

The Constitutional Challenge of the Integration and Interaction of Customary and the Received English Common Law in Nigeria and Ghana

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I. INTRODUCTION

One of the persistent challenges of post colonial African States is to understand the nature of their legal pluralism. If it was inevitable that at independence these States continued with their plural legal legacy it was

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also inevitable that they would address this issue as they consolidated their political independence. The different periods of constitutional design in the wake of the waves of democratization in Africa offered good opportunities in this regard. Generally African States have permitted the interaction of the received European law and customary and Islamic law. In the more than half a century since Ghanaian independence (1957) and almost half a century since Nigerian independence (1960), two clear phases of the interaction of customary Law and Islamic Law with the received English common law can be identified. They may be denoted as the common law and the constitutional eras. The common law era in these two countries commenced at the time of colonization and continued even after their independence up till the adoption of the post-military constitution in Nigeria in 1979 and 1999¹ and in Ghana in 1992.² What is significant for our discussion is that in this era customary law and Islamic law were appendages of a dominant received English common law. The second era is the constitutional era which commenced with civil democratic rule on the aforementioned dates and continues till now. It is the contention of this Article that because the Constitution is the fundamental law of the land, constitutional policy must govern the structure of the legal system and in the case of Nigeria and Ghana it must deal with the plural bases of the common law era. This Article examines how the CFRN 1999 and CG 1992 have addressed the significant issues in the interaction of the received English common law with Islamic law and customary law.

One reason for the choice of Nigeria and Ghana as the basis of comparative analysis is the fact that even though both countries have a broadly similar legal system because of a common legal heritage, Ghana more than Nigeria seems to have responded directly to the challenge of her plural legal order by a constitutional affirmation that the Ghanaian legal system shall be partly constituted by a Ghanaian common law which in turn is to be partly constituted by Ghanaian customary law(s). This vision of a Ghanaian common law seems to be directly linked to Ghana's status as a unitary State. Nigeria on the other hand is a federal State and does not constitutionally address the nature of her legal system.

1. The 1979 Constitution of the Federal Republic of Nigeria was suspended by military incursion in 1984. This intervention ended in 1999 when the 1999 Constitution of the Federal Republic of Nigeria was adopted. In the same year Nigeria returned to civil democratic rule. The 1999 Constitution of the Federal Republic of Nigeria is hereafter referred to as CFRN 1999. Nigeria's first republic began at independence in 1960 and ended when the military staged a coup in 1966. The military ruled Nigeria from then to 1979.

2. The Constitution of Ghana 1992 ushered in civil democratic rule after years of military rule from 1966 to 1992. The Constitution of Ghana is hereafter referred to as CG1992.

There is no vision of a Nigerian common law and the interaction of the received English common law with customary and Islamic law continues within the context of a judicial structure that reflects the plurality of the system at the lower trial level but is integrated at the appellate level. The reasons for these constitutional choices are not the central preoccupation of this Article even though I have discussed them where they help to explain the issues of this Article. Rather I intend to show how the constitutional choices made by Nigeria and Ghana have affected the interaction of the plural legal orders in both countries. Another reason for the choice of Nigeria and Ghana is that they are multi-ethnic States. Nigeria is made up of over 250 ethnic groups³ while Ghana is made up of over 60 ethnic groups.⁴ In addition they are multi-religious States with a mix of Islam, Christianity, and traditional African religions.

In order to set the context for the ensuing discussions I only briefly define customary law in the next Part, because, of the three legal orders I assume that the received English common law is well known. I have also decided to generally exclude Islamic law. Islamic law is not customary law. Given Nigerian and Ghanaian religious demography there has been a continuing controversy as to whether customary law includes Islamic law or not. A considerable body of judicial⁵ and academic⁶ opinion, more

3. The 2009 Report on International Religious Freedom on Nigeria describes the religious demography of Nigeria as follows:

The country has an area of 356,700 square miles and a population of 149 million. While some groups estimate the population to be 50 percent Muslim, 40 percent Christian, and 10 percent practitioners of indigenous religious beliefs, it is generally assumed that the proportions of citizens who practice Islam and citizens who practice Christianity are roughly equal and include a substantial number who practice indigenous religious beliefs alongside Christianity or Islam.

See U.S. Dep't of State, *2009 Report on International Religious Freedom—Nigeria* (26 Oct. 2009), available at <http://www.unhcr.org/refworld/docid/4ae86119c.html>.

4. The 2009 Report on International Religious Freedom on Ghana describes the religious demography of Ghana as follows: The country has an area of 238,538 square miles and a population of 22 million. According to the 2000 government census, approximately 69 percent of the population is Christian, 15.6 percent is Muslim, 8.5 percent adheres to indigenous religious beliefs, and 6.9 percent is classified as other religious groups, which includes those who profess no religious beliefs. The Muslim community disputed these figures, asserting that the Muslim population is substantially larger. See U.S. Dep't of State, *2009 Report on International Religious Freedom—Ghana* (26 Oct. 2009), available at <http://www.unhcr.org/refworld/docid/4ae8613dc.html>.

5. See the case of *Alkamawa v Bello* [1998] 6 SCNJ 127, 129: "Islamic Law is not the same as customary law as it does not belong to any tribe. It is a complete system of universal law, more certain more permanent and more universal than the English common Law."

6. See Abdul Baasit Aziz Bamba, *Accommodating Muslim Family Law in Ghana: Strategies and Challenges*, in MENSEA-BONSU, HENRIETTA J.A.N. ET AL., GHANA LAW SINCE INDEPENDENCE: HISTORY, DEVELOPMENT AND PROSPECTS 467 (Black Mask for Faculty of Law,

in Nigeria than Ghana, asserts that Islamic law is not customary law. There is merit in this position even though Islamic and customary law are of the same status in both countries. In Part III of the Article I examine the application and enforcement of customary law in the common law era. In Part IV, I examine the challenges posed by CFRN 1999 and CG 1992 and I make some concluding remarks in Part V.

II. THE DEFINITION OF CUSTOMARY LAW

Customary law is defined by section 11(3) of CG 1992 as meaning the rules of law which by custom are applicable to particular communities in Ghana. This definition implies that the communities have a significant influence in what is customary law. And it is their acceptance of a custom as obligatory that confers a normative quality to the custom. This conforms to the definition of custom given by Judge T.O. Elias:

The law of a given community is the body of rules which are recognized as obligatory. . . . This recognition must be in accordance with the principles of their social imperative, because operating in every community is a dynamic of social conduct, an accepted norm of behavior which a vast majority of its members regard as absolutely necessary for the common weal. This determinant of the ethos of the community is its social imperative.⁷

In Nigeria, this definition has been influential in the judicial articulation of the meaning of customary law. In *Oyewunmi v Ogunsesan*⁸ the Nigerian Supreme Court defined customary law as

the organic or living law of the indigenous people of Nigeria regulating their lives and transactions. It is organic in that it is not static. It is regulatory in that it controls the lives and transactions of the community subject to it. It is said that custom is a mirror of the culture of the people. I would say that customary law goes further and imports justice to the lives of all those subject to it.⁹

Univ. of Ghana, Legon, 2007); A.A. Oba, *Islamic Law as Customary Law: The Changing Perspective in Nigeria*, 51 INT'L & COMP. L.Q. 817 (2002).

7. T.O. ELIAS, THE NATURE OF AFRICAN CUSTOMARY LAW 55 (Univ. Press Manchester 1956); see also N.A. Ollenu, *The Changing Law and Law Reform in Ghana*, 15 J. AFR. L. 132 (1971).

8. (1990) NWLR (pt 137) 182, 207.

