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Supreme Court Centenary

Essays in Ghanaian Law

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and

G. R. Woodman

FOREWORD BY

HIS LORDSHIP S. AZU CRABBE
CHIEF JUSTICE OF GHANA
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Foreword

A centenary is always a good opportunity for a survey in retrospect, but when such a survey is made by the celebrants themselves, they run a risk of appearing to be patting themselves on the back. There is no doubt that, initially at least, this collection of essays—in every sense of the word, a festchrift—will be scrutinized by the reader with this reservation at the back of his mind.

It is good to be able to say that by a happy consensus of approach, the contributors to this collection have succeeded in informing and commenting without falling into the trap of saying of themselves and of their profession: "What a marvellous job we have done."

And yet the profession—and the law (all of it received as well as locally-developed)—have done, in this past century, a marvellous job of work, and, looking back upon it all, the one thing that can be said with conviction is that the main problem of reception of the common law into this society, has been fully solved. And how it has been solved is the story these essays have to tell.

It is, for us in Ghana, a story that makes us proud, and for that reason alone, it would have been worth telling. But I believe it is also of some historical significance in the general scheme of world legal history. For what we are celebrating here happens but rarely, and may be truly said to have its counterparts in such landmarks in world history as the reception of Roman law in continental Europe, in the much more diffuse impact of the same system of law on English law in its formative years, and, more recently, in the encounter of the common law with the great and ancient legal traditions of the orient.

The facts of these past great encounters have always fascinated legal science in its search for the roots of present doctrine. But they are ancient facts, hard to identify and difficult, when identified, to evaluate and analyse.

The importance of the Ghanaian experience to legal history lies in the fact that here the facts are fully documented and fully fresh; and, even more important, have been consciously acknowledged in the welding of the various systems of law,—the African law, the common law and Islamic law—that make up our system today. And it is such facts that are the subject of rich and extensive comment in this festal symposium.

The story is by no means ended, and therefore what is observed, recorded, and commented upon here need not necessarily have any final conclusions. But the physicists of this century tell us that even the
Foreword

act of observation can alter the nature of the thing observed, and that thought prompts the hope that the future may be beneficially conditioned by our observations at this punctuation point in our legal history. If so, these essays should be more than just a festschrift, and their value and significance that much more enhanced.

On behalf of the Judicial Service, I congratulate the editors and contributors on their co-operative effort to provide a lasting monument to the celebration of one hundred years' achievement by the Supreme Court.

S. AZU CRABBÉ
The decision by the Faculty of Law of the University of Ghana to publish these essays was in response to the announcement by the Judicial Service to commemorate the Centenary of the creation of the Supreme Court of Judicature in a befitting manner. It was, however, not the only reason for producing this book. The occasion also marks just over a century of the reception of English law into this country. For the Courts Ordinance of 1876 which established the Supreme Court also prescribed the law to be administered within its jurisdiction. In sum, it was to apply the English common law, the doctrines of equity and the statutes of general application in force in England on the 24th day of July 1874. The court was also enjoined to observe and enforce the observance of customary law under certain defined circumstances. The task of deciding the extent to which English law or customary law should govern a particular cause or matter was left to the judges.

For over half a century the court was dominated by expatriate judges. Most of them were reasonable in their interpretation of the law, but some of them were unmindful of the cardinal principle re-echoed by Lord Denning, Master of the Rolls of the English Court of Appeal, that the English “common law cannot be applied in a foreign land without considerable qualification.” The attainment of independence in 1957 marked the beginning of a new approach to the application of the received law as well as the indigenous. Since the First Republic in 1960 the judiciary has been manned wholly by Ghanaian judges.

The celebration of the Centenary of the Supreme Court therefore furnishes a propitious occasion to undertake a review of the laws which have been applied by our courts to do justice between the state and the individual and between man and his neighbour.

The essays are varied in content and style. All the authors have been associated one time or another with the Faculty of Law in its teaching, research and examination programmes. We hope that through the pages of this book we have made some contribution to the development of jurisprudence in this country.

We pay a special tribute to his Lordship Justice Samuel Azu Crabbe, Chief Justice of Ghana, who kindly agreed to write the Foreword and also to arrange the requisite financial assistance.

It will be an impossible task to mention all the persons who in their various capacities have helped with the publication. However it is
right and proper that we should record our inestimable appreciation to the Printing Division of the Ghana Publishing Corporation of Accra and Tema for their excellent services. A somewhat messy manuscript was submitted in March this year. Six months later the book was ready for binding. Few printers can match this record without running the risk of a few printing mistakes. Finally we owe a special debt of gratitude to Mrs. Janet Daniels, Editor, *Review of Ghana Law*, who inter alia supervised the work at every stage of printing and publication. The defects that remain are responsibility of the editors and contributors.

W. C. E. D.

G. R. W.

*Legon, September 1976*
THE SUPREME COURT, A HUNDRED YEARS AGO

A. N. E. AMISSAH*

On 31 March 1876, the Supreme Court Ordinance1 was enacted by the Governor of the Gold Coast Colony, by and with the advice and consent of the Legislative Council thereof.2 It was entitled “An Ordinance for the Constitution of a Supreme Court, and for other purposes relating to the Administration of Justice.” The preamble to the Ordinance explained that, “Whereas by Letters Patent under the Great Seal of the United Kingdom of Great Britain and Ireland, bearing date the 24th day of July, 1874, Her Majesty’s Settlements on the Gold Coast and of Lagos were constituted and erected into one Colony, under the title of the Gold Coast Colony; And whereas it is expedient to make provision for the administration of justice in the said Colony,” so the Ordinance was enacted. The Ordinance, however, for reasons to be given later, was not brought into operation until 4 April 1877. Thus strictly, 1976 is the centenary, not of the Supreme Court, but of the enactment of the Ordinance establishing it.

It is necessary at the outset to remind ourselves of one or two things. First the Gold Coast Colony of a hundred years ago for which the Supreme Court was created was not co-extensive with the Ghana of today. As the preamble indicates it was the British Settlements which were constituted into a Colony. That Colony formed only a small fraction of what Ghana is today. But it also included territory, namely Lagos settlement, which is no more part of Ghana. The exact extent of the Colony was undefined. “In 1874,” says one writer3 “the Gold Coast had consisted of several scattered Forts and Settlements along the coast, with a largely undefined sphere of influence stretching towards Ashanti.” The extent of the sphere of influence was the Protectorate, the Colony proper formed by the castles and forts on the coast together with some ill-defined contiguous areas around them. And it was for this Colony that the Supreme Court was established in 1876. Before the Ordinance was passed, a chief magistrate had administered justice within the forts and settlements, and a judicial assessor had sat mainly on appeals from decisions of the kings and chiefs in the Protectorate and contiguous zone. This jurisdiction of the judicial

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* M.A.; Justice of the Court of Appeal.
1 No. 4 of 1876 (hereafter referred to as “the Ordinance”).
2 See the Preamble.
3 Kimble, David, A Political History of Ghana, p. 301.
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The assessor had been increasing in geographical area with the increase in the popularity of the judicial assessor. The office of chief magistrate and judicial assessor was normally combined in one man. The Supreme Court was to replace this arrangement.

The need for a Supreme Court

Why was the court established some two years after the constitution of the Colony? The constitution of the Colony was an act of the Imperial Government. The Colony was to have its legislature to take care of its needs. In a major policy speech made to the House of Lords by the Earl of Carnarvon, the British Secretary of State for the Colonies at the time, he described the state of the law prevailing in the Settlements before the legislature was established and the improvements that would flow from its institution. The English law had been applied "in all its technicalities and in all subtle processes." It was, he felt "a mistake, and almost an absurdity, to apply to negroes the English law of bankruptcy." This was greeted with cheers and a laugh. He looked forward to "a great simplification of this and other branches of law on the Gold Coast." But whereas the Constitution of the Colony and the establishment of the legislature was an act of the Imperial Government effected by Letters Patent, it was envisaged that the Supreme Court be established by the local legislature. By despatch dated 3 July 1874, Lord Carnarvon addressed the Officer Administering the Government of the Gold Coast on the general question of the administration of justice. The despatch dealt with the laws which the colonial power considered essential to lay down as the basis of administration. It did not deal with the machinery for their administration. But as courts are established to administer laws, it is of interest to find out what sort of subject was to be the concern of the courts in the Gold Coast. The despatch was as follows:

"When the Gold Coast Colony has been established, one of the first and most important duties that will devolve upon you in conjunction with the new Queen's Advocate, will be to revise the existing laws of the Settlements with a view to frame one simple body of Laws for the whole Colony.

His attention should in the first instance be directed to the preparation of Laws affecting the administration of justice. and, as at present advised, I should suppose that it will be found practicable to adopt, with the necessary alterations to suit the special circumstances and relations of the Colony, the Straits Settlements Penal Code of 1871 (as amended by Ordinance No. 3 of 1872)

Speech by the Earl of Carnarvon, House of Lords, 12 May 1874.
Gold Coast (hereafter denoted "G.C.") No. 106, paragraphs 15-18.
which is based upon the Indian Penal Code, and the Straits Settlements Criminal Procedure Ordinance No. 6 of 1873. With respect to Civil Causes, it may be desirable to adopt the Code of Procedure lately passed at Hong Kong (Ordinance 13 of 1873) which so far as I am aware has given entire satisfaction in that Colony. The Indian Evidence Act of 1872 will probably be found useful as embodying certain Rules of Evidence applicable both to Civil and Criminal cases.

I abstain at the present time from referring to other subjects which will have to be dealt with, and upon which the Laws require consolidation and simplification, but the Customs and Revenue Laws, and Law of Insolvency and imprisonment for debt seem to me to require a very early attention.

You will understand that these remarks apply to British territory only, and not to the Protected Territories, but I have it under consideration whether the time has not arrived for entrusting the Legislative Council with authority to exercise and give effect by Ordinance to such jurisdiction as Her Majesty may have under the Foreign Jurisdiction Act (6 & 7 Vict. c. 94) in the last mentioned Territories. These powers as you are aware, are now only partially exercised by the Judicial Assessor under the Order in Council of April 1856."

The immediate concern, therefore, was with the criminal law and its administration, obviously to ensure the orderly political administration of the territory, and on the civil side, with revenue laws to generate and regulate the necessary funds for that administration. The only laws of a non-public nature mentioned are in respect of insolvency and imprisonment for debt which are matters of importance to a nation protecting the interests of businessmen and traders in the colonies.

What form it was hoped the machinery to administer justice in the Colony would take was outlined in Lord Carnarvon's policy speech. His views on this and on the jury system in the Gold Coast were as follows:

"As regards the administration of justice, changes will, of course, be necessary. At this moment there is on the Gold Coast no Court of Appeal, no Public Prosecutor, and only one judge. Now I propose to have one Chief Justice for the two settlements, one Chief Magistrate or Judge resident at each settlement, but applicable to either, and one Queen's Advocate or Public Prosecutor. Besides that, I hope to extend, as far as possible, the principle of separate administration. There are many cases where it is easier to bring a tribunal to the persons interested than it is to bring the persons interested to a tribunal, and this was the principle
we adopted in re-organising Jamaica. Besides that, I am bound to say that I entertain very considerable doubts as to whether the jury system ought to go on without some material modification. (Hear, hear.) Though it is the palladium of English liberty, I doubt whether it is essential to liberty on the Gold Coast. It seems to be true that Gold Coast juries, partly through tribal jealousies and partly through interested motives, cannot be thoroughly entrusted with the adjudication of the cases which are brought before them."

British policy on the administration of justice was further elaborated in a despatch from Lord Carnarvon to the first Governor of the Colony after it acquired its new status, G. C. Strahan. In both the Settlements of the Gold Coast and in Lagos though the English law had been the basis of the system of justice administered by the courts, the local enactments had been diverse. Those laws, he said, should remain in force until altered,

"... but you will make it an object of policy, whilst retaining the principles of the Laws of England as the general rule under which Justice is to be administered, to provide for the supercession of the present heterogeneous and defective Legislation of the two extinct Legislatures by Laws which shall be as far as possible uniform, simple and complete. And it will further be an object of policy to amalgamate the Judicial systems of the two Settlements in subordination to a single Supreme Court, with provisions forAdministering Justice as far as possible at convenient places in each District.

It may probably also be found desirable to confer on this Court the Jurisdiction of the Judicial Assessor's Court at the Gold Coast, so as to avoid confusion which may arise from a multiplication of Jurisdictions."

The drafting of the Ordinance

The task of drafting the Supreme Court Ordinance fell upon David Chalmers, who until July 1874, had been Queen's Advocate of Sierra Leone. Realising that the establishment of a separate Colony of the Gold Coast would lead to the creation of a separate court with its own Chief Justice, Chalmers had applied for that post. No appointment could of course be made to the post until the constitution of the court. But by a stroke of luck James Marshall who was then chief magistrate and judicial assessor, the only judge in the Gold Coast referred to by Lord Carnarvon in his House of Lords speech in May 1874, had asked

7 Despatch from Carnarvon to Strahan, dated 28 August 1874 (G.C. No. 160) paragraphs 5 and 6.
8 Despatch from Robert W. Herbert on behalf of Lord Carnarvon to the Officer Administering the Government of the Gold Coast Colony (G.C. No. 129).
for six months' leave of absence due to ill-health. The Secretary of State in the circumstance "thought it right not to delay placing the services of Mr. Chalmers at [the Governor's] disposal." Accordingly he directed Chalmers to proceed to the Gold Coast at once with the title of Queen's Advocate at a salary of £1,800 a year. As Chalmers had been Queen's Advocate of Sierra Leone, the older and premier British Colony in West Africa at the time, his appointment as Queen's Advocate of the Gold Coast would on the face of it appear to be a demotion of some sort. But the choice of title was obviously something convenient that the Colonial administration could readily lay hands on. Besides it was to lead to greater things. The office of Queen's Advocate did not require legislative sanction. The Governor was left to judge in what capacity Chalmers' services had better at that time be rendered. It was even suggested that during Marshall's absence it might be best to appoint Chalmers acting chief magistrate. As it turned out Chalmers performed the services of both judge and legal adviser to the Government during the time that the Supreme Court Ordinance was in preparation. And it was due in no small measure to the pressure of work upon him that the constitution of the court was delayed.

The instructions for the drafting of the legislation on the courts were contained in a despatch from Lord Carnarvon to Governor Strahan dated 16 April 1875. The relevant parts, though long, are both important and interesting enough to warrant reproduction. They read as follows:

"An Ordinance should be submitted to your Council creating a Supreme Court for the Gold Coast and Lagos and for the Gold Coast Protectorate . . . With respect to the legal jurisdiction of the Supreme Court, it might be well that the Ordinance should enact that the Court shall have the same jurisdiction as Her Majesty's Courts of Queens Bench, Common Pleas and Exchequer, have in England, and shall be a Court of Oyer and Terminer, and Gaol Delivery, Assize and Nisi Prius—and that it should also have the same jurisdiction as Her Majesty's Courts of Equity in England, with all powers and authorities of the Lord Chancellor as to the appointment and control of Guardians of Infants and Committees of Lunatics and their Estates.

The Court should also be empowered to exercise the same Jurisdiction as Her Majesty's Court of Probate, and (if it should

9 Ibid.
10 See despatch from Governor Strahan to Lord Carnarvon dated 10 July 1875 (G.C. No. 154): "5. With reference to the first paragraph of Mr. Chalmers' letter it is just to that Officer that I should state that the calls upon his time from varied duties have been and are such that it is not to me a matter of surprise that the Ordinances for the Organisation of the Courts are not as yet completed."
be considered desirable) to exercise the same jurisdiction as Her Majesty's Court of Divorce and Matrimonial Causes. A jurisdiction in Bankruptcy or Insolvency should be conferred upon the Court by a separate Ordinance, the provisions of which might be specially framed with reference to local circumstances.

The Courts should consist of a Chief Justice and two Puisne Judges—one of the Puisne Judges residing generally on the Gold Coast and the other generally at Lagos; the Chief Justice . . . moving from post to post as the business of the Courts or the necessities of the public service might require . . . The Court should have power to appoint any Magistrate or Commandant to be in his district a Commissioner of the Court."

Then followed a part of the despatch showing what the expectations of the British Government of the proposed court were. In relation to the jurisdiction of the traditional rulers, this part must have contributed in no small measure to the confusion and the prolonged debate over whether the establishment of the Supreme Court extinguished the jurisdiction of the traditional rulers which therefore had to be re-conferred if wanted at all by the colonial administration. That part of Lord Carnarvon's despatch is as follows:

"When the Supreme Court is established I should hope that its influence might be so widely extended as to supersede in most districts of the Protectorate the courts of the native kings which are in themselves open to grave objections, and which, in view of the present policy towards the native rulers, there is no political reason to encourage. The natives do not place a high value on time, and those living at a moderate distance from the coast would probably repair for justice to the nearest Magisterial Post on the sea-coast. With British magistrates at the several British ports from Axim to Quittah, I should hope that British justice might be effectually made accessible to the people of Apollonia, the two Wassaws, Elmina, Denkera, Fanti, Abrah, Aquapim, Adampe, and the Ahuna country between the lagoon and the sea. If the sanatorium is established at Akropong, justice might be administered by British magistrates to the people of Croboe and the neighbouring country.

Wherever the Colonial Courts can be made to meet the requirements of the people of any district, I should, as I have intimated, be prepared for suppression of the native courts of that district. Understanding always this to be done prudently and with proper regard to existing circumstances and considerations, where this cannot be effected the native courts should be regulated on the principles . . . [of] the Memorandum on slavery and the
Jurisdiction of the Judicial Assessor, which I forwarded to you confidentially in my despatch of the 6th of November."

The policy of the British government at this stage was clearly to exclude the jurisdiction of the traditional courts in the areas where the colonial courts created by the proposed Ordinance would be established and to retain, but only as long as it was necessary, the jurisdiction of the native courts in those areas where the colonial courts could not for the time being be established. As it turned out things did not work out that way. But as pointed out earlier for years to come controversy raged as to whether the jurisdiction of the traditional courts which were retained side by side with the colonial courts was derivative from the British power or inherent.

Turning then to substantive and procedural matters which the proposed Ordinance had to deal with Lord Carnarvon instructed:

"With regard to the substantive system of law to be administered in the court, the Ordinance should lay down for its guidance that all civil and criminal jurisdiction in the Colony should be exercised, so far as circumstances permit and subject to local legislation, upon the principles of and in conformity with the common law, the rules of equity and the statutes of general application in force in England at the date of the Colonial Charter. As regards natives who have not adopted the usages of civilization and Christian life, native law and custom, as declared by the kings and chiefs sitting with the Judges as their assessors, should prevail if not contrary to natural equity and right, especially with respect to the laws of marriage, of testamentary dispositions and inheritance, and of tenure, transfer and devolution of property. In cases between natives and Europeans, where it may appear to the Court that substantive injustice would be done to either party by a strict adherence to the rules of English law, native laws and customs should be considered and the principles of natural equity and good conscience should be applied.

[Procedure should be as simple as possible. Sample colonial acts are enclosed for guidance.] . . . In furnishing you with codes which recognise and regulate a system of Trial by Jury, I do not, of course, wish to be understood as desiring to revive the practice of Trial by Jury in civil cases on the Gold Coast, though I consider that the judges may usefully continue, when trying cases between natives involving native custom, to associate with themselves the intelligent native chiefs of the district.

The question of Trial by Jury in criminal cases presents a somewhat difficult question. A jury composed of either white men or black men would each be open to objections of its own,
especially when trying a prisoner of a different colour. In the Judicial Assessor's Court there has never been any system of Trial by Jury, and as the new Court must in a large measure be regarded as succeeding to the jurisdiction of the Assessor's Court, there might seem the less necessity to establish Jury Trial, were it not for the fact that, as stated by Mr. Chalmers, that of late years a practice has grown up of transferring important criminal cases arising in the Protectorate for trial in the Court of the British Settlement where the system of Jury Trial prevails. On the whole, and looking to the very peculiar state of circumstances and the Society in the Colony, I should be inclined to confine trial by jury to capital cases. Perhaps the system in force in India for the trial of natives by the Court with the aid of assessors, might be adopted with advantage, and you will observe that the drafts of a Criminal Procedure Ordinance which I enclose, and which was lately prepared for Fiji, contains clauses providing for this mode of trial...

[Appeals to Sierra Leone will cease as soon as the new Supreme Court is established.]"

With these instructions Chalmers accordingly drafted the Supreme Court Ordinance together with the Interpretation Ordinance and the Criminal Procedure Ordinance. For this he had very high praise from the Secretary of State for the Colonies, who nevertheless made some suggestions for improvements. When the Supreme Court Ordinance was enacted on 31 March 1876, it was anticipated by the Gold Coast Government that it and the Criminal Procedure Ordinance would not come into force until a sufficient number of copies of the enactments had been made available in the Colony. Upon the advice of Chalmers, the Ordinances were brought into force on 4 April 1877 and this fact was promulgated by a Proclamation which was published on 22 January 1877. Apparently the Colonial Office was not made aware of the reasons for the delay. As late as the middle of May 1877 they were not abreast with what was happening. Evidence of this is given by an irate despatch sent by the Secretary of State on 16 May 1877 to the Governor asking why the Ordinance had not yet been brought into force. Of course, by the time this despatch was written and long before it was received in the Gold Coast, the Supreme Court Ordinance

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11 Despatch from Carnarvon to Strahan dated 16 February 1876 (G.C. No. 209); "2. I may express at once my high appreciation of the laborious diligence and mastery of a complex subject which I have considered in conjunction with his full and careful report."
12 Ibid. paras. 26–28. The printing was done in England.
13 Despatch from Governor Freeling to Lord Carnarvon dated 14 June 1877 (G.C. No. 58).
14 Despatch from Carnarvon to Freeling dated 16 May 1877 (G.C. No. 444).
The Supreme Court, 1876

had already been brought into operation. Governor Freeling, who had since the establishment of the Colony succeeded Strahan, replied giving the reasons for the delay. Chalmers had advised for several reasons that the Supreme Court and the Criminal Procedure Ordinances should be brought into operation on 4 April 1877. One of the reasons was that sufficient time ought to be allowed to enable district commissioners and others to make themselves thoroughly acquainted with the provisions of the Ordinances before they came into operation. Another was the insufficiency of the copies of the Ordinance which had arrived even by January 1877, the bulk of them together with the necessary judicial forms arriving much later. The printing of the laws for the Gold Coast at the time had to be done in England.

The first judicial appointments

An examination of the Supreme Court Ordinance shows that it began in its substantive provision with the formal establishment of the court. The Supreme Court so established was not only a final appellate tribunal as known in modern times. The system created consisted of two tiers of courts rolled up in one. There was first a trial court equivalent of the High Court of today. This court was presided over by a single judge or, in some cases, two judges. Appeals from the High Court lay to a Full Court consisting of two or more of the judges who ordinarily sat in the trial court. Both levels of the court so established together formed the Supreme Court. The formal establishment of the court was followed by provisions on its constitution which stated that it consisted of the Chief Justice of the Gold Coast Colony and so many puisne judges not exceeding four in number at any one time as the Governor might from time to time appoint in accordance with instructions received from Her Majesty. It also included the Chief Justice and every judge of the Supreme Court of the Colony of Lagos.

David Chalmers was duly appointed Chief Justice of the Gold Coast. The first information of the intention of the Colonial Office so to appoint him was given by Lord Carnarvon in a despatch dated 27 April 1876 by which the Secretary of State acquainted the Lieutenant Governor of the appointment of Mr. Thomas Woodcock, “a Barrister of high standing and recognised ability now practising at the Leeward Islands Bar,” as Queen’s Advocate of the Gold Coast Colony in

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15 Despatch from Freeling to Carnarvon dated 14 June 1877 (G.C. No. 158). A few copies of the Ordinance arrived on 7 January, the remainder on 11 March and the judicial forms on 24 April 1877.
16 Ordinance, s. 3.
17 Ordinance, s. 4. The appointment of puisne judges by the Governor was by letters patent under the seal of the Colony.
18 Ibid.
succession to Chalmers. The despatch went on, “Upon the passing of the Supreme Court Acts, [sic] I am prepared to advise Her Majesty to appoint Mr. Chalmers to the post of Chief Justice of the Gold Coast Colony, when Mr. Woodcock will succeed him as Queen’s Advocate, at the above mentioned salary of £1000.” Before his appointment was formalised Chalmers was knighted. A despatch dated 11 August 1876 from Lord Carnarvon informed Lieutenant Governor Lees “that the Queen, on my recommendation, has been graciously pleased to confer the Honour of Knighthood on Mr. David Patrick Chalmers, Her Majesty’s Advocate for the Gold Coast Colony in recognition of his very valuable Judicial Services to the West Coast of Africa.”

Subsequently, on 2 December 1876 the letter was despatched announcing the first appointments of judges of the Supreme Court of the Gold Coast. It states:

> “Her Majesty has been pleased to appoint Sir David Chalmers to be Chief Justice of the Supreme Court at a salary of £1800 a year; and Mr. James Marshall to be a Puisne Judge at a salary of £1000 a year, and Mr. Thomas W. Jackson, lately Chief Magistrate of the Gambia to be also a Puisne Judge, but at a salary of £900 per annum.

The necessary Warrants for these appointments will be forwarded to you in due course, and you will take care to date the Letters Patent to Mr. Marshall earlier than those to Mr. Jackson, so as to prevent any question arising as to their relative rank.”

From this it would appear that Chalmers was to earn no more as Chief Justice than he earned as Queen’s Advocate. Having regard to the fact that his successor was put on a salary of £1,000 per annum instead of the £1,800 which he had been drawing it would seem that his salary as Queen’s Advocate was determined by the Secretary of State with the position of Chief Justice in view even though in the first two years of his service in the Gold Coast he was discharging the office of Queen’s Advocate.

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19 Despatch from Carnarvon to Lt. Gov. Lees (G.C. No. 252). The letter discloses that salaries for offices were not yet fixed for while Chalmers was on £1800 a year as Queen’s Advocate, Woodcock’s appointment carried a salary of £1000 a year only.

20 See despatch from Carnarvon to Lees dated 31 July 1876 (G.C. 306) in which Chalmers was referred to as “Sir David Chalmers.” Then despatch from Carnarvon to Lees dated 11 August 1876 (G.C. 310) informing the Administrator of the conferment of the honour.

21 G.C. 310. It continues, “Her Majesty was pleased to confer the Honour personally on Mr. Chalmers at Council held at Osborne House, Isle of Wight on the 21st ultimo.”

22 Despatch from Carnarvon to the Officer Administering the Government of the Gold Coast dated 2 December 1876 (G.C. 358), paras. 3-4.

23 See despatch from R. W. Herbert per pro. Lord Carnarvon to Officer Administering, etc. dated 24 July 1874 (G.C. No. 129) for confirmation of this view. That was the letter which relayed the information about Chalmers’ application to be Chief Justice of the Gold Coast and explained why the appointment could not at
The flexibility with which the appointing officer determined salaries was further illustrated by the fact that though Marshall and Jackson held the same office of puisne judge, Marshall was to draw a salary higher than Jackson's.\(^{24}\) This, no doubt, emphasised the seniority of Marshall. But it was not necessary to adopt that method of deciding seniority. The dates in the warrants of appointment would already have established the order of precedence. Most probably, the salaries merely indicated the values which the Secretary of State set on the services of the respective gentlemen.

Once Chalmers had taken charge of drafting the complicated legislation needed to launch the new Colony and to advise the Governor on legal problems he was put in an enormously advantageous position to display his legal talent. And he seized this to make himself indispensable to Governor Strahan. Several times the Governor and indeed the Secretary of State himself wrote commending him. In a despatch from Governor Strahan before the establishment of the Supreme Court in which he urged the early appointment of at least two judicial officers, Strahan said this of the would-be Chief Justice\(^{25}\):

"With reference to Mr. Chalmers Your Lordship will readily understand that I should be much embarrassed if circumstances should render necessary his early departure on leave of absence; and this may not be an unfitting opportunity to record my high appreciation of Mr. Chalmers’ services in connection with the work of legislation and otherwise in the legal Department of the Colony and of the assistance which I have received from him in the many other important matters which have come before me since I assumed the administration of this Government."

As pointed out on the salary issue, it may be that Chalmers’ appointment as Chief Justice was decided upon even before he arrived in the Gold Coast as Queen’s Advocate. If not, Chalmers’ presence in the Colony must have put Marshall in the shadows and correspondingly dimmed the latter’s chances of securing the appointment for himself. In any case Marshall’s illness at a crucial point when the appointment had to be made must have put matters beyond doubt.

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\(^{24}\) A comparison of judicial salaries with those in other fields shows that the salary of the Colonial Surgeon was in June 1877 set at £450 per annum. The appointment, however, had been offered to one Dr. Jeans at £600 per annum on the “understanding that he exercises supervision over all the Medical Officers, and visits the outstations.”

\(^{25}\) Despatch from Governor Strahan to Lord Carnarvon dated 12 December 1875 (G.C. No. 237).
Chalmers and Marshall

What sort of personalities were these two men? What were their legal philosophies? An opportunity to judge them is afforded by their debate in 1874 over the question of imprisonment for debt. Marshall had given an opinion on the law prevailing on the subject and this was passed on by the Colonial Secretary to Chalmers then still Queen’s Advocate in Sierra Leone but at the time visiting London for his observations. Chalmers comes out as sure of himself, a strict interpreter of the law, and unsympathetic towards the African. Marshall appears diffident, preferring a broad flexible approach to law, and altogether a kinder man. Commenting on some point Marshall had made to the effect that imprisonment for debt in the Gold Coast has been abolished by the Debtor’s Act, 1869, in England, Chalmers said this:

“But in whatever way imprisonment for Debt was introduced in the Gold Coast, I cannot hold that it was abolished by the English ‘Debtor’s Act 1869’ an Act which is expressly provided shall extend only to England in the United Kingdom and in which there is nothing so far as I am able to discover, showing the intention that it should apply to Her Majesty’s Colonial Dominions.”

Chalmers’ opinion was dated 29 June 1874. It is significant to note that the date chosen in the Supreme Court Ordinance, which he himself drafted, before which all statutes of general application in England alone, namely 24 July 1874, were to apply to the Gold Coast, was still a few days away. Chalmers could plead that at the time he gave the opinion the Supreme Court Ordinance had not been drafted much less come into force. He could say that the Gold Coast had not acquired a legislature of its own. All these, however, would not make him any less self-confident, dogmatic and a strict constructionist. By contrast, Marshall when faced with this comment gave the impression of the practical man who expresses doubts and feels his way with caution. It is a lengthy opinion but because of the light it sheds on the man’s character and the interesting comment it provides on the state of the law in the Gold Coast at the time, its extensive quotation may be forgiven. He said:

“I feel considerable difficulty in dealing with any question as to what is and what is not law on the Gold Coast, for it appears to

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26 Opinion given by Chalmers dated 29 June 1874.
27 Letter from Marshall to R. S. W. Herbert of the Colonial Office dated 18 August 1874.
me, it is a matter which has been left very much to the discretion not merely of the Chief Magistrate, but of every Commandant acting as Magistrate at the various coast towns. The peculiar nature of the British jurisdiction in the Protectorate has given rise to a great amount of vagueness as to how far, or in what manner English law prevails there, and I am quite sure that the restriction of a Statute in its operation to the United Kingdom or to England alone, has not been considered as necessarily excluding its operation from the Gold Coast. The only rule that appears to me to guide the administration of law in the English Courts on that coast is, that what is law in England prevails there as far as it can be applied, and that the extent and expediency of such application is left to the discretion of the Magistrate presiding, who is sometimes a sub lieutenant of the Governor.

When therefore I quite acknowledge the correctness of the opinion given to Lord Carnarvon and expressed by Mr. Chalmers as to the impossibility of the ‘Debtors Act 1869’ being legally established on the Gold Coast on account of its restriction to England, I am equally certain that such restriction would not practically exclude the operation of a statute from the Protectorate if those who administer the law there should consider it a part of English law applicable to the country.

It is simply impossible for any person to define what is and what is not law on the Gold Coast, and an attempt to do so on strictly legal principles would probably exclude the operation of every act which is not distinctly mentioned as applicable to or intended for the Protectorate which is not a Colonial Possession in the strict legal sense of the word.

The difficulty of defining what is and what is not English law on the Gold Coast is not restricted to the Imperial Acts, it extends also to the local ordinances, some of which are to be found in manuscript only and of which there is no reliable or perfect collection except perhaps the one kept in Government House, certainly there is none at any of the Courts. Nor does the fact of the Ordinance having been passed appear of necessity to give it the force of law on the Gold Coast. The principal instance on which I ground this observation is that there is now an Ordinance for the Administration of the property of deceased persons, and by which it is provided that official administrators should be appointed by the Administrator of the Settlements. But when called upon to deal with property of this kind I found the Ordinance was practically in abeyance; that no official administrators existed, and that the property of deceased persons was administered very much according to the discretion of the Chief Magistrate.
I also found an Ordinance for the regulation of the Court of Civil and Criminal justice duly passed under the administration of Colonel Conran, but which existed only in manuscript and of which the officials of that Court informed me they had no knowledge. . . .

It cannot be said that the library facilities in our courts have improved much in the hundred years since Marshall wrote. But the machinery of legislation certainly has. Indeed the state of uncertainty of the law disclosed by Marshall led to directions from the Colonial Secretary that the Queen’s Advocate’s attention be directed to this important matter. Marshall, from this essay, deals with practical problems as he finds them leaving the theorising to be done by others remote from the scene. About the practice of imprisonment for debt itself there was also a clash of views between the two lawyers. In Chalmers’ opinion:

“Imprisonment is the most tangible method by which the English courts can vindicate the fulfilment of obligations, as well as being the only one which would not on the Gold Coast, in the state of the population with which I am acquainted, be practically a failure. In my opinion the time has not yet come for its abolition, if it should do so at some time afterwards.”

Marshall’s view on this, on the other hand, was:

“As regards the actual practice of imprisonment for debt now existing on the Gold Coast I recommend the abolition, at all events in the present form, on account of the injustice which I have in many cases found to attend to its operation. [Marshall here enumerates several instances and examples and continues:]

Another reason why I recommend the abolition of imprisonment for debt in its present form is that there is no debtor prison either in Cape Coast or at any of the forts and settlements so that debtors have during all these years been incarcerated in the criminal gaols under the same gaolers and assistants as the criminals, a fact which I feel sure I need do no more than mention.

Theoretically I do not dispute the correctness of Mr. Chalmers’ opinions. I ground my observations on existing facts. Probably in dealing with these there would be little or no difference of opinion between us as I would on no account propose that the Judge, and still less the Judicial Assessor should not have the power to

28 Despatch from Carnarvon to Strahan dated 4 September 1874 (G.C. No. 165).
29 Opinion given by Chalmers dated 29 June 1874.
30 Marshall to Herbert dated 18 August 1874.
imprison debtors with or without hard labour, when after full enquiry it was proved that the justice of the case required it."

The contrast in the personalities of these two men who were obviously the important appointees to the new court which emerges from these exchanges could not have been more marked. With the exception of a suggestion that Marshall's observations on the imprisonment of sureties might require some amendment of the law, Chalmers' view prevailed. The direction was given that all the papers in connection with this matter be communicated to him.31

Jackson and Melton

Although Chief Justice Chalmers and Marshall J. were able to start for the Gold Coast almost immediately after their appointment, Jackson J. who was also on leave in England at the time could not. He had been sick. In his letter to the Colonial Office expressing gratitude for his appointment, he added the following appeal12:

"Subject to the necessities of the public service I am anxious to get well before going to the Gold Coast and I wish it were in my power to report my readiness to go at once. I have not been able to keep myself out of the doctor's hands and so far as I can form an opinion very little benefit has resulted from the loss of time and expense which have been incurred by me. If I may be permitted to make so indefinite a statement I would take advantage of this opportunity to say that I shall be glad to set out for the Gold Coast [immediately] that any medical man to whom His Lordship shall be pleased to refer me is of opinion that I ought to go."

The Secretary of State, therefore, requested that Mr. Melton should act for Jackson J. until the latter assumed office.33

Melton had acted as judicial assessor between January 1875 and May 1877 and during that period sometimes as chief magistrate in the absence of Chalmers.34 But obviously the Colonial Office did not think very much of him. He was present on the spot but was not elevated to the Supreme Court bench, the Colonial Secretary merely adding to his request that Melton should act in the absence of Jackson J.,

31 Despatch from Carnarvon to Strahan dated 14 September 1874 (G.C. No. 165).
32 See despatch from Carnarvon to Freeing dated 9 March 1877 (G.C. No. 411) enclosing Jackson's letter dated 1 March 1877 to the Colonial Office. R. H. Meade wrote to Jackson assuring him that the Secretary of State would not require him to take up his duties as puisne judge before 10 May. (Meade's letter is dated 7 March 1877).
33 They were to start by steamer on 16 December 1876; see despatch (G.C. 358) dated 2 December 1876.
34 Letter from W. Melton to Carnarvon dated 3 October 1877 (see Vol. 44 (2) of despatches from the Secretary of State to the Governor of the Gold Coast, p. 205).
that, “After he has ceased to act in a judicial capacity I have to request that you consider whether other employment, for which he will be competent cannot be found for him on the Coast.” \(^{35}\) Presumably, such employment could not be found immediately after Jackson J. assumed office. In his despatch announcing the arrival of Jackson J. in the Colony to assume his post, Governor Freeling said, “The only employment I could offer Mr. Melton and for which he would be competent would be as District Commissioner which he would not accept.” \(^{36}\) In that same letter Freeling intimated that Melton had asked for six months’ leave with full pay. The Governor was not able to advise leave with full pay as Melton had held only an acting appointment. But “in view of his service of over three years during which he has not had leave,” the Governor sanctioned the grant of a free passage to England. He said he had informed Melton that whether or not Melton was to get any salary, and how much, must be left to the Secretary of State. The Governor then suggested to Lord Carnarvon that half of Melton’s late annual salary might be allowed him for six months. It is not quite clear what this advice exactly meant. Melton could not have properly understood his position, because there subsequently followed an embarrassing exchange of letters between himself and the Colonial Office. Melton while in England wrote pointing out the many services that he had rendered to the Colonial administration in the Gold Coast, adding that “Governor Freeling was good enough to grant me leave of absence for six months on Mr. Jackson taking up his appointment, but my health sustained a further check by the loss of the Gambia S. in which I was a passenger . . .” and asked for an extension of this leave. Back came the reply from the Colonial Office that Lord Carnarvon was unable to consider Melton as being on leave of absence, the appointment Melton held in the Gold Coast being only an acting and provisional one. On his return to England, the reply continued, Lord Carnarvon had decided to grant him a sum equal to half of his six months’ salary while in the Gold Coast and the sum having been paid Melton’s connection with the Public Service of the Gold Coast thereupon terminated. \(^{37}\) Melton was eventually offered the appointment of assistant collector of customs at a salary of £450 per annum. His previous salary had been £800 per annum. \(^{38}\) He accepted. \(^{39}\) To what extent this diminution in status was due to Governor Freeling’s assessment of the man is a question to which an answer must admit little doubt. Freeling had said to the Secretary of

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35 Despatch from Freeling to Carnarvon dated 8 May 1877 (G.C. No. 124).
36 Letter from W. Melton to Carnarvon dated 3 October 1877.
37 Letter from R. H. Meade on behalf of the Secretary of State to W. Melton dated 8 October 1877.
38 See despatch from Freeling to Carnarvon dated 8 May 1877 (G.C. No. 124).
39 See despatch from Carnarvon to Freeling dated 27 November 1877 (G.C. No. 565).
State, “Mr. Melton is suited for any work not of an arduous nature or involving great responsibility; he is trustworthy and painstaking and I should be glad to see him appointed to any post where these are the qualities required.” A more telling commentary on the qualifications and standards of a man required to sit on the Supreme Court bench can hardly be found.

The volume of legal work

The Supreme Court Ordinance had given a complement of one Chief Justice and up to four puisne judges in the Gold Coast as well as the Chief Justice and other judges of the Colony of Lagos. But only Chief Justice Chalmers and his two colleagues were appointed for both the Gold Coast and Lagos. Marshall J. continued to reside in Lagos.40 Apparently, the Colonial Office was not prepared to sanction the appointment of more judicial officers for the Colony. Governor Freeling asked that a gentleman learned in the law be appointed from England as district commissioner at Accra at a salary of £600 a year and allowances, in order that he may be able if necessary to take the place of one of the puisne judges.41 The Secretary of State did not feel himself able to sanction the creation of this new judicial appointment. “It appears to me,” he said, “looking to the size and importance of the Colony and the small number of white Inhabitants, that the present Judicial Staff, which I must remind you is considerably in excess of that by which the legal business of the Colony has previously been discharged, should be amply sufficient to meet all present requirements.”42 Provision had in anticipation been made in the Estimates by the Governor for the appointment of this additional judicial officer. In his despatch commenting on the Estimates and Appropriation Ordinance for the Gold Coast for 1877, the Secretary of State restated his opposition to that appointment43:

“I have already in my Despatch No. 401 of 2nd March informed you that I could not consent to the appointment of a legal gentleman as District Commissioner at Accra. The item of £500 which

40 See despatch from Lt. Gov. Lees to Mr. Hicks-Beach dated 16 July 1878 (G.C. No. 144).
41 Despatch from Freeling to Carnarvon dated 22 January 1877 (G.C. No. 32).
42 Despatch from Carnarvon to Freeling dated 2 March 1877 (G.C. No. 401).
43 Despatch from Carnarvon to Freeling dated 22 June 1877 (G.C. No. 467). Obviously Freeling in anticipation of the approval of the Estimates had employed someone already to fill this post and was keen that this person should continue. In his despatch following on to the disallowance, he pleads for a portion of the money to be made available. “With respect to the disallowance of the item of £500 for the salary of the District Commissioner at Accra as it is absolutely necessary under the Supreme Court Ordinance that there should be a District Commissioner and as there has been one acting at a salary of ten shillings per diem, I trust that a sum of £182.10 may be sanctioned out of the £500 inserted in the Estimates for the purpose.” Despatch from Freeling to Carnarvon dated 30 July 1877 (G.C. No. 192).
you have inserted for the Salary of such an officer must therefore be disallowed. The cost of the Judicial Department of the Colony is already very high, and I cannot but think that with the Chief Justice at Accra, and the head Quarters of various branches of the administration there also, it should be possible to provide for all necessary legal and Magisterial duties without the appointment of a highly paid and specially qualified District Commissioner.”

Accra it is noted had by now become the administrative capital of the Colony having supplanted Cape Coast.

Further studies are necessary to determine the volume of legal work in the courts at this time. But an indicative comment could be found in a letter written just over three years before the Supreme Court started to function by one Mr. E. M. Moylan. He had been deputed by Governor Buckley in Freetown to come to the Gold Coast to prosecute the outstanding criminal cases. This was before the establishment of the Gold Coast as a separate colony, the administration being directly under the Governor of Sierra Leone. Sir Garnet Wolseley, who was then administering the settlements in the Gold Coast was very short with Moylan. Moylan duly reported this treatment to Governor Buckley in these terms:

“On my arrival at Cape Coast, I reported myself to His Excellency Sir Garnet Wolseley and handed him the Despatch with which you had entrusted me.

Sir Garnet Wolseley informed me at the first interview I had with him that there was no work whatever for me to do as Crown Prosecutor, and further stated that he had received a letter from Mr. Marshall the Chief Magistrate and Judicial Assessor informing him that there was no prospect of there being any work for me to do as Crown Prosecutor for a considerable time to come.”

Perhaps Wolseley had an aversion to the interference of lawyers in the summary dispensation of justice to persons charged with crime. It appears from Moylan’s letter that Marshall himself had written asking for a permanent and not a temporary Crown Prosecutor for the Gold Coast. Why he should ask for such an officer when the prospect of work for him for some time to come was negligible is not clear. On the other hand, it is unlikely that Wolseley would misrepresent Marshall to Moylan, seeing that the chances of being found out were so great. Unless it can be said that Wolseley’s refusal to give Moylan work was a means of forcing the colonial administration to make the permanent

44 Letter from Mr. E. K. Moylan to Governor Buckley dated 26 November 1873, paras. 2-3.
appointment, and it seems the surest self-defeating means, then one has to accept that at the time of Moylan’s visit there were no cases of serious crime on the court lists. Of course, this does not tell us anything about the state of the civil list in the courts.

The Full Court

Turning back to the provisions of the Supreme Court Ordinance, all the judges of the court were to have in all respects, except where expressly provided otherwise in the Ordinance, equal power, authority and jurisdiction. Any judge might, subject to the Ordinance and any rules of court, exercise all and any part of the original jurisdiction, civil and criminal, vested by the Ordinance in the Supreme Court, and for such purposes formed a court.\(^4\)

For purposes of appeal, a Full Court was created as the Court of Appeal. The Full Court was fully constituted by two or more judges, one of them had to be the Chief Justice, or the person for the time being discharging his functions. In cases of disagreement, the decision of the majority was the judgment of the court. A proviso was added that “when the Court shall be constituted by two Judges, the Chief Justice or person for the time being discharging the functions of Chief Justice shall have a casting vote.”\(^4\)

Surprisingly, nothing was said about what should happen to resolve the situation where there was an equality of votes in a Full Court constituted by more than two judges. The result was the uncertainty in the court’s decision in the famous constitutional case of *Bainyi v. Dantsi*\(^4\) nearly 30 years later. Four judges constituted the court in that case, two deciding each way. The question at issue was the then important one of whether the kings and chiefs of the land could lawfully exercise the judicial powers and functions vested in them by the native law and custom (subject to the limitations imposed by the Native Prisons Ordinance) within the Colony, or was all jurisdiction of all kinds now vested in the Supreme Court to the exclusion of all other jurisdictions except in those cases to which the Native Jurisdiction Ordinance applied. This question was stated by Morgan J. for the consideration of the Full Court in which he himself participated. The earlier Full Court decision in the case of *Oppon v. Ackinie*\(^4\) which had held that the Supreme Court Ordinance had in no way impaired the judicial powers of the kings and chiefs, was interpreted by Morgan J. as applying to the protected territories as distinct from the Colony and therefore he felt himself not bound by it in the present case. To answer the question

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\(^4\) Ordinance, s. 6.
\(^5\) Ibid., s. 7.
\(^6\) (1903) Ren. 287; 2 G. & G. 11.
\(^7\) (1887) Sar.F.L.R. 233; 2 G. & G. 4.
posed by Morgan J., the Full Court was constituted by the Chief Justice Sir William Brandford Griffith, Francis Smith, Morgan himself, and Purcell. The Chief Justice in a most learned opinion and Francis Smith J., the most senior puisne, were of the opinion that the kings and chiefs could lawfully exercise the judicial powers and functions vested in them by customary law, subject to the limitation in question, within the confines of the Colony. But Morgan and Purcell JJ. decided to the contrary. As Attorney-General Willoughby Osborne commented in a debate in the Legislative Council on a Bill to regulate the powers and jurisdiction of native authorities some four years later, "There was at that time no casting vote, and consequently there is no express decision of the Full Court on the subject." 

It is not unknown for appellate courts to be constituted by an even number of judges. In that case where there is an equality of votes, the view of the court from which the appeal comes is taken to stand. The justification for this is that the judge of the lower court notionally becomes the extra judge whose view breaks the tie. But that position can be allowed only if the judge below does not form part of the appellate tribunal in which the equality of votes occurs. Otherwise a crucial double vote would have been conferred on the judge whose decision is appealed against. And according to the arrangement under the Ordinance, if the decision appealed against was that of the Chief Justice, where he sat in the Full Court with only one other brother, the Chief Justice’s view of the matter was overwhelming.

The Ordinance also gave a casting vote to the senior of the two judges who constituted a Divisional Court whenever that court was so constituted instead of it being normally constituted by one judge.

The sittings of the Full Court were in Accra and Cape Coast, but it could also sit in other places as appointed, subject to the rules of court, by the Chief Justice. Provided that appeals were pending, the Full Court must hold sittings not less than four times in every year. The Chief Justice, with the approval of the Governor in writing, requested the attendance of one or more judges at the sitting of the court thus conferring on that judge the power to continue to possess and exercise any power exercisable by a single judge of appeal until the next succeeding sitting of the Full Court. Directions incidental to an appeal not involving the decision of the appeal itself and interim orders

49 The judgments of Morgan and Purcell JJ. were read by Pennington J. who was not a member of the Full Court which dealt with the question.
51 Ordinance, s. 23.
52 Ibid., s. 34.
53 Ibid., s. 35.
to prevent prejudice to the claims of parties pending an appeal were the sort of orders which a single judge of appeal could make. An appeal lay to the Full Court from final judgments and decisions of a Divisional Court or judge where the claim thereby determined exceeded the amount or value of £50, and by leave of the judge making the order from all interlocutory orders and decisions. But the Full Court was given the residual power to entertain an application referring to any suit or matter pending before it and to make any order and give such directions thereon as the justice of the case might require.

Apart from appeals, a question of law arising in the trial of any cause, civil or criminal, might be reserved by a judge by way of case stated for the consideration of the Full Court.

**Jurisdiction of the Supreme Court**

The jurisdiction conferred upon the Supreme Court itself by the Ordinance is well known and will only be briefly treated here. It will be seen that much of what was then laid, has with due modification remained the foundation of the jurisdiction of our courts today. The Supreme Court was made a Superior Court of Record. In addition to any other jurisdiction conferred by the Ordinance or other Ordinance of the Gold Coast Legislature, it was to possess and exercise, within the limits and subject to the Ordinance, all the jurisdiction, powers and authorities vested in or capable of being exercised by the High Court of Justice in England, except the jurisdiction and powers of the High Court of Admiralty. The jurisdiction included all Her Majesty's civil and criminal jurisdiction which at the commencement of the Ordinance or at any time afterwards might be exercisable in the Territories, near or adjacent to the Gold Coast Colony. The court was given the powers and authorities of the Lord Chancellor of England to appoint and control guardians of infants and their estates, and keepers of the persons and estate of idiots, lunatics and those of unsound mind unable to govern themselves. Then came the now famous

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54 Ibid.
55 The consequences of this minimum monetary value of claims decided upon as a prerequisite of an appeal can be found in the 1959–60 personal liberty cases of In re Okine [1960] G.L.R. 84, C.A.; and Amponsah v. Minister of Defence [1960] G.L.R. 140, C.A. and in the chieftaincy case of Peprah II v. Brown [1960] G.L.R. 169, C.A. when the Court of Appeal declined jurisdiction on the ground that the claims upon which the decisions appealed against were based could not be quantified in money.
56 Ordinance, s. 36.
57 Ibid., s. 37.
58 Ibid., s. 11. As to admiralty jurisdiction, see Colonial Courts of Admiralty Act, 1890 (53 & 54 Vict., c. 27).
59 Ibid., s. 12.
60 Ibid., s. 13.
section 14 which, whether in its pristine form or the amended form in which it eventually appeared in the later Courts Ordinances and Acts, has been the subject of much learned exposition both judicial and academic without putting its meaning beyond dispute:

"The common law, the doctrines of equity, and the statutes of general application which were in force in England at the date when the Colony obtained a local legislature, that is to say, on the 24th day of July, 1874, shall be in force within the jurisdiction of the Court."

But all Imperial Laws declared to extend or apply to the Colony or the jurisdiction of the court had force only so far as the limits of the local jurisdiction and local circumstances permitted, and were made subject to any existing or future local Ordinances. For the purpose of facilitating the application of the Imperial laws, the court was given power to construe them with such verbal alterations not affecting the substance, as might be necessary to render the laws applicable to the matter before the court. The jurisdiction of the court in probate, divorce and matrimonial causes and proceedings was made, subject to the Ordinance and rules of court, exercisable in conformity with the law and practice for the time being in England, with the Attorney-General being put in the position of the Queen's Proctor to intervene in cases of collusion.

**Law and equity**

Law and equity were to be administered concurrently by the court. Laws and customs existing in the Colony which were not repugnant to natural justice, equity and good conscience and which were not incompatible either directly or by necessary implication with any enactment of the Colonial Legislature were made enforceable by the court. But their application was limited first of all to causes and matters where the parties were natives of the Colony, and particularly to marriages, tenure and transfer of property, real or personal, inheritance and testamentary dispositions. Such laws and customs could apply also in causes and matters between natives and Europeans where it appeared to the court that substantial injustice would be done to either party by a strict adherence to the rules of English law. It was also provided that:

61 Ibid., s. 17.
63 Ordinance, s. 18.
64 Ibid., s. 19.
"No party shall be entitled to claim the benefit of any local law or custom, if it shall appear either from express contract or from the nature of transactions out of which any suit or question may have arisen that such party agreed that his obligations should be regulated exclusively by English law: and in cases where no express rule is applicable to any matter in controversy, the Court shall be governed by the principles of justice, equity, and good conscience."

**Customary law**

It would appear that the Ordinance paid greater respect to customary law than subsequently accorded it. In proceedings in which native law and custom may be material to the issue, the court was given power, if it thought it expedient to do so to "call one or more other persons, whom the Court shall consider specially qualified, to act as referees, and may hear and try such cause or matter wholly or partially with the assistance of such referees." The provision went on to say that "the affirmation of any such law or custom by the said referees, upon being consulted by the Court, shall be evidence thereof, and the Court shall presume the correctness of such evidence." It is submitted that far from making native law and custom a matter which should be determined by the calling of evidence by parties, this provision put it within the power of the court to ascertain the content and nature of the customary law by calling on the assistance of the court's own referees. A method not so different from what is the present position after legislation has wrested customary law from the status of evidence consigned to it by the Privy Council decision in *Angu v. Attah*.

**Promotion of reconciliation**

Jurisdiction was also given to the court and its officers "in civil cases ... as far as there is proper opportunity" to "promote reconciliation among persons over whom the court has jurisdiction" and to encourage and facilitate the settlement in an amicable way, "and without recourse to litigation" of matters in difference among them. This provision which is found in section 84 of the Ordinance is quite different from that which dealt with the promotion of reconciliation in pending civil suits which was taken up in section 85. That provision simply stated that, "Where a civil suit or proceeding is pending, the Court may promote reconciliation among the parties thereto, and encourage and facilitate the amicable settlement thereof." It is unlikely

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65 Ibid., s. 81.
66 (1916) P.C. '74-'28, 43.
that both sections were intended to deal with the promotion of reconciliation in civil cases pending before the court only. For that power section 85 is totally adequate. The question then is why was section 84 put in and why was care taken to speak of "persons over whom the Court has jurisdiction" in contrast to "the parties" to the pending civil suit in section 85? Again why the omission of the reference to the pendency of the case in section 84? It is submitted that the jurisdiction intended under section 84 was wider than the practice that has developed of limiting the court's intervention to promote reconciliation to cases pending before it. Section 84 must have intended to give the court the power to intervene in a civil dispute even before one of the parties to it had brought a formal action in court. In that respect "persons over whom the Court has jurisdiction" coincides not with parties to a dispute before the court but with persons within the territorial area over which the court exercises jurisdiction. Had the court chosen to exercise this power, litigation in this country would not have become as formalised as it is today.

Apart from the power given in civil cases, power was also given to the court to promote reconciliation and encourage and facilitate the settlement, in an amicable way, of criminal proceedings for assault or any other offence of a personal or private nature not amounting to a felony, and not aggravated in degree. Terms like the payment of compensation to the aggrieved could be imposed.67

Governor's power of control

The various provisions regulating administrative matters like the sittings and distribution of business of the court indicated the power of control which the Governor had over the court. He could, for example, declare by order that the jurisdiction of the Supreme Court should not extend to any specified part of the Colony or impose within any specified part any limitation in respect of the class of cases to which the jurisdiction of the court should extend or apply.68 Again it was for the Governor from time to time to appoint either temporarily or permanently by order the province or place in which each judge was to exercise jurisdiction and in like manner to transfer a judge from one province or place to another.69 There were only two provinces at the time. The Western Province, consisting of all the part of the Colony west of a notional straight line drawn from Appam (Apam) northwards and including Abra, Brimen, Ejumako, Akumfi and Oguan but not including Gomoa. The Eastern Province was that part of the Colony

67 Ordinance, s. 86.
68 Ibid., s. 20 (a).
69 Ibid., s. 22.
lying cast of this demarcation. From time to time the Governor might by order appoint places and times at which Divisional Courts were to be held for the trial of criminal and civil causes and the disposal of all other pending legal business (the Assizes). At the Assizes the trial of criminal causes was given priority over any other business.

The Chief Justice, however, had the power to transfer a cause or matter from any court to any other court and such transfer might be entire or only in respect to part.

Legal practitioners

One part of the Ordinance which caused considerable comment from the Colonial Office when in draft form was the part on barristers, solicitors and proctors. It is not quite clear who these proctors were. The Ordinance gave the Chief Justice power to approve, admit and enrol to practise as barristers and solicitors in the court, persons who had been admitted barristers or advocates in Great Britain or Ireland, or solicitors or writers to the signet in any of the courts at London, Dublin or Edinburgh. He was also given power to admit as a solicitor of the Supreme Court any person who had served five years continuously in the office of a practising barrister or solicitor residing within the jurisdiction of the court and who had passed such examination touching the principles and practice of the law as might be provided, and before such persons as might be appointed from time to time, by the Chief Justice. It will be recalled that the first native born Ghanaian lawyer, John Mensah Sarbah, was not to appear on the scene until 1887, ten years after the Supreme Court had started operation. This provision, therefore, enabled some of the unqualified attorneys then practising in the British courts to continue practising until they were phased out.

A word should here be said about these attorneys. Before the Ordinance, there had developed the practice whereby educated Africans who specialised in the presentation of cases appeared on behalf of clients in the British court established in 1853. They were not qualified lawyers. This was the era of the Bannerman brothers, Edmund, Charles

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70 Ibid., s. 21.
71 Ibid., s. 24. In the absence of such order the Assizes were to be held on the first Monday in January, April, July and October, in each province.
72 Ordinance, s. 29.
73 Ibid., s. 60.
74 Ibid., s. 62.
75 John Mensah Sarbah qualified in 1887. The first qualified African lawyer to practise in the Gold Coast was J. Renner Maxwell (1883–84). He was followed by P. Awoonor Renner in 1884. (See Azu Crabb, John Mensah Sarbah 1864–1910, p. 2; Kimble, D., A Political History of Ghana 1850–1928, p. 96).
76 Kimble, D., op. cit., pp. 68–70 gives an interesting account of the time and its personalities.
and James. Charles even appeared for the prosecution in 1863 when his brother James was convicted of extortion, fined £50, imprisoned for twelve months and dismissed from the magistracy. In 1864 a court order had required that these attorneys, as they were called, take out regular licences. But in 1865 the licences were discontinued and the attorneys were forbidden to wear wigs and gowns in court. In 1866, several of the attorneys crossed swords with magistrates. For using strong language to the Bench, W. C. Finlason, from Jamaica, and Charles Bannerman were prohibited entirely from practice. Charles Bannerman was in addition sentenced to three months' imprisonment. Colonel E. Conran, the then Administrator, proceeded to stop all self-educated attorneys from practising in the courts. However, Charles Bartels, G. Blankson jun., H. F. Spilsbury and W. A. Ward, all attorneys, thereupon petitioned in protest, and the British Secretary of State condemned the prohibition as arbitrary and impolitic, instructing that Conran immediately withdraw it. The attorneys were once again licensed and enrolled in 1867. But they continued to have difficulties in the courts with Chief Magistrate W. A. Parker when he arrived, some of them being imprisoned by him. The vindictiveness of Parker in his attitude towards the attorneys has been officially described as "a species of monomania." He was transferred early in 1869 to St. Helena under an official cloud. When David Chalmers took over the duties of chief magistrate, he was not much more friendly towards the attorneys. He alleged that they lacked the necessary education and exacted excessive fees from clients. Finding that the licences of the attorneys had lapsed, he took no steps to renew them. As he himself admitted,

"I was reluctant to take steps to revive these licences deeming it undesirable to give to men of, at least, very imperfect educational and professional qualifications that status, and quasi guarantee which enrolment as recognised officers of the Court tended to confer..."

A further objection Chalmers had to the attorneys was, according to him, that through their intervention in cases, "Time is wasted through the causes being overlaid with an excessive mass of evidence useless at best or more often directed to conceal and pervert the truth—and by frivolous discussions." He thought the confidence of the people in the British courts was through the actions of these attorneys more or less weakened. In 1870 he forbade the attorneys from acting in

77 Despatch No. 5 of 14 January 1869 from Kennedy to Lord Granville.
78 Letter from Chalmers to the Administrator in Chief dated 3 June 1872.
79 Ibid.
civil cases concerning Africans. In 1872 he wrote to the Administrator-in-Chief arguing that the attorneys be excluded from all the courts. But Lord Carnarvon, the Secretary of State, upon hearing about it, refused to authorise this proposal. In his despatch to the Officer Administering the Settlements he said:

"2. The evils pointed out in [Chalmers'] paper as arising from the employment of ill educated and extortionate practitioners appear to be very serious, but I am not prepared to adopt the arbitrary course of prohibiting altogether the intervention of Attorneys, at all events not before other less stringent steps have been tried with a view to remedy the evil."

