THE HISTORICAL DEVELOPMENT OF THE LEGAL SYSTEM OF GHANA: AN EXAMPLE OF THE COEXISTENCE OF TWO SYSTEMS OF LAW

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1 Introduction

The fact of globalisation has brought with it the issue of rationalisation of legal systems. The opportunities for inter-connectedness of peoples of different legal systems have increased, necessitating a conscious rationalisation of the legislation of various countries. The process of rationalisation could follow a number of approaches, such as transplantation, legal harmonisation and legal unification. Legal transplantation has been described as consisting of the "introduction, in national legal systems, of statutes and principles belonging to other systems ...". In the case of legal harmonisation, "nations agree on a set of objectives and targets and let each nation amend their internal law to fulfil the chosen objectives", while by legal unification "nations agree to replace national rules and adopt a unified set of rules chosen at the interstate level". These various approaches will achieve varying degrees of rationalisation, but in the final analysis they will all represent an expressed intention of people of different legal systems to benefit from the advantages of co-existence and integration.

Irrespective of the form that the harmonisation process might take the law of a people is nevertheless essentially an expression of their very existence, their culture, values and aspirations and a reflection of their history. In the light of its past colonial connections, the Ghana legal system belongs to the common law tradition. Nevertheless, that classification is rather simplistic in view of Simpson’s statement:

Legal systems do not emerge out of nothing; they possess a history, and reflect ideas, and make use of institutions which have developed over time, and been moulded by cultural and political forces.

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2  Idem 2.
3  Idem 3.
4  Ibid.
6  Idem 18.
Prior to the intrusion of the Europeans, particularly the British, into the affairs of the territories that became the Gold Coast, the political and judicial systems of the native inhabitants were determined by the traditions and culture, as well as by the socio-economic demands, of the specific people. The various traditional societies were governed according to customary law.

Ghana, as a country, was pieced together by the British Colonial authorities, essentially in satisfaction of British economic and political aspirations. The development of the legal system was therefore also shaped by these interests. In the words of Kimble:

> [F]rom the earliest days of European contact, it was in the economic, rather than the social, cultural, or political sphere, that the Gold Coast felt what is so often called the impact of ‘the West’ … Trade remained the main object of Anglo-African relationships, so that when the Gold Coast Settlements were taken over by the Crown for the brief period 1821-8, and more permanently in 1843, it was a case of the flag following trade and not vice versa.7

It is possible to argue that it was the economic exigencies of the time that influenced the direction along which the legal system developed. The activities of the British in the sphere of law on the Gold Coast could be seen as an exercise in the alignment of the introduced law to the indigenous system of law so as to achieve a harmonious co-existence in the territory for trade to flourish.

2 Creation of the Gold Coast (Ghana)

Ghana started life under colonial rule as the Gold Coast and consisted of “the settled colony of the coastal areas, the conquered colony of Ashanti in the middle belt, the Protectorate of the Northern Territories, and the Trust Territory of British Togoland”.8 It has been emphasised that the southern coastal sections of the Gold Coast were not acquired by conquest but by “the sufferance and the tacit assent of the natives”.9 Trade in slaves was the dominant economic activity along the West African Coast until its abolition in 1807. It was later replaced by trade in natural resources. This transformation in the character of the trading activity necessitated a change in the relations of the

8 Elias The British Commonwealth: Ghana and Sierra Leone (1963) 3.
9 Redwar Comments on Some Ordinances of the Gold Coast Colony (1909) 60.
traders to the sources and producers of these natural resources thus leading to their political intervention in local affairs. ¹⁰

After the elimination of Ashanti control of the middle belt through conquest the British were in a position to push on into the territory beyond Ashanti. In order to forestall French and German influences in these Northern Territories of the country, the British entered into treaties of friendship and protection with the local chiefs.¹¹ A protectorate was therefore declared over all the territories annexed in the Northern parts of the country. As was the trend, this implied that the British Colonial authority had control of the external affairs of the territory while the internal control was to be left in the hands of the local elites, the chiefs.

Upon the defeat of the Germans in the First World War part of the former German colony of Togoland was placed under British mandate by the League of Nations in 1922.¹² This portion lay to the eastern part of the Gold Coast, stretching from its mid-section to the northern part. Again after the Second World War the territory became a British Trust Territory by authority of the United Nations in 1946.¹³ Irrespective of the varying methods of acquisition all of these other territories were governed as an integral part of the Gold Coast Colony and the received English laws were applied in all these territories without distinction as to the mode of acquisition. That attitude represented a conscious move towards the integration of the protectorates into the colonial areas.

