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Introductory Note

When young Thrasymachus challenges Plato and offers his definition of justice as that which is in the interest of the stronger person, perhaps he speaks as a pragmatist who has no patience for such utopian views as those held by Plato himself and Polemarchus, his friend, who thinks justice means giving each person his due.[1] That Thrasymachus' stance is supported by reality is illustrated by the fact that conquerors from ancient times are wont to impose their own laws on vanquished people and it is a well recognised principle of international law that "duress" does not vitiate a treaty entered into between conqueror and conquered.[2]

I. ACQUISITION OF GHANA BY BRITAIN AND THE INTRODUCTION OF ENGLISH LAW.

Dr. T. O. Elias has said: "It is an established principle of British constitutional law that the question whether, and if so to what extent, English law should be introduced into a foreign territory under British rule depends on the manner of its acquisition."[3] The standard treaties on the mode of acquisition of new territories have often enumerated the following methods:

(i) Settlements,
(ii) Ceded territories,
(iii) Conquered territories,
(iv) Protectorates and Protected States, and
(v) Trust territories.[4]

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1. PLATO, THE REPUBLIC 56 (1966).
2. 1 H. LAUTERPACHT, OPPENHEIM'S INTERNATIONAL LAW 891 (8th ed. 1955).
3. THE NIGERIAN LEGAL SYSTEM 5 (1963).
4. 5 HALSBURY'S LAWS OF ENGLAND 544 et seq. (3rd ed. 1953).

In the case of settlements, a good example being Australia, the fiction that Englishmen carry their law with them wherever they go makes the introduction of English law into a settled colony a matter of course; and the law which the English thus take with them includes *the common law of England, equity and statutes of general application in force at the time when the newly-acquired colony was constituted.* It has also been said that only so much of the English law is applicable, as is suitable to the circumstances of the colony.[5] In other acquisitions, English law is introduced not by settlers, but by express legislative enactments. The Gold Coast Courts Ordinance Cap. 4 (1876) was of this type. The question, therefore, as to the extent of the application of English law in these cases must be resolved by reference to the constituting legislation.

It should be noted that before 1876, Ghana had had contact with white European traders (among whom were the Danes, Dutch, and Portuguese) dating back to the fifteenth century, and that British jurisdiction actually began in 1821 when "the several forts on the Gold Coast (later Ghana) formed part of the territories of the Corporation of the Company of Merchants trading in Africa which was created and subsidised annually by Parliament."[6] However, the beginning of the Ghana legal system may be traced to 1884, the year in which the Fanti Bond was signed between Commander H. W. Hill, the head of the then - British Colonial administration representing the British Crown and "some Fanti chiefs."[7]

The critical date in the annals of Ghanaian constitutional and legal history was July 24, 1874, when the first local legislature was established. It was on that date when English law was first (officially) introduced into the Gold Coast, now Ghana. Earlier in the same year the bellicose Ashanti had been defeated by the British and had renounced their claim to the coastal areas around Elmina and Cape Coast. The chiefs of these places had signed the 1844 Fanti Bond with the British. After some hesitation the British two years later passed the Gold Coast Courts Ordinance[8] which contained the relevant laws for our purposes. This Ordinance was revised in 1935, and repealed by the Courts Act (1960)[9] which

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5. Kino Hoa Leong v. Khoo Chong Yack [1930] A.C. 346; Maleksulton v. Sherlia Jovai [1947] J.A.L. 58, at 65; [1955] 22 E.A.C.A. 142; *see also* BLACKSTONE, 1 COMMENTARIES 107.

6. W. DANIELS, THE COMMON LAW IN WEST AFRICA 4 (1964).

7. *See generally* W. CLARIDGE, A HISTORY OF THE GOLD COAST AND ASHANTI, (1945); and W. WARD, A HISTORY OF THE GOLD COAST (1948).

8. Gold Coast Courts Ordinance 8 [1876] Cap. 4.

9. Enactments of the Ghana Legislature are numbered consecutively beginning from Act I. Some of the numbers are preceded by the letters C.A. (Constituent Assembly) of which there are twelve. The Constituent Assembly was a quasi-legislative body which was acting between the period of the dissolution of the "Independence" Legislature and the promulgation of the Republican Constitution which brought into being the

superseded it. The Courts Acts itself was also repealed by the Courts Decree 1966.

It is necessary to note for the purposes of understanding the nature of customary law, that what is today known as Ghana consists of fragmented tribal groups of territories which the British acquired piecemeal. The Gold Coast Colony, which was formerly administered with Nigeria, consisted of the coastal towns where the British retained the forts built by the Danes and the Portuguese, and was acquired by treaties of cession and "friendship," an example being the 1844 Fanti Bond. Ashanti was acquired by conquest and declared a protectorate after the 1900 rebellion. The Northern Territory was declared a protectorate in 1912. The Volta Region, formerly a German possession, came to the British after World War I as a mandate territory; after a U.N. supervised plebiscite on the eve of Ghana's independence, the Volta Region became part of Ghana.[10]

Ghana thus represents an amalgam of three modes of acquisition: cession, protection, and trust.

II. THE SOURCES OF ENGLISH LAW AND CUSTOMARY LAW

Sec. 83[11] of the Gold Coast Supreme Court Ordinance provides:

> Subject to the terms of this or any other Ordinance, the common law, the doctrines of equity and the statutes of general application which were in force in England on the 24th day of July 1874 shall be in force within the jurisdiction of the Courts.

Sec. 85[12] provides:

> All Imperial laws declared to extend or apply to the jurisdiction of the Courts

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Republic of Ghana. This Assembly was the old National Assembly.

The rate at which the numbered enactments are growing convinces the author that very soon it will be cumbersome to cite a statute by its number. Consequently enactments are referred to in this work without regard to their corresponding numeric serials.

10. For a complete history *see* R. BENNIEN, CONSTITUTIONAL LAW OF GHANA, Chapter 1 (1962) and also the following enactments; The Gold Coast Colony and Ashanti (Legislative Council) [1948] Stat. R & O 1946 No. 353 Vol. IX, 673; Northern Territories Order in Council [1901]; The Gold Coast (Constitution) Order in Council [1950] Sta. Instr. 1950 No. 2094; The Ghana (Constitution) Order in Council [1957] Sta. Instr. 1957 No. 277.