He then went on to suggest that the attorneys be required to pass a simple examination before the chief magistrate, designed to prove their knowledge of court procedure and the broad general principles of civil and criminal law. Lord Carnarvon pointed out that the examination for some time would necessarily have to be of a "very slight and simple character." He also suggested that a table of fees should be made public by fixing it in the court house and in the office of everyone practising as an attorney. Any attorney who could be proved to have taken any remuneration for work done whether by way of gift or otherwise, beyond that fixed by the table or by the chief magistrate in the case of work not included in the table, should be debarred from practising either altogether or for such time as the chief magistrate should appoint. These suggestions were embodied in the new Supreme Court Ordinance.

But Chalmers had in his draft of the Ordinance sought to restrict the employment of the attorneys, by imposing stiff conditions on their admission to practise. Here again it was the Secretary of State who saved them. In his comment on the draft he said:

"I regret that I cannot coincide in the scope and policy of the Order VIII of the first schedule designed as it obviously is designed to restrict as much as possible the numbers and employment of legal practitioners and agents.

I am fully aware of the abuses incident to the employment of dishonest and rapacious lawyers in an ignorant community, but the Order applying as it does to criminal and civil proceedings alike, seems to me to exceed the legitimate bounds of Legislative

80 Despatch from Carnarvon to Officer Administering, etc. dated 17 July 1884 (G.C. No. 214).
81 Ibid.
82 The account of the experiences of the attorneys is taken from Kimble, D., op. cit., pp. 68-70.
83 Despatch from Carnarvon to Strahan dated 16 February 1876 (G.C. No. 209), para. 11.
interference on this subject. I cannot therefore approve of the provisions of Rules 2 and 3 which impose what seem almost prohibiting conditions upon the admission of advocates to practise temporarily under section 73."

Unqualified attorneys were not the only practitioners whom Chalmers wanted to restrict. He seems to have been against the appearance of advocates, whether formally qualified or not, in cases before the court altogether. And though his aim of excluding attorneys from cases had been frustrated he obviously still cherished the dream of establishing or perpetuating in the Gold Coast the institution of the inquisitorial judge or as he once put it "restoring what I understand to have been the former method of the Judicial Assessor's Court—that is to discard all technicalities and by as thorough as possible an investigation of the facts to ascertain the true merits of the matters of controversy in each particular case."84 In his scheme of things advocates could be a nuisance. In his comment on Chalmers' draft rules on the qualified lawyers, Lord Carnarvon protested that making the employment of a barrister or solicitor dependent on the sanction of the court and subject to its approval and that a practitioner should be made liable to pay any costs which might be awarded against his client in case the latter should default in paying were innovations which he was unprepared to sanction. The Secretary of State thought that the powers of the court as to suspending a practitioner or striking him off the Rolls were sufficient to protect the public substantially against malpractices.85

In spite of this admonition, Order VIII, rule 5 of the Ordinance provided that in civil causes the employment of a barrister, solicitor, or proctor should be subject to the approval of the court, which might disallow such employment in causes which it considered might more advantageously be conducted by the litigants in person. Where the parties were illiterate the employment of barristers or solicitors should not be allowed, unless where, for special reasons, the court saw fit to permit a deviation from this rule. And in rule 7 the barrister, solicitor and proctor's liability to pay costs in cases where the client failed to pay was retained if limited to cases where it appeared to the court that the case had "been commenced or carried on maliciously or without probable grounds" and the party commencing or carrying on such cause had been represented by a barrister or solicitor or proctor. The barrister, solicitor or proctor was similarly liable if it appeared that he

81 Chalmers tc the Administrator-in-Chief dated 3 June 1872.
85 Ibid.
had by "any sort of deceit induced his client to enter into or continue any litigation."

In view of the difficulty which has plagued our Bench and Bar over the past decade in their endeavour to establish a scale of fees for lawyers it would be rewarding to find out whether the table of fees spoken of by the Rules was ever published. Those were days when judges could act more arbitrarily in such matters with less risk of their wishes being flouted or ignored. On the other hand if the tradition had then been set by the production of such a table of fees it is unlikely that it would have been abandoned before now. Unfortunately present researches have not at the moment yielded an answer to this question.

Neither the Ordinance nor its rules said anything about robes in court. From Colonel Conran's prohibition of attorneys wearing wigs and gowns obviously the English tradition of robing by advocates had been adopted even by those without the English lawyer's qualification for the privilege. In such circumstances when qualified lawyers with the entitlement appeared on the scene what was more natural than that they should want to give visible evidence of their membership of an exclusive profession.

Role and personalities of the court one hundred years ago

The Supreme Court of 1877 was not an institution which was intended to be seen as separate from the executive as present day constitutional arrangements have sought to provide. One indication of this has already been mentioned—the Governor's powers in relation to the courts. Another is the admitted colonial practice of Governors submitting periodic reports on judges to the Colonial Office.\(^86\) The Chief Justice himself was closely associated with both the executive and the legislature. He was a member of the Legislative Council established by the Order in Council of 1874\(^87\) and he continued to be such a member until 1911. By then, the performance of the then Chief Justice, Sir William Brandford Griffith, in consistently opposing at every stage the Native Jurisdiction Bill and finally in withdrawing from the Council over it, had, according to Governor Rodger "demonstrated, if any demonstration were needed, the inadvisability of a member of the Judicial Branch being also a member of the Legislative Council."\(^88\) The determination of the

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\(^87\) See Additional Instructions to Strahan dated 3 July 1875 (Despatches, Vol. 40, pp. 83-129 at p. 110 et seq). The other members were the Officer Administering Lagos, the Colonial Secretary, the Queen's Advocate, the Collector of Customs, the Treasurer, the Officer Commanding the regular troops and such other persons as may from time to time be named.

\(^88\) Despatch from Governor Rodger to the Earl of Crewe dated 10 August 1910. (G.C. No. 519).
career of Brandford Griffith as Chief Justice in 1911 almost coincided with the termination of the Chief Justice’s right to sit in the Legislative Council.

But 1876–77 was long before then. Chief Justice Chalmers was not only a member of the Legislative Council, he continued to draft practically all the legislation of the Colony and to advise the Governor on all major legal issues. The despatches during his Chief Justiceship are full of references to his drafts and opinions.

Chalmers did not stay long as Chief Justice of the Gold Coast. In the middle of 1878, he was offered the Chief Justiceship of British Guiana and he accepted.89 He left the Gold Coast in July 1878.90

It was Justice Marshall’s ill-luck to be once again unwell at a time when the office of Chief Justice was up for filling. He had left Lagos as an invalid, Woodcock, the Queen’s Advocate being sent there temporarily to take his place. Whether it was because of his health or because some one else was considered in other respects better fitted for the post, the fact is that he did not get it. Mr. Austie Smith was appointed Chief Justice in January 1879 to succeed Chalmers.91 He arrived in the Colony to assume duty at the end of March of that year.92 But Marshall’s preferment as Chief Justice was merely postponed. Barely a year after this, that is on 28 February 1880, he was appointed Chief Justice of the Gold Coast.

The period between the departure of Chief Justice Chalmers and the arrival of Chief Justice Smith had been enlivened by the endeavours of Jackson J., the third of the original bench of judges appointed under the Ordinance, to be recognised formally as acting Chief Justice. Lt. Governor Lees had thought it unnecessary to make any such appointment as the senior continuing judge was in any case authorised by the Ordinance without appointment to perform all the functions of the Chief Justice under the statute.93 Lees’ disinclination was partly due to the fact that if Marshall came back before the appointment of a new Chief Justice he would as senior puisne claim the office of acting Chief Justice and he thought it undesirable that the office of Chief Justice should change hands more often than was necessary.94 His other concern was that the salary position of Chalmers be protected until Chalmers had assumed his new duties in British Guiana and thereby justified his claim for salary from there. But Lees recognised that

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89 Despatch from Sir M. E. Hicks-Beach M.P. to Lt. Governor Lees dated 17 May 1878 (G.C. No. 66) and despatch from Lees to Hicks-Beach dated 19 June 1878 (G.C. No. 124).
90 Despatch from Lees to Hicks-Beach dated 1 July 1878 (G.C. No. 132).
91 Despatch from Hicks-Beach to Lees dated 11 January 1879 (G.C. No. 196).
92 Despatch from Lees to Hicks-Beach dated 1 April 1879 (G.C. No. 57).
93 Despatch from Lees to Hicks-Beach dated 16 July 1878 (G.C. No. 144).
94 Ibid.
Jackson J. personally seemed to attach some importance to his holding that position, however temporarily. Lees therefore appointed Jackson acting Chief Justice on condition that he received no extra emoluments whatever from the position. This was acceptable to Jackson J. Obviously Jackson J. saw the opportunity to act as often as Chief Justice as possible as important in advancing his judicial career. We find him next, just before the arrival of Smith C.J., applying to be allowed to act as Chief Justice of the Bahamas. He was granted six months’ leave of absence almost immediately Smith arrived, Woodcock, the Queen’s Advocate being brought in to act as puisne judge instead of him.95

The traditions of the court and the law administered in it have not changed over the hundred years of its existence as much as the personnel. Until Francis Smith J. appeared on the scene from Sierra Leone in the 1880s, the judges were all white. And for a long time afterwards he remained the only exception.96 For about twenty years he remained senior puisne judge and acted in the absence of the incumbent as Chief Justice but he never achieved the position. A hundred years ago, the connection of indigenous Ghanaians with the courts was as litigants, their representatives and may be clerks. The visible contribution of Ghanaians to the administration of justice by the Supreme Court then established was as harassed advocates.

95 Despatch from Lees to Hicks-Beach dated 10 February 1879 (G.C. No. 23).
96 In 1898 when Sir William Brandford-Griffith recommended that Mr. McCarthy, Solicitor-General, and another Sierra Leonean be made to act as puisne judge, Governor Hodgson’s minute to his Acting Colonial Secretary on the point was—"Inform the Chief Justice that although I am averse to the appointment of Mr. McCarthy, Solicitor-General to act as a Puisne Judge yet in view of his recommendation that he should so act as I do not see what better arrangement can be made I approve of his being appointed until the arrival of Clarke in the Colony."
A NOTE ON THE SUPREME COURT ORDINANCE, 1876

T. O. ELIAS*

The centenary of the Supreme Court Ordinance, 1876 (No. 4 of 1876), which was enacted by the joint Government of the Gold Coast Colony and the Lagos Settlement established in 1874 affords a good opportunity for taking stock of the development of the present legal systems of Nigeria and Ghana. There can be no doubt that both legal systems owe their main characteristics to the general framework of the organisation of the courts, the judicial and administrative personnel as well as the procedures and practices introduced by the legislation of 1876. It should also be mentioned in passing that our two countries are fortunate in that the structures and proceedings of the administration of justice were to a large extent influenced by the new reorganisation of the courts and of the procedures introduced into England itself only in the preceding year by the English Supreme Court of Judicature Acts, 1873–75, which laid the foundation of the modern English legal system. A comparison of our own legislation of 1876 with its English model of 1875 will show the extent of the debt in sophistication and high-spiritedness towards the ideal of administration of justice. In order to appreciate our common inheritance let us take a synoptic view of our development before and under the legislation of 1876.

CENTRALISATION OF JUDICIAL ADMINISTRATION IN SIERRA LEONE

To make better provision for the administration of justice within the Settlement of Lagos and its Dependencies, Ordinance No. 7 of 1 December 1866 was enacted to effect the unification of the Forts and Settlements on the West African Coast with the Colony of Sierra Leone under one Governor-in-Chief. It established the "Court of Civil and Criminal Justice of the Settlement of Lagos" as a court of record to be holden and presided over by the Chief Magistrate of Lagos who would be named and appointed by Her Majesty the Queen. Each of the four colonies had this type of court established with the same name and similar jurisdiction.

Under the British Settlements Act, 1843 (6 & 7 Vict., c.13), an Order in Council dated 26 February 1867 was issued constituting "the judges for the time being of Her Majesty’s Supreme Court of the

A Note on the Supreme Court Ordinance, 1876

Settlement of Sierra Leone,” a court of record. The style of the new court was “The West African Court of Appeal” and it was to receive, hear and determine appeals from the Courts of Civil and Criminal Justice of the Settlements of Gambia, the Gold Coast and Lagos.

Thus was planted the seed of the idea of a joint appeal court for all the West African Settlements, but it was short-lived, as the grand alliance was soon broken up in 1874 when Lagos and the Gold Coast were together erected into one separate colony under an independent political and judicial administration. It nevertheless served as a precedent for the reintroduction of the same idea in 1928 when the now defunct West African Court of Appeal was initiated.

This 1867 appeal court provided a better medium of intermediate authority in judicial appeals from the Superior Court of the Lagos Settlement than did the previous arrangement whereby the Governor, a political officer, had the last word on a purely judicial issue. An Order in Council No. 8 of 26 February 1867 established regulations for appeals from the Supreme Court of Sierra Leone to Her Majesty in Council. It made it lawful for any party to a civil suit respecting title to property or to some civil right which amounted to or was of the value of £300 sterling to bring an appeal within fourteen days of the judgment thereon of the Supreme Court of Sierra Leone. In other words, a civil case from one of the four colonies of the minimum value of £300 would go up to the Court of Civil and Criminal Justice of that colony, thereafter to the West African Court of Appeal (i.e., the Sierra Leone Supreme Court), and finally to the Judicial Committee of Her Majesty’s Privy Council.

LAGOS AS PART OF THE GOLD COAST COLONY (1874–86)

On the recommendation of a Select Committee of the House of Commons in 1865, Lagos had under the Royal Commission of 19 February 1866 been united with the Gold Coast, Sierra Leone and the Gambia under one government known as the Government of the West African Settlements. It was this new government that created and established the Court of Civil and Criminal Justice for each of its constituent units. Under the Royal Charter of 24 July 1874, however, the Settlements on the Gold Coast and Lagos were separated from the Sierra Leone Government and constituted into an independent colony called the “Gold Coast Colony.” It had its own legislature, which subsequently passed the Supreme Court Ordinance, 1876 (No. 4 of 1876).

THE SUPREME COURT OF THE LAGOS SETTLEMENTS

The Supreme Court Ordinance, 1876, established with effect from 31 March 1876, “The Supreme Court of the Colony of Lagos” as the Supreme Court of Judicature for “the Colony of and for the territories
thereto near or adjacent wherein Her Majesty may at any time before or after the commencement of this Ordinance have acquired power and jurisdiction."

Constitution of the court

By section 4 the court was made up of (i) a Chief Justice and such judge or judges as the Governor of Nigeria might appoint from time to time, and (ii) the Chief Justice and every judge of the Supreme Court of the Gold Coast Colony, all of whom (including the Chief Justice) should be puisne judges of the Supreme Court of Lagos Colony. The court was deemed to be duly constituted during and notwithstanding any vacancy in the office of the Nigerian Chief Justice or of any puisne judge thereof.

The Chief Justice of Lagos was the President of the court, the Chief Justice of the Gold Coast ranked next to him, the puisne judges of both colonies ranked amongst each other according to the priority of their respective appointments, and any acting puisne judges ranked after all the puisne judges holding permanent appointments.

Organisation of the court

The Governor was by section 9 given the power to appoint a place as a court house. We learn, however, that the premises round the old court house at Tinubu Square were "completely taken down to improve the site" on 12 February 1876; and that a new court house was formally opened by Marshall J. on 5 April 1877. A house adjoining the court was on Mr. Justice Smalman Smith's recommendation made into offices on 1 August 1885 to accommodate the jurors and officers of the court.

The filling of judicial vacancies by the appointment of new judges was also in the hands of the Governor. But the seal of the Supreme Court was in the custody of the Chief Justice or of his deputy, while a duplicate seal was kept by each puisne judge.

Jurisdiction

The Supreme Court was by virtue of section 11 made a Superior Court of Record and given all the jurisdiction, powers and authorities, excepting those of the High Court of Admiralty, which were vested in or capable of being exercised by the High Court of Justice in England as constituted by the Supreme Court of Judicature Acts, 1873–75. The court also possessed the powers of the Lord High Chancellor of England to appoint guardians of infants and of their estates and to appoint committees of lunatics, idiots and persons of unsound mind. Jurisdiction in probate, divorce and matrimonial causes was also given
to the court to be exercised in accordance with the law and practice then in force in England. Finally, the Supreme Court had vested in it Her Majesty's civil and criminal jurisdiction in the adjacent territories.

**Applicable law**

Section 14 provided that the common law, the doctrines of equity and statutes of general application in force in England on 24 July 1874 should be in force within the court's jurisdiction. By section 17 relevant Imperial laws were to apply only within local limits. Law and equity were under section 18 required to be concurrently administered so as to avoid any multiplicity of legal proceedings; and in cases of conflict or variance between the rules of equity and those of common law with reference to the same subject-matter the rules of equity should prevail.

By section 19 local laws and customs, which were not "repugnant to justice, equity and good conscience," were to be applied by the court in suitable cases.

**Procedure**

The practice and procedure of the Supreme Court were to be regulated by the relevant provisions of the 1876 Ordinance and by those of the Criminal Procedure Ordinance, or by the Rules and Orders that might be made thereunder from time to time (ss.15 and 113). The Rules formed the First and Second Schedules to this Ordinance.

Power of altering, amending, etc. was vested in the Chief Justice with the concurrence of the puisne judges, and any such alterations, etc. were subject to the approval of the Legislative Council as published in the *Gazette*, from the date of which the alteration, etc. took effect unless otherwise stated.

The Supreme Court Ordinance also contained provisions enabling the Chief Justice of each territory to arrange for the admission and enrolment of barristers and solicitors to appear before the courts.

**The Full Court**

This was a court of appeal and was fully constituted by two judges but might consist of three judges one of whom must always be the Chief Justice or his deputy. In all appeal cases the decision was by majority vote. Where there were only two judges sitting the Chief Justice or his deputy had a casting vote.

The Full Court was to sit not less than once a year for the purpose of hearing appeals and other matters in Lagos or elsewhere on such dates as the Chief Justice should by Rules of Court appoint. The Chief Justice might with the Governor's approval require the attendance of one or two of the puisne judges at any sitting of the Full Court.
Appeals lay to the Full Court from (i) all final judgments and decisions of the Divisional Court or judge where the amount of the claim was more than £50; (ii) all interlocutory orders and decisions made in the course of any suit, only if the judge making the order gave leave to appeal therefrom; and (iii) any suit or matter pending before the court in any province, whenever the Full Court was sitting and on an application to it by a party to that suit; the Full Court could then make any order and give such directions as the justice of the case might require.

The Full Court sat for the first time on 31 May 1877 under the Chief Justice, Sir David P. Chalmers, and Mr. Justice Marshall.

**DIVISIONAL AND DISTRICT COMMISSIONERS' COURTS**

Puisne Judges were appointed by the Governor to the Divisional Courts in the larger judicial units, the Provinces. There was one court to each Province. Assizes were held quarterly since 1897.

In much the same way, certain persons who were ex officio Commissioners of the Supreme Court were appointed (and removable) by the Governor to the smaller judicial units—the districts. These district commissioners and their deputies were empowered each to constitute a court, one in each district, and to exercise the powers of a judge of the Supreme Court. Also, each district commissioner had the powers of two justices of the peace sitting together, and was under the direct control of the Supreme Court.

Jurisdiction was both civil and criminal.

**APPEALS FROM THE SUPREME COURT OF LAGOS COLONY**

We observed above that when Lagos was placed under the centralised Government at Sierra Leone, an Order in Council of 26 February 1887, was passed establishing the West Africa Court of Appeal and providing regulations for appeals from the Supreme Court of Sierra Leone to the Privy Council. On the subsequent erection of Lagos and the Gold Coast into a separate colony in 1874, it became necessary to make fresh provisions for appeals from the decisions of the Lagos Supreme Court set up under Ordinance No. 4 of 1876, and an Order in Council of 23 October 1877 was the result. Yet another adjustment became inevitable when Lagos was separated on 13 January 1886 from the Gold Coast and an Order in Council of 5 July 1889 regularised the position for the new Lagos Colony. Appeals lay wherever the amount involved was £500 or more.

While Lagos remained with the Gold Coast Colony, its Supreme Court decisions would seem to have been subject to appeal to the Gold Coast Supreme Court, for in the volume of *Gold Coast Ordinances* for 1871–78 is a body of "Rules regulating Appeals to the Supreme Court
of Judicature of the Gold Coast Colony from the Supreme Court of Judicature of the Colony of Lagos” made under the 1876 Ordinance, though dated 21 January 1887. If so, the 1877 Order in Council must be taken to have provided for appeals from the Gold Coast Supreme Court only. Accra seemed at least to have been treated as the administrative and judicial headquarters; e.g. it was at Accra that Admiral Sir W. Hunt-Grubbe held the judicial inquiry on 1 December 1887 respecting the deposition of King Jaja of Opobo whom he found guilty and sentenced to be exiled to St. Vincent Island in the West Indies.

Be that as it may, the 1889 Order in Council now made arrangements for direct appeals from the Lagos Supreme Court to the Privy Council.

**CONCLUSION**

It will thus be seen that Nigeria and Ghana once shared a common historical experience extending over a period of some twenty years in which their legal and judicial institutions had the same origin and flourished together. If we have stressed mainly the Nigerian aspects of this mutual heritage, it is because the Gold Coast side has no doubt been fully documented and described elsewhere in this anniversary publication. This no more than a footnote to, or indeed a reminder of, those common legal and judicial traditions which our two countries nourished and nurtured together when our laws were one and the same.

It is common knowledge that this mutuality of legal experiences has led in the years subsequent to separate political existence of our respective countries to fruitful co-operation among our leaders on such issues as the West African Land Question (1912) and the National Congress of British West Africa (1919). Our lawyers maintained the practice of appearing before another’s Supreme Courts to argue briefs without let or hindrance. Of course, the West African Court of Appeal fostered this healthy cross-fertilisation of ideas and no doubt promoted the course of legal development until that court ceased to function on the attainment of independence by Ghana in 1956.

What has developed from our humble common origins in 1866, or in 1874 if we prefer the latter date, has been not just an identity or similarity of judicial and legal institutions for a while, but indeed a common legal culture. There is discernible, even today, a distinctive West African legal tradition rooted in our long association in the laws and institutions under which we have lived together and worked together in such a way as to induce common expectations of and similar reactions to the elemental things of our daily lives. This common legal culture will also be seen to be nurtured by the broad sameness of our customary laws and mores, especially as these shape and are shaped by their interaction with the received English law and our amending statutes.
CHIEFTAINCY UNDER THE LAW

N. A. Ollennu*

Introduction

Prior to the Proclamation of 1874 which established the British Crown as the central authority in this country, the supreme power over the various individual indigenous states, political, military, and for the maintenance of law and order, vested in their respective heads who were, in effect, kings. Chalmers, chief magistrate and judicial assessor, describes the position in 1872 as follows1:

"Every village has its headman, who exercises a sort of patriarchal rule over its few inhabitants; he, again, as well as his villagers, is subject to some chief, who has control over three, four, five or more villages; and this chief is again subject to the chief or king of a large district."

In consequence of certain treaties concluded, even before 1874, between the British Government and some of them, the most important of which treaties is the famous Bond of 1844,2 the aboriginal rulers conceded to the British Crown, power and jurisdiction over their territories which by various constitutional provisions, now comprise the territory of Ghana. Pursuant to these treaties the British Government, for about 30 years or more before the Proclamation, administered the country through district commissioners, magistrates’ courts, and the court of the judicial assessor.

Despite the assumption of this authority by the foreign government, the aboriginal rulers maintained and carried on administration of their respective states, judicial and otherwise. These powers were exercised by the chiefs side by side with the authority exercised by district commissioners, and appeals from the courts of the traditional rulers went to the court of the judicial assessor.

Increasingly, people were taking matters to the offices of the British commissioners; moreover the courts of the chiefs were finding service of process, and enforcement and execution of their judgments difficult; sometimes much confusion and rivalry arose as to the territorial limits

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of each authority, leading to duplication of suits, the results of which satisfied no one. Chalmers, in his despatch referred to above, describes the situation as follows:

“A chief will issue his summons, when applied for, without the least regard either to the domicile of the defendant or to the locality of the land, or other subject in dispute; and it is quite a common thing to find that a cause has been taken to one chief after another, each of whom has heard it and given a decision, without apparently the idea existing of any of the decisions being of more authority or finality than another. At each hearing fresh expenses have been accumulated until one or both the parties are plunged hopelessly in debt, and sell themselves and their families into slavery.”

**ENACTED LAW**

In view of the situation which existed, and with the apparent purpose that the chiefs should ultimately serve as agents of the central government in their areas of authority, Chalmers recommended the establishment of what he termed “native judicatories,” giving government recognition to the chiefs, the traditional authorities, defining their powers and jurisdiction.4

Thus it was that two years after the Supreme Court Ordinance, 1876 (No. 4 of 1876), was passed, the Native Jurisdiction Ordinance, 1878 (No. 57 of 1878), was enacted. That Ordinance was replaced by another Ordinance of the same title, Native Jurisdiction Ordinance, 1883 (No. 5 of 1883), later amended by Ordinance No. 7 of 1910,5 and entitled, “An Ordinance to Facilitate and Regulate the Exercise of Certain Powers and Jurisdiction by Native Authorities.”

Despite the general term “Native Authorities” used in the long title, the Ordinance was selective in its application to chiefs, in that by section 3 of the 1878 Ordinance, only some chiefs and their councils, the Traditional Authorities, were brought within its scope by proclamation. The section read:

“It shall be lawful for the governor, with the advice of the Executive Council, by proclamation to be issued by him for that purpose, to declare from time to time as he may think desirable that any head chief’s division, or part thereof, shall be brought, from a time to be named therein, within the operation of this Ordinance. On such proclamation being issued, and in force, the

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4 Ibid., para. 18; see *Sar.F.N.C.*, p. 215.
5 Cap. 82, *Laws of the Gold Coast* (1920 ed.).
said division or part thereof shall be subject to the provisions of this Ordinance, and the powers and jurisdiction of all native authorities therein shall be exercised under and according to the provisions of this Ordinance and not otherwise."

It is significant, as Sarbah points out, that in the proclamation issued consequent upon the said section, Accra and Cape Coast were omitted, and ancient prisons maintained by the chiefs of those two cities, had to be closed. The reason, says Sarbah, is that it was settled policy of the government not to extend the Ordinance to districts where a district commissioner was stationed. Of course Chalmers had expressed the view that the ideal organisation for administration of the country would have been the appointment of a commissioner (magistrate) to every part of the country working in unison with the chief, and it was failing this that he recommended recognition of the traditional authority.

The new section 3 of the Ordinance introduced in 1910 made the Ordinance applicable to chiefs throughout the country; it read:

"Every head chief's division with all its sub-divisions is within the operation of this Ordinance and the powers and jurisdiction of all native authorities therein shall be exercised under and according to the provisions of this Ordinance and not otherwise."

The Ordinance recognised and preserved the judicial powers of the aboriginal rulers. The Native Jurisdiction Ordinance also maintained some at least, of their legislative powers as well as executive and ministerial powers. By the Prisons Ordinance, 1888, the traditional prisons were legalised.

Section 27 of the Ordinance provided statutory protection for a chief for acts done by him in good faith "in the execution or supposed execution of the powers and jurisdiction vested in him." To that extent the chief was placed in the same category with officers of the central government. A lamentable provision in the Ordinance was section 29 which gave the Governor power to suspend or depose a chief. This, as Sarbah points out, raised suspicion in the country that government intended ultimately to do away with the aboriginal authority.

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6 Sar.F.N.C., p. 128.
7 Ibid. at pp. 209–210.
8 This was provided in Part III which dealt with Native Tribunals.
9 As set out in Part II.
10 Part IV.
11 Amended by Ordinance No. 10 of 1910.
The definition of chief under the Native Jurisdiction Ordinance was unsatisfactory. Another definition, in the Chiefs Ordinance, 1904 (No. 4 of 1904), is better but still not satisfactory. That is an Ordinance “To Facilitate the Proof of the Election and Installation and the Deposition of Chiefs according to Native Customs.” For the first time, that Ordinance makes confirmation of election or deposition of a chief, made in accordance with custom, a condition for holding of the office. As will appear presently, this provision has since been retained in one form or another in all enactments including the Chieftaincy Act, 1971 (Act 370). This in effect means that the constitutional position of a chief is that he holds his office by the wish of his people, but at the will of the Government.

Until the enactment of the Native Jurisdiction Ordinance, matters of a constitutional nature, that is to say questions relating to the election, installation or the abdication or deposition of a chief, were purely for the Traditional Authority of each area. Section 5 of the Chiefs Ordinance made it a subject of enquiry by the Secretary for Native Affairs (S.N.A.), or of other officers appointed by the Governor. By section 7, a statement signed by the Secretary for Native Affairs, that a chief had been elected and installed or deposed was, without proof of signature, conclusive evidence on the subject.

Letters Patent of 20 September 1916, provided for the establishment of a Legislative Council. In the exercise of his powers thereunder, the Governor in his discretion included chiefs in his nomination to the Legislative Council. An Order in Council in 1925 setting up a Legislative Council for the then Colony, gave chiefs a right by their representatives to participate in the central legislature of the country by some of their colleagues elected by themselves. The Order provided for the constitution by the Governor of Provincial Councils, composed of head chiefs, charged, among other things, with “the duty of electing from among their members, a representative or representatives of the Provincial Council to serve as Provincial Member or Provincial Members of the Council [the Legislative Council].” The Coussey Committee Report records that by creating Provincial Councils, the Order in Council recognised the importance of chiefs. The Burns Constitution of 1946 gave an option to the Provincial Councils to elect non-members, i.e. non-head chiefs to the Legislative Council. And so from 1925 until 1951 Paramount Chiefs participated in the legislature of the country.

For the exercise of power in their areas, enactments affecting chieftaincy were passed from time to time. The first of these in point of time
is the Native Administration (Colony) Ordinance. This is a very comprehensive code dealing with all aspects of chieftaincy; and defining chiefs' powers and duties fairly widely. It sought to protect the dignity of chieftaincy, and the relationship between chiefs, and maintain the integrity of each state. It is entitled "An Ordinance to Define and to Regulate the Exercise of Certain Powers and Jurisdiction by Native Authorities, and to Assign Certain Functions to the Provincial Councils and for Purposes connected therewith."

Special mention should be made of the provisions in Part 5 thereof which make it an offence to undermine the authority of a chief, and those in Part 4 which make it an offence for a chief to withdraw allegiance from a superior stool either by claiming independence or transferring allegiance to another stool.

On the face of sections 3, 4, 5 and 6 of the Ordinance, all that need be done upon the election, installation or deposition of a chief is to report the same to the Governor for his information—prima facie implying that at long last the Governor's confirmation was no longer necessary for the validity of an election, installation or deposition of a chief once the same had been carried out in accordance with customary law. It is implied, however, that before reporting to the Governor, the State Council and the district commissioner must have satisfied themselves on the validity of the election and installation.

The Ordinance gave jurisdiction to the State Councils and the Provincial Councils in matters of a constitutional nature and provided for judicial committees including Joint Committees of the Provincial Councils.

An important feature of the Ordinance is the clear line of demarcation drawn between the local government functions of the State Council, and its purely traditional functions. The Ordinance confirmed to the State Council its traditional jurisdiction to determine disputes in matters of a constitutional nature. But appeals from its decisions went to the Governor in his executive capacity. To ensure that the elections, installations or depositions were in accordance with customary law, it was provided in sections 4 and 6, that a list approved by the State Council should be supplied to the district commissioner, to be published in the Gazette, of names of office and position holders who by customary law were entitled to elect the chief.

15 Cap. 76, Laws of the Gold Coast (1936 Rev.).
16 Ibid., Pt. II See also State Councils Ordinance 1952 (No. 8 of 1952), Pt. VIII.
17 Later enactments, e.g. the Native Authority (Colony) Ordinance, 1944, and similar enactments relating to Ashanti and the then Northern Territories contained similar provisions.
In 1944, two separate Ordinances were passed, the Native Authority (Colony) Ordinance, 1944 (No. 21 of 1944), and the Native Courts (Colony) Ordinance, 1944 (No. 22 of 1944). The one restricted to the Native Authority, which by section 3 consisted of a chief and council or councils, the powers of a local authority; the other created local courts (called native courts), which took away from the traditional authority jurisdiction in civil and criminal matters; the only connection which the Ordinance created between the Native Authority and the courts thereby established was nothing more than the power to recommend persons, some of whom might be among persons whom the Governor appointed, to preside over the court, and that fees and fines from the court formed part of the revenue of the authority.

Further provisions made in these enactments required native authorities to work in conjunction with finance boards appointed under the Native Administration Treasuries Ordinance, 1939. This assured to the traditional authority the support of revenue funds which enabled the authority to exercise its powers efficiently, and to ensure maintenance of the chieftaincy. On this point Mate Kole says, “after 1944, however, the native authorities in the Colony became active agents for the provision of these local services—education, health, roads, etc., which are expected of the local authorities.” He then quotes relevant figures and table from Revenue and Expenditure of Local Government for the year ending 31st March, 1949 (No. VI of 1950), and continues:

“The official comment was: ‘From the above figures it will be seen that great progress has been made. The revenue and expenditure of the combined native authorities in the Colony has passed the half million mark and the revenue in Ashanti in 1948–49 is nearly ten times as great as it was in 1942–43.’

It will be seen from the table that local authorities all over the Gold Coast have in the last ten years made rapid progress in building up their financial strength that is required to enable them to undertake public services and development in their area.”

He concludes:

“The important point I wish to make is that the institution of chieftaincy was only by 1944 given the opportunity to demonstrate what it can achieve in modern government and it proved itself worthy. Had it been allowed a little more time, it could, on the
evidence of its performance in the years 1944–49, turn chieftaincy from the concept of traditional to a modern Governmental institution.

What chieftaincy could have achieved had it been guided since 1944 or even 1887 by laws such as the Native Authority Ordinance, 1944, could well be imagined."

With the passing of the Local Courts Act, 1958 (No. 23 of 1958), chieftaincy completely lost all its ancient powers and jurisdiction to adjudicate on disputes other than disputes in matters of a constitutional nature. In the same year, 1958, the Houses of Chiefs Act (No. 2 of 1958), was passed, dealing mainly with chieftaincy. It retained the jurisdiction of the State Council and the Houses of Chiefs in matters of a constitutional nature, and created appeal commissioners appointed by the Judicial Commission, to hear appeals in matters of a constitutional nature affecting chiefs. The House of Chiefs might at the request of the Governor-General or the National Assembly, make written declarations of what, in its opinion, was the customary law affecting any matter.

Now almost every stool or skin in Ghana owns land or has land attached to it. Management of stool lands has been one of the aboriginal functions of a stool. In 1951, a Local Government Ordinance was passed. It provided for the creation of local government bodies, which took over local government functions which used to be a responsibility of the Traditional Authority.

The Local Government Ordinance had another far-reaching effect upon chieftaincy. Part VII thereof dealing with lands vested the management of stool lands in the local council for each area. The revenue from these lands was to be collected by the council, and deposited in a special account in the custody of the Accountant-General set up by the Minister, such revenue to be distributed between the council and the stool in certain proportions. This provision was in accordance with recommendations made in the report of the Coussey Committee. The Ordinance rendered ineffective any disposal of any interest in stool land which had not the concurrence of local council. For purposes of such management, it was provided that a stool should, at the request of a council of the area, declare its interest in land giving full particulars.

22 Part III of the Act.
23 Busia, op. cit., p. 40.
24 Cap. 64 (1951 Rev.).
25 Ibid., s. 3.
26 Ibid., s. 72. By that section, ss. 72–76 inclusive of Cap. 64 did not apply to the then Northern Territories.
27 Ibid., s. 74.
28 Ibid., s. 75.
The Administration of Lands Act, 1962 (Act 123), declared that the management of stool lands was vested in the Minister.

In July 1960, Ghana became a Republic. One of the enactments passed by the Constituent Assembly to bring the Republic into being is the Courts Act, 1960 (C.A. 9). This Act repealed among other enactments the Local Courts Act, 1958. Part VI thereof created new local courts presided over by officers designated local court magistrates appointed by the Minister, without reference to the Traditional Authority.

An Act was passed in 1961 to consolidate with amendments, enactments relating to chieftaincy, namely the Chieftaincy Act, 1961 (Act 81). It gave recognition to councils of divisional chiefs which it called divisional councils; it redesignated State Councils as Traditional Councils retaining their jurisdiction in matters of a constitutional nature. An office of Judicial Commissioner was set up under it with both original and appellate jurisdiction in matters of a constitutional nature.

The 1969 Constitution guaranteed chieftaincy together with its Traditional Councils as established by customary law and usage, and provided for establishment of a National House of Chiefs, which should have appellate jurisdiction in decisions in chieftaincy matters given by a Regional House of Chiefs “and advise any person or authority charged with responsibility under the Constitution, or other law for any matter relating to or affecting chieftaincy.”

The Local Administration Act, 1971 (Act 359) (subsequently renamed the Local Government Act) brought into operation and amended by the Local Administration (Amendment) Decree, 1972 (N.R.C.D. 138), allocates one-third of the membership of district councils to the Traditional Authorities.

The most recent enactment affecting chieftaincy, is the Chieftaincy Act, 1971 (Act 370), which notwithstanding the suspension of the 1969 Constitution, continues in force by virtue of section 23 of the National Redemption Council (Establishment) Proclamation, 1972. It created the House of Chiefs, Traditional Authorities and divisional councils, the same as under the Chieftaincy Act, 1961 (Act 81). The functions of the National House of Chiefs include appellate jurisdiction from decisions of a Regional House of Chiefs. Those of the Regional House of Chiefs include original jurisdiction in matters affecting Paramount Chiefs, and appellate jurisdiction from decisions of Traditional Authorities and the functions of the Traditional Authorities include exclusive jurisdiction in causes and matters affecting chieftaincy.29

29 This “exclusive” jurisdiction is now being challenged by the High Court which is claiming concurrent jurisdiction. See, inter alia, Republic v. Boateng; Ex parte Adi-Gyamfi II [1972] 1 G.L.R. 317.
The traditional powers of the chiefs and their councils to legislate was completely taken over by the British Government in 1901. Three Orders in Council made on 26 September of that year, respectively provided for separate administration of the Colony, Ashanti and the Northern Territories. These are: the Gold Coast Order in Council, 1901, the Ashanti Order in Council, 1901, and the Northern Territories Order in Council, 1901. The Colony Order in Council made the Governor, upon the advice and consent of the Legislative Council, the legislative authority in respect of the Colony; the Ashanti Order in Council and the Northern Territories Order in Council each made the Governor the sole legislative authority in Ashanti and in the Northern Territories respectively. By virtue of these statutory provisions, the Chiefs and their councils, in each of these areas, were deprived of their inherent powers to legislate for their people; they also lost their powers to alter, modify or amend the customary law existing in their respective areas.

Gradually, power was conferred upon the chiefs to make recommendations or proposals to the Governor, for promulgation of new customary law or for the modification or amendment of the existing customary law, with the provision that the Governor, if satisfied that the proposal met certain tests, might proclaim the same as part of the customary law of the state or council. This power was first given in 1927 and to the chiefs of the Colony under section 130 of the Native Administration Ordinance.

The power was next extended to Ashanti by the Native Law and Custom (Ashanti Confederacy) Ordinance, 1940 (No. 4 of 1940). Finally it was also extended to the Northern Territories under the State Councils (Northern Territories) Ordinance, 1952 (No. 5 of 1952). The State Councils (Colony and Southern Togoland) Ordinance, 1952 (No. 4 of 1952), which consolidated with amendments existing legislation relating to State Councils in the Colony and Ashanti, re-enacted with expansion the powers of the State Councils in the two territories to propose amendment and modification of the customary law in their respective areas, for consideration of the Governor. Any proposal which did not receive the Governor's consent, was null and void of effect. Thus at the date of coming into force of the Chieftaincy Act, 1971 (Act 370), all traditional councils in the country were vested with jurisdiction to make proposals for amendment and modification of the customary law, for the consideration of the Governor.

30 These Orders in Council are reproduced in Sar. F.N.C., pp. 170-182.
31 Cap. 76, Laws of the Gold Coast (1936 Rev.).
Special mention should now be made of the provisions in Part VII of the Chieftaincy Act, 1971 (Act 370), with respect to powers of Traditional Councils and the Houses of Chiefs in relation to customary law. It 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." Provision is also made in the Act for declaration of the customary law rule relating to any subject in force in any region, for the alteration of customary law, as also for assimilation of the customary law by the common law.

The Act further provided for the maintenance by the National House of Chiefs of a National Register of Chiefs. The Act in section 48 contains the latest definition of a chief and it is as follows:

"(1) A Chief is an individual who has, in accordance with customary law, been nominated, elected and installed as a Chief or as the case may be appointed and installed as such and whose name for the time being appears as a Chief on the National Register of Chiefs:

Provided that no person shall be deemed to be a Chief for the purposes of the exercise by him of any function under this Act or under any other enactment, unless he has been recognised as such by the Minister by notice published in the Local Government Bulletin.

(2) Subject to the foregoing subsection (1) the name of any person who has been installed as a Chief shall be entered by the National House of Chiefs in the National Register of Chiefs not later than one month from the date of the receipt of the notification of such installation."

By this definition the Act recognises two categories of chiefs, namely:

(a) a chief as known in customary law, that is one who has been duly nominated, elected, or appointed and installed in accordance with customary law, and whose name has been entered as such in the National Register of Chiefs, in accordance with section 48 (2); and

(b) a chief recognised by the Minister by notice published in the Local Government Bulletin for purposes of the exercise by him of any function under the Act or under any other enactment.

33 Act 370, s. 40.
34 Ibid., s. 42.
35 Ibid., s. 43.
36 Ibid., s. 45
37 Ibid., s. 50.
A chief of the first status may be described as the chief as he was known in ancient times but without any of his local government functions, administrative duties, judicial powers, etc. A chief of the second status is the chief whom the government recognises for performance of functions prescribed by enactment.

Mr. Victor Owusu, Attorney-General, as he then was, moving the second reading of the Chieftaincy Bill in the National Assembly in 1971 made this same point when he said:

"I would like to demonstrate this distinction between customary functions and statutory functions with a few examples. Pouring libation on the black stool on important festivals, serving as customary arbitrator or conciliator in inter-family disputes, receiving customary homage and tribute from subjects and performing all religious duties incidental to Chieftaincy are functions which lie exclusively within the province of customary law. But exercising appellate jurisdiction over decisions of a Traditional Council of say the Manya Krobo Traditional Area is certainly not customary law. No paramount stool has appellate jurisdiction over another paramount stool. The only basis for the exercise of such appellate jurisdiction is the Constitution and Statute. Indeed the whole institution of a Regional House of Chiefs is founded on legislative enactments and has no basis in customary law except, possibly, in the case of Ashanti. Similarly, the election of representatives from the Regional House of Chiefs to the National House of Chiefs is a statutory function and not a customary one. So is participation in the deliberations of the National House of Chiefs. The maintenance of a National Register of Chiefs by the National House of Chiefs and the creation and operation of judicial committees are all traceable to statute and not customary law. The Chieftaincy Act will do no more than empower the Government to recognise chiefs for the limited purposes of statutory functions."

To further elucidate this point, it is relevant at this stage to again refer to subsection (2) of section 48, which makes it mandatory for any chief installed in accordance with customary law to be registered. It reads:

"Subject to the foregoing subsection (1) the name of any person who has been installed as a Chief shall be entered by the National House of Chiefs in the National Register of Chiefs not later than..."
one month from the date of the receipt of the notification of such installation."

The automatic registration is the exercise of a right. When the whole of section 48 is read together, the interpretation to be placed upon it appears to be that recognition of a chief by Government is not needed for the purpose of the exercise by the chief of a right, either under the Act or otherwise, but it is needed by him, "for the purpose of the exercise by him of any function under the Act." So that while a chief cannot function or participate in the functioning as a traditional authority, he may lawfully litigate his right, say in a House of Chiefs, and obtain a declaration that he has been validly installed as a chief in accordance with customary law; he will thereupon be recognised by the National House of Chiefs as under section 49, and consequently have his name entered in the National Register of Chiefs; yet the Minister may, without assigning reason, refuse to grant him recognition.

While it should be conceded that the Minister would be presumed always to exercise his discretion judicially and in the best interest of the people, and of good government, it cannot be denied that refusal by the Minister to grant recognition to a chief who is recognised by the National House of Chiefs, and whose name has consequently been entered in the National Register of Chiefs, will, most likely, create embarrassing situations in chieftaincy, and for the House of Chiefs. Since chieftaincy is founded upon tradition and customary law, and since the accredited holders of traditional office are the custodians of the traditions and customary laws of the people, it is respectfully submitted that registration of the name of a person as chief by the National House of Chiefs, under section 48 (2) of the Chieftaincy Act, 1971, amounts to a declaration by the National House of Chiefs that the person has been installed in accordance with customary law; in other words registration is recognition of a chief by the National House of Chiefs. That decision on recognition by the National House of Chiefs should as of right warrant recognition of the chief by the Minister.

We may state that effect of the proviso to the section in another way: since a chief in the first category is a chief under the Act, he has automatic recognition by government, but government denies to him the right to function under the Act or any other enactment. This creates an anomalous situation.

Either there is need for government's recognition for a chief validly installed under customary law, or there is not. If there is then it is submitted, the recognition should be accorded without exception, to all such chiefs proved to be validly installed and recognised by the
National House of Chiefs, i.e. to all registered chiefs. It is further con­
tended that the recognition should be for all purposes, and not only for
purposes of the exercise of functions under the Act. The institution of
chieftaincy founded as it is upon custom and tradition would be
ruined, if consideration for admission of a chief to exercise of rights
which enacted law confers upon it, were other than is warranted by
custom and tradition.39

CUSTOMARY LAW

We have so far discussed chieftaincy under enacted law. But enact­
ments are not the only set of laws comprised in the laws of Ghana.
The law includes the customary law, the indigenous law of the land,
including those rules of customary law determined by the Superior
Court of Judicature. This, which is comprised in the common law of
Ghana as defined in the Constitution, 1969,40 constitutes a most impor­
tant part of the law of Ghana, particularly with regard to chieftaincy.
Hence the significance of the provision in the definition of a chief, 41
that the first condition precedent of becoming a chief is nomination,
election, and installation “in accordance with customary law.”

In pursuance of power given to it under section 19 of the Supreme
Court Ordinance, 1876 (No. 4 of 1876),42 to observe and enforce
observance of customary law in adjudicating upon disputes between
natives (Ghanaians), the High Court and the court of the judicial
assessor before it, exercised jurisdiction in chieftaincy disputes, i.e.
in causes and matters relating to the nomination, election, installation,
deposition and other matters involving chieftaincy. Being a superior
court, the jurisdiction of the High Court covered every subject-matter
except any which is expressly excluded from it by statute. While on this
subject, it is proper to point out, that the statement in the article, “The
case for traditional courts under the Constitution”43 that chieftaincy
disputes have never been within the jurisdiction of the superior courts
in Ghana is an oversight. It became so only in 1935. The error is
regretted.

We have earlier referred to section 5 of the Chiefs’ Ordinance, which
provided that a certificate of the Governor that a person had either
been enstooled or deposed in accordance with customary law, was

39 On this point see Ofori-Boateng, J., “Chieftaincy matters and proceedings”
(1974) 6 R.G.L. 93 at pp. 99–102. See also Republic v. Boateng; Ex parte Adu-
1 G.L.R. 63 at p. 75.
40 Art 126 (2) and (3).
41 Chieftaincy Act, 1971 (Act 370), s. 48 (1).
42 The section later became section 87 of Cap. 4 (1951 Rev.).
conclusive evidence in any court that the person had been so nominated, elected, installed or deposed. Interpreting that section of the Ordinance, the Judicial Committee of the Privy Council held in Odonkor v. Matekole\(^44\) that the section ousted the jurisdiction of the High Court in chieftaincy matters where such approval or certificate was given. That decision was followed in Nkum v. Bonso.\(^45\) It did not, however affect the jurisdiction of the High Court generally in other chieftaincy disputes, e.g. disputes as to who were proper persons to nominate, elect, install or depose a chief, or claims by an individual or a family to entitlement to election, or claims for recovery of stool or skin property. Thus the Superior Courts continued thereafter to exercise jurisdiction in chieftaincy matters after that case. Among decisions of the Superior Courts in this regard, we may mention Mensah v. Toku.\(^46\) There it was held that deposition of a chief was invalid if made without giving the chief notice of the accusation against him and without giving him opportunity to defend himself there. There is also Toku v. Ama\(^47\) which held, among other things, that the nomination, etc. must be made by accredited traditional office holders, and that the electors, etc., had discretion to pass over one person or another in making their nomination. Another case of importance is Sasu v. Diawuo\(^48\); it dealt with who were proper custodians of stool property. About the most celebrated reported case on chieftaincy is the case of Boafo IV v. Ofori Kuma I I.\(^49\) The claim there was for recovery of property of the Paramount Stool of Akuapim; it was made on the grounds that the defendant who had possession of it had abdicated the stool. A plea by the defendant that he was in lawful possession because he had been validly re-nominated, elected and installed, led to the canvassing of almost every major issue in chieftaincy. The judgment of the Full Court in the case confirmed by that of the Judicial Committee of the Privy Council laid down the general principle of the customary law on the subject; that decision applies to almost every stool or skin in Ghana save as to minor details and designations of the traditional office holders.

In 1935, the jurisdiction of the Supreme (High) Court in chieftaincy disputes both original and appellate was expressly taken away by statute, that is by the Courts Ordinance, 1935 (No. 7 of 1935), section 75 of which provided as follows\(^50\):

"The Supreme [High] Court and the Magistrates' Courts shall not have jurisdiction to entertain either as of first instance or on

\(^{44}\) (1915) P.C. '74-'28, 37.
\(^{45}\) (1926) F.C. '26-'29, 165.
\(^{46}\) (1887) Sar.F.L.R. 42.
\(^{47}\) (1890) Sar.F.L.R. 58.
\(^{48}\) (1916) D. & F. '11-'16, 97.
\(^{49}\) (1920) F.C. '20-'21, 130 and (1922) P.C. '74-'28, 57.
\(^{50}\) Cap. 4, Laws of the Gold Coast (1936 Rev.), s. 75; it became Cap. 4 (1951 Rev.), s. 88.
appeal any civil cause or civil matter instituted for—

(1) the trial of any question relating to the election, installation, deposition, or abdication of any Paramount Chief, Head Chief or Chief;

(2) the recovery or delivery up of stool property in connection with any such election, installation, deposition or abdication;

(3) the trial of any question touching the political or constitutional relations subsisting according to native law and custom between two or more Paramount Chiefs or Head Chiefs, or between two or more chiefs, or between a Paramount Chief, and a Chief or between a Head Chief and Chief."

Consequently there has been no outstanding judicial pronouncement on the subject by the highest appellate court\(^1\) since then. As earlier pointed out, article 105 clause (3) of the Constitution, 1969, now expressly confers jurisdiction on the Court of Appeal to hear and determine any matter which has been determined by the National House of Chiefs. It is therefore hoped that from now on, there will be decisions of the Court of Appeal in the exercise of this jurisdiction, which will help to develop the law as it applies to chieftaincy as an element in the common law of Ghana.

**General principles**

Chieftaincy is an ancient institution, the centre of rich culture, an object of awe and reverence as the active possessor of state power and possessor of the spirit of the ancestors and of the state. Of this sacred institution the Coussey Committee on Constitutional Reform had this pregnant statement to make\(^2\):

"The whole institution of Chieftaincy is so closely bound up with the life of our communities that its disappearance would spell disaster. Chiefs and what they symbolise in the society are so vital that the subject of their future must be approached with the greatest caution. No African of the Gold Coast is without some admiration for the best aspects of chieftaincy and all would loathe

\(^1\) However, in *Republic v. Boateng; Ex parte Adu-Gyanif I* (supra), Hayfron-Benjamin J. (as he then was) held that as there was an inconsistency between the provisions of the Constitution, art. 102 (2) and the Courts Act, 1971 (Act 372), s. 52, the provisions of the Constitution should prevail and the High Court thus had original jurisdiction in chieftaincy matters. See further Ekow Daniels, W. C., "Jurisdiction of the High Court in chieftaincy matters" (1972) 4 R.G.L. 81 and Ofori-Boateng op. cit.

to do violence to it any more than to the social values embodied in the institution itself. Criticisms there have been, but none coming from responsible people whom we have known or met is directed towards the complete effacement of chiefs.”

The Constitutional Commission of 1968 agreed with those views of the Coussey Committee.53

As successors of their ancestors customary law requires that chiefs should come from particular kindred groups,54 to which the stool or skin belongs. He should first be nominated, then elected, and finally installed. These were sacred functions and must be performed by persons holding accredited traditional offices.55 Where there is more than one house in the stool family or more than one family from which a chief is chosen, those houses or families take it by turns, in rotation, to supply candidates for the stool or skin.

Nomination of a candidate to the stool is made by the head of the family whose turn it is to occupy the stool; he or she acting in consultation with elders of the family. (In Akan areas the nomination is made by the Abrewatia or Queen Mother, Ohemaa; although in theory this officer is said to act in her absolute discretion, in practice she does so in consultation with the senior female members of the family). The board of electors may reject the candidate, and demand nomination of another candidate.56 In some parts of the Northern and Upper Regions, the first step to the skin is selection made by holders of certain traditional offices, and is based upon some well defined principles. If the electorate reject a third candidate, the family loses its right to nominate a candidate to fill that particular vacancy. In that event the electing body will demand a candidate of their own choice from that family. The nominating body may pass over an older candidate in the family and nominate a younger one.57

A “youngman,” meaning a person of whatever age, who is not a holder of traditional office, may in rare cases be created a chief in recognition and appreciation of special services rendered or honour done to the town or state, or for distinguishing himself in any field of life or the other, for example special academic or professional distinction, achievement in commerce and industry and so on. This is more common in Nigeria than in Ghana.

53 Supra.
54 Usually the family has branches, two or three as the case may be.
55 The offices may differ in the various traditional and divisional areas. Discussion on this subject may be found in Rattray, Ashanti Law and Constitution, p. 84 et seq.; Casely Hayford, Gold Coast Native Institutions, pp. 40-43, 63 et seq.; and B. sia, op. cit., p. 37 et seq.
56 Boufo IV v. Oforikuma II (1920) F.C. '20-'21, 130; (1922) P.C. '74-'28, 57, and Republic v. Boaeng, supra
There usually would be more persons than one eligible for the stool. The case of each such claimant is carefully considered, and the candidates meticulously screened to choose the best among them, the one who has popular support. To achieve this end, intensive consultations take place behind the scenes, both at the nomination level and the election level. Possession of certain sterling qualities is an advantage. These include qualities of leadership, high moral standard in private and in public life, industry, native intelligence and good human relationship.

The consultations proceed in a cross-section of the community such that the result of the election should express the consensus of majority opinion. This process is an exercise of democracy without the use of ballot box, free from all the evils and disharmony which usually attend upon election campaigns.

Any individual or family who feels that he has been unjustly rejected, or that his claim has not received due consideration, or that he has a superior claim, may sue in the Traditional Council, or the Regional House of Chiefs as the case may be, to litigate his claim, and do so in compliance with the procedure laid down in the enactment. As earlier pointed out, the final decision in this constitutional matter rested with the Governor prior to 1971. It now rests with the Court of Appeal by virtue of section 22 of the Chieftaincy Act, 1971 (Act 370).

Upon his election the chief subscribes to certain principles and promises to observe certain taboos; and upon his installation, he takes a solemn oath upon the state sword, to uphold the dignity and the traditions of the state, and to respect his elders.

It is important at this stage to restate the well-known principle of customary law that there are two family groups in Ghana, the paternal and maternal, the family of the father and the family of the mother, and that "every Ghanaian belongs to each of these two groups of ancestry, the paternal and maternal. He may belong to one of the groups for one or more purposes; and to the other for one or more purposes; he may belong to both for all purposes". Membership of the family entitles a person to certain customary rights and privileges in the family and imposes certain customary obligations upon him. His right may for example include the right to be elected or appointed to a traditional office: as a chief, sub-chief, linguist, asafoatse, etc. His duty may include service in the asafo company of the family, etc.

When a candidate is elected or appointed to a traditional office in one family, custom requires that concurrence of the other family should be formally obtained. This is done by the offer of drink by the one

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58 Ollennu, The Law of Testate and Intestate Succession in Ghana, p. 72.
family to the other, and acceptance of the same by the other family. The import of this custom is precisely the same as the custom of asking for the hand of a girl in marriage from her family; thus in Ga the two ceremonies are classified under the term "Shibimo," meaning engagement.

Until a chief takes the oath mentioned above he is not a chief. In that oath he pledges to lead his people righteously and faithfully to achieve prosperity, to answer all their legitimate calls by day or by night, in prosperity, in happiness and in sorrow and joy, in danger and in adversity, all these and more upon pain, upon violation of any of them, of forfeiting the stool, suffering extreme disgrace and in ancient times, even suffering loss of life sometimes at his own hand, e.g. by drowning himself in the sea. Upon violation of his oath, the chief would be removed from office by destoolment, or will be forced to abdicate.

The customary law that a chief should be an object of reverence and homage, and that any disrespect to his person or office is a punishable offence, finds statutory recognition in section 53 (a) of the Chieftaincy Act, 1971 (Act 370).

Under customary law a chief is father of the state, and leader of his subjects; he is the custodian of all property of the stool or skin, including land, paraphernalia and other properties. He is entitled to the use and enjoyment of the land and other properties and proceeds therefrom and any interest or profit which he acquires through the use of this property forms part of the stool property.

Equally with all the subjects he is entitled to a portion of the land for his own personal purposes. As father of the people he should set an example to them in industry; e.g. by farming his individual portion of the land, or by engaging in any profession, trade or business. All profits from such business and any income he derives from his personal exertions remain his individual property and not stool property. In the practice of his profession, or in carrying out his trade or business, it is expected of the chief that he be a man of stature, morally and spiritually, and an example to his people in honesty and integrity; any corrupt and fraudulent practice employed in public or private business, exposes him to the risk of forfeiting this office.

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55 Busia, op. cit., p. 38.
56 For the form and examples of the oath, see Rattray, op. cit., p. 84 et seq.; Busia, op. cit., p. 54 et seq.
57 Busia, op. cit., pp. 21-22, on destoolments in Ashanti; note Mate Kole's memo reproduced in Busia, p. 38, giving the Manya Krobo account; see also Quarcoo, A. K., Draft Paper No. Q/3/75, Socio-Political Relevance or Irrelevance of Chiefship in Contemporary Ghana.
In furtherance of his oath to seek and promote the welfare and prosperity of his people, and in return for their homage, reverence and service, it is the duty of the chief, from time to time, as need arises, to encourage them in agriculture (in the rural areas), and to work for the siting of industries within his state, and locating avenues of employment for his subjects. He is also expected to organise his people in communal service, and to encourage and patronise the establishment of voluntary welfare organisations in the area; and in all other ways, inspire his people, particularly the youth, to patriotism, bravery, respectability and to all that goes to make honourable citizens of the state. Thus in these respects, quite apart from the responsibilities and privileges assigned to him in the local government system, the chief could be regarded as an agent of the central government in his state or area.

Still as father of his people, the chief should promote peace, order and good neighbourliness in his state, settle disputes extra-judicially, if any should arise between sections in the state, and promote reconciliation between subjects. It is gratifying therefore, that the legislature thought fit, by enacted law, to preserve to chieftaincy, its rights under customary law, to hold arbitral proceedings.

The chief's place, says Mate Kole, is among his people. This then is chieftaincy; an institution which "is still the pivot around which community development evolves and the social framework for settlement of a broad spectrum of individual, family, clan and tribal disputes," the disappearance of which, as was widely and vehemently represented to the Constitutional Commission, would create a vacuum in the life of the nation.

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63 See Mate Kole's unpublished speech on chieftaincy, supra.
65 Chieftaincy Act, 1961 (Act 81), s. 5.
66 Mate Kole, unpublished speech supra; see also Nii Anyetei Kwakranya II, paper to Academy of Arts and Sciences Seminar, 27 November 1974, on chieftaincy.
68 Ibid., para. 642.

S. O. Gyandoh, Jr.*

The modest burden of this contribution is to trace in outline the story of the courts' role in this country in the matter of the protection of the liberty of the individual during the last hundred years. Since the publication, of which this contribution is a part, is in commemoration of the centenary of the first major enactment on the subject of courts and the administration of justice in this country, attention will be focused on the work of those courts established by that enactment—the Supreme Court Ordinance, 1876, and their lineal successors or descendants to date.