Before 1821 the government of the British trading forts and settlements on the Gold Coast was vested in the Company of Merchants Trading to Africa.¹⁴ Upon the abolition of the slave trade in 1807 the Company of Merchants ran into financial difficulties in the maintenance of the forts and this was coupled with the lack of incentive to maintain them.¹⁵ The Company was accordingly dissolved in 1821 and the forts and other possessions thereupon vested in the Crown.¹⁶

Between 1821 and 1874 therefore the British possessions on the Gold Coast were conjoined with Sierra Leone under the control of the Governor of Sierra

¹⁰ Ibid.
¹¹ Elias (n 8) 4.
¹² Ibid.
¹³ Ibid.
¹⁵ Idem 5.
¹⁶ Ibid.
Leone.\textsuperscript{17} This period was interspersed with the period from 1850 to 1866 when the Gold Coast was handled as a separate entity, and also from 1828 to 1843 when it was administered by a Committee of Merchants in London.\textsuperscript{18} The Committee of Merchants appointed a President to take care of administration at Cape Coast Castle.\textsuperscript{19} The scope of authority of the administration was “theoretically restricted to the forts themselves (but) the powers vested in the Committee of Merchants came to be used on a \textit{de facto} basis in the neighbouring areas”.\textsuperscript{20} It has been explained that this development was attributed largely to the administrative and judicial acumen of Captain George Maclean who was appointed President in 1830.\textsuperscript{21} According to Redwar, through the exertions of Maclean, “a sort of irregular civil and magisterial jurisdiction came to be exercised over the coast tribes by their tacit consent and acquiescence and over a much larger area than the local limits originally prescribed by the Committee in London”.\textsuperscript{22} Thus a \textit{de facto} jurisdiction was extended by Maclean and the magistrates to cover the natives in the immediate vicinity of the forts. The introduction of a European type of commerce and the need for the natives to trade with Europeans undoubtedly led to a situation where the natives had no choice but to deal with the Europeans on their own terms. That, of course, included the resort to a European court system for the resolution of disputes.

In 1842 a Parliamentary Select Committee was appointed to examine the administration of the Gold Coast. The Select Committee recommended that the British Government should resume governance of the forts and also that “the regular judicial jurisdiction \textit{de facto} exercised by Maclean and the magistrates at the forts should be better defined and understood”.\textsuperscript{23}

According to Bennion, this latter recommendation was to be understood as being achieved “by means of agreements with the local chiefs and by the appointment of a judicial officer who, in administering justice to the African population, should follow the principles, while not being restricted to the technicalities, of English law and should be allowed a large discretion”.\textsuperscript{24} Thus the creeping extension of jurisdiction over the local population was recommended for official support.

\textsuperscript{17 Idem} 4.  
\textsuperscript{18 Ibid.  }  
\textsuperscript{19 Idem} 6.  
\textsuperscript{20 Ibid.  }  
\textsuperscript{21 Ibid.  }  
\textsuperscript{22 Redwar (n 9) 2.  }  
\textsuperscript{23 Bennion (n 14) 6.  }  
\textsuperscript{24 Ibid.  }
In 1843 the Crown took over the governance of the British possessions. Meanwhile the territory remained attached to Sierra Leone and a Lieutenant-Governor was appointed with Maclean designated as Judicial Assessor and Stipendiary Magistrate and he continued to exercise jurisdiction within and outside the forts. It is worth noting the words of Brandford Griffith that “it is to be carefully noted that this external jurisdiction was given distinct from the jurisdiction inside the forts, where Captain Maclean and the other magistrates had the ordinary powers of magistrates”. The exercise of jurisdiction beyond the forts was therefore initially an imposition.

3 Regularisation of British legislative authority and recognition of indigenous law

The British were very much aware of the lack of legal authority for the exercise of their political authority and therefore judicial authority on the Gold Coast. It was to correct that deficiency that two pieces of legislation were passed in 1843, namely the British Settlements Act (6 & 7 Vict c 13) and the Foreign Jurisdiction Act (6 & 7 Vict c 94).

By virtue of these two pieces of legislation the British Crown was able to unilaterally extend its jurisdiction to areas over which it did not otherwise have authority. As was reported by Bennion, an Order in Council of 3 September 1844 made under these two Acts required judicial authorities on the Gold Coast – when exercising jurisdiction among the indigenous inhabitants – to observe such of the local customs as were compatible with the principles of the law of England, and in default of such customs to proceed in all things as nearly as may be according to the law of England.