11. Gold Coast Supreme Court Ordinance [1876] § 83, Cap. 4. Though the Ordinance had been amended several times and finally repealed by the Courts Act [1960], §83 was saved both by the Courts Act [1960] and the Courts Decree [1966] which has now replaced the 1960 Act. §93 (2) of the 1966 Courts Decree reads: "The provisions relating to Admiralty jurisdiction, infants, persons of unsound minds, probate and matrimonial causes, *and statutes of unequal application which were in force in England on 24th July, 1874 and applicable to Ghana* immediately before the commencement of this Decree, shall continue to apply on and after such commencement until such provisions are modified, amended or revoked under this Decree." (Emphasis added)

12. Gold Coast Supreme Court Ordinance [1876] §85, Cap. 4.

> shall be in force so far only as the limits of the local jurisdiction and local circumstances permit, and subject to any existing or future ordinances of the Colonial Legislation. . . .

Sec. 86[13] provides that in time of conflict between the rules of the common law and equity, those of equity should prevail.

Sec. 87[14] provides for the application of native law and custom. It reads in part:

> Nothing in this Ordinance shall deprive the courts of the right to observe and enforce the observance, or shall deprive any person of the benefit of any native law or custom existing in the Gold Coast, *such law or custom not being repugnant to natural justice, equity and good conscience nor incompatible either directly or by necessary implication with any Ordinance for the time being in force.* (Emphasis added).
>
> Such laws and customs shall be deemed applicable in causes and matters where the parties thereto are natives and particularly, but without derogating from their application in other cases, *in causes and matters relating to the tenure and transfer of real and personal property, and to inheritance and testamentary dispositions,* and also in causes and matters between natives and non-natives where it may appear to the court that substantial injustice would be done to either party by a strict adherence to the rules of English law. . . . (Emphasis added).

The section goes on to provide that if from the nature of a transaction it appears that the parties intend English law to govern their rights and obligations under the transaction, the court should apply English law.

The import of Sec. 89 is that customary law should be proven by evidence as a fact. It was in this respect treated as foreign law.

It should be noted that while the only limitations on the application of English law in its proper sphere were non-retroactivity and the provision that English law should be applied "so far only as the limits of the local jurisdiction and local circumstances permitted," customary law was under several disabilities, the most important being that:

(i) It applied primarily between natives;
(ii) It applied primarily to inter-personal relationships — land transactions, inheritance and succession, marriage and divorce;
(iii) It applied only where in the opinion of the court it was not contrary to equity and good conscience;
(iv) It applied only where it was not contrary to an existing imperial enactment, and
(v) It was provable by evidence as a fact.

Some customs were proscribed altogether because they were said to be barbaric and objectionable to good conscience and morality.[15]

Inevitably, difficulties were experienced in the application of this statute not only with reference to the customary law provisions, but also the English law provisions. For example the courts had to grapple with

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13. *Id.* §86.
14. *Id.* §87.
15. A *locus classicus* was *panyarring* or *Adwo* which was the custom by which a person on failing to make good a debt or some such other obligation, allowed one member of his family to be kidnapped and held until the debt was defrayed or obligation cleared. The Bond of 1844 proscribed this custom. (*See* CLARIDGE, *supra* note 7, at 452, for the text of the Bond). Human sacrifice was likewise forbidden.

the interpretation of "statutes of general application."[16] Does the phrase "in force in England on the 24th day of July 1874" refer only to the "statutes of general application" (on the assumption we know the meaning of this) or extend to "common law" and "rules of equity" also?[17] The courts were faced with the problem of the definition of "native." Would a West Indian of African descent who had lived in Ghana for sixty-one years be regarded as a Ghanaian native?[18]

Meanwhile there were problems about what meaning should be put on words like "wife,"[19] or "child."[20] Should these be given common law meaning or not? The Courts Act 1960 was designed to remove some of these difficulties.

But before looking at the law as it is now, perhaps it will not be out of place to investigate briefly the nature of customary law and why the British, while recognizing its existence, placed so many limitations on its application.

III. THE NATURE OF CUSTOMARY LAW

Perhaps some of the modern nationalist fervor apparent in African legislatures today may be traced in part to a reaction to the attitudes of the old colonial powers. More specifically, the British in the days before Ghana's independence often expressed the opinion that there was no native law. This attitude was due to a basic failure to discern the bases and nature of native customary law. While this statement would have been true in the case of certain tribes which existed without any chiefs, the acephalous tribes, it was not true of the tribes which had chiefs, the cephalous tribes.[21] Among the latter are the Ashanti of Ghana, the Yorubas of Nigeria, the Zulus of South Africa and the East African tribes of Tswana, Bunyoro, Ngwato and others. These societies have

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16. De Bordes v. De Bordes [1884] Sar. F.C.L. 267; Dede v. African Association Ltd. [1910] 1 N.L.R. 131; Oknaku v. Oknaku [1947] 12 W.A.C.A. 137; Young v. Albina [1940] 6 W.A.C.A. 180.

17. On this A. ALLOTT, ESSAYS IN AFRICAN LAW 21 (1960) says: "It is not only in regard to the 'statute of general application' — whose very sobriquet indicates this requirement — that we must inquire whether the English law received or potentially be received into a colonial territory is of general application. This requirement extends also to the common law and equity of the territory." He cites, however, no authority for the proposition. *See also* G. SAWYERR, EAST AFRICAN LAW AND SOCIAL CHANGE 120 (1967).

18. Brown v. Miller [1921] F.Ct. 1920-21, 48, F.Ct. *See also* Savage v. Macfoy [1909], Ren. 504.

19. *See* Lord Panzanco in Hyde v. Hyde [1866] L.R. 1 P & D 130.

20. Edet v. Essien (1932) 11 N.L.R. 47.

21. FORTES and EVANS-PRITCHARD, AFRICAN POLITICAL SYSTEMS 5 (1961). *See also* T. ELIAS, THE NATURE OF CUSTOMARY LAW 17 (1956).

"centralized authority, administrative machinery and judicial institutions — in short, a government. . . ."[22] The acephalous group, which includes the Tallensi of Northern Ghana, the Nuer, and the Tiv of Nigeria, lack central government. Though these tribes have no legal structure, it by no means follows that the remaining tribes are so lacking.