9. *Id.* at 207. See also the case of *Owonyin v Omotosho* (1961) 2 SCNLR 57 where Bairamian F.J. defined customary law as a mirror of accepted usage. This definition was adopted in *Kimdey v Military Governor of Gongola State* (1988) 2 NWLR (pt 77) 445. Section 77 of the High Court Law of Bayelsa State defines Customary Law as "a rule or body of rules, regulating rights and imposing correlative duties, being a rule or body of rules which obtains and is fortified

In Ghana customary law is constitutionally recognized as a source of law. Section 11(1) of the CG 1992 provides that the laws of Ghana shall comprise the Constitution; enactments made by or under the authority of the Parliament established by this Constitution; any Orders, Rules and Regulations made by any person or authority under a power conferred by this Constitutions; the existing law; and the common law. Section 11(2) defines the common law of Ghana to comprise the rules of law generally known as the common law, the rules generally known as the doctrines of equity and the rules of customary law including those determined by the Superior Court of Judicature. The constitutional definition of customary law in Ghana throws up a number of issues when considered in the context of the constitutional sources of law. The first question is whether the whole of Ghana can be regarded as a “community.” If the answer is yes, the next question allied to this is whether there can be customs common to Ghana. Ollenu agrees that there are and lists them. According to him:

Judicial decisions have established common customs within the Republic with respect to land tenure, succession and family law. It must be stated categorically that the common customs in these subjects declared by superior courts . . . form part of the Ghana Common Law. . . .¹⁰

Professor Woodman disagrees and argues that these common customs should be regarded as customary law¹¹ for three reasons. The first is that the customs do not fit the definition of either customary law or common law; secondly that there would be no guide as to how to make a choice between Ghanaian and English common law and thirdly that such general rules are summaries of a number of particular rules which fit the definition of customary law.¹² Another issue in this definition is that it locates the community as the legitimating factor of customary law. This has a number of implications principal of which is that evidence can always be led to show that a particular customary law has changed. If this is so the courts can use this to change the law and thereby circumvent the negative effects of the doctrine of judicial precedent. From this definition, there is a mention of custom as being the foundation of customary law. There is of course a difference between

by established usage and which is appropriate and applicable to any particular cause, matter dispute, issue or question.”

10. Ollenu, *supra* note 7, at 160.

11. See G.R. Woodman, *Common Customs of Ghana: Common Law or Customary Law?*, 5 U. GHANA L.J. 1 (1968).

12. See also G.R. WOODMAN, *CUSTOMARY LAND LAW IN GHANAIAN COURTS* 49 (Ghana Univ. Press Accra 1996).

custom and customary law. It is not every rule of social relation that is a custom. But there is no standard in the definition or in any other law as to differentiate a custom from a customary law. How do we recognize what a community regards as law and what a community regards as a custom?¹³ Do we rely on traditional authorities or a consensus of the community?¹⁴ It is often the case that what is advanced as customary law may reflect a dominant minority or simple majority and that a significant part of a community is against a particular rule. How do we resolve such deep contradictions? These and similar questions are directly linked to the oral nature of customary law and will be discussed at appropriate places in this Article.

Assessing the present state of customary law in Ghana Professor HJAN Mensa-Bonsu states: “The current state of customary law in Ghana is one of confusion and doubt. Some of these doubts have been created by the unwritten nature of customary law but others by the activities of the courts themselves.”¹⁵ The Nigerian Supreme Court has also lamented the state of customary law in Nigeria. In *Ugo v Obiekwe*¹⁶ the Court regretted that “whereas the authorities concerned are taking the commendable step of ridding our statute and received English law of anachronism, nothing appears to be happening in the area of customary law which forms the essential backbone of our *corpus juris Nigerianae*.”

III. THE APPLICATION AND ENFORCEMENT OF CUSTOMARY LAW IN THE COMMON LAW ERA

A fundamental attribute of the colonial legal structure of commonwealth Africa was that the application and enforcement of customary law occurred in common law courts. As stated above, this fact continued after independence and in the case of Ghana and Nigeria up till now. In such a setting it is inevitable that customary emerged and continues as an inferior system of law. In this Part this Article explores different mechanisms which have led to the subjugation of customary law.

13. See A.N. ALLOT, *NEW ESSAYS IN AFRICAN LAW* 147 (Butterworths London 1970).

14. See generally A.N. Allott, *The People as Law-Makers: Custom, Practice and Public Opinion as Sources of Law in Africa and England*, 21 J. AFR. L. 1 (1977).

15. See HJAN Mensa-Bonsu, *Of “Nuts in the Ground Not Being Groundnuts”—The Current State of Customary Law in Ghana*, U. GHANA L.J. 1, 24 (2002-2004).

16. (1989) 1 NWLR (pt 99) 566.

A. *Customary Law as a Question of Law and as a Question of Fact*

In Nigeria customary law is a question of fact because section 14(1) of the Evidence Act provides that it can be proved by evidence unless it can be judicially noticed. Section 14(2) of the Evidence Act provides that custom may be judicially noticed if it has been acted upon by a court of superior or co-ordinate jurisdiction to an extent which justifies the court asked to apply it to assume that the persons or class of persons concerned in that area look upon it as binding. Section 59 of the Evidence Act provides that customary law can be proved by opinions of persons having special knowledge of native law and custom;¹⁷ opinions of native chiefs;¹⁸ any book;¹⁹ and any manuscript.²⁰ Even though a number of cases were for a long time required to enable a court take judicial notice of a custom,²¹ it is now the law that one decision—the Nigerian Supreme Court appears most appropriate because of the doctrine of judicial precedent—is enough for the courts.²² Being a question of fact, the existence of a rule of customary law is entirely at the discretion of the trial court since it is at liberty to believe or disbelieve the evidence. In Ghana customary law was also a question of fact for a long time and had to be proved. In *Angu v Attali*²³ the Court stated that “as is the case with all customary law, it has to be proved in the first instance by calling witnesses acquainted with 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.”²⁴ By making customary law a question of fact, a lot turns on the discretion of the judge and the possibility that the content of customary law may be heavily influenced by a judicial officer. Thus the interpretation and conclusion of a judicial officer from the evidence of a customary law may significantly differ from the customary law practiced by the people. In Ghana and Nigeria the

17. See *Oyewunmi v Ogunesan* (1990) NWLR (pt 137) 182; *Cole v Folami* (1990) 2 NWLR (pt 133) 445; *Nzekwu v Nzekwu* (1989) 2 NWLR (pt 104) 373; Y. Osibanjo & T Osipitan, *Proof of Customary Law in Non-Customary Courts*, in Y. OSIBANJO & A. KALU, TOWARDS A RESTATEMENT OF NIGERIAN CUSTOMARY LAW 255 (Fed. Ministry of Justice Lagos 1991).

18. See *Ojemen v Momodu* (2001) FWLR (pt 37) 1138.

19. See the case of *Adedibu v Adewoyin* (1951) 13 WACA 411 where the court used WARD PRICE, MEMORANDUM OF LAND TENURE IN YORUBA PROVINCES (Lagos 1933).

20. See *Adeseye v Taiwo* (1956) 1 FSC 84 where the court used A.K. AJISAFE, LAWS AND CUSTOMS OF YORUBA PEOPLE (London 1924).

21. See the case of *Olagbemi v Ajagunbade III* (1990) 3 NWLR (pt 136) 37.

22. See *Oyewunmi v Ogunesan* (1990) NWLR (pt 137) 182.

23. (1916) Gold Coast Privy Council Judgments 43 (1874-1928).