This policy amounted to recognition of the relevance of the indigenous law of the natives. At the same time it permitted a predominance of English law over indigenous law.

4 The Bond of 1844

In 1844, Commander Hill, then Lieutenant-Governor, entered into an agreement with the local chiefs. This became popularly known as the Bond of
1844 which was signed on 6 March 1844. Kimble stated that the Bond of 1844 was

the first of a succession of treaties under which certain Gold Coast Chiefs acknowledged the power and jurisdiction of the Crown, and gave their formal consent to the trial of criminal cases before the Queen’s judicial officers and the Chiefs of the district moulding the customs of the country to the general principles of British law.

Nevertheless that same document was described as of “small intrinsic value” because, from the perspective of the British, “whether by virtue of our protection or by consent or by usage or by usurpation, we had undoubtedly acquired the right of jurisdiction, civil and criminal.

If for nothing, at least the Bond, and many others like it, came to represent the formal attempt by the British at formalising their jurisdiction in the areas concerned. Significantly the Bond came to reiterate the fact of the recognition accorded to local laws by the British. It could be said to have set the tone for the comprehensive extension of English law and practice over the native populations of the territories in question.

5 The applicable laws and their development

The legal system of Ghana therefore flowed along two streams: it namely introduced English law on the one hand and indigenous customary law on the other. These two streams have been described as “fully integrated through a system of appeals linking the one to the other”.

Initially the Court systems for these two streams used to be distinct, but they have since coalesced into one. The received English rules of common law apply as part of the Ghanaian law to fill gaps left by the statutes. In his examination of the legal system of Nigeria and Ghana from a historical perspective, Elias argued that “both legal systems owe their main characteristics to the general framework of the organisation of the courts, the
judicial and administrative personnel as well as the procedures and practices introduced by the legislation of 1876.  

The said legislation was the Supreme Court Ordinance 4 of 1876, enacted by the joint Government of the Gold Coast Colony and the Lagos Settlement.

Earlier on, an Order in Council of 26 February 1867 was issued under the British Settlements Act of 1843 to constitute “the judges for the time being of Her Majesty’s Supreme Court of the Settlement of Sierra Leone”, into what was to be known as “The West African Court of Appeal”. Its jurisdiction was to receive, hear and determine appeals from the Courts of the Settlements of the Gambia, the Gold Coast and Lagos. It was reported that this harmonisation was short-lived because in 1874 Lagos and the Gold Coast were separated to form another unit under a separate political and judicial administration.

This separation notwithstanding, Elias argued that the initial harmonisation of the Court System “served as a precedent for the reintroduction of the same idea in 1928 when the now defunct West African Court of Appeal was initiated.” Appeals from the West African Court of Appeal lay to the Judicial Committee of the Privy Council.

The 1874 separation saw the Gold Coast and Lagos settlements merged into what was known as the Gold Coast Colony. It was the legislative body of the Gold Coast Colony that passed the Supreme Court Ordinance 4 of 1876.

These aggregations and segregations were in themselves motivated essentially by the expediencies of governance as would satisfy the economic and political demands of the British.

5.1 The Supreme Court Ordinance of 1876

Afreh attributed the coming into existence of the modern legal system in 1876 to the passing of the Supreme Court Ordinance of 1876. That was notwithstanding the fact that the British had been exercising regular jurisdiction since 1844.

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34 The position is the same for Nigeria: see Adesanya “Separation, non-objection and fault under the Matrimonial Causes Decree, 1970 of Nigeria – A comparative study with English and Australian laws” 1972 (9) University of Ghana Law Journal 16.
36 Ibid 33.
37 Ibid.
38 Ibid.
39 Ibid.
41 Ibid.
The said Supreme Court established in 1876 had the jurisdiction of the English High Court (except in Admiralty matters). Section 14 of the Ordinance law 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.

The common law of England and the doctrines of equity were therefore wholly imported into the Gold Coast. With respect to statutes, only those that qualified as “statutes of general application” were applicable. Even then that category was limited to those that 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”. The phrase “statutes of general application” as used in that statute was meant to have a restrictive meaning: in the words of Redwar, it must mean, “applicable to the circumstances of the Colony itself”. This assertion was justified by section 17 of the Ordinance which provided that English law shall only be in force in the Colony “so far as local circumstances permit and subject to any existing or future Ordinances of the colonial legislature”. This was an obvious recognition that even where laws are imposed, they must, where possible, endeavour to be in harmony with local circumstances.

With respect to native law, section 10 “requires the Court to respect Native Law as much as possible, and enacts, in effect, that, as between natives, or, as between Europeans and natives, English Law can only become applicable by contract, either express, or implied from the course of dealing or the nature of the transactions between the parties”. Native law and custom were therefore to be recognised and applied.