Members of cephalous societies did not go to court merely to find a man of wisdom and authority who could help them in arriving at an amicable settlement. They went to court because a political authority called on them to do so for the exercise of its authority. There is a distinction between criminal offenses and civil delicts. On this, Mr. J. N. Matson, former Judicial Adviser in Ghana, writes:

> Akan (the Ashantis of Ghana) customary law recognised two classes of acts giving rise to judicial proceedings: those causing danger (Spiritual more often than mundane) to the community, either as a whole or in the person of its head; and those causing harm only to individuals.[23]

Sir Henry Maine cannot therefore be right (at least in respect of Akan law) when he says, "the penal law of ancient communities is not the law of Crimes, it is the law of Wrongs, or to use the English technical word, of Torts."[24] This is not to say court actions were not preceded by private negotiations to reach amicable settlement. Indeed the majority of cases which ended up in the chief's court went up there because private negotiations failed to produce a settlement. In fact it was considered unneighborly to rush to the King's court without first "exhausting local remedies."[25] And it is misleading to call these private attempts at settlement arbitration, because a person may recede before such an award is made in settlement while this will not be countenanced at arbitration proper.[26]

Among the Akans of Ghana, farming on the earth spirit's day of rest, drawing water on the stream spirit's day, certain sexual offenses such as incest or sexual relations with the chief's wife or doing any act considered disrespectful of the chief personally, and taking human life were crimes punishable by the entire community represented by the chief.[27] The

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22. FORTES and EVANS-PRITCHARD, *supra* note 21, at 5.

23. Matson, *Judicial Process in the Gold Coast,* 2 INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 47, at 48 (1953).

24. H. MAINE, ANCIENT LAW 379 (1906).

25. This compares with the practice in Medieval England where the custom and the law was that; "If any complaint (quorimonia) should arise between burgesses, the plaintiff ought to demand thrice at the defendant's house that he should do him right and whatever law required; and if at the third demand satisfaction is refused, let him at length make a reasonable complaint to the justice of the town." *Borough Customs* 189. Quoted in T.F. PLUNCKNETT, A. CONCISE HISTORY OF THE COMMON LAW 383 (5th ed. 1956).

26. *See* Kwasi v. Larbi (1953) A.C. 164 and Allott's Legal Note on it in 2 INTERNATIONAL & COMPARATIVE LAW QUARTERLY 466 (1953); see also Beattie, *Informal Judicial Activity in Bunyoro,* 9 J.A.A. 188 (1957).

27. See DANQUAH, AKAN LAWS AND CUSTOMS *passim* (1928).

chief's court is seised of a civil cause when, after attempts at amicable settlement have proved fruitless, one of the parties makes an "oath" usually the mentioning of an abominable thing. This is considered a "curse", "ntam ka" which, unless attended to promptly, is believed to cause disaster. The parties are therefore brought before the chief who would adjudge the matter.[28]

Among the Buganda of Uganda there is evidence of a political organization of that country in the nineteenth century. Not only was the authority of the great king, the Kabaka, felt through administrative agents but also through the elaborate judicial system wherein appeals lay from smallest local court to the Kabaka's court.

On the judicial structure, E. S. Haydon says: ". . . ancient Buganda had a great variety of judicial tribunals connected in a pyramidal structure so that appeal lay from the minor chiefs through the great chiefs to the Katikkiro (Prime Minister) and thence to the Kabaka. . ."[29] Among the Buganda as among the Ashanti there is a distinction between crime and tort.

Among the chiefless, or acephalous, societies on the other hand, because of the absence of a central authority, there does not seem to be any distinction between crime and tort and the function of law is amicable settlement by conciliation although there may be the right to resort to self help where an offense charged is serious enough.[30] It may be true of these non-hierarchical tribes that they went to court only to find help in arriving at an amicable settlement.

In view of the overwhelming evidence of political organization in some African societies and some mode of administration of justice however crude, and the recognition of these legal structures by colonial powers, we may now ask: what is the real nature of the law in these African societies?

The analytical positivist may be disappointed because traditionally some tribal laws would not bear any resemblance to the commands[31] of a political sovereign (whether the sovereign be a monarch or a legislature) in a politically organized society regulating the social conduct of the subjects. Today however, enacted laws are introducing changes and variations into customary law to the extent that some customary laws may be said to be commands.[32]

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28. MATSON, *supra* note 23, at 50.
29. E. S. HAYDEN, LAW AND JUSTICE IN BUGANDA 11-12 (1960).
30. C. C. EVANS-PRITCHARD; THE NUER, *passim* (1940).
31. John Austin has said in his Lectures on Jurisprudence that "Laws proper, or properly so called are commands," i.e. laws "set by political superiors to political inferiors." Reproduced in Professor C. MORRIS, THE GREAT LEGAL PHILOSOPHERS 336-37 (1959).
32. *See* W. TWINING, *The Place of Customary Law in the National Legal Systems of*

Traditional customary law is deeply rooted in the habits and usages of a people. Dr. Dundas says customary law

> is the experiences of generations which successively have cast this and that aside, tried many methods and found them to fail until at last some course remained open which proved itself the most workable and acceptable, not because it met merely one requirement, but because it fitted into all other circumstances. *Therefore it is a deeply thought-out code, and the experiences and intellect of generations have worked to make it one link in a chain of usages and ideas.* For the law as approved by custom is but part of the mechanism of society.[33] (Emphasis added)

Dr. Allott says it is unwritten and not the work of a legislature or lawgiver; "the rules of law trace back to the habits, customs and practices of the people which engender and support the norms expressly formulated from time to time for the decision of disputes;" and that it is flexible.[34] Mr. Justice Ollennu says: "basically the customary law is a usage or custom which exists in a particular locality or community and is accepted as binding upon the people of that community."[35]

Incidentally, none of the Colonial Ordinances defined customary law except the Gold Coast (Colony) Native Courts Ordinance 1944. It reads:

> Customary law means a rule or body of rules regulating rights and imposing correlative duties being a rule or body of rules which obtains and is fortified by establishing usage and which is appropriate and applicable to any particular cause, matter, dispute, issue or question.[36]

This is also embodied in the Eastern Region of Nigeria Customary Law (1956). This definition is good because of the word "fortified," for if the people abandon a usage, the custom departs; indeed as the Full Court said in *Lewis v. Bankole;* "one of the most striking features of West African native custom . . . is its flexibility; it appears to have been always subject to motives of expediency, and it shows unquestionable adaptability to altered circumstances without entirely losing its individual characteristics."[37] No wonder, therefore, that this definition of customary law was accepted by the Privy Council in *Eleko v. Officer Administering the Government of Nigeria.* That court said: "It is the assent of the native community that gives custom its validity, and therefore barbarous or mild, it must be shown to be recognized by the native

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East Africa. Lectures delivered at the University of Chicago Law School in April-May 1963.