By concentrating on the role of the established judiciary in the crucial matter of the protection of the liberty of the individual, I do not mean to deny, or even under-rate, the responsibility of policy-makers other than the judiciary to ensure the full flowering of liberty. Executive and legislative encroachments on the liberty of the individual can, and often are, more devastating in their impact than judicial pronouncements which tend to narrow the scope of the liberty granted under the laws of a particular community. Yet, it is assumed throughout this contribution that the responsibility of the judiciary for ensuring a maximisation of the liberty of the individual is crucial and paramount, for two basic reasons. First, while the characteristic function of the legislative and executive branches of the government is to protect the public interest in maintaining law and order, that of the judiciary is an act as arbiter over competing claims between individuals or between individual and the State. Second, by training and by the sheer force of traditional attachments, the personnel of the judiciary should always consider the protection and promotion of the liberty of the individual as a crucial function of the primary duty to administer justice to all manner of people without fear or favour.

The expression "liberty of the individual" is used throughout the survey in the compendious sense of the freedom of the individual to order his personal life and to conduct his affairs as he sees fit within a regime of law-government which eschews arbitrariness, inequality of treatment before the law, and other forms of abuse of power. In

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other words, it is assumed that the road to the goal of personal liberty is best mapped out on the terrain of the Rule of Law state. And, I should hasten to add that I consider the concept of Rule of Law as positing a comprehensive ideal to which those who claim a commitment to liberty must daily aspire. This ideal is reflected in a general description offered by the International Commission of Jurists,\(^1\) which sees the Rule of Law as

"a dynamic concept for the expansion and fulfilment of which jurists are primarily responsible and which should be employed not only to safeguard and advance the civil and political rights of the individual in a free society, but also to establish social, economic, educational and cultural conditions under which his legitimate aspirations and dignity may be realized."

It follows from my adopted designation of the expression "Rule of Law" and my stated preference for protecting and promoting the liberty of the individual within the context of a regime of the Rule of Law that I do not claim for the judicial branch exclusive responsibility for ensuring personal liberty. Nevertheless, I believe that it bears repetition to maintain, once again, that the long and tortuous road that leads ultimately to maximum and optimal enjoyment of personal liberty, consistent with the preservation of law and order, is best illuminated by the decisions of the courts. And, it is further suggested that without the illuminating wisdom of the courts’ decisions, the road tends to get darker and darker, thus rendering passage difficult and, ultimately, impossible. This is a further reason for showing close concern for the modalities by which the courts provide practical content and substance to the somewhat disembodied rules and standards which control the scope of personal liberty in a given society.

As this essay will show, the impression ought not to be allowed to gain ground that the administration of justice began in this country with the promulgation of the Supreme Court Ordinance of 1876. Nor should it even be remotely imagined that the Ordinance of 1876 was the first such legislation to be introduced into this country. The fact of the matter is that the maintenance of ordered liberty within

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\(^1\) See the International Commission of Jurists (I.C.J.), *The Rule of Law and Human Rights: Principles and Definitions* (Geneva, 1966). The quoted description was first formulated at New Delhi, India, at a regular Congress of the I.C.J. whose main task was to work out a comprehensive definition of the Rule of Law. At this Congress, it was also emphasised that it was the responsibility of jurists to ensure that practical effect was given to this concept. A follow-up conference, held at Lagos, Nigeria, adopted the Law of Lagos, which declared that the principles of the Rule of Law, as described in the text, should apply to any society, whether free or otherwise, thus making explicit their application to colonial territories. Rather significantly, the Law of Lagos also pointed out that the Rule of Law cannot be fully realised unless legislative bodies had been established in accordance with the will of the people under a freely adopted Constitution.
any given community, including our own, must invariably include the steady refinement of formal and informal processes of specialised modes of adjudication of disputes and resolution of social conflicts. And, the story of the courts’ role in the protection of the liberty of the individual in this country must be viewed against the background of the universal need to devise fair and workable strategies for the peaceful resolution of conflicts in any comprehensive political scheme of governance.

I BEGINNINGS AND JURISDICTIONAL CONFLICTS

The beginnings of the administration of justice in this country gave little promise of developing into a firm regime of law-government, with the established courts as the principal instrument through which the liberty of the individual is protected. European contact with some of the littoral peoples of this country had been established as far back as the fifteenth century. During the next three centuries or so, the Portuguese, Danes, Dutch and the English vied with one another in establishing commercial and trading influence with pockets of the indigenous peoples. Yet, it was not until the early nineteenth century that the foundations of the administration of justice were laid. Even so, the foundations then laid rested, initially at any rate, largely on informal arrangements, secured almost entirely through the efforts of a single remarkable individual.

Captain George Maclean, an English soldier with a penchant for administration, was the first to plant the seeds of British ideas of justice in this country, then known as the Gold Coast. British official influence in the Gold Coast began in 1821, with the passage in that year of the West African Act by the British Parliament. Under the terms of this enactment, British possessions on the Gold Coast, which consisted of a number of castles and forts either built by the British themselves or bought from other commercially-motivated European adventurers, were to be officially administered from the earlier-established colony of Sierra Leone by a governor based in that country. By 1828, the British Government had grown weary of her settlements on the Gold Coast, and decided to abandon them. There were two main and related reasons for this decision, which, had it stuck, would have entirely


3 Ward, op. cit. at p. 189 et seq.; Fage, op. cit, at p. 134. And see Newbury, op. cit. at pp. 500-503: Despatch on Gold Coast Forts dated 21 March 1827.
changed the course of the political and constitutional history of this country. The first reason was British involvement in a number of inter-tribal wars (mainly fought between the Fantes and Ashantis) which was costing Britain rather heavily in men and money. Following largely from this first reason, trade and commerce, which provided Britain as well as the other European colonisers with their most powerful motivation for their presence here, were at their lowest ebb. In these circumstances, continued British presence on the Gold Coast was seen as too much of a burdensome liability for the British tax payer. A minor reason for the desire to pull out was the inhospitable nature of the climate.

The decision by the British Government to back out of the Gold Coast was, however, resisted by the local British merchants, who expected trade to pick up and by their Fante allies, who did not relish the prospect of being left at the mercy of the warlike Ashantis and their traditional allies, the people of Elmina. To this resistance the British Government reacted with the compromise solution of handing over the administration of the British Settlements and forts to a committee of three London merchants, whose duty was to maintain the forts at Cape Coast and Accra and to administer the settlements and their trade. The actual government of the settlements was to be carried out by a governor and an elected council, and the first substantive governor was designated as Captain George Maclean, a young soldier who had commended himself to the authorities during a brief period of active military service in Sierra Leone and the Gold Coast from 1826 to 1828.

Maclean, who arrived at Cape Coast as governor in 1830, was undoubtedly the most colourful of the early British administrators. He was largely responsible, through the sheer force of his indomitable courage and sterling qualities of leadership, for the firm establishment of the courts’ jurisdiction in the administration of justice generally, and in the protection of life, liberty and property, in particular. And, he achieved this rare feat without a shred of legal backing, for in 1830, the British Government had carefully limited the jurisdiction of the administration of the settlements to “the forts, roadsteads or harbours thereunto adjoining as well as the persons residing therein.” Yet, by the end of Maclean’s tenure as governor in 1843 British jurisdiction had spread to an area “extending from the Pra in the West to the Volta in the east, and for about forty miles inland.” Maclean was criticised by his own compatriots for his high-handedness in dealing drastically with native chiefs and other functionaries who were slow in giving up,
at his request, such barbarous practices as panyarring\(^6\) and human sacrifice. He was also criticised for failing to stop domestic slavery at a time when slavery had been outlawed by the British Parliament. Finally, he was criticised for extending British jurisdiction without lawful authority. He was vindicated by a Select Committee of the British Parliament, whose report of 1843 recommended the resumption of direct control by the British Government over the affairs of the British settlements on the Gold Coast.

Maclean's successor as governor, Commander Hill, who took office as governor in 1843, continued the process of expansion of British jurisdiction in the administration of justice on a more orthodox basis. The celebrated Bond of 1844 was concluded between Commander Hill, acting for and on behalf of the British Crown, and a number of coastal chiefs. The limited effect of the Bond was to confer retrospective legality on the jurisdiction exercised earlier without authority by Captain Maclean. It did not purport to subjugate politically the territories or subjects of the chiefs who signed it in the first instance or those who later ratified it. However, the "power and jurisdiction" granted to the British under the Bond was intended to be exercised as it had been exercised by Maclean for the "protection of individuals and property."\(^7\)

The mutually shared concern for the protection of the liberty of the individual which was thus exhibited in the Bond of 1844 was further emphasised in the remaining two articles of the Bond. The first of these denounced human sacrifices and other barbarous customs, such as panyarring as "abominations and contrary to law," and the second declared murder, robbery and other crimes and offences as triable "before the Queen's judicial officers and the chiefs of the districts, moulding the customs of the country to the general principles of British law."\(^8\) Captain George Maclean was the judicial assessor, a

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\(^6\) Defined by Fage, op. cit. at p. 135 as "the forcible seizure of a person or property in order to secure redress or restitution for a grievance or a debt." Panyarring was widely practised in the West African territories as part of the customary law.

\(^7\) Ward carefully points out, op. cit. at pp. 192-193, that neither Maclean's unauthorised extension of the territories under his jurisdiction nor the voluntary acceptance of British jurisdiction in the administration of justice under the Bond of 1844 implied acceptance by the natives of British political sovereignty. He states at p. 192: "The position of the country was anomalous in that its independent peoples were voluntarily submitting to a restriction on their independence in the one particular of judicial matters, and in no other particular." (My own emphasis.)

\(^8\) There were, of course, mixed motives for the establishment of British influence in the administration of justice as in other spheres. Governor Hugh Clifford in his Introduction to the first edition of Claridge's monumental work, op. cit. at p. xii candidly acknowledges this fact in the following revealing sentence: "Thus, the history of British relations with the peoples of the Gold Coast and Ashanti, rightly viewed, is the story of an attempt to secure our merchants' profits at the least possible cost to ourselves, and the gradual assumption of extended responsibilities undertaken in pursuance of that object." And, even more pointedly, Sarbah, op.
position which also carried with it, at that time, the title of Chief Justice, from 1843 to 1847, when he died and was buried at Cape Coast Castle.

From the humble but crucial foundations of British jurisdiction in the administration of justice thus laid by Captain Maclean and Commander Hill with the consent of some indigenous chiefs, the stage was set for a whole series of jurisdictional disputes concerning the permissible areas of authority as between the British courts established on the Gold Coast and the traditional rulers. The edges of these jurisdictional issues were further sharpened by the passage, in due course, of a series of Court Ordinances, beginning with the Supreme Court Ordinance of 1853 and culminating with the most comprehensive consolidation of these laws in the Supreme Court Ordinance of 1876. In important respects, the conflicts of jurisdiction thus unleashed afforded added impetus to the process of judicial protection of the liberty of the individual. Many of the jurisdictional problems were resolved through the process of the common law principle of judicial precedent, while others could only be resolved by statutory intervention. Some of these problems remain with us to this day, and it will, therefore, be worth our while to take a look at some of the earlier cases.

*Oppon v. Ackinie* was an appeal brought in 1887 before the Full Court of the Supreme Court against a judgment of the Divisional Court of Cape Coast confirming a judgment of the district commissioner at Saltpond ordering the defendant, Ackinie, to pay damages of £5 and costs of 11 shillings to the plaintiff, Oppon. Ackinie, who was the “King” of Aikunfie (a title we should now describe more accurately as Omanhene of Ekumfi Traditional Area) had caused Oppon to be arrested and imprisoned for refusing to pay the costs in an earlier action brought before the “King” of Ekumfi. In this earlier action, which concerned an allegation of bribery against one of the “King’s” subjects, Oppon (who was also a subject of the “King”)...
had stood surety for the defendant in the bribery action on the understand­ing, established by custom, that he (Oppon) would pay any costs that might be ordered by the “King” against the defendant. The defendant was in due course found liable to pay costs, but Oppon refused to pay the costs (as mentioned earlier) on the ground that he was dissatisfied with the “King’s” decision.

At the hearing before the Full Court it was noted that on the last day of the proceedings before the Divisional Court (from which the present appeal was brought) one of the witnesses called by the court had stated that if Oppon felt dissatisfied with the king’s decision, his proper remedy or course of action was to appeal to the British courts after paying the costs, which, according to the law and custom applicable in the king’s court, he was liable to pay. The Full Court obviously accepted this piece of evidence as a statement of the correct customary law position.

The single question framed by the Full Court as constituting the only legal issue to be resolved was this: “Has the Supreme Court Ordinance, 1876, swept away the previously existing judicial powers of native kings and chiefs?” In addressing itself to the question, the court felt it important to distinguish it from “any inquiry as to the extent of Her Majesty’s power and jurisdiction in and over the Protected Territories.”

One of the most important constitutional aspects of this case is that the court was fully aware of, and indeed made references to, a number of judicial opinions, notably those of Chief Justice Bailey, which were in favour of holding that the Supreme Court Ordinance of 1876 extinguished the jurisdiction of native chiefs. Nevertheless, after considering the object and scope of the 1876 Ordinance, the court concluded that “the Supreme Court Ordinance, 1876, has in no way impaired the judicial powers of native kings and chiefs, and, so far as we know, it has not been suggested that any other Ordinance has taken them away.”¹⁰ The object and scope of the Ordinance were to correct the “very confusing arrangement of Courts and magistrates” by the help of which her Majesty had exercised jurisdiction on the Gold Coast prior to the Ordinance of 1876.¹¹ In other words, the object of the 1876 Ordinance was to streamline and regulate the system of courts which administered Her Majesty’s jurisdiction on the Gold Coast, and not to extinguish the powers and jurisdiction exercised by native authorities.

A second interesting aspect of the case is that having held that the Ordinance of 1876 left intact the jurisdiction of native kings and chiefs, the court reversed the decision of the Divisional Court and entered

¹⁰ (1887) 2 G. & G. 4 at p. 6.
¹¹ Ibid. at p. 5.
judgment for the defendant Ackinie (Akyen)\(^{12}\) but declined to award costs in his favour, explaining,\(^{13}\)

"We are not inclined to give him costs, for the impression made upon our minds is that he had brought this action upon himself. It must be distinctly understood that there is to be no imprisonment without an adequate and regular supply of food, means of washing daily, and ample opportunities for obeying the calls of nature, given to every prisoner."

In *Oppon v. Ackinie*, we see, I suggest, an early example in this country of high judicial statesmanship, whose main thrust is to enlarge upon the scope of judicial protection of the liberty of the individual by broadening the rational and institutional base of that protection. It is true that in the instant case, the court exercised disciplined self-restraint by declining, on principled criteria, to interfere with a legitimate jurisdiction exercised by a native chief to the chagrin of an individual. Yet the court made it quite clear that the preservation and promotion of human dignity should be as much the concern of indigenous tribunals as of the received courts.

A few years later, another court was to interpret another provision of the Supreme Court Ordinance, 1876, in a way that further advanced the cause of enlarging upon the liberty of the individual. This was in the colourful case of *Tamakloe v. Mitchell*, 1892.\(^{14}\) The defendant, Mitchell, was a colonial district commissioner stationed at Keta in what is now the Volta Region. Like all other district commissioners of the colonial era, he exercised an admixture of administrative and judicial functions.\(^{15}\) In the present case, the plaintiff, Tamakloe, was claiming damages in the sum of £3,000 for false imprisonment, a tort allegedly committed against him while the district commissioner was purporting to exercise his official functions. Mitchell was walking along the street with an European friend one evening when they met the plaintiff, also in the company of an African friend. According to the official report of the case:

"The Plaintiff saluted in a manner which Mr. Mitchell thought not respectful to him as the Queen's Representative, though whether the disrespect consisted in the mere touching of his hat, instead of raising it, or touching it with a hand in which he carried a stick, or in 'the expression of his countenance' is not clear."

For this intolerable show of disrespect, as Mitchell saw it, he caused Tamakloe to be arrested and locked up in a cell, where he spent the

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\(^{12}\) "Akyen" is the modern spelling for "Ackinie."

\(^{13}\) (1887) 2 G. & G. 4 at p. 6.

\(^{14}\) (1892) Red. 146; (1892) 2 G. & G. 9.

\(^{15}\) The Supreme Court Ordinance, 1876, ss. 34–48 expressly granted a wide variety of judicial powers to district commissioners to act as ex officio commissioners of the Supreme Court.
night with other prisoners. The next morning, Mitchell, sitting as a judicial officer in court, had Tamakloe brought before him, and, after chastising him on the rudeness of black men and lecturing him on the duty to pay proper respect to the Queen's representative, released him. At no time was any formal charge of an offence against the law made against Tamakloe.

Thus far, the material facts of the case clearly indicated that the plaintiff's imprisonment was illegal, and he was, consequently, entitled to damages. But then section 50 of the Supreme Court Ordinance, 1876, contained a provision behind which Mitchell sought shelter. The provision was as follows:

“No action shall be brought against any Commissioner in respect of any act or order bona fide performed or made by him in the execution or supposed execution of the powers or jurisdiction vested in him.”

Not unnaturally, Mitchell argued that he was entitled to the protection of this provision, and could not be held liable. He sought further refuge in subsection (7) of section 28 of the Towns Police and Public Health Ordinance, 1878, which made it an offence for a person to create a breach of the peace in the street, and then stated that he was “fully convinced,” at the time he set in train the chain of events which culminated in the present action, that he was acting under this law to prevent a breach of the peace. As he put it, “I was convinced that he [the plaintiff] was trying to provoke me.”

Chief Justice Hutchinson was not convinced by Mitchell's line of defence, which amounted to ex post facto rationalisation and justification of a clearly illegal act:

“I cannot believe”, said Hutchinson C.J. “that at the time it ever occurred to him [Mr. Mitchell] that the Plaintiff was committing

(1892) 2 G. & G. 9, col. 3. An interesting example of British official concern with the administration of justice by colonial appointees invested with judicial powers may be seen in the following letter discovered by the present writer during research work at the National Archives of Ghana (Folio No. ADM.1/706). In this letter which is dated 16 September 1852 at Cape Coast Castle, the preservation of human dignity and the promotion of the liberty of the individual are seen as a central objective of British administration of justice. The text of the letter addressed to “Joseph Smith and Henry Barnes Esquires, Justices of the Peace, The Gold Coast,” is as follows: “Gentlemen, I am directed by His Excellency the Governor to inform you that his attention has been drawn to a case which came under your adjudication on the 9th instant in which a man named Yowhoo (?) having been found guilty of being partly concerned in stealing four heads of Corn was for that trifling offence sentenced to undergo six months' imprisonment with hard labor(sic) and also to receive four dozen lashes. I have to state His Excellency regrets that the latter part of the sentence has already been carried out, otherwise he could not have permitted a punishment which is the extent a magistrate is allowed to award for the most serious crime to have been inflicted for an offence for which he cannot but conceive one week's imprisonment would have been excessive, and while he deplores this undue severity, which unfortunately he did not detect until too late, he has made the only reparation now in his power by
an offence against that law or against any law. He did not think at all about his duties or jurisdiction as a Commissioner, but he acted as he did because he was in a passion, and thought the Plaintiff was disrespectful... and did not care or think about the rights of the matter."

More crucially, the learned Chief Justice, before making the above-quoted statement, considered the real import of the clause of the Supreme Court Ordinance under whose protective umbrella the district commissioner was seeking refuge. It seemed clear to his lordship that the limited effect of the words "or supposed jurisdiction" in that clause was to afford protection to a district commissioner who was new on his job and without much experience or knowledge of the limits of his powers, provided that such a commissioner acted in honest ignorance of the limits of his powers. Thus, while Mitchell's statement that he thought he had jurisdiction was admissible as evidence that he thought so, it was not conclusive, for it might be apparent from the circumstances that he did not think so. On the evidence available in the instant case, his lordship thought it was clear that Mitchell, who had been on the Gold Coast for four years as a constabulary officer, and three months as district commissioner, could not have thought that disrespect to him in the manner of saluting (or greeting) was an offence against the law. Accordingly judgment was entered for the plaintiff, and the defendant, Mitchell, was ordered to pay damages in the sum of fifteen pounds and the costs of the action.

The Mitchell case itself did not involve any conflict of jurisdiction as between "native courts," as the traditional tribunals held under the jurisdiction of chiefs were called, and the British courts established on the Gold Coast during these formative years. The latter courts administered justice according to the principles of English common law and of Ordinances duly made by the colonial Legislature. But the case throws into sharp relief the process of the gradual importation into the administration of justice in this country of the principles by which the liberty of the individual is protected under English common law. The basic assumption underlying these principles was, and is, that the individual may do or say what he pleases, so long as he does not infringe any known law of the land. The received notions of British justice appealed to the indigenous peoples of this country. This is shown, for instance, by the readiness with which some of the coastal chiefs accepted the jurisdiction of British justice under the Bond of 1844, as we have seen, ordering the Prisoner's immediate release. I have further to acquaint you that I have communicated His Excellency's command to the Clerk of the Police Court that in future no Corporal Punishment shall take place prior to His Excellency's sanction to the infliction thereof. I have the Honour etc. (Sgd.) Colonial Secretary."
while at the same time refusing to concede British political sovereignty over the territories and peoples thus subjected to British jurisdiction in the matter of the administration of justice.

In this regard, a despatch by an early chief magistrate and judicial assessor to the Administrator-in-Chief of her Majesty's Settlements in West Africa is instructive in the awareness shown of the benefits and problems of the coexistence of this plurality of jurisdictions. Chalmers, the Chief Magistrate, wrote in 1872:

"Wherever an English magistrate will patiently and conscientiously perform his duties, the Natives, unless warped by extraneous and exceptional influences, will bring their disputes generally into his court in preference to their own, and will accept his decisions with confidence. He will receive material assistance if he associate the chiefs of his district with himself in judicial matters, both from the information he will derive as to native customs and modes of thought, which it is necessary to study, and by securing their goodwill and assistance in that most important branch of his duties which relates to the repression of crimes."

"Although it would be in vain to look for much improvement in the character of the native courts if left to their own guidance, yet that gradation of authority which is found to exist, by which each man is, in a measure, answerable to his immediate superior, affords an organisation which seems capable of being usefully employed for purposes of jurisdiction."

The positive encouragement given to the coexistence of traditional patterns of authoritative decision-making on the one hand, and the received British system of administration of justice on the other hand, is demonstrated in a number of the early cases on jurisdictional disputes. Two examples should suffice. In a case of 1892, the Divisional Court sitting at Cape Coast Castle declined to make an order for the issue of a writ of habeas corpus against the respondent, the Omanhene (or head chief) of Abura Traditional Area, on the ground that the chief had a right to enforce the judgment of his court by imposing a sentence of imprisonment.

In the other example, the right of a chief to enforce his judgment by detention in a prison was more strictly circumscribed, in the light of the controlling statutory provisions. In Bimpon v. Abokie decided in 1903, the plaintiff (Bimpon) claimed damages for false imprisonment, unlawful arrest, assault and battery alleged to have been

17 See Sarbah, op. cit. at pp. 209-210. The quotation is from paras. 3 and 6 of Chalmers' despatch on native courts reproduced by Sarbah.
18 In the Matter of Kwow Asamoah, A Prisoner at Abakrampa (1892) Red. 196; (1892) 2 G. & G. 10, col. 1.
19 (1903) Sar.F.L.R. 161; (1903) 2 G. & G. 10, col. 2.
committed against him by the defendants, the "king" (or head chief) of Mampon and his councillors. The plaintiff alleged, and this was not in dispute, that the head chief and his councillors had caused him to be summoned, tried, convicted and punished (by imposition of a fine) for having caused the death of the immediate predecessor of the present head chief of Mampon by "burying bad medicine," that is to say, using a fetish on the deceased chief. The plaintiff further alleged, and again this was not in dispute, that the chief of Mampon (Abokie) caused him to be detained in prison until such time that he had paid the fine imposed on him. The defence was justification, and the court, therefore, had to go into the question of the extent of the jurisdiction of native tribunals to try and punish offences recognised by native law and custom and sanctioned by received statute law.

To begin with, the court followed the earlier case of Oppon v. Ackinie (discussed above) in holding that the Supreme Court Ordinance of 1876 had not abolished the jurisdiction of native tribunals. The court further noted that the Native Jurisdiction Ordinance of 1883 had recognised the native law offence of putting a person in fetish which is practically the same offence with which the plaintiff had been charged and for which he had been tried and punished. But the plaintiff made things a little difficult for the court by insisting that the offence for which he was tried and punished was in effect and in essence murder and yet he had used no physical force to cause the death of the late chief, though he readily admitted that he knew of, and believed in, the offence of putting a person in fetish. The presiding judge conceded the plaintiff's contention that the use of physical force is a pre-requisite to a prosecution for murder under the received English law, but took the view that if the trial and conviction of the plaintiff was authorised by native law then the plaintiff could not complain in a British court that he had suffered from injustice at the instance of the native tribunal.

Having held that the trial and conviction for the cognate offence of putting a person in fetish was recognised by statute as existing under native law, the only issue left for the court was whether plaintiff's subsequent incarceration until such time as he had paid the fine imposed was justified. To resolve this issue, the court referred to the Native Prisons Ordinance of 1888 which provided that no imprisonment to enforce the judgment of any native tribunal could be carried out unless in a prison recognised by the Government, and for a period not exceeding one month. As it was established that the Chief of Mampon had no such recognised prison, he would be liable to the plaintiff in damages for false imprisonment if it was shown that he had authorised the plaintiff's imprisonment. In the result, however, the court was unable to come to a conclusion that plaintiff's imprisonment was authorised by the defendant chief, as there was "so much conflict of evidence on
the part of the plaintiff” on this point. Hence, the chief could not be fixed with direct or vicarious liability.

The Bimpon case, it is submitted, is highly instructive in indicating the cautious methods by which the courts assume their crucial role of protecting the liberty of the individual. Competing interests are balanced in such a way as to advance, rather than retard, the march towards enlargement of the areas of personal liberty. The court treated the case as raising a purely jurisdictional issue and expressly refrained from uttering any view as to the correctness or otherwise of the judgment reached by the chiefs’ native tribunal, for as the presiding judge put it, “the cause of action . . . merely raises the issue as regards this part of the plaintiff’s case of the unlawful arrest and imprisonment,” pending full payment of the amount of the fine. Yet, there is no doubt that a major thrust of the plaintiff’s case was that in cases where two parallel jurisdictions exist for the trial of the same substantive offence, namely murder, that jurisdiction which exacts a stricter and more rational proof of guilt should be preferred to the jurisdiction which requires a lesser measure of proof. While the colonial court should be expected to be sympathetic to this point of view, there was also a need to preserve order and good government by permitting the jurisdiction of native chiefs to administer justice among those who were subject to native law and custom.

II Nation-building and the Liberty of the Individual

An inauspicious aura that surrounded the first instrument of Government with which this country began its life as a nation in March 1957 was the fact that it was a compromise instrument. The compromise was between opposing demands for a strong central government capable of managing the difficult affairs of a new-born nation and for autonomous regional governments bound together in a Federation. This first Constitution was carefully designed to maintain a delicate and frankly precarious equilibrium between these opposing demands. And, it was the judiciary which was largely entrusted with the somewhat invidious task of preserving the balance which was eventually struck. It should, therefore, come as no big surprise that the judiciary, as I hope to show, was reduced to the status of a tolerated poor relation by the time that the Independence Constitution was succeeded by the first Republican Constitution in July 1960.

The Independence Constitution, 1957, at once opted for a central unitary government and created a number of institutional and procedural brakes on the exercise of central governmental power, as well

20 (1903) 2 G. & G. 10 at p. 11.
21 Contained in the Ghana (Constitution) Order in Council, 1957, (hereinafter referred to as the Independence Constitution, 1957). The Constitutions of this country, starting from the “Guggisberg Constitution” of 1925, are all reproduced...
as providing for devolution of powers, in specified fields, to the Regions. Regional Assemblies were to be created in each of the five then existing Regions.²² Amendments to the Constitution could only be effected by Parliament (comprising the Governor-General and the National Assembly) if passed by a two-thirds majority of the National Assembly and by a majority in each of the five Regional Assemblies.²³ Any bill affecting the traditional functions or privileges of a chief was to be referred by the Speaker to the appropriate House of Chiefs in which the chief exercised his functions as such and a period of three months was to elapse between the day of introduction of the bill into the Assembly and the second reading of the bill.²⁴ In addition to the foregoing major examples of restraints, the Constitution imposed severe limitations on Parliament’s power to make laws for the compulsory acquisition of property, movable or immovable, or to make laws of racial discriminatory effect, or to make laws purporting to abridge the individual’s freedom of conscience and religion.²⁵ Finally, the Supreme Court was granted exclusive and “original jurisdiction in all proceedings in which the validity of any law is called in question.”²⁶

Soon after the Constitution came into force, it became plain that the government in power had every intention of consolidating its position as the central government by working relentlessly on several fronts towards greater national unity. In the euphoria that followed the attainment of political independence it seemed clear to the Government that legislative supremacy at the centre was the surest way of demonstrating the political sovereignty of the people. On the other hand, the Opposition groupings insisted particularly on keeping the Government within the confines of the strict limitations placed on the law-making powers of the central government, and generally within the constitutional boundaries mapped out in the Constitution for the exercise of governmental powers. This brought the judiciary very much into the arena of the conflict that followed.

The first major step taken in the direction of consolidating the gains of independence was to assert the central legislative power in no uncertain terms; and, the very first enactment of the new Parliament, the Ghana Nationality and Citizenship Act, 1957, provided the setting for a series of cases in which judicial blessing was given to the assert-

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²² Independence Constitution, 1957, ss. 63 and 64. The five Regions were: Eastern Region, Western Region, Ashanti Region, Northern Region, and Trans-Volta/Togoland Region.
²³ Independence Constitution, 1957, s. 32.
²⁴ Ibid., s. 35.
²⁵ Ibid., s. 31 (1)–(3).
²⁶ Ibid., s. 31 (5).
tion of legislative supremacy. A number of deportation orders were made by the executive under the authority of the Deportation Act, 1957, against several individuals, who in turn resisted the orders in the courts on the ground that they were citizens of Ghana. In *Lardan v. Attorney-General (No. 1)*\(^{27}\) the applicant, Lardan, against whom a deportation order had been made, filed a writ seeking a declaratory order to the effect that he was a citizen of Ghana, and, therefore, immune from deportation under section 3 (1) of the Deportation Act, 1957. The applicant also sought an interlocutory injunction to prevent his being deported pending the determination of the claim for citizenship status. The court declined to make the declaration sought on the ground that the procedure of an ordinary civil action adopted by the applicant was inappropriate as it could conduce to intolerable delay. Instead, a person affected by a deportation order should use the process of habeas corpus for expeditious trial. After granting an interim injunction for a week, the court held, on the adjourned date, that the injunction must be discharged because applicant had not adequately discharged the burden of proving his citizenship. He had only barely stated in a short affidavit that he was born in Kumasi and his mother (unnamed) in Krachi, and had not shown a fair prima facie case in support of the status claimed. As Smith J. put it, to emphasise the value-neutral and positivist nature of his ruling\(^{28}\):

“It must be very clearly understood that the motives and reasons for the [deportation] order made are not for the court. The court is indeed concerned with the liberty of the subject but there are other safeguards for that.”

In *Lardan v. Attorney-General (No. 2)*\(^{29}\) Lardan and Ahmadu Baba were resisting in court deportation orders made against them, when an Act was passed, giving power to the Minister of Interior to deport the two named persons from Ghana “notwithstanding any proceedings in any court, whether pending or determined.” The ominous Act ended thus: “any proceedings in any court instituted for the purpose of impugning the validity of the Alhaji Alufa Othman Lardan Lalemie Deportation Order, 1957, or the Alhaji Amadu Baba Deportation Order, 1957, shall be automatically determined.”\(^{30}\)

The two victims of this *ad hominem* legislation brought an action praying for a declaratory order to issue to the effect that section 4 (2) of the Act, just quoted, did not terminate their actions in court, for those actions were not instituted for the purpose of impugning the validity of the deportation orders made against them but rather for

\(^{27}\) (1957) 3 W.A.L.R. 55; (1957) 2 G. & G. 96.

\(^{28}\) (1957) 2 G. & G. 96 at p. 97, col. 3.

\(^{29}\) (1957) 3 W.A.L.R. 114; (1957) 2 G. & G. 98.

\(^{30}\) Deportation (Othman Lardan and Ahmadu Baba) Act, 1957, s. 4 (2).
the purpose of establishing their Ghanaian nationality. The court thought that this contention merely amounted to a semantic ploy to introduce equivocation into the wording of a statute whose meaning was clear: the substance of the pending actions was, clearly, to impugn the validity of the deportation orders made against the applicants. Secondly, it was argued on behalf of the victims that the *ad hominem* legislation was void as being ultra vires the Constitution of 1957, which, as we have seen, placed certain limitations on the legislative powers of Parliament for the protection, inter alia, of the liberty of the individual. Counsel for the applicants contended that the discretionary power granted to the legislature “to make laws for the peace, order, and good government of Ghana” was not of a plenary nature though extremely wide. Hence, the courts could, and should, enquire into the merits of the *ad hominem* Act, which had the effect of transgressing two fundamental rights, namely, the right of a citizen to live in his own country and the right to have recourse to the courts.

While agreeing with counsel on the effect of the Act as just stated, Smith J. felt constrained to hold that there was no express limitation in the Constitution on the power of Parliament to pass the Act which affected the applicants. The learned judge distinguished a New Zealand case cited to him in argument, and in which the Privy Council had enquired into the merits of a law passed for the “peace, order and good government of New Zealand” by pointing out that the power to make laws in New Zealand was subject under the Constitution, to a proviso that no such laws shall be repugnant to the laws of England. By contrast the Ghana Independence Act, 1957, provided, inter alia, in the First Schedule that, “No law and no provision of any law made on or after the appointed day [6 March 1957] by the Parliament of Ghana shall be void or inoperative on the ground that it is repugnant to the law of England.” In the light of the above clear provisions, and in the absence of any specific transgression of a provision of the Independence Constitution, the validity of the Act which named Lardan and Ahmadu Baba was upheld. In so holding, the court adopted a contention, made in argument before the court and supported by judicial opinion, to the effect that the words “peace, order and good government” are simply “a compendious means of delegating full powers of legislation, subject to any limitations which may be expressed and to any overriding legislation.”

In his concluding remarks, Smith J., after noting that the Independence Constitution, 1957, did not include any comprehensive safeguarding of “fundamental rights,” or a Bill of Rights, quoted a passage

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Liberty and the Courts

from Erskine May's *Parliamentary Practice* which merits reproduction here because of the profound influence the ideas enshrined therein appear to wield on our courts, even to this day:

"The Constitution has assigned no limits to the authority of Parliament over all matters and questions within its jurisdiction. A law may be unjust and contrary to the principles of sound government. But Parliament is not controlled in its discretion and when it errs its errors can be corrected by itself."

Adopting the above idea as a correct statement of the position in Ghana, Smith J. drew his own final conclusions thus:

"In England it is not open to the court to invalidate a law on the ground that it seeks to deprive a person of his life or liberty contrary to the court's notions of justice, and, so far as the Ghana (Constitution) Order in Council, s. 31 (1), is concerned, that is the position in which I find myself."

Before returning to the deportation cases which finally crystallised the legislative hegemony claimed and asserted by the Government with the blessing of the judiciary, we may, to present a clearer and fuller picture of the scenario, pause for a little while to take note of certain critical steps taken by the Government of the day, in furtherance of the central objective of legislative hegemony. It will be recalled that the Independence Constitution required the setting up of Regional Assemblies in each of the five then existing Regions of Ghana. Furthermore, there were, as we have seen, elaborate procedures laid down for amendments to the Constitution, and the Regional Assemblies played a vital role in the amendment process. Now, by a striking irony of history, these Regional Assemblies were to be used, soon after Independence, to serve the sole function of removing the elaborate restrictions governing amendments to the Constitution. And, immediately after serving this function, the Regional Assemblies were themselves abolished.

All this was achieved entirely through constitutional means, even though the spirit, as opposed to the letter, of the Constitution was clearly subverted in the process. In accordance with the requirements of the Constitution, a Regional Constitutional Commission was set up in June 1957, with the late Mr. Justice van Lare as chairman. The Commission's Report was submitted to the Government in April 1958, and in September the Regional Assemblies Act, 1958, came into force.

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34 Ibid. at p. 101, col. 1.
35 Ibid.
36 The Convention People's Party (C.P.P.) led by the late Osagyefo Dr. Kwame Nkrumah, formed the Government of this country from 1951 until 24 February 1966, when it was overthrown by the coup d'état which brought the National Liberation Council (N.L.C.) into power.
In the elections which were held in October, only C.P.P. candidates and a handful of independents were returned to the Regional Assemblies, as the Opposition boycotted the elections on the general ground that the Government had emasculated the powers of these bodies by converting them, under the terms of the Regional Assemblies Act, into advisory bodies instead of investing them with effective governmental powers at the regional level. As the Government party at this stage dominated both the Parliament and the Regional Assemblies in terms of numbers, no difficulties stood in the way of amending the Constitution.

In December, the Constitution (Repeal of Restrictions) Act, 1958, became law. That Act repealed section 6 of the First Schedule to the Ghana Independence Act, 1957, which forbade repeal of the provisions as to amendment of the Constitution contained in section 32 of the Independence Constitution. It also repealed section 32 itself and sections 33 and 35 of the Constitution. The repealing Act was passed by more than the required two-thirds majority of the National Assembly and by an overwhelming majority of each of the five Regional Assemblies. And, on 14 March 1959, the Regional Assemblies Act was repealed, and the Regional Assemblies were dissolved for ever, the then Prime Minister explaining that "the Government are convinced that Regional Assemblies are an unnecessary complication in the machinery of Government and constitute a waste of money and manpower." The Government of the C.P.P. was thus labouring to establish legislative hegemony through manipulation of the political process, the courts were busy hearing and determining further challenges of deportation orders made against persons whose presence in the country was alleged, as in the Ahmadu Baba and Larden cases, not to be conducive to the public good. A striking example is the case of Balogun v. Edusei the facts of which also provide an arresting illustration of a particularly unabashed and direct type of legislative interference with the judicial process.

Balogun and three others were on 17 October, 1958, served with deportation orders issued by the Minister of Interior, the Honourable Mr. Krobo Edusei (as he then was). At the same time as issuing the

37 s. 33 placed severe restrictions on Parliament’s power to pass a bill for effecting alteration of the boundaries of a Region and s. 35 placed restrictions on bills affecting the traditional functions or privileges of a chief. In Ware v. Ofori Atta [1959] 1 G.L.R. 181 (reproduced in (1959) 2 G. & G. 132) a High Court at Kumasi, had, on the application of a chief (Gyasehene of Ejisu) issued a declaratory order striking down as unconstitutional, and therefore void, an Act of Parliament which was proved to have violated the Independence Constitution, s. 35.


deportation orders, the Minister also authorised the Acting Commissioner of Police (Mr. Madjitey) to arrest the four men without warrant and to fly them to Nigeria. The four men were arrested on Saturday, 18 October. On Monday, 20 October, at 8.15 a.m. counsel for the relatives of the four arrested men filed an ex parte application in the High Court, Accra, giving notice that the court would be moved that morning to issue a writ of habeas corpus challenging the deportation orders on the ground that the four men were citizens of Ghana and, therefore, immune from deportation under the terms of the Deportation Act, 1957, under which the Minister had purported to act. After hearing counsel that day, 20 October, Smith J., presiding, directed notice of the motion for the writ of habeas corpus to be served on the defendants, and adjourned to 30 October for further hearing. In the late afternoon of the same day, 20 October, the four men were removed from Ghana by air while applications for the writs of habeas corpus were still sub judice.

On 11 November 1958, counsel for the four persons, now removed from the court's jurisdiction, filed notice of motion of an application that the Minister of Interior and the Acting Commissioner of Police be committed for contempt of court. In a supporting affidavit sworn to by counsel's law clerk, it was deposed that the two defendants knew that the four persons' applications for writs of habeas corpus were pending before the court even though the court's notices were not served on them until Sunday, 19 October, by hand.

The hearing of the contempt action was fixed for 22 December, and on that day Smith J. still presiding, found the Minister and the Acting Commissioner to be in contempt of court because they knowingly interfered unlawfully with the administration of justice by summarily putting an end to court proceedings and thereby bringing the administration of law into disrepute. The learned judge, however, stayed execution of committal to prison for contempt “to leave opportunity for advice to be given to the contemnors by their legal advisers to adopt the obvious course, namely to express regret.” Expression of such regret would have amounted to purging themselves of their contempt, for as the learned judge pointed out, the two gentlemen might just have been carrying out executive instructions without knowing the full legal implications of their actions.

On the adjourned date for sentence, which was 24 December 1958, the acting Solicitor-General appeared for the contemnors simply to announce that Parliament had, in an emergency meeting held early that morning, passed an Indemnity Act in respect of the two contemnors. After a short adjournment, the Act was indeed produced before the court, and it bore the Royal Assent. Section 2 of the Act
read as follows:

“The Honourable Krobo Edusei, formerly Minister of the Interior, and Erasmus Ransford Tawia Madjitey, Commissioner of Police, shall be indemnified from all penalties for contempt of court and exonerated from all other liabilities in respect of any action taken by them in carrying out the deportation order in the Schedule of this Act after the institution by the persons named in those orders of proceedings by way of habeas corpus.”

Smith J.’s concluding remarks on the effect of the Indemnity Act and the baneful influences that executive interference with the judicial process can have on the well-being of the country neatly summarise the only comments that can appropriately be made in an article such as this, and are, therefore, reproduced hereunder:

“By the passing of this Act, I take it that the courts’ finding that the respondents are in contempt is not challenged by Parliament, but that the intention is to neutralise any consequential order that I might make. It is plain that Parliament prefers that the respondents should not apologise, and it has passed this Act in order to nullify any order which I might make in the absence of the apology. The Courts of Justice exist to fulfil, not to destroy, the law, and it would not make sense for me to record an order which is incapable of being carried out.

As to the deportations while the applications for habeas corpus were still sub judice, I cannot over-emphasise the undesirability of interference by the Executive with the functions of the court. Persistent indulgence in such a practice could not have any other than the most serious ill-effect on the well-being of the country. Decisions of a court are as binding upon the Executive as the laws which Parliament passes are binding upon the ordinary citizen, and it is the court that enforces upon the people obedience to these laws, thereby aiding Parliament in the ordering of the country.

In the result, the finding of contempt stands, but I make no further order.”

The concluding story of the Balogun case must be told, in order not to be left with the impression that when the court has thus been reduced to the status of a tolerated poor relation by the machinations of the Legislative and Executive branches of Government, the individual has no option but to throw up his hands in sheer despair. As it happened, counsel for the four “deported” persons showed considerable and admirable resilience in fighting for the liberty of the individual, and, in the result, the law triumphed.

40 Quoted in (1958) 2 G. & G. at p. 125, col. 1.
41 Ibid.
After the events described in the preceding paragraphs, counsel was instructed to seek a declaratory order, in fresh proceedings, that Balogun and the three others were citizens of Ghana within the meaning of the Ghana Nationality and Citizenship Act, 1957. The decision of the court in *Balogun v. Minister of Interior* was delivered by Ollennu J. (as he then was) on 22 December 1959, exactly one year after Smith J.'s finding of contempt against the contemnors who were later indemnified by Act of Parliament. The single issue before the court was whether the four plaintiffs, none of whom could appear in court as they had already been “deported,” could claim Ghanaian citizenship under the then existing law. That law required that a person could claim Ghanaian citizenship by birth if he could show: (a) that he himself was born in Ghana, (b) that one of his parents or grandparents was also born in Ghana, and (c) that immediately before the commencement of the Ghana Nationality and Citizenship Act, 1957, he was a citizen of the United Kingdom and Colonies or a British protected person. Although the plaintiffs were themselves not before the court, their relatives gave testimony to establish their respective citizenship.

The court held, following previous decisions, that the standard of proof of the facts relied on to establish citizenship was that required in civil proceedings, namely proof on the balance of probabilities, and that in this country oral testimony and documentary evidence of the traditions of a family constituted a well-known exception to the hearsay rule, which generally rendered hearsay evidence inadmissible. Hence, since each of the plaintiffs had, in the opinion of the trial judge, established his citizenship on the balance of probabilities, the deportation


43 See, in particular, *Bruce v. Attorney-General*, decided by the Court of Appeal in November 1957, and reproduced at (1957) 2 G. & G. 105. This case, which is not yet officially reported, is of profound importance in laying down the standard of proof required of persons who are called upon to establish citizenship and outlining the parameters of the appropriate judicial temperament that must be brought to the determination of such issues. In that case, which was an appeal from the decision of a trial court, the late van Lare Ag.C.J. (as he then was) stated succinctly at pp. 108-109: “In this appeal in which the primary issue is whether or not the appellant was born in this country we have the prima facie evidence supplied by a British Passport, and from the baptismal register that the appellant was born in this country... It would appear that the learned [trial] judge entertained a doubt in his mind on the material issue which he ought to have resolved in favour of the plaintiff in an action instituted to remove a penal order [the appellant was also resisting a deportation order made against him] in respect of him. On the other hand from the conclusion reached by the judge I am not able to say that the court below made findings of a material fact with precision and particularity. The judicial process is a duty to resolve the facts in issue and facts relevant to the issue and then to apply the law to the facts found. Where a judge says, 'it is all very borderline' [as the trial judge had said], I am afraid he cannot be taken to have made up his mind one way or the other with a degree of certainty.” (My own parenthesis and italics).
orders made against them were null and void. In the words of Ollennu
J. (as he then was):

“The uncontradicted evidence on the record leads to the irresistible
conclusion that each of the four plaintiffs is a citizen of Ghana,
and that the deportation of each of them is prohibited by section 3
sub-section (1) of the Deportation Act (No. 14 of 1957), which
provides ‘No citizen of Ghana shall be liable to deportation under
this Act’.”

We have seen how in undertaking the admittedly noble task of
nation-building, overreaching preoccupation with the maintenance of
the dignity and integrity of the nation may blind statesmen and law-
makers to the need for scrupulously adhering to the ground-rules of
statecraft, and even lead them to ignore those common courtesies which
are so necessary for the smooth functioning of the inter-action of the
three readily identifiable organs of government. Happily, the judiciary,
which has been appropriately described as the “least dangerous branch
of government,” even when it is armed with the power of judicial
review of unconstitutional legislation, need not be deterred by thinly-
veiled threats to its authority, as the Balogun v. Minister of Interior
case clearly demonstrates.

In this country, it would appear that, in spite of occasional threats
to the authority of the courts, the judges have, on the whole done a
magnificent job of groping constantly for the best means of protecting
the liberty of the individual while at the same time helping to consoli-
date the authority of the State, for as Smith J. said in Balogun v. Edusei,
“the Courts exist to fulfil, not to destroy, the law.” This should require
the development of principled criteria for the performance of the
courts' plainly unenviable task. In the next and final section of this
contribution, attention will be focused on that problem, as the courts
have grappled with it during the last decade or so.

III The Development of Principled Criteria for the Judicial
Protection of Personal Liberty

The monarchical Independence Constitution of 1957 yielded place to
the first Republican Constitution, which came into force on 1 July
1960. By this time, the legislature had acquired virtual legislative

44 See Bickel, Alex M., The Least Dangerous Branch: The Supreme Court at the Bar
of Politics (1962). This book is an incisive and comprehensive critique of the power
of judicial review of legislation as exercised by the Supreme Court of the U.S.A.
The title is taken from Alexander Hamilton’s Federalist Papers, No. 78, where
Hamilton argues that having neither force nor will, the judiciary “will always be
the least dangerous to the political rig.its of the Constitution.”

45 See Bennion, op. cit., pp. 73-84 for a lucid and fascinating account of the reasons
that were offered by the C.P.P. Government for the change from a monarchical
to a Republican Constitution, as well as of the complex strategies that were
adopted to bring about the change.
supremacy with the removal of those parts of the Independence Constitution which were seen as constituting a stumbling-block to national advancement. The Parliament which was created under the first Republican Constitution was itself described in a marginal note of the Constitutional document as "sovereign," though the term may well have been a misnomer since even those who claimed unlimited law-making powers for that Parliament conceded that it could not, by itself, pass an Act which had the effect of amending any provision of the Constitution. Be that as it may, it was clear by 1960 that the first few rather tottering and nervous steps taken by the Government from the time of Independence along the path of nation-building had given way to a firm and confident mood. In this mood, the nation was poised for a period of bold legislative initiative, and a flood of social and facilitative legislation was waiting to be pressed into the service of the young adolescent nation. That legislation would be dealing with such diverse matters as land utilisation, the courts, chieftaincy, housing and rent regulation and many more.

Meanwhile, the Preventive Detention Act, 1958 (ultimately repealed in 1966 following the coup d'état of that year) had been passed to facilitate summary curtailment of the personal liberty of would-be "nation-wreckers" even though a number of constitutional Acts had been passed since Independence to take care of a variety of situations which would tend to threaten the security of the State. Barely a year after the coming into force of the first Republican Constitution, the constitutionality of the Preventive Detention Act was tested in the celebrated case of Re Akoto. This case offered a unique opportunity for the development by the courts of principled criteria for the protection of personal liberty of the type adumbrated in 1959 in Balogun v. Minister of Interior, already discussed in the previous section. Since Re Akoto, there have been a number of other cases in which the courts have been called upon to balance the public interest against the liberty

Among the constitutional Acts may be mentioned the following: the Emergency Powers Act, 1957 (No. 28 of 1957), the Deportation Act, 1957 (No. 14 of 1957), the Immigration Act, 1957 (No. 15 of 1957), the Sedition Act, 1959 (No. 64 of 1959), and the Treason Act, 1959 (No. 73 of 1959). The term "constitutional Act" is here used to designate any enactment which deals, in the main, with an aspect or aspects of state security and therefore has important consequences for personal liberty. The term "nation-wreckers" was often used in the columns of the government-controlled newspapers of that era to refer contemptuously to those who opposed Government moves or indulged in acts of lawlessness.

[1961] G.L.R. (Pt. II) 523; (1961) 2 G. & G. 183, S.C. This case has the distinction of being the only reported case in Ghana in which the bulk of the submissions of counsel was reduced into writing and submitted to the Supreme Court. The submissions of leading counsel on both sides have been published for the first time ever at (1961) 2 G. & G. 160 (submissions by Geoffrey Bing Q.C., Attorney-General on behalf of respondents) and at (1961) 2 G. & G. 169 (submissions by Dr. J. B. Danquah on behalf of the appellants in reply to submissions by the Attorney-General).
of the individual. What I propose to do in this concluding section is to examine these cases with a view to evaluating the qualitative performance of the courts in the development of what I have called "principled criteria for the judicial protection of personal liberty."

I must enter an initial caveat: in considering the sample of cases which I have chosen as the vehicle for recounting the story of the courts' role in the protection of the liberty of the individual in recent years, my concern is not so much with the results reached by the courts as with the reasoning by which the courts arrive at their decisions. This is because in spite of Holmes' perceptive comment made long ago that the life of the law has not been logic but experience, it remains equally true that the logic or reasoning of judicial pronouncements has all too often an uncanny habit of wielding profound influence on future judicial decisions, even when the sociological context of such later decisions is radically different from that of the previous decisions.

The Akoto case is, in my view, a striking example of the phenomenon just mentioned. The two main issues before the court in the case were: (1) whether the Preventive Detention Act, 1958 (No. 17 of 1958), should be interpreted in such a way as to allow for judicial review of the discretion given by the Act to the President (formerly, the Governor-General) to detain persons without trial, and (2) whether the Preventive Detention Act was ultra vires the 1960 Republican Constitution and therefore void. Each of these two issues called for the exercise of high judicial creativity, not only in terms of the letter and spirit of the Act and the Constitution to be interpreted, but also in terms of the taught traditions of the common law. There was authority in the Constitution itself to support the idea that there was a duty thrust upon the Supreme Court, which heard the case, to be creative: the Constitution provided that:

"the Supreme Court shall in principle be bound to follow its own previous decisions on questions of law, and the High Court shall be bound to follow previous decisions of the Supreme Court on such questions, but neither court shall be otherwise bound to follow the previous decisions of any court on questions of law."

In my thinking, this important provision can only be interpreted as requiring the superior courts to be innovative and creative in the exercise of their primary function of administering justice. So far as the High Court was concerned, the constraint contained in the requirement that it "shall be bound to follow previous decisions of the Supreme Court" on questions of law would seem to narrow the creativity which was expected of it. The same cannot be said of the Supreme Court,

48 See Art. 42 (4) of the Republican Constitution, 1960, reproduced in 1 G. & G. 163 et seq. Author's emphasis.
which was free to depart even from its own previous decisions in appropriate cases.\textsuperscript{49} What is even more important, the Supreme Court was decidedly emancipated by the Constitution from the constraint of feeling itself bound to follow judicial decisions pronounced by any court outside Ghana.

Yet, when the Supreme Court came to address itself to the first issue mentioned above, that court simply side-stepped the issue by declaring that it was bound to follow an English war-time majority decision of the House of Lords\textsuperscript{50} in which it had been held that where an administrative plenary discretion is vested in an official in cases where a detention order is made for the security of the State, the court cannot review the exercise of that discretion. The war-time decision which was followed was, moreover, only an exception to a general rule of law acknowledged by the court to be applicable to Ghana at that time, namely that the courts are, on a proper reading of the English Habeas Corpus Act of 1816 which applied to this country as a “statute of general application,” permitted to enquire into the truth of the facts set forth in a formal answer to a writ of habeas corpus. In the result, the issue of the reviewability or otherwise of the type of discretionary power which had been exercised was resolved not on the basis of the controlling general rule, but by analogy to a presumed exception to that rule. What is worse, the exception relied upon by the court was derived from a decision on a question of law which was not binding on the court. Thus, an excellent opportunity for developing some principled criteria for determining the question of the reviewability of administrative discretionary powers of the type which had been exercised to detain the appellants in \textit{Re Akoto} was missed through sheer default, or through an unexamined enchantment with a principle (that of

\textsuperscript{49} Bennion, op. cit. at p. 173, argues that the formulation of Art. 42 (4) “is intended to provide a suitable combination of certainty and flexibility in the enunciation and development of legal principles” and concludes that while the formulation preserves the classical doctrine of stare decisis for the Supreme Court, it leaves that court free to depart from its own previous decision “if it considers that the decision was given \textit{per incuriam} or should for any other exceptional reason not be followed.” Asante, S. K. B., in “Stare decisis in the Supreme Court of Ghana” (1964) 1 U.G.L.J. 52 at p. 63 grudgingly accepts this interpretation provided the expression “any other exceptional reason” “would freely admit of situations where a decision was wrong or where a decision, in the fullness of experience, has proved no longer responsive to the needs of society,” and concludes: “The use of the expression ‘in principle’ in Art. 42 (4) while enunciating a general policy of stability, does not, it is submitted, prevent the Supreme Court from playing a more positive and creative role.”

stare decisis) which had been reformulated in a constitutional document of this nation's own making to encourage bold judicial innovation rather than sterile attachment to alien and irrelevant anachronisms.

On the second issue, namely whether the Preventive Detention Act, 1958, was ultra vires the Republican Constitution of 1960 the court succumbed to an invitation\(^\text{51}\) to treat the Constitution as a mechanistic document, and Article 13 (1) as a compendium of moral principles which could not be said to be justiciable. In the result, the court held that "the provisions of Article 13 (1) do not create legal obligations enforceable by a court of law."\(^\text{52}\) What is more, the court concluded that "the people of Ghana by their representatives gathered in a Constituent Assembly" had, by deliberate choice, continued in force the Preventive Detention Act of 1958 with the coming into force of the Republican Constitution of 1960. Finally, the court agreed with the Attorney-General's argument that Article 20 of the Constitution, which created a "sovereign Parliament" placed no limitation whatsoever on the legislative power of Parliament, except in relation to amendments to the Constitution, and by no stretch of the imagination could the Preventive Detention Act, 1958, be said to constitute an amendment to the Constitution. Thus, the Act was upheld, and the concept of legislative supremacy triumphed under the 1960 Constitution as it had done under the 1957 Constitution, with the readily forthcoming blessing of the courts.

In these circumstances, it would have been surprising, indeed, if the concept of legislative supremacy had suffered from any serious set-backs during the period of military-cum-police rule that followed the overthrow of the Nkrumah regime\(^\text{53}\) in February 1966. Surprising, because the Government that took office in February 1966 assumed "power for such purposes as they may think fit and in the national interest to make and issue decrees which shall have the force of law."\(^\text{54}\)

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51 The invitation was extended by G. Bing, Q.C., the then Attorney-General, in his written submissions: see note 47, supra.

52 The last paragraph of the principles to which the President was required by Art. 13 (1) to declare his adherence reads as follows: "That subject to such restrictions as may be necessary for preserving public order, morality or health, no person should be deprived of freedom of religion, of speech, of the right to move and assemble without hindrance, or of the right of access to courts of law." Counsel for appellants in this case was contending that preventive detention without trial deprived his clients of "the right of access to courts of law" without any showing, on the part of Government, that such deprivation was necessary for preserving public order, morality or health.

53 As indicated in note 36, supra, the late Dr. Kwame Nkrumah's Convention People's Party (C.P.P.) Government came into power in 1951 and held office continuously from that time until February 1966. Thus, the "Nkrumah Regime" refers to this 15-year rule, though it must be borne in mind that full responsible Government was not attained until March 1957.

54 Proclamation for the Constitution of a National Liberation Council for the Administration of Ghana and for other matters connected therewith, para. 3 (1). See 1 G. & G. 172 et seq.
In other words, in assuming the law-making powers, the new Government did not concede any limitation whatsoever on its substantive law-making powers. Nevertheless, nearly six months after this assumption of unlimited legislative powers, the Government of the National Liberation Council (N.L.C.) amended, inter alia, that part of the original Proclamation under which the N.L.C. exercised its law-making powers. The entire amendment Decree was to be deemed to have come into force on the same date as the original Proclamation under which the N.L.C. derived its powers. Two seemingly minor amendments made by paragraph 16 of the new Decree were to provide an occasion for the High Court to demonstrate the extent to which the courts would concern themselves with the development of principled criteria for the judicial protection of the liberty of the individual within a regime of legislative supremacy. Paragraph 3 (6) and (9) of the Proclamation were amended to read:

"3. (6) Every decree made by the National Liberation Council shall, as soon as practicable after it is made, be published in the Gazette."

"3. (9) Decrees made by the Council shall be numbered consecutively from the commencement of this Proclamation in accordance with the order in which they are published and the numbering shall not begin afresh at the commencement of a calendar year or any other period."

In June 1968, an ex parte application for a writ of habeas corpus was filed to secure the release of one Abdul Rahim Baba Salifa, then a young man of eighteen years of age, who was allegedly being kept in unlawful detention in a prison. In the return to the writ of habeas corpus, which was directed by the court to issue against the Director of Prisons, it was revealed that Salifa was being kept in prison under the authority of a “Decree” of the N.L.C. which had neither been published in the Gazette nor numbered serially, as required by the N.L.C. Proclamation, as amended, quoted above. Nevertheless, counsel for the Director of Prisons drew attention to the document produced as authority for Salifa’s detention which stated, inter alia, that “this Decree shall be deemed to have come into force notwithstanding that it has not been published in the Gazette” as required. Anterkyi J., before whose court the application for habeas corpus was made, posed for

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See Republic v. Director of Prisons; Ex parte Salifa (before Anterkyi J.) (1968) 2 G. & G. 374.
himself the question whether the document produced as authority for detention could be said to be "a Decree in the eyes of the law," in the light of the absence of publication and numbering. In so framing the issue to be decided, he rejected as irrelevant an argument forcefully put forward by counsel for the respondent to the effect that the question to be decided was whether the N.L.C. had exceeded its law-making powers in passing that Decree. As the learned judge put the matter, "the question is whether an enactment has been duly made as an enactment, but not that it has been so duly made but so made in excess of the power of the authorities responsible for making the enactment." 57

The learned judge then held that the document produced as authority for the detention of Salifa "is not a decree having the force of law in consonance with the provisions of the Proclamation," and continued, "I also find that the alleged document is not in law a commitment warrant upon which a person can lawfully be detained." Accordingly, the learned judge ordered the discharge of the applicant-prisoner "forthwith" and awarded costs against the Director of Prisons. It is of interest to note that the learned judge addressed his mind to the importance of the case, having regard to the liberty of the individual. His very first sentence ran as follows, "This is a very serious matter, as, in it, the liberty of the subject is concerned."