It is significant to note that section 19 of the 1876 Ordinance required that before the Court could “be induced to hold that English law shall apply under section 19, it must be satisfied that the parties agreed that their obligations should be regulated exclusively by English law, and not partly by English law and partly by Native law”. This formulation raised the question of choice of law, and Redwar, writing in 1909, proposed a number of general rules as guides. These include, inter alia, that where native law is not repugnant to natural justice, equity and good conscience, and not incompatible with any

42  Redwar (n 9) 8.
43  Ibid.
44  Idem 11.
enactment of the Colonial Legislature, it shall be the applicable law as between Natives. As between Europeans and Natives, English law would become applicable only by contract. Even then, according to him, if the application of English law would lead to substantial injustice to either party then native law would have to be given priority.  

Obviously the recognition accorded to native law was significant. An example could be discerned in the 1925 case of Thompson v Thompson in which the deceased husband was married under the Marriage Ordinance but the wife had died earlier without issue. It was held that his surviving son born out of wedlock was entitled to share in the distribution of the estate as one of the next-of-kin of the deceased in accordance with native customary law.

In the Thompson case the court received with approval the following position of the law as was stated in the Nigerian case of In re Sapara:

> [U]nder English law, marriage is necessary to legitimise the offspring of two persons, such offspring, if illegitimate, having no right of inheritance; but under native law, a child’s right of succession to his father’s property can be legalised by mere acknowledgement of paternity, without the necessity of any form of marriage between his parents.

The position of the child born out of wedlock under customary law exemplifies the dexterity with which native law and custom were woven into the English system of law and applied side by side in the Gold Coast. Customary law, as a general body of law, stood its grounds and was applied side by side with the received English law. The customary law exhibited resilience and co-existed with the English value-laden legal principles, and the courts had no choice but to always endeavour to maintain a delicate balance that would preserve the values of both social systems.

### 5.2 The Gold Coast Native Jurisdiction Order of 1883

A separate court system was put in place for native tribunals. The Gold Coast Native Jurisdiction Ordinance of 1883 provided for the setting up of Native Courts. They were manned by the Chiefs and their Elders (Councillors) and

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45 Idem 59, 64, 65.
46 Div Court 1921-1925 at 155. (Selected Judgments of the Divisional Courts of Gold Coast Colony 29 June 1921 to 31 December 1925.)
47 Reiner’s Reports (Reports, Notes of Cases & Proceedings and Judgments In Appeals, collected by Renner (1915)) at 605.
48 Quoted in Thompson v Thompson, Div Court 1921-1925 at 164. (Selected Judgments of the Divisional Courts of Gold Coast Colony 29 June 1921 to 31 December 1925.)
49 See Afreh (n 40) 25. See also Bennion (n 14) at 19.
their jurisdiction covered both criminal and civil matters subject to limits determined by the value of the property involved.\textsuperscript{50} These Native Courts, according to Afreh,\textsuperscript{51} were regarded as outside the main judicial system and primarily administered customary law. Appeals arising from those courts, however, lay to the Supreme Court\textsuperscript{52} while further appeals lay from the Supreme Court to the Privy Council.\textsuperscript{53}

Under the \textit{Native Courts (Colony) Ordinance} 1945, CAP (Chapter in Laws of the Gold Coast (1951)) 98, jurisdiction of the Native Courts was described as extending to all land cases and criminal cases in the area in which it had jurisdiction.\textsuperscript{54} All other civil cases other than land matters had to be determined by the Native Courts having jurisdiction over the area where the cause of action arose.\textsuperscript{55}

There were therefore two systems of courts in place: the first system consisted of the Privy Council, West African Court of Appeal, the Supreme Court of the Gold Coast and Magistrates’ Courts. The second system was the Native Courts.\textsuperscript{56} The two systems remained until independence in 1957.

Upon the attainment of independence various changes were effected. A Court of Appeal was established as the highest Court in Ghana and appeals to the Privy Council and the West African Court of Appeal were discontinued.\textsuperscript{57} The Native Courts were abolished by the \textit{Local Courts Act} of 1958. They were replaced by local courts. The 1960 Constitution streamlined the judicial system. The judicial power of the Chiefs as had existed under the Native Court system was taken away.

6 The post independence era: The sources of law in Ghana

Ghana attained independence in 1957 and republican status in 1961. In 1960 the 1957 Independence Constitution was replaced with the 1960 Constitution to take account of the new direction that the newly independent nation had anticipated for itself.