33. Dundas, *The Organisation and Laws of some Bantu Tribues in East Africa,* 45 JNL. ROY ANTH. INST. 234, at 305-6 (1915).

34. A. ALLOTT, ESSAYS IN AFRICAN LAW 62 (1960). This is subject to the quaification that some customary laws have become inflexible today as a result of the court's adherence to the 'stare decisis' principle. Some customary law is today "written" as a result of the system of law reporting. Codification is also being done in some African countries today. *See* TWINING, *supra* note 32.

35. Ollennu, *Law of Succession in Ghana,* 2 U. GHANA L. J. 4, at 11 (1965).

36. Gold Coast (Colony) Native Courts Ordinance [1944] Cap. 98, §2.

37. Per Osborne C. J. [1909] 1 N.L.R. 81, at 100-101.

community whose conduct it is supposed to regulate."[38]

From what has been said above it is now possible to list the elements in African customary law.

(i) Traditional customary law derived from the habits and usages of the people.
(ii) Though ancient customary law was unwritten and definitely not the work of a law-giver, in its modern form, some of it is written and may be attributed to the work of a law-giver.
(iii) It was the assent of the people which made traditional customary law obligatory.
(iv) The law's past flexibility has been affected today by the courts' compliance with the "stare decisis" principle; consequently some of it may be said to be "inflexible" now.

IV. BRITISH ATTITUDE TO NATIVE TRIBUNALS

Although the British authorities recognized native law and did everything they could to preserve it, at first they did not take cognizance of the judicial authority of the native tribunals which administered native law prior to their advent. Later on, however, they lent their recognition to the existence and authority of these native courts.

A. PHASE ONE: 1821-1927

This was a period of direct administration of justice in the Gold Coast colony by the British.[39] There was direct responsibility for adjudicating matters and the customary judicial authorities were unrecognized or at best tolerated. The Native Jurisdiction Ordinance,[40] for example, would not allow the administration of justice to the natives of the Gold Coast through indigenous tribunals.

In this phase the British incursion into local politics was limited to dispensing justice on an irregular jurisdictional basis and the Supreme Courts Ordinance[41] was silent on the question of native tribunals. Cruickshank said early in the period:[42]

> Indeed we (the British) had no legal jurisdiction in the country whatever. It has never been conquered or purchased by us, or ceded to us. The Chiefs, it is true, had on several occasions, sworn allegiance to the Crown of Great Britain; but by this act, they only meant the military service of vassals to a superior. Native law and custom were never understood to be abrogated or affected by it. . .

This was the time when it was said:[43]

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38. Elako v. Officer Administering the Government of Nigeria [1931] A.C. 662 at 673.
39. A. ALLOTT, ESSAYS IN AFRICAN LAW, Chapter 5 (1960); Allott, *Native Tribunals in the Gold Coast 1844-1927,* 1 J.A.L. 163 (1957); BANNION, *supra* note 10, at 3 et seq.
40. Native Jurisdiction Ordinance [1878].
41. Supreme Courts Ordinance [1876].
42. B. CRUICKSHANK, TWENTY YEARS ON THE GOLD COAST (1953).
43. Select Committee 1842, Report (i), (iv), (v).

> The Judicial Authority in the forts resides in the Governor and Council who act as Magistrates, and whose instruction limit them to the administration of *British Law,* [sic] and that as far as the natives are concerned, strictly and exclusively within the forts themselves; but practically, and necessarily, and usefully, these directions having been disregarded, a kind of irregular jurisdiction has grown up, extending itself far beyond the limits of the forts by the voluntary submission of the natives themselves, whether Chiefs or Traders to British Equity, and its decisions, owing to the moral influence, partly of the respect which has been inspired by the fairness with which it has been exercised by Captain MacLean and the Magistrates at the other forts, have generally . . . been carried into effect without the interposition of force.

Captain MacLean, President of the Committee of Merchants, had said British justice "has had the happiest effect in maintaining peace, encouraging agriculture and commerce and promoting the civilization of the natives." He extolled the system: "Let but the local government deny or cease to administer even-handed justice to the population for a single day, and the whole country would again become a scene of warfare, rapine and oppression."[44]

B. Phase Two: 1927-1944

In this period native tribunals and customary law came to be overtly recognized.[45] This was the era of Indirect Rule.[46] The British found that their hold on the natives would be stronger if they utilized traditional institutions — the Chiefs and their courts. This presupposes the acceptance of native courts as direct machinery for adjudication of disputes among the natives without interference from British administration.

C. Phase Three: 1944-1958

This was the period in which Native Courts were created and regulated by statutes. The British authorities created the courts by statutes, defined their jurisdiction and areas of competence, defined the applicable laws and made provision for their supervision by higher tribunals. This was exemplified by the Native Courts (Colony) Ordinance Cap. 98 (1944). The Native Courts which were graded A, B, C, and D administered customary law in the main with limited criminal jurisdiction. Appeals lay from these to the regular or superior courts,[47] in the parallel English system of courts.

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44. J. Sarbah, Fanti National Constitution 95 (1897).
45. *See for example,* Native Administration Ordinances [1927].
46. Elias, *The Evolution of Law and Government in Modern Africa in African Law* 185, 187 (Kuper & Kuper ed. 1965).
47. Elias, *Colonial Courts and the Doctrine of Judicial Precedent* 18 M.L.R. 366 (1955). Afrika-Instituut, Customary Law in Africa (1956) particularly the articles by Arthur Phillips, Dr. Ajayi and the Colonial Office (African Studies Branch).

The final phase of this whole process culminated in the integration of courts systems. We shall treat this in Section VII.

V. DIFFICULTIES ENCOUNTERED BY THE COURTS IN THEIR ADMINISTRATION OF THE LAW.

Reference has already been made to the disabilities which harassed customary law in its application in its proper sphere.

Native courts were generally empowered to administer the native law and custom prevailing in the area of their jurisdictions.[48] In addition they were empowered to apply any law binding between the parties except where the parties had agreed or could be taken to have agreed that the transaction should be governed by English law. This would appear to empower the courts to apply some customary law other than that prevailing in their area if such other law was binding between the parties. These provisions were repeated in the Local Courts Act of 1958.[49]

Native Court personnel were supposed to know the law; indeed as native Africans they were repositories of the law. However, to the extent that their decisions were subject to the supervision of administrative officers, judicial advisers and magistrates, which supervision was not limited to procedural matters, their knowledge of the law was liable to challenge by these officers. It is thought, however, that such supervision was generally limited to procedure and remedies.