Soon after the release of the boy Salifa on the orders of Anterkyi J., he was re-arrested, this time by the Special Branch, and detained. A fresh ex parte application for habeas corpus was made on his behalf, 58 and the matter was listed before another High Court judge, Charles Crabbe J. The learned judge immediately ordered the production in court of Salifa for justification, if any, to be given for his new arrest and detention. This time, both the Attorney-General and the Director of Public Prosecutions appeared to resist the release of Salifa on habeas corpus. The court, and counsel for the applicant, accepted the Attorney-General's presence in court as constituting a return to the writ. By way of justification for the detention, the Attorney-General produced a new document, purporting to authorise the detention, which read, inter alia, as follows:

"This Decree shall be deemed to have come into force on the 8th day of July 1968 and notwithstanding the provisions of paragraph 3 of the Proclamation for the Constitution of the National Liberation Council published in Gazette No. 11 of 28th February, 1966 (as amended by paragraph 16 of N.L.C.D. 73) this Decree..."

57 Republic v. Director of Special Branch: Ex parte Salifa (1968) 2 G. & G. 378.
shall be deemed so to have come into force notwithstanding that it has not been published in the *Gazette* as required by that paragraph."

Not unnaturally, the same arguments used by the court to declare the previous document (under which the same applicant had been detained) as a non-Decree were used by counsel for the applicant, for in all material respects, the present "Decree" was on all fours with the previous one. Counsel for the respondent also used similar arguments as in the previous case to resist the application. Yet, the court found reasons to come to the conclusion that, in spite of its lack of a number and its non-publication, the document under which applicant had been detained was a duly-made Decree of the N.L.C. which had as much force as any other Decree of the N.L.C. On the requirement of numbering, Charles Crabbe J. noted that the Proclamation of the N.L.C. as amended, provided for two alternative methods of identifying a Decree duly made by the N.L.C. namely, the short title or a number allotted to the Decree on publication. Furthermore, the Proclamation merely required "Decrees made by the Council [N.L.C.]", and not "Every Decree of the Council," to be numbered. Hence, the absence of numbering was not fatal to the status of a Decree. As to the requirement of publication, his lordship noted that there was nothing on the face of the new document under which applicant was being detained which "says that it shall not be published." Since the Proclamation simply required that a Decree of the N.L.C. shall be published "as soon as practicable after it is made," publication could take place after action has already been taken under the Decree. His lordship's own words are crucial, as in my view, they reject both the contention of the Attorney-General as to the omnipotence, in all respects, of the N.L.C. (considered as a law-maker) and the contention of counsel for the applicant that a Decree of the N.L.C. must satisfy the requirements of the Proclamation as to publication and numbering before it acquires the status of a Decree. Said he\(^9\):

"As I have already indicated the words 'as soon as practicable'... can only mean that a decree issued by the National Liberation Council cannot be said to be ineffective unless it has been published in the *Gazette* and a number assigned to it. I reiterate that it means what it says, that it may not be possible to publish it immediately before an action is taken under it but steps should be taken as soon as may be practicable to have it published and numbered."

The unavoidable inference that must be made from the above-quoted judicial pronouncement is that even a supreme legislature such

\(^9\) Ibid, at p. 382.
as the N.L.C. (or the Supreme Military Council that rules the country today) must, in the long run, observe procedural limitations placed by itself on its law-making powers. As I see it, the two High Court judges who considered the legality or otherwise of Salifa’s arrest and incarceration were both agreed on this principle. The difference between them was that while the first concluded that non-observance of these procedural requirements should, in a case where the liberty of the individual was involved, be strictly construed to the benefit of the individual, the second preferred to interpret the non-observance liberally, so as to permit action to be taken under the defective Decree, which defects, however, “steps should be taken as soon as practicable” to correct. Neither judge was willing to allow that a supreme legislature is free to ignore procedural limitations, whether self-imposed or not, on its law-making powers.

In my humble submission, a crucial matter which was not adequately, or at all, considered by either court was the rationale behind the requirements of publication and numbering. A cardinal feature of the concept of the Rule of Law is that men are entitled to know, at any rate about the existence of, the laws under which they are governed. That is the only way in which official or private caprice and arbitrariness can be prevented. What is more, there must, under a regime of rational law-government, be dependable ways of distinguishing between genuine and counterfeit laws, and the requirements of publication and serial numbering of laws are such dependable means of distinguishing genuine from counterfeit laws. If the applications for habeas corpus in the two proceedings discussed above had been considered in the light of such a principled criterion, the case law of this country would have been much the richer, and bereft of unnecessary obfuscation which merely serves to attract unenlightened mysticism to the law.

As was said, with truth, in another case,60 decided by the Court of Appeal of this country not long before the Salifa cases:

“The court in the execution of its duty to protect the citizen’s liberty always proceeds on the well-known principle, at any rate as acknowledged in democratic countries, of the primary necessity in the administration of the law to establish a healthy balance between the need to protect the community against crime and the need to protect individual citizens against abuse of executive power. Subject to the limits imposed on this two-fold protection by the establishment and maintenance of the requisite balance the scales are to be held evenly, at any rate in normal times, between

60 General Officer Commanding Ghana Army v. Republic; Ex parte Bruimah (1967) 2 G. & G. 285 at p. 287.
the community, that is the state, and the individual and there can
be no question of 'leaning over backward,' so to speak, to favour
the state at the expense of the citizen or to favour the citizen at the
expense of the community. And the courts' vigilance in protecting
the citizen against any encroachments on his liberty by the execu­
tive becomes meaningful and real only when pursued on the basis
of this principle."

In the case in which the foregoing attempt at prescribing principled
criteria for the judicial protection of the liberty of the individual was
made, our highest court reluctantly allowed an appeal brought against
an order of the High Court, presided over by Anterkyi J. which had
granted an application for a writ of habeas corpus and ordered the de­
tainee's release from custody. The respondent in the present appeal
proceedings had been detained under a Decree61 which gave to the
army authorities a power to detain a person arrested without warrant
for "a period of twenty-eight days or such other period as the Attorney-
General may determine."62 After the 28 days had expired, the Attorney-
General issued another consent in writing for the detention of the
respondent for a further period of 28 days; and it was this further
detention that the respondent successfully resisted at the High Court
as being unauthorised by the law quoted above. The Court of Appeal,
after making the statement of principle quoted earlier, allowed the
appeal brought by the General Officer commanding the Ghana Army
"because we were satisfied that the enquiry into the matters relating
to the arrest and detention of the said Yusufu Interiba Aminu was
complex enough to require for its completion a longer time than 28
days and that "it was not safe that the said Yusufu Interiba Aminu
be at large while the enquiries were being conducted."63

Commenting upon the Attorney-General's assurance, while con­
ducting the case on behalf of the General Officer (appellant), that so
long as he remained the Attorney-General the provisions under which
the prisoner was detained would be resorted to only in times of
genuine necessity and for the purposes of the Decree only, the court
delivered of itself as follows64:

62 The effect of N.L.C.D. 109 was to give the army the same powers as are exercis­
able by the police under s. 15 (5) of the Criminal Procedure Code, 1960, as
inserted by the Criminal Procedure Code (Amendment) Decree, 1966 (N.L.C.D.
93). The new subsection reads: "(5) Notwithstanding anything to the contrary, a
person taken into custody without a warrant may, with the consent in writing of
the Attorney-General, be held in custody for a period of twenty-eight days or
such other period as the Attorney-General may determine and the provisions of
section 96 of this Code (relating to bail) shall not apply to a person so held."
63 Per Akufu-Addo C.J. (as he then was) delivering the opinion of the Court of
64 Ibid.
"We have no reason whatever to doubt the Attorney-General's assurances or his integrity or his devotion to the course of legal propriety, and if in this judgment we have been at pains to set the limits to which the courts will tolerate the use of the powers conferred by the decree in question, it is only because it is not safe, in the nature of things human, to erect principles round the personality and character of any particular person."

Finally, the court acknowledged that the enactment in question constituted "a wide departure from the accepted principles of the administration of the criminal law," and expressed "the hope that an early consideration will be given to its removal from the Statute Book."

It is a rather sad commentary on our national efforts to enlarge upon the scope of the personal liberty of the individual that the "28-day rule," as it has come to be widely known, still forms part of our criminal law. It is to be hoped that executive abuse of the rule will be minimal, if not totally absent, and that the courts will more strictly control executive action taken under the rule in the exercise of the duty to protect personal liberty from capricious and arbitrary encroachments.

Perhaps on an occasion such as the centenary celebration of the Supreme Court of Ghana, we may end on a happier note by drawing attention to a final case in which the court, to my mind, showed commendable concern for the protection of personal liberty on the basis of principled criteria. In Republic v. Chairman, Commission of Enquiry (State Fishing Corporation, Accra); Ex parte Bannerman,65 the applicant (Bannerman, then distribution marketing manager of the State Fishing Corporation) was suspended from his duties by a letter signed by the chairman of a commission of enquiry which had been set up soon after the coup d'état of February 1966, to enquire into allegations of malpractices within the State Fishing Corporation. A few days later, the N.L.C. purported to confirm the suspension order made by the commission.

The applicant sought an order of certiorari from the High Court to quash the commission's decision to suspend him and prohibition to prevent the chairman or the commission from suspending, dismissing, interdicting or in any such manner interfering with him in the performance of his duties as distribution marketing manager. The applicant's grounds for seeking the two remedies were that the commission lacked power by virtue of the instrument establishing it, to so interfere with his functions as an employee of the corporation, and that the commission's suspension order was in violation of the rules of natural justice.

65 (1967) 2 G. & G. 293.
in that the commission had failed to grant him a hearing before deciding to suspend him.

In dealing with the ground of objection based on natural justice, Edusei J. rejected the respondent's argument that the chairman of the commission was, by his letter of suspension addressed to the applicant, acting in an administrative capacity, not in a judicial or quasi-judicial capacity, and therefore his action could not be controlled by reference to the rules of natural justice. His lordship, after arguing from first principles that a decision that affected the rights of individuals could not escape from judicial control simply because that decision is labelled as executive or administrative, found support in the view of Hodson L.J. expressed in the important case of *Ridge v. Baldwin* to the effect that the question of the applicability or otherwise of the rules of natural justice does not depend on the capacity, whether administrative or judicial, in which the decision-maker performed his functions. His lordship then commented generally:

“This emphasis of Lord Hodson is a manifestation of the growth of jurisprudence in a progressive society and the role of natural justice could now be regarded as a sheet-anchor in protecting the individual from the unfair exercise of certain powers which directly affect him, and the instant application is a glaring example.”

On the objection based on the commissioner's action of suspension being ultra vires, the court had no difficulty in showing that the commission did not have any powers of suspension under its instrument of creation. The point that was of more complexity and importance was whether the N.L.C. government's purported confirmation of the commission's suspension order could be upheld. Edusei J. could simply have ruled that the purported confirmation was a nullity, since the decision sought to be confirmed was itself non-existent, legally, because the commission lacked the power to make such a decision. But I believe that Edusei J. was more concerned with developing some principled criteria which would make for the progressive growth of our jurisprudence. For this reason he responded boldly and imaginatively to an invitation (from counsel representing the respondent) to consider the effect of the N.L.C.'s suspension letter, addressed to the complainant and three others. The instrument setting up the Fishing Corporation

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66 Cf. the Court of Appeal's reasoning in *Captan v. Minister of Interior* (1970) 2 G. & G. 457 in which the court narrowed the locus operandi of the rules of natural justice by drawing the somewhat anachronistic distinction between judicial and quasi-judicial acts on the one hand and executive or purely administrative acts on the other and implying that the requirements of natural justice are only applicable to the former. For a full critique of the *Captan* case, see Gyandoh, “Discretionary powers in the Second Republic” (1971) 8 U.G.L.J. 98.


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clearly gave a power to the N.L.C. (as successor to the President under the 1960 Constitution) to, inter alia, “appoint, transfer, suspend or dismiss any employee of the Corporation if satisfied that it is in the national interest so to do.” However, the exercise of any of these powers was expressed to be a consequential function of the N.L.C. taking over “the control and management of the affairs or any part of the affairs of the Corporation.” In other words, the assumption of control and management of the corporation by the N.L.C. is a condition precedent to the exercise of any powers of interference by the N.L.C., and Edusei J. held that the N.L.C. had acted ultra vires the instrument of incorporation since there was no evidence that it took over control and management of the corporation before purporting to suspend Bannerman and three others. His lordship concluded:

“I wish to make it abundantly clear that the National Liberation Council may occupy a dual capacity in that it has powers to enact decrees which have the force of an Act of Parliament, and it also occupies an executive position such as the deposed President occupied . . . The ultra vires principle is effective to control those who exceed the administrative discretion which an Act has given. It is in this respect that the ultra vires rule may be invoked to question the validity of exhibit 2—the letter from the National Liberation Council suspending the applicant and the other officers mentioned therein—because the pre-requisites for the exercise of the discretion to suspend . . . have not been complied with.”

Concluding Note

In our short survey, we have seen how a succession of statutes, judicial opinions, and executive actions have combined in a curious admixture to determine both the scope and content of the liberty enjoyed by the individual in a regime of law-government. By focusing attention largely on the role of the courts, it has been possible to throw a floodlight on the multifarious ways, some of which are frankly mystifying, in which the courts approach the crucial business of applying standards of varying degrees of unequivocation to an infinite number of factual situations in an ever-changing society. By all calculations, the courts have an unenviable, and sometimes clearly invidious, task in the performance of this basic function of application of general standards to particular situations.

It is my humble submission that if the courts are to effectively perform their specialised function of preserving and promoting the
liberty of the individual, then they need to develop principled criteria that will guide them in the choices they make. We see the development of some of these principled criteria in some of the cases decided over the last hundred years or so, and in the shining example of such towering pioneers as Captain George Maclean. If this survey has served to highlight achievements and shortcomings in the matter of the judicial protection of the liberty of the individual, the ultimate justification is that objective analysis of past experience is the only sure guide to future progressive ventures.
For nearly a century past the personal laws of Ghanaians have been greatly influenced by English notions relating to marriage and divorce. The reason for this lies in the contradictory objects of British colonial rule. In theory, the British colonial power aimed not to interfere with the traditional laws of its colonial subjects, yet in practice this aim was ignored. The Supreme Court Ordinance whose hundredth anniversary falls due this year may be cited as one of the instruments which gave effect to these contradictions. The chief object of that legislation was to regulate the conditions of the applicability of English law and of the recognition of existing customary laws within the jurisdiction of the courts of record. However the conferral of power on the courts was so effected as to leave no room for doubt that the validity of customary laws was to be determined in accordance with the social norms and values of the English people. When one considers the fact that the Ghanaian is socially and culturally different from his English counterpart one begins to wonder at the motive of the colonial power. Friedman was making a statement of universal application when he observed that “Family law is a subject intimately connected with historical traditions, with social habits and institutions of a country, and many differences still exist in that field among various countries.”

The British colonial power cannot be singled out for blame with respect to the present underdeveloped state of laws relating to marriage and divorce. Legislative inertia on the part of the Gold Coast colonial government and judicial inactivism may also be mentioned. The purpose of this chapter is to attempt a review of our marital family laws and to evaluate the social policies, if any, behind them.

I. The Concept of Marriage

The introduction of English law into Ghana brought with it a “new concept” of marriage to operate side by side with the customary laws

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2 See, e.g. the Supreme Court Ordinance, 1876 (No. 4 of 1876), s. 19.


4 The term “marital family” is used to distinguish it from a family relationship based on blood ties.
of marriage and thereby produced many conflict of laws problems. The classic definition of marriage in English law is attributed to Lord Penzance who made the following observations when delivering the judgment of the court in *Hyde v. Hyde*:

"I conceive that marriage, as understood in Christendom, may for the purpose be defined as the voluntary union for life of one man and one woman, to the exclusion of all others. There are no doubt countries peopled by a large section of the human race in which men and women do not live or cohabit together on these terms—countries in which this institution and status are not known. In such parts the men take to themselves several women, whom they jealously guard from the rest of the world, and whose number is limited only by considerations of material means. But the status of these women in no way resembles that of the Christian 'wife'."

His Lordship then proceeded to show why the former matrimonial laws of England which were adapted to the Christian marriage were wholly inapplicable to polygamy. Although Lord Penzance's definition has been shown by subsequent decisions to be anachronistic yet it still epitomises the Englishman's idea of a marriage. Firstly, for a marriage to be regarded as valid in English law, it must be voluntary. Secondly, it must be the parties' intention that it should last for life unless it is earlier dissolved by a court of competent jurisdiction. Finally it has to be monogamous.

It may be appropriate now to consider the concept of customary marriage in the light of Lord Penzance's observations. Text writers and jurists tended to define a customary marriage by reference to its characteristic features. One of its most distinguishing features is the involvement of the families of the parties to a customary law marriage in its formation, maintenance and dissolution. In the view of Rattray:

"It is perhaps almost a platitude to state that marriage in Ashanti is not so much a contract between the individuals directly concerned, as one between the two groups of individuals whom they represent."

A similar assertion was made by Ollennu J. (as he then was) when delivering his judgment in *Yaotev v. Quaye*:

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5 (1866) L.R. 1 P. & D. 130 at p. 133.
6 A portion of Lord Penzance's dictum has now been affected by the English Matrimonial Proceedings (Polygamous Marriages) Act, 1972, which enables matrimonial relief to be granted notwithstanding that the marriage is polygamous.
"Now, one peculiar characteristic of our system of marriage which distinguishes it from the system of marriage in Europe and other places is that it is not just a union of 'this man' and 'this woman'; it is a union of the family of 'this man' and the family of 'this woman'. That union carries with it certain incidents. For example, it confers upon the family of the man a right to call upon the wife or her family, in certain eventualities, to perform certain customary rites, and imposes an obligation upon the wife and her family to perform those rites; and vice versa."

A question that now suggests itself is whether or not in law a marriage under customary law can be defined as contract between the parties directly concerned or between the family of the man and the family of the woman or both. Basing his conclusions on researches personally carried out by him, Rattray inclined to the view that a customary marriage in Ashanti was in essence a contract between the families of the individuals concerned. He was however prepared to accept that the facts as he had found them were "modified in actual practice by any extraneous social factors." Ollenu J., on the other hand, views the agreement of the parties to a customary marriage as the essential prerequisite of its validity. With the greatest respect, it is submitted that he goes a bit far when he seemingly implies that a customary marriage confers certain enforceable legal rights on the respective families of the parties. The essentials of a valid marriage under customary law as seen by the learned judge do not support the latter proposition. They consist of 10:

"(1) agreement by the parties to live together as man and wife:
(2) consent of the family of the man that he should have the woman to his wife; that consent may be indicated by the man's family acknowledging the woman as wife of the man:
(3) consent of the family of the woman that she should be joined in marriage to the man; that consent is indicated by the acceptance of drink from the man or his family; or merely by the family of woman acknowledging the man as the husband of the woman; and
(4) consummation of the marriage, i.e. that the man and the woman are living together in the sight of all the world as man and wife."

In the light of the foregoing it is suggested that a marriage under customary law should be considered as a contract which primarily exists between a man and a woman to live as man and wife during which

10 Ibid. at pp. 578-579
period there arises an alliance between the two family groups based on a common interest in the marriage and its continuance.\textsuperscript{11}

The payment of a marriage consideration by the bridegroom to the family of the bride is seen as another essential characteristic of customary marriage which is lacking in the European concept of marriage. The early missionaries and other writers were quick to conclude that the offer of payment by the bridegroom to the family of the bride and the acceptance thereof constituted a wife purchase. One such writer recorded his impression thus\textsuperscript{12}:

"The payment is regarded in the Native Courts and in English Courts now as the indispensable part of the native marriage contract and after that the girl becomes the property of the husband."

A little research into the customs of the land would have revealed that it is inaccurate to describe the payment of marriage consideration as a transaction which smacks of bride purchase. The various ethnic groupings have their own words for it. The Fante use the expression "Tsir nsa" which was erroneously translated into English as "head rum" by an ignorant clerk who according to Sarbah should have termed it "nuptial wine."\textsuperscript{13} The word used in Akim Abuakwa and Ashanti is "aseda." It is defined by Rattray as follows\textsuperscript{14}:

"Ase" is a thank-offering given to the person or persons from whom some gift or benefit has been received, not so much with the basic idea of showing politeness by tendering thanks, as to serve as a record for all concerned that such a gift or benefit has been conferred and accepted... In marriage ceremonies the Aseda may perhaps loosely be termed 'the bride price', although this term may easily create a somewhat erroneous impression, for in no way is the wife 'purchased' in the literal sense. All that is bought and sold is a sexual prerogative, coupled with the benefit of her services and later those of her children, the last two within strictly defined limits. The 'bride price' does not even enrich the parents of the bride, for it is distributed among many individuals who thus become the witnesses to the contract."

The idea that under customary law a wife is bought in the way that an English farmer buys cattle is the result of ignorance and it is no

\textsuperscript{11} Daniels, "Towards the integration of the laws relating to husband and wife in Ghana" (1965) 2 U.G.L.J. 20 at p.22.


longer excusable to entertain it.\(^\text{15}\) Marriage payment is optional at the instance of the bride’s family. Certainly for the Fante, Sarbah writes that a man and a woman can live together as husband and wife even though no marriage consideration has been paid. Such a marriage would be “perfectly legal” notwithstanding that the chances of the man claiming damages from his wife’s paramour may be slim.\(^\text{16}\)

The procedure by which a customary marriage may be terminated has also been given as one of the reasons for denying it the recognition that it deserved. Under European law a marriage must be dissolved by a court of competent jurisdiction and not by the parties themselves whilst under customary law a marriage may be brought to an end either by a court or through an extrajudicial process. The possibility of resort to divorce by the latter process has been interpreted by some writers as evidence of the ease with which a customary marriage as opposed to a European type marriage can be dissolved. The interpretation is untenable. The dissolubility of a marriage or the ease with which it may be determined cannot have a bearing upon its original character, for the validity of any contract whether matrimonial, mercantile or otherwise, stands apart from the conditions of its defeasance.\(^\text{17}\) In Nachimson v. Nachimson\(^\text{18}\) the Court of Appeal in England held that in spite of the fact that under then Russian law a marriage there could be dissolved by mutual consent, a marriage contract valid under Russian law possessed the essential legal characteristics of a valid marriage even under English law.

The idea that the dissolution of a customary marriage can be easily obtained at the mere wish of the parties is erroneous.\(^\text{19}\) A certain degree of formality must be complied with. The matters in difference between the parties are carefully examined by a group of arbitrators including members of the families of both parties. The sentence of divorce will be pronounced when all efforts to reconcile the differences have failed. Sarbah, a leading authority on Fante customary law, took great pains to refute the misconception relating to the dissolution of a marriage under customary law. He went on to explain that the notion that either spouse of a customary marriage or their respective families can, without going through an approved procedure, declare a marriage terminated does not form part of customary law.\(^\text{20}\)


\(^\text{20}\) Op. cit., p. 52. Penin v. Duncan (1869) Sar.F.C.L. 118. See also Attah v. Annan [1975] 1 G.L.R. 366, where a letter of divorce captioned “Free Note” sent by a husband to his wife was held to be ineffective to dissolve a customary marriage
Perhaps the one outstanding feature of customary marriage is its toleration of polygamy. Critics of the social system in Africa have even wondered whether a customary union of a man and a woman can properly be called marriage. But the fact that one system permits polygamy whilst the other prohibits it does not necessarily make the one inferior to the other. Since marriage is a contract, it should be judged by the attitude of the parties to it. It is hard to resist the conclusion that the confusion in legal thinking as to the relative merits of each social system is the result of the unprincipled nineteenth century conceit of the then judges. The opinion of Lord Brougham in Warrender v. Warrender furnishes a classic example:

“But marriage is one and the same thing substantially all the Christian world over. Our whole law of marriage assumes this; and it is important to observe that we regard it as a wholly different thing, a different status from Turkish or other marriages among infidel nations, because we clearly should never recognise the plurality of wives, and consequent validity of second marriages, standing the first, which second marriages the laws of those countries authorise and validate.”

Many more examples could be mentioned in support of the view that for a considerable period of time there was a definite policy to extol the virtues of monogamy and to deny recognition to a marital relationship entered into by persons whose personal law allows a plurality of wives. Monogamy was regarded as the highest state of human relationship. What happened behind the legal curtains, where real life is enacted, was no concern of the law and jurist. An impartial appraisal of the two “types” of marriage—monogamous marriage and polygamous marriage—will reveal that all the fundamental ideas that assert themselves in all forms of human marriage are present in both. The essence of our customary marriage is summed up accurately by Sarbah as follows:

“It will be found by careful study of the people and exoneration of the local marriage institution, that marriage entirely rests on the voluntary consent of a man and a woman to live together as man and wife, which intention, desire, consent, or agreement is further evidenced by their living together as husband and wife.

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21 See for example the view expressed by Sir Robert Hamilton in Rex v. Amkey (1917) 7 E.A.L.R. 14: “In my opinion the use of the word ‘marriage’ to describe the relationship entered into by an African native with a woman of his tribe according to tribal custom is a misnomer.”
22 (1835) 2 Cl. & F. 531.
23 Engels, F., The Origin of the Family, Private Property and the State (Moscow, 6th imp.), p. 119.
24 Phillips and Morris, op. cit., p. 4.
All other ceremonies and expenses attending marriage are superfluous, but are useful and taken account of in assessing damages in case of criminal conversation."

**Muslim marriage**

Muslim marriage is also polygamous and what has been said with respect to the native customary marriage applies to a large extent to marriage by those who practise the Islamic religion.

In 1907 the Marriage of Mohammedans Ordinance was enacted to provide for the registration of marriages and divorces among Muslims.\(^{26}\) The Ordinance does not specify the essential elements of Islamic marriage, as there is more than one version of the teachings of that religion. But the doctrines of the Maliki School are more widely practised here than those of the Shafi School.\(^{27}\) The Ordinance merely makes provision for proof of its celebration through the system of registration within a specified time before a state official. The parties required to be present are the bridegroom, the bride’s Wali, two witnesses and an Islamic priest who is licensed to pronounce on the validity of Muslim marriages. The certificate of registration must stipulate the amount of dower paid and must bear the signature of the priest who pronounced the marriage valid. Recognition of marriage valid under Islamic law is based on the fact of its registration. Failure to register it would render the marriage invalid as a Muslim marriage although it would be recognised as a valid marriage under customary law.\(^ {28}\) Provision is made by section 7 for the registration of divorces under Islamic law. Section 10 states that succession to the property of a Muslim will be regulated by Islamic law only if it is established that the marriage of the deceased Muslim was duly registered under the Ordinance. In *Kwakye* v. *Tuba* Ollenu J. summarised the attitude of the courts to Islamic marriages as follows\(^ {29}\):

"In the eyes of our law, a marriage by a Mohammedan according to Mohammedan law is at its very best a marriage by customary law and does not affect succession to his estate, unless the said marriage is registered under the Ordinance. Therefore if a Mohammedan died not having married, or if married not having had his said marriage registered under the Marriage of Mohammedans Ordinance, the only law which can regulate succession to his estate is his personal law, *i.e.* the customary law of the tribe to which he belonged."

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\(^{26}\) Marriage of Mohammedans Ordinance, Cap. 129 (1951 Rev.).


\(^{28}\) Cap. 129 (1951 Rev.), s. 9.

It may be asked whether it is now a sound policy to treat the marriage of Muslims on the footing that it will only be recognised by the court when there is evidence of its registration. Surely when a judge is satisfied that the parties are Muslims and that they have contracted a marriage in accordance with the rites of the Muslim religion he ought to be prepared to hold that the parties intended that Muslim law should govern their marital relation.  

II. OFFICIAL POLICY AS REGARDS MONOGAMOUS MARRIAGE BEFORE THE ORDINANCE

Before the passing of the Marriage Ordinance in 1884 there was some uncertainty within judicial and religious circles as to whether a valid Christian monogamous marriage could be celebrated in the country. The courts took the view that the Marriage Acts in force in England did not form part of the laws received in the Colony. The religious authorities were however convinced that they had power to declare a man and woman lawfully married till death should separate them. Regardless of the legal uncertainty the missionaries celebrated marriages in accordance with rites and observances of their respective religious denominations. The differences between the churches and the courts were resolved by the Marriage Ordinance. Section 45 provides that every marriage celebrated in the Gold Coast before the commencement of this Ordinance by any minister of any religious denomination or body according to the rites in use by such religious denomination or body shall be, and shall be deemed to have been from the time of the celebration thereof, a legal and valid marriage.

From the time of the passing of the Ordinance it has been made illegal for religious bodies to celebrate monogamous marriages independent of the statute. At best the courts have treated potentially polygamous marriages blessed in the church as customary marriages. A question that remains to be answered is whether it is now wise to uphold such a view where there is evidence of a clear intention of the parties to take each other as man and wife to the exclusion of all others. Under the old matrimonial laws the High Court refused to exercise jurisdiction in cases where the parties were married under customary

30 This was the view of Apaloo J.A. in Malum Berko v. Madam Rukua, unreported judgment of the High Court, Accra, dated 5 September 1973; and see (1973) 5 R.G.L. 158.
33 Cap. 127 (1951 Rev.), s. 42.
The law has now been changed. The Matrimonial Causes Act of 1971 permits a party to a marriage other than a monogamous marriage to ask the court that the provisions of the Act be applied to issues arising from their marriage. The reason for the distinction between a monogamous marriage and a customary marriage ceases to be of any importance as far as jurisdiction in matrimonial causes is concerned.

III. INTRODUCTION OF STATUTORY MONOGAMOUS MARRIAGE

Notwithstanding the avowed policy of the British colonial power of non-interference with the operation of the personal laws of the colonial territories within its dominion so long as they were not repugnant to natural justice, equity and good conscience, the colonial administration yielded to pressure from various interested bodies. The enactment of the Marriage Ordinance in 1884 is an example of legislation passed to satisfy the wishes of some pressure groups.

Two main reasons have been suggested for its introduction in Africa, namely, the need for a lex loci in respect of monogamous marriage for the European settlers and residents, and the desire of the missionaries to make available a legal form of Christian marriage for those Africans who, on grounds of religion or civilization, might require it. Ghana was no exception. There are many variants of the Marriage Ordinance existing in all the former British colonial territories. In Kenya for example there is the Marriage Act which is available for all residents who desire to contract a statutory monogamous marriage; then there is the African Christian Marriage and Divorce Act which is available to African converts to Christianity. There are also special enactments which regulate the marriage of Hindus and Muslims.

In Ghana and Nigeria however the marriage legislation is available to Europeans and Africans alike. There is no doubt that the policy behind the Ghana Marriage Ordinance of 1884 was to spread English social ideals, with the hope of the eventual eradication of African social values. The chief objects of the Ordinance were:

(a) to provide a machinery for the celebration of statutory monogamous marriage locally in accordance with the principles of English law;

35 Phillips and Morris, op. cit., p. 137.
(b) to encourage persons ordinarily subject to customary laws to avail themselves of the provisions of the Marriage Ordinance;

(c) to offer them and their offspring proprietary benefits in the event of death intestate of one of the parties to such a marriage;

(d) to make it possible for persons already married under customary law to marry again under the Ordinance and thereby convert that marriage into a statutory monogamous marriage;

(e) to clothe the parties with a status superior to and unknown to customary law; and

(f) to make it virtually impossible for parties who are married under the Ordinance and their offspring to relapse into polygamy.\(^3\)

A few instances of the effect of the Marriage Ordinance may be referred to by way of illustration.

**Capacity**

Parties who desire to contract a marriage under the Ordinance must possess the requisite capacity to marry and must observe the necessary formalities prescribed by the Ordinance. A person will be deemed to have fulfilled the requirements as to capacity to marry under the Ordinance if he satisfies the registrar that

(a) he has attained the prescribed marriageable age or if he is under age he has obtained the necessary consents from his parents or guardian;

(b) there is not any impediment of kindred or affinity to the intended marriage;

(c) neither of the parties to the intended marriage is married by customary law to any other person than the person with whom the Ordinance marriage is proposed to be contracted.\(^3\)

Subject to the provisions of the Ordinance a person's capacity to marry is governed by English common law. The enactment does not specify any minimum age limit. It merely states that unless he or she is a widower or widow, persons under the age of 21 years need to obtain their parents' consent. Therefore in order to ascertain the requirements as to the permitted marriageable age, one must fall on the principles of the English common law which prescribe fourteen years for males and twelve years for females.\(^4\)


\(^5\) Ibid.
Prohibited degrees

Persons within the prohibited degree of consanguinity and affinity are forbidden to inter-marry. Notwithstanding the principles of private international law, section 42 of the Ordinance provides inter alia that no marriage shall be valid, "which if celebrated in England would be null and void on the ground of kindred or affinity." The absurdity of this provision manifests itself when one considers the case of persons who are validly married under customary law and who intend to convert their marriage into a statutory monogamous one. On a strict interpretation of the section they would not be able to contract a valid marriage under the Ordinance if the degree of relationship though permitted by their personal law offends against English law on ground of kindred and affinity. It is implied by the Ordinance that English law shall prevail over customary law in the matter of prohibition based on blood and affinity.41

Subsisting marriage

A person who is married to another under customary law is incapable during its subsistence of contracting an Ordinance marriage with any other person.42 If he goes through with the Ordinance marriage he will be liable to criminal prosecution.43 The purported marriage will be declared null and void.44

Preliminaries to marriage

The preliminaries to a marriage under the Ordinance follow the English pattern. The Ordinance provides for the solemnisation of the marriage under the authority of:

(1) A registrar's certificate,
(2) A religious marriage officer's certificate, or
(3) A special licence from the Head of State.

Before the celebration of a marriage under any of the above-mentioned authorities notice to that effect giving certain particulars concerning the parties and signed by one of the intended parties must be given to the registrar of marriages. After a period of 21 days and before the expiration of three months from the date of the notice the registrar may issue his certificate in a prescribed form on his being satisfied that

41 This view is expressly stated in the Southern Rhodesia Marriage Act. See Phillips and Morris, op. cit., p. 159.
43 Criminal Code, 1960 (Act 29), s. 265; Re Sapara (1911) Ren. 605; Quaye v. Kuevi (1934) D. Ct. '31-'37, 69.
there is no just cause why he should not permit the parties to be married. One of the parties is required to depose to the following facts, in an affidavit, namely: that the residential qualification has been complied with; that both of them are of full age or if under age the consent of their parents has been granted; that they are not within the prohibited degrees of marriage; and finally that there is no subsisting customary marriage between either party and a third person.

It is provided that any person who may know of any just cause why the marriage should not take place may enter a caveat against the issue of registrar's or a religious marriage officer's certificate. On receipt of the certificate the parties may be married by a civil ceremony before the registrar at any time within three months of the issue of the notice. If the parties desire a church marriage, provision is made for the due publication of banns of marriage in an audible manner in English and the vernacular during a public divine service on Sunday mornings. After due publication of the banns and if no caveat is entered by any one, the religious ceremony of marriage may be celebrated in a licensed place of worship by a recognised minister of the church in the presence of two or more witnesses.45

After its celebration the officiating officer is required to make certain entries concerning, e.g. the date of marriage, names and conditions of the parties, their occupation, etc. in a prescribed marriage certificate which must be signed by the parties, two or more witnesses and the officiating officer. The duplicate must be delivered to the parties.

Invalid marriages

Non-compliance with any of the provisions of the Marriage Ordinance may render a marriage celebrated under it null and void. As already noted, no marriage shall be valid which if celebrated in England would be null and void on grounds of kindred and affinity or where either of the parties at the time of the celebration is married by customary law to another person. Again, it is stated that a marriage shall be null and void if both parties knowingly and wilfully acquiesce in its celebration in a place other than that recognised or under false names or without obtaining a certificate issued for that purpose or by a person not recognised or licensed to celebrate a marriage under the Ordinance. Section 42 which stipulates the circumstances under which a marriage shall be held to be null and void however contains a saving provision in favour of validity of marriages celebrated under the Ordinance. After giving a list of invalid marriages it states, "But no marriage shall after celebration be deemed invalid by reason that any

45 But it may be celebrated elsewhere under the licence of the Head of State: Cap. 127, s. 38.
provision of this Ordinance other than the foregoing has not been complied with.”

On a strict interpretation of section 42 it could be argued that non-compliance with any provision of the Ordinance other than that section will not render a marriage celebrated under the Ordinance null and void. The better view however is that a court will examine the purpose of each provision to see whether or not it is mandatory. Thus in *Carr v. Carr* where an Ordinance marriage was purportedly celebrated without the registrar’s certificate it was held that section 31 which required the obtaining of a registrar’s certificate before its celebration was mandatory and therefore non-compliance with that provision rendered the marriage invalid under the Ordinance.

**Converted marriages**

One interesting feature of the Ordinance is the provision which impliedly permits persons who are already married to each other under customary law and wish to convert their existing customary marriage into a statutory monogamous one to avail themselves of the provisions of the Marriage Ordinance.47 The motive or policy behind the provision which permitted double marriages was questioned in *Re Isaac Ammetifi* by Hutchinson C.J., who remarked as follows48:

“I should have thought that persons already lawfully married could not be married over again. The Ordinance, however, certainly seems to contemplate that in future such persons can be married over again and that the second marriage shall have certain important consequences on the devolution of their property.”

In a subsequent case *Ackah v. Arinta* which also related to the question of double marriages, Francis Smith Ag. C.J. disagreed with the opinion expressed by his predecessor Hutchinson C.J. He felt that the main duty of a judge was to look at the provisions of the Ordinance and to apply them. He continued49:

“. . . the question to my mind is not whether a person married according to native law and therefore lawfully married cannot be married over again, but what has the Legislature declared on the subject. For the legislature can legislate that a square peg shall be considered and taken to be a round peg. Now the Legislature has provided in clear and unmistakable terms that a person married according to native law can be again married according to English law . . .”

47 Cap. 127, s. 14(4).
48 (1889) Red. 157 at p. 160.
49 (1893) Sar.F.L.R. 79 at p. 81.
It is beyond argument that under the Marriage Ordinance double marriages are permitted. The problem that has still not been resolved is whether the second marriage under the Ordinance is to be regarded as a new marriage or a continuation of the existing marriage which is characterised as monogamous from the date of the second marriage for the purposes of the Ordinance. Since the procedure for the second marriage is nearly the same as the procedure for contracting a statutory marriage for the first time, it is legitimate to infer that the Ordinance contemplates that the second marriage is to be regarded as a new one. Before the registrar pronounces the parties married, he is required to address them thus: “Do I understand you A.B. and you C.D. that you come here for the purpose of becoming man and wife?”\(^50\) If the answer is given in the affirmative then the registrar shall tell them that they have become “legally married” to each other and that the marriage cannot be dissolved during their lifetime except by a valid judgment of divorce.\(^51\)

It is hard to understand why persons who are already married under customary law should be asked to make a false declaration to a registrar before they are declared to be married under the Ordinance. The answer to this question is given by Phillips and Morris as follows\(^52\):

> “The legal effect of these provisions goes beyond the mere superimposition of additional obligations on an existing customary marriage. Although the ceremony presupposes an existing customary marriage, and although the language of the Ordinances at first sight suggests that its object is simply to ‘convert’ that marriage into one involving stricter obligations rather than to create a statutory marriage \textit{de novo}, it seems that the ceremony is in fact sufficient in itself to constitute a statutory marriage independently of the pre-existing customary marriage, and its validity as a statutory marriage will not be dependent on the validity of such pre-existing customary marriage.”

In the light of this explanation can one draw any conclusion other than that it was the intention of the colonial legislatures to depict a customary marriage as an institution inferior to that known to the European world?

\(^{50}\) Cap. 127, s. 36.

\(^{51}\) Compare s. 9 of the Kenya African Christian Marriage Ordinance (1962 Rev.) now Cap. 212: “Do I understand that you A.B. and you C.D., have been heretofore married to each other by native law and custom, and that you come here for the purpose of binding yourself to each other as man and wife so long as both of you shall live?” This is more realistic.

Incidents of marriage under the Ordinance

Until comparatively recent times, it was generally accepted without reservation that a marriage under the Ordinance conferred on the parties thereto a status unknown to customary law. The judges in the colonial days took the view that the law that governed this new status was English law. Thus in Ackah v. Arinta, Francis Smith Ag. C.J. held that "going through the ceremony of marriage at the Wesleyan Chapel altered the status of the parties concerned and conferred rights and privileges entirely different from, and at variance with those under native law." Brandford Griffith J. in delivering the judgment of the Full Court of the Gold Coast Colony in the Nigerian case of Cole v. Cole also said:

"The position of a man and a woman who marry according to Christian rites is entirely different. Christian marriage imposes on the husband duties and obligations not recognised by native law. The wife throws in her lot with the husband, she enters his family, her property becomes his . . . In fact a Christian marriage clothes the parties to such a marriage and their offspring with a status unknown to native law."

This view of the law was carried even further by Michelin J., who declared in Re Otoo (now overruled) that the only form of will which a party to a marriage under the Ordinance could legally make was one in accordance with the provisions of English law.

A careful reading of these pronouncements from some of the judges of that day leads one to conclude that they were determined to take the parties to a marriage under the Ordinance out of the regime of their personal law. In adopting this line of reasoning the judges offended against the principles of private international law which states that the law of a person's domicile generally governs the question of his status. The fact that a party has contracted a marriage under the Ordinance may be very strong evidence of his desire and intention to have his life generally regulated by English law and customs, but it is by no means conclusive evidence. Marriage in essence is a contract between two parties. If the parties desire to contract a marriage of a special kind it is only reasonable to assume that the parties intend that their rights, duties and obligations in respect of that marriage only shall be governed by the law of their choice.

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54 (1898) 1 N.L.R. 15 at p. 22.
55 (1926) D.Ct. '26-'29, 84 at p. 86.
56 Smith v. Smith (1924) 5 N.L.R. 105.
57 But one cannot by marrying under the Ordinance give himself the choice of pursuing his matrimonial rights either under customary law or under English law: Akwapim v. Budu D.Ct. '31-'37, 89 at p.90; Graham v. Graham [1965] G.L.R. 407.
In the case of *Coleman v. Shang* a strong Court of Appeal gave the quietus to the erroneous impression created by the early judges. Van Lare J.A. in delivering the unanimous decision of that court observed:

"We are of opinion that a person subject to customary law who marries under the Marriage Ordinance, does not cease to be a native subject to customary law by reason only of his contracting that marriage. The customary law will be applied to him in all matters, save and except those specifically excluded by the statute, and any matters which are necessary consequences of the marriage under the Ordinance."

Now the Courts Act of 1971 contains elaborate provisions designed to solve choice of law problems. The Act stipulates that a transaction entered into by person subject to customary law shall generally be governed by the system of customary law to which he is subject unless a contrary intention is manifest.

Section 44 of the Marriage Ordinance furnishes another example of the incidents of marriage under the Ordinance. It states that a person who is married under the Ordinance shall be incapable during the continuance of such marriage of contracting a valid marriage under customary law. Breach of this provision is punishable under the Criminal Code. The policy behind this section was to ensure that a person who chooses to contract a monogamous marriage does not relapse into polygamy. For reasons which it is difficult to discern, the section impliedly permits the contracting of a second marriage in accordance with Muslim law.

It is an open secret that the section has been honoured more by its breach than by its observance. There have been very few prosecutions under it. The main complaint against this section is that it does not afford the parties the freedom of changing the choice of law during the subsistence of the Ordinance marriage so as to enable them to convert it to a customary marriage. After all there are no marriages which are not potentially polygamous in the sense that they may be rendered so by a change of domicile and religion on the part of the spouses. It will be worthwhile to give serious consideration to the observations of Lord Upjohn in *Attorney-General of Ceylon v. Reid*:

59 Act 371, s. 49.
60 Cap. 127.
62 *R v. Amoo Mensah* (1922) F.C. '22, 61 is one of the few reported cases.
64 [1965] 2 W.L.R. 671 at p. 678.
“Whatever may be the situation in a purely Christian country (as to which their Lordships express no opinion) they cannot agree that in a country such as Ceylon a Christian monogamous marriage prohibits for all time during the subsistence of that marriage a change of faith and of personal law on the part of a husband resident and domiciled there . . . In their Lordships’ view in such countries there must be an inherent right in the inhabitants domiciled there to change their religion and personal law and so to contract a valid polygamous marriage if recognised by the laws of the country notwithstanding an earlier marriage.”

Ghana is also a country of more than one creed and the personal laws of the inhabitants differ from community to community. If a person whose personal law is customary law is permitted to contract a monogamous marriage there is no earthly reason why he should be forbidden from reverting to his original status if he so wishes.

The contracting of a statutory marriage under the Ordinance also affects the devolution of the property on the death intestate of either of the spouses. By the provisions of section 48, two-thirds of the property of the husband shall be distributed in accordance with the laws in force in England as at 1884 relating to the distribution of personal estates of intestates, and one-third in accordance with customary law. In other words, two-thirds of the property goes to the widow and children and the remaining one-third goes to the extended family of the deceased.

The section strangely enough provides further that on the death intestate of any issue of an Ordinance marriage his property shall also be distributed in the same manner as though he were married under the Ordinance. Here again the long-term policy of the Ordinance manifests itself. It is the intention of the Ordinance that children of a monogamous marriage shall organise their family lives on the same lines as those of their parents.

IV. EFFECT OF MARRIAGE ON THE SPOUSES AND THEIR PROPERTY

The legal consequences of marriage in relation to the personal rights and duties of the spouses, their issue and their property have been discussed elsewhere.65 Under this head it is proposed to examine recent developments in that branch of family law. The position until a decade ago may be summarised thus: When a person married another under customary law it was presumed that the parties had agreed that their rights and liabilities as a consequence of the marriage should be

governed by the relevant customary law. Similarly, parties who contracted a statutory monogamous marriage were deemed to have acquired a status unknown to customary law. Thus English law was applied to determine their rights and obligations generally.

In effect however everything turned on the legal position of the married woman. The courts were called upon to determine the property relationship between husband and wife, the extent to which a married woman could enter into legal transactions on her own or the extent to which the husband could be made liable for the contracts entered into by his wife or the torts committed by her.

Under customary law, the marriage of the spouses had limited effect on the relationship between them and their respective extended families. Among the Akan, for example, who reckon their family relation in the female line, a spouse never lost his or her legal ties with the extended family. Rattray’s description of the relationship between the spouses during coverture is instructive. He observes that after the payment of the marriage consideration by the family of the bridegroom to the family of the bride, the husband acquires the following legally enforceable rights:

"(1) To claim damages, in event of his wife’s infidelity, from the co-respondent, who might be sold by his abusua to pay the debt; this is another way of saying that by the payment of Aseda he acquired the exclusive right to the woman’s body, a right in which customary law would now support him.

(2) The right to profit by the fruits of her labour and later that of her children . . .

The husband incurs the following liabilities:

(1) He becomes liable for his wife’s debts and torts and for her maintenance and that of her children.

(2) He takes into his house some one over whom neither he nor his clan ultimately have control, and one whose acceptance of her position seems largely to depend upon the kind of treatment she meets with in her new surroundings."

The position with regard to women married under the Ordinance was so much worse than that described by Rattray because the legal status of married women under English law in the nineteenth century was the epitome of discrimination. In Ghana a woman married under the Ordinance was deemed not to have capacity to maintain an action in her own name for any contract or any breach thereof until the enactment of the Married Women’s Property Ordinance in 1890.


Essays in Ghanaian Law

Since 1960 when the first modern Courts Act was enacted, there has been a significant change in the manner in which the courts have determined questions concerning the rights and liabilities of married couples and their issue. The present choice of law rules are contained in section 49 of the Courts Act, 1971. It states that unless a contrary intention is shown customary law shall be applied to transactions entered into by Ghanaians. On the other hand it is provided that where a person is not subject to customary law, the common law will be applied to determine his rights and liabilities in any legal transaction. The court is also empowered to adopt, develop and apply such remedies from any system of law (whether Ghanaian or non-Ghanaian) as appear to the court to be efficacious and to meet the requirements of justice, equity and good conscience. The section therefore gives a wide discretionary power to the court to determine these matters in a manner which accords with common sense and fair play.

So far as the question of maintenance is concerned the Matrimonial Causes Act of 1971 has given the court sufficiently flexible powers to grant relief in deserving cases. There is a tendency on the part of the court to adopt a uniform approach to settle maintenance questions arising from customary and Ordinance marriage alike. Again, the Act does away with the old notion that it is always the duty of the husband to maintain his wife. The incomes of the parties appear to be the dominating factor to be taken into consideration by the court in the exercise of its power to award maintenance. Section 16 of the Act enables “either party to a marriage” to petition the court for an order for maintenance on the ground that the other party to the marriage has wilfully neglected to provide for the other party and any child of the household. The court is also empowered to award maintenance both during a suit for the dissolution and after its determination. The order shall be made only after the court has “considered the standard of living of the parties and their circumstances.” There is also provision under the Act for the award of a lump sum payment.

The expression “standard of living of the parties and their circumstances” is so elastic that it could present difficulties when considering the factors to be relied on. Ought the conduct of the parties leading to

68 Act 372.
69 For a recent application of the section see Mate v. Amanor [1973] 1 G.L.R. 469; but see also Attah v. Annan [1975] 1 G.L.R. 366.
70 Act 367, s. 19. In a recent English case, the Court of Appeal affirmed a decision ordering a woman to maintain her husband. Scarman L.J. in his judgment said: “I rejoice that it should be made abundantly plain that husbands and wives come to the judgment seat in the matters of money and property upon the basis of complete equality. That complete equality may, and often will, have to give way to the particular circumstances of their married life.” Calderbank v. Calderbank [1975] 3 W.L.R. 586 at p. 593.
the breakdown be taken into account? Two cases may be referred to to highlight the dilemma in which courts have found themselves. In Beckley v. Beckley Abban J. had this to say on the question on maintenance11:

"Consequently, so long as it is not clear from the present state of affairs as regards the party responsible for the separation and the cessation of cohabitation, the obligation of the husband to maintain the wife remains."

The learned judge found as a fact that during the marriage the wife was being maintained by the husband. He therefore made an award in recognition of that fact. It is implied from the passage just quoted that he would have come to a different conclusion if it had been established that the wife was the cause of the break up of the marriage.

On the other hand, in Happee v. Happee72 Edusei J. found as a fact that the conduct of the wife-respondent fell very far short of that of a reasonable married woman and that no man, however conciliatory he might be, even with the patience of the biblical Job, could tolerate a woman of the calibre of the respondent. Yet in spite of his findings, he awarded the wife a lump sum payment of £4,640.00 in order to assist her to make a fresh start in life.

To date, the courts have departed from English law principles governing the quantum of award. Quite often the award is made with the consent of both parties. As a general rule if the married woman is employed she may only apply for financial provision for the children of the household, hence bitter quarrels are avoided.

As regards the property rights of the parties on marriage, it has long been settled law that marriage has no effect on the property of either spouse whether they are married under customary law or otherwise. This is particularly true of property acquired by a spouse before marriage. During marriage neither spouse has had the right to interfere with the enjoyment and disposal of the property of the other spouse.73

On the other hand there has been some development with regard to property acquired during coverture. Until a few decades ago the husband was regarded as the sole breadwinner. The law therefore presumed that any property acquired during marriage belonged to him. While customary law favoured joint family property it did not encourage joint

ownership between persons who were not connected by blood.\textsuperscript{74} According to Sarbah "whatever a wife helps her husband to acquire is the sole property of the husband."\textsuperscript{75} The basis of this law was expressed by Ollennu J. in \textit{Quartey v. Martey} as follows\textsuperscript{76}:

"Again, by customary law it is the domestic responsibility of a man's wife and children to assist him in the carrying out of the duties of his station in life, e.g. farming or business. The proceeds of this \textit{joint effort} of a man and his wife and/or children, and any property which the man acquires with such proceeds, are by customary law the individual property of the man . . . The right of the wife and children is a right to maintenance and support from the husband and father."

Most married women engage in some gainful employment or other and participate financially and effectively in the running of the household. Most of the wives of workers in the low income group are retail traders. Those married women who go out to work are paid the same salaries as their male counterparts. Thus the question, what interest accrues to a married woman who assists her husband in the acquisition of property during marriage must now yield a different answer from that given by Sarbah and the courts some years ago.

In the absence of any legislative provision recognising the realities of the present position, the courts have shaken off the constraints imposed on them by the strict doctrine of customary law and have embarked on a progressive development of this branch of the law. Thus in \textit{Deborah Takyiwa v. Kweku Adu}\textsuperscript{77} a divorced customary law wife successfully claimed one half of the cocoa farm cultivated jointly by the husband and herself on a piece of land belonging to her.

Hayfron-Benjamin J. (as he then was) has suggested that the proprietary rights of a married couple must be determined in accordance with the intention of the parties. He even doubted whether the position as stated by Sarbah and others represented the true position at customary law. In \textit{Yeboah v. Yeboah} he observed as follows\textsuperscript{78}:

"There is, however, no positive rule of customary law which prohibited the creation of joint interests in property between persons not connected by blood. Where there is clear evidence

\textsuperscript{74} \textit{Yeboah v. Yeboah} [1974] 2 G.L.R. 114 at p. 121 per Hayfron-Benjamin J. (as he then was).
\textsuperscript{75} Sarbah, op. cit., p. 60. See also Bosman, \textit{A New and Accurate Description of the Coast of Guinee} (1704) (4th ed. 1967) p. 202; Rattray, \textit{Ashanti Law and Constitution}, p. 22.
\textsuperscript{77} Unreported judgment of the High Court (Sunyani Suit No. L.C. 7/66) 18 May 1971.
\textsuperscript{78} [1974] 2 G.L.R. 114 at p. 121.
that the parties intended to hold the property as joint tenants, the law would give effect to such an intention. In any event, in this case the parties were married under the Marriage Ordinance and the relations between each other are not governed exclusively by customary law. English legal concepts cannot be completely excluded in the determination of this case."

General principles of equity are also being relied on by the courts in order to do justice between man and woman as far as their proprietary rights are concerned. In *Bulley-Neequaye v. Acolatse* the evidence established that the money for the purchase of a house was provided by Mrs. Acolatse even though the house was conveyed in the name of her husband. While Mrs. Acolatse was away from Ghana, her husband sold the house to Mr. Bulley-Neequaye. On her return to the country Mrs. Acolatse recovered possession. Mr. Bulley-Neequaye brought an action against her for the recovery of the house. The High Court gave judgment in his favour, but the decision was reversed on appeal. The Court of Appeal held that where a wife buys property and puts it in the name of her husband, prima facie he holds it as a trustee for her. A similar decision has been given in the case of *Reindorf v. Reindorf*. It can legitimately be assumed that this trend will not be reversed.

V. ATTITUDE TO DIVORCE

Until 1971 when the first Matrimonial Causes Act was passed in Ghana, the jurisdiction conferred on the courts to dissolve statutory monogamous marriages was expressed to be exercised "in conformity with the law and practice for the time being in force in England." The courts were given a discretion in the matter but they almost invariably determined such marriages in accordance with English law and practice. Some judges expressed their disapproval of the state of the law which allowed the wholesale application of English law in matrimonial causes within the jurisdiction of the courts. Thus in *Gray v. Gray* Hayfron-Benjamin J. refused to hold that a law passed by the British Parliament

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81 See the recent judgment of Sarkodee J. in *Ahrebrefeh v. Kaah* to be reported in [1976] 2 G.L.R.
82 Cap. 4 (1951 Rev.), s. 17, now repealed.
84 (1971) 1 G.L.R. 422 at p. 423. See also the following observation by Taylor J. in *Anokyi v. Anokyi*, High Court, Kumasi, 24 June 1974; digested (1970) C.C. 90: "that the law and practice in matrimonial causes in Ghana should be made subject to the fluctuations in thinking in a foreign country is to be deplored. The law in a country must reflect the attitudes and experiences of the people."
in the exercise of its legislative powers should become part of the laws of Ghana through the back door. Though the view expressed by the learned judge was obiter the Law Reform Commission decided to act. It made recommendations to the then Parliament to enact a local law on matrimonial causes.

In moving the Second Reading of the Bill, the then Attorney-General explained the objects of the legislation as follows:

"The divorce law at present applicable in Ghana is the English Divorce Reform Act, 1969, which came into force on 1st January 1971. The statute effected very considerable improvement in the law relating to divorce, and adopted an enlightened and humane approach towards this difficult human problem. The present Bill retains the progressive features of the English legislation while adapting them to meet Ghanaian circumstances.

Foremost among the changes made by the English Act was the abolition of the old form of divorce on the ground of adultery, desertion, cruelty and so on. The English Statute provided that the sole ground of divorce should be proof to the satisfaction of that Court that the marriage had broken down beyond reconciliation. I wish to stress that this is now also the law in Ghana, since the 1st January, 1971...

The Bill adopts the approach that divorce should only be granted when the marriage has broken down completely and there is no possibility of reconciliation. Adultery, cruelty and other former grounds for divorce will remain very relevant in helping to prove the breakdown of the marriage beyond reconciliation but they will not necessarily be conclusive of that fact."

No attempt will be made to deal fully with all the implications of the breakdown theory. It is quite clear from the passage quoted from the speech of the Attorney-General and from the provisions of the Matrimonial Causes Act, 1971 (Act 367), that the local law is still patterned on the English model. Attention will be drawn briefly to the modifications of the English law by Act 367.

By the provisions of the Act all English statutes relating to matrimonial causes and hitherto in force in Ghana have ceased to exist. Such reliefs as restitution of conjugal rights, jactitation of marriage, and judicial separation are abolished. All courts of first instance now have jurisdiction in matrimonial causes. The domicile of the husband is no longer the sole test for the exercise of jurisdiction. Nationality and residence for three years also afford the basis for the exercise of jurisdiction.

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86 See Daniels, "The legal position of women under our marriage laws" (1972) 9 U.G.L.J. 39-63 at p. 56.
jurisdiction. The adjectival law has also been simplified. A co-respon-
dent and a woman named need not be made a party to the proceedings.
Cross-petitions and apparently cross-prayers are no longer necessary
as forms of counter actions for the dissolution of a marriage. The
court is required to look at all whole pleadings including the petition
and the answer. If it is satisfied with proof by the respondent of his
allegations of the breakdown it can grant the respondent a decree
notwithstanding that he has not counterclaimed for a dissolution of the
marriage. Decree nisi has also been done away with. Every decree
takes effect from the date on which the court gives judgment.

In a petition for divorce the petitioner must establish that the
marriage has broken down beyond reconciliation. For the purpose of
showing breakdown he must satisfy the court on one or more of the
following facts: (a) adultery and intolerability, (b) unreasonable
behaviour of the respondent, (c) two years’ desertion, (d) non-cohabita-
tion for two years and respondent’s consent, (e) five years’ non-cohabi-
tation and (f) mutual failure to reconcile differences.87

Statutory directions are given to the court with regard to the attitude
to be adopted in the granting of a decree. It is provided that on a
petition for divorce it shall be the duty of the court to inquire, so far as
is reasonable, into the facts alleged by the petitioner and the re-

spondent. It is further provided that notwithstanding that the court
finds the existence of one or more of facts (a) to (f) the court shall not
grant a petition for divorce unless it is satisfied, on all the evidence,
that the marriage has broken down beyond reconciliation.88 Section 10
of the Act empowers the court to grant a decree notwithstanding
evidence of collusion between the parties or any conduct on the part of
the petitioner. Finally, it is provided that at any stage of the proceedings
for divorce, if it appears to the court that there is reasonable possibility
of reconciliation, the court may adjourn the proceedings for a reason-
able time to enable attempts to be made to effect a reconciliation.89

The guidelines given to the court leave much to be desired. The Act
appears to give with one hand and to take with the other. In Mensah v.
Mensah90 Hayfron-Benjamin J. after examining the relevant sections of
the Matrimonial Causes Act, 1971, expressed his anxiety thus:

“The wording of these sections is not very clear. The burden of
proof on the petitioner is obscure. The court ought to grant a

87 Matrimonial Causes Act, 1971, s. 2 (1).
88 M.C.A., 1971, s. 2 (2) and (3). These provisions are similar to s. 2 (2) and (3) of
the English Divorce Reform Act 1969 except the former is expressed in a positive
manner whereas the latter is negative in approach.
89 M.C.A., 1971, s. 8 (2).
90 [1972] 2 G.L.R. 198 at pp. 202-203. For a critical appraisal of the English Act
see Finlay, H. A., “Reluctant, but inevitable: The retreat of matrimonial fault”
divorce only where there has been a breakdown of the marriage beyond reconciliation. It is obligatory on the petitioner to prove one or more of the specified facts in order to establish that the marriage has broken down beyond reconciliation obviously on all the evidence. Having established these facts to such a standard as to lead the court to make a finding that these facts exist, the court can still refuse to grant the decree because it is not satisfied that the marriage has broken down beyond reconciliation . . .

Our legislation seems to state that proof of one of the facts shows that the marriage has broken down beyond reconciliation, and yet the court can decline to grant the decree because it is not satisfied that the marriage has broken down beyond reconciliation. The Act seems to draw a distinction between appearance and reality.97

The legislation has been in force for only four years. It may be too early to forecast the manner in which the courts will exercise their discretion. There have been occasions when some judges have relied on English case law both old and new in order to interpret certain sections of the Act.91 So far there is only one reported case where a petition for divorce has been dismissed.92 Almost all the petitions brought before the court end up with a decree being granted. Once the judges free themselves from excessive legalism derived from English case law, the aim of the legislation may be achieved sooner than later.

