. Charter on Human Rights to take off and protect the rights of people in Africa, and I hope it is the shape of more things to come on Human Rights in Africa.