24. *Id.* at 24; see also *Hughes v Davis* (1909) Renner 550, 551: “As Native Law Is Foreign Law, It Must be Proved as Any Other Fact.”

evaluation of the factual basis of an alleged customary law rule has led to two versions of customary law: one version developed by judicial officers that can be termed judicial customary law and the real customary law practiced by the people.²⁵ Because of the doctrine of judicial notice, it becomes possible that a wrong version of customary law accepted by a judicial officer may become more entrenched by the weight of precedent as the correct version of the customary law.²⁶

At present customary law in Ghana is a question of law in terms of section 55 of the Ghana Courts Act 1993. By regarding customary law as a question of law, it is presumed that the judges know the law and have a number of tools at its disposal: reported cases,²⁷ textbooks,²⁸ and other sources. These may be used in ascertaining the content of the law just as when a court ascertains the content of the received English common law. Ultimately all the processes a court undergoes when customary law is a question of fact, including the use of the concept of judicial notice, can be deployed by a judge who is uncertain about the content of a customary law. Regarding customary law as a question of law assumes that the tools for ascertaining the content of customary law are readily available in the form of textbooks, law reports, and so forth. When these tools are not available, as is the case presently, there may not be much difference between regarding customary law as a matter of fact and as a matter of law because the discretion of the judge in both instances appears the same. If there were substantial written records of customary law as there is of the received English common law it would be easier for a judge to ascertain the content of an alleged rule of customary law. The oracular nature of customary law therefore makes it imperative that evidence be led to assist the judge's evaluation of the rule. However some difference exists because when customary law is a question of fact the judicial officer is likely to exercise more discretion than when it is a question of law. In practice however this is not the case, especially where a custom has been judicially noticed. If the precedent is set by an appellate court, it may take a while before it is overturned.²⁹ It must be pointed out however that regarding customary law as a question of law is a fitting response to the challenge of respect and equality posed by CFRN 1999

25. See WOODMAN, *supra* note 12.

26. See S.K.B. Asante, *Over a Hundred Years of a National Legal System in Ghana: A Review and Critique*, 31 J. AFR. L. 70 (1987); see also WOODMAN, *supra* note 12, at 46.

27. It should be noted that there a growing number of customary law cases reported in Nigerian and Ghanaian law reports.

28. See WOODMAN, *supra* note 12, at 42 n.22, for a comprehensive list of textbooks. He asserts that Sarbah's *Fanti Customary Law* retains the eminent position.

29. See *Fiaklu v Adjiani* [1972] 2 GLR 209.

and CG 1992. In *Nzekwu v Nzekwu*³⁰ Nnaemeka-Agu JSC brought home the reality of regarding customary law as a question of fact. He said: “It is bad enough that our customary law has to be proved as a fact in our own country nearly thirty years after independence from British rule.”³¹ In *Ugo v Obiekwe* the same judge continued to lament the fact that customary law is a question of fact, calling it an “annoying vestige of colonialism.”³²

A clear effect of the judicial ascertainment of customary law in both countries is the homogenizing tendency of the judgments of common law courts of a significant part of customary law. There is enough evidence to conclude that after superior courts of record ascertain a customary law rule, subsequent courts conveniently forget that it was meant for a particular area. They adopt it as a law for a set of facts irrespective of whether it really represents the customary law of all the ethnic groups. An example is the question of the appointment of a head of a family. For a long while in Nigeria, the case of *Lewis v Bankole*³³ has established that the head of the family is the eldest surviving son of a deceased person³⁴ irrespective of the fact that this may vary from place to place. In Ghana Professor Kludze has demonstrated³⁵ that the Head of Family (Accountability) Law 1985 is legislation which sought to reverse the judicial customary law that the head of a family shall not be accountable. These examples make the conclusion of Professor Woodman plausible that Ghanaian land law is largely the product of judicial customary law.³⁶ The same conclusion can be said to apply to Nigerian land law. Another example of the homogenizing effect of the common law interpretation of customary law in Nigeria is the question of how title passes in customary land law transactions. In disregard of the possibility that rules may vary from place to place, Nigerian courts in a long line of cases—*Ajadi v Olarenwaju*³⁷ *Folarin v Durojaiye*³⁸ *Ewu v Egwu*³⁹ and *Akinterinwa v*

30. (1989) 2 NWLR (pt 104) 373.

31. *Id.* at 428.

32. (1989) 1 NWLR (pt 99) 566, 583.

33. (1908) 1 NLR 81. This decision has been followed in *Olowu v Olowu* (1985) 3 NWLR (pt 13) 372 and *Eyesan v Sanusi* (1984) 1 SCNLR 353.

34. See the case of *Adesanya v Otuewu* [1993] 1 NWLR (pt 270) 414; see also *Otun v Otun* [2004] 14 NWLR (pt 893) 389.

35. See A.K.P. Kludze, *Accountability of the Head of the Family in Ghana: A Statutory Solution in Search of a Problem*, 31 J. AFR. L. 107, 108 (1987).

36. WOODMAN, *supra* note 12.

37. (1969) 1 All NLR 382.

38. (1988) 1 NWLR (pt 70) 351.

39. (1995) 5 NWLR (pt 396).

*Oladunjoye*⁴⁰—have held that land passes as soon as customary rites have been performed and the handing over of the possession of the land in the presence of witnesses. In *Akinterinwa* the Nigerian Supreme Court described the custom as of “universal application throughout Nigeria.”⁴¹

B. Validating Tests of Customary Law

Closely allied to the question of whether customary law is a question of fact or of law is the issue of the validating tests for its application. For a long time customary law in Ghana was subject to a validity test which required that it was not “repugnant to natural justice equity and good conscience.”⁴² By this test it was generally believed that it was the English standards of justice that were applied to assess customary law. But as stated above the test did not last long, even though its legacy is quite evident in Ghanaian legislation and judicial thinking. Thus section 54 Rule 6 of the Courts Act⁴³ empowers courts to achieve results that meet the requirements of justice equity and good conscience. The Courts are also enjoined to apply remedies that appear efficacious and also meet the requirements of equity and good conscience.⁴⁴ Professor Mensa-Bonsu wonders whether there is “a difference between what they are now empowered to do, and what the courts were doing when they applied the repugnancy clause”⁴⁵ and concludes that “this is a distinction without a difference and serves no useful purpose.”⁴⁶ She also draws attention to the uncertainty thrown up by case law⁴⁷ regarding an appropriate external standard to assess customary law and suggests the “re-introduction of the repugnancy clause—or whichever test [is] considered most appropriate by statute.”⁴⁸

In Nigeria three validating tests apply before customary law can be applied. Customary law is to be applied in Nigerian courts if they are not repugnant to natural justice equity and good conscience.⁴⁹ The second

40. [2000] FWLR (pt 10) 1690 (*Akinterinwa*).

41. *Id.* at 1701; *see also Egonu v Egonu* (1978) 11-12 SC 111.

42. *See* § 19 of the Supreme Court Ordinance Act No. 4 of 1876.

43. Courts Act 1993 (Act 459).

44. *See id.* § 54 Rule 7.

45. Mensa-Bonsu, *supra* note 15, at 22.

46. *Id.*

47. This is a representative sample: *Kombiat v Lambim* [1989-90] 1 GLR 324: “Age of Women’s Liberation”; *Republic v Accra New Town District Magistrate Court: Ex parte Papafio* [1969] CC. 53: “Decency Public Morality and Public Policy”; *Asante v Wiredu* [1976] 1 GLR 100: “Common Sense, Equity and Good Conscience”; *Abebreseh v Kaah* [1976] 2 GLR 46 “Natural Justice and Good Conscience in This Day and Age.”

48. Mensa-Bonsu, *supra* note 15, at 22.

49. *See* § 15 of the High Court Law of Bayelsa State, ch. H2 Laws of Bayelsa State 2006.

test is that customary law should not be incompatible with any written law in force from time to time.⁵⁰ The third test is that customary law must not be incompatible with public policy.⁵¹ Of all these tests the repugnancy test is the most widely applied. It has been applied to reject a rule of customary law that allowed the head of house to administer the estate of a former slave.⁵² In *Edet v Essien*⁵³ the court rejected a custom that granted legal paternity to the man who paid the bride price instead of the biological father. In *Chawere v Aihenu*⁵⁴ the customary law rule that an adulterous wife became the wife of an adulterer was repugnant to natural justice equity and good conscience. In *Egri v Uperi*⁵⁵ a customary law rule that required a father to send back the daughter to her estranged husband, even in the face of her stout resistance, was regarded by the Court as repugnant. One of the more recent cases of the application of the doctrine is the case of *Okonkwo v Okagbue*⁵⁶ where the Nigerian Supreme Court held that a custom which allows a woman to be married to a dead man is repugnant to natural justice equity and good conscience. There are also cases of customary law rules that have survived the test. In the Estate of Agboruja⁵⁷ the court applied a rule of customary law that allowed the wife of a deceased person to marry her husband's brother. In *Cole v Akinyele*⁵⁸ the Yoruba rule of legitimacy by acknowledgment was upheld. In *Daudu v Danmole*⁵⁹ the JCPC recognized as valid a Yoruba custom that inheritance should pass to the widows of a deceased person.