The most novel feature of the Act is section 41 which enables a party to a customary marriage to avail himself of the provision of the Act. It is also provided that on assumption of jurisdiction, the court may have regard to the peculiar incidents of that marriage in determining the appropriate relief, financial provision and child custody arrangements. The section enumerates a number of “faults” to be taken into consideration in a petition for the dissolution of a customary marriage. It is not made explicit as to whether the breakdown theory should also be applied to the customary marriages. In practice the courts pay little attention to the peculiar incidents of customary law marriage. They try the action in the same manner as they would do in dissolving a monogamous marriage.

One wonders whether the time has not come for the introduction of a uniform divorce law for all marriages which are valid in Ghana. In 1960,
the Government published a White Paper on Marriage, Divorce and Inheritance which contained proposals inter alia for the reform of the law of divorce. It was proposed that when a judge received an application for divorce he should appoint an ad hoc panel of four from the inhabitants of the locality to sit with him to hear the matter in chambers. The panel would attempt to reconcile the parties. Divorce would be granted only when attempts at reconciliation had failed. The proposed legislation was designed to accentuate the aim of reconciliation and the sanctity of marriage. Divorce was to be granted as a last resort. Unfortunately the legislation never saw the light of day. It is not too late to take another look at the question.

CONCLUSION

From the brief survey of the law of marriage and divorce, it has been shown that our legislature and our courts have depended heavily on English law and practice with all its prejudices and technicalities. Customary marriage was considered as an inferior institution. It was hoped that the introduction of statutory marriages would give the quietus to our own local system of marriage. The fact that to date only a small minority of the populace are married under the statute should make us aware of the ineffectiveness of wholesale transplantation of foreign law without regard to the social norms of the people to whom such law is to be applied. English law was introduced in Ghana as a temporary stop-gap and it has served the needs of our society in a variety of ways. The search for our national identity now impels us to make a critical review of those features of English law which tend to erode our national and social values. For example, it has been a cardinal feature of our system that family matters are causes which are not suitable for determination by the ordinary courts. Developed countries are coming round to accept this social theory. We must not wait to copy their system only after they have borrowed it from us. The next century should see a radical reformation of our family law rooted in our social values and culture.
LEGISLATIVE CONTROL OF FREEDOM OF CONTRACT

S. K. Date-Bah

Ghanaian law has adopted, along with the general reception of the common law, the individualistic common law notion of freedom of contract evolved in England and America in the late eighteenth and nineteenth centuries. This evolution was in an age whose intellectual climate stressed individual freedom and autonomy of the will. One would have thought that this idea should have received a stern adaptation in the Ghanaian context to fit the less individualistic local culture. But both the colonial judges and even the post-independence Ghanaian judges have followed the non-interventionist policies of the English judges.

Undoubtedly, a consequence of the process of economic change in Ghana over the past century since the establishment of the Supreme Court has been the considerable increase in the proportion of people who now depend upon others in order to obtain their consumer requirements. In traditional society, most families produced for themselves the majority of the goods they consumed. But now more and more people have come to depend on others to produce the goods and services they need. In other words, the market dependence of consumers has increased. A problem that has developed from this situation has been that consumers have come to stand in need of legal protection in connection with the contracts through which their consumption requirements are satisfied. The need has therefore arisen for freedom of contract to be controlled in the interests of the consumers of the various goods and services available in the modern Ghanaian economy.

It is believed that the socialisation of the law of contract is necessary to enable it to solve many of the problems created by modern economic conditions in Ghana. By the socialisation of the law of contract is meant the exercise of control by the legislature and judiciary over the institution of contract in the interest of society’s welfare. In this essay, there will be an examination of what attempts have been made by the...
Legislative Control of Freedom of Contract

Legislators of Ghana to exercise control over the institution of contract in order to overcome problems that have arisen in the century since the Supreme Court of the Gold Coast was established and what other efforts may need to be undertaken by such legislators.

Legislative control of contracts may be exercised in various ways3: for instance, through the statutory incorporation of compulsory terms in certain types of contracts, through the prescription of a statutory form for certain kinds of contracts, through a declaration of certain contracts or terms in such contracts to be void or unenforceable, if certain statutory requirements are not complied with, through compelling certain persons to enter into certain kinds of contracts, and through the prohibition of particular kinds of terms, e.g. exemption clauses, from particular kinds of contracts.4 Such control is usually asserted in pursuance of some social policy objective or other.

**Concessions Ordinance, 1900**

An early example in Ghana of legislative control over freedom of contract, in pursuit of a social policy objective, was the enactment of Concessions Ordinance in 1900. This enactment was amended several times and attained its final form in 1939, as the Concessions Ordinance of that date.5 The Ordinance's importance in present-day Ghana has, however, been diminished by the Concessions Act, 1962,6 which provides that the Ordinance shall cease to apply to stool lands. The purpose of this Ordinance might easily be thought to be the protection of the community against reckless and improvident sales of stool lands to expatriates. It imposed a requirement of writing in respect of agreements whereby a “native” purported to grant an interest in land to an expatriate.7 Any agreement for such grant was void, unless it was in writing. Furthermore, no such grant was to be valid, unless proceedings were taken before the High Court to obtain a certificate of validity from the court. The court had power to intervene in the bargain struck by the parties to the concession.8

By section 13 of the Ordinance, the court was prohibited from issuing a certificate of validity if, inter alia, the court was of the view

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5 Cap. 136 (1951 Rev.).
6 Act 124.
7 See Cap. 136, s. 3.
8 Concession is defined in the Ordinance as “... any instrument whereby any right, title or interest in or to land, or in or to minerals, timber, rubber, or other products of the soil in or growing on any land or the option of acquiring any such right, title or interest purports to be granted or demised by a native...” See s. 2 of the Ordinance. However, sales, mortgages and leases of land within a village or town were excluded from this definition. See ibid.
that the concession was made without adequate valuable consideration, regard being had to the circumstances existing at the time of the acquisition of the concession, or if no satisfactory agreement had been reached as to the protection of the customary rights of the "natives," in respect of the collection of firewood, hunting and the snaring of game. There were various other requirements that had to be satisfied before the court could grant a certificate of validity.

But apart from the objective of protecting members of particular communities from the improvidence of their chiefs, the Concessions Ordinance sought to achieve security of title for the concessionaire; once a certificate of validity was issued to him by the High Court, his title could no longer be challenged. The problem that the Ordinance sought to control was one that had arisen from the process of economic change. Expatriate land speculators had arrived in the country during the mining and commercial boom in the Gold Coast which had begun in the late nineteenth century. They sought mining and timber concessions. The government of the day realised that if it allowed unmitigated freedom of contract to operate between these concession hunters and the local chiefs, undesirable consequences would result. The chiefs, in their desire for quick gains, might not strike good enough bargains on behalf of their communities. Secondly, and more importantly from the point of view of the colonial government, there was the issue of security of title for the concessionaires. Since there was no system for the registration of title, the chiefs might sell or demise the same plot of land more than once to the concession seekers. It was therefore found necessary to curtail the freedom of contract of the concession hunters and the chiefs, in the interest of the security of title of the concession seekers and also in the interest of the local communities whose chiefs might be persuaded by lucre to abandon their interest.

The Concessions Ordinance thus illustrates an interventionist state policy in relation to concession contracts. The interesting question emerging from a consideration of the Ordinance is: Why this interventionism by a colonial government of a capitalist metropolitan state? The post-independence Ghanaian skeptic cannot but suspect that this interventionism was with a view to protecting the economic interests of the colonial regime. The predominant concern of the colonial regime could not have been so much the protection of the local community interest as the protection of the interests of the expatriate capitalist class. In West Africa, the technique whereby the local economies were linked to the western capitalist system did not, on the whole, require large-scale landholding by the expatriate capitalist class. Rather, the small-scale peasants were allowed to till their land and then sell the fruits of their labours to the expatriate produce companies. However, in the timber and mining sectors where this technique was not found
to be satisfactory, one sees the interventionism described above undertaken by the colonial government in order to guarantee the title of the foreign entrepreneurs.

**Moneylending**

Another area where the colonial regime found it necessary to adopt an interventionist policy was that of moneylending contracts. From the latter half of the nineteenth century into the present century there was a rapid expansion in the web of the cash economy in Ghana. In the course of this growth, moneylending became sufficiently significant to require regulation. The Loans Recovery Ordinance of 1918 was passed by the colonial legislature to deal with the problem of unconscionable moneylending transactions. This Ordinance is still in force. It is a verbatim reproduction of section 1 of the English Moneylenders Act, 1900. The purpose of the Ordinance is to give the Ghanaian courts power to re-open unconscionable moneylending bargains and to do justice as they think fit. The courts are authorised to relieve a debtor from payment of "any sum in excess of the sum adjudged by the Court to be fairly due in respect of principal, interest and charges, as the Court having regard to the risk and all the circumstances, may adjudge to be reasonable." The licensing of moneylenders was subsequently introduced into Ghana by the Moneylenders Ordinance, 1941, which was based on the English Moneylenders Act, 1927. The cumulative effect of these two enactments is to subject moneylending contracts to considerable control: they must be in writing; the memorandum in writing of the contract must be delivered to the borrower or his agent within seven days of its being signed; the contract may not provide for interest at a rate higher than that prescribed in the statute. The moneylenders themselves in addition to being obliged to take out licences, are under various other duties, for

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9 Cf. the interventionist policies of the Colonial Government in Kenya to buttress the plantation economy that evolved there. See Seidman, R. B., "Contract law, the free market, and state intervention: A jurisprudential perspective" (1971) 7 *Journal of Economic Issues* p. 553, esp. pp. 560 et seq.


11 Cap. 175 (1951 Rev.).

12 63 & 64 Vict., c. 51. The Ordinance omitted only subsections (3) and (7).

13 See the Loans Recovery Ordinance, s. 3 (1).

14 See Cap. 176 (1951 Rev.).

15 17 & 18 Geo. 5, c. 21.

16 If there is no memorandum in writing of the contract, the contract is void. See e.g. *Basil v. Raad* [1961] G.L.R. 155 and *Yeboa v. Bofour* [1971] 2 G.L.R. 199.

17 Failure to deliver the memorandum has been held to render the whole moneylending transaction unenforceable. See *Alagbade v. Acheampong* [1959] 1 G.L.R. 96; *Attah v. Nkureh* High Court, Kumasi, 23 December, 1965, unreported; digested (1966) C.C. 132; *Wula v. Wae* [1966] G.L.R. 649.
instance, to keep accurate records of their moneylending transactions and to give receipts for every payment made to them.\textsuperscript{18}

In spite of the heavy protection extended to borrowers, so far as the law in the books is concerned, in practice the legislation has had little efficacy. Very few moneylenders are licensed and hardly any contracts comply with the requirements of the legislation, and yet there is very little challenge in the courts of the legal validity of such contracts. The explanation is to be found in the kind of people who are the usual customers of the moneylenders. These tend to be low income people whose only realistic source of credit is these moneylenders. Bank loans and overdrafts are simply not accessible to such people. In the absence of the availability of credit from institutional sources for this class of people, and given the fact that they do need credit, a dependency relationship arises which such small borrowers would not like to jeopardise by any resort to law. The control of the freedom of contract of moneylenders is thus in legal theory only; in reality, these moneylenders operate in a “seller’s market” and their usual and well-known terms are quite unconscionable.\textsuperscript{19} The failure of the control over moneylenders’ contracts illustrates the difficulties of control of freedom of contract in a market economy where particular services or goods are in short supply. Consumers in such situations willingly give up whatever protection is sought to be accorded them in order to have access to the scarce goods or services.

\textit{Price control}

Another area illustrating this same difficulty is that of price control. Price control began under the colonial government in 1949 with the Control of Prices Regulations, 1949 (No. 25). But because of the laissez-faire policy of the colonial government and of the earlier days of the Nkrumah regime with regard to the import trade, this statutory control of the freedom of contract of sellers and buyers of goods did not assume much social, economic or political significance until the early sixties. This latter period of more militant price control saw the revocation of the Control of Prices Regulations, 1949, and the enactment of the Control of Prices Act, 1962,\textsuperscript{20} in its place. The memorandum accompanying the bill of this Act stated that it was “designed to

\textsuperscript{18} Thus, in \textit{Wordis v. Chahin and Sackey} [1962] 1 G.L.R. 78 where a moneylender failed to give a receipt for interest paid, it was held that that payment should be regarded as received in repayment of the principal and that the interest had become unenforceable. Also in \textit{Chahin v. Boateng} [1963] 2 G.L.R. 174 it was held that failure to give receipts and keep proper books renders the whole transaction unenforceable resulting in an obligation to return payments already made and security given.

\textsuperscript{19} One of the usual terms is widely alleged to be at least 100 per cent interest.

\textsuperscript{20} Act 113.
replace the present machinery for the control of prices which is con­
sidered very unsatisfactory. This resurgence of governmental desire to
control prices more effectively should be viewed within the context
of the economic conditions of the early sixties. The free trade policy for
imports was being rejected in favour of import control effected through
import licensing. The reason in part for this change of policy was the
increasing imbalance between foreign exchange earnings and the cost of
imports. The cumulative effect of import licensing and foreign
exchange shortage was the creation of scarcities in foreign commodities.
A consequence of these scarcities was that to allow the market forces
of supply and demand to have free play would lead to very high prices.
This consequence the Government was not prepared to accept.

The Control of Prices Act, 1962, was the statutory weapon adopted
by the government to combat the market forces in the interests of
consumers and the economy. The Act authorised the minister to make
orders, by executive instrument, fixing the maximum prices at which
goods of any description specified in the order might be sold. It was
made a crime to sell goods at prices not in compliance with such an
order. A machinery of price inspectors was established to enforce these
orders. In 1965, the offence of "hoarding" was created to buttress
this price control machinery.

The current provisions on price control are contained in the Price
Control Decree, 1974. This Decree authorises the Commissioner
responsible for Trade acting on the advice of the Prices and Incomes
Board to prescribe by executive instrument the maximum prices at
which goods of any description may be sold. The penalty for
non-compliance with any price control order is a fine not exceeding
£1,000 or imprisonment not exceeding five years or both. Where an
offender has charged more than twenty per cent in excess of the con­trolled price, the penalty cannot be less than one month's imprisonment
without the option of a fine. Similarly, if the offence is committed in
respect of corned beef, sardines, mackerel (pilchards), codfish (kako),
rice, sugar, milk, flour, bar soap and all other kinds of soap, detergent
powders, cement, matchets, textiles, blankets and grass mats, then the
Decree prescribes a minimum of a month's imprisonment without the
option of a fine. Finally, if the offender has been convicted of another
offence under the Decree within the previous two years, again there is

21 See s. 1 of the Control of Prices (Amendment) Act, 1965, which enacted a new
s. 4A for the 1962 Act. S. 4A (1) reads as follows: "Any person who retains any
goods in a manner likely to result in or to contribute to the creation or con­tinueance of such a shortage of those goods available for sale to the general public
as could facilitate the sale by him or by any other person of those goods or of
goods of that kind at an excessive profit is guilty of an offence."

22 N.R.C.D. 305.

23 See s. 1.
to be no option of a fine and a minimum sentence of one month. The maximum sentence in all three situations is five years. In addition to the sentence, supplementary penalties are imposed. A person convicted of selling above the controlled price must pay to the person to whom he sold the goods a sum equal to double the price which he charged such person. All goods in respect of which the offence is committed are also to be forfeited to the Republic. If the offence is committed in a market established or controlled by a local authority, the court is enjoined to prohibit any person convicted of selling above the controlled price from conducting any further trade in that market for twelve months.

The Price Control Decree thus constitutes a determined attempt to provide a legislative framework within which to join battle with the market forces and distorters of the market. These rules have been effective only in the supermarkets and the retail outlets of the established large distributors. In the market-places, the small kiosks and the small shops of the petty traders from whom the majority of Ghanaians buy their consumer goods, the price control regulations are of little effect. Even in the heart of the cities; in Accra, Kumasi, Sekondi-Takoradi, Cape Coast, the market women sell goods much above the controlled price largely with impunity. These city dwellers are so glad to come by some of the goods which periodically become short that the price at which they buy them becomes not as important as the access to

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24 See s. 4 (b) of the Decree.
25 See s. 4 (a) of the Decree.
26 See s. 5 (1) of the Decree.
27 The offence of "hoarding" is retained and its ambit broadened. Thus, inter alia, the offence of hoarding is committed "where any person keeps or obtains goods of any one kind in quantities unreasonably in excess of his immediate requirements." Thus it would seem not only traders, but even consumers, can be guilty of hoarding.
28 Since the manuscript for this essay was completed, there have been developments which probably render this sentence incorrect in so far as it relates to goods specified under the Commercial Houses and Supermarkets (Sale of Specified Goods) Decree, 1976 (S.M.C.D. 17). This Decree provides that the goods specified in its Schedule shall not, in any area of Ghana specified in the Decree's Schedule, be sold except by a commercial house or supermarket designated by the Commissioner for Trade. By the Commercial Houses and Supermarkets (Sale of Specified Goods) (Amendment) (No. 3) Decree, 1976, it is made an offence even to purchase specified goods from any source other than the designated commercial houses and supermarktes. The goods specified in the Schedule to S.M.C.D. 17 are: sugar, milk, mackerel, baby foods, dry cell batteries, key soap, Omo, Lux soap and toothpaste. The specified areas which were originally Accra and Tema have now been extended by the Commercial Houses and Supermarkets (Sale of Specified Goods) (Extension of Application) Instrument, 1976 (L.I. 1066), to the rest of Ghana. It must be noted however that the specified goods under legislation under discussion do not exhaust the range of goods subject to price control and the sentence probably remains true of these other commodities. For these other commodities, the new Price Control Regulations, 1976 (L.I. 1068), are clearly intended to strengthen the price control mechanism. These provide for the display of current lists of controlled prices by the sellers and the marking of prices on goods offered for sale.
the goods. This experience of Ghana in the area of price control raises the larger issue whether it is not an exercise in futility to attempt to control prices in an economy where the distributive outlets are predominantly privately owned and where many commodities are in short supply.27

**Prices and Incomes Board Decree**

The governmental intervention in private contracts to regulate prices is not limited to sale of goods contracts. Wide-ranging interventionist powers are conferred on the Prices and Incomes Board by the Prices and Incomes Board Decree, 1972.28 Pursuant to the wide powers conferred on it by this main Decree, the Prices and Incomes Board has issued the Prices and Incomes Regulations, 1973,29 which contain provisions attempting to control freedom of contract in a very wide area. The regulations provide that no person should increase the price of any goods or service whatsoever without the prior consent in writing of the Prices and Incomes Board.30 This is an obviously preposterous and unworkable provision in an inflationary economy such as the Ghanaian. The board would need to have a vast bureaucracy reaching into the remotest villages. If citizens were to comply with this direction, there would be such a flood of requests and applications at such frequent intervals that the mind boggles at the kind of bureaucracy that could process such requests. One thing is clear: the Prices and Incomes Board with its present bureaucracy would be in no position to process such applications. The provision thus constitutes an unrealistic attempt to control the freedom to increase prices for all goods and services in an economy that is still predominantly controlled by private interests. Such a policy would have little chance of implementation in a non-socialised economy.

The regulations further provide that where a person intends to sell any goods or services not previously available in Ghana or which he had not previously sold, he can only sell such goods or services after the proposed price for the goods or services has been approved in writing by the Prices and Incomes Board.31 Also no person shall increase the rent payable for any premises or land whatsoever without the prior consent in writing of the Prices and Incomes Board. If the landlord is letting his premises or land for the first time, he is not to do so until the proposed rent has been approved in writing by the Prices and Incomes Board.32

27 Even if the new experiment with designated supermarkets and commercial houses succeeds, the issue posited in the text would remain alive since it can be argued that in the degree of control and supervision that the Government seems to be exercising over the outlets for the specified goods one can see a certain degree of their socialisation.
28 N.R.C.D. 119.
29 L.I. 805.
30 See reg. 1 (1).
31 See reg. 1 (2).
Board. Again, it is quite clear that these provisions have little chance of efficacy. It is ridiculous to suppose that an odikro in some remote village who lets farmland to a stranger and imposes “nto” or rent on him will consult the Prices and Incomes Board in Accra before doing so. It is ridiculous even to suppose that the odikro knows of the existence of this new-fangled bureaucratic animal. Moreover for urban rents there already exists the machinery of the Rent Act, 1963, with its rent officers, rent magistrates, etc. If even this is not working with the desired efficacy, and it is of a more wide-flung nature, what chance has the centralised, Accra-bound, Prices and Incomes Board of implementing their law-in-the-books control?

Finally the regulations provide that no employer shall increase the wages, salaries or other pecuniary emoluments of any employee without the prior consent in writing of the Board in any case in which the proposed increase exceeds two and a half percent of the amount paid by him to that employee in the previous twelve months. And, no company is to distribute any profits or dividends in any year without the prior consent of the Board in any case where the profits or dividends are to be increased by an amount exceeding two and a half percent of the amount paid by the company in the previous twelve months. Breach of these regulations is made punishable with imprisonment up to two years or a fine up to $3,000 or to both. Also any increase made in breach of the regulations is expressed to be void.

The latter controls may be of some practical utility in a limited range of circumstances. Employees of large employers who engage in collective bargaining with their employer and also public sector employees will in practice need the consent of the Prices and Incomes Board for increases in their remuneration. But take the cocoa farmer who increases the wages of his labourer or the domestic servant whose salary is increased by his master, etc., etc. Such increases can hardly be expected in practice to reach the Prices and Incomes Board. Again, the dividends declared by the few public companies in Ghana and the larger privately owned ones may in practice be effectively subjected to the supervision and consent of the Prices and Incomes Board. But the hundreds of small privately owned companies probably do not even know about the existence of the regulations under discussion here.

Rents (Stabilization) Act, 1962

Related to this issue of regulation of prices and rents is the interesting legislation passed during the Nkrumah period called the Rents

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32 Act 220.
33 Reg. 3 (1).
34 Reg. 4.
35 Reg. 5 (1).
36 Reg. 5 (3).
(Stabilization) Act, 1962. This Act sought to control the freedom of contract of agricultural land-owners and their tenants in an attempt to encourage greater production by tenants. The use of compulsory revision of contracts as a strategy for promoting greater efficiency in agricultural production is a measure that has been advocated by certain economists, while other economists have expressed doubt. The Rents (Stabilization) Act of 1962 gave the Minister power to prescribe rents for all lands subject to the Act and it was made a misdemeanour to demand a rent higher than that prescribed, or, without the prior consent of the Minister, to serve notice claiming possession from a person in occupation of any land subject to the Act. The Minister, in exercise of the powers conferred upon him, issued the Rents (Cocoa Farms) Regulations, 1962, which provided as follows:

1. (1) Every person who is a subject or a member of the Stool from which he holds land shall pay a nominal rent of one shilling a year, if demanded.

(2) Subject to the provisions of the preceding sub-regulation every other person who holds land shall pay for every acre or part of an acre thereof an annual rent of five shillings to the Administrator of Stool Lands.

Provided that the words 'every other person' shall include a person who, not being a subject or a member of the stool concerned, has become entitled to the use of land by grant, demise or sub-demise from a subject.

2. These Regulations shall apply to lands used for purposes of the cultivation of cocoa in the Ashanti, Brong-Ahafo, Central, Eastern, Volta and Western Regions excluding land situate in the Schedule hereto (acquired by any person otherwise than by way of an absolute purchase of a freehold).

This is a very far-reaching legislative measure. It radically changed the quantum of receipts by landlords under the customary law institution of the abusa tenancy, under which there is sharecropping, the landlord taking one-third of the harvest and the tenant two-thirds. Such abusa tenants are usually non-stool members who are granted the tenancy by the stool itself, or by stool members in stool lands in which such members have acquired an interest. The abusa landlord's share was thus reduced by these regulations from one-third of the yield to only five shillings per acre per year. By thus increasing the income of the tenant, it was hoped that he would be encouraged to produce more.

37 Act 109.
38 For a discussion of the pros and cons of this strategy, see Bauer & Yamey, The Economics of Under-developed Countries, (The Univ. of Chicago Press & Cambridge Univ. Press, 1957), p. 209 et seq.
39 l.l. 186.
There was an amending Act in 1963⁴⁰ which, inter alia, declared that the original Act did not apply to land which had been cultivated or farmed before being granted by way of demise. These Rents (Stabilization) Acts were very unpopular with the landlords and they were repealed after the coup d'état in 1966 by the Rent Stabilization Act (Repeal) Decree, 1966.⁴¹ Little is known by the present writer about the efficacy that the Rents (Stabilization) Acts achieved on the ground. But the agitation by farmers⁴² that followed the repeal of the Act may be some measure of the efficacy of the control of freedom of contract that it did achieve before its repeal, although there are many problems that one can visualise in connection with the implementation of such legislation. Landlords can resort to violent ejectments and in rural communities where the authority of the chief (who is often the landlord) is strong and police stations few and far between this can be a real threat to the efficacy of such legislation. Secondly, such legislation is likely to lead to unwillingness on the part of landlords to take on new tenants.

Rent Act, 1963

From this consideration of the rent of agricultural land, let us turn next to the rent of premises as regulated by the Rent Act, 1963.⁴³ Again, this is legislation endeavouring to control the free play of market forces in order to avert undesirable social consequences. A concomitant of the process of economic change and growth in Ghana has been the urbanization process. Since the production of houses has not kept pace with the inflow of people into the urban areas of Ghana, a scarcity in housing has occurred. To leave the fixing of rents to the uncontrolled interplay of the forces of supply and demand in this situation of scarcity would lead to intolerably high rents and the exploitation of tenants by their landlords. The Ghanaian legislature has therefore found it socially desirable to intervene in contracts between landlords and their tenants.

⁴⁰ The Rents (Stabilization) Amendment Act, 1963 (Act 168).
⁴¹ N.L.C.D. 49.
⁴² See Yaw Saffu, Politics in a Military Regime: The Ghana Case (Unpublished D. Phil. thesis, Oxford University, 1973) p. 80, where he discusses the numerous petitions sent to the N.L.C. by farmers and farmers' associations to re-enact the Acts because of the abuse by the chiefs of the freedom to fix yearly tribute or rent. See also Appendix B which are two letters from farmers to the Political Committee of the N.L.C. asking for the repeal of the Decree again on the ground of oppression and cheating by chiefs following on the repeal of the Acts.
⁴³ Act 220. This Act and its predecessors are studied in an unpublished LL.M. dissertation entitled “Towards an effective control of rents of premises in Ghana” by Frimpong, J. K. (Faculty of Law, University of Ghana, 1973).
State intervention in such contracts in Ghana dates back to the Second World War. By the Defence (Rent Restriction) Regulations, 1942, rent control was to be established over such areas as the Governor by notice in the Gazette directed. These regulations were superseded by new regulations in 1943. After the end of the war, a substantive Rents (Control) Ordinance was enacted in 1947. Its purpose was to regulate the rents of small premises; that is, premises whose annual rent did not exceed £100 per annum. This Ordinance had an interesting provision under which a rent assessment committee could suo motu fix the rent for any premises or class of premises and this power was exercised by some rent assessment committees. The Rent Control Ordinance, 1952, eventually superseded the 1947 Ordinance and was in force until the current Rent Act, 1963, was enacted. The 1952 Ordinance also retained the provision whereby the rent assessment committee could investigate the rental of any premises of its own motion and then intervene in the contract between the landlord and tenant covering those premises.

The rent control machinery under the current Rent Act is pivoted on the assessment of rents by the rent officer who cannot act suo motu. It is the Minister rather who is given power to intervene proprio motu. He is authorised to assess, by executive instrument, the amount of rent to be charged in respect of premises of a similar type in similar localities. This power has not, to this writer’s knowledge, ever been used. Rather the usual mode of rent assessment has been for either the tenant or the landlord to apply to the rent officer for an assessment. An appeal lies from the rent officer’s assessment to the rent magistrate whose functions are usually discharged by the district magistrate in the locality. The limiting of the rent payable is thus left to the initiative of the tenant. Once the landlord-tenant relationship is established, it is open to the tenant or landlord to seek the intervention of the rent officer in reopening the original bargain as to the rent. However, this rent control machinery has not been effective because of the failure of tenants to seek redress from the rent officers. There are several reasons for this: many tenants do not know of the provisions of the Rent Act; others do not wish to incur the displeasure of their landlords; such displeasure

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41 No. 20 of 1942 made under the Emergency Powers (Defence) Acts, 1939 and 1940, as extended to the Gold Coast.
42 The Defence (Rent Restriction) Regulations, 1943 (No. 18).
43 No. 30 of 1947.
44 See s. 7 (2) of the Rents (Control) Ordinance, 1947.
45 See, e.g., the Bibiani Rent Assessment Committee’s exercise of this power by a Gazette Notice contained in the Social Welfare and Housing Gazette Notice No. 438 (January–June, 1950).
46 No. 2 of 1952.
47 See s. 13 of the Rent Act.
48 See Frimpong, op. cit., 119 et seq.
could lead to an ejectment that is often effective, even if illegal and in breach of the provisions of the Rent Act. And given the scarcity of urban housing, tenants do not want to risk this while fighting for their rights.

The Rent (Amendment) Decree, 1973,\(^5\)\(^2\) has attempted to do something about the inefficacy of the rent control machinery of the Rent Act, 1963 by prescribing standard rents for tenants of single rooms. Depending upon the size of the one room and the material with which it is constructed, certain monthly rents are prescribed and it is made an offence to charge anything higher than the prescribed rent. The Decree is however applicable to only Accra, Kumasi and Sekondi-Takoradi.

In addition to rent control, the Rent Act, 1963, gives tenants protection against ejectment. Section 17 lays down the circumstances under which a court may grant a landlord an order of ejectment.\(^5\)\(^2\)\(^a\) Where none of these circumstances is applicable, an ejectment order will not be granted even if the tenant has expressly agreed to ejectment under such circumstances.

Public control of consumer contracts

The kind of state intervention embodied in the prices, incomes and rent legislation discussed above has been directed primarily at regulating the price mechanism and controlling the quantum of consideration payable under the regulated contracts. In the rent legislation, this main objective is buttressed by the protection of tenants from arbitrary ejectment. State intervention of the kind discussed in relation to the prices, incomes and rent legislation then does not tackle the problem of eliminating unfair or improper terms that may have been imposed because of great inequality in the bargaining positions of the parties. However, many consumer contracts in capitalist economies require state intervention of the kind that re-opens the bargain and regulates its terms in the interest of fairness to consumers. The mischiefs spawned by standard contracts or contracts of adhesion are now too well known to merit recounting.\(^5\)\(^3\) These mischiefs need to be met by an avowed socialisation of many of the recurrent kinds of consumer contracts in order to square their terms with the reasonable expectations of consumers. This socialisation or public control of consumer contracts can

\(^5\)\(^2\) N.R.C.D. 158.

\(^5\)\(^2\)\(^a\) Two other situations in which ejectment is permissible under the Act are provided for in s. 25 (2) and s. 28.

be achieved by a two-pronged control mechanism. One control modality is to police the terms of standard contracts but allow these to continue to be drawn up by the suppliers of goods and services; the other basic modality is for the state to intervene to draw up or stipulate the core provisions of various kinds of contracts of a recurrent kind, and to say that the suppliers of the goods or services covered by those kinds of contracts must use these provisions without modifying them to the disadvantage of consumers. Such suppliers may supplement the core provisions with their own terms so long as such terms do not detract from the substantive advantages of the core provisions. The best strategy is probably to combine both modalities.

As regards the policing modality, recent Israeli\textsuperscript{54} and Swedish\textsuperscript{55} legislation offers interesting models and possibilities. The Swedish legislation, because of its activist orientation, offers particularly interesting ideas for the fashioning out of a Ghanaian solution. The Swedish remedy against improper or unfair contract terms is not left to be sought at the initiative of the parties to the contract. Rather, there is a Consumer Ombudsman charged with seeking out improper contract terms in standard contracts and doing something about them. This Swedish legislation is contained in an Act of 30 April 1971 (No. 112) Prohibiting Improper Contract terms\textsuperscript{56} and its substantive provision is to the following effect:

"If an entrepreneur, when offering a commodity or a service to a consumer for personal use applies a term which, in regard to the payment or other circumstances, is to be considered as improper toward the consumer, the Market Court may, if the public interest so requires, issue an injunction prohibiting the entrepreneur from using that term or a term substantially the same in similar cases in the future."

The primary responsibility for securing enforcement of this provision is laid on the Consumer Ombudsman, a lawyer whose office was created by the related Market Court Act. This Ombudsman is given wide discretion as to where to intervene, his only instruction being to "inquire into marketing practices and contract terms within areas where improper procedures are especially common or have great practical importance for consumers."\textsuperscript{57}

This basic idea of allowing state intervention through a full-time investigating office which refers to a court terms in standard contracts

\textsuperscript{54} See Diamond, "The Israeli standard contracts law" (1965) 14 J.C.L.Q. 1410; Gottschalk, "The Israeli law of standard contracts 1964" (1965) 81 L.Q.R. 31.
\textsuperscript{56} A translation of the Act is appended as Appendix A to Sheldon's article. See Sheldon, op. cit. at p. 68.
\textsuperscript{57} See Sheldon, op. cit. at p. 29.
which are unfair to consumers is an interesting one and one that should repay careful study. All cases to prohibit "improper contract terms" are initiated by the Consumer Ombudsman either on his own initiative or upon receiving a complaint from the public. The Ombudsman does not take all cases straightaway to the Market Court. He first seeks voluntary compliance by negotiation with the enterprise concerned. He may also issue legally binding "Cease and desist orders" against the continued use of improper terms, in cases not of great importance. But in all matters of great importance or where matters of principle are involved, he has to bring the case before the Market Court for adjudication.

It ought to be possible to localise these ideas within the Ghanaian setting and produce a strategy for state intervention in standard contracts to eliminate terms unfair to consumers. The idea of the Consumer Ombudsman is quite appealing and deserves study by the Ghanaian authorities. Because of the activist role of the Consumer Ombudsman in ferreting out "improper terms," the Swedish model is preferred to the Israeli model for the control of standard contracts, although elements from the Israeli model can be incorporated into a future Ghanaian solution.

The Israeli solution is to give courts the power to refuse to enforce any "restrictive term" in a standard contract if they consider this to be just and necessary in the interest of the party who did not participate in its drawing up. A "Standard Contract" is defined in the Israeli Standard Contract Law 5274 1965 as

"a contract for the supply of a commodity or a service, all or any of whose terms have been fixed in advance by, or on behalf of, the person supplying the commodity or service (hereinafter 'the supplier') with the object of constituting conditions of many contracts between him and persons undefined as to their number or identity (hereafter 'the customer')." 58

The meaning of a "restrictive term" is set out in the Law and basically the defining section constitutes an enumeration of many types of obnoxious terms frequently used in standard form contracts. By this approach then, obnoxious clauses in standard contracts can be refused enforcement by the judges as and when these come to their notice in the course of private litigation.

But the drawback of this approach is that the effect of some exemption clauses and other kinds of unfair terms may be to deter the consumer from going to court. Terms in a standard contract may give the

consumer a misleading impression of his rights and he may consequently give up without a fight. If he does this, then under the Israeli model, the judicial authority to intervene in his contract will avail him nothing. That is why the Swedish model is preferred. Nevertheless, the general authority granted to judges to declare void obnoxious clauses in standard contracts relied on in litigation before them is a salutory one and well worth incorporating into a Ghanaian solution. This judicial power of avoidance is recognised by the Israeli law to introduce an element of uncertainty into all standard contracts and therefore the suppliers of goods and services who draw up these contracts are permitted by the Law to submit their standard contracts in advance of litigation to an administrative agency for approval. Approval of a standard contract by this agency means that it cannot be challenged in litigation. This is another notion worth considering in the Ghanaian context.

In sum then, what is being urged is that an institutional framework be created in Ghana for the policing of the terms of standard contracts because freedom of contract notions are unworkable in this area. The problems associated with standard contracts have been experienced in almost all modern economies. One can therefore fashion out an eclectic solution drawing on the experience of other countries, but with a determined effort to localise and attune the various foreign solutions to the circumstances of Ghana.

Basic standard contract forms

The other basic modality of controlling the terms in standard contracts is for the state to prescribe the basic contents of some selected kinds of contracts. A very well-known example of this is the standard fire policy in use in many states in the United States. Originating as the New York Standard Fire Policy, it has been adopted by many other states. The purpose of its adoption has been to control the complex, confused and misleading fire policies that the various competing companies churned out. The New York Standard Fire Policy provides a compulsory basic contract form but insurers are permitted to add riders expanding the benefit to consumers.

Similarly compulsory basic standard contract forms could be enacted for various other kinds of contract of significance in Ghana. For a start, the lead of the New York example could be followed in the insurance field. Indeed, perhaps legislative authority already exists for such a strategy in the insurance field. By the Insurance Act, 1965, the office of Commissioner of Insurance is created in Ghana and one of
the commissioner's functions is the approval of standard conditions to apply to policies of insurance. However, the commissioner has thus far not laid down any standard conditions for any class of insurance contracts. But some of the terms in widespread use in insurance contracts in Ghana clearly need to be controlled. Pre-eminent among these is the "basis clause" which makes the truth of each and every answer given by the insured on the proposal form a warranty. Consequently, breach of the clause entitles the insurer to avoid the contract. Relying on this clause insurers are entitled to avoid and have avoided contracts for completely immaterial and innocent mis-statements of facts. In any standard statute-prescribed insurance contract form the basis clause's operation should clearly be restricted in such a way as to prevent it from producing unjust results for the consumer. The Commissioner of Insurance could prescribe a clause entitling an insurer to avoid the policy on the ground of the falsity of an answer given by the insured on the proposal form, only when the insured's mis-statement is both material and fraudulent.

This technique of the state drawing up a fair contract and compelling suppliers of goods and services of a particular kind to use that prescribed form can be said to be indirectly deployed when terms are by statute compulsorily incorporated into contracts of a particular kind and the parties to such contracts are not allowed to contract out of such terms. The Ghanaian Sale of Goods Act, 1962, provides an example of this. Section 8 of the Sale of Goods Act, 1962, defines what the fundamental obligation of a seller is. In a sale of specific goods, it is to deliver those goods to the buyer. In a sale of unascertained goods, it is to deliver to the buyer goods substantially corresponding to the description or sample by which they were sold. Section 8 (3) lays it down that in a contract for the sale of goods, any provision which is repugnant to this fundamental obligation of a seller is void. The effect of the whole section is, therefore, to insert a compulsory provision in all contracts of sale, in terms of the fundamental obligation of the seller described above.

The statutory provision therefore contradicts the subsequent House of Lords' decision in Suisse Atlantique v. M. V. Rotterdamsche Kolen Centrale where the House held that the fundamental obligation of a contracting party is capable of exclusion through an exculpatory
In Ghana, the fundamental obligation of a seller of goods cannot be excluded by contract. The Sale of Goods Act, 1962, provides for another compulsory term in sale of goods contracts. Section 13 (1) contains a statutory implied condition to the effect that goods sold are free from defects which are not declared or known to the buyer before or at the time when the contract for sale of those goods is made. This implied condition is made inapplicable in certain circumstances where the defects would have been discovered by the buyer’s reasonable examination. The Act prohibits the exclusion by contract of this implied condition where the goods sold are of a description which are supplied by the seller in the ordinary course of his business. These two examples from the Sale of Goods Act constitute legislative attempts to control freedom of contract in the interest of the protection of the consumer. A similar attempt at such control is embodied in section 4 of the Hire Purchase Decree, 1974, which declares void certain terms which if embodied in hire-purchase contracts would prejudice the interest of the consumer.

Conclusion

The above exposition of various ways in which legislative power in Ghana has been used to limit freedom of contract is not an exhaustive account of all such legislative intervention. But the exposition seeks to bring out the function of such intervention. This function is usually the protection of the community or a section of it from the harmful consequences of untrammelled freedom of contract. Such state intervention might be thought by some to contradict the traditional conception of the essence of contract as a free bargain between the parties to it. The response to this query is that such essence is missing in any case from most standard consumer contracts and many contracts reached in strong “sellers’ market” situations. The purpose of many legislative interventions is to make the terms imposed on consumers by such contracts fairer. Indeed, it seems to the present writer that any modern conception of contract must include a recognition of the public control element as part of the very essence of the modern contract. For as Kessler and Sharp have said:

“In the evolution of the law of contracts, the basic assumption of the past that contract deals with the individual relations of man with each other has gradually given way to the realization that in large sectors of our social and economic life contract is no longer

67 Ibid. at pp. 968-969, 981-982 and 987-988.
68 See s. 13 (1).
69 N.R.C.D. 292.
an individual and private affair, but a social institution affecting more than the interests of the two contracting parties. An analysis, therefore, of present-day contract exclusively in terms of volition and agreement does not do justice to contract as a social institution. Social control has become an integral part of contract itself, and cannot be omitted from any analysis of the modern law of contract."
THE HISTORY OF PUBLIC CORPORATIONS

RICHARD B. TURKSON*

The history of public corporations in Ghana falls roughly into three periods. The first is the colonial period, particularly from the immediate pre-World War II years to the attainment of independence in 1957. The second period is the post-independence era, particularly from 1961 onwards. The third period is from 1966, the year of the overthrow of the Nkrumah regime to the present. The purpose of this essay is to trace the history of the institution of the public corporation in Ghana through these three periods, identifying and attempting to explain the significant landmarks in and the ideas which influenced the development of this institution.

The colonial period

The origins of the public corporation date back to the days of British colonial rule when the government established a few public boards and corporations to perform various functions. Among these were boards dealing with educational and cultural functions,¹ banking authorities,² boards concerned with the granting of loans,³ and public corporations dealing with agricultural and industrial development and the marketing of agricultural products.⁴

Public corporations established during this period, however, appear to have been instruments of the colonial government's policy of promoting the existing pattern of the economy—an economy which was dominated by private expatriate firms (e.g. Cadbury and Fry Ltd., the United Africa Company Ltd.) and in which the government's role was limited to the provision of an infrastructure upon which private entrepreneurs could build. This point is well brought out in the

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¹ E.g., the Council of the University College of the Gold Coast.
² E.g., the Bank of the Gold Coast, established by Ordinance No. 49 of 1952.
³ E.g., the Agricultural Loans Board.
⁴ E.g., (a) the Gold Coast Agricultural Development Corporation established by Ordinance No. 27 of 1948 as subsequently amended by Ordinance No. 47 of 1952 and No. 10 of 1955; (b) the Industrial Development Corporation established by Ordinance No. 38 of 1947 as subsequently amended by Ordinance No. 11 of 1956 and No. 33 of 1957; (c) the Agricultural Produce Marketing Board established by Ordinance No. 9 of 1949, and (d) the Gold Coast Marketing Board established by Ordinance No. 16 of 1947, as subsequently amended by Ordinance No. 27 of 1952.
following description of the Colonial Civil Service:\n
"The Civil Service was, therefore, geared towards the rather negative policy of preventing trouble and bringing the Pax Britannica to all the dependent territories overseas. It was not, until comparatively recently, concerned with economic and social development as a major objective of administration... Economic activities were mainly in the hands of private trading companies from overseas—usually Britain. These were primarily interested in the sale of manufactured trade goods and the purchase of local agricultural produce. Such industries as developed were mainly concerned with exploitation of mineral resources. A few companies established plantations for the supply of such products as rubber, palm-oil and other vegetable oils for their factories in the metropolitan countries. The central administration had no positive policy towards the promotion of these economic services except to create the conditions under which private enterprise could flourish, and to intervene to ensure fair play to the unsophisticated peoples of the territories...

The Civil Service in its early stages was not required to deal with the complex responsibilities of the modern-day administrations in the political, economic and social spheres. Moreover, it was the effective government and even the later pre-war development of having representative, or partially representative, legislatures did not take away anything from the responsibility of the Governor to govern, acting through and advised by the Civil Service. The involvement of the service in the greater complexities of modern government came in slowly and did not become a major feature until the 1939-45 war and after."

The preponderance of evidence appears to lend strong support to this view.

Firstly, the events leading to the establishment of the first public corporation in the Gold Coast, the Cocoa Marketing Board, afford evidence of government intervention only after the forces of the market had failed to ensure fair play to the "unsophisticated" farmers.

Before 1937, the trade in the purchase for export of cocoa not only in the Gold Coast but also in other parts of West Africa (e.g. Nigeria) was characterised by intense competition among expatriate firms. The history of the cocoa trade during this period abounds in instances of wrecked concerns, large and small, which were unable to withstand the fierce competition of their more powerful rivals. Factors such as the climate and geography, which made it necessary to invest large sums of

money, tipped the scales in favour of the better-organised and wealthier concerns. This state of affairs produced amalgamations, liquidations and a number of trading agreements, mostly of a temporary nature, designed to limit excessive competition. As McPhee puts it, "before the War, the whole trading community was honeycombed with understandings."6

In 1937, all the large European firms purchasing cocoa in the Gold Coast and Nigeria, with the exception of the English and Scottish Joint Co-operative Wholesale Society Ltd., entered into two agreements, one in respect of the Gold Coast and the other in respect of Nigeria. The purpose of the agreements was stated thus: "The parties have entered into this Agreement for the purpose of eliminating harmful competition and the abuses hitherto associated with cocoa-buying in the territory covered by the Agreement."7

The essential principles of the buying agreements were as follows:

(a) the division of the total purchase of cocoa by all members and the allocation to each of an agreed proportion based on past performance; and

(b) the payment, subject to certain specially permitted exceptions, of a uniform "limit" price by all members, based on the world price ruling from time to time less an agreed amount to cover costs of collecting, handling, and shipping cocoa from the coast to the world markets, and a reasonable profit to the firms.

Shortly after these agreements had been entered into, rumours about them began to spread in the Gold Coast and a hostile press campaign was started in which it was alleged that a "pool" had been formed to fix the price of cocoa at the firms' figure and to exploit the natives.

The feeling of the Gold Coast public against the agreement reached its peak when meetings of farmers' delegates were held in various parts of the country at which the buying agreements were condemned as designed to depress the price of cocoa and to ruin the farmers. Resolutions were passed in favour of a hold-up of cocoa and a boycott of imported goods except "necessities" such as sardines, kerosene, candles, etc. Despite Government efforts to effect a compromise, neither the farmers nor the firms were prepared to abandon the positions they had taken. Meanwhile, the hold-up continued bringing the economic machine to a grinding halt. Only small quantities of cocoa were marketed and imported goods remained unsold.

6 The Economic Revolution in British West Africa, p. 74.
At the instance of the Governors of the Gold Coast and Nigeria, the United Kingdom government decided to establish a commission\(^8\) with the following terms of reference:

"To examine and report on the marketing of cocoa in the Gold Coast and Nigeria, with special reference to the situation which has arisen as a result of the Buying Agreement(s) entered into between certain firms; and to submit recommendations."

The commission reported that the continuance of the buying agreements introduced into the Gold Coast and Nigeria in 1937 would be undesirable. However, there was need to devise an alternative marketing scheme to that existing before the agreements were entered into. Such a scheme was to provide for the following minimum requirements\(^9\):

"(i) The removal in the interests both of producers and of shippers of various undesirable features of the marketing system,
(ii) The strengthening of the economic position and morale of producers in relation to the buyers, both European and African,
(iii) The recognition of the legitimate interests of both the African community and the shippers,
(iv) The maintenance of free competition in the purchase of the cocoa crop, and
(v) The avoidance of any unnecessary expense in marketing."

More specifically, the commission recommended the establishment of an association of producers for the collective marketing of their produce and for the representation of their joint interests. In paragraph 514 of their report appear the following recommendations:

"1. That the principle of the association of all cocoa producers on a statutory basis for the marketing of their produce should be accepted by Government;
2. that the recognized leaders of the Africans should be invited by the Gold Coast government to participate either personally or by representatives, in a drafting committee appointed to elaborate the details of a statutory scheme . . .
3. that the collaboration of representatives of the firms be sought by the drafting committee; and
4. that to assist its deliberations the committee should use, as a general basis of discussion, a draft scheme framed by ourselves."

The outbreak of the Second World War in 1939 prevented the detailed discussion of the Nowell Commission’s proposals. War

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\(^8\) The Chairman of the Commission was Mr. William Nowell.
conditions reduced drastically the size of the world market for cocoa and made the possibility of profits on eventual resale rather remote. The merchant firms engaged in the cocoa trade in West Africa were, therefore, reluctant to buy any cocoa. In view of this situation, His Majesty's Government decided to guarantee the purchase of the total cocoa production of the British West African colonies. It undertook to bear any loss on resale and to invite Parliament to vote a sum equivalent to any eventual profit realised for payment directly to the producers or, in agreement with the colonial governments concerned, for expenditure on objects of benefit to them.

His Majesty's Government's decision was implemented by the United Kingdom Ministry of Food which for the 1939-40 season bought the total production of cocoa from the British West African colonies. A system of control was introduced whereby the local governments fixed prices and carried on other aspects of the trade in the export of agricultural produce. The merchant firms became the agents for purchase of cocoa from the producers for which they were reimbursed with their average out-of-pocket expenses and paid for their services at an agreed rate per ton. At the end of the 1939-40 season, the responsibility for the purchase of West African cocoa was transferred from the Ministry of Food to the West African Cocoa Control Board, the predecessor of the Cocoa Marketing Board.

With the return to normal conditions, consideration was given to the post-war organisation for the purchase and export of British West African cocoa, having regard both to the Nowell Commission Report and to the experience gained during the War. In a statement published by the United Kingdom government, a return to pre-war market conditions was rejected as not being in the "genuine interests of either producers or consumers." The statement continued:

"War experience has added weight to the view that a prime need of the cocoa industry, if it is to attain prosperity and efficiency, is a reasonably stable price basis, by which is meant not necessarily prices fixed over periods of several years, but the avoidance of short-term fluctuations. To achieve this result it is necessary to break the direct link between producers' price and world market prices, the existence of which in the past has caused the local purchase prices to reflect every vagary of speculation on the world's produce markets. Careful consideration of this problem has led to the conclusion that the means best adapted to this end in the circumstances of the West African cocoa industry would be the

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10 Later (May, 1942) known as the West African Produce Control Board because its activities were extended to include the purchase of other agricultural raw materials.

11 See Report on Cocoa Control in West Africa (1939-43) and Statement on Future Policy, Cmd. 6554, September, 1944, paras. 34 and 35.
continuance in essence of the present system whereby all cocoa would be bought at uniform prices, fixed at any rate seasonally, and sold to the world markets by special organizations created for that purpose, which would operate as regards both purchase and disposal either direct or through such agents as it might seem expedient to employ.

It is therefore proposed that there should be established in the Gold Coast and Nigeria, as from the beginning of the 1945–46 cocoa season (i.e. in October, 1945) organizations empowered by law to purchase the total production of cocoa, to prescribe the price to be paid by the producers, and to be responsible for the disposal of the cocoa. These organizations would be established by, and responsible to, the colonial Government, and would be required to act as trustees of the producers.  

The establishment of the new machinery for the marketing of cocoa in West Africa, however, was held in abeyance during the 1945–46 and the 1946–47 seasons while consultations were held with interested persons and organisations. Criticisms of the proposals and alternative schemes were considered. Finally, the Government in another statement published in November 1946 committed itself irrevocably to the implementation of the scheme described in the earlier statement of September 1944.  

The foregoing account of the circumstances leading to the establishment of the Cocoa Marketing Board illustrates the point made earlier. The involvement of the colonial government in the economy of the Gold Coast was restricted to reinforcing the existing structure of the economy in which foreign private activity was predominant. The government only intervened to ensure the continued movement of the economic machine. The government's intervention in the controversy arising out of the 1937 buying agreements and again its action with regard to the crisis arising out of the shortage of outlets for cocoa during the Second World War are perfect examples. Indeed, the whole process of economic development, understood in the sense not only of an increase in the gross national product but also of a corresponding increase in real terms of the per capita incomes of the general population, was left to the virtually uncontrolled mysteries of the market. The public corporations which were set up during this period have to be viewed against the background of this economic policy.

Secondly, evidence of colonial economic policy is provided by the nature of the so-called development plans which were drawn up during

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this period. These were heavily oriented towards providing the infra­structure of the economy. Under the Guggisberg Ten-Year Development Plan (1920–30), the development of a good railway system serving the cocoa growing areas received top priority. It was planned to invest £14.6 million, representing 58 per cent of the aggregate government “development” expenditure, in the railway system. The development of harbours was to receive £2 million and water supplies, £1.8 million. Of the £12.4 million spent by the seventh year of the Plan, £5.6 million represented expenditure on railways. Similarly the 1951 Ten-Year Plan devoted 88.8 per cent of the total planned expenditure to social services and infrastructure.13

Even the so-called Colonial Development and Welfare Acts, 1929–45, were not originally designed to promote industrial development, for its own sake, in the Gold Coast and the other colonies to which the Acts applied but primarily to solve the unemployment problem in Great Britain.14

Introducing the Colonial Development Bill in the House of Commons on 17 July 1929, the Under-Secretary of State for the Colonies, Mr. Lunn, stated15:

“The Government gathered in the Debate on Friday that the measure is acceptable to all sections of the House and they are anxious that today’s proceedings on the Second Reading may not be unduly prolonged, so that we may start immediately with the means which, we believe, the Bill will provide, of colonial development on a very large scale—development which will in turn provide work for our people in this country . . .

The Bill is linked with the promotion of commerce and industry in the United Kingdom, and we have good reason to believe that not only will development be undertaken in many colonies but that the purchases of materials will come to this country and will assist considerably in the provision of work for our people. There is no doubt that up to now the colonies have purchased materials for their development schemes in this country and we believe that their orders will remain here and will help considerably in the provision of employment in this country. The scheme is based primarily on a far-sighted policy of Imperial development, but it will no doubt mean a good deal in prosperity to some industries at home.”

14 See (a) the Colonial Development Act, 1929 (20 Geo. 5, c. 5), (b) the Colonial Development and Welfare Act, 1940 (3 & 4 Geo. 6, c. 40), and (c) the Colonial Development and Welfare Act, 1945 (8 & 9 Geo. 6, c. 20).
Again, on the occasion of the Second Reading of the Colonial Development and Welfare Bill, 1940, the Minister of Health, Mr. Malcolm MacDonald, said:

"Therefore the Government are introducing this legislation, because the British people who have assumed responsibilities for the Colonies in these circumstances must assume responsibility for providing the wherewithal for establishing these works. This principle has been partially recognized in the past. There is for instance, the existing Colonial Development Act . . . Those who are familiar with the Debates of 1929 will remember that even then the primary purpose of our legislation was not to help colonial development for its own sake, but in order to stimulate development mostly to bring additional work to idle hands in this country. It was devised as part of our scheme to solve our own unemployment problem.

In that respect, as in other respects, the Bill which we are discussing this afternoon breaks new ground. It establishes the duty of taxpayers in this country to contribute directly and for its own sake towards the development in the widest sense of the word of the colonial peoples for whose good government the taxpayers of this country are ultimately responsible."

What the 1940 Act did was basically to provide for the payment of outright grants rather than advances to the colonial governments. This, however, did not affect the basic aim of the Act, viz. to solve the unemployment problem in Great Britain.

The establishment in 1947 and 1948 of the Industrial Development and Agricultural Development Corporations reflects a measure of official concern with the development in the Gold Coast of agricultural and other industries. But even here the intention appears to have been to stimulate private entrepreneurial activity. Section 4 of the Industrial Development Ordinance, 1947, states the following objects of the Corporation:

"(a) with the approval of the Governor to establish and conduct any industrial undertaking; and

(b) to facilitate, promote, guide and assist in the financing of—

(i) new industries and industrial undertakings;

(ii) laboratories for the investigation of the commercial possibilities of products and the plant, equipment and technique necessary for making the same: and

16 H.C. Deb., Vol. 361, cols. 44-45.
17 See Act, s. 1 (1).
18 The Agricultural Development Ordinance (No. 27 of 1948) s. 9 is in similar language. See also (i) the I.D.C. Ordinance (No. 38 of 1947), s. 5 (3) which describes what the corporation may do in furtherance of its objects, and (ii) the A.D.C. Ordinance, s. 11.
(iii) schemes for the expansion, better organization and modernization of, and the more efficient carrying out of operations in, existing industries and industrial undertakings."

The Cocoa Purchasing Company Enquiry

The appointment of a commission of enquiry in 1956 (i.e. towards the end of a period of internal self-government beginning in 1951) to investigate the affairs of the Cocoa Purchasing Company Limited, a wholly-owned subsidiary of the Cocoa Marketing Board, is a significant landmark in the history of public corporations in Ghana. For following the publication of the Commission's Report (the Jibowu Report), the Government decided to initiate changes in the formal arrangements for the control of public corporations. The aim of these changes appears to have been to enable the government and Parliament to exercise a greater degree of control over the corporations. In relation to parliamentary control, the Government expressed the view that Ordinances based on United Kingdom experience were not adequate in Gold Coast conditions mainly because in the United Kingdom, unlike the Gold Coast, public opinion had more outlets through the press, consumers’ councils and trade unions, for the criticism of statutory authorities than was the case at that time in the Gold Coast. The Government, however, hoped that the good sense of members of the Assembly, irrespective of party, would help to avert the possible dangers inherent in the introduction of a greater degree of control over the corporations.19

On 4 March 1955, Professor Busia tabled a motion in the Legislative Assembly in the following terms20:

"That this House do request Government to set up a Commission of Enquiry into allegations of improper methods of administration and of disbursement of public funds in the Cocoa Purchasing Company, particular attention being paid to the matter of loans made by the Cocoa Purchasing Company."

This motion produced a heated debate in which the Government denied the allegations of maladministration referred to by the Honourable Member in his introductory speech and accused the Opposition of attempting to discredit the Government. The motion was heavily defeated.21

19 Gold Coast Legislative Assembly Debates, 1955, cols. 628–673.
20 The division was as follows: Ayes: 16; Noes: 60.
It was not until November 1955 that the Government, either through pressure from the Colonial Secretary to whom an Opposition petition had earlier been directed or on its own volition, instructed the police to make a thorough investigation of the company’s affairs. Following the police investigation, the Government ordered the Minister of Trade and Labour to arrange the appointment of a commission of enquiry.

On 9 May 1956, a commission of enquiry, chaired by the late Mr. Justice Jibowu, then Federal Justice of the Supreme Court of Nigeria, was appointed by the Acting Deputy Governor with the following terms of reference:

“To enquire into and report upon (sic)
(a) the management and administration of the Cocoa Purchasing Company from its foundation to the 30th day of April, 1956, in relation to the disbursement of funds and financial control; and
(b) any allegations of irregularity in the conduct of the Cocoa Purchasing Company’s affairs brought to the notice of the Commission.”

Among the commission’s findings were the following:
(a) that the allegation that the ruling Convention People’s Party controlled the Cocoa Purchasing Company (hereinafter referred to as the C.P.C.) was justified22;
(b) that though no direct proof existed of the use of C.P.C. funds for the purposes of the Government party, the commission was not satisfied that loan money might not have been used for other purposes23;
(c) that loans were only given to farmers who were members of the United Ghana Farmers’ Council, a branch of the Government party24;
(d) that loans were given out in excess of the fixed limit25;
(e) that loans were issued without regard to the authorised procedure26;
(f) that bribery, corruption and extortion existed among C.P.C. officials27; and
(g) that the management of the C.P.C. took no positive steps to correct irregularities. The Cocoa Marketing Board, however, did what it could in this respect.28

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24 Ibid., paras. 94–100.
25 Ibid., paras. 101–108.
26 Ibid., paras. 109–117.
27 Ibid., paras. 118–124.
28 Ibid., paras. 182–187.
On the management of the C.P.C., the commission reported as follows:

"The members of the Board of Directors of the C.P.C. were largely figureheads who left the running of the C.P.C. to the Managing Director . . . In view of our finding on the allegations of irregularities made against [the managing director] we do not consider him to have been a fit and proper person to have been in what was virtually sole control of the affairs of a quasi-public concern whose assets, and those of the Loans Agency at 30th September, 1955, totalled over £6,000,000."

Of particular interest are the commission's observations on the position of the Government with regard to the irregularities in the affairs of the C.P.C. and the Government's reaction to those observations. The commission reported as follows:

"It is probable that most of the irregularities which we have had to investigate would have been prevented if the Government had taken a firm stand to check and punish irregularities of the type complained about by both Mr. Mercer and Professor Busia as far back as 1953."

"[The managing director's] case does not, in our view, reflect any credit on the Government by the way it was handled. The Prime Minister had a copy of the proceedings of the enquiry made by the Mercer Committee as also the Exhibits proving the malpractices [sic] of [the managing director] to the hilt yet the Prime Minister failed to see to it that [the managing director] was punished. He said he passed the papers on to the Minister and therefore did not bother any more about it . . ."