> What we see in operation today, therefore, is a system of courts and a body of law which have deep roots in traditional society and culture but which have been modified, particularly in the direction of more regular organization and *procedure* by years, of colonial administration. It is significant that such modifications have been slight enough and gradual enough so that the Basoga may feel that these are still their courts and their laws. Certainly to the outside observer this appears to be true.[50] (Emphasis added)

This remark about the Basoga judicial system was true of the Ghana situation at least up to the time the Courts Act 1960 was passed.

As regards the higher courts, they were allowed free resort to chiefs and other persons with special knowledge of customary law, and to books and manuscripts recognized as authoritative on customary law. They were also empowered to refer cases dealing with native customary law to native courts for their decision. The decisions of native courts on customary law had no binding force either on the customary courts themselves or when such matters come before the higher courts. The Evidence Ordinance of Nigeria provided however, that *judicial notice* could be taken of a custom, with respect to any circumstances and it could then

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48. Native Courts Ordinance §15.
49. Local Courts Act [1958].
50. Fallers, *Customary Law in the New African States*, 27 LAW AND CONTEMPORARY PROBLEMS, 605, at 614 (1962).

be adopted as part of the law governing those circumstances.[51] The power to refer to persons knowledgeable in customary law has been taken to indicate that native law always required proof. Thus for example in *Limbani v. R*[52] it was held that the mere decision of a native court that a particular custom exists does not establish that custom. But the Privy Council stated in the Ghanaian case of *Angu v. Atta*[53] that, "In the Gold Coast Colony the principal customs as to the tenure of land have now reached the stage at which the courts recognize them and the law has become, as it were, crystallized." Their Lordships went on,

> As is the case with all customary law, it 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.[54]

Earlier it was held in *Hughes v. Davies*[55] that, "As native law is *foreign law,* it must be proved as any other fact." (Emphasis added)

This vaccillation on the part of the English courts in recognizing customary law in its own right, and their equation of it with custom as that word is understood in English law[56] had two unfortunate results. The attitude of regarding custom as a fact worked injustice between parties. It also placed native law in an inferior position in the *corpus juris* of the country.[57]

VI. COMMON LAW AND EQUITY

Meanwhile the common law and equity were tempering "justice with mercy" in the sphere of customary law. In particular, customs regarded as barbaric or tainted in any way with indecency were proscribed.[58] Thus for instance in two Nigerian cases, *Edet v. Essien*[59] and *Chawere v. Aihenu & Johnson*[60] the "repugnancy rule" was applied to the Yoruba custom that if a woman was married under customary law and had a child with another man while the dowry paid on her by the husband

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51. Cap. 68, §§14, 15, 61, 62. See also Mr. Justice Butler Lloyd's dictum in Buraimo v. Bamgboyo [1938] 14 N.L.R. 42, 44, on the effect of a notorious custom.
52. [1946] N.L.R. 6.
53. [1916] P.C. 1874-1928, 43, 44
54. *Id.*
55. (1909) Ren. 550, 551.
56. At common law custom must have the qualities of antiquity, certainty, reasonableness, continuance, peaceable enjoyment, obligatoriness, and consistency. C. ALLEN, LAW IN THE MAKING 127-35 (4th ed. 1946).
57. Allott, *The Judicial Ascertainment of Customary Law in British Africa,* 20 M.L.R. 244, at 257 (1957).
58. *See* A. ALLOTT, ESSAYS IN AFRICAN LAW Chapter 7 (1960); DANIELS, *supra* note 6 at Chapters 10, 13; BENNION, *supra* at note 10, Chapter 12. Hannigan, *The Imposition of Western Law Forms upon Primitive Societies,* COMPARATIVE STUDIES IN SOCIETY AND HISTORY 1 (1961).
59. [1932] 11 N.L.R. 47; *see supra* note 18.
60. [1935] 12 N.L.R., 4

remained unrefunded, the child was to be regarded as belonging to the husband of the woman and not to the natural father. In the first case a woman married under native law left the husband to live with another man. She had two children by this other intruder, the respondent. The respondent did not refund to appellant, as custom then required, the money which the appellant had paid as bride money on the wife. Appellant therefore claimed the two children. It was held that to uphold the claim would be contrary to natural justice. It was inequitable to allow the appellant to claim another's natural children simply because the other man had deprived the appellant of his wife without paying dowry for her. In the *Chawere case,* the first defendant was originally the wife at customary law of one from whom plaintiff seduced her. Plaintiff then paid to the husband twenty pounds which were said to be the dowry. The woman later left the plaintiff to live with the second defendant. Plaintiff, now claiming that the woman was the wife of the second defendant, demanded twenty-four pounds and ten shillings "being dowry paid on the first defendant to her first husband and also for the purchase price of a sewing machine given by the plaintiff to the first defendant." The court said of this claim:

> If the suggestion is that there is a native custom by which a wife who commits adultery, ipso facto of the adultery becomes automatically the wife of the adulterer, I have two comments to make. First, that there is no evidence of such a custom, and second, that I am clear that such a custom is one to which this court would not be prepared to give judicial sanction.[61]

In the Ghanaian case of *Sarteng v. Darkwan*[62] the issue was whether the child of a slave woman should be considered a member of the father's family for the purposes of succession. The court held contrary to custom that the child of a slave is a member of the father's family and that to hold otherwise would be to uphold the institution of slavery which was not only abolished by statute but also repugnant to the common law of England.

Not only was English law, both common law and equity, concerned with the problem of refashioning local rules of law, but also equitable decisions were enforced in the strict English sense. This conflicted with local practices. The maxim *nemo iudex in sua re,* a man should not judge his own case, flew in the face of situations where a chief or other authority might often adjudicate on breach of his own decree or a wrong to his personal right. The maxim *alteram partem audi,* both sides of a case must be heard, might conflict with some customary practice because although in ancient African law a man was generally given an opportunity to be confronted with his adversary, the institutions of

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61. *Id* at 5.
62. Sarteng v. Darkwah [1940] 6 W.A.C.A. 52, at 53.