There are two broad views of the application of the repugnancy doctrines in Nigeria. On one hand there is opinion that the repugnancy doctrine has been of relative benefit in striking down barbarous customs.⁶⁰ Other opinion points to the disastrous effect of the repugnancy doctrine because the test uses a foreign standard in evaluating the customs of a different people.⁶¹

50. *Id.*

51. § 14(3) of the Evidence Act.

52. See *In re Effiong Okon Ata v Henshaw*, 1930 10 NLR 65.

53. (1932) 11 NLR 47.

54. (1935) 12 NLR 4.

55. (1973) 11 SC 299.

56. [1994] 9 NWLR (pt 368) 301.

57. (1949) 19 NLR 38.

58. 1960 5 FSC 84.

59. 1962 1 All NLR 602.

60. See T.O. Elias, *Towards a Common Law in Nigeria*, in *LAW AND SOCIAL CHANGE IN NIGERIA* 266 (T.O. Elias ed., Univ. of Lagos Press 1972); F.A. Ajayi, *The Interaction of English Law with Customary Law in Western Nigeria*, 4 J. AFR. L. 103 (1960).

61. See the following representative sample: A. UCHEGBU, *THE JURISPRUDENCE OF THE NIGERIAN LEGAL ORDER* 75 (Ecowatch Publ'ns Lagos 2004); A.O. OBILADE, *THE NIGERIAN*

C. *The Development of Customary Law*

This Part examines how Nigerian and Ghanaian courts have developed customary law. A closely related question to the definition of customary law as deriving its authority from the people is whether the courts have the power to develop customary law. If such power exists a related question is the direction of this development. Quite interesting is the fact that it is not in controversy whether Nigerian and Ghanaian legislatures have the power to develop customary law and the received English common law. It is generally assumed that the legislature as representatives of the people can change customary law. The power of the courts to develop customary law is apparently not well settled. The point must be made that if development means change in any respect, the preponderance of the evidence supports the conclusion that common law courts develop customary law as they evaluate and apply the principles of that law. However there still exists a significant opinion in the Nigerian and Ghanaian judiciary that they should not develop customary law. In *Saakyi Mami v Dede Paulina*,⁶² the Ghanaian Supreme Court refused to abolish a custom except in circumstances where it encourages people to commit crimes. The Court recognized that a custom may be changed by parliament, by the President⁶³ or by the people. In *Okonkwo v Okagbue*⁶⁴ the Nigerian Supreme Court also refused to develop a customary law rule of levirate marriage. As stated above there is evidence that the dilution of communal and family land holding in Nigeria and Ghana is attributable to the courts. In *Fayehun v Fadoju*⁶⁵ the Nigerian Supreme Court traced the development of individual interests in land to intense commercial activities.⁶⁶ The position in Ghana is not really different with respect to individualization of interests in land. The case of *Lokko v Konkloff*⁶⁷ is authority for the rule that long uninterrupted occupation by a stool subject transformed the latter's interest into a title adverse to the stool. Professor Agbosu believes that the Chief Justice of Ghana who decided the case was attempting "to engraft onto the traditional schema,

LEGAL SYSTEM 110 (Sweet & Maxwell, London 1979); I.O. Agede, *Repugnancy Clause as an Instrument of Legal Development: Myth or Substance*, in T.O. ELIAS & M.I. JEGEDE, NIGERIAN ESSAYS IN JURISPRUDENCE 407 (MIJ Professional Publishers Ltd. Lagos); B.O. Achimu, *Wanted: A Valid Criterion for Customary Law*, 10 NIGERIAN L.J. 35 (1976); and Y. Aboki, *Are Some Nigerian Customary Law Really Repugnant*, 9-10 ABU L.J. 1 (1991-1992).

62. [2005-2006] GLR 1116.

63. *Id.* at 1123.

64. [1994] 9 NWLR (pt 368) 301.

65. [2000] FWLR (pt 7) 1219.

66. *Id.* at 1229-30.

67. (1907) Ren. 450.

legal expedients and devices which have proven useful in European industrialized countries which he believed were indices of civilization.”⁶⁸ Before this case, absolute communal land holding was the norm. Professor Asante on the other hand asserts that the decision of the Court was based on an empirical examination of the new economic order, pointing to the fact that the judge realized that communal land holding was no longer suitable to an emergent economic order.⁶⁹ Central to the two views is the role of the Chief Justice in effecting a radical change to customary law. The power of the common law judge over customary law is very tempting especially when there is a perceived need to do justice. Professor Asante has highlighted the positive examples of the effect of the received English common law on Ghanaian customary law:

The interaction between customary law and English Law has produced fascinating results in such areas as the application of the equitable doctrine of laches to customary concepts, the supervision of traditional courts and committees by superior courts through the prerogative writs of certiorari, mandamus and prohibition, the injection of the principles of natural justice to the customary legal process and introduction of writing to the traditional judicial process. Customary Law has been enriched by these processes and our courts should be given credit for them. This process of integration should be taken to its logical conclusion by forging one common law of Ghana encompassing the received Law and indigenous law. Our statutes have already shown the way to such integration by providing a mechanism for the declaration of customary principles of sufficiently wide application as part of the general common law of the land.⁷⁰

D. Judicial Reaction to Legislation Abrogating or Amending Customary Law in Ghana and Nigeria

As stated above the inability or reluctance of the courts to develop customary law has led to a recourse to legislation as a means of dealing with the problems that have arisen from the operation of customary law. In Ghana more than Nigeria there are a number of these enactments⁷¹ and the most important appears to be the Intestate Succession Law 1981

68. L.K. Agbosu, *Individualisation of Interests Under the Customary Land Law of Ghana*, 13 & 14 REV. OF GHANA L. 35, 43 (1981-1982).

69. SKB ASANTE, PROPERTY LAW AND THE SOCIAL GOALS IN GHANA 1844-1966 (Accra 1975), *quoted in* Agbosu, *supra* note 68, at 40.

70. Asante, *supra* note 26, at 91.

71. Other legislative intervention include *Head of Family (Accountability) Law 1985 (PNDC Law 114)* which abolished the rule that the head of the family cannot be made accountable for family property entrusted to him. See Kludze, *supra* note 35; *Mortgages (Amendment) Decree (AFRCD 37)* (a law which appears to abolish the customary pledge); E.V.O. Dankwa, *The End of Pledges in Ghana*, 33 J. AFR. L. 185 (1989).

(PNDC Law 111).⁷² This legislation abolishes all customary law rules on intestate succession and institutes a uniform regime for that purpose. In the main the law allows spouses to receive the larger part of the estate of the deceased than obtained under customary law. However the law applies only in cases where the deceased did not make a will and only to self-acquired property of the deceased and not to property of the lineage. Section 3 provides that the spouses are entitled absolutely to the household chattels⁷³ and if the decedent left a house, section 4 of the law enables them to receive the house which they will hold as tenants in common. Other rules govern the distribution if there is only a spouse and no surviving children⁷⁴ or if only children and no surviving spouse.⁷⁵ Section 17 of the law makes it an offence for any person to eject a spouse or child from the matrimonial home, whether the deceased died testate or intestate, before the distribution of the estate. But how has the legislative intervention worked? Can it be said that it has changed the rules in practice? It should not be surprising that there will be serious opposition to legislative changes that seeks to upset customary law that is built on practices and structures that have survived for long.⁷⁶ The point remains that there is new legislation which changes the rules.

In the case of Nigeria the Land Use Act can be considered as the best example of legislation developing customary law. The importance of this legislation is widely acknowledged. For example Professor Allott describes it as revolutionary because it imposed for the first time in Nigeria a common and uniform system of land titles and land control.⁷⁷ Its existence over the past three decades has witnessed considerable resistance and the process of its amendment has just begun. Even before amendments began Nigerian appellate courts dealt a near fatal blow to the provisions of the legislation as it affects customary land tenure. The early judicial interpretation of the Land Use Act held that the Act had

72. See Gordon Woodman, *Ghana Reforms the Law of Intestate Succession*, 29 J. AFR. L. 118 (1985) (“[T]he Intestate Succession Law radically changes the law of inheritance and constitutes the most extensive legislative reform ever made in the private law of Ghana.”).