In a statement published together with the commission's report, the Government claimed that the commission's findings were made without considering the legal position of the Cocoa Purchasing Company vis-à-vis the Government, represented by the Minister. The Cocoa Purchasing Company was a wholly-owned subsidiary of the Cocoa Marketing Board and incorporated under the provisions of the Companies Ordinance, Cap. 156 (1951 Rev.). It was impossible for the Government to exercise, by means of general directions, effective control over the affairs of the C.P.C., whose only link with the Government was the ownership of its shares by a public authority. The Government

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29 Ibid., para. 205.
30 Ibid. at paras. 214, 215, 218, 219 and 220.
31 It appears that even before the Opposition members approached the Minister of Commerce and Industry, the Chairman of the C.M.B. had submitted a report drawing the Government's attention to a number of irregularities in the C.P.C., particularly those involving the managing director. See Appendix 18 to the Commission's Report.
therefore, proposed certain changes in the constitution and control of all statutory boards and corporations. These proposals involved changes in the organisation and administration of the Cocoa Purchasing Company in order to allow the Government to deal directly with the company instead of through general directions to the Cocoa Marketing Board. They also involved the introduction of legislation to increase the degree of public accountability of all statutory boards and corporations.

The Government's claim appears to have been unjustified for the following reasons. Firstly, adequate machinery existed for the effective control of the C.P.C. Whatever the reason for lack of effective control, it was certainly not lack of legal machinery. Section 16 of the Cocoa Marketing Board Ordinance, 1947, states:

"(1) The Governor in Council may make regulations generally for the better carrying out of the purposes of this Ordinance.
(2) In particular, and without prejudice to the generality of the foregoing, such regulations may provide—
(a) for the licensing of buying agents and the fees to be paid in connection therewith;
(b) for the duties, functions and responsibilities of licensed buying agents;
(c) for the keeping of books and accounts by such agents;
(d) for the appointment and duties of inspectors to examine such books and accounts;
(e) for the submission of returns by agents and other persons."

The above section has to be read together with section 10 which provides as follows:

"(1) Every person shall be guilty of an offence against this Ordinance who contravenes any of the provisions of this Ordinance or of any terms or conditions of any licence issued under this Ordinance.
(2) Save where other provision is expressly made, every person who is convicted of any such offence shall, on summary conviction, be liable for a first offence to a fine of one hundred pounds or to imprisonment to a term of six months or to both such fine and imprisonment and for a second or subsequent offence to a fine of five hundred pounds or to imprisonment for twelve months, or to both such fine and imprisonment.
(3) Where any offence against this Ordinance committed by a body corporate is proved to have been committed by a body

32 See the Government Proposals in Regard to the Future Construction and Control of Statutory Boards and Corporations in the Gold Coast, p. 6.
corporate with the consent or approval of any director, manager, secretary or other officer of the body corporate he as well as the body corporate, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly."

Apart from the foregoing provisions, six out of eight directors of the Cocoa Marketing Board, who were all members of the Government party and were appointed by the Government, were also directors of the Cocoa Purchasing Company. The Chairman of the C.P.C., for example, was also Chairman of the Cocoa Marketing Board.

In view of the foregoing, it is difficult to accept the claim of the Government that it did not have the power to control the affairs of the Cocoa Purchasing Company. Having regard to the fact that the Government possessed the power to check the irregularities to which the commission referred, the proposals for greater control of public corporations were uncalled for. What was needed was to make good use of the existing mechanisms of control rather than attempt to invent new ones. In the case of the C.P.C., political considerations, namely the strategic position of the company as a weapon for fighting other political parties, prevented the exercise of the powers of control at the disposal of the Government.

The post-independence era before the 1966 coup d'état

The first few years after independence in 1957 were taken up with what the Government described as "consolidation." This period (i.e. from 1957 to 1959) saw the preparation of a new Five-Year Development Plan which was expected to "give us a solid foundation to build the welfare state." The Prime Minister, introducing the Plan, said:

"We believe that it should show what we have to do—by our own hard work, by the use of our natural resources, and by encouraging investment in Ghana—to give us a standard of living which will abolish disease, poverty and illiteracy, give our people ample food and good housing, and let us advance confidently as a nation."

The Five-Year Development Plan (1959–64) did not differ in any material particular from earlier plans (e.g. the 1951 Plan) in the sense that the emphasis was still on the development of infrastructure.

During the currency of the 1959–64 Plan, an important document was adopted and published by the ruling Convention People's Party Congress in July 1962. The document entitled "A Programme for Work and Happiness" formed the political and philosophical basis for the
Seven-Year Plan of 1963–64 to 1969–70. This document stated that socialism was to be the goal of the nation and that this could only be achieved "by a rapid change in the socio-economic structure of the country." It was also recognised that the economy had to be freed from "alien control and domination" through the medium of central planning. This could only be effective if the State controlled the "major means of production, distribution and exchange."

It was these ideas which influenced the formulation of the Seven-Year Development Plan. The general purpose of the Plan was stated as follows:\(^{35}\):

"With this Seven-Year Plan Ghana enters upon a period of economic reconstruction and development aimed at creating a socialist society in which Ghanaians will be able to enjoy a modern standard of living in their homes supplemented by an advanced level of public services outside. The Government regards the well-being of the individual Ghanaian, however humble, as the supreme law. All the energies of the nation and the Government must be mobilized to promote it."

The socialist policy of the Plan was stated to be based on certain fundamental principles including the following:\(^ {36}\):

(i) The economy must be developed rapidly and efficiently so that it shall within the shortest possible time assure a high rate of productivity and a high standard of living for each citizen based on gainful employment,

(ii) The income from our physical assets and from the labour of our people applied to these assets year by year must be utilized for socially purposeful ends. Never must public want and private affluence be allowed to co-exist in Ghana. Among the most important ends that the community must provide for out of its incomes should be the education and welfare of its children, and the continued expansion of the economy itself,

(iii) The community through its Government must play a major role in the economy, thus enabling it to assure the maintenance of a high level of economic activity, the provision of adequate employment opportunities, the equitable distribution of the nation's output, and the availability of the means of satisfying overriding social ends. Accordingly the need for the most rapid growth of the public and co-operative sector in productive enterprise must be kept in the forefront of government policy."

\(^{35}\) Ch. I, p. 1.

\(^{36}\) Author's emphasis.
In pursuit of the above objectives, particularly that relating to the expansion of the Government’s role in economic development, a number of public corporations was established. By 1966, public corporations had become a characteristic feature of the economic landscape. Unlike the public corporations established during the colonial days, they were regarded as a major instrument of an active Government economic policy, namely the assumption of control over the “means of production, distribution and exchange.”

The legislation relevant to the establishment of these public corporations are the Statutory Corporations Act, 1964 (Act 232), which re-enacted with amendments an earlier Act of 1961, and the Instrument of Incorporation of the State Enterprises Secretariat, 1965 (L.I. 457), which established the State Enterprises Secretariat to co-ordinate and supervise the affairs of the public corporations.

One of the most striking features of the Statutory Corporations Act is the President’s power to establish or dissolve public corporations by means of legislative instruments without recourse to Parliament. The power of the President in this regard had certain implications in terms of parliamentary control of public corporations. Debates on the Second Reading of bills establishing new corporations or amending existing legislation on public corporations have in the past provided Members of Parliament with the opportunity of discussing but not controlling the affairs of public corporations. In the past, Members of the House, particularly Opposition Members, have made full use of such occasions for a general review of the activities of the corporations concerned. These discussions do not appear to have made much, if any, impact on the Government’s attitude to the affairs of the corporations because they tended to be conducted in the arena of inter-party conflict and voting tended to be strictly along party lines. Consequently, no significant changes in the bills emerged from these debates. However, the debates may have had useful side effects even if they did not result in any change in Government policy. One of these effects was the mere fact of bringing into the open issues of public importance for the consideration of at least the literate segment of the electorate who in fact took an interest in following parliamentary debates through the various media of communication.

37 There were about 55 by 1966.
38 Act 41. This Act of 1961 itself repealed an earlier Act of 1959 (i.e. No. 53 of 1959). The 1959 Act was introduced “to provide the means whereby public corporations can be established without recourse to parliamentary legislation.” See speech by the late Mr. N. A. Welbeck (then Min. of State) introducing the Bill: Parl. Deb., 1st Series, Vol. 17, cols. 269-270, 9 November 1959. The 1961 Act repealed most of the provisions of the 1959 Act.
39 See Act 232, ss. 1 and 4.
But even the possibility of such side effects was effectively removed by the Statutory Corporations Acts, 1959 and 1964. The cumulative effect of these statutes was to make it possible for public corporations to be established or dissolved by the President by legislative instrument without recourse to Parliament. Such an instrument was not required by Act 232 to be laid before Parliament. Neither did the Statutory Instruments Act, 1959, make it mandatory to lay such instruments before Parliament.41

The United Nations Mission on the Re-organization of State Enterprises which visited the country in 1966 reported that as at that date the total investment in state enterprises was about £G100 million while the accumulated losses were of the order of £G20 million. The Seven-Year Development Plan (1963-70) envisaged a net income of £G23m (i.e. £G3m to £G4m a year) from state enterprises. On the whole, state enterprises have not proved as profitable as envisaged by the Seven-Year Development Plan.42

Some would argue that profitability (in simple terms of excess of revenue over expenditure) is not and should not always be a criterion of the viability of a state enterprise. For the state may establish enterprises which have little or nothing to do with the making of profits in the sense in which the term is understood by private entrepreneurs. One of these motives is the provision of employment and other social benefits (e.g. cheaper goods and services). In Ghana during Nkrumah’s rule attempts were made to set up enterprises in the rural areas to serve as poles of growth. The £G5.5 million Asutsuare sugar refinery (now a division of the Ghana Industrial Holding Corporation) is an example of such an enterprise. It was envisaged that apart from being a significant import-substitute industry, the refinery would employ 20,000 Ghanaians. It would also provide a steady market for a locally-produced cash crop, namely sugar, and thus contribute to the cash incomes of the farmers in the vicinity. The increased purchasing power of the farmers would enable them to buy goods, thus creating a broader market for other industries, state as well as private. Besides, it was hoped that the by-products of the plant (such as molasses alcohol which is now being used in the Distilleries Division of the Ghana Industrial Holding Corporation) would provide raw materials for other manufacturing industries. Although such an enterprise may not

41 See the Statutory Instruments Act, 1959, s. 10.
42 pp. 2-3 of the Report: the Auditor-General’s Report on the accounts of Ghana for the period 1 January 1965 to 30 June 1966 states at para. 162 that the total losses sustained by public corporations during the period under review were £20,310,466 as against an accumulated surplus income of £14,548,431. See also the 1965 Budget Statement. Parl. Deb., Vol. 38 No. 7, 21 January 1965, cols. 175–205.
be immediately, or even eventually, "profitable," it may nevertheless set off a chain of growth in an entire area.

Whatever view one takes of profitability as a criterion of viability, it is submitted that there is no reason why minimum standards of efficiency ought not to be maintained. In other words, the argument against profitability as an index of viability should not be a plea for administrative inefficiency, e.g. failure to keep proper books of account and to set production targets.

Several reasons were advanced by the United Nations Mission in their report for the poor performance of public corporations during this period. Firstly, some of the enterprises were established without adequate feasibility studies. Secondly, since Ghana lacked (and still lacks) metallurgical industries, the heavy machinery and equipment had to be ordered from overseas and paid for in foreign currency. In some cases the Government did not provide the initial working capital and the enterprises had to borrow money from the banks at interest rates of eight per cent to ten per cent. The result was that these enterprises were saddled from the beginning with rather serious financial problems. Many of the enterprises relied (and still rely) heavily on imported raw materials. By 1965, import restrictions had forced them to reduce their operations. The full work force was, however, retained during these periods of reduced activity leading to heavy expenditure on wage bills.

Apart from these problems, there was persistent political interference in the affairs of the corporations. This interference led to several appointments being made not only to the Boards but to other posts as well where they should not have been made. It also led to the taking of steps which were simply uneconomic, however politically expedient they might have been.43

Most of these problems had their roots in the phenomenon of corruption and allied administrative irregularities which were the hallmark of state corporations during the period under review. This view is supported by the following passage from the 1966 Budget Statement read by the Minister of Finance on 22 February 196644:

"Mr. Speaker, I should like to point out that the State Enterprises worked under very difficult conditions in 1965. The greater part of the year was fraught with uncertainties about import licences for raw materials and spare parts. But I must also say that again the joint state-private enterprises also worked under similar conditions and yet were able to make some profits. This shows

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44 Parl. Deb., Vol. 43, No. 7, col. 659.
that the problem is also one of management and not only one of import licences."

Corruption is neither the invention nor the monopoly of Ghanaian (or African) governments. This social evil was present in much earlier times and in different parts of the world. It has been said that the decline of the glory that was Greece and the grandeur that was Rome was due, in a large measure, to corruption and frivolity.\textsuperscript{45} The rigid training which Plato prescribes for his Guardians (including the prohibition on ownership of property and marriage) was probably designed as an antidote for corruption. Ownership of property would increase the acquisitive propensity of the Guardians\textsuperscript{46} and marriage would engender those sentiments which give rise to favouring relatives. In the United States, corruption in politics was at its zenith between 1880 and 1894, particularly at the local government level. In Britain, bribery, corruption and nepotism were at their height during the nineteenth century.\textsuperscript{47}

But neither the antiquity nor the ubiquity of corruption can be regarded even as a plea in mitigation of its condemnation. On moral grounds alone, corruption is sufficiently reprehensible. It is, however, its cost in terms of administrative efficiency which is of grave concern in developing countries such as Ghana where the public corporation is an important vehicle of national economic development.

Even though legal machinery existed for the investigation and punishment of corrupt practices,\textsuperscript{48} there is no evidence that this was ever used during the period under review. It would be extravagant to suggest that corruption, like crime generally, can ever be wiped out from Ghanaian society or for that matter from any other society. At best one can only hope for a reduction in the scale on which it is practised. In this regard, there are several other factors beside the law which have a role to play—for example, education designed to instil a sense of responsibility and dedication to the service of the nation. But these are by their very nature long-term solutions and the drive for economic development cannot await them. In the meantime, a vigorous enforcement of the law would seem to be required.

\textsuperscript{45} Gibbon, E., \textit{The History of the Decline and Fall of the Roman Empire.} (London, 1820).

\textsuperscript{46} Perhaps an older version of what economists call "Griffins paradox."


\textsuperscript{48} See the Criminal Code, 1960 (Act 29), particularly Ch. 5 on corruption of or by public officers; and the Corrupt Practices (Prevention) Act, 1964 (Act 230), which repealed an earlier statute, namely the Public Property (Protection) and Corrupt Practices (Prevention) Act, 1962 (Act 121).
Post-1966 reorganisation

Shortly after the overthrow of the Nkrumah regime in 1966, the Government at the time made a policy statement to the effect that state participation in the economy would in future be "limited to certain basic and key projects" and that some existing state enterprises would be offered for sale to the private sector. Furthermore, economic expansion would be left to private enterprise, private investment from overseas would be encouraged and any future joint private-public enterprises would be arranged only on a "voluntary" basis.\(^{49}\)

Pursuant to this official policy, the United Nations Mission referred to earlier in this article was invited to study and report on the administration and organisation of state corporations in general and the State Enterprises Secretariat in particular. One of the major observations made by the Mission was that the Secretariat had failed to maintain effective supervision over various state enterprises.\(^{50}\) The Mission, therefore, recommended a number of changes including the reorganisation of the manufacturing and industrial enterprises under a holding authority.

Pursuant to these recommendations, three enterprises were sold to the Ghanaian private sector while private participation was invited in the case of some of the enterprises.\(^{51}\) Besides, the Ghana Industrial Holding Corporation (GIHOC) was created in 1968 by N.L.C.D. 207 to supervise and co-ordinate the activities of about twenty industrial and manufacturing concerns constituted as divisions of the holding corporation. The reorganisation did not, however, affect a number of corporations (e.g. Volta River Authority, State Housing Corporation, the Electricity Corporation, State Transport Corporation) which have retained their independence and have no links whatsoever with the holding corporation.

Problems have arisen with regard to control of the divisions by the corporation. The main mechanism of control by the corporation over its various divisions was the executive directive (issued by the board of directors) and the managing director’s directives. Not only were these directives issued very frequently but they also contributed to the establishment of a rigid system of control over the divisions. The most notable were those directives which required the general managers to seek the prior approval of the managing director for certain types of

\(^{49}\) See *West Africa*, 2 March 1966, p. 301. The Government’s policy was reiterated by Mr. J. V. L. Phillips, then Commissioner for Industries in the *Financial Times* (London) of 24 February 1969 (Special Supplement on Ghana) at p. 16.


\(^{51}\) See, for example, the Agreement between the Government of Ghana and Firestone (Ghana) Ltd. and that between the Government and Société Industrielle et Forestière des Allumettes of Paris.
business transaction involving their divisions. The reaction of general managers of the constituent divisions to the constant stream of directives from the Ghana Industrial Holding Corporation was one of resentment. This reaction may be explained by the fact that the divisions (which were in existence before GIHOC was formed and had their own boards of directors) had been subjected to extensive political interference not only from Ministers but also from board members. This interference reduced their autonomy considerably and dampened their enthusiasm. It was felt that the holding corporation should concern itself with laying down broad policy decisions and with rendering advisory services to the divisions on request.

The practice of issuing directives on virtually every aspect of the administration of the divisions was based on too literal an interpretation of the relevant statutory provisions. There is nothing in those provisions which suggests that a relaxation of administrative control so as to grant general managers operational autonomy would have been inconsistent with them. Indeed, the provisions envisaged delegation of functions subject to such restrictions as to their exercise as the managing director thought fit. But there was no obligation to impose restrictions on the exercise of every delegated function. The imposition of too many restrictions had the undesirable effect of stifling initiative which is necessary for the operation of any commercial enterprise, be it state-owned or otherwise. In its recommendations for the reorganisation of state enterprises, the United Nations Mission said:

"The Authority [the Holding Corporation] will formulate ‘delegation of powers’ to the Managing Directors [General Managers] to facilitate their day-to-day working and give them operational autonomy within limits."

During the latter half of 1969, there was a decision by the board that the holding corporation should work systematically towards re-establishing each division as a separate legal entity with its own board of directors. The holding corporation under the proposed changes would be an "interlocking directorate." It was even envisaged that those divisions which proved viable would be floated as separate limited liability companies in which some of the shares would be held by the holding corporation and the rest by members of the public. As a first step towards this goal, it was decided to establish management committees for all the divisions with special responsibility and authority to deal expeditiously with matters which required the decision of the managing director or a committee of the board of directors of the holding corporation.

52 See N.L.C.D. 207, para. 6 (6) and (7).
Executive Directive 1455 which established the management committees, however, was not consonant with the aims and objectives of the proposals outlined above. About 75 per cent of the members of each management committee were either board members of the holding corporation or headquarters personnel. The managing director of the corporation was chairman of all the management committees. Besides, the functions of the management committees as contained in the directive implied greater involvement by the headquarters in the day-to-day administration of the divisions which is precisely what the proposals in the earlier directive were intended to minimise.

The entire scheme to re-establish boards of directors for the divisions was unnecessary. The problem of granting general managers a certain measure of autonomy could have been solved within the existing administrative framework by resorting to delegation of powers. This would have been consistent with both the recommendations of the U.N. Mission and the provisions of N.L.C.D. 207.

Conclusion

The foregoing account of the historical development of the public corporation in this country reveals an unhelpful obsession on the part of decision makers with structural reforms. Various governments over the years have identified the structural attributes of the public corporation as the factors which have contributed to its failure to make any meaningful impact on the economy of the country. It is submitted that the problems which have faced the public corporation in this country throughout its history have arisen out of the economic and political matrix within which it has operated. Any study of the public corporation which attempts to divorce the form from the material conditions in which it operates cannot get at even half the truth. Indeed, any structural reforms which ignore this important factor are bound to be exercises in theoretical model-building, completely unrelated to reality.
LAND LAW AND THE DISTRIBUTION OF WEALTH

GORDON WOODMAN*

Nature of the enquiry

The paper aims to sketch in outline the present distribution of that particular type of wealth which consists of rights in Ghanaian land, and to show the relationship of the law to that distribution. A number of theoretical questions need mention first.

This is an attempt to move beyond the confines of the type of legal research which was prevalent in Ghana until recently. When a Ghanaian Faculty of Law (originally a Department) was first established in 1958, the immediate research need appeared to be the investigation and categorisation of the black-letter rules of law, or the rules recognised by the legal profession as valid, authoritative law. It was necessary to know what the law was, to operate a legal system with tolerable efficiency. It may be that in some areas this need remains predominant, but it is now justifiable to devote a substantial part of our energies to an examination of the relationship between these rules and Ghanaian society and economy. This is necessary to determine the ways in which law may play a part in planned social development. The work has started. The immediate future presents Ghanaian legal scholarship with peculiarly interesting challenges although the limitations of our expertise makes them also peculiarly difficult.

Such an enquiry needs to be directed by a general theory of law or law reform. This question has been discussed more fully elsewhere, but certain arguments need to be put briefly here. It is submitted that a general theory is essential because without it there can be no way of choosing rationally between the infinite number of possible investigations. Possible theories differ in their degrees of comprehensiveness, that is, in the extent and number of the propositions which they incorporate as essential elements. For example, Marxist theory, which provides relatively full guidance for research of the present type, does so on the basis of an extensive analysis of social development. The work of Roscoe Pound also suggests the sort of research which ought

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2 "A basis for a theory for law reform" (1975) 12 U.G.L.J. 1. This did not, however, examine the potential of Marxist theory as a basis for law reform.
to be done for the purpose of law reform (or "social engineering"), but asserts that law ought to aim exclusively at the satisfaction of the maximum value of interests, the valuation of the society in question being taken as conclusive. The objection to the use of such theories for the present purpose is that, whether highly elaborate, as with Marx, or more rudimentary, as with Pound, acceptance of controversial value-judgments is required. It seems preferable to use a theory which acknowledges the limits on the use of expertise, and does not encourage the expert to prescribe what is good for society. This suggests that investigation should only seek to reveal the alternative lines of development open to society, namely, those not excluded by physical impossibility or social unacceptability.

What, according to this view, is a useful contribution in which a knowledge of land law may be used? The area of investigation will clearly consist of social facts which appear to be related to land law. But a further reduction of scope is needed, because the range of this class of social facts is extremely large. The particular phenomena taken in this paper are the differences between the quantities of wealth held by different individuals. This choice is justified if these phenomena are likely to be regarded as significant in a discussion of land law reform. It is believed that there is widespread agreement on the importance of this subject. The amount of wealth a person holds presumably affects the quality of his life, and the quality of every person's life is frequently regarded as valuable. To the extent that this view is widespread, those who discuss possible systems of land law will wish to know the relationship between that law and the distribution of wealth. It is not, however, suggested that this factor ought to be regarded as having greater significance than any other. This paper is intended merely as a contribution to discussion of the reform of Ghanaian land law, and certainly does not claim to discuss all possibly relevant facts.

The paper is not concerned with the related phenomena of economic growth. These also are widely regarded as significant. However, it is submitted that research ought not to be generally restricted to that particular aspect of social development. Such a restriction would assume that economic growth was more important than any other facts. This would entail a value-judgment that it ought to be the prime objective of society. This is of doubtful validity, is not in practice generally accepted, and ought not to be imposed by the researcher. He can use his expertise only to reveal the various developments which have occurred and which could be produced. Since economic growth

has received a great deal of attention in the literature on law and development, it may be desirable to redress the balance by examining a different phenomenon.4

In examining the relationship between the land law and the distribution of wealth, we are concerned to discover a causal relationship. But this should not be taken to imply any assumption that the law has caused any particular social change, or indeed any at all. The cause-effect relationship may be the reverse. On this issue enquiry starts merely by asking whether there is a causal relationship, and if so, what is its nature.

Method and materials

When lawyers consider this type of question, they must not be misled into assuming that the concepts of formal law necessarily denote social facts. For example, care is necessary in analysing any situation where a person is said to hold a “title” to land. Thus in one class of cases in Ghana a person is said to hold a title which carries the imposing name of the allodial or absolute title. But this amounts to no more than a questionable right to receive customary services of nominal value which are normally not in fact rendered, and a reversionary right on abandonment by the occupier, which almost never occurs. Thus, if we are looking for the fact of wealth, this legal concept of “title” is of negligible importance. We should look instead for the enjoyment of material benefit from land. This benefit may be in the form of possession and use of the land, or some less obviously tangible enjoyment such as the control of its use. Normally legal title carries with it some type of material benefit, but it is important to ascertain in each case the nature and extent of this.5

Another formal concept which needs to be treated with suspicion is that of corporate personality. Where title is said by the law to be vested in a corporation, such as a stool or a family, it is necessary to ascertain which particular individuals in fact enjoy particular benefits.

These observations lead to the conclusion that an investigation concerned with social fact will not necessarily adopt the usual formal

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5 The principal statutory provisions for compulsory acquisition allow claims for compensation by “any person claiming a right or having an interest in any land” acquired: State Lands Act, 1962 (Act 125), s. 4 (1). However, compensation is assessed with regard to “the market value or the replacement value of the land or the cost of disturbance or any other damage suffered”: ibid.
classifications of the law. The principal division in this paper will be according to the use made of land, whether for agriculture or building. The same rules of law are generally applicable to each type of land, but the different economic uses of land result in different consequences for the distribution of wealth. Again, there is no inherent importance in the common formal classification of law by legal source into customary law, common law and statute law. The discussion here will in fact be concerned largely with customary law, but this is merely because it happens that land use activities receive their legal analysis predominantly in terms of the rules of customary law.

The primary practical difficulty for this type of investigation is lack of evidence. As already suggested, this does not apply to the rules of law, which have been described fairly fully elsewhere. But relevant research into social factors has been rare, and further research is likely to be expensive and lengthy. In particular, little of the available evidence permits quantitative statements of any precision. For traditional legal research, to establish that a rule of law exists it is enough to give one instance of its application, or even merely of its authoritative declaration. For research into social facts it is important to know whether a rule refers to a frequent or a rare practice. The evidence of social practice used in this paper is of two types. Where items of sociological and economic research are available, they are used. In addition, reference is made to the rules of customary law as administered in the courts, since these provide some evidence of regular practices.

Since the information is inadequate, an approach which refuses to go beyond clearly proven conclusions is liable to produce a series of commonplaces. These may not contribute greatly to a programme of action. Here we shall attempt to go beyond this, but at the price of less

7 For this reason citation of legal authorities will generally be avoided. The literature and case-law are referred to in Olleenu, N. A., Principles of Customary Land Law in Ghana (1962); Bentsi-Enchill, K., op. cit.; Kludge, A. K. P., Ewe Law of Property (1973); University of Ghana Law Journal.
8 Furthermore, as the citations will show, a disproportionate amount of the research has been devoted to cocoa farming. Important work has recently been carried out by the Land Administration Research Centre, Kumasi, partly on behalf of the Law Reform Commission. At the time of writing the findings are accessible only in working papers Nos. 6, 8 and 17, 1975 of the Law Reform Commission, written by K. E. Obeng. These will be referred to as LRC 6/75, etc.
9 On the distinction between quantitative and qualitative change, see Renner, K. The Institutions of Private Law and Their Social Functions (Kahn-Freund, O. ed. 1949), pp. 265-266.
10 Some work has already been done in this respect: see Asante, S. K. B., "Interests in land in the customary law of Ghana—A new appraisal" (1965) 74 Yale L.J. 848; (1969) 6 U.G.L.J. 99. However, that work is directed to discussing changes in the legal rules. Social changes are discussed as causes of changes in the legal forms, on which is placed the main focus. The present paper focuses on certain changes in the social facts.
certainty regarding the correctness of the conclusions. It is assumed that it is better to act on the basis of carefully formulated probabilities, than to wait for certainty and not to act.

**Agricultural land**

The division of land into agricultural and building land is intended to be in terms of the uses to which land is put in fact, not in terms of any inherent qualities. It is of course possible for agricultural land in this sense to become building land. The possibility will be mentioned in the next section. Changes in the opposite direction are extremely rare.

In the use of agricultural land over the past century, two developments are outstanding. Firstly, the quantity of land in use has increased. In some areas there is now a shortage of land.\(^{11}\) This has occurred partly because of new means of using land, which require less labour to produce a yield from a given area. These were either unknown previously, or were uneconomic because of lack of markets. There are no doubt other causes, such as the increase in population. Secondly, the use of land has become more prolonged. This again has resulted partly from the new methods of user. Both developments are illustrated by cocoa, developed as a major crop since 1890.\(^{12}\) Once cocoa has been planted and tended to maturity it requires relatively little labour to maintain it and prepare the produce for sale, and the trees continue to bear for about 30 years, after which they can be cheaply replaced.\(^{13}\) These developments were not purely the result of scientific advance. Economic factors must have provided the motives for the exploitation of the new uses of land. However, this paper seeks, as far as possible, to isolate and concentrate on the uses of land and their relation to legal rules. Economic and other causes will be considered only when asking whether the law has been in any way a cause of the developments.

The area of law most likely to be related to the increase in the amount of land in use would appear to the law concerned with the creation of interests in land, since an interest is usually created when

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### Footnotes


Land Law and the Distribution of Wealth

land is first cultivated. The new uses of land are likely to bear a relationship to the extent of rights and obligations constituting those interests. These aspects of the land law will now be examined.

The legal root of virtually all rights in land is the allodial title, vested in the traditional communities, principally families, stools and skins. The communities themselves, as groups of individuals, do not use the land personally in economically significant ways. We have to turn to the transactions which accompany significant use of the land, of which three need mention.

Firstly, by customary law every member of the community is entitled to cultivate unoccupied land in which the community holds the allodial title, and to acquire thereby a usufruct (or customary freehold). The cultivation may be carried out by the member himself or by labour which he hires. This right has frequently been exercised. The cultivator acquires the right to use the land until he abandons it. Because of the more extensive and prolonged uses of land today, he frequently does not abandon it. There is some controversy as to the nature of the legal obligations attached to the interest. However, even if we take the view that there are indeed legally significant obligations, it seems clear that they are not economically significant today. It is said that the member is subject to the obligation of loyalty to his community. At one time this community was the unit of government and defence. Today the national government has assumed most of these functions, so that this obligation no longer imposes any burden. The “customary services” which are said by some to be due are largely nominal, and are often not exacted. The usufruct is thus in practice a valuable right. It has recently acquired a clear market value by becoming freely alienable. It had already been possible for the holder to grant tenancies of the land. Therefore the acquirer of the usufruct has a number of alternative modes of benefiting from his rights: he may cultivate the land himself; he may employ others to cultivate it for

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14 There is some controversy as to whether there is, or has recently been any “unowned land,” in the sense of land without an allodial or any other title-holder. See Kludze, A. K. P., “The ownerless lands of Ghana” (1974) 11 U.G.L.J. 123. The controversy is unimportant for the present purpose because, even if there is “unowned land,” it is clear that it is very small in extent and value.

15 It is assumed that the collection of “natural fruits” such as firewood is not economically important.

16 Fairly numerous reported cases give individual instances. Surveys show that in some areas land is cultivated largely by persons originating from those areas, who are therefore members of the local communities. Another minor instance is the newly developed cultivation of ginger in Nkawie, Ashanti Region. This is apparently grown only by members of the community at present: LRC 8/75.

17 The legal development is documented in Woodman, “The scheme of subordinate tenures of land in Ghana” (1967) 15 Am. J. Comp.L. 457 at pp. 461-463. The social circumstances in which the legal development occurred are discussed in Asante, op. cit. at pp. 862, 872-876, and 114, 125-129.
him\textsuperscript{18}; he may grant a tenancy and receive rent; or he may convert his rights into money by selling his interest.

This interest therefore constitutes one important class of wealth in land. Is it possible to generalise about the class of holders? It seems clear that these interests are not held equally by all Ghanaians. Some acquire the use of land in the ways to be described below, which are less beneficial to the acquirer. Clearly they would not do this if they could acquire usufructs free in suitable land. It would seem that there is a distinction based on the varying productive capacity of land. This gives an advantage to persons belonging to communities which hold the allodial title to land which produces a net product of greater value to the cultivator when cultivated in the manner practicable for most farmers.\textsuperscript{19} Further, the system gives an advantage to those whose communities hold, proportionately to their size, title to more extensive areas of land available for this purpose.\textsuperscript{20} These are not necessarily the communities which hold simply the largest areas proportionate to their size. The relevant factor in assessing the potential wealth of community members is the quantity of land available to be developed by them. Land already occupied by strangers, under the procedures to be mentioned, is no longer available.

Thus one may expect this interest to be held disproportionately by persons from areas where one or more of three conditions are present: potentially productive land; a large quantity of land; and the admission of few strangers. One other factor which may place a particular individual or family in an advantageous position is the prior accumulation of capital. Ways in which this may occur are mentioned below when the stranger purchaser is discussed. Such capital enables a member to employ labour, so that a larger area of land can be brought under cultivation.

This effect of the acquirer’s death will be discussed below, as all interests can be considered together in this respect.

Secondly, a community is empowered to grant its land outright to a stranger. (There is a controversy as to whether the allodial title may be so granted, but there is no doubt that the usufruct may be. Since, as

\textsuperscript{18} The employment of labourers for farming is common, at least for cocoa farming, although the available evidence does not often distinguish between different categories of employers. Sometimes the employer belongs to the present category, and sometimes to that of stranger purchasers, to be discussed below. See Hill, P., \textit{The Gold Coast Cocoa Farmer} (1956), Chaps. I–III; Bray, F. R., \textit{Cocoa Development in Ahafo, West Ashanti} (1959, cyclostyled), pp. 38–45; Addo, N. O., \textit{Migration and Economic Change in Ghana} (1971, cyclostyled), cited below, note 25.

\textsuperscript{19} It is acknowledged that the value to cultivators of a product is determined by a complex of social and economic factors, such as the price of that product as a raw material for industry, either in Ghana or elsewhere. However, that is another area for investigation.

\textsuperscript{20} There does not, according to the census returns, appear to be a significant variation between different agricultural areas as to the proportion of inhabitants capable of farming.
we have seen, the usufruct gives the unrestricted benefit of the land, the controversy is a mere matter of form, and is of no importance for the present analysis.) Naturally a payment is exacted. Such sales have passed substantial portions of the land of some communities.21 Since 1951 they have been subject by statute to governmental approval, but brief enquiries suggest that this control has never gone beyond attempts to ensure that the purchaser acquires a valid title.22

The purchaser thus makes a payment out of wealth already accumulated by him. There is no evidence of a general pattern as to the mode of accumulation. There is indeed little information on the source of such funds, even in the literature which discusses the economics of such strangers' farming. The price may be saved from trading, or from previous farming,23 and today one hears of retiring civil servants using their gratuities for this purpose. Relatively rarely the price may have been borrowed from a bank or a state agency. Such loans are, however, available to few, and usually collateral is required in the form of title to property already accumulated.24 For the present purpose it is necessary, and to some extent sufficient to say that this interest will be found to have been acquired only by those with capital, whatever may be the circumstances of its accumulation. When acquired the interest may be exploited in exactly the same ways as the usufruct acquired by a member of the community: the land may be used by the purchaser personally or through his hired labourers, he may sell his interest, or he may grant a tenancy.25

21 Sec, e.g. Hill, P., The Migrant Cocoa Farmers of Southern Ghana (1963), Chap. V.
22 Information from the Lands Department, Ministry of Lands and Mineral Resources. Ensuring that title is valid includes ascertaining that the statutory limits on permitted areas are not exceeded. These are set out in the Concessions Ordinance, Cap. 136 (1951 Rev.), ss. 22-26 (now restricted to land which is not "stool land", by the Concessions Act, 1962 (Act 124), s. 1); Administration of Lands Act, 1962 (Act 123), s. 12. These limits are very wide. For example, one person may be granted stool lands for cultivation up to a maximum aggregate of 100 square miles, and even this limit may be waived under the Administration of Lands Act, 1962 (Amendment) Decree, 1968 (N.L.C.D. 233). For this reason they are not stressed in this paper.
23 There is some information on this particular source of capital for one group of purchasers in Hill, P., The Migrant Cocoa Farmers of Southern Ghana (1963), pp. 178-187.
24 There is evidence that the price is higher if it is known—as it inevitably will be—that this is the source of the money: Adinkrah, K. O., The Customary Law of Landlord and Tenant in the Southern Half of Ghana—An Appraisal (1973; L.L.M. thesis, University of Ghana), p. 34, n. 15.
25 Relevant information on cocoa farmers and their employees in the Brong-Ahafo Region is contained in Addo, N. O., op. cit. This shows that more than half (52%) of the farm owners were Ashanti: pp. 3, 4. It is not certain, however, whether these should be classified as stranger purchasers. The customary law status of Ashanti in the various traditional areas of the Brong-Ahafo Region is controversial. Moreover, most of these farmers had been born in the Region, a factor which also suggests that they may have been regarded as members of the local community. Nearly half (46%) of the labourers employed on the farms were from the Northern and Upper Regions; ibid., pp. 42, 44. A total of 885 farmers were found to employ 2,634 labourers: ibid., p. 42. (In this respect the sample was probably
From the vendor community’s point of view, the sale is its mode of exploiting its rights in the land. Since such sales are a continuing phenomenon, it may be useful to consider the vendor’s position further, even though the sale terminates its interest in the land. While the vendor is a community, not an individual, it is necessary to ask which individuals benefit, and how, from the prices paid. If the community is a “stool” in the statutory sense, the payments are required by law to be made into a stool lands account. From that account money is to be paid out to: the stool, which is to receive moneys through the traditional authority for its maintenance; the traditional authority; and the district or local council. It appears that substantial sums are paid into the stool lands accounts. But the representatives of stools, primarily chiefs, are also able to exact direct payments to themselves. Communities which are not “stools” receive all payments directly. This applies primarily to families, which are the holders of the allodial title in some areas. It appears that sums paid to the local and district councils are treated as ordinary income. Some is spent on the maintenance of services, and some on development projects which are intended to increase the productive capacity and living standard of the inhabitants. Sums paid to the traditional authorities, the stools (which means there the chiefs), and non-stool communities, are in part spent on capital projects. Some of these result in productive capacity, such as scholarships, although some, such as chiefs’ palaces, do not. However, brief enquiries (of admittedly uncertain reliability) suggest that the bulk of these sums are consumed unproductively, for example in mounting representative of the area; ibid., p. 2.) Useful information on the cost of establishing cocoa farms is given in Okalie, C., Dominase, op. cit., pp. 75-83.

26 A “stool” is defined as including “a Skin and the person or body of persons having control over stool land,” while “stool land” is defined as including “any land or interest in, or right over, any land controlled by a Stool or Skin, the head of a particular community or the captain of a company, for the benefit of the subjects of that Stool or the members of that community or company”: Constitution, 1969, art. 172 (1). This substantially re-enacted the definition in the Administration of Lands Act, 1962 (Act 123), s. 31.


28 Constitution, 1969, art. 164 (4), also retained in force by N.R.C.D. 24. In practice a common mode of distribution is: 10 per cent to the government for administrative expenses; 45 per cent to the district or local council; 45 per cent to the traditional authority for that area and the stool. See LRC 8/75.

29 A common device is to demand, in addition to the “price” for the land, a payment of “customary drinks.” These were traditionally a presentation made by way of courtesy by a stranger introducing himself to a chief. It is apparently argued that, since statute requires payment into the stool lands accounts only of payments “from” stool land, these payments are not included. Information on the practice is given in LRC 8/75. One stool is recorded there as regularly requiring the payment of £600 for a grant of an area of about two acres. Another instance, of payment of £11,000, is given in Adadevoh, J. F. K., and others, Report of the Committee of Enquiry into Ejura Affairs (1973), paras. 93 (Finding No. 9), 94-107.
durbars and funeral ceremonies, and in maintaining chiefs' retinues.\textsuperscript{30}

Thus the effect of these sales on the wealth of the vendors seems to be that land is exchanged for property which is largely consumed unproductively by the community, mainly to the benefit of a small section, although some is used to increase the productive capacity of inhabitants of the localities.

Thirdly, the community may grant not the full title to the land, but some lesser title. There is evidence that today communities are often more reluctant to make outright grants than they used to be, and that these lesser grants are much commoner.\textsuperscript{31} The reason for the change is not clear.\textsuperscript{32} The terms vary greatly, according to the usual practice in the locality, the type of crop contemplated, and personal factors. However, it appears that grantees normally become tenants entitled to cultivate a particular crop, and making periodic payments which usually amount to a substantial proportion of the yield. A typical arrangement is the abusa tenancy, in a common version of which the tenant delivers annually one-third of the principal crop, or its money equivalent. The tenant may also pay an initial premium on receiving the grant.\textsuperscript{33} Statutory governmental controls again have not affected the economic relations.\textsuperscript{34}

The duration of the interest is often for one farming season, or until a period of fallow becomes necessary. In the case of long-lived crops it is often in law perpetual. In practice a tenant may find it impossible to remain in possession against the wishes of the landlord. This does not result at present in many evictions, but it means that tenants do not always dispute their landlords' unilateral interpretation or changing of the terms of their tenancies, even though the formal rules of law regard the initial agreement as binding.\textsuperscript{35} The tenant's interest is

\textsuperscript{29} At periods in the past sums were spent directly on political activity. See, e.g. Jackson, J.,\textit{Report of the Commission of Enquiry into the Affairs of Akim Abuakwa State} (1959). There may be some doubt as to whether this should be considered unproductive consumption (e.g. drinks for party activists) or investment (e.g. the production of a government which will consistently direct its efforts to the betterment of the locality).

\textsuperscript{30} Thus LRC 8/75 records grants only of tenancies for virgin lands in the Western and Central Regions. Beckett, W. H., \textit{Akokoaso} (1944), pp. 31–32, found that sales were made only to defray debts, which had usually arisen from litigation. Okalie and Kotey, op. cit., pp. 11–12, reported that sales had ceased by 1950.

\textsuperscript{31} It could be that with the passage of time communities came to appreciate that the early outright grants were bad bargains from their point of view. However, the communities whose land is most sought after today are not those who made many of the earlier grants. Thus the acquisition of land for cocoa farming moved from Akim to Brong-Ahafo, and is now notably in parts of the Western Region. The long-made complaint that too much land was being granted away, leaving insufficient for members of the communities, seems not to have carried weight, because there is still great readiness to grant tenancies for perennial crops, which are known to be perpetual in practice.

\textsuperscript{32} LRC 17/75.

\textsuperscript{33} See above, note 22. On attempts at rent control of agricultural land, one short-lived and the other now in force but ineffective, see Date-Bah's paper in this volume.

\textsuperscript{34} Adinkrah, op. cit., Chap. 6.
sometimes in practice a marketable property. While the tenant surrenders a part of the value of his produce, it is not certain that no tenants are able to accumulate wealth. There have been instances of tenants saving enough to move to the outright purchase of land.

The community which grants a tenancy acquires by the transaction benefits from the land. It does not necessarily surrender permanently its original rights. If the grant is for a limited period, the community at the end recovers its original property, subject only to the possible need for a period of fallow before the land recovers its original fertility. In those cases where the tenant is likely to remain in possession in perpetuity, the community does surrender a capital asset. In each case it receives title to a part of the value of the produce of the land for as long as the tenancy continues. The payments made by tenants are dealt with in the same way as the prices paid by purchasers, described above. Thus ultimately some of the payments are used to accumulate more wealth, which will be controlled by the district or local council, the members of the traditional authority, or the head and elders of the traditional community, but which may confer a wider benefit on the inhabitants of the locality. Some will be unproductively consumed by a section of the community.

Thus far there has been a consideration of the three classes of legal transactions which occur when land is brought under cultivation. Each has been briefly described in terms of the arrangement for the distribution of wealth. Certain aspects of subsequent developments need mention.

The possibilities of outright disposal by the acquirer, and of the grant of a tenancy by him have been mentioned. A further possibility is that he may pledge or mortgage his rights as security for a loan. While the possibility exists in law, little is known of its occurrence in practice. Such evidence as there is suggests that there has not developed a distinct class of moneylenders holding a share of land wealth very greatly disproportionate to their numbers. Pledging and mortgaging doubtless entail shifts in wealth. The terms of these transactions are, to judge from instances given in litigation, highly advantageous to the lenders. But the lenders appear to be primarily members of the farming group in each locality. While the transactions are recognised to be profitable investments, there do not seem to be lenders with the capital or inclination to concentrate large sections of the business in their hands.

36 Ibid., Chap. 5.
38 Hill, P., The Gold Coast Cocoa Farmer (1956), pp. 56–57. But there are exceptions: Hill, P., The Migrant Cocoa Farmers of Southern Ghana, pp. 186–187. A useful analysis of these transactions in practice in one village was given in Beckett, W. H., Akokrom (1944), Chap. V. He considered that indebtedness was closely correlated to the differences in incomes between families in the same rural community; ibid., Chap. VI.
The other subsequent development which needs discussion is the death of the acquirer. Obviously a redistribution occurs at this point. The law is fairly clear. In most cases the customary law of intestacy applies, and under this title to the property of the deceased passes to a group of individuals as a corporate person. This is frequently a family to which the deceased belonged while alive; in other cases there is some question as to whether the group ought to be called a family. The group may retain the inherited interests as corporate property, or may partition them among the members. Additional diffusion may result from another practice. The original acquirer sometimes wishes other persons to benefit, as well as those who are to inherit on intestacy. Therefore he sometimes takes care to give specific properties to those other persons, either by gift inter vivos or by will. The result of the passage of time would therefore appear to be a diffusion of this type of property among ever-widening circles of the population. This assumption may, however, be mistaken, for two reasons.

Firstly, it is not certain that a wide diffusion is required even by the formal legal rules. In many instances the initial inheritance will pass the property to a group which, although it may be absolutely more numerous than the original single acquirer, will not on average be a larger proportion of its generation in the population. This is the case where a person’s property passes to his or her children. If the children of acquirers are generally more numerous than the acquirers, this is merely an aspect of a growing total population. Admittedly the inheriting group is frequently wider than this. For example, in Akan customary law a man’s property passes to a group consisting of the matrilineal descendants of his mother. Thus property which belonged to one person passes in the next generation to the issue of all his uterine sisters. However, even where these rules are allowed to operate, while some diffusion occurs at the time of the original inheriting, it is likely that no further diffusion will occur thereafter. The inheriting group is replenished only by the birth of further unilineal descendants. It is probable, therefore, that, while it may grow in absolute terms, it will not grow in relation to the total population. The same argument applies if the original inheriting group partitions the property, and the individual shares are again inherited on the deaths of the holders.

39 Addu v. Bawo, Land Ct., 30 August 1951: “It is very common, according to native custom, for a husband to reward a wife for her services with part of his property before his death, in view of the fact that a widow inherits nothing.” The practice was noted by Allott, A. N., Akan Law of Property (1954, Ph.D. thesis, University of London), pp. 523–524. The device has a long history, being referred to by Bowdich, T. E., Mission to Ashantee (1819), p. 254.
40 There is a current trend towards using wills not merely to add to the list of beneficiaries but to oust the family altogether in favour of a smaller number of individuals. See Asante, S. K. B., op. cit., pp. 877–878, 130–131, on the power of an owner to do this without the consent of his family.
Secondly, this is an area where it is particularly important to look at the facts behind the formal rules. To say that a corporate group inherits the property in law is not necessarily to establish that all individual members of the group in fact obtain significant benefits from the property. There is very little evidence of the practice. Some of this evidence suggests that one member of the inheriting group, designated the “successor,” in practice assumes unfettered control of the property. This would indicate that the benefits continue to be enjoyed by one individual. However, the evidence is not unequivocal.41

It is now possible to attempt a summary of the findings so far. The general trends are towards the acquisition of extensive rights in agricultural land, amounting to significant quantities of wealth, by certain classes of persons. The first class is those who belong to communities with relatively large amounts of unalienated, fertile land, and who are physically or financially able to exploit their legal right to acquire the usufruct. Second is those who have accumulated sufficient capital to purchase valuable interests in land. Members of each of these classes have marketable properties, the wealth-producing potentiality of which may be realised by personal use, through tenants or through employees. The third class of persons holding significant wealth in land is less easy to define. It consists of those who benefit from the grants made to strangers, primarily by tenancies rather than outright, by some communities. Individuals who are granted tenancies do not appear to obtain particularly valuable rights, nor to be in position to acquire these rights over extensive areas. They may therefore be disregarded. The communities concerned are those which have held plentiful vacant fertile land, and have not sold it, but have granted it to strangers on tenancies. The individuals who benefit within these communities are

41 Hill P., The Migrant Cocoa Farmers of Southern Ghana (1963), Chap. IV, writes in terms of individual “inheritors” with extensive powers over the property, including the right to pledge it, although not the right to sell it. (Her useful point that socially there is not a strict distinction between individually owned property and family property might require some amendment to the terms in which the present problem is discussed, but would not seem to affect the main conclusion.) See also Beckett, W. H., Akokoaso (1944), p. 57; de Graft Johnson, K. E., “Succession and inheritance among the Fanti and Ewe,” in Domestic Rights and Duties in Southern Ghana (Oppong, C., ed. 1974), p. 257. But cf. Beckett, W. H., Koransang Cocoa Farm 1904–70 (1972) ISSER Technical Publications Series, No. 31, Part III, pp. 2–4, recording that a large cocoa farm was divided on the owner’s death into eleven parts: for four sons, five daughters, a niece and a grand-nephew. However, “management” of the whole area was for many years carried on by one of the eleven. There is no information as to the terms of this management, except that the manager reported annually to the owners: ibid., p. 14. Okalie and Kotey, op. cit., pp. 34–44, also show a limited tendency towards dispersal among a number of individuals. However, they also show a tendency for inheritors to neglect individual farms in favour of their self-acquired farms, the reasons being that inherited farms were older and therefore less productive, that inherited farms were liable to be encumbered by debts, and that other relatives of the deceased were liable to challenge the inheritors. This possibility also needs further investigation.
primarily those who are traditionally the leaders. They receive and dispose of such payments as are made directly to them by grantees, and also those which filter through from the stool lands accounts. It must be added that, in so far as money paid by stranger purchasers and tenants is spent on capital development projects, it tends to benefit the inhabitants of the locality where the land is situated, so that there is a general trend towards greater development in areas where it has been possible to grant land to strangers for substantial payments.

An even more concise summary points towards an accumulation of wealth in land by two classes of persons: those who belong to communities with an abundance of fertile land, with the most marked advantage going to those who acquire usufructs in extensive areas, or who are traditional communal leaders; and those who accumulate capital and use it to acquire land.

**Building land**

Much of the discussion of agricultural land applies here. It will be necessary only to set out the differences.

Members of communities have acquired usufructs by erecting buildings on communal land. Outright grants to strangers for payment have occurred. Grants of tenancies to strangers have been much rarer. The reason for this is unclear. It is not lack of legal facilities. Customary law has, in the building licence, a device for granting the use of land for building thereon, a device which could have been developed for modern purposes. And in the analogous case of the renting of existing houses and rooms for rent, where it has been held that customary law has no appropriate transaction, there has simply been a recourse to the common law lease to meet the need. Thus, had there been a demand for arrangements whereby customary communities granted land for building, but retained a right to rent, the law would have complied. One can only speculate on the cause of the communities' attitude. With increasing opportunities for consumption, they may have felt a strong need for the large sums obtainable from outright sales. Moreover, the amounts of land sold were always a small portion of the total left. Thus, when it appeared that the urban areas had entered a period of continuous expansion, it may have seemed natural to regard the opportunity of making a number of sales of land annually as offering an annual income.

An instance of acquisition of wealth with no precise equivalent for agricultural land occurs when a member of a community acquires a usufruct by cultivating land, and it then becomes building land. Here

42 Particular instances of grants to strangers met with in the reported cases are almost always outright grants. See also, e.g. Quarcoo, A. K. and others, *Madina Survey* (1967), pp. 17–21. An exception is the statutory system in Kumasi: see *Administration of Lands Act, 1962* (Act 123), ss. 5–6.
the economic nature of the land has changed, usually because of urban growth. Thus the member may find that the value of his property has greatly increased. He can benefit from this increase in wealth either by building on the land himself, or by selling his interest at the enhanced price.

Another difference in fact between building land and agricultural land is that the value of the average investment of an individual in a building enterprise is greater. Firstly, the prices paid for building land have become high, in comparison with the prices for agricultural land. This is clearly the case if one compares the prices for units of area, but it may also be the case if one compares the prices of average portions acquired, despite the fact that the average building plot is smaller than the average farming plot. The main reason is presumably that the supply of land is necessarily restricted by the circumstances of urban development. Most land is capable of agricultural use, and large areas have considerable potential. But it is only a small portion of the total land area which is suitably placed for building development at any particular time. The higher prices of building land are of course a factor which affect only strangers to an area, although the fewness of the areas in question means that most of the population are necessarily strangers for the purpose of acquiring building land.

Secondly, the average investment is greater because of the nature of the enterprise of erecting a building. Farming activities are relatively simple and uncontrolled, require little input other than labour, and give some return in the form of foodstuffs for personal consumption in a short time, even if this is not the main objective. The erection of a building requires various types of expertise, some of which usually has to be hired; compliance with various governmental regulations, which again involves expenditure; materials which have to be purchased, and are in part expensive because imported; and gives virtually no return until at least a substantial part of the enterprise is complete.

This factor of price means that the acquisition of this wealth is relatively restricted. It is open to those who have accumulated sufficient capital. It is also open to those who are able to raise sufficiently large loans. Again, we have little evidence of the characteristics of the latter class, but the immediate impression is that they are people who have already accumulated some capital, or who have incomes considerably higher than the average.

43 For instances of the rates of increase in the prices of land in areas of Accra just assuming their potential for building, see Pogucki, R. J. H., *Gold Coast Land Tenure* (1955), Vol. III, pp. 10-12.

44 A foodstuff farm on a portion of a building site gives an insignificant return in relation to the total investment in the building. A building may be usable, and may be the source of rental payments, before all the planned structures have been completed. But, unlike a farm, it produces no return whatever until substantial development has occurred.
The mode of use of buildings differs from that of farmland. One individual can personally cultivate a fairly large area of land, and if he employs labourers there is hardly any limit. In the case of buildings this does not apply. The maximum area of land which an individual can use for living accommodation is limited. Most other activities requiring buildings can be economically carried on in a relatively limited space. Therefore the most effective way for a large-scale owner to exploit this form of property is to let it on tenancies. The high initial capital cost of acquiring a building, and the inability of many people to provide this capital, means that there is a ready market for rented buildings. The form of the transaction is usually the common law lease, but the terms are determined by economic circumstances, statutory rent control being generally ineffective. Consequently lessees of private landlords are in general unlikely to accumulate wealth, while the lessors are well-placed to increase their wealth.

Finally, state activity in respect of this type of land is significant. Substantial tracts of land have been compulsorily acquired for building. The compensation passes in the same way as the price paid for private purchases. In some instances the land is then used permanently for a state activity. This need not concern us further. In the other cases the state proceeds to develop the land to a greater or lesser extent, and then to grant it to individuals. Sometimes the development extends to the erection of buildings, for example through the State Housing Corporation. These are then granted on long leases to individuals, or used to provide accommodation for state employees. Sometimes the development is no more than the drawing of land use plans and the provision of certain infrastructure, such as drainage, after which plots are allocated to individuals for them to develop, subject to some controls. It appears that in each case the state does not aim to extract the highest possible payments from those who eventually use the buildings. There is indeed some public stress on the object of making them available as cheaply as possible. However, since the supply is limited, they cannot be made available to everyone who could use them. It would appear that the selection is related in part to the existing wealth of possible applicants. Thus building plots are granted to those who can show that they will be able to erect substantial buildings, and government accommodation is

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45 See Date-Bah's paper at p. 128 et seq. of this volume.
46 The compensation may be less than the market price would have been. If the land is "stool land" as statutorily defined (see above, note 26), it can be acquired under the Administration of Lands Act, 1962 (Act 123), s. 7. The only provision for compensation in this case is that any moneys accruing as a result of the state's dealings with the land are to be paid into the stool lands account. Again, if the land is "land to which this Act applies," the state may under s. 10 authorise its occupation and use for any purpose. In this case the state has merely a discretion to pay into the stool lands account such annual rent as it deems proper. It is only when the land is acquired under the State Lands Act, 1962 (Act 125), that full compensation is paid under the heads listed in note 5 above.
provided for the higher ranking civil servants in preference to the lower ranks. In principle estate houses are granted to those who have been longest on the waiting list. Further research is necessary to determine the factors which lead to a person being on the list, and whether there is any departure from the principle. The rent payable for these houses is more than could be afforded by a person with an average income. Thus the general result is to make property available at less than its market price to persons selected in part by the characteristic of having more wealth than most.47

We may summarise the trends in the distribution of wealth in building land as follows. In general the same trends exist as with agricultural land. However, greater initial wealth is needed for accumulation; and once a person fulfils that condition the extent of his accumulation tends to be greater. The communities able to benefit are fewer in number. There is greater state participation, and it tends to increase the wealth of those already relatively wealthy. Put more concisely, the trends towards differentiation of quantities of wealth are more pronounced in the case of building land, with the possible exception of those resulting from state participation.

Conclusion

This paper has argued that wealth in land has been and is accumulating in the hands of a section of the population, and has attempted to identify the characteristics of that section. Emphasis has already been placed on the limited nature of the evidence used. Assuming that the conclusions are nevertheless correct, it is necessary also to emphasise the limited nature of the enquiry.

The discussion has been concerned with only one type of wealth. Other types, such as industrial plant or trading capital, might emerge as more important if one were constructing a complete picture of the distribution of wealth in Ghana. Only a portion of that task has been attempted here. If other sections of the picture are to be investigated, different methods and materials will be needed.48

The other important limit on the enquiry has been the exclusion of the more fundamental causes of the processes described. There has been mention of causes such as the prior accumulation of capital by some persons, which has enabled those persons to purchase land, or the varying productive potential of land, which has led to the purchase of land in certain areas in preference to that elsewhere. We have not

17 The Lands Commission (Amendment) Decree, 1973 (N.R.C.D. 192), provides, subject to exceptions, that “no person shall be granted more than one plot of land by the [Lands] Commission for residential purposes in the same city or town. where the plot of land forms part of public lands.” This provides a minor restriction on accumulation.

18 Another section, adjacent in parts to this, is drawn in Luckham’s paper at p. 177 of this volume.
looked further, to the facts underlying these proximate causes. But the prior accumulation of capital occurred within a certain economic context, which produced this accumulation by some persons and not by others. Similarly, the greater productive potential of some land has arisen from an economic context, in which certain products of land have a greater market value than others. For the purposes of the present discussion this wider context has been assumed, as a set of given factors. It is believed that enquiries such as this can serve to clarify particular areas of understanding. With limited resources knowledge has to be built up in this way, each enquiry investigating a somewhat narrow area. There is a need for further studies which will examine those factors which have been taken as given here.

One question of causation needs further discussion. To what extent has the law caused the social developments which have been discussed? It has been seen that, each time land is brought into use, certain rules of law are said to operate, permitting the acts of user and directing the economic benefits toward certain persons. There is clearly a correspondence between the prescriptions of legal rules and social events. It might therefore appear that the rules cause the particular distribution of the resultant wealth. Such a view could be questioned as assuming an autonomy in legal rules which does not exist. The rules are made and applied by people within a certain social context, and it is doubtful in what sense legal rules can be said to “do” anything. However, the answer to this objection is that it may be convenient to speak in this abbreviated way to describe the behaviour of those who operate a legal system. A different objection will be examined here. Given that the legal rules exist and are applied, can they be so influential as to cause major social trends of the type described?

It is not immediately obvious that all the rules even purport to produce action. Many appear to be facilitative, not directive. Thus certain rules say that a member of a customary law community may cultivate vacant communal land, and that if he does so he acquires a usufruct. These rules do not say that anyone must cultivate land, merely that if they do so certain legal conclusions are to follow. The existence of the rule is compatible both with very extensive use of the facility, and with almost complete disuse. However, this argument places undue emphasis on the mode in which certain selected parts of the law are customarily expressed. The system as a whole does appear to be directive. Thus the rules just taken as an example are necessarily related to rules which are directive: those, for example, which say that strangers are not to cultivate land without permission, and which forbid interference with the usufructuary’s enjoyment of the land.