\textsuperscript{50} Idem 20.
\textsuperscript{51} Afreh (n 40) 25.
\textsuperscript{52} Bennion (n 14) 20. It may be of interest to note as stated by Bennion (n 14) at 20 that “[t]he Ordinance also empowered divisional Chiefs to make by-laws relating to roads, water supply, fisheries, forests, mines and other matters”.
\textsuperscript{53} Idem 19.
\textsuperscript{54} S 14(1)(2).
\textsuperscript{55} S 14(3).
\textsuperscript{56} See Afreh (n 40) 25.
\textsuperscript{57} Ibid.
Starting from the 1960 Republican Constitution through the 1969, 1979 and the present 1992 Constitution, the primary sources of law in Ghana have been listed as

“(a)  this Constitution;

(b)  enactments made by or under the authority of the Parliament

... established by this Constitution;

(c)  any Orders, Rules and Regulations made by any person or authority under a power conferred by this Constitution;

(d)  the existing law; and

(e)  the common law.”\(^{58}\)

This represents the harmonisation of all sources of law into one comprehensive unit.

6 1 The 1992 Constitution

According to article 1(2) of the 1992 Constitution the Constitution is the supreme law of Ghana and any law that is inconsistent with it shall to the extent of the inconsistency be void. All enactments of Parliament and orders, rules and regulations that are not in conformity with the provisions of the Constitution cannot stand.

6 2 Enactments of Parliament

Ghana has always been a unitary state with legislative authority conferred on Parliament. Under the 1992 Constitution therefore Parliament has legislative supremacy.

6 3 Orders and regulations

The Constitution authorises some institutions to make regulations to govern their own affairs: for example the Commission on Human Rights and Administrative Justice has the constitutional authority to make regulations relating to its operations. These regulations must however be laid before Parliament.

6 4 Existing law

As is stated in article 11(1)(d) of the 1992 Constitution, there is also the category of laws labelled as “existing law”. Existing law has been defined in article 11(4) to mean the written and unwritten laws of Ghana as they existed immediately before the coming into force of the Constitution.

6 5 Common law

The Interpretation Act of 1960, CA (Act of the Constituent Assembly) 4 defined the common law as comprised in the law of Ghana to consist in addition to the rules of law generally known as the common law, of the rules generally known as the doctrines of equity and rules of customary law included in the common law under any enactment providing for the assimilation of such rules of customary law as are suitable for general application.

Generally therefore the “common law” in the Ghanaian conception encompasses principles of the common law as was imported through colonialism in addition to the customary law that operates among the various indigenous communities of Ghana. This expansion of the concept of the common law represents the harmonisation of the original common law with the customary law of the local people.

Section 18 of the Interpretation Act defines customary law as follows:

Customary law, as comprised in the laws of Ghana, consist of rules of law which by custom are applicable to particular communities in Ghana, not being rules included in the common law under any enactment providing for the assimilation of such rules of customary law as are suitable for general application.

7 Choice of laws

In any civil proceeding the statutory laws, the common law and therefore customary law could become the applicable law. Situations do arise when the question of whether it is the common law or the customary law that should apply. In the case of the customary law the further question would be which regime of customary law: for example, is it Ga customary law or Ewe customary law that should apply to the situation? This raises very intricate choice of law considerations.
It is to provide generally-accepted guiding principles in the choice of law in this respect that the *Courts Act* 459 of 1993, following from the *Courts Act* of 1960, set out some guiding principles to assist the judges. The whole of Part III of the *Courts Act* of 1993 is devoted to the determination of the principles that should govern the choice of law as between common law and customary law principles. Section 54 of the *Courts Act* accordingly sets out seven Rules that are to serve as guidelines. The principal determinant is the intention of the parties; for example where the matter relates to the devolution of property but no such intention is expressed, it is the personal law of the person whose property is in issue that would apply.

In Section 54 of the *Courts Act* of 1993, therefore, the courts have been provided with the guide on the determination of the most appropriate body of personal law that should be applied generally. Perhaps this approach to solving conflicts in the choice of law could serve as a guide for others.

### 8 Determining the content of customary law

It was provided in the *Supreme Court Ordinance* of 1876 that

> nothing in this Ordinance shall deprive the Supreme Court of the right to observe and enforce the observance, or shall deprive any person of the benefit of any Native Law and Custom, such law or custom not being *repugnant to natural justice, equity and good conscience*, nor incompatible either directly or by implication with any law for the time being in force.\(^{59}\)

This provision was repeated in section 87 of the *Courts Ordinance* of 1951. Customary law was therefore accorded an important place in the legal system even from the initial stages of colonialism.