73. Section 18 defines household chattels as including jewelry, clothes furniture and furnishings, refrigerators, televisions and other electrical appliances, kitchen and laundry equipment, books, motor vehicles other than motor vehicles used wholly for commercial purposes, and household livestock.

74. Section 6 of the Law provides that the spouse inherits one-half of the residue with the parents and the lineage inheriting receiving one fourth.

75. The children inherit three-fourths of the estate and the remaining one-fourth will be divided between the parents and the lineage group.

76. Akua Kuenyehia, *Women Marriage and Intestate Succession in the Context of Legal Pluralism in Africa*, 40 U.C. DAVIS L. REV. 385, 398 (2006).

77. A.N. Allott, *Nigeria: The Land Use Decree, 1978*, 22 J. AFR. L. 136 (1978).

inter alia abolished customary land law. An example is the case of *Akinloye v Oyejide*.⁷⁸ This decision was approved by the Eso JSC in *Nkwocha v Governor of Anambra State*⁷⁹ who stated that “the tenor of that Act as a single piece of legislation is the nationalization of all lands in the country by the vesting of its ownership in the State, leaving the private individuals with an interest in land which is a mere right of occupancy.”⁸⁰ Predictably these cases generated considerable scholarly comment. In support of this point of view especially of the case of *Akinloye v Oyejide*, Professor Agbosu believes that the “ownership rights which had been vested in the customary legal entities such as the village, the community and the family constituted the basis of the contractual or legal nexus between the customary grantee and the grantor. The effect of section 1 of the Act is to sever this connection.”⁸¹ On the other hand Professor Omotola disagreed with the opinion of Eso JSC in *Nkwocha*. He said:

The statement of the learned justice quoted above is confusing. If the Act nationalized land, this suggests state ownership. How can the same Act also leave the individual with an interest in the same land however mere. The truth, of course, is that the Act did not nationalize land in this country.⁸²

Given the considerable opposition to the legislation, it was quite predictable that the Nigerian Supreme Court would be called upon to take a conclusive stand on the import of the legislation. This occurred in *Abioye v Yakubu*⁸³ where a customary tenant claimed that by virtue of the Act his landlord was no longer his customary landlord but tenants of the Local Government by virtue of the Land Use Act. The unanimous Supreme Court held that the Land Use Act did not abolish the customary law governing relationship of customary tenants and customary landlords and that the Act preserved the relationship and the customary tenant was still in a relationship with the customary landlord. It is interesting to note that the Court invited amici curiae to guide her—which did not include any traditional authority—and that their views varied between those who

78. (Unreported). Suit No HCJ/9A/81 of 17th July 1981, *reprinted in* J.A. OMOTOLA, *CASES ON THE LAND USE ACT 149-50* (Univ. of Lagos Press, Lagos, reprinted 1985).

79. (1984) 6 SC 362.

80. *Id.* at 404.

81. L.K. Agbosu, *The Land Use Act and the State of Nigerian Land Law*, 32 J. AFR. L. 1, 13 (1988).

82. J.A. Omotola, *Does the Land Use Act Expropriate*, (1985) 3 J. PRIVATE & PROP. L. 1; J.O Adigun, *Law and Language in Nigeria: The Tyranny of Imported Values*, in *LAW AND DEVELOPMENT* 188 (J.A. Omotola & A.A. Adeogun eds., Lagos Univ. Press); J.F. FEKUMO, *PRINCIPLES OF NIGERIAN CUSTOMARY LAND LAW* 413 (F & F Publishers Port Harcourt 2002).

83. [2001] FWLR (pt 83) 2212.

expressed their opinion that the Land Use Act had abolished customary land tenure and those who voiced a contrary opinion. It was clearly therefore the opinion of the court that had changed and this was also monumental. In fact Belgore JSC observed that because of the decision “the Act which appeared like a volcanic eruption is no more than a slight tremor.”⁸⁴ Clearly the revolutionary import of the legislation was stunted by this and subsequent decisions and it was essentially back to the position of law before the Land Use Act. Even though the merits of the decision are questionable, it remains the fact that customary law survived and the attempt to impose a common system of land tenure, and thus a fundamental principle of the common law, failed. The resilience of customary law needs to be noted just as the decision points to the enormous capacity of the judiciary in this regard.

Our analysis of the two legislations indicates predictable opposition to the legislated changes. In the Ghanaian case, it seems to be the opposition of the people while in the case of Nigeria, it seems to be both but seemingly more pronounced by the judiciary. As stated above opposition to legislative changes are to be expected. It may well mean that entrenched interests within the affected communities are struggling to maintain the status quo. In summary while the Ghanaian judiciary seems quite prepared to uphold legislation designed to abolish customary law rules the same cannot be said of the Nigerian judiciary.

IV. THE CONSTITUTIONAL CHALLENGE OF THE INTERACTION OF THE RECEIVED ENGLISH COMMON LAW AND CUSTOMARY LAW IN GHANA AND NIGERIA

In this Part of the Article I shall examine the nature of the challenge posed by CG 1992 and CFRN 1999. One challenge is whether because of the Constitution the validity tests for customary law should be abolished. Another challenge is how the vision of the country and the legal system will affect the interaction of customary law and received English common law.

A. *The Constitutional Test for Customary Law in Nigeria and Ghana*

The nature of the constitutional design and the cast of relevant sections show clearly that the Constitution is the supreme law and a validating test for all other laws. Section 1(2) of the CG 1992 declares the Constitution to be supreme and other inconsistent laws shall be

84. *Id.* at 2334.

considered invalid to the extent of the inconsistency. So does section 1(3) of the CFRN 1999. Accordingly all law including the received English common law and customary law are subject to the constitution creating a constitutional muster which must be passed by all law before they can be valid. It is arguable that the validity tests are impliedly repealed since they perform the function that the Constitution is better at. In terms of a constitutional test, the most relevant parts of both constitutions are the fundamental human rights provisions. In Ghana the provisions of chapter five of the CG 1992 provide for the fundamental rights and freedoms which are standards by which customary law can be evaluated. Examples of these freedoms and rights include the protection offered spouses by section 22 to their property rights. This constitutional provision is an addition designed to enhance the protection offered by the Intestate Succession Law 1985. Generally under customary law in Ghana, when a man dies intestate his property becomes the property of his matrilineal or patrilineal family, depending on his lineage. Because spouses are not part of a man's lineage, they are not allowed to inherit the property.⁸⁵ Article 22 of the 1992 Constitution has made more far reaching changes than the Intestate Succession Law. The said section provides:

- (1) A spouse shall not be deprived of a reasonable provision out of the estate of a spouse whether or not the spouse died having made a will.
- (2) Parliament shall, as soon as practicable after the coming into force of this Constitution, enact legislation regulating the property rights of spouses.
- (3) With a view to achieving the full realisation of the rights referred to in clause (2) of this article—(a) spouses shall have equal access to property jointly acquired during marriage; (b) assets which are jointly acquired during marriage shall be distributed equitably between the spouses upon dissolution of the marriage.

The import of article 22(1) of the Constitution “goes beyond the context of intestate succession to permit—indeed to require—courts to override a will to provide a reasonable share to a surviving spouse.”⁸⁶ Another example of a constitutional test is provided by the abolition of the practice of Trokosi which is considered as breaching many of the human

85. See E.V.O. Dankwa, *Property Rights of Widows in Their Deceased Husband's Estates*, 16 U.G. L.J. 7 (1982-85); A.K.P. KLUDZE, *MODERN LAW OF SUCCESSION IN GHANA* (Walter de Gruyter Inc. 1988); Akua Kuenyehia, *Women and Family Law in Ghana: An Appraisal of Property Rights of Married Women*, 17 U. GHANA L.J. 72 (1986).