Can it then be said that the trends in the accumulation of wealth result partly or entirely from the legal rules? There is no clear evidence
of the motivation of the actors in this development, of the sort, for example, that social surveys might produce. We might attempt an answer by speculating whether the course of development might have been different had the law been different. In this respect there is some suggestive evidence from situations where rules of law were opposed to trends produced by other social factors. An example is the old rule of law which prohibited the community member from alienating his usufruct to a stranger without the consent of the community. The social trends have been towards greater alienability of interests in land, and a decline in the powers of the traditional communities. The result of the clash between legal rules and social trends has been noted: the legal rules were changed to allow the alienations. Thus the law in no way prevented, changed or caused social development. Rather, social development swept away a law which stood in its path. The same result emerged in other, similar instances.49 This suggests that, far from the rules of law being a cause of the social development recorded, the reverse has been the case.50

49 Thus the allodial title has probably become alienable to individuals; the usufruct has become an unrestricted interest, the holder of which may exclude others from entering the land; the letting of buildings and rooms for rent, not permitted under customary law, is widely practised through the medium of common law; customary law principles concerning the inviolability of titles have been modified by importing (with little legal justification) the common law doctrine of estoppel by acquiescence.

50 Cf. the view of Renner, op. cit. He also argued that social change occurred without any effective influence from the law. But he considered that the legal norms remained unchanged, the new social order almost always being accommodated within the old forms. To some extent this is true of Ghanaian land law. For example, the traditional scheme of land tenure, in which the allodial title is held by communities, and individuals hold at most the usufruct, is still frequently asserted, although the social significance of the allodial title has disappeared. See Asante, op. cit., pp. 872–877, 125–130. However, it would not be correct to argue that formally the law has remained unchanged, as is shown by the examples of legal change just given. On law as a cause of social change, see also Date-Bah, S. K., “Aspects of the role of contract in the economic development of Ghana” [1973] J.A.L. 254. There contract law, regarded as facilitative law, is repeatedly said to have had a "role" in economic development. This seems to mean that the experience of the land law suggests that, if social development requires the law to provide a certain facility, it will be provided, if necessary, through change in the law.
THE ECONOMIC BASE OF PRIVATE LAW PRACTICE

ROBIN LUCKHAM*

Introduction

In this essay I shall discuss the social relations through which the production and sale of private practitioners’ legal skills are organised.

I shall show to begin with that law practice is predominantly organised on an entrepreneurial rather than a bureaucratic basis. Periodic complaints are made by those concerned with the administration of the profession that chambers are too small, that they are poorly organised, that accounts are badly kept and that there are too few lawyers willing to undertake routine chamber-work of the kind that solicitors carry out in Britain. I shall suggest on the other hand that these aspects of law practice are a natural consequence of lawyers’ conditions of work: the extremely variable character of their workloads, the difficulty of organising their time in advance and the heterogeneity of their clientele. Such conditions of work result in turn from the fact that lawyers on the whole service the legal needs of the rural and informal sectors of the economy rather than the urban and large-scale sectors. Just as small-scale craft production is often a fairly efficient way of organising some kinds of economic activity with a variable work-flow, such as the building trade, so too it may be an appropriate way of organising law practice in an economy in which the activities of small-scale capitalists like the cocoa farmer, the lorry owner or the trader are still so important.

Lawyers’ relationships with their clients, second, are multiplex and by no means confined to the simple cash nexus of fees for service. Nevertheless the highly personal relationships they keep up with friends, relatives, stools and community organisations, old clients, court clerks, letter writers and the like help to keep in operation the commercial relations of law practice. From the lawyer’s point of view the creation of such a network of people who are either potential clients themselves or will send clients his way is an essential aspect of becoming a successful practitioner.

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Because, third, there is little standardisation in the organisation of practice, there is also much variation in the ways that lawyers extract money from their clients. Some lawyers base their fees on the value to the clients of their output, some on their own inputs of labour time and some on their clients' market or bargaining power. Behind this, however, all lawyers face a contradiction between their fiduciary role as friends and protectors of clients, tied to them by personal and professional obligations, and the fact that they depend for their livelihood on what surplus funds they can get from them. This contradiction is seldom satisfactorily resolved. It is manifest in the variety of ways legal practitioners can manipulate both their personal and their professional relationships for commercial ends—as for example in the use some of them make of strategic adjournments to ensure payment of fees by clients.

Lastly, I shall attempt to demonstrate some of the ways an internal stratification between lawyers themselves develops from the conditions of law practice. The more senior lawyers, those practising in the higher courts, in the more prestigious areas of practice like the customary law of land and inheritance, with a more developed client network, make more money than their less fortunate colleagues. They also acquire more professional standing, take a more active role in the Bar Association and adhere to the values of the profession more than those who have a less material stake in it.

The Organisation of Practice

Most practising members of the Bar in Ghana can be regarded as small-scale legal entrepreneurs. More than three-quarters (78%) practise from small chambers of no more than three lawyers: 30 per cent entirely on their own and 48 per cent in the same place as only one or two other lawyers. Sharing chambers with other lawyers does not mean, furthermore, that they necessarily share clients, work or money. Only fourteen per cent of the private practitioners interviewed work in law firms or partnerships properly so called. The remainder of those who share chambers usually split the rent payments for the premises and may co-operate occasionally by holding each other's briefs; but do not work together on a routine basis.

Those who work in law firms are quite emphatic about the advantages:

"We started as a partnership, then became an unlimited liability company . . . But whether or not you want to have a law firm depends on what you want to do. The difficulty is that most people don't understand that although you share your takings you are better off, because you have more time to do a good job, knowing he's doing good work too." (Lawyer in Accra law firm)
"X. and Y. I think is one of the most successful partnerships in operation in Ghana today. I met X. only once before we both returned from the U.K. We were both at a loose end in Kumasi and were not going into chambers with any of the seniors. So we decided to set up together... Partnership, you know, depends very much on the attitude of partners and their relative success. X. knows he'll never have to carry me out of the money he earns and vice versa. If there was any disparity in earning power this would soon lead to mutual recriminations about not keeping accounts properly and so on." (Senior Kumasi practitioner.)

And some of those who do not regretted that they had been unable to establish more routine working arrangements with other lawyers:

"It's better if you can get someone with whom you can work. The moment you build up an active practice you can't work alone. You're running the whole hierarchy of courts and you can't do it alone." (Senior Kumasi practitioner.)

"There are not enough hours in the day. There are many cases which you'd rather conduct yourself, but you may have more than one case in different courts and therefore you may have to ask someone else to do it." (Accra practitioner.)

Yet the fact is that there are no more than half a dozen law firms in Ghana and at most a dozen genuine partnerships. Four of the law firms are based in Accra, the largest of which, Lynes and Quashie-Idun & Co., has fluctuated in size from between two to four partners with five to nine juniors in their employ. There is one such firm in Kumasi; and another in Sekondi-Takoradi which has small branch offices in Cape Coast and Accra. Of these law firms two, Lynes and Quashie-Idun in Accra and J. J. Peele in Kumasi, are the linear descendants of leading firms of expatriate lawyers, although both are now fully staffed and run by Ghanaians.

The division between the two or three English firms which specialised in solicitors' work and the more numerous group of local practitioners most of whom practised on their own was a feature of the Gold Coast Bar from the beginning of this century. The clients of the English firms were for the most part expatriate companies and concession-hunters negotiating concessions for gold, diamonds and timber in the Colony. Giles Hunt, the Englishman who established the first and most successful of these firms, estimated in his evidence before the West African Lands Committee in 1913 that his firm had drawn up the documents for no less than 80 per cent of the concessions negotiated between European concessionnaires and the chiefs between 1900 to 1913. None of the expatriate firms, however, had more than two or three partners. They had little impact on the local profession because they
neither trained nor brought any of the Gold Coast lawyers in as partners until the late 1950s when J. J. Peele recruited a Ghanaian who later took over the chambers (Giles Hunt on the other hand wound up its operations entirely after the last of its expatriate partners left the country).

The Gold Coast lawyers on the other hand made their living mainly from litigation over land, inheritance and chieftaincy matters, though most did a little criminal work as well. The business that came to them from their clients—for the most part chiefs, merchants and wealthy farmers—came to them on a far from regular basis and there was little incentive to standardize their own methods of work. The first attempt to set up a large firm of local lawyers was the establishment of Law Chambers & Co. in 1960. It is interesting that the initiative for the formation of these chambers was mainly political. The C.P.P. government was worried about the opposition shown to it by members of the legal profession and wanted to bring together lawyers sympathetic to the regime who could handle cases of a quasi-political nature for the party as well as taking on legal work for the public corporations for which the Attorney-General's Department did not have adequate staff. As one of the founders explained it.

"I established Law Chambers along with X. and others... We formed the partnership inside the party. One reason for it was that there were now so many of our young lawyers coming out and there didn't seem to be enough work for them to do. If we didn't find work for them our lawyers might turn against the party..."

The chambers was given a loan to set it on its feet; and circular letters were sent to public corporations asking them to use it for their legal work. Its help was enlisted to establish legal departments in the public corporations; but meanwhile it did their work on a retainer basis. The work thus passed on to the chambers was enough to allow it to operate quite successfully for a year or two. There were up to six partners who shared the proceeds on a formula agreed among themselves; and (according to one of the former partners) up to fifteen salaried juniors at any one time. But the chambers soon began to disintegrate. One of the seniors left because (to use his words):

"The chambers had got too large for us to have any control of what was going on. You see political considerations came in and we found ourselves having to take every young lawyer who could not stand on his feet."

Another (Kwaw Swanzy) left soon afterwards to become Attorney-General. In a fairly short time Law Chambers ceased to operate as a law firm and it became, like most other chambers, a group of loosely associated lawyers working in the same place.
This story is told because it illustrates some of the difficulties in the way of the establishment of law firms in Ghana. Government support made it easier to set the Law Chambers up on a large scale; and yet politics contributed to its disintegration. Its size made it unwieldy. After it had only been in operation for two or three years it was involved in one of the few suits to have been brought against lawyers for professional negligence. The suit was successful in exposing the absence of co-ordination between the lawyers working in the firm. And finally its continuity was disrupted by the disappearance of its partners into politics or business, onto the Bench or into practice on their own.

In contrast the largest and most successful firm to be set up under purely private initiative, Lynes and Quashie-Idun, was created by the fusion, in 1963, of an expatriate partnership, Lynes and Cridland, with a firm of local lawyers, E. N. P. Sowah & Co. Neither of these had been in existence very long (E. N. P. Sowah & Co. since 1958, Lynes and Cridland since 1960, the latter having been set up by two expatriate lawyers who formerly worked for other European firms). Both specialised in solicitors' work and already drew much of their custom from partnerships and companies rather than individual clients. Not long before the merger was completed Cridland left for Britain and Sowah was elevated to the Bench, handing over to his junior partner J. Quashie-Idun. The success of the firm is based on the establishment of long term relationships with clients, most of whom are foreign firms, banks and insurance companies. The transactions carried out for them are mostly solicitor's work of a fairly routine and recurring kind. One of the partners estimated that 90 per cent of the firm's time is devoted to non-contentious work and only ten per cent to litigation, though, as he put it, "litigation is the jam on the bread. You see it accounts for about 25 per cent of our receipts." The firm was fortunate enough to secure the services of a former registrar as their chief managing clerk, and through him to build up a smooth working relationship with the court registries. Just as a building contractor might contract out his more difficult plumbing work to a master plumber, so too the firm has often contracted out its court work in more difficult cases to other leading advocates.

A crucial test is whether a firm can survive as an on-going enterprise when its partners move on to other things. The test was one that Lynes, Quashie-Idun passed in very difficult circumstances when Lynes was deported from the country in 1970 after Quashie-Idun and Reindorf between them had done an all too effective job of destroying the

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government's arguments in the Sallah case.² (And similarly two of the other major law firms in Accra, Quist, Brown and Aidoo and Bruce Lyle, Bannerman and Asamoah have survived, respectively, the death and absence from the country of their senior partners.)

In contrast the life span of many other partnerships is short. As two senior lawyers put it (the first from Kumasi, the other from Accra):

“You find in Ghana here many mushroom partnerships. They join today and you see within three months they are separated. They just can’t work together.”

“I don’t think lawyers should be allowed to form companies, because a lawyer is primarily responsible as an individual. But if firms are formed, they must be registered as such unlike most of those now operating. How many of them now publish balance sheets? How long do they last?”

Several lawyers stressed that Ghanaians are highly individualistic and find it difficult to establish trustful business relationships with other people. I regard this, however, as rather a doubtful proposition, which would be hard to prove. More satisfactory explanations can be found in terms of the professional training of lawyers, their careers, the kind of legal work that normally comes to them and the expectations of their clients. I shall not comment on the training of lawyers in detail here. The points that are often made are that the great majority of senior lawyers were trained in Britain as barristers rather than solicitors; that the Ghana trained lawyers who first began to practise in the mid-60s have had a primarily academic training and that their pupillage has either been of little value or has succeeded in passing on the attitudes and work habits of their seniors, including the preference of advocacy over office tasks. Those who have trained as solicitors tend indeed to be scornful of their colleagues’ work, one going so far as to claim that, “There are no more than six lawyers in Ghana who could draw up a simple lease through which I could not drive an express train.” Yet in Ghana the two roles of barrister and solicitor have always been fused. In this way Ghanaian lawyers resemble American attorneys much more than they do either branch of the British profession. When practitioners were asked if they saw themselves as being mainly advocates in the court or as solicitors doing office work or as both about equally, no less than three quarters (75%) thought they practised equally as both. 20 per cent mainly as advocates and only six per cent mainly as solicitors. On the other hand when they were asked what they would prefer to be, three quarters of them (73%) said they would prefer to specialise, most of them (62 % of the total) in advocacy.

Career lines are equally unfavourable to practise in law firms. Over the 25 years since self-government, successful practitioners have been able to move rapidly onto the Bench, into politics or into business, even bigger firms being vulnerable to the disappearance of their senior men, still more so the small partnerships. Yet even in earlier days, when politics was a hobby rather than an occupation and when African practitioners could rarely look forward to promotion to the Bench, practice was normally an individual rather than a collective endeavour. The rapidity of career mobility has no more than aggravated other more enduring obstacles to the bureaucratisation of law practice.

The most important of these obstacles is the highly variable character of the work that lawyers do. Small-scale practice by individual legal entrepreneurs is often a more rational way of organising the flow of legal work than practice in the more rigid framework of a large law firm. In table 1 we see the workload of lawyers tabulated in three different ways, first according to type of work activity, second according to the substantive area of legal practice dealt with and third by type of client represented. Most private practitioners find court work is the most time consuming activity of all. Almost half the lawyers in private practice (47%) spend 40 per cent or more of their working time in court and about a quarter of them (exactly 25%) half or more of their time there. Lawyers have to spend hours of their time hanging around the courts waiting for their cases to come up, perspiring underneath their wigs and gowns in the hot courtrooms. There is no certainty that all the cases listed on a given day will receive a hearing. The progress of a case through the courts is almost invariably punctuated by frequent adjournments. The management of time in these circumstances becomes highly problematic. No amount of good planning in chambers can anticipate all the difficulties and delays in court. As a partner in one of the leading Accra law firms put it:

"The main difficulty is time. You find yourself jumping from one subject to the other—having to prepare your cases, attending to clients and fitting all that in. A lot of time is wasted in the courts—even though I limit my appearances to as little as possible. A Q.C. who came out from England to defend... was surprised to see how many cases we do. You see he does only about one case a week and of course he can do a first class job."

The management of the uncertainties of time in the courtroom is also a problem of managing the uncertainties of human relationships:

"It is very much a question of how to win friends and influence people," said a senior Kumasi lawyer, "of human management rather than law, because the technical side tends to obscure the human side, which is much more intractable. Relations with the
Bench are very important. If the judges know, for example, that when you cite a case, you are citing it accurately and are not trying to fool them, then they'll be much more inclined to listen to your argument."

### Table 1

**DIVISION OF PRIVATE PRACTITIONERS' TIME BY TYPE OF WORK ACTIVITY AND AREA OF PRACTICE; AND DIVISION OF PRACTITIONERS' RECEIPTS BY TYPE OF CLIENT**

1. **Per cent of all practitioners spending given proportions of their working time on each type of work activity.**

<table>
<thead>
<tr>
<th>Type of activity</th>
<th>None</th>
<th>1%–19%</th>
<th>20%–39%</th>
<th>40% or more</th>
<th>Total %</th>
</tr>
</thead>
<tbody>
<tr>
<td>Administration of practice</td>
<td>1.7</td>
<td>15.7</td>
<td>60.4</td>
<td>22.3</td>
<td>100</td>
</tr>
<tr>
<td>Conferring with client firms and businesses</td>
<td>37.3</td>
<td>49.1</td>
<td>11.0</td>
<td>2.5</td>
<td>100</td>
</tr>
<tr>
<td>Conferring with individual clients</td>
<td>8.4</td>
<td>39.5</td>
<td>44.6</td>
<td>7.5</td>
<td>100</td>
</tr>
<tr>
<td>In court</td>
<td>3.3</td>
<td>12.3</td>
<td>37.7</td>
<td>46.7</td>
<td>100</td>
</tr>
<tr>
<td>Conferring with colleagues</td>
<td>28.9</td>
<td>68.6</td>
<td>2.5</td>
<td>0.0</td>
<td>100</td>
</tr>
<tr>
<td>On business activities other than law practice</td>
<td>75.2</td>
<td>20.5</td>
<td>4.3</td>
<td>0.0</td>
<td>100</td>
</tr>
</tbody>
</table>
2. Per cent of all practitioners spending given proportions of their working time in each area of practice.

<table>
<thead>
<tr>
<th>Area of practice</th>
<th>None</th>
<th>1%-19%</th>
<th>20%-39%</th>
<th>40% or more</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Land and customary law</td>
<td>2.2</td>
<td>17.2</td>
<td>33.3</td>
<td>47.3</td>
<td>100</td>
</tr>
<tr>
<td>Civil injury</td>
<td>14.3</td>
<td>44.0</td>
<td>25.3</td>
<td>16.5</td>
<td>100</td>
</tr>
<tr>
<td>Commercial and company law</td>
<td>34.1</td>
<td>45.1</td>
<td>7.7</td>
<td>13.2</td>
<td>100</td>
</tr>
<tr>
<td>Criminal</td>
<td>5.4</td>
<td>41.3</td>
<td>34.8</td>
<td>18.5</td>
<td>100</td>
</tr>
</tbody>
</table>

3. Per cent of all practitioners deriving given proportions of gross receipts from each type of client.

<table>
<thead>
<tr>
<th>Type of client</th>
<th>None</th>
<th>1%-19%</th>
<th>20%-39%</th>
<th>40% or more</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Large firms (including foreign companies)</td>
<td>47.5</td>
<td>28.7</td>
<td>11.15</td>
<td>12.3</td>
<td>100</td>
</tr>
<tr>
<td>Small firms and partnerships</td>
<td>22.8</td>
<td>43.9</td>
<td>21.9</td>
<td>11.3</td>
<td>100</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Less than</th>
<th>50%</th>
<th>69%</th>
<th>89%</th>
<th>100%</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Individuals</td>
<td>15.2</td>
<td>19.1</td>
<td>23.8</td>
<td>42.1</td>
<td>100</td>
</tr>
</tbody>
</table>
One might have expected that the amount of lawyers' court work would be associated with the organisation and size of their chambers. For to the extent that court work increases the variability of a practitioner's work it should make it harder for him to agree on a division of labour with others. As we see in table 2 lawyers in the larger chambers tend to spend slightly less time on court work than those in smaller chambers. Yet the relationship is a weak one: and further there is no association one way or the other between the organisation of chambers (whether or not a law firm) and the amount of time spent in court. Indeed remarkably few lawyers share any proportion of their workload at all with others, be they colleagues in their own chambers or outside them. As we see in table 1, all but two and a half per cent of practitioners spend less than twenty per cent of their working time conferring with colleagues. Twenty-nine per cent indeed said that in the normal course of their work they put aside none of their time at all for such consultations.

One reason for this may be that the administrative tasks of practice as well as those of court work are far from routine. A lawyer cannot predict how many briefs will come to him month by month, nor how much time he will spend preparing them. Nor is filing of papers, negotiating an insurance claim, interviewing a client or ascertaining the validity of title to land always straightforward when practitioners have to deal with the vagaries of inefficient registries, cumbersome bureaucracies and illiterate clients. Most lawyers say (table 1) they spend a substantial amount of time on the administration of their practice, though it is usually less than that spent on court work. Three-fifths of them (60%) spent between twenty per cent and 40 per cent of their time on such tasks and almost a quarter (22%) 40 per cent or more of their time (only 8%, however, giving it more than half their time). Slightly less time is spent by lawyers interviewing their clients, the predominant portion of this for most practitioners being given over to individual clients rather than businesses and firms.

Another feature of the small-scale entrepreneurial law practice is that relatively few lawyers specialise in one field of practice exclusively. About 60 per cent of practitioners specialised to the extent of spending more than half their time on practice in any one of the four main areas of practice: land and customary law, civil injury, commercial and company law and criminal law. But beyond that the level of specialisation sharply declines, only 27 per cent spending more than 60 per cent of their time on any one area.

3 These four areas between them account for almost the entire range of lawyer's activities in Ghana. There are one or two other fields in which lawyers occasionally practice, like matrimonial causes or constitutional law; but these account for no more than an insignificant proportion of the total.
The Economic Base of Private Law Practice

Table 2

PER CENT OF PRACTITIONERS IN CHAMBERS OF GIVEN SIZES SPENDING GIVEN PROPORTIONS OF THEIR TIME IN COURT

<table>
<thead>
<tr>
<th>Number of lawyers in chambers</th>
<th>less than 20%</th>
<th>21%-39%</th>
<th>more than 40%</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>One</td>
<td>12.1</td>
<td>36.4</td>
<td>51.5</td>
<td>100</td>
</tr>
<tr>
<td>Two or three</td>
<td>18.2</td>
<td>34.5</td>
<td>47.3</td>
<td>100</td>
</tr>
<tr>
<td>Four or more</td>
<td>21.7</td>
<td>34.8</td>
<td>43.5</td>
<td>100</td>
</tr>
</tbody>
</table>

The most popular area is that which I have grouped loosely together under the heading of "land and customary law," including succession to property and position within the family and chieftaincy disputes as well as land law properly so called. Fewer than a fifth of the lawyers in the sample spend under twenty per cent of their time on such matters; almost half (46%) more than 40 per cent of their time on them and a third (33%) more than half their time. While relatively fewer lawyers actively specialise in civil injury and criminal law practice respectively, the great majority of lawyers devote at least a small portion of their time to these two areas. Remarkably few lawyers however specialise in commercial law and company law practice (company formation, liquidations, taxation, business contracts and all other types of commercial or company law work). Over three quarters of the lawyers in private practice (77%) said they spend less than twenty per cent of their time on this kind of work; and a third (34%) say they do no work in this field at all. Law practice in sum, is still much less dependent on transactions in the urban capitalist sector of the economy than it is on property transactions in the rural sector.

In table 3, these areas of practice are cross-tabulated with the proportion of time each lawyer spends in court. As one would expect those who specialise in criminal law spend very much more of their time in court than other practitioners. None of those who devote more than 40 per cent of their practice to criminal law spend less than twenty per cent of their time in court, and about three quarters (73%) spend more than 40 per cent of their time on court work. Those who work mainly in the field of land law tend also to spend slightly more of their time in
court than others. On the other hand those who specialise in commercial and company law and civil injury tend to do relatively less court work, the latter spending more time negotiating claims with insurance companies than litigating about them.

As one would also anticipate, areas of specialisation are related to the division of labour between practitioners (table 4). Lawyers who devote much of their practice to land, succession and chieftaincy matters tend to work more frequently on their own or in small chambers of two or three lawyers. The same tendency is observed among those who specialise in criminal cases. Lawyers specialising in civil injury work do not seem to show a strong tendency either to work in small chambers or in larger ones. As one might expect, those who specialise in commercial law practice are more frequently to be found in the larger chambers of four or more practitioners. On the other hand the proportion of lawyers in each area of specialisation working in law firms (see the right hand column of table 4) yields no consistent pattern of results except a tendency of those specialising in civil injury not to work in firms. This suggests that the formal incorporation of chambers as firms or partnerships may be less important than the size of the chambers and the actual working arrangements among its partners.

Another important influence on the organisation of law practice is the characteristics of the clients who come to a lawyer’s chambers. This theme is taken further below, but for the moment let us concentrate on one important characteristic: whether the clients are individuals—acting either on their own behalf or that of their families, communities or stools—on the one hand or business firms and partnerships on the other. In table 1 above, we see that the great majority of lawyers base their practice on individual clients, 85 per cent of them deriving more than half their gross receipts and no less than 42 per cent deriving between 90 and 100 per cent of their income from this source. On the other hand, almost half (48%) said that they do no work at all for the larger firms and foreign companies and a little under a quarter (23%) said they do no work at all for the smaller businesses and partnerships.

As one would expect, the characteristics of practitioners’ clientele are strongly related to the kind of law work they do. In table 5 we see that those who specialise most in the areas of land law, civil injury and criminal practice, especially the latter, derive relatively small proportions of their receipts from business firms and partnerships, compared with those who specialise in commercial law practice. For each of these areas of practice represents a different kind of articulation between law work and a capitalist economy. The lawyers who specialise in land law take part in the regulation of property relations, for the most part in the rural sectors of the economy. Their clients are individuals but
most often individuals acting in their capacity as head of a family, a community or a stool. Most of the civil injury or insurance lawyers act on behalf of isolated individuals and negotiate their claims with the State Insurance Corporation or with the private insurance companies. A few, however, work for the insurance companies themselves, the majority of which are local branches of multi-national insurance firms. Criminal lawyers again represent individuals qua individuals. Apart from the fact that their services are sold on the market, their work is not directly related to the functioning of the economy; though indirectly modes of economic production both determine what activities are defined as crimes and generate the social conditions like rapid urban growth which stimulate criminal activity.

<table>
<thead>
<tr>
<th>Area of practice</th>
<th>Proportion of time devoted to area of practice</th>
<th>Proportion of time spent in court</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Less than 20%</td>
<td>20%-39%</td>
</tr>
<tr>
<td>1. Land and customary law</td>
<td>Less than 20% 11.1</td>
<td>44.4</td>
</tr>
<tr>
<td></td>
<td>20%-39% 10.3</td>
<td>37.9</td>
</tr>
<tr>
<td></td>
<td>40% or more 15.4</td>
<td>33.3</td>
</tr>
<tr>
<td>2. Civil injury</td>
<td>Less than 20% 12.5</td>
<td>31.3</td>
</tr>
<tr>
<td></td>
<td>20%-39% 4.3</td>
<td>47.8</td>
</tr>
<tr>
<td></td>
<td>40% or more 30.8</td>
<td>38.5</td>
</tr>
<tr>
<td>3. Commercial</td>
<td>Less than 20% 9.2</td>
<td>36.9</td>
</tr>
<tr>
<td></td>
<td>20%-39% 28.6</td>
<td>42.9</td>
</tr>
<tr>
<td></td>
<td>40% or more 25.0</td>
<td>41.7</td>
</tr>
<tr>
<td>4. Criminal</td>
<td>Less than 20% 23.1</td>
<td>35.9</td>
</tr>
<tr>
<td></td>
<td>20%-39% 3.2</td>
<td>41.9</td>
</tr>
<tr>
<td></td>
<td>40% or more 0.0</td>
<td>26.7</td>
</tr>
</tbody>
</table>

4 The questionnaire did not unfortunately distinguish between these and individuals acting in their own capacity.
5 These are classified in the tables as devoting their time to company and commercial practice, rather than civil injury as such.
### Table 4

**PER CENT OF LAWYERS IN EACH AREA OF SPECIALISATION WORKING IN CHAMBERS OF GIVEN SIZE AND IN LAW FIRMS**

<table>
<thead>
<tr>
<th>Proportion of time devoted to area of practice</th>
<th>Number of lawyers in chambers</th>
<th>Proportion working in law firms</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>One</td>
<td>Two or three</td>
</tr>
<tr>
<td>Land and customary law</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Less than 20%</td>
<td>20.0</td>
<td>46.7</td>
</tr>
<tr>
<td>20%-39%</td>
<td>14.3</td>
<td>53.6</td>
</tr>
<tr>
<td>40% or more</td>
<td>34.1</td>
<td>51.2</td>
</tr>
<tr>
<td>Civil injury</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Less than 20%</td>
<td>23.9</td>
<td>50.0</td>
</tr>
<tr>
<td>20%-39%</td>
<td>30.4</td>
<td>47.8</td>
</tr>
<tr>
<td>40% or more</td>
<td>15.4</td>
<td>69.2</td>
</tr>
<tr>
<td>Commercial</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Less than 20%</td>
<td>29.2</td>
<td>53.8</td>
</tr>
<tr>
<td>20%-39%</td>
<td>16.7</td>
<td>50.0</td>
</tr>
<tr>
<td>40% or more</td>
<td>9.1</td>
<td>36.4</td>
</tr>
<tr>
<td>Criminal</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Less than 20%</td>
<td>17.9</td>
<td>53.8</td>
</tr>
<tr>
<td>20%-39%</td>
<td>30.0</td>
<td>50.0</td>
</tr>
<tr>
<td>40% or more</td>
<td>35.7</td>
<td>42.9</td>
</tr>
</tbody>
</table>

* "Firms and Partnerships" amalgamates the two categories of "large firms (including foreign companies)" and "small firms and partnerships" shown in table 1.

### Table 5

**PER CENT OF LAWYERS IN EACH AREA OF SPECIALISATION DERIVING GIVEN PROPORTIONS OF GROSS RECEIPTS FROM FIRMS AND PARTNERSHIPS**

<table>
<thead>
<tr>
<th>Area of practice</th>
<th>Proportion of time devoted to each area</th>
<th>Proportion of receipts from firms and partnerships</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Less than 20%</td>
<td>20%-39%</td>
</tr>
<tr>
<td>Land and customary law</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Less than 20%</td>
<td>50.0</td>
<td>16.7</td>
</tr>
<tr>
<td>20%-39%</td>
<td>51.9</td>
<td>25.9</td>
</tr>
<tr>
<td>40% or more</td>
<td>61.9</td>
<td>26.2</td>
</tr>
<tr>
<td>Civil injury</td>
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<tr>
<td>Less than 20%</td>
<td>53.1</td>
<td>26.5</td>
</tr>
<tr>
<td>20%-40%</td>
<td>60.9</td>
<td>13.0</td>
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<tr>
<td>40% or more</td>
<td>61.5</td>
<td>38.5</td>
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<tr>
<td>Commercial</td>
<td></td>
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<tr>
<td>Less than 20%</td>
<td>68.7</td>
<td>23.9</td>
</tr>
<tr>
<td>20%-40%</td>
<td>0.0</td>
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<tr>
<td>40% or more</td>
<td>8.3</td>
<td>16.7</td>
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<tr>
<td>Criminal</td>
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<tr>
<td>Less than 20%</td>
<td>41.5</td>
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<tr>
<td>20%-40%</td>
<td>66.7</td>
<td>23.3</td>
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<tr>
<td>40% or more</td>
<td>75.0</td>
<td>12.5</td>
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Only those who specialise in commercial and company law work are directly articulated with the central mechanisms of the capitalist economy, in industry and in commerce. Of these again relatively few undertake work for the multi-national firms, despite the pivotal position of the latter in the economy. Nevertheless, they are a distinctive group. Not only do those who specialise in commercial and company law derive a higher proportion of their income from firms than other practitioners (table 5), but also they share several other characteristics. They tend to practice from larger chambers and are more often organised in law firms (table 4). They spend less time on court work and more on the administrative or solicitor’s side of practice (table 3). And they also have more regular clients than other practitioners. All of these are different facets of the bureaucratisation of law practice. It is interesting that they are for the most part characteristics we have found to be absent in the profession as a whole, reinforcing the argument made earlier that it is the economic basis of the greater part of law practice in the rural sectors of the Ghanaian economy and of Ghanaian society which explains the tendency of most practitioners to act as small-scale legal entrepreneurs with little routine organisation of their work. Things would no doubt be different if lawyers felt there were substantial material advantages to be gained by doing more solicitor’s work for the business community. But they do not: as we shall see later, the small group of commercial and company lawyers in large chambers do not seem to accumulate more wealth than their colleagues, nor to be any more likely to acquire status within the profession. How far this situation arises because of the relatively small size of the business sector, its lack of dynamism and subordination to foreign capital; and how far because lawyers have been less well equipped to make use of available opportunities than other professional groups like the accountants (who do a fair amount of work in areas like company formation which could equally well be done by lawyers) it is impossible to determine.

**Lawyers and Their Clients**

“If you’re doing your work seriously, not doing politics or other odds and ends, if you’re single-minded it [the relationship with a client] is a purely commercial relationship. You come and you bring your case and then you pay.” (A senior and highly successful Kumasi practitioner.)

Many other lawyers also see their relationships with their clients in terms of the rules of the marketplace. Relatively few, however, can settle the terms on which clients come to them without at least some regard to their social circumstances and expectations. The complaints that private practitioners make about their clients suggest some of the
difficulties of meeting these expectations through the market nexus in which their contacts with clients are organised. First, it was alleged, clients fail to differentiate a lawyer's professional role from his role as a private individual and member of the community, to whom any problem, however small, may be brought, and whose privacy can always be intruded upon:

"I hate being a solicitor—sitting in my office talking to clients who will take four hours to tell a story which should only take five minutes . . . and then they'll go and come back the very next day and start telling me the same story all over again. Clients turn up at the house at all times. They seem to regard me as a sort of public property you can come to at any time. Half of the time I am doing the job of a psychiatrist. Sometimes I have to pretend I'm not in or else I'll have to come out and talk to them. Some I just tell to shove off. Of course, the whole problem would be solved if one were to use a strict system of time payment—two hours for so much—but that would keep so many of them away." (Senior Accra practitioner.)

"Clients give me a lot of trouble. They make irrelevant and lengthy complaints which one must have patience to listen to. They come in at any time and I have no business hours." (Sekondi-Takoradi practitioner.)

"If you refuse to take a case you will be visited by the man's father, then the next day by his mother, then the next day by his uncle, each one with a different instruction for you." (Senior Sekondi-Takoradi practitioner.)

Yet at the same time it is precisely the close personal involvement in the fortunes of clients that many lawyers said was one of the most satisfactory features of their work:

"Victory in cases is my greatest satisfaction. When you win your cases the family and the entire dependents of the man come in and say God bless you and keep you for us, that you may long live to defend our cause. I can remember a murder case in which I defended a man. When he was acquitted he came to me and he bent over and held both my hands and he said 'I'm going home and I'm going to produce a child and name it after you—that's the best thing I can do for you in return'." (Senior Kumasi practitioner).

"There's the occasional case where one is in a position to congratulate oneself. In Ashanti even you might have a client for whom you would lose a case—but he'd be so satisfied that you argued to the best of your ability that he comes later on to see you—sometimes with a gift—saying, 'You did your best, I'm entirely satisfied'. But you don't get that so much here in Accra.
The Ashantis have a sort of artistic interest in litigation.” (Senior Accra practitioner.)

“I have learnt to like the work, even though it wasn’t my choice. I have turned it into a sort of social service. I have got an involvement in juvenile delinquency and rehabilitation. As a catholic I don’t encourage divorce and I am happy if I am able to bring couples together. Given the right attitude and temperament both sides trust the lawyer. It is satisfying to be able to settle disputes.” (Kumasi practitioner.)

Although clients expect their lawyers to involve themselves closely in all their affairs, they are at the same time sometimes exceedingly mistrustful of them. The problem, as a junior Kumasi practitioner put it, is:

“Trying to diagnose a client’s case as a doctor does, when they themselves do not compare a doctor to a lawyer. They keep out much of the truth of their cases unless you put in much force.”

Mistrust, illiteracy and inarticulateness makes dealing with them a very tricky exercise in social skill and patience:

“its difficult getting clients to tell their stories truthfully; getting clients to be a little dispassionate about cases being handled for them.” (Accra practitioner.)

“I have to cope with their incoherent narration of events and therefore it takes a long time to get the facts. Clients talk too much in court. They are often unpunctual and its hard to get them to pay their fees.” (Accra practitioner).

“Language is a headache—how to be understood by clients who can neither speak English no. the language I myself understand.” (Accra practitioner.)

“The problem is getting the clients to be frank and tell the truth about their side of a case. They depend more on the advice of licensed letter writers . . . Though in such cases I manage by careful questioning to get the truth if possible.” (Senior Kumasi practitioner.)

Third, there was often very real material base for mistrust: the suspicion by laymen that they are being exploited on the one hand and the accusation by lawyers that their clients are financially unreliable on the other:

“These days it’s difficult to collect one’s fees. In my time you named a fee and if they paid immediately you’d know they were a trustworthy client. And sometimes then they’d pay even more than you asked for. Now clients don’t have money. For most of
our young men it's a real headache. It's difficult sometimes for a client to find money to file a writ and so you have to file a writ with your own money." (Senior Accra practitioner.)

"Clients are not sincere. They come looking very worried and asking for help. But when once the help is given they forget about the helper and won't pay their fees." (Accra practitioner.)

A number of questions sought to delineate in a rather more precise way the sources of client pressures upon lawyers and the ways the latter normally deal with them. A revealing indicator of the openness of lawyers to social pressures is the frequency with which they face requests by friends and relatives to reduce professional fees and the replies they usually give to them. Very few lawyers, (only 15%) are never asked to bring down their fees for those who lay claim to some connection with them. The great majority of practitioners, furthermore, (74%) say that when they are asked to bring down their fees, they will do so quite readily, most of them emphasising the binding nature of their social obligations, and some that they would not only bring fees down for relatives but also for anyone else in need:

"They never ask but you can read between the lines and I have done the cases without taking fees, or the whole world would get to know of it." (Koforidua practitioner.)

"I have always done cases free for them. though they have never asked me. Even people who don't have money but have a good case I have taken even when they're not relatives of friends of mine." (Accra practitioner.)

"I'll never do it for relatives, but I will do so for poor individuals who come, and I'll charge them just for 'shoe leather' plus a bit." (Senior Accra practitioner.)

"I have always obliged. It's not very good professionally, but it cannot be avoided in Ghana because of our extended family system," (Accra practitioner.)

"I would do it, though of course there's no such thing as a reduced fee because we have no set fee." (Senior Sekondi-Takoradi practitioner.)

One or two said they would only reduce their fees if the relationship was a close one. Others adopted stratagems for diverting such requests into other channels. But very few dared turn them down openly:

"Often I used to charge them less, but now I have devised a trick. I tell them I would normally charge much higher than I really would and then I reduce to the normal fee from there." (Accra practitioner.)
“I try to convince them that I am not so good as a lawyer and that they should go to my partner who is not a relative; and then he can charge them.” (Accra practitioner.)

Another possible index of lawyers’ incorporation in a network of extra-market relationships is the extent to which they are prepared to accept payment of fees in a form other than money. Relatively few lawyers (only 21%) however, admitted that they have ever been offered non-monetary rewards for their services and many of these said they had normally turned them down. Some of them said they had had unfortunate experiences with such offers in the past:

“Once I did a case for the stool of . . . and I was offered land and I took it. But then I lost it again because it was claimed by a neighbouring stool. I won’t do it again!” (Senior Sekondi-Takoradi practitioner.)

“I only did so once. I was asked by a company to take up shares in it. I took them, but in the end the company didn’t make any headway and I lost the money.” (Senior Kumasi practitioner.)

“It hasn’t occurred to me before. I’d rather buy the land from him and then he can pay me, because some clients go around saying that lawyers have taken their land which was worth more, because they could not pay fees for a small case.” (Kumasi practitioner.)

Most lawyers, in other words, prefer to deal with their clients on a strictly cash basis. Nevertheless the way the question was worded may not have done justice to the complexities of dealings with clients. For a number of those who were questioned further said that although they would not accept payment of their fees in kind, they would often receive gifts from clients as “aseda” (thank-offerings) for their help:

“Well [laughs loudly at the question] quite often I get it as a kind of aseda, I got my car, for instance, from a grateful client. Some people who think they are terribly clever offer me a percentage of what they hope to get from a case. Of course, this is allowed in our code in the cases of libel and personal injury, and sometimes I’d do it. But I always insist on a nominal deposit . . . but whenever beautiful women come to me to ask me to do a case [laughs again] I put up my guard.” (Senior Accra practitioner.)

“Sometimes, especially in land cases land is given on top of fees as a form of ex gratia payment. In my own case I have once or twice been asked to ‘cut a piece of land’ by a chief for whom I have done a land case, but I have usually declined. I’m sorry now, though, that I couldn’t be bothered, as one of these lands was bush, but it is now part of the urban area.” (Senior Sekondi-Takoradi practitioner.)
"I have often accepted gifts like foodstuffs from the poorer people and land from the wealthy, car service from engineers." (Accra practitioner.)

Practitioners find it extremely difficult to differentiate their professional from their private lives, since this is not a dividing line their clients will readily accept. Over nine-tenths (92%) of the practitioners interviewed have to cope with visits by clients to their homes (about 32% of them frequently). Strictly speaking, receiving clients at home, as well as visiting them for professional purposes in their own houses or businesses is contrary to the rules of professional etiquette. Yet the great majority (73%) of practising lawyers are prepared to attend to clients who come to their houses, although around half of these say that they normally instruct them to meet them in chambers the next time. The force of social mores and the fear of losing clients to competitors are in this instance stronger than professional impulses to separate lawyer-client relationships from extraneous influences:

"The client who is not well-to-do tries to find you in the house, because he feels you'll listen more patiently to him there. And you've got to show them a good face. It helps your name if you do so." (Senior Sunyani practitioner.)

"Clients are coming in from 6.00 a.m. until you sleep. As a matter of public relations you must handle them. You can't tell anyone who comes 'I'm off duty, go away,' especially since it's more respectable and important people who prefer to come to your house, rather than be seen in your chambers." (Senior Kumasi practitioner.)

Yet there were still those who preferred not to mix business with social relationships:

"I positively instruct them to see me in chambers. It is easier in chambers to keep a proper record and also to give due privacy to a client." (Kumasi practitioner.)

"I send them away from the house as most of them are relatives who don't want to pay for the help I give them." (Senior Accra practitioner.)

"They used to do so in the early stages of my career, but now they don't often do so. I receive them when they come, because I know they don't normally do it unless it's urgent. But I refer them to my chambers next time." (Senior Kumasi practitioner.)

The quotations above make it clear that intrusions by some categories of client are less welcome than those by others. But lawyers
showed great variety in their responses to clients: some said they would accept visits by relatives, others that they would drive relatives away; some said they received only their prosperous clients, others threw open their doors to the poorer clients who might be intimidated in their chambers. There was thus little systematic relationship between visits made to lawyers' homes and other features of practice, beyond a slight tendency of such visits to be more frequent when most of their clientele originates in their own home area; and for lawyers receiving their clients at home to be asked to reduce their fees more often than those who do not receive them. And as one might expect, the lawyers practising in provincial towns were more often visited by clients in their homes than the Accra lawyers (5% of the former never receiving such visits, 53% sometimes receiving them and 41% often; compared with 10%, 66% and 25% respectively of the Accra-based practitioners).

When lawyers were asked what they thought of visits to their clients’ homes or places of business, the terms of exchange are much more clearly in the lawyers’ favour. The link between the social distance they keep from clients and their consciousness of class distinctions comes sharply into focus. The majority of lawyers neither visit their clients (51%) nor feel that it is appropriate for them to do so (59%). And even among those who make such visits, most made a distinction between client companies and businesses—which they might have purely technical reasons for visiting—and private individuals, visits to whom were not to be encouraged.

"Visits to clients are ill-advised, unless they are undertaken for some specific reason to do with the case one is putting forward, such as a visit to land that is in contention." (Senior Cape Coast practitioner.)

"My retainer firms ask me to their board meetings et cetera. There's no other way in such a case. But otherwise it's unprofessional." (Accra practitioner.)

"One should never visit a client on business, you should let them come to you. Going to them smells of touting." (Senior Sekondi-Takoradi practitioner.)

"It may be embarrassing to your hosts and put them to expense as they may wish to provide some drinks. And besides this, people may think you are after money." (Senior Kumasi practitioner.)

"A lawyer's office is the place he gets all the necessary things which he needs for advice. Besides as a lawyer he must feel important to be wanted by a client and not him running after clients himself." (Sekondi-Takoradi practitioner.)
Practitioners in sum felt that visits to clients would alter the terms of exchange on which they made themselves available to the public. Clients should come to them, and they should not be seen to be going to see clients. Not only could this lead to accusations of touting but it would also demean their social status. The few who disagreed, on the other hand, placed emphasis on the needs of their clients which, they argued, are best served if lawyers visit them in familiar surroundings:

“They promote friendship and good relations. The client feels you have interest not only in his money, but also in his person.” (Senior Kumasi practitioner.)

“They are useful in the sense that you get to know what the client wants to say exactly because some of them feel more at home in their houses or offices.” (Accra practitioner.)

“They are very useful in letting the client know that you are doing the work properly. And then they appreciate your efforts and consequently send you other clients.” (Accra practitioner.)

Clients often do not come to lawyers as isolated individuals but as members of a group. And they often bring a part of their network of social relationships physically with them to the chambers or house of the practitioners: a distant cousin, perhaps, who offered to bring them to a lawyer; an officious husband or uncle who wants to make sure his wife or nephew is not cheated; a wealthy or well connected relative who is there to impress and lend social support; a literate acquaintance who can help interpret; or other members of a family group who have a collective interest in the farm or house that is the subject-matter of litigation. Lawyers were asked whether they felt it helpful or harmful to have members of a client’s family or friends present during a conference. This was an issue on which there was little agreement. Some thought that where group interests were at stake, it was useful to have as many members of the group present as could conveniently be arranged:

“It really depends on what sort of issue you are talking about. In many civil matters expenses are met by the group, so they will naturally want to be represented.” (Senior Sekondi-Takoradi practitioner.)

“It’s helpful in some cases. If the head of the family is a plaintiff or defendant, it’s usually useful to have other family members there.” (Senior Cape Coast practitioner.)

“It’s especially helpful in land cases, where there are family properties at stake, though for some other matters it depends very much on the circumstances.” (Senior Sunyani practitioner.)
It was also agreed that it is easier to understand a client's case if other members of the family or group are present, for:

"Some clients leave things out when they're alone, but friends or relatives who know bits and pieces about it can easily supply the missing links." (Sekondi-Takoradi practitioner).

"You get an insight into a person's character from the comments they might make. In fact clients usually come in a group or with someone who is meant to be the spokesman." (Accra practitioner.)

But others again argued the contrary, that clients were less likely to be frank with their lawyer when other people they knew were present:

"It's helpful in personal matters, but in business matters it may inhibit the client from being frank about his financial problems." (Senior Accra practitioner).

"The tendency is to tell you the same story he told the relatives before, which may not be the truth." (Koforidua practitioner.)

One would expect the complex interweaving of social and professional relationships to dispose lawyers towards the settlement of disputes and against the adversary procedures of the courtroom. Yet one of the best established myths about members of the Ghanaian legal profession is that its members encourage their clients to litigate in order to obtain large fees from them. It is a myth to which practitioners themselves give virtually no support. They were asked (a) under what circumstances they prefer to settle on behalf of clients rather than taking a matter to court: and (b) more specifically how they proceed when there is a risk of losing a case if they take it to court, but they think they might be able to obtain more for their client and a higher fee for themselves by proceeding there. Remarkably few (only 11%) confessed outright that they would prefer to litigate rather than settle, and not many more (15%) said they would do so only if the circumstances seemed appropriate. About three-quarters of those who answered the question preferred without any doubt at all to settle when they could. Two main reasons were given by those who preferred to litigate. First it was said that the settlement of disputes is complex and rarely final, so that it is often better on technical grounds to get a determination from the courts at as early a stage as possible:

"Arbitration is all very well in theory but commercial arbitration requires real knowledge and understanding on both sides and on the part of the arbitrator. It is far better in Ghana to take action at law than to go to arbitration. So-called native settlement of disputes doesn't work well either because of a split down the middle in the family or group and no one can be found to arbitrate
from within the group whom everyone considers really important.” (Senior Accra practitioner.)

Second, one or two lawyers expressed a personal taste for risk taking:

“"When the other side suggests settling, I’m all for it. But the occasions I suggest it myself are very few indeed. However bad the case is, there’s always the luck of litigation.” (Senior Accra practitioner.)

Others wanted a more precise calculation of the risks and the benefits:

“I’ll settle when I feel that on considering the whole case my client has less than 50–50 chance of winning and the matter is such that I feel my client should be prepared to accept a smaller award out of court.” (Senior Accra practitioner.)

The wishes of clients themselves had to be considered as well:

“I consider the client’s interests to be paramount. The situation will be explained to him and he will be told of the risks involved. But if after this he insists on having the case in court, his wishes will be satisfied.” (Senior Kumasi practitioner.)

But for the most part, even if a client did want to litigate, many practitioners would not, they said, encourage him, for litigation is lengthy, costly for the client and in the final analysis not all that profitable for the lawyer either, particularly if he is already busy with other work:

“When a client comes with a bad case, I encourage him to settle. I prefer not to start the case at all. ‘Well, my friend, I say’, I advise you so and so . . . but of course if you still insist on going to court, I’ll do it.’ But then if he does say he wants to, I’ll name a fee which will frighten him off, and say I’ll arrange a settlement for him at a much lower fee.” (Senior Accra practitioner.)

“It is much more satisfactory if one can arrange one’s time so one never has a chance to go to court. The better lawyers all think the same. But the poorer lawyers never get that kind of work to do.” (Senior Accra practitioner.)

“When people talk about lawyers dragging out their cases they don’t know what they’re talking about. In this country when clients come early in the morning to your house, they come late at night . . . and he thinks he’s entitled to come and see you whenever he likes . . . you get tired of his face. In this country, there’s absolutely no benefit in dragging a case on and on.” (Senior Kumasi practitioner.)
“In all cases we (his firm) will rather settle if possible and we only go to court where it is not possible. And when we are forced to take cases to court we almost always settle eventually before it goes much further. I would say we settle more than 75 per cent of our cases.” (Accra practitioner, partner in law firm.)

Litigation, furthermore, is fraught with dangers for a lawyer’s relationship with his clients:

“I would tend to be very cautious about proceeding to court. If it’s going to take you two years in the courtroom and so much time that you’ll take half what he recovers, then you run a big risk of losing all benefits to your client. One must remember that most clients are not so much interested in the development of the law as we are. If the client wants to litigate he should be told it’s this and that chance of winning and it’ll cost you so much and take you so long.” (Senior Accra practitioner.)

Some practitioners were reluctant to fight cases in court because of potential damage to their broader network of relationships in the community:

“I advocate settlement if it might be in the interest of both parties, particularly if the issue is not in doubt, but only the quantum. I sometimes advise compromise just to reduce bitterness, especially in family or village matters. In such cases I prefer even to forgo my fee. You have to have the respect of both parties, and I don’t stand to lose much from this in the long run... they’ll come to you again.” (Kumasi practitioner.)

“I will advise settlement wherever possible. A Ga proverb says that when you fight, stepping on a stone may bring a fatal fall.” (Accra practitioner.)

By now it should be clear that the social networks through which lawyers are connected both to their clients and to the community beyond them are an essential part of their practice. Many of what we have up to this point talked of as lawyers’ extra-market obligations—to oblige a friend by reducing his fees, for example, to cope with an emergency deputation of rural litigants who arrive at the doorstep of his house, or to advise a client not to precipitate himself into litigation against members of his family—arise out of and help to reproduce his professional relationships. In a certain sense these networks are highly particularised. No one lawyer’s network is the same as any others. They are constructed mainly of informal personal links rather than formal legal relationships or purely impersonal market contacts. Ties with family, with friends and acquaintances, and with community influentials are all put to service to build up a clientele. Yet in no sense
Essays in Ghanaian Law

are the networks made up of antecedent "traditional" relationships of lawyers with persons in their own communities of origin. Had they been so the nets would be tighter and bring in a far narrower range of potential clients. As it is, remarkably few lawyers (9%) said that the majority of their clients came from their home areas. Three-quarters of them (75%) said that people from their home area only made up a minority of their clientele, while fifteen per cent denied having any clients from their home areas at all.

Almost every single lawyer interviewed said that at least some of his clients come through referral by former clients: no less than 80 per cent claimed that 40 per cent or more of their clients came through such referrals; and 49 per cent claimed that 60 per cent or more came by the same means. Nevertheless lawyers differ in the way they make use of such contacts to bring in new business. Lawyers on their own or based in small chambers were slightly more likely to make use of their personal contacts than those in the larger, more bureaucratised chambers. And some of the better known lawyers can rely on their reputations and regular clients to bring them more than enough work without having to activate their contacts to bring in more:

"Now I am so well known that they just arrive at my office. A lot flock to my house, particularly at weekends at . . . [his home town], but I normally tell them to meet me in my office at Koforidua." (Senior practitioner based in Accra and Koforidua.)

"Clients come mainly by recommendation of my former clients. I don't advertise in any way, even in freemasonry or rotary. I don't like the clannishness of these societies. Their members are obviously affected in their judgment and I'm surprised it doesn't do more damage than it does." (Senior Accra practitioner.)

"Some clients are sent when a private person talks to a friend of mine, some because of my public reputation. Quite often, too, I am briefed by other lawyers. I've also got two or three regular clients—the people who live next door to me for instance. They are a very litigious family and indeed it was they who persuaded me to come to Accra from Kumasi. The . . . stool is also another regular client, and they normally have about twenty cases in the courts at any one time." (Senior Accra practitioner.)

"It's difficult to tell when clients come because of referrals from other clients, because they often don't tell you. But you can only build a big practice through your former clients." (Senior Kumasi practitioner.)

Lawyers' client networks vary in their stability and this is related to the areas of practice in which they specialise. Slightly more than half (53%) of the private practitioners say the majority of the clients who
come to them are new clients coming to them for the first time, the
remainder (47%) saying the majority of their clients are people whose
cases they have taken before. Those who specialise in commercial and
company law establish routine relations with their clients, (most of them
 partnerships and firms), more often than other lawyers. Lawyers who
specialise in land law are also slightly more likely to have a stable
clientele— built however around the networks of personal relations
they establish with stools, communities and families— though less so
than the commercial lawyers. Both criminal and insurance lawyers are
more likely in the nature of their work to base their practice around
clients who came to them once and once only. To summarise, the
networks of lawyers who take on the legal work of business firms and
the land transactions of stools and families are for different reasons
self-reproducing, in that a firm or a stool or family will continue to
bring business to the same lawyer over fairly long periods of time if he
handles their transactions well. But neither insurance lawyers nor
criminal law specialists can be sure their clients will need them again
and are under constant pressure to expand and develop their networks,
following them outwards in order to find new clients.

Alongside the networks of clients and former clients, therefore, and
often interknitted with them are further networks of letter-writers, court
clerks, insurance agents and other go-betweens. The subtlety and
multistrandedness of these relationships is such that our rather clumsy
efforts to pin them down in the questionnaire were not very successful.
All private practitioners were asked:

“How often in the past year or two has an acquaintance or
previous client brought a new client to you and indicated that
they expected some kind of reward or consideration for their
services? What do you do in these circumstances? What would
you do if this happened?”

Most lawyers, quite understandably, rejected any suggestion that they
paid people to bring in clients. Two-thirds of them (65%) denied out­
right that they had ever been asked for a reward by those who brought
them clients, some with high indignation:

“Nobody would dare to try it, so it wouldn’t ever happen.”
(Senior Sekondi-Takoradi practitioner.)

“It never happens, and if it did, I should drive the fellow away
from my chambers immediately.” (Accra practitioner.)

Seventy-one per cent of them, furthermore, said that, if asked they
would refuse to give anything at all, 34 per cent saying they would not
only rebuff the intermediary but also that they would turn the client
away as well:
"I would tell the person that I do not pay people to bring me clients. I rely on my own ability and therefore I would not do it."
(Sekondi-Takoradi practitioner.)

"Because I'm in a partnership this doesn't happen. It couldn't happen as I couldn't make such a payment without it going in the firm's books, unless, of course, I took the money out of my own pocket." (Senior Sekondi-Takoradi practitioner.)

The majority of those who said they would give anything at all (18%) said they would exchange only minor favours, such as a lorry fare or a drink:

"I wouldn't entertain an outright request. I would however pay C5 or so for transport or cigarettes to a client who brought in a friend from a distant village." (Senior Sekondi-Takoradi practitioner.)

"It often happens, but it's not necessarily touting. I'll give something out of gratitude for his trouble. A man will come and say 'Lawyer, will you consider me. I had to come from ... Can I have a bottle of beer. Can you meet me for my travel expenses?' Though you'll often know that in fact the client has probably paid the man's travel expenses once already." (Senior Sunyani practitioner.)

The number of those who admitted outright to making payments to clients and acquaintances who bring clients to them was still smaller, only eleven per cent of the lawyers who had answered the question:

"I'll say, 'Well, I give you what I like to give you'." (Senior Cape Coast practitioner.)

"It wouldn't be contractual in any sense, but I would give him something. When I know that someone has gone to a certain amount of trouble I make it a point to give him something. If I know he has spent money, I'll try to cover him up." (Senior Kumasi practitioner.)

"Suppose somebody has wasted his time and money—for some of them come from afar—is it not justifiable to give them some kind of consideration for their troubles?" (Kumasi practitioner.)

"I would take on the case if it is about an insurance claim and give him something from what I receive: but in other cases, I'd not consider it." (Accra practitioner.)

As one would anticipate, those lawyers who said that they were sometimes approached by go-betweens asking for a reward for their services were also those who tended to admit they would pay them, or at the very least do minor favours for them. Only thirteen per cent who claimed they were never asked said they would return a favour of any
kind, compared with 57 per cent of those who said they had once or twice been asked and 71 per cent of those who were often asked (4%, 26% and 29% respectively saying they would make an out and out payment to the intermediary for his services). Lawyers with stable clients were less likely to say they would make payments, only seventeen per cent of them doing so, compared with 43 per cent of those whose clients mostly came to them for the first time; the latter, as suggested earlier, finding that they need to expand their network of contacts and acquaintances outwards to ensure an inflow of clients and the former being more assured of business from the same limited circle of regular clients.

The denial by the great majority of lawyers that they ever rely on paid intermediaries to bring clients was, however, coloured by the fact that “touting” for clients is not merely regarded as unprofessional, but is also explicitly forbidden by the code of ethics. The question as it was put in the questionnaire, furthermore, implied an explicit relationship in which intermediaries ask for and are paid an agreed consideration. The reality is much more subtle than this. When pursued further, a number of the lawyers who had condemned the practice of touting not only acknowledged the existence of intermediaries, but also argued that, suitably controlled and organised, they might be a useful institution. Those who took this view included some of the most prominent lawyers in private practice in Ghana today:

“There are the self-appointed touts who do that—insurance agents, ex-local court clerk types and letter-writers too. They can be very useful. In Kumasi it’s an institution. In my opinion they are like humble unqualified solicitors. If they were legalised and controlled they could be extremely useful. One can find someone of this type in every village—a sort of village solicitor, who is very helpful to everyone concerned. They are people who have a certain amount of specialised knowledge. A cocoa farmer in Brong-Ahafo, for instance, will go to a letter-writer in his village, and he will discuss his case with him and he will advise him to take it to a lawyer and will direct him where to go. This kind of touting should not be looked down on. It should be encouraged and controlled and made into an institution.” (Senior Accra practitioner).

“A certain amount of touting is built into our system here. Auctioneers, letter-writers, court registrars, especially in the magistrates’ courts. Such people bring cases that come to them, as a matter of human contact. They are not actually employed by you. Very very few lawyers retain touts as such. If you handle them well they play the same sort of function that solicitors play in Europe. There may be a letter-writer in Bekwai that you know. You know that if someone comes to him with a matter too big for
him to handle he will say, 'You must take it to a lawyer. My friend, lawyer so and so, I think he might be able to handle it.' Then he brings him to you . . . but its only on a gentleman's agreement really, you may dash him ten pounds for his pains . . . but there is no contract, and if you don't dash him for so many times, I suppose you will find no more cases coming to you from that quarter any more . . . You may pass through his town and not look him up and he won't be coming to see you any more and that's the end of it. Every lawyer has some sort of working arrangement. But if you had a contract to pay a tout I don't see how that would work. How would you assess his work? Could you say that he should bring in so many cases that month? But less contractual agreements are essential to our practice. We cannot do without it . . . Those letter-writers and registrars are playing the same kind of function as solicitors play in Europe.” (Senior Kumasi practitioner.)

FEES: STRATAGEMS FOR THE EXTRACTION OF SURPLUS

The market character of law practice is brought out most clearly in the way lawyers determine their fees. To the extent that practice is routinised, fixed rates are charged, to the extent that it is not, rates vary according to the market power of each individual practitioner and the overall state of the market. Many kinds of non-contentious work are charged by lawyers at fixed rates. A lawyer who negotiates an insurance claim can only charge up to a specified maximum percentage of the value of the liquidated claim. Routine office tasks like conveyancing are charged for according to fixed schedules, though different chambers do not always arrive at these in the same way. The larger chambers with foreign firms among their clients explicitly charge according to British or international rates:

“We use a fixed scale for non-contentious business. We took the U.K. scales and upped them by a third. That is mainly because in the U.K. your land registrations are there for you to see, whereas we have to make several investigations and do all sorts of extra work on it.” (Senior Accra practitioner in law firm.)