One deficiency of customary law, therefore, is its fluid nature which makes it difficult to determine what the content of the law is. At the initial stages the strategy adopted by the courts in determining the content of the customary law was known as the rule in *Angu v Attah*\(^{60}\) wherein the Privy Council held that

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\(^{59}\) The subjection of the applicable customary law to the repugnancy test of “natural justice, equity and good conscience” was a contestable issue. This was particularly so during the colonial period when the concern was “whose conscience”? See Woodman “How state courts create customary law in Ghana and Nigeria” in *Woodman on Customary Law*, compiled by Dankwa (1995) at 82 (unpublished but on file with author).

\(^{60}\) 1916 PC 1927-1928 at 43.
[a rule of customary law] has to be proved in the first instance by calling witnesses acquainted with the native customs until the particular customs have, by frequent proof in the courts, become so notorious that the courts will take judicial notice of them.

According to this principle, customary law was essentially a matter of fact to be ascertained by proof until it has become so notorious as to no longer require proof.

This was the position until it was reversed in 1960 upon the enactment of the \textit{Courts Act} of 1960 (CA 9), and continued in the \textit{Courts Act} 372 of 1971, section 50. It was further replicated in the current \textit{Courts Act} 459 of 1993, section 55(1). According to this legislative intervention “[a]ny question as to existence or content of a rule of customary law is a question of law for the court and not a question of fact”. The court is thus no longer compelled to always call evidence in proof of a particular principle of customary law. The personal knowledge of the judge is assumed.

This legal position, notwithstanding, customary law will continue to respond to internal forces of change and undergo transformations from generation to generation. It is for this reason that the window is kept open for the verification of any particular rule of customary law if doubt exists on its existence. Section 55(2) of the \textit{Courts Act} permits that

\begin{quote}
\text{[i]f there is doubt as to the existence or content of a rule of customary law relevant in any proceedings before a court, the court may adjourn the proceedings to enable an inquiry to be made under subsection (3) of this section after the court has considered submissions made by or on behalf of the parties and after the court has considered reported cases, textbooks and other sources that may be appropriate to the proceedings.}
\end{quote}

By the conscious process of legislation therefore, the people of Ghana transformed the character of customary law from one of a question of fact to one essentially of law.

The expert knowledge of the judges is consequently presumed. This is perhaps so because the present-day judges are natives of Ghana. This was unlike the colonial days when the judges were mostly Europeans who needed to be guided in all respects about what constituted the customary law.

Nevertheless, by the inherent nature of customary law one cannot help but agree with Bentsi-Enchil that the transformation of customary law from one as
a question of fact to one of law does not completely solve the problem of the ascertainment of what the customary law on a particular issue is precisely. The main effect of this provision, according to Bentsi-Enchill was “to remove from the parties to litigation the burden of proving the law, and to focus the attention of the Court on its primary responsibilities in this area, thus hopefully minimizing the tendency for witnesses called by parties litigant to slant their evidence of custom to suit the case of the party calling them”.

This explanation further continues the seeming desire of the legislators to shove the customary law along lines leading to the concretisation of its principles. This determination at the formalisation or concretisation of the principles of customary law has been elaborately reiterated in the Chieftaincy Act 370 of 1971. The provisions of the Act under Part VII clearly evince this intention.

Section 40 of the Chieftaincy Act requires the National House of Chiefs to undertake a study, interpretation and codification of customary law “with a view to evolving in appropriate cases a unified system of rules of customary law”. This provides an indication of a preference for the eventual evolution of a unified system of rules of customary law along the lines of the common law of England. Of far-reaching effect are sections 41, 42 and 43 according to which a Traditional Council, upon forming the opinion that the customary law within its area is uncertain or that it is desirable that it be modified or assimilated by the common law, make a representation to the House of Chiefs of the region. The Regional House of Chiefs shall in turn make a representation to the National House of Chiefs which may request the President of the Republic to give effect to the action or change required. The President may, after consultation with the Chief Justice, make a legislative instrument giving effect to the recommendations.

Similarly the law provides that the Regional House of Chiefs and the National House of Chiefs could, following the requisite process, recommend the alteration of customary law and also its assimilation by the common law.