"oath" and "ordeal" might lead to a man's condemnation without an effective chance of putting his own point of view across. The maxim that decisions should be supported by reasons might be violated where a man's guilt was made to depend on the ordeal device. And there might be no way of finding whether the rule that punishments and awards should not be excessive, but should be proportionate to the circumstances of the offense was always observed.[63]

The word equity was not only interpreted to mean fair play. It was also interpreted technically to mean that rules formerly administered in the Court of Chancery such as constructive notice and laches were applicable to customary law at least where procedural matters were in issue. An example of the application of the rule in *Willmott v. Barber* (1880) 15 Ch.D. 96 is the 1923 case of *Ephraim v. Asuquo*[64] where plaintiff sought to revoke a grant of letters of administration after a lapse of two years or more. The court found him guilty of laches. In delivering the opinion of the court Justice Webber of the Divisional Court of Calabar observed:

> It is now nearly two years since this grant was made. The plaintiff and his people have had every opportunity of opposing the grant, of which opportunity they have not availed themselves. If they were anxiously desirous of administering this estate, why did they wait a whole year to make this first move, and why did they wait another twelve months before getting the case on the hearing list?[65]

VII. DEVELOPMENTS AFTER INDEPENDENCE

On March 6, 1957 the Gold Coast won its independence from Britain under its new name, Ghana. By an Order in Council issued in the same year the West African Court of Appeal ceased to be an appellate court for Ghana.[66] Ghana established her own appellate court — the Court of Appeal of Ghana — from whence appeals lay direct to the Privy Council.[67]

Though the legal structure was undergoing a change customary law still was initially left in an inferior status. But in 1960 with the promulgation of the Republic Constitution and the Courts Act, the change was complete. Indigenous law should not be relegated to an inferior position in its own land. This attitude on the part of the new Republic savors

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63. *See generally* A. ALLOTT, ESSAYS IN AFRICAN LAW, *supra*, note 17 *passim*.
64. [1923] 4 N.L.R. 98.
65. *Id.*
66. S.I. 1957 No. 279.
67. The West Africa (Appeals to Privy Council) Order in Council (S.I. 1957, No. 1362); The Ghana (Appeals to Privy Council) Order in Council (S.I. 1957 No. 1361).

of nationalism, but is understandable since not only did the Republic Constitution establish a Ghana judiciary completely autonomous and without links with the British Judiciary,[68] but it also made Ghana a sovereign nation which owed no allegiance to the British Crown. Professor Harvey holds the view that what was dominant in this period of change was the value of "nationhood" and not "nationalism," because "the effort through legal, political and social means has been to create the perception of a new value and to organize its expression internally rather than to implement externally a set of developed and articulate national aims."[69]

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68. Article 41 reads: "Superior and inferior courts — (1) There shall be a Supreme Court and a High Court, which shall be the superior courts of Ghana. (2) *Subject to provisions of the Constitution, the judicial power of the State is conferred on the Supreme Court and the High Court, and on such inferior courts as may be provided for by law.* (3) The power to repeal or alter this Article is reserved to the People." (Emphasis added).

Perhaps a short history of the evaluation of the court system will not be out of place here. By the Supreme Court Ordinance 1876, as amended 1 Laws of Gold Coast c.7 (1920), the Supreme Court of Judicature was created for the Gold Coast colony "and for territories thereto near and adjacent wherein Her Majesty may at any time before or after the commencement of this Ordinance have acquired powers and jurisdiction." *Id* S. 12. The Court comprised the Full Court — the appellate tribunal — and Divisional Courts sitting in each of the administrative provinces of the colony. Appeals from the Full Court lay to the Privy Council. In 1928, the West African Court of Appeal was established as the penultimate Court of Appeal for British dependencies in West Africa, with jurisdiction to entertain appeals from the Supreme Courts of Gambia, Gold Coast Nigeria and Sierra Leone. 1 Laws of Gold Coast c.5 (1937), as amended. The Gold Coast judiciary was reorganized by extending the Supreme Court Ordinance of 1876 to the later accretions to the British jurisdiction namely, Ashanti and the Northern Territories, thereby creating one Supreme Court for the whole colony. Thus immediately prior to independence (March 6, 1957) the highest tribunal situated in the Gold Coast was the Supreme Court from which appeals lay to the W.A.C.A. and thence to the Privy Council.

The Courts (Amendment) Ordinance [1957] created the High Court and the Court of Appeals as component parts of the Supreme Courts, and abolished the right of appeal to the West African Court of Appeals whose appellate jurisdiction was transferred to the Court of Appeal. However, the Privy Council retained its ultimate appellate jurisdiction. Ghana (Appeal to Privy Council) Order in Council, 1957, Laws of Ghana No. 387 (1957). The Republic Constitution (July 1, 1960) again reorganised the Ghana Judiciary. There are now two Superior courts — the High Court and the Supreme Court. The right of appeal to the Privy Council was abolished by the Constitution (Consequential Provisions) Act, 1960. The Supreme Court is today the Court of last resort in Ghana. Article 42 (4) of the suspended Republic Constitution reads, "The Supreme Court shall in principle be bound to follow its own previous decisions of the Supreme Court on such questions, but neither Court shall be otherwise bound to follow the previous decisions of any court in questions of law."

For a scholarly exposition of the problems of "stare decisis" raised by this article, see Asante, *Stare Decisis in the Supreme Court of Ghana,* 1 U.G.L.J. 52 (1964).

Since the suspension of the 1960 Constitution following the takeover by the military and the police, the law in this regard has been embodied in Part I of the Courts Decree, 1966.

69. Harvey, *A Value Analysis of Ghanian Legal Development Since Independence,* 1 U. of Ghana, L.J. 4 (1964).

The change has begun and will continue. As a result of the report of the Korsah Commission on Native Courts, the Local Courts Act (1958) was passed to provide for the establishment of Local Courts in place of Native Courts. This Act began the work for the eventual fusion of the court systems. What it did was to bring the former native courts under the same court hierarchy with the regular courts.[70] They had limited jurisdiction and applied customary law in personal actions where the debt, damage or claim did not exceed fifty pounds. Appeals lay from these to the Magistrate or Circuit Courts and thence to the High Court. This Act was repealed by the 1960 Courts Act which completed the fusion of courts process. This Act was in turn repealed by the Courts Decree 1966[71] which has reenacted the 1960 Act substantially.