86. See J. Fenrich & T.E. Higgins, *Promise Unfulfilled: Law Culture and Women's Inheritance Rights in Ghana*, 25 *FORDHAM INT'L L.J.* 286 (2001).

rights and freedoms in CG 1992.⁸⁷ The Trokosi system which has been criminalized⁸⁸ is one by which a female usually a virgin is selected to serve in a shrine to atone for the sins of the family. The duties of the girl include working on shrine farm and assisting the priests with rituals. Another specific provision of CG 1992 which can serve as a validating test for customary law is section 39(2) which provides, “The State shall ensure that appropriate customary and cultural values are adapted and developed as an integral part of the growing needs of the society as a whole; and in particular that traditional practices which are injurious to the health and well-being of the person of the person are abolished.” This provision can be viewed as containing two parts. The first part relates to the development of customary law and the second proposition enjoins the State to abolish traditional practices which are injurious. To embark on this exercise is to evaluate and determine which traditional practices are injurious to the health and well being of a person. There is no doubt that the two parts are related but can stand on their own. The State may abolish a traditional practice and refuse to adapt and develop same. Section 39(2) of the CG 1992 was interpreted in *Saakyi Mami v Dede Paulina*⁸⁹ a case in which the Ghanaian Supreme Court abolished the Krobo custom of Fia, wherein a woman who contracts a lawful marriage is disqualified from inheriting any portion of her father’s property because she is regarded as belonging to her husband’s family. If however the daughter had children before getting properly married, those children will be regarded as illegitimate or fatherless and belonging to the daughter’s pre-marriage family and entitled to inherit from the estate of her intestate father but in trust for the illegitimate children.

Nigerian courts have also used chapter four of the 1999 Constitution which provides for civil and political fundamental rights to evaluate customary law. An important right is the right to freedom from discrimination protected by section 42(1) of the CFRN 1999 on the basis

87. See generally E.K. Quasigah, *Religious Freedoms and Vestal Virgins: The Trokosi Practice in Ghana*, 10 AJICL 193 (1998); A.S. Bilyeau, *Trokosi-The Practice of Sexual Slavery in Ghana: Religious and Cultural Freedom vs Human Rights*, 9 IND. INT’L & COMP. L. REV. 457 (1989-99).

88. See The Criminal Code (Amendment) Act 1998 (Act 554) inserted a new Section 314A into the Criminal Code 1960 Act 29. It provides:

Whoever (a) send to or receives at any place any person; (b) participates in or is concerned in any ritual or customary activity in respect of any person with the purpose of subjecting that person to any form of ritual or customary ritual commits an offence and shall be liable on conviction to a term of imprisonment to a term of not less than three years.

89. [2005-2006] GLR 1116.

of belonging to a particular community, ethnic group, sex, religion or political opinion. Gender discrimination has been vigorously challenged as breaching this right. In the celebrated case of *Mojekwu v Mojekwu*⁹⁰ Tobi JCA (as he then was) struck down the Nnewi custom of “oli-ekpe” that discriminated against women, such that daughters of a deceased person cannot inherit his property. This view point was also supported by the Court of Appeal in *Muojekwu v Ejikeme*.⁹¹ Even though the Supreme Court of Nigeria in *Muojekwu v Iwuchukwu*⁹² overruled the decision of Tobi JCA in *Muojekwu* the reasoning of the *Muojekwu* decision has been reaffirmed in the recent case of *Asika v Atuanya*.⁹³ In *Uke v Iro*⁹⁴ an Nnewi custom by which a woman is precluded from giving evidence at a trial was held unconstitutional as it offended the right to freedom from discrimination. Again in *Ukeje v Ukeje*⁹⁵ the Nigerian Court of Appeal held that an Igbo custom that disentitles daughters from participating in the sharing of the estate of their deceased father is unconstitutional because it is discriminatory on grounds of gender. The right to freedom of association protected by § 40 CFRN 1999 has been held as protecting individuals from being coerced into community associations such as age grades.⁹⁶ In *Salubi v Nwariakwu*⁹⁷ the Court of Appeal held that the status of illegitimacy has been abolished by section 39(2) of the 1979 Constitution similar to section 40(2) of CFRN 1999.

B. The Challenge of a National Common Law

It is inevitable that the implementation of the constitutional design in any State will address the nature of the normative system. In a plural post-colonial State it also appears inevitable that a desire for a national law will feature prominently in the design process. The normative system adopted by a country is often a reflection if not significantly influenced by the political system adopted by the country. As noted above Ghana conceives of a common law that is partly constituted by

90. [1997] 7 NWLR (pt 512) 283 (*Muojekwu*).

91. [2000] 5 NWLR (pt 657) 419.

92. [2004] All FWLR (pt 211) 1406.

93. [2004] All FWLR (pt 433) 1293.

94. [2001] 11 NWLR 196.

95. [2001] 27 WRN 142.

96. See the cases of *Agbai v Okagbue* 1997 7 NWLR (pt 204) 391 and *Anigbogu v Uchejigbo* [2002] 10 NWLR (pt 776) 472.

97. [1997] 5 NWLR (pt 504) 459. This case was affirmed by the Supreme Court in *Salubi v Nwariakwu* [3003] ALL FWLR (pt 154) 401. See Y. Osibanjo, *Legitimacy and Illegitimacy Under Nigerian Law*, 14 NIGERIAN J. CONTEMP. L. 30 (1984-1987).

customary law. The prescription of a common law points clearly to a vision of an integrated legal system. A composite examination of CG 1992 shows clearly that Ghana is conceived as a unitary state and that national integration is at the heart of its constitutional design. First section 4(1) of the CG 1992 provides: “The sovereign State of Ghana is a unitary republic consisting of those territories comprised in the regions which immediately before the coming into force of this Constitution existed in Ghana including the territorial sea and air space.” Secondly section 35(2) of the CG 1992 obligates the State to “protect and safeguard the independence unity and territorial integrity of Ghana; and seek the well-being of her citizens.” Thirdly, section 35(5) proclaims the goal of national integration by providing that “The State shall actively promote the integration of the peoples of Ghana and prohibit discrimination and prejudice on the grounds of the place of origin, circumstances of birth, ethnic origin, gender, religion creed or other beliefs.” To ensure national integration, section 35(6)a of CG 1992 requires the State to take appropriate measures to foster a spirit of loyalty to Ghana that overrides sectional, ethnic and other loyalties. Another evidence of legal integration is found in the Cultural Policy of Ghana 2004 which describes Ghana as follows:

Ghana has over 50 ethnic groups whose common values and institutions represent our collective national heritage. Each of these ethnic groups brought together by accident of history, has unique cultural features and traditions that give identity, self-respect and pride to the people. Since independence, the emerging civil society of Ghana has recognised the need to promote unity within this cultural diversity, and Ghana has since enjoyed relative unity, stability and peace.⁹⁸

The fact that a common law is envisaged for Ghana is quite significant. It is even more significant that the Ghana common law is to be made up of the common law, the doctrines of equity, and rules of customary law. A number of observations are pertinent. Even though there appears to be a mandate to fashion a common law from the three sources of law, the manner in which the different sources interact with each other is not obvious. A pertinent question is whether any of the sources of law take precedence over the others? Does the common law and doctrines of equity take precedence over the rules of customary law? Even though all the sources of law should be at par, scholarly opinion draws attention to a hierarchical ordering in section 11 of CG1992 pointing to the fact that

98. Cultural Policy of Ghana 7 (2004), *available at* <http://www.s158663955.websitehome.ghanaculture/privatecontent/File/CULTURAL.%20POLICY%20-20FINAL.pdf>.