The implication of assimilation is that such customary law would become labelled as “a common law rule of customary origin” with the consequent effect that “it shall apply to every issue within its scope.” These indeed are

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62 Ibid.
63 Courts Act 370 of 1971 s 46(1).
64 See s 46(2).
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far-reaching provisions aimed at the harmonisation of customary law through unification and assimilation. In practice, however, no specific application of these provisions is known to have taken place. However, a project is underway to ascertain and codify customary law relating to family and land law in Ghana.65

9 Statutory and judicial modification of customary law

Irrespective of the general recognition of customary law as a source of law within the Ghana legal system, its characteristic feature of following the path of a slow internal growth process has often brought it into conflict with the fast evolving nature of modern life. It is therefore in the regime of customary law that one comes across far-reaching incursions by the courts and the legislature into that domain to reform some of its aspects that are considered unacceptable under modern circumstances.

Ghana is a developing state with remarkable social and economic transformations which render some of the customary rules outmoded. If the customary law is to retain its place as the greatest adjunct to statutory law and the common law, it cannot remain stagnant whilst other aspects of the law are in constant motion. Clearly therefore customary law often leads to consequences that are outmoded and unacceptable in terms of modern socio-economic factors.

9.1 Legislative intervention

The 1992 Constitution, for instance, subjects customary law and practices to the rights of individuals66 as are guaranteed under the Constitution. Article 26(1) of the Constitution guarantees to every person the practice of any culture, subject however, to clause 2 which mandates that “[a]ll customary practices which dehumanise or are injurious to the physical and mental well being of a person are prohibited”.

As a remedial process, the National House of Chiefs is required by article 272(c) of the Constitution67 to “undertake an evaluation of traditional customs

65 This is a joint project by the National House of Chiefs and the Law Reform Commission with assistance from the German Development Organization (GTZ).
66 These include the right to human dignity, the right to religious liberty and the right to education, and the prohibition against slavery, forced labour and torture – see generally Chapter 5 of the 1992 Constitution.
67 See s 9 above for similar mention of this point.
and usage with a view to eliminating those customs and usages that are outmoded and socially harmful.\(^6^8\)

Article 272(c ) of the Constitution implies therefore that even though a particular customary law or practice might have evolved over a period it should be possible for the National House of Chiefs to eliminate those that are outmoded and socially harmful.

It is possible to conjecture that the elimination process could take the form of social mobilisation of the people by the traditional authority for them to drop a particular harmful or outmoded custom in favour of a more progressive one. This could be interpreted as a change that is still coming from within the common consciousness of the people even though it is somewhat orchestrated.

The second approach is where the legislature responds by prohibiting an outmoded or harmful customary practice. Examples are the criminalisation of the customary practice known as *trokosi*, female genital mutilation (FGM) and childhood and forced marriages. The *trokosi* practice “was a system under which young virgin girls were sent into fetish shrines to atone for the misdeeds of relatives”.\(^6^9\) Obviously this was a customary practice that has become outmoded and constitutes an infraction upon the rights of individuals. Parliament therefore legislated to prohibit the practice by virtue of the *Criminal Code (Amendment) Act* of 1998, section 314(A).\(^7^0\) No case of prosecution has yet been reported.

### 9.2 Judicial intervention

The principle of conformity of customary law to natural law equity and good conscience that was introduced by early legislation became the basis for the rejection of customary law in certain cases, even where they were proved as was the case of *Abangana v Akologo*.\(^7^1\) In this case the plaintiff, a Frafra man, was married to his wife under Frafra customary law. Not too long after conclusion of the marriage the wife left and cohabited with the defendant who was also a Frafra. The defendant and the woman cohabited for about five years and two children were born. Subsequently the plaintiff sued in the

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68 It is worth noting that the National House of Chiefs in collaboration with the Law Reform Commission and with support from GTZ has embarked on an exercise for the ascertainment of customary family and land law in Ghana.


70 Further significant legislative intervention is discussed below.

71 [1977] 1 GLR (Ghana Law Reports) 382.
magistrates’ court asking for the return of his wife and the two children in addition to damages for seduction. The magistrate found according to Frafra customary law that the plaintiff was entitled to the children because the defendant could not be regarded as the father of the children born out of his illicit cohabitation with the plaintiff’s wife. The High Court per Wiredu J held that

the order that the defendant should hand over his two children to the plaintiff, a stranger to the union that brought them into being, solely on the basis of a customary rule of practice is not only repugnant to principles of equity, good conscience and natural justice but also contrary to the accepted principle which our courts have accepted as paramount in considering granting custody of infants, namely the welfare of the children.72

In this case therefore, the principle of repugnancy as well as the general principle of law that the interest of the child is paramount, was utilised to defeat the customary law as was proved.