Section 1 provides:

> (1) For the purposes of this Decree there shall be —
> (a) a Supreme Court of Judicature, consisting of the Court of Appeal and High Court, which shall be the Superior Courts of Ghana; and
> (b) the following Inferior Courts —
> (i) the Circuit Courts,
> (ii) District Courts of two grades designated District Courts (Grade I) and District Courts (Grade II) and
> (iii) such other Inferior Courts as may be provided by law.

The dichotomy of courts system is dead. A fusion of courts such as occurred in England in mid 19th century between the common law courts and Chancery has occurred in Ghana also between the native courts and the successors of the English courts. But the question remains to be answered: what is now the relationship between the common law and equity on the one hand and customary law on the other? The suspended 1960 Republic Constitution throws some light on the question.

Article 40 of that Constitution provides:[72]

> Except as may be otherwise provided by an enactment made after the coming into operation of the Constitution, the Laws of Ghana comprise the following:
> (a) the Constitution,
> (b) enactments made by or under the authority of the Parliament established by the Constitution,
> (c) enactments other than the Constitution made by or under the authority of the Constituent Assembly,
> (d) enactments in force immediately before the coming into operation of the Constitution,
> (e) the common law and
> (f) customary law.

This list does not pretend to present in order of precedence the laws of Ghana. It only indicates the sources of the law of Ghana and the fact

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70. Harvey, *The Evolution of Ghana Law Since Independence,* 27 LAW AND CONTEMPORARY PROBLEMS 281 (1962).
71. Courts Decree [1966] N.L.C.D. 84, Courts Act [1960] C.A. 9.
72. The Constitution of the Republic of Ghana [1960].

that customary law is listed last is not a derogation from its status. Article 40 of the Constitution does not answer the question posed however.

The Interpretation Act 1960 defines the common law thus:

> (i) the common law as comprised in the laws of Ghana, consists in addition to the rules of law generally known as the common law, of the rules generally known as the doctrine of equity and of 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.[73]

Here is an attempt on the part of the legislature to incorporate some customary law into the common law.[74] Section 18 of the Act[75] provides:

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

Customary law properly so called is, therefore, "provincial". There are many tribes and each has its own peculiar customs. There are the Akan (Ashanti, Fanti, Akim, Kyerepong, Akwamu and Kwahu), Ewe, Ga-Adangbe and the Tallensi. These are only the principal tribes — there are over two hundred tribes in Ghana.

The Courts Decree provides a set of rules for determining whether in a particular case customary law or the common law should apply. Since customary law is no longer under any disabilities — it being equal to rules of common law and equity and of general application — it follows that it applies to both natives and non-natives; and unless care is taken the application of customary law in certain circumstances may work injustice, especially where aliens are concerned.

Section 64 of the Courts Decree[76] provides:

> (1) Subject to the provision of any enactment other than this subparagraph, in deciding whether an issue arising in civil proceedings is to be determined according

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73. The Interpretation Act [1960] C.A. 4 §17.

74. As far as the author is aware not one such enactment exists. This was to be one of the greatest contributions of the Chiefs to the nation's legal development. See The Chieftancy Act 1961, §58. But the Nkrumah government, bent on building a strong central government and a unitary state from a large number of tribes effectively undermined the authority of the Chiefs. The Houses of Chiefs were no more than debating clubs. The District Commissioners who were the "political watchdogs" of Dr. Nkrumah's ruling party, the Convention People's Party (C.P.P.) were more influential than local magnates because traditionally they have been forces around which the people rallied. The example of Ashanti is a clear indicator. Here because Sir Agyeman Prempeh III supported the National Liperation Movement (N.L.M.), the strongest pre-independence opposition party to the C.P.P., more than 80% of the Ashanti also belonged to this party. *See* Asante, *Law and Society in Ghana*, 1966 WISC. L. REV. 1113 (1966).

This situation, it was rightly feared, would lead to 'divided' allegiance with serious consequences for the infant Republic. Consequently the Chiefs were unable to make any worthwhile contribution to the legal development of the nation in the way envisaged by §58 of the Chieftancy Act.

75. The Interpretation Act [1960] C.A. 4 §18.

76. Courts Decree [1966] N.L.C.D. 84.

to the common law or customary law and if the issue is to be determined according to customary law, in deciding which system of customary law is applicable, the court shall be guided by the following rules, in which references to the personal law of a person are references to the system of customary law to which he is subject or, if he is not shown to be subject to customary law, are references to the common law.

Rule 1

Where two persons have the same personal law one of them cannot by dealing in a manner regulated by some other law with property in which the other has a present or expectant interest, alter or affect that interest to an extent which would not in the circumstances be open to him under his personal law.

Rule 2

Subject to Rule 1, where an issue arises out of a transaction the parties to which have agreed, or may from the form or nature of the transaction be taken to have agreed, that such an issue should be determined according to the common law or any system of customary law effect should be given to the agreement.

In this rule 'transaction' includes a marriage and an agreement or arrangement to marry.

Rule 3

Subject to Rule 1, where an issue arises out of any unilateral disposition and it appears from the form or nature of the disposition or otherwise that the person effecting the disposition intended that such an issue should be determined according to the common law or any system of customary law effect should be given to the intention.

Rule 4

Subject to the foregoing rules, where an issue relates to entitlement to land on the death of the owner or otherwise relates to title to land —

(a) if all parties to the proceedings who claim to be entitled to the land or a right relating thereto trace their claims from one person who is subject to customary law, or from one family or other group of persons all subject to the same customary law, the issue should be determined according to that law;

(b) if the said parties trace their claims from different persons, or families or other groups of persons, who are subject to the same customary law, the issue should be determined according to that law;

(c) in any other case, the issue should be determined according to the law of the place in which the land is situated.

Rule 5

Subject to Rules 1 to 3 where an issue relates to the devolution of the property (other than land) of a person on his death it should be determined according to his personal law.

Rule 6

Subject to the foregoing rules, an issue should be determined according to the common law unless the plaintiff is subject to any system of customary law and claims to have the issue determined according to that system, when it should be so determined.

(2) Notwithstanding anything contained in the foregoing provisions of this paragraph, but subject to the provisions of any other enactment

(a) the rules of the common law relating to private international law shall apply in any proceedings in which an issue concerning the application of law prevailing in any country outside Ghana is raised;

(b) the rules of estoppel and such other of the rules known as the common law and the rules generally known as the doctrine of equity as have heretofore been treated as applicable in all proceedings in Ghana shall continue to be so treated.