the common law and doctrines of equity are superior to customary law.⁹⁹ Some judicial support can also be found. In Amaing alias *Angu v Angu II*¹⁰⁰ Abban JA held that: “Since 1876 the courts of this country have consistently been applying principles of both equity and customary law where the principles are not in conflict. . . . It is only where the customary law is in conflict with equity that the latter would prevail.” There is however no support of this view in CG 1992. Accordingly all the sources of the Ghanaian common law are at par. Another issue of note is whether the Ghanaian common law is a distinct category from the other sources of law. If it is then the sources of law conceived as the common law must mean—given the colonial pedigree of Ghana—the received English Common law as far it has been transplanted into Ghana. There is a certain belief that the Ghanaian judiciary has not done well in adapting the received English law into a Ghanaian common law. Assessing the Ghanaian judiciary, Professor Asante believes that they could have done better.¹⁰¹ Another Ghanaian legal academic states, “What we need in Ghana is not a set of rules for choosing between different systems of law but a framework of guiding principles for progressively developing one system of law generally applicable to everyone.”¹⁰²

A reading of CFRN 1999 does not reveal any clear vision of a national law. There is no mention of a Nigerian common law as there is also no direct recognition of customary law, the received English common law, or Islamic law. Rather the constitutionally recognized judicial structure of Nigeria indirectly recognizes customary and Islamic law. At the trial level there are separate courts for Islamic and customary law while at the appellate level there is a single judicial structure. It is plausible therefore to argue that the constitutional vision of the Nigerian legal system is a compromise between pluralism and integration. This appears consistent with Nigeria’s preferred political arrangement of federalism which is thought appropriate to manage her multi-ethnic and multi-religious constituents. This vision recognizes the existence of the three different systems of law without any deliberate or conscious effort towards integrating them into a Nigerian common law. The CFRN 1999 can be said to reflect this compromise. First an inclination to integration

99. See WILLIAM BURNETT HARVEY, *LAW AND SOCIAL CHANGE IN GHANA* 251 (Princeton, New Jersey: Princeton Univ. Press, 1966) (commenting on a similar provision in the 1960 Constitution).

100. [1984-1986] 1 GLR 309.

101. See Asante, *supra* note 26.

102. Kwamena Bentsi-Enchill, *Choice of Law in Ghana Since 1960*, 8 U. GHANA L.J. 59, 60 (1971).

is found in section 15(2) of the 1999 Constitution which provides that national integration shall be actively encouraged, whilst discrimination on the grounds of place of origin, sex, religion, status, ethnic or linguistic association or ties shall be prohibited. Section 15(4) further provides that the State shall foster a feeling of belonging and of involvement among the various peoples of the Federation, to the end that loyalty to the nation shall override sectional loyalties. Academic commentary in Nigeria is divided on the question of a common law, on the one hand, and the continued existence of the three different systems of law on the other hand. One of the biggest advocate of a Nigerian common law is Judge T.O. Elias who has called for a Nigerian common law to be fashioned out of a synthesis of received English law (including English common law and statutes of general application) and customary law.¹⁰³ Judge Aguda on the other hand suggests that the judiciary should develop a Nigerian common law out of the sources of Nigerian law such as the English common law, applicable English statutes of general application, customary law and Shari'ah law.¹⁰⁴ Allied to the question of integration is the nature of the Court system in the country. Many scholars who favour integration also find it compatible to have an integrated court structure. Some of them however are prepared to accept that this structure should be sensitive to Customary and Islamic law by recognizing structures and expertise in the two systems of law.¹⁰⁵ Many of them of course oppose the existence of parallel courts since it derogates from the project of the Nigerian common law.¹⁰⁶ The reasons for a Nigerian common law are varied. Professor Agbede believes that it will remove uncertainty in the administration and teaching of Nigerian laws, reduce the cost of maintaining parallel systems, quicken the response of the legal system to social change, and remove questions of equality that arise from different persons in a country being subject to different systems of law.¹⁰⁷ Justice Tobi points to the capacity of a unified system to unite and unify a

103. See T.O. ELIAS, *GROUNDWORK OF NIGERIAN LAW* 25 (London: Routledge 1954); Elias, *supra* note 60, at 254.

104. T. Akinola Aguda, *Towards a Nigerian Common Law*, in M.A. AJOMO, *FUNDAMENTALS OF NIGERIAN LAW* 249 (Nigerian Inst. of Advanced Legal Studies Lagos 1989); *The Challenge for Nigerian Law and the Nigerian Lawyer in the Twenty-First Century* (1988) (Nigerian National Merit Award Lecture).

105. See Y. Dinakin, *The Customary and Sharia Court of Appeal of a State Under the 1989 Constitution*, 2(1) JUSTICE 63 (1991).

106. See, e.g., A.N. ANIAGOLU, *THE MAKING OF THE 1999 CONSTITUTION OF NIGERIA* (Spectrum Books 1993); I.O. Agbede, *Legal Pluralism: The Symbiosis of Imported Customary and Religious Laws: Problems and Prospects*, in AJOMO, *supra* note 104, at 235; N. TOBI, *SOURCES OF NIGERIAN LAW* (MIJ Prof'l Publishers Ltd, Lagos 1996).

107. See Agbede, *supra* note 106, at 236, 240-41.

country with much tribal ethnic and cultural proliferation.¹⁰⁸ Those who support a Nigerian common law point to the centrality of the judge in this regard:

If Law is to be permitted to consciously improve the moral as well as the cultural tone of our community as a whole, it seems to follow that the interpreters of the law, that is the judges, must be credited with some power of directing positive laws towards the achievement of that goal.¹⁰⁹

It is important to note that the support for the continued existence of the three different systems of law is indeed strongest among Islamic scholars.¹¹⁰ Many Islamic scholars view Islamic law as divinely ordained and cannot be modified and fused with any other system.¹¹¹ There is a general feeling that adherents of customary law are more likely to yield to a Nigerian common law than Muslims. There are however tentative signs that the use of a single appellate court structure in Nigeria has facilitated a comparison and assertion of the similarity of Islamic and customary law in a way that may facilitate the development of a common law. For example in *Kankia v Maigemu*¹¹² the Nigerian Court of Appeal stated, “Incidentally, the principle of prescription under customary Law is not very different, if not the same from what obtains under Islamic Law.”¹¹³

C. Customary Law or Customary Laws of Ghana and Nigeria

One of the consequences of the constitutional recognition and definition of customary law in Ghana is the fact that it appears that a customary law of Ghana is conceived even though the definition of customary law appears to recognize that there may be as many customary laws as there are communities. Given the constitutional definition of customary law, what exactly is meant by customary law? Does it mean an integrated customary law of Ghana or the customary law of the different communities? That the former may be the intent of the Constitution may be gleaned from section 39(1) of the CG 1992 which provides: “Subject to clause (2) of this article, the State shall take

108. See TOBI, *supra* note 106; see also T. Aguda, *A New Perspective in Law and Justice in Nigeria* 5 (Nat'l Inst. for Policy & Strategic Studies Distinguished Lectures Series, 1985).

109. See Aguda, *supra* note 104.

110. A.H. Yadudu, *Customary Law and the Nigerian State: Policies Dilemmas and Options*, in TOWARDS A RESTATEMENT OF NIGERIAN CUSTOMARY LAW, *supra* note 17, at 70; A.A. Oba, *Lawyers Legal Education and Sharia Courts in Nigeria*, 49 J. LEGAL PLURALISM 113 (2004).

111. See A.A. Oba, *The Administration of Customary Law in the Post-Colonial Nigerian State*, 37 CAMBRIAN L.R. 95 (2006).

112. [2003] 6 NWLR (pt 817) 496.

113. *Id.* at 523.

steps to encourage the integration of appropriate customary values into the fabric of national life through formal and informal education and the conscious introduction of cultural dimensions to relevant aspects of national planning.