The inheritance cases also provide another respect in which the courts have had to exert their authority to reform customary law to fall in line with the demands of fast changing social forces. Inheritance under the customary law system was organised along the lines of patrilineal or matrilineal inheritance depending upon the personal law of the deceased individual. Where such individual was of the Islamic religious stock, his or her property devolved according to Islamic injunctions. According to customary law practice, upon the death of a man, his wife and children were often left out without adequate provision from the estate of the deceased. This was more so under the matrilineal system of inheritance according to which it was the children of the deceased’s sister that were entitled to inherit according to customary law and practice. Even among the patrilineal system women were often discriminated against in the inheritance of their deceased father’s property. In the case of Kofi Antubam,73 the Court was prepared to accept evidence to the effect that customary law in the matrilineal system had changed and accordingly the children and wife of a man who died intestate were now entitled to residence in the deceased’s house subject to good behaviour. This was an improvement on the previous position according to which they had practically no claim to the property.

72 Idem 388.
Yet, the position in the Antubam case was not the best. In the case of Amisah v Abadoo, Wiedu J (as he then was) rejected the restrictive nature of that position and called for a change in the customary law on the issue. According to him

[t]he injustices and hardships caused to children and widows by tacking on the phrase ‘subject to good behaviour’ as a limitation to their rights to reside in houses which their deceased fathers and husbands respectively die possessed of, irrespective of how they came by such property, have been ignored indiscriminately in the past to the detriment of the children and widows. The conduct of the family flowing from this neglect must be frowned upon as behaviour not countenanced by customary law and calls for an urgent need for a more realistic and practical reappraisal of this aspect of the customary law in view of the fast social changes in the country caused partly by the high rate of inter tribal marriages and partly by the development of a money economy which has provided other modes of acquiring wealth.

Evidence abounds that children could be evicted from the property where for instance the customary successor required it for personal use, as in the case of Eshun v Johnfia.

It was to supplement the judicial efforts at reforming the inheritance system and therefore to remove the unacceptable effects of customary succession that the Intestate Succession Law 1985, PNDC (Provisional National Defence Council) Law 111, was formulated. With the promulgation of Law 111 “the devolution of the estate of any person who dies intestate … shall be determined in accordance with the provisions of this Law”. The rationale behind this law was to remove the unacceptable and harsh consequences of the customary systems of inheritance, particularly as they have operated to the detriment of the wives and children of deceased men. It is worth noting that where, however, the person dies without leaving behind a wife, children or parent the devolution of his estate is in accordance with customary law.

75 Idem 131.
77 S 1.
78 See, eg, Dankwa Comparative Studies of Customary and Modern Legislation in the Area of Family Inheritance, Marriage and Family, Inheritance, Marriage and Fertility Rights, NPC/UNFPA National Research Project, December 2001. PNDC Law 111 was formulated and promulgated by the government in response to the obvious deficiencies inherent in the customary systems of inheritance.
79 See s 11(1) of PNDC Law 111.
Even though it has been the subject of some criticism, PNDC (Provisional National Defence Council) Law 111 represents a remarkable attempt at effecting a change in the customary law and practice. By this singular legislation the effort is made to harmonise, to a large extent, the customary law of succession to personal property among the various ethnic groups in the country.

These are practical attempts at harmonising the customary law and practices with the contemporary socio-cultural changes and human-rights demands. This also shows the trend of increasing legislative intervention to reform customary laws and practices that are perceived as outmoded and or inhumane.

10 Conclusion

This issue of harmonisation is not peculiar to the modern globalised system; it had been prevalent even in earlier periods and this essay has endeavoured to examine the approach that was used during the colonial and modern periods in Ghana to rationalise the operations of the indigenous customary laws of the people and the introduced common law and statutes of the modern state.

In the case of Ghana, the introduction of colonial rule did not operate to obliterate the indigenous system of laws of the people; the realisation had come at a very early stage of the colonisation process that the co-existence of the introduced system of law and the customary law system were both needed for the harmony of the colonial society. Even now, in modern times, customary law faces challenges in the fast changing inter-connected world where values of different societies often have to be harmonised to achieve relatively generally accepted standards. In Ghana, legislation and the ingenious intervention of the courts have become the instruments of change forcing harmony between customary law and practice on the one hand and the imperatives of social change on the other.

The conscious efforts made to harmonise the co-existence of received English law and the existing customary law of the people of Ghana could serve as a pointer to how the harmonisation effort at the African level could be directed. Just as has been the case in Ghana, it is possible to integrate the various streams of legal systems in Africa into a fully-integrated system that would serve Africa as one but with room for choice of law where the peculiarities of the situation necessitate it.