Many of the rules envisage that effect should be given to the intention of the parties to a transaction. Therefore, whether both of the parties are natives or non-natives, as far as the court is able to ascertain their

intention, effect would be given to it and either customary law or common law would apply.

On the misleading appearance of clarity and certainty of these rules Professor Harvey says:

> . . . [T]he use of the concept of personal law in a legal order based primarily on the concept of territoriality of law introduces great complexity. Many of the legal norms of Ghana are applicable within the geographic boundaries of the nation. The common law and the general systems of customary law are 'personal', however, and their application depends on the particular persons involved. Surprisingly the Courts (Decree) is entirely silent as to the criteria by which one's 'personal law' is to be determined. Presumably this determination must still be made on the basis of such ethnic factors as determined the jurisdiction of the former Native Courts, that is, is the person of African descent? Is his way of life that of a native community? If so of what native community is he a member? While the legislative draftsmen were able to avoid the use of the word 'native', the concept of the personal law seemingly commits the courts to criteria reminiscent of the colonial period in answering the choice of law questions.[77]

Professor Harvey, however, has a word of praise for the legislation. He thinks the status of the common law is improved by the elimination of the former presumption favoring the applicability of customary law where the parties were natives.

Section 65 of the Decree makes provision for the ascertainment of a customary law rule either by inquiry, testimony of experts, or written opinions of chiefs. One may ask whether the time has not now arrived for the codification of customary law since this would ensure certainty; the present method of ascertainment of customary law, it may be argued, still makes customary law a provable fact. On this issue there are several views, but it is submitted that codification would do more harm than good.

> Codification of Customary Law now might, on the one hand, minimize if not bar altogether any chances of progressive development to meet the ever changing conditions in society and thus amount to an attempt to make the regulations of human conduct in modern life subject to a kind of mummified ancient law. It might on the other, (as codification usually involves alterations in existing law) lead to another of those futile attempts 'to make people good by Act of Parliament'.[78]

An example of the progressive development of customary law to meet changing conditions is this: before 1909 it was almost anathema to regard a woman as head of family among the Yorubas. Nevertheless under

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77. *See* Harvey, *supra* note 70, *at* 599-600.

78. AFRIKA INSTITUUT, THE FUTURE OF CUSTOMARY LAW IN AFRICA 66 (1956). In spite of the support for codification among Western writers (among the most notable are Allott, Anderson, Cotran and Gower) there is very little support for the idea of codification among African jurists. At the African Conference on Local Courts and Customary Law held in Dar-es-Salaam, Tanganyika, September 1963, the delegates to the Conference noted that "customary law codes are rare" — *Records of Proceedings* 35, note 1. The model code which was studied — The Natal Code — was adversely criticised by the delegates who thought it was a failure. No recommendation on codification was made by the Conference.

changing conditions the Full Court gave judicial sanction in *Lewis v. Bankole*[79] to the female headship of a family in Lagos. It did so on the basis of evidence which proved the lady's personal capacity for leadership though ordinarily "the Yoruba social structure is patrilineal and patrilocal and their rules on family headship generally primogenital in operation."[80] Of course, nothing prevents changes to be made to a written code, when new developments necessitate alteration in the existing law. Unfortunately written codes sooner or later become sacrosanct, and almost defy changes.[81]

It will be seen that English law has impinged on African customary law in two ways:

(i) in its modifying influence on those parts of indigenous customary law which have not so far succumbed to the invasion of British legal and cultural influences

(ii) in its role of filling in the gaps (creative role) and supplying the deficiencies of indigenous law and usage brought about by new economic and commercial values, and national development goals.

The first category concerns such phenomena as changes in property law (for example, corporate and inalienable ownership becoming gradually individual and alienable), the increasing, though gradual, break-up in the customary ties of family and lineage with a resultant narrowing in the individual's sense of obligation towards his kin. The second embraces the introduction of criminal law and procedure, commercial law — banking, insurance, bills of exchange, corporations, — and industrial law regulating the relationships of those who control capital and the means of production and wage-earners — originally an unknown group in indigenous society.

It will be mentioned in passing that it may be interesting to compare the British policy of conferring on customary law an inferior status with the policy of other colonial powers, notably France, Belgium and Portugal which determine the applicability of customary to individual natives of their colonies by reference to their status. There is the process[82] variously called "assimilation", "immatriculation" and "evolution" in French, Belgian and Portuguese colonies whereby a native upon attaining a defined level of "civilization" changes his status. He ceases to be subject to native law and becomes localized French, Belgian or Portuguese. His relationships with others thenceforth become subject to continental law. Dr. Cowen says the "status system" avoids the dilemma in which customary law finds itself in other colonial territories where jus-

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79. [1909] 1 N.L.R. 81.
80. AJAYI, *supra* note 47, at 69.
81. R. SCHLESINGER, COMPARATIVE LAW 264 (2nd ed. 1959).
82. *See generally,* Cowen, *African Legal Studies — A Survey of the Field and Role of the United States,* 27 LAW AND CONTEMPORARY PROBLEMS 543, 556 (1962); A. ROBERT, in CUSTOMARY LAW IN AFRICA 170.

tice is administered on racial lines — English law for non-natives and customary law for natives. He admits however that "admission to the status of immatriculation became that of 'middle-class respectability in a typical Belgian city' " after 1948 in the former Belgian Congo.[83]

The retention of English law as part of the Ghanaian legal system after independence stems from the people's acknowledgement of the fact that English law has played a significant role in shaping the entire legal and political conditions of the society. It has had profound ameliorating effect on customary law. It has given Ghanaians their sense of constitutionalism and legalism.[84] It has become an important institution in the structure of the society. It could not simply be done away with. Beyond all this is the general acceptance of the law by the vast majority of the people which alone gives it a binding character. The people believe also in the English law's ability to do justice between people of different clime and culture, subject of course to the qualification that local circumstances should be taken into account in its application.

Its retention may also be due in part to expedience and the desire to maintain the "status quo". If English law were discarded, existing legal relations already entered into on the basis of the existing legal order would have been disturbed.

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83. *Supra* note 82, at 556. See further GOWER, INDEPENDENT AFRICA 9 (1967); E. N. GRISWOLD, LAW AND LAWYERS IN THE U.S.A. 105-107 (1964).

84. J. N. SHKLAR, LEGALISM 180 (1964).