Given the political structure of Ghana, there may be an intention to emphasize or point to a Ghanaian customary law. After all, it appears logical that a national customary law is complementary to the project of integration and a national common law. Academic commentary has identified an existing body of Ghanaian customary law. Professor Asante believes that "By a remarkable process of elaboration and refinement the Courts of Ghana have, over the past 100 years transformed heterogeneous bodies of pre-literate traditional law into a common law of well articulated and sophisticated customary principles catering for the needs of a people caught up in the dynamics of an exchange economy."¹¹⁴ He continues in his article:

The purists would deny the existence of any comprehensive system of customary law on the ground that the systems applicable to the various communities and ethnic groups have very little in common. On the other hand, the courts have over the years pursued a policy of gradual integration somewhat in the manner of the royal judges of Norman England, leading to the evolution of principles which they have proclaimed to be of universal application in the country. In doing so they have relied substantially on the pronouncement of Sarbah which they tended to extend indiscriminately to other communities. This development may have produced some bizarre results in some cases, but on the whole, it is to be welcomed as salutary exercise in national unification and sophisticated legal growth.¹¹⁵

In Nigeria too there is evidence, as discussed above, that the courts have constituted a body of Nigerian customary law by the process of ascertainment of customary law judicial notice and judicial precedent. The example which we have considered above is the manner of passing interest in customary land tenure. Another example is the development of principles of customary arbitration. When the Nigerian Supreme Court in *Agu v Ikewibe*¹¹⁶ enunciated the requirements of customary arbitration it was in fact creating a principle of Nigerian customary law. A reading of the relevant cases reveals significant differences in the procedure of customary law of different communities in Nigeria¹¹⁷ which

114. Asante, *supra* note 26, at 83.

115. *Id.* at 88.

116. (1991) 3 NWLR (pt 180) 385.

117. See E.S. Nwauche, *Customary Law Arbitration and Customary Arbitration in Nigeria*, 3 NIGERIAN L. & PRAC. J. 63 (1999).

is largely obscured by the principles in *Agu v Ikewibe* and subsequent cases.¹¹⁸

Dealing with the effects of the oral nature of customary law is crucial to the development of a national customary law. It appears essential that customary law should be reduced into writing as the fundamental basis of further scientific inquiry. It will aid the process of comparison and analysis. One option in this regard is restatement and codification which is regarded as important in both countries even if there is nothing much going on in the two countries. In Ghana, one of the duties of the Chieftancy Institution is in respect of customary law. Part VII of the Chieftancy Act 1971¹¹⁹ charges the National House of Chiefs to undertake the progressive study, interpretation and codification of customary law with a view to evolving in appropriate cases, a unified system of rules of customary law;¹²⁰ to declare any customary law rule relating to any subject in force in any region;¹²¹ to alter customary law;¹²² and the assimilation of customary law by the common law.¹²³ This power was affirmed in *Saakyi Mami v Dede Paulina*¹²⁴ where the Court noted that these processes become legislative instruments when the President issues the deliberations of the Council of Chiefs after consultations with the Chief Justice under sections 42(3) and 43(3) of the Act. In Nigeria different Chiefs Law permit the making of Chieftancy Declarations which have been held by the Nigerian Supreme Court as amounting to codification of customary law in the cases of *Adefulu v Oyesile*¹²⁵ and *Oredoyin v Arowolo*.¹²⁶ It should be noted that the Supreme Court merely echoed the legislative intent permitting such codification and its effect. In *Ugo v Obiekwe*¹²⁷ Nnaemeka-Agu JSC gave what is up till today the highest judicial support for codification. He said:

118. See, e.g., *Ohiaeri v Akabeze* [1992] 2 NWLR (pt 221) 1; *Egesimbe v Egesimbe* [2002] 15 NWLR (pt 791) 466; *Eke v Okwaranya* [2001] 12 NWLR (pt 726) 181; see also G. Elombi, *Customary Arbitration: A Ghanaian Trend Reversed in Nigeria*, 5 AFR. J. INT'L & COMP. L. 803 (1993); G.N. Ezejiofor, *The Prerequisites of Customary Arbitration*, 16 J. PRIVATE & PROP. L. 19 (1992-1993).

119. Act 370. See generally N.A. Ollenu, *Chieftancy Under the Law*, in ESSAYS IN GHANAIAN LAW 38 (W.C. Ekow Daniels & G.R. Woodman eds., Faculty of Law Univ. of Ghana 1976).

120. See Chieftancy Act 1971 § 40.

121. *Id.* § 42.

122. *Id.* § 43.

123. *Id.* § 45.

124. [2005-2006] GLR 1116, 1123.

125. (1989) 5 NWLR (pt 122) 272.

126. (1989) 4 NWLR (pt 114) 172.

127. (1989) 1 NWLR (pt 99) 566.

Much as I agree with those who believe that codification will have the effect of stultifying customary law and inhabiting its growth, I believe that something can be done to rescue it from the fluttering uncertainty and contemptible inferior status to which it is now subjected. A machinery can be set up to ascertain and record these customs from elders and pundits of customary law at the community level, outside the twisting vagaries of litigation—an exercise that was successfully carried out in East Central State (now Imo and Anambra State) between 1972 and 1976. . . . In those two States all that is missing is an enabling legislation, which will empower the courts to apply them. I am of the view that if the other states of the federation follow suit, it will be possible to give customary law in our country its rightful place and status.¹²⁸

Beyond this legislative remit, there is reluctance to engage in codification in the two countries. A number of reasons are usually offered in such opposition. First, codification is said to be premature as many customary law rules are undergoing adaptation and modification to adapt to modern conditions.¹²⁹ Secondly it is cautioned that codification may result in a wrong deduction of principles given the process of rationalisation of numerous rules and the difficulty of capturing the processes of customary law, leading to an official customary law and a judicial customary law.¹³⁰ It is also contended that in a multi-ethnic and multi-religious state as Nigeria with a huge number of customary law codification will be a difficult process. Evidence from Nigeria and Ghana reveal that no organized form of codification has taken place in the two countries. Without a written form of customary law it is easy to understand why the process of constituting a national common law in both countries is not considered important or ongoing. Even if it is not for the process of a national common law or a national customary law it is important for customary law to be reduced into writing in the form of restatement manuals etc for many reasons including an important one of making meaning of the fact that customary law is a matter of law.

V. CONCLUDING REMARKS

Our analysis in the preceding Parts can yield a number of conclusions that reflect the constitutional challenge of the integration and interaction of customary law and the received English common law in

128. *Id.* at 583-84; see E. Azinge, *Codification of Customary Law—A Mission Impossible*, in TOWARDS A RESTATEMENT OF NIGERIAN CUSTOMARY LAW, *supra* note 17, at 275.

129. See M. Odje, *The Repugnancy Doctrine and the Proper Development of Customary Law in Nigeria*, in TOWARDS A RESTATEMENT OF NIGERIAN CUSTOMARY LAW, *supra* note 17, at 25, 37.

130. *Id.*

Nigeria and Ghana. The first challenge is to undertake a massive assignment of reducing customary law to writing in a way that captures its values and spirit. The second challenge is to use only the spirit and letters of the CG 1992 and CFRN 1999 as the only validating test for all other laws including customary law and the received English common law. The third challenge is to remember that customary law is law because it is accepted as binding by the people and that its interpretation and growth should be outside the homogenizing tendencies of the common law and its principles of judicial precedent and judicial notice. Even though there are certain rules of customary law of the different ethnic communities and groups in Nigeria and Ghana that are similar, care should be exercised that this is not the result of the judgments of common law court but empirical conclusions arrived at from available evidence. In this way a national customary law may develop. The fourth challenge is that both countries need a national law that should reflect their multi-ethnic and religious make up. To this end adequate concrete steps should be deployed to realize the constitutional vision. It is evident that the existing normative systems of both countries are lacking in dealing with the numerous problems of a plural legal legacy which include the resolution and reconciliation of the relationship between the individual and communal ethos in their human rights regime especially the dominance of patriarchy and gender discrimination; the promotion and protection of socio-economic rights; an appropriate balance between public and private interests; the means of constraining a post colonial State with excessive powers concentrated in the executive; a time-consuming expensive and alienating administration of justice framework; and an relative absence of the values of compassion dignity freedom equality and empathy as fundamentals of the legal order. Meeting the constitutional challenges is directly linked to the ability of the Nigerian and Ghanaian legal systems to contribute effectively to the development of their countries. Difficult as it is, the process of a genuine national normative framework must start with the sustained scientific inquiry into customary law and that is not possible as long as it is an oral system of law.