Litigation, however, is the bread and butter of the majority of Ghana's practitioners. This is much less easy to reduce to a definable "product" which can be charged for in a predetermined way. There is and always has been much variation in the way lawyers charge their clients. As a senior Accra lawyer put it:

"There was always a great deal of variation in the way lawyers charged fees, even with the older lawyers in the past. Some like X. had a clerk who gave you a bill and that was that. Others like Y.
told you, 'Bring one hundred guineas'. Then when the case was
adjourned one or two times he would say, 'Bring me another
hundred guineas', and if you didn't bring it he didn't go ahead.'

There are three main criteria lawyers may apply when deciding on
the charge for a particular piece of work. The first is to assess the
resources and market power of the client himself.

"In deciding what to charge I give most emphasis to a client's
ability to pay. The client will perhaps beg you to come down to a
third of what you ask and then you'll probably be content if you
settle for, say, 50 per cent of what you asked for." (Senior Accra
practitioner.)

"It depends on the type of case. I will determine a normal fee
for the case and if the client is poor I will perhaps reduce by a
quarter. But if he is more affluent I may slap a quarter more on
top." (Senior Accra practitioner.)

Another way of charging is to assess the likely return to the client of
the practitioner's output, either in terms of the value of the property or
claim the client is litigating or in terms of the seriousness of the criminal
charges with which he is faced.

"I charge what traffic will bear. There are no rules. I normally
want to assess how much I can do for the client—the benefit to him
of paying me. If it's a dispute over property, I want to know how
much it's worth and I make that the basis of my fee. If I'm to spend
one or two years on a case and the case is not worth much in
terms of acquiring or protecting property and one charges too
much the person inevitably complains. So if a lot of work is
involved and I know it won't be profitable I more or less advise
the client it won't be worthwhile." (Senior Kumasi practitioner.)

Thirdly, lawyers can assess the likely input of their own time into a
case and attribute a price to this:

"In litigation we charge on a time basis set in accordance with
the property involved. This is the most important factor, parti-
cularly the expected length of hearing. But sometimes they can be
very unfair to clients, so we adjust our fees accordingly when we
feel it's necessary." (Practitioner in Accra law firm.)

"We charge on a time basis—for example for incidental advice
on the telephone not subject to paper work £40 a time. Individuals
want to bargain at the beginning and there's a tendency to over-
charge if they do. Clients are very anxious to know how much it
will cost them. But it's sometimes quite possible that one may
resolve the difficulty and if you've agreed on a fee in advance you'll
end up with your client feeling you have cheated him. With regular
customers, particularly the companies I handle, I prefer to submit a bill every quarter.” (Senior practitioner in Accra law firm.)

“Mostly I work on the basis of 12 guineas an hour—both time and difficulty—for non-contentious work. For contentious work the fee is less. If you’re in court all day on a case you cannot charge 12 guineas an hour, so I charge, say, 15 guineas for the day in court.” (Senior Kumasi practitioner.)

“I charge according to the amount of work involved, the ability of the client to pay and the difficulty of the legal arguments involved. On the other hand where a case is a peculiar one which needs special handling and leads to the development of the law in some way, here the question of fee does not count so much and it can even be done free.” (Senior Kumasi practitioner.)

All three methods of charging—what the market will bear, what outputs are produced and what labour inputs are required to produce them—are widely used. Of these, labour time was the most frequently stressed, by no less than 80 per cent of those asked. Fifty-one per cent attached importance to the output criterion (15%, specialising in criminal matters, the seriousness of the charges against a client; the other 36%, the value of the land or property in contention). And 59 per cent referred to the client’s resources and ability to pay. Few lawyers, however, said they applied any one criterion in isolation from the others. Eighteen per cent said they employ all three at once; 25 per cent combine labour time with an assessment of the ability of the client to pay; eighteen per cent consider both labour time and the likely return to the client; and ten per cent combine the return to the client with an assessment of his resources. Only eighteen, five and five per cent respectively said they use labour time, the output or the resources of the client exclusively by itself.

No matter which way lawyers compute the price of their services in theory, in practice there is plenty of scope for both the lawyer and his client to negotiate the terms of exchange between them. In this sense criteria of market power are often implicit in transactions that are overtly regulated by labour time or output criteria. Lawyers sometimes deny that this is the case, invoking their status as professional men to argue that their services have an intrinsic worth which they alone are qualified by their expertise to assess. In practice, however, such claims are associated with the assertion of control over the market, either collectively as a profession or individually as successful and much sought

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6 The question was not introduced until about two-thirds of the sample had already been interviewed. The total number of practitioners on which these percentages are based was only 41 of the private practitioners interviewed. They were not a random sample, the most obvious bias being the over-representation of senior lawyers.
after practitioners. If clients have even a rough idea what a lawyer's services are worth to them, they can bargain; and once bargaining is permitted, it reduces the practitioner's control over the price of his services:

"Normally I don't bargain, I only do it if the client is obviously incapable of paying, and then I do it as a favour. But if someone comes who can pay and he wants to bargain then I will say he should go to another lawyer, and I give him a name and say, 'Go to this man, I think he may bargain with you'. You see if you are successful, the public will normally accept you at the price you can sell yourself at." (Senior Accra practitioner.)

"Bargain, what does it mean? After assessing the work you can discuss it with him, but you give him an unequivocal charge." (Accra practitioner.)

"One of the first things my father worried me about was never to try and squeeze money out of a person who has not got it. I will, however, bring my fees down or in really hard cases do my utmost. In land claims I may even be prepared to wait until some money has been awarded before I am paid." (Accra practitioner.)

Nevertheless, only 27 per cent of those asked said they would never under any circumstances bargain over fees, and about the same number again said it would depend on the circumstances, several saying they would bring fees down if a client could convince them they genuinely lacked resources:

"I'm prepared to bargain when the client explains his financial difficulties. The extent depends on the financial limitations of the client." (Ho practitioner.)

"If I realise the client is poor, I'll do so, but this is sometimes difficult to ascertain and I have to take chances with them." (Sunyani practitioner.)

"One likes to be reasonable and accommodate clients. If they are being reasonable, that is if they really have not got the means to pay more then I'll do so." (Senior Accra practitioner.)

Almost half (46%) of the lawyers interviewed, however, said they were prepared to haggle with clients about their fees in most circumstances.

"I'm prepared to bargain under all circumstances and to any extent." (Cape Coast practitioner.)

"There's bargaining all through a case. Usually I don't ask a client to pay outright but by instalments as the case progresses." (Senior Sunyani practitioner.)

"There was a time in land cases when you could charge as much as people could afford. Sometimes there was no limit to what you
could ask. But nowadays you look at a person and if you think he could pay two or three hundred cedis then you go ahead.” (Senior Accra practitioner.)

“One has to bargain ... I hate it, but I have to. One is almost always cheated if one does not. But some lawyers you know, are not interested in any aspect of litigation except bargaining for their fees.” (Senior Accra practitioner.)

The extraction of surplus from clients is thus one of the most problematic aspects of fees-for-service legal practice. Clients are often dilatory in making payments, sometimes because their resources are limited, sometimes because a case turns out to be lengthier and more costly than they had bargained for, frequent “refreshers” being needed to revive their lawyer's lagging interest in the case. It is well recognised among practitioners that unless they are dealing with an established business corporation, a wealthy stool or a particularly affluent and respectable member of the community, they will find it difficult to secure payment of fees once a case has actually been heard. More than one told us regretfully that “a barrister cannot sue for his fees,” a statement true only in Britain where the profession is divided, but not in Ghana where it is fused. As lawyers themselves know all too well, however, litigation is expensive even if they undertake it on their own behalf. Practitioners have only resorted to the courts to recover fees when the amounts owed them have been very substantial indeed. Most of them prefer less formal but nevertheless effective ways of getting money out of clients. The strategem perhaps in widest use is the strategic adjournment. One question put the issue to lawyers thus:

“A client’s substantive case is listed for a hearing soon, and he has still not paid his fee in spite of all requests to do so. How often does this sort of situation occur in the course of your own practice and how do/would you handle it?”

All but a handful (91%) of private practitioners acknowledged that this kind of situation occurs in the course of their work, somewhat more than half (51%) saying that it is a frequent occurrence. A little less than half (43%) said that if faced with a recalcitrant client they would either adjourn the case until some money was paid or would withdraw from it altogether.

“I would ask the court for adjournment on the grounds that ‘I was not fully instructed’. I’d try, however, to inform my colleague on the other side, preferably beforehand but sometimes in the court

that the client hadn’t paid and I was asking for an adjournment for that reason.” (Senior Sekondi-Takoradi practitioner.)

“"No payment no appearance. You always make sure you receive a substantial portion of the fee before you set the ball rolling.” (Accra practitioner.)

“I usually tell the client that if he does not pay, I shall not go to court. At times I ask for adjournments to gain more time. If he simply does not have money this is different. But when one threatens to withdraw they will come and pay.” (Cape Coast practitioner.)

Some lawyers said that they might adjourn a civil case, but not a criminal one; some that it would depend on their relationship with the client; some that they would consider the genuineness of the client’s financial need; and others that it would depend on how much they had already paid:

“If he has done his best to pay, you will carry on regardless, and I have done so in two murder cases recently. You will find there are some clients who say they will pay, but you will find they will not pay at all. But if they discover you won’t go ahead, they will bring the money right away and pay.” (Senior Sunyani practitioner.)

“Sometimes you see that the client probably cannot really afford it. If you think the case is worth prosecuting you go to court, if you think the court would be able to dispose of it quickly. But sometimes you are forced to withdraw from the case if it is going to be too protracted.” (Senior Kumasi practitioner.)

Several lawyers however, said that they did not resort to strategic adjournments because other tactics of extracting money were more effective or because they insisted on substantial advance payments before they would even begin. Often, however, these were the more successful practitioners whose bargaining power was such that it was easier for them to set their own terms:

“In practice, civil cases take a long time to get to this stage. If by this time a client has not paid any money I would not go on. But nobody who is serious about a case would come to you and not be serious about paying. I have never had to tell a client, ‘you have not paid the balance, I will not do it’, except in one or two appeal cases which take less time to get a hearing.” (Senior Kumasi practitioner.)

“I am very soft about that kind of thing and I will go on with the case. Sometimes I have to agree with the client on a fee, two, three or four times what the case is worth, and I will go on with it hoping to get at least some of it paid to me. If he pays some that is
alright. But you do get some bloody-minded clients who think they are more clever than the lawyer so they can have it for nothing. Yet I think I can recall having adjourned for the fee in only one case, and I got it.” (Senior Accra practitioner.)

Lawyers practising mainly in the lower courts had more trouble getting fees out of their clients than those practising at the higher levels (98% of those practising mainly in magistrates’ or circuit courts said they had had dealings with clients who were dilatory about payments of whom 59 per cent faced such situations regularly in the course of their practice; compared with 84 per cent and 50 per cent respectively of those practising mainly in the High Court or Court of Appeal), although once faced with a recalcitrant client they were neither more nor less likely to resort to the strategic adjournment to obtain their fees. Practitioners with a mainly new clientele were no more likely than their colleagues with a stable clientele to face situations in which their fees were not paid; but as one would expect were more likely to adjourn because they had less confidence of ultimate payment (47% of those with mostly new clients said they would go forward with the case without payment, compared with 64% of those with mostly regular clients). There was little association between a lawyer’s area of specialisation and his clients’ payment or non-payment of fees on the one hand or his own use of adjournments to get fees out of them on the other. The one exception, however, was in the area of commercial and company law. Practitioners who had little or no practice in this area more often had clients who did not pay up (96% of those with less than 20 per cent of their practice in this area faced such situations, 64 per cent of them often; compared with 85% and only 23% of those with more than 20% of their practice in commercial and company law) and would more often adjourn or refuse to go on with a case in these circumstances (51% compared with 33% of those with more than 20% of their practice in commercial and company law). There was also a slight relationship between the time a lawyer spends in court and his proneness to dilatory clients and use of strategic adjournments against them.

In sum, therefore, there is a tendency for the bureaucratic sector of practitioners described earlier to have established relationships with their clients, such that securing fees from them is little problem. But the great majority of practitioners face difficulty in obtaining payment and have to consider how best to improve the terms on which their services are exchanged.

ACCUMULATION OF PROPERTY AND THE STRATIFICATION OF THE BAR

“The atmosphere of practice, the status of lawyers . . . the whole thing has changed so much over the last few years. Also the
amount of money people are making is very small... based on what lawyers were making in active practice in Kumasi when I started. Images change... they were false even two years ago... now they are absolutely false. Many lawyers are trying to make a living in a very hostile environment... It is hard to get anywhere unless you are really able and energetic.” (Senior Kumasi practitioner.)

"Except if you’re very able and flamboyant—like Victor Owusu—nobody makes much money at the Bar any more. Now that I’m mixing with businessmen I see how much they make and when I compare it with what one can make at the Bar it’s ludicrous, considering all the time one spends working in practice. There one is, sharpening one’s brains and imagining that one is making lots of money. But even at one’s peak one is not making much... One can do well for ten years and not more beyond that, after then one will go downhill. It’s best to leave at one’s peak... then one’s image is good enough to start something else.” (Senior Kumasi practitioner.)

Such comments were frequently made, particularly by the senior practitioners, many of whom have undoubtedly suffered from declining real incomes over the years. Law practice is no longer as good a way of accumulating a surplus as it was when lawyers were fewer and cocoa prices higher. (Even now law is still strongly linked to cocoa to such an extent that in cocoa centres like Kumasi, Sunyani and Koforidua litigation still fluctuates with the cocoa seasons and fluctuations in the producer price). In the 1950s, according to the somewhat impressionistic accounts given by the more senior lawyers, private practice was extremely lucrative. One lawyer whose father was a highly successful practitioner in Kumasi in the 1950s said the latter could sometimes earn £2,000, £3,000 or even £5,000 in the course of one month. A judge who was a prominent Kumasi practitioner in the 1950s before going on the bench told us he used to have average takings of about £1,000 a month after deducting his expenses; another who was one of the first lawyers to practice in Sunyani in the early 1960s said he could make a similar amount.

Conditions are much less favourable now. Yet a successful lawyer in mid-career can still accumulate considerable resources from practice. A partial assessment can be made with the information supplied by practitioners about their incomes and their possession of certain fixed assets like houses, cars and telephones. The figures for their incomes given in table 6 below are unsatisfactory, to say the least. Some lawyers were unwilling to disclose their incomes at all, and those who did often gave inaccurate figures. Several of them do not in the normal course
account for all the cash that comes into their hands. Even if they main­
tain proper "clients' accounts" to keep track of moneys held on behalf
of clients (which most, though by no means all do), they find it less
easy to keep track of every ten cedi note pressed into their hands by litigants for transport to distant magistrates' courts, expenses or fees. Evasion of income tax—facilitated by the cash basis of many of the transactions undertaken by lawyers—is widespread. And many a practitioner who was interviewed would laugh heartily when asked how much he earned and say "I'll tell you how much I told the income tax
people I earned, but I'll leave you to guess what my real income is."
(Nevertheless, the income figures were not completely valueless—and
were roughly in line with indicators of material success like the number
of houses owned.)

On the other hand, the data on their assets seem to be more reliable. Practitioners did not seem to mind telling us how many buildings or cars they possess. There was no doubt a certain amount of under­
reporting particularly by those who have invested in joint family
property or transferred ownership of houses to their wives, children or other members of their families. Former politicians whose assets were
or had been under scrutiny also no doubt held some things back from us. Nevertheless these were a small portion of the sample. And the
information about lawyers' assets fell into place with other data fre­
quently enough, as I shall show below, to suggest that it is at least a
respectable approximation.

The picture that emerges from table 6 is of a substantial though by
no means extravagantly wealthy group of individuals. The median
income in 1970 if one believes the figures was around £11,000 and the
very highest incomes admitted to were in the region of £30-35,000.
Sixty per cent of private practitioners own houses (some 23% of them
more than one), 96 per cent of them have telephones in their house or chambers or both and no less than 98 per cent of them own cars. A car
as well as a telephone is regarded as an essential tool of a lawyer's
trade. Further it is striking that 40 per cent of the lawyers interviewed
not only had a car but owned two or more vehicles.

These resources were for the most part accumulated from the
proceeds of law practice rather than from other activities. As we see
from table 6, rather less than half of the lawyers in private practice
derived any income from other economic activities, and the majority
of these obtained a fairly small proportion of their total income from
such sources. The majority of these supplementary earnings seem to
be from rentier income such as director's fees and allowances, rents
from property and government pensions, rather than from direct
entrepreneurial activity they undertake themselves. Exactly a third of
all private practitioners (33%) hold company directorships, many of
them in firms for which they provide legal representation. Some, however, were not paid more than nominal directors' allowances and sometimes not even these. Rather few private practitioners (19% of the sample; 42% of those with incomes from sources other than law practice) said they engage in commercial and productive activities such as business, manufacture, or farming. A number of those in the sample have import-export businesses, including two or three timber exporters; there are a couple of wholesalers; two or three own taxis or transporting businesses; one lawyer in the sample owns a laundry and dry-cleaning business, another a pharmacy and two others a textiles and clothing factory. Only one or two of those in the sample farm on a large scale, owning a cattle ranch or a poultry farm. Most of those who have incomes from the rural sector merely receive rents and other proceeds from family farms. There are no doubt others who supplement their incomes from family farms, but did not mention this to us either because they receive the proceeds in produce rather than cash or because the amounts received are too trivial in their opinion to merit mention.

### Table 6

**Indication of Practitioners' Material Success**

<table>
<thead>
<tr>
<th></th>
<th>Up to £4,000</th>
<th>£4,000-£8,000</th>
<th>£8,000-£12,000</th>
<th>£12,000-£16,000</th>
<th>More than £16,000</th>
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<tbody>
<tr>
<td>Income (1969-70)</td>
<td>16.4%</td>
<td>19.5%</td>
<td>22.7%</td>
<td>18.0%</td>
<td>23.4%</td>
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<td>No. of houses</td>
<td></td>
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<td>37.6%</td>
<td>39.2%</td>
<td>13.6%</td>
<td>9.6%</td>
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<tr>
<td>No. of cars</td>
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<td></td>
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</tr>
<tr>
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<td>2.1%</td>
<td>57.9%</td>
<td>29.3%</td>
<td>10.7%</td>
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<td>Telephone</td>
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<td>4.4%</td>
<td>44.5%</td>
<td></td>
<td>51.1%</td>
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</tr>
<tr>
<td>Proportion of income from sources other than law practice</td>
<td>54.8%</td>
<td>19.1%</td>
<td>14.8%</td>
<td>11.3%</td>
<td></td>
</tr>
<tr>
<td>Economic activities of private practitioners with income sources other than law practice</td>
<td>Directors' fees and allowances and dividends</td>
<td>28.9</td>
<td></td>
<td></td>
<td></td>
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<tr>
<td></td>
<td>Rents and sale of property</td>
<td>26.9</td>
<td></td>
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<tr>
<td></td>
<td>Government pensions and allowances, MPs' salaries</td>
<td>9.6</td>
<td></td>
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<td></td>
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<tr>
<td></td>
<td>Business and manufacture</td>
<td>26.9</td>
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<tr>
<td></td>
<td>Farming</td>
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<td>9.6</td>
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</tbody>
</table>
In sum, most lawyers make their greater part of their living from law practice itself rather than other economic activities. And even when they manage to accumulate surpluses for investment they do so mainly from the proceeds of practice. It is to various features of the organisation of practice we must therefore look in order to account not only for differences between practitioners in professional standing but also in their material accumulation. Professional standing is based on a number of interrelated criteria. Seniority at the Bar is the official basis for the ranking of members of the profession and is also related of course to a lawyer’s acquisition over the years of experience, clients and wealth. The more successful practitioners also tend to be those who practise in the higher rather than the lower courts: about half the lawyers in private practice (51%) say they spend most of their time before the High Court, slightly more than a quarter (26.0%) before the circuit courts and rather less than a quarter (22%) before the magistrates’ courts. If one takes into account also the courts in which lawyers practice next most frequently it appears that almost half the lawyers in the sample (49%) combine practice in the High and circuit courts, slightly less than a quarter (23%) move mainly between the magistrates’ courts and the High Court and the same proportion between the magistrates’ courts and the circuit courts. Very few lawyers indeed remain exclusively in the lower regions of the magistrates’ courts or in the upper regions of the High Court and Court of Appeal (4% and 2% respectively). Standing is also based to a certain extent on the type of law practice in which a lawyer specialises. The more successful are usually those who specialise in land law, succession and chieftaincy disputes followed by those specialising in commercial and company law; those who undertake a lot of civil injury work tend to have less professional standing; and usually the most junior and inexperienced are to be found specialising in criminal law practice. The more successful lawyers also tend to have a more stable clientele and rely less on clients arriving in their chambers for the first time.

All these factors are strongly interrelated. The more senior lawyers tend to practice in the higher courts: 77 per cent of those who enrolled up to 1960 said they practise mainly in the High Court or Court of Appeal compared with only 43 per cent of those who enrolled after 1960. Senior lawyers also tend to specialise in land law to a greater degree than their juniors and in civil injury and criminal matters to a lesser degree (table 7). And their clientele is more established than that of their juniors, only 33 per cent of lawyers enrolled up to 1960 basing their practice mostly on new clients coming to them for the first time, compared with 58 per cent of those enrolled after 1960. Those who practise in the higher courts, besides being more senior, tend more often to practise in the area of land law and less often in civil injury.
They also have more regular clients, only 42 per cent of those practising mainly in the High Court or Court of Appeal relying mainly on new clients, compared with 66 per cent of those practising mainly in the magistrates’ or circuit courts. Finally, as we saw earlier, those who practise in the areas of land law and commercial and company law tend to have a more established clientele than those who concentrate on civil injury and criminal cases.

**Table 1**

A. PER CENT OF TIME DEVOTED BY PRACTITIONERS TO EACH AREA OF SPECIALISATION, BY SENIORITY

<table>
<thead>
<tr>
<th>Year enrolled</th>
<th>Less than 20%</th>
<th>20%–39%</th>
<th>40% or more</th>
<th>Total %</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Proportion of time on land and customary law</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Before 1960</td>
<td>8.3</td>
<td>22.2</td>
<td>69.4</td>
<td>100</td>
</tr>
<tr>
<td>After 1960</td>
<td>29.4</td>
<td>35.3</td>
<td>35.3</td>
<td>100</td>
</tr>
<tr>
<td>2. Proportion of time on civil injury</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Before 1960</td>
<td>77.1</td>
<td>14.3</td>
<td>8.6</td>
<td>100</td>
</tr>
<tr>
<td>After 1960</td>
<td>46.3</td>
<td>32.8</td>
<td>20.9</td>
<td>100</td>
</tr>
<tr>
<td>3. Proportion of time on commercial and company law</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Before 1960</td>
<td>74.5</td>
<td>5.7</td>
<td>20.0</td>
<td>100</td>
</tr>
<tr>
<td>After 1960</td>
<td>73.1</td>
<td>11.9</td>
<td>14.9</td>
<td>100</td>
</tr>
<tr>
<td>4. Proportion of time on criminal cases</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Before 1960</td>
<td>71.4</td>
<td>20.0</td>
<td>8.6</td>
<td>100</td>
</tr>
<tr>
<td>After 1960</td>
<td>38.2</td>
<td>38.2</td>
<td>23.5</td>
<td>100</td>
</tr>
</tbody>
</table>

B. PER CENT OF TIME DEVOTED BY PRACTITIONERS TO EACH AREA OF SPECIALISATION, BY COURT MOSTLY PRACTICES

<table>
<thead>
<tr>
<th>Court mostly practices in</th>
<th>Less than 20%</th>
<th>20%–39%</th>
<th>40% or more</th>
<th>Total %</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Proportion of time on land and customary law</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Magistrates or circuit</td>
<td>24.0</td>
<td>48.0</td>
<td>28.0</td>
<td>100</td>
</tr>
<tr>
<td>High or Appeal</td>
<td>6.1</td>
<td>24.2</td>
<td>69.7</td>
<td>100</td>
</tr>
<tr>
<td>2. Proportion of time on civil injury</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Magistrates or circuit</td>
<td>29.2</td>
<td>45.8</td>
<td>25.0</td>
<td>100</td>
</tr>
<tr>
<td>High or Appeal</td>
<td>72.7</td>
<td>15.2</td>
<td>21.1</td>
<td>100</td>
</tr>
<tr>
<td>3. Proportion of time on commercial and company law</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Magistrates or circuit</td>
<td>75.0</td>
<td>20.8</td>
<td>4.2</td>
<td>100</td>
</tr>
<tr>
<td>High or Appeal</td>
<td>59.4</td>
<td>28.1</td>
<td>12.5</td>
<td>100</td>
</tr>
<tr>
<td>4. Proportion of time on criminal cases</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Magistrates or circuit</td>
<td>25.0</td>
<td>54.2</td>
<td>20.8</td>
<td>100</td>
</tr>
<tr>
<td>High or Appeal</td>
<td>54.5</td>
<td>24.2</td>
<td>21.2</td>
<td>100</td>
</tr>
</tbody>
</table>

Taken together these figures are impressive evidence of a high degree of stratification between legal practitioners in terms of professional experience, access to the higher courts, subject-matter of practice and clientele. What is equally striking is the manner these indicators of professional success are related to those of material accumulation.
As may be seen in table 8, the more senior lawyers, those who practice in the higher rather than the lower courts, those who specialise in land law as opposed to civil injury and criminal law, and those who have a stable rather than a new clientele have acquired more houses in the course of their career than their professionally less successful colleagues. (Those, however, who specialise in commercial and company law are not significantly more likely to acquire houses than their colleagues.) In much the same way successful lawyers more often own cars, 50 per cent of the more senior lawyers (qualifying up to 1960) have more than one car, compared with 39 per cent of their juniors, 53 per cent of the lawyers who practise mainly in the higher courts possess more than one, compared with 29 per cent of those practising in the lower courts; 43 per cent of the lawyers who devote more than 40 per cent of their time to the practice of land law own two or more cars compared with 33 per cent of those giving over 20–39 per cent of their practice to this area and only 28 per cent of those spending less than 20 per cent of their time in it. On the other hand criminal lawyers are more likely to be one-car men: 24 per cent of those with 40 per cent

<table>
<thead>
<tr>
<th>Table 8</th>
</tr>
</thead>
<tbody>
<tr>
<td>PRACTITIONERS' ACCUMULATION OF HOUSES BY SENIORITY, COURTS THEY PRACTISE IN, AREA OF SPECIALISATION AND STABILITY OF CLIENTELE</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>None</th>
<th>One</th>
<th>More</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>A. Year enrolled</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Up to 1960</td>
<td>12.0</td>
<td>40.0</td>
<td>48.0</td>
</tr>
<tr>
<td>1961–70</td>
<td>48.3</td>
<td>41.4</td>
<td>10.3</td>
</tr>
<tr>
<td>B. Court mostly practise in</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Magistrates or circuit</td>
<td>57.6</td>
<td>42.4</td>
<td>0.0</td>
</tr>
<tr>
<td>High or Appeal</td>
<td>37.0</td>
<td>30.4</td>
<td>32.6</td>
</tr>
<tr>
<td>C. 1. Time on land and customary law</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>less than 20%</td>
<td>64.7</td>
<td>17.6</td>
<td>17.6</td>
</tr>
<tr>
<td>20%–39%</td>
<td>50.0</td>
<td>28.6</td>
<td>21.4</td>
</tr>
<tr>
<td>more than 40%</td>
<td>24.4</td>
<td>43.9</td>
<td>31.7</td>
</tr>
<tr>
<td>2. Time on civil injury</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>less than 20%</td>
<td>36.5</td>
<td>28.8</td>
<td>34.6</td>
</tr>
<tr>
<td>20%–39%</td>
<td>47.4</td>
<td>42.1</td>
<td>10.5</td>
</tr>
<tr>
<td>more than 40%</td>
<td>50.0</td>
<td>35.7</td>
<td>14.3</td>
</tr>
<tr>
<td>3. Time on commercial and company law</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>less than 20%</td>
<td>42.4</td>
<td>31.8</td>
<td>25.8</td>
</tr>
<tr>
<td>20%–39%</td>
<td>42.9</td>
<td>37.1</td>
<td>—</td>
</tr>
<tr>
<td>more than 40%</td>
<td>33.3</td>
<td>33.3</td>
<td>33.3</td>
</tr>
<tr>
<td>4. Time on criminal cases</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>less than 20%</td>
<td>25.0</td>
<td>32.5</td>
<td>42.5</td>
</tr>
<tr>
<td>20%–39%</td>
<td>44.8</td>
<td>44.8</td>
<td>10.3</td>
</tr>
<tr>
<td>more than 40%</td>
<td>68.7</td>
<td>18.7</td>
<td>12.5</td>
</tr>
<tr>
<td>D. Clients represented</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>mostly new</td>
<td>46.2</td>
<td>40.4</td>
<td>13.5</td>
</tr>
<tr>
<td>mostly regular</td>
<td>38.3</td>
<td>36.2</td>
<td>25.5</td>
</tr>
</tbody>
</table>
of their practice in this area having more than one car compared with 40 per cent of those with less than 40 per cent specialisation. (Neither those who specialise in commercial and company law nor the civil injury lawyers are any more or less likely than their colleagues, however, to have more than one car.) And 50 per cent of those with regular clients are two (or more) car men compared with 32 per cent of those whose clients mostly come to them for the first time.

The lawyers who are professionally most successful and have accumulated the most substantial resources in law practice, finally, are those most active in defending the collective interests of the profession, being the most prominent in the affairs of the Bar Association. In table 9 we see that lawyers who specialise in land law and have a greater number of houses and cars are significantly more likely to hold office in the national or regional executives of the Bar Association at some time during their professional career, while those who specialise in criminal law and civil injury and have less material success do not hold office in the Association as frequently. The contrast between lawyers in civil injury practice and those specialising in land is particularly striking. Insurance lawyers are not the least well-heeled group of practitioners materially, but they are more often accused of professional

### Table 9

**PER CENT OF PRACTITIONERS WHO ARE OR HAVE BEEN OFFICE­HOLDERS IN THE BAR ASSOCIATION, BY AREA OF SPECIALISATION AND ACCUMULATION OF HOUSES AND CARS**

<table>
<thead>
<tr>
<th>1. Time on land and customary law</th>
<th>20%–39%</th>
<th>40% or more</th>
</tr>
</thead>
<tbody>
<tr>
<td>less than 20%</td>
<td>5.6%</td>
<td>6.7%</td>
</tr>
<tr>
<td>20%–39%</td>
<td>6.7%</td>
<td>45.7%</td>
</tr>
<tr>
<td>40% or more</td>
<td>45.7%</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>2. Time on civil injury</th>
<th>20%–39%</th>
<th>40% or more</th>
</tr>
</thead>
<tbody>
<tr>
<td>less than 20%</td>
<td>39.2%</td>
<td>12.0%</td>
</tr>
<tr>
<td>20%–39%</td>
<td>12.0%</td>
<td>0.0%</td>
</tr>
<tr>
<td>40% or more</td>
<td>0.0%</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>3. Time on criminal law</th>
<th>20%–39%</th>
<th>40% or more</th>
</tr>
</thead>
<tbody>
<tr>
<td>less than 20%</td>
<td>34.9%</td>
<td>15.6%</td>
</tr>
<tr>
<td>20%–39%</td>
<td>15.6%</td>
<td>16.7%</td>
</tr>
<tr>
<td>40% or more</td>
<td>16.7%</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>4. Number of houses</th>
<th>One</th>
<th>More</th>
</tr>
</thead>
<tbody>
<tr>
<td>None</td>
<td>15.9%</td>
<td>26.0%</td>
</tr>
<tr>
<td>More</td>
<td>40.7%</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>5. Number of cars</th>
<th>One</th>
<th>More</th>
</tr>
</thead>
<tbody>
<tr>
<td>None</td>
<td>0.0%</td>
<td>21.1%</td>
</tr>
<tr>
<td>More</td>
<td>29.1%</td>
<td></td>
</tr>
</tbody>
</table>

Note: Office-holders of the Bar Association are those who are or have been members of the national or regional executives of the Bar Association. The percentages in the table are the proportions of such office-holders within each category shown.

Indeed negotiating insurance claims is seen by many young lawyers as a way of making money fast. Civil injury is certainly more lucrative than criminal practice (see Table 8). Its practitioners are just as likely to acquire more than one car than other lawyers, though not as many houses. But once a practitioner becomes better established he is likely to seek a more stable source of income.
malpractice than any others and have the least prestige among their fellow-practitioners. None of those specialising in civil injury to the extent of 40 per cent of their practice have been elected members of the national or regional executives of the Bar Association at any stage of their career.  

In contrast almost half the specialists in land law (46%) have been able to secure office in the Bar Association. Looked at (and percentaged) the other way round this means that no less than 88 per cent of the practitioners who are or have been officers of the Association specialise in land and customary law to the extent of at least 40 per cent of their working time. No better way could be found of illustrating the continuing dominance of land—and thus cocoa—in the organisation of the legal profession and in the determination of its interests and values.

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8 It must be recalled that this does not include the practitioners who work for the insurance firms—rather than negotiating claims on behalf of individuals—who are classified here as company lawyers and one or two of whom have been able to attain office in the Association.
Strictly speaking the company law of Ghana, unlike the life span of the courts, is not one hundred years old. But its contribution to the orderly regulation of business and economic affairs is no less significant. To be exact, the earliest known piece of company legislation of any real significance in Ghana was the Companies Ordinance of 1907, (No. 14 of 1907).

The chief aim of company legislation throughout the period under review has been primarily the promotion of confidence in business and, in a much wider sense, the encouragement of the economic growth of African business and foreign investment. Because of the traditional separation of ownership from management which the idea of a company entails, it is important that means should be found to assure prospective investors of the safety of their investment, despite the very wide powers conferred on the management. In the absence of a commercial court in Ghana and in a fast changing continent, it is the writer’s view that, despite the need for certainty in the law, our courts should adopt a cautious policy of judicial activism so that the rapid and tremendous social and economic changes now taking place in Ghana may not cause company and commercial practice to diverge too widely from the letter of the law.

This issue is, of course, just part of a much larger question with which this paper is not directly concerned; namely, the place and position of the law in the economic development of Ghana. The tremendous pace of commercial and industrial expansion now taking place in Ghana makes it imperative that the legal framework in which it operates must be streamlined so as to meet the challenge of development. The proper administration of company law—which, after all, is the hard core of commercial law—is therefore a necessary part of the general process of development. And this is especially so in a developing

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Of this more will be said in the last section of this essay.
The economy where the need to encourage internal capital formation and its effective utilisation remains a matter of the greatest importance. But these rather interesting subjects must now be laid aside while we focus attention on the company law of the past, the present and the future.

The past

At the beginning of the twentieth century, there was a marked development in the cocoa, timber and mining industries in Ghana, then the Gold Coast. With this development came the influx of general companies. The need to bring some orderliness into this motley array of assorted companies was sharply felt. In 1907, the colonial legislature enacted the Companies Ordinance. That Ordinance was based on the obsolete 1862 Companies Act of Britain which was itself awaiting relegation into the limbo of forgotten statutes with the passage of the Companies (Consolidation) Act of 1908. According to Gower, the Ordinance was nearly "fifty years behind the times when enacted." By the 1960s it was a "century out of date."

Such was the overall damning commentary on the Companies Ordinance that a working party appointed in 1958 by the Government to revise the Ordinance made short shrift of it by describing it as "completely obsolete and quite unfitted for modern commercial needs." But Geoffrey Bing, one-time Attorney-General of Ghana, must have the last word. He says of the Ordinance that:

"in its heyday the English Act of 1862 had been the Company Promoters' Charter and it seemed to me only a matter of time before some far-seeing financier would appreciate that Ghana possessed the most out-of-date joint stock legislation of anywhere in the English-speaking world."

The next act of some significance was the Companies (Preferential Creditors) Ordinance. This, as its title indicates, was meant to provide

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4 Cap. 193 (1951 Rev.).

5 Final Report, p. 12, para. 8.

6 Report of the Working Party, 1958, at p. 1 (Government Printer). The report continues by saying that the Ordinance "falls short of modern codes particularly in its failure to distinguish between public and private companies and the lack of protection which it affords to creditors, members and the general public alike. In this respect, the Gold Coast lags far behind most other Crown colonies which have for many years had the advantage of modern codes based in most cases upon the English Act of 1929."

7 "Living with Dr. Savundra," Punch, 3 August 1967, at p. 179. See also Bing, Reap The Whirlwind (MacGibbon & Kee, 1968).

8 No. 18 of 1906.
merely for the preferential payment of local creditors, especially employees of insolvent companies. At the time of independence, the colonial heritage still shaped the realities of the business world in Ghana. But the then emerging transformation of the country’s economy brought a sharp awareness to all that there was a clear need to reform the business laws to keep abreast with modern demands. It was this clear need for a fundamental departure from traditional legal thinking which gave birth to the appointment of the working party in 1958 by the then Minister of Commerce and Industry. Their task simply was to review the 1907 Companies Ordinance. The working party prepared a draft Ordinance which was merely a replica of the 1948 Companies Act of Britain. Having just cast off the umbilical cord from the mother Parliament at independence, the country, not unnaturally, was in no mood for the wholesale adoption of English statutes. Accordingly, the draft Ordinance was rejected by the Government as not being suited to Ghanaian conditions.


Before we leave this discussion of the “past” we must pause a while to consider whether the introduction of the statutory incorporated company affected the conduct of business in a society whose life was predominantly regulated by the customary law. What is most striking even to the most casual observer is the near irrelevance of the Companies Ordinance of 1907. Indeed, quite a number of companies

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9 See on this Szereszewski, R., Structural Changes in the Economy of Ghana (Weidenfeld and Nicolson, 1965).
10 Cap. 249 (1951 Rev.).
11 The full terms of the Commission were: “To enquire into the working and administration of the present Company Law of Ghana and in the light of such enquiry make recommendations for the amendment and alteration of the Companies Ordinance and of such other laws of Ghana as the Commissioner may consider necessary in regard to his conclusions concerning the said Companies Ordinance. The Commissioner shall take into account and examine the laws of such other African States as he may consider appropriate and he shall be entitled to recommend that any existing or proposed law in relation to companies enacted by or proposed to be enacted by any African State may be adopted in whole or in part for use in Ghana.
In framing his recommendations the Commissioner shall take into account the need for encouraging African enterprise in Ghana and the encouragement of foreign investment therein.”
12 Act 179.
operated in Ghana before and after 1907 but the idea of the Ghanaian incorporated company which the Ordinance was designed to facilitate was largely a myth. The influx of the foreign trading firms that accompanied the gold rush did not result in the creation of any noticeable locally incorporated companies. The number of companies trading in Ghana definitely increased but the significance here lay in the fact that these companies were mostly trading in the Gold Coast as subsidiaries of foreign companies.

Another interesting question worth debating is why the customary law was not adapted to the changing demands of business so as to pre-empt the introduction of the Companies Ordinance which, as has been shown, was both obsolete and irrelevant. One is forced to raise this question because some research writers, notably Bentsi-Enchill and Polly Hill have discovered ideas of corporate groups in the customary law, and the view has often been expressed that the customary law changes and adapts itself to new situations and circumstances. The use of the term “corporation” and “company” in the customary law context by both Bentsi-Enchill and Polly Hill may tend to mislead, although in the type of customary organisation described by Polly Hill one could discern the local equivalents of modern capital formation and capital utilisation in the interest of a common venture. But beyond that one cannot press the analogy too far.

Four basic reasons may be offered for the supersession of the customary law. Firstly, the idea of the corporate personality was an entirely new concept not known to the customary law. Secondly, at the time of the gold rush the business enterprises that existed in the Gold Coast were almost all non-indigenous. As foreign companies, they were not subject to the customary law. Thirdly, the customary law simply did not contain “sufficient responses to the demands of development.” Fourthly, by virtue of the Courts Ordinance, 1876, customary law did not apply between “non-natives” nor between a “native” and a “non-native” unless substantial injustice would arise from applying English law. The word “native” was defined to exclude companies as well as the government.

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11 One report had it that there were about 400 mining companies operating in the Gold Coast at this time and Gower in the Final Report also mentions an “influx of a number of companies from South Africa.”
But to concede the inherent inability of the customary law to cope with the problem of commercial advancement is not to assume that it is of no consequence at all in the commercial law of Ghana. On the contrary, the fact that modern ideas of incorporation had been thrust upon a traditional society meant that conflicts would arise from time to time. Atiyah has argued that the indirect “application of the customary law in the ordinary commercial transactions may well prove an obstacle to Ghana’s economic development.” For all these reasons, the supersession of the customary law was entirely justified. But having cast aside the customary law, does our Companies Code meet the challenge of the day? We must now turn to that question.

The present

Here we propose to discuss the basic philosophies underlying the Companies Code, 1963. By far the most predominant philosophy is the protection of creditors, investors and the general public through the disclosure of company affairs. Indeed constant reference is made to publication in the Gazette. It is, of course, a matter for debate whether the philosophy of disclosure in itself—though a desirable objective—is the best policy for Ghana. It is perfectly possible to proffer the alternative philosophy of supervision, especially in the absence of a functioning stock exchange and an articulate financial press. Even in the case of prospectuses, their opening phrase is a bold warning to all that the Registrar has not checked and will not check the accuracy of statements therein.

One cannot but feel some sympathy with the views of Mr. Justice Douglas of the U.S. Supreme Court, namely that:

“those needing investment guidance will receive small comfort from the balance sheets, contracts, or compilation of other data. They either lack the training or intelligence to assimilate them and find them useful, or are so concerned with a speculative profit as to consider them irrelevant.”

It is hoped that an activist supervisory role in the Registrar of Companies coupled with the creation of the stock exchange will go a long way to meet the problem raised here.
Another important introduction in the Companies Code is the attempt to prevent limited companies from trading when they are grossly undercapitalised. Accordingly section 28 of the Companies Code provides that a company shall not commence effective business unless there has been paid to it for the issue of its shares consideration to the value of at least C1,000 of which at least C200 shall have been paid for in cash. The means for proving this is by filling out Company Forms 3 and 4 which contain a solemn declaration by the directors and secretary that the section has indeed been complied with. Desirable though this provision is, it is submitted that it was still-born insolar as there is no means of giving real effect to it. It is the writer’s view that this provision cannot be properly enforced when it is most desired; that is to say at the birth of the company. Of course, it is always possible to discover at the end of the company’s financial year that the company is undercapitalised but it will then be too late since the certificate to commence business would have been issued to the company already. The production of a bankers’ order would not be effective either since the company could always get an accommodation for the purposes of the section only to withdraw it all immediately afterwards. To insist on the minimum capital amount in the company’s reserves throughout the company’s life would be unrealistic and would involve the unnecessary locking up of capital. Indeed Gower himself conceded that the idea of a minimum paid up capital was not meant to be a guarantee that there would always be this sum in reserve. One sure way out of the impasse is to get an insurance company to guarantee the viability of new companies to the extent of the minimum paid-up capital. Whether Ghanaian insurance companies would be willing to undertake this type of risk is an entirely different matter.

The Code further makes an attempt to limit the gulf between ownership and control by banning non-voting shares and by strengthening the position of the members. No doubt, that is another very desirable objective but it will be argued later that the whole concept of shareholder control is increasingly becoming a myth and that other alternative methods of achieving this objective should be sought. As a corollary to shareholder control, there is a greater limitation on the

22 See s. 45 for the meaning of payment in cash.
23 The justification for this provision is provided for us by Gower in a talk which is reproduced in an article: “Company Law Reform” (1962) 4 Malaya Law Review 36. “It seems to me to be quite self-evident that no one should be allowed to trade with limited liability unless he is prepared to put a reasonable amount of capital into his business.”
24 Final Report, p. 46.
25 ss. 31, 49 and 50.
26 ss. 157, 158, 163 and 170.
27 Infra.
powers of the directors\footnote{28} and much stricter rules regarding self-dealing by directors\footnote{29}. Again shareholders are given much more effective remedies against misconduct on the part of the directors and against oppression by the controlling majority.\footnote{30} In England the rather hopeful signs\footnote{31} that the corresponding section 210 of the English Companies Act on oppression was becoming a sharp weapon in the armoury of the minority were quickly arrested in the case of \textit{Re Five Minutes Car Wash Ltd.}\footnote{32}

In Ghana the spate of applications for relief from oppression seems to be on the increase.\footnote{33} It is rather early to say whether the courts have seized with boldness the rather wide provisions of sections 217 and 218. But on any fair view of the matter, it could be said that our courts have shied away, and rightly so, from the narrow legalistic approach which the British courts adopted ever since Lord Eldon’s famous pronouncement that “this Court is not required on every occasion to take the management of every Playhouse and Brewhouse in the Kingdom.”\footnote{34}

Two other areas of law need be singled out for special mention and to those we must now turn. These are the prospectus provisions\footnote{35} and the enhanced powers of supervision in the Registrar of Companies.\footnote{36} The prospectus provisions in the Companies Code are clear, better arranged than before and certainly more effective. Ghana has seen a spate of public issues over the past five years\footnote{37} and almost all have shown a scrupulous regard for the provisions of the Companies Code. If it could only be said that the investing public fully understood all the technical details in the various prospectuses then we could say with pride that the aim of the founding father of our Companies Code had been fully achieved.

Now to the Registrar of Companies. The Companies Code vests the registrar with greatly enhanced powers of supervision and Professor O. Kahn-Freund has described those powers as inquisitorial.\footnote{38} Indeed, the one remarkable thing about the Ghanaian registrar is that he is required to be an “activist” registrar. Unlike the English Registrar of Companies his job extends much further than that of an officer whose

\footnotesize{\begin{itemize}
\item \footnote{28}{s. 202.}
\item \footnote{29}{s. 203.}
\item \footnote{30}{ss. 210, 217 and 218.}
\item \footnote{32}{[1966] 1 W.L.R. 745.}
\item \footnote{33}{E.g., \textit{Re Politis}, High Court, Accra, 17 January 1967, unreported; \textit{Vamharis} v. \textit{Altuna} [1973]}\footnote{34}{2 G.L.R. 41; \textit{Okudjeto} v. \textit{Izanti Bros.} [1974]}\footnote{35}{1 G.L.R. 374; \textit{Aboagye} v. \textit{Tetevi} [1976]}\footnote{36}{1 G.L.R. 217.}
\item \footnote{37}{E.g., \textit{Kingsway Ghana Ltd.} issue; \textit{C.F.A.O. Ghana Ltd.} issue; \textit{Guardian Royal Exchange Assurance Ghana Ltd.} issue; \textit{Standard Bank Ghana Ltd.} issue. (1962) 25 M.L.R. 78 at p. 81.}
\end{itemize}}
main function is to keep a register of company activities. In addition to his traditional role of receiving, scrutinising and registering documents, he is required, inter alia, to decide on the desirability of names; to take proceedings to annul any undesirable alterations of the authorised business of a company; and to refuse to issue a certificate of incorporation to any company unless he is satisfied that it has a minimum paid-up capital of at least £1,000. He may take proceedings to vindicate minority rights, conduct informal investigations into a company’s affairs and, in all public issues of shares, he remains the supreme protector of the public interest, especially in the absence of a functioning stock exchange in Ghana. Again, when it comes to company accounts, the registrar is also the bridge between the company on the one hand and the public on the other. What is more, he can by legislative instrument, and on showing cause, disqualify any practising accountant of a private company from so acting. By section 7 of the Bodies Corporate (Official Liquidations) Act, 1963, he is the liquidator in any official winding up under that Act. In a continent which has been torn apart by a fusillade of coups, the use of military language may be forgiven. It would seem that the Registrar of Companies in Ghana is more of a “general” than a “registrar.”

Gower was averse to making the registrar a kind of “overlord of corporate enterprise” for fear of creating him a “superman,” but in the final analysis the end result is dangerously close to that. The administrative supervision of companies is left solely with him. In modern times, this power of supervision vested in the registrar is receiving greater awareness as a real source of protection for aggrieved minority shareholders. The real importance of the registrar’s powers in section 219 lies in its quiet and informal nature. Of course the registrar has power to conduct formal enquiries into the affairs of companies to be carried out by his inspectors with all the publicity that this entails. All expenses of, and incidental to, an investigation are to be defrayed by the registrar from his own funds in the first instance but there is no evidence that such funds have been voted for the Registrar-General’s Department.

39 s. 14.
40 s. 15.
41 s. 26.
42 s. 28.
43 s. 225.
44 s. 219.
45 s. 279.
46 s. 123 et seq.
47 s. 270 (4).
49 s. 226.
The Future

We may now consider the question, where do we go from here? Here we should like to look at the real problem of enforcement of directors' duties and the problem of democracy in company law.

It must be obvious, even to the most casual observer, that the duties of directors are basically unenforceable. This is due to two factors: firstly, because the agency of enforcement is the shareholder; and secondly, because the pernicious rule in *Foss v. Harbottle*50 denies the shareholder the locus standi to bring an action. Even though the duties of directors emerge from trustee concepts51 and are directed to fiduciary probity, in practice the duties are lax and can be waived in the regulations and through proxy voting.52 Furthermore, the duties of skill, care and attention are still largely undeveloped in Britain.53 But this is merely illustrative of the philosophy that it is not the real business of the courts to manage the affairs of companies for them.

Fortunately, Professor Gower provided legislative answers to these problems, for under our Companies Code *Foss v. Harbottle* has been radically cut down to size and the duties of directors have been made more readily enforceable.54 Equally the duties of skill, care and attention have been placed on an objective basis.55 But insofar as these laudable reforms are based on shareholder control of management, it is submitted that they do not really meet the argument full square. A solution would lie along the lines of increased powers of enhanced supervision in the registrar. Investigations are the most valuable form of enforcement of directors' duties and the prevention of breach where an actively interventionist state enforcement agency exists. If this viewpoint were to be accepted then there must be active recruitment, training and proper staffing of the Registrar General's Department to cope with this further task. Especially, the core of company inspectors will have to be greatly increased and strengthened. When considering the argument for enhanced powers for the registrar, Gower was wary of "substituting administrative discretion and regulation for fixed statutory rules."56 Happily, this is the one area where that argument does not apply for it is here not a question of substituting administrative

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51 E.g., Marquis of Bute's Case [1892] 2 Ch. 100.
52 Re Brazilian Rubber Plantations & Estates Ltd. [1911] 1 Ch. 425; Re City Equitable Fire Co. [1925] Ch. 407; Trebilcock, "Liability of directors for negligence" (1969) 32 M.L.R. 499.
53 ss. 210, 217 and 218.
54 s. 203(2).
discretion for fixed statutory rules but merely giving effect to the statutory rules through the office of the registrar.

Now a word about the problem of democracy. Ghanaian company law of the future must seek to democratise the institution of the company. Everybody agrees that the doctrine in *Parke v. Daily News Ltd.*[^57] is not good enough and this democratisation must begin with the employees on whom, after all, the success of the company depends. It is the writer's belief that the recognition of the duties of efficiency in management must reflect a complementary duty to the employees of the company. This recognition of effective worker participation in management ought, as is the case in West Germany, to find reflection in their right to information, their right to representation on the board, their right to participate in the decision-making process and their right to some supervisory role on the board. Alongside this development must be increased awareness of the social responsibilities of companies. Fortunately, Gower has provided the seeds of this development in the *Companies Code*[^58] and the challenge of the next century in company law will be along these lines. It is possible to predict that from very opposite levels the rights of shareholders and workers will in future tend to merge in company law.

In a contribution devoted to the centenary celebrations of the Supreme Court, it is only fair that the courts should take the pride of place in this discussion. While the contribution of our courts to the company law of Ghana has thus far been commendable, it is the writer's view that for the future we must focus attention on a reorganisation of the courts with a view to achieving greater efficiency. Ghana has a very sophisticated Companies Code and some of its provisions require speedy and effective judicial control. It is the writer's view that it is time Ghana set up a commercial court. When the Province of Ontario undertook an overhaul of its company law in 1967, the Lawrence Committee recommended the creation of a "Companies Court" to deal with the specialised proceedings under their proposed new and complex legislation.[^59] It would be hard to justify the creation of a special court to deal solely with company matters but in the wider context of a commercial court, the arguments against fade away.

The arguments for the creation of the commercial court may be summed up as follows: Firstly, the courts as presently constituted take too long to try cases and are thus not the best suited to deal expeditiously with business disputes. Secondly, the whole procedure of the courts is designed to deal with disputes between hostile adversaries.

[^58]: E.g., ss. 181(4), 202 and 203(3).
But this is not entirely appropriate to most commercial situations. Thirdly, litigation under the present system tends to be rather expensive. Fourthly, commercial men generally resent publicity and probably dislike the normal court procedure of oral examination and cross-examination in open court.

It is partially for these reasons that a commercial court stripped of some of these cumbersome procedural limitations and staffed by a judge well versed in commercial matters is important for Ghana. If there is a case for the creation of commercial court, then it is necessary to determine two fundamental questions: whether there is any justification for providing the commercial community with a special court at the expense of the state and at a time when resources are scarce; and whether the new court should determine disputes by following present procedure.

It must be stressed that Ghana is a trading nation with a growing population and an expanding economy. More and more people will take to business and so will commercial cases increase. Perhaps the time is ripe to consider seriously the deployment of special funds for the creation of the commercial court. It would be the function of the commercial court to consider settlement of commercial disputes and to resort to the present adversary system as a last resort. As has been stated earlier, the present system involves too much waste of time and effort. The commercial court should provide short cuts to the determination of disputes. Towards the achievement of that goal the following proposals are put forward:

(a) Pleadings in their present form should be abolished except when the judge of the commercial court otherwise directs. Greater use ought to be made of originating summonses and originating notice of motion.

(b) The rules of evidence should be considerably relaxed. For example, the hearsay rule must not be applied in all its rigidity.

(c) Except where the dispute is grave and serious, the case should be dealt with summarily and quickly by the judge.

(d) Where necessary, the court should consider sitting in camera to prevent needless publicity for defamatory, embarrassing or vexatious proceedings except where the public interest requires otherwise. In such a case, it should be open to any aggrieved party or the Press to apply for the case to be tried in open court.

(e) The main approach of the court should be conciliatory and where desirable the court should appoint official referees to assist in the solution of the case. So for example an official referee skilled in company accounts could be appointed ad hoc.
to assist the judge whenever an application is made to the court by an auditor for directions in the discharge of his duties.  

Such a suggestion hopefully should take care of the serious concern expressed by many as to the suitability of the courts to decide on matters of business. Once the idea is accepted then whether one styles the judge a “Corporation’s Ombudsman” or not is neither here nor there. The foundations for the solid development of Ghanaian company law over the next century would have been firmly reinforced.

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60 s. 136 (5). See also s. 337 concerning the functions of the Registrar of Companies.  
A CENTURY OF CHANGES IN THE LAW OF SUCCESSION

A. K. P. KLUDZE*  

For a century now the courts of this country have administered the law of succession, both testate and intestate. The concept of the law of succession, however, is basically not an innovation from English law, nor an imposition which would derive its validity from only the Courts Ordinance of 1876. Our people, presumably from the era of the private acquisition of property, had evolved their different rules for the devolution of self-acquired property after death. These were customary law rules known before the reception of English law. Although these customary law rules have in this respect been subjected to changes inevitable from the impact of foreign ideas and foreign juridical and social concepts, the idea of a regime of legal rules to regulate succession to property existed before European contact.

INDIGENOUS RULES OF SUCCESSION

The indigenous rules are admittedly not the same for the whole country. In some areas it is contended that the family of the deceased is the rightful successor to his interests in intestate property. In others it is maintained that it is specifiable individuals who are entitled to succeed to interests in property left intestate. Yet in some communities an institutionalised form of testamentary disposition had been recognised before the reception of European or English legal concepts and rules.

After a hundred years during which these indigenous rules have been administered alongside or in combination with the received English law and statutory enactments, it may be instructive to review the changes or modifications that have resulted from their administration. Some of these modifications were evolved from the socio-economic changes consequent upon the development of a more complex society with a cash economy; others have resulted from the imposition of English law; and yet others are directly attributable to statutory modifications in both the colonial and post-colonial eras. Some of the changes are also due to judicial legislation and even judicial inconsistency and ambivalence.

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TESTAMENTARY CAPACITY UNDER THE WILLS ACT, 1837

As is well known, when the Courts Ordinance was passed in 1876, section 83 thereof provided that our courts were to apply the common law, the doctrines of equity and the statutes of general application which were in force in England on 24 July 1874. From time to time there have been arguments as to whether a particular statute in force in England on the relevant date was a statute of general application in Ghana within this context. This argument, however, does not appear ever to have been extended to the Wills Act, 1837, which seems to have been accepted by judicial authority as an English statute of general application in force in Ghana. Accordingly Ghanaians, for about a century, had been making statutory wills in accordance with the provisions of the English Wills Act, 1837, until the enactment of our own Wills Act, 1971.

The capacity of a Ghanaian to make a will under the received English law has, however, been a subject of some controversy. Ollennu says:

"The right of a Ghanaian to make a testamentary disposition of property is inherent, derived from customary law and not from English law, but in exercise of that right a person may adopt a method of testamentary disposition recognised by the law of the land, namely, the method provided by customary law, or that provided by English law."

The problem raised here is fundamental. It implies that the capacity to make wills under the Wills Act, 1837, was not regulated by that Act, but by the customary law. If this argument was sound, it would mean that the 1837 Act regulated only the formal validity of wills made by Ghanaians, but not the capacity to make them. This proposition, simple as it appears, and notwithstanding the force of its logic, has certain practical problems.

In the first place, if the capacity to make wills was not conferred by the Wills Act of 1837 as the received law, it would mean that Ghanaians whose customary laws did not recognise the making of wills could not avail themselves of the provisions of the 1837 Act to make testamentary wills.

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2 7 Will. 4 & 1 Vict., c. 26.

3 Act 360, effective from 1 June 1971.

dispositions. As far as the Akan generally are concerned, it may not be doubted that they can make customary law wills known as samansiw. It seems that it is also recognised among the Ga who know it as shamansho. The Ga cases would seem to include Akele v. Cofie. It may, therefore, be contended that the Akan and the Ga who made wills under the Wills Act, 1837, did so on the basis of a testamentary capacity derived from their respective customary laws.

The position was certainly more difficult in the case of testators from other communities. It seems that, in particular, among the Ewe and the Adangbe communities, communities which practise patrilineal succession whereby a deceased person's properties devolve on his children, the institutionalised form of testation was unknown in their customary laws. Writing, for instance, on the Adangbe, Pogucki, a former Commissioner of Lands in Ghana who had consulted official records and researched into the matter, declared that "Nuncupative wills, which are an import from Akan customary law, appear seldom. Indeed, in some instances a death-bed disposition can be invalidated by a family decision." The present writer has also expressed the opinion that the customary law will is unknown to the Ewe. There is little information from decided cases and legal literature on the existence of a customary law will among the communities of the Northern and Upper Regions of Ghana. One would hazard an opinion, supported by random and certainly inconclusive research, that it is unknown among the communities of the Northern and Upper Regions.

If the customary law will, as known to the Akan, was unknown to other communities, and if the testamentary capacity of a Ghanaian was derived from the customary law and not from the Wills Act, 1837, on what basis could the will of an Ewe, an Adangbe, a Dagbani (from the Northern Region) or a Sissala (from the Upper Region) be validated? It would mean that all wills made by such persons before our Wills Act of 1971 were invalid by reason of the lack of the requisite testamentary capacity. This is a logical deduction. However, in the history of our courts it does not appear that the validity of a will has ever been seriously challenged on this ground. This could be due to the fact that at least one of the premises on which the argument is based is erroneous. It is submitted, with respect, that the better view is that the Wills Act, 1837, did not merely prescribe the formalities of a will but also conferred the testamentary capacity, such capacity being conferred even where it did not exist under the applicable customary law.

Admittedly there were possible problems with the proposition that the Wills Act, 1837, conferred testamentary capacity on Ghanaians. The problem could arise in particular with married women. For section 8 of the Wills Act, 1837, prohibited the making of a will by a married woman or feme covert because “no will made by any married woman shall be valid.” The word “married” refers to a question of status which, according to settled principles of private international law, is regulated by the lex domicilii. By the Ghanaian domiciliary law, not only marriages under the Marriage Ordinance but also those under the customary law as well as under the Marriage of Mohammedans Ordinance are recognised as valid marriages. It would mean that until 1 June 1971 married women in Ghana, if their customary laws did not confer the testamentary power on them, could not make valid wills under the Wills Act, 1837. This restriction was removed in England by section 1 of the Married Women’s Property Act, 1882 and later sections 1 and 4 (1) (a) of the Law Reform (Married Women and Tortfeasors) Act, 1935, both of which, as post-1874 English enactments, did not apply in Ghana. Our own Married Women’s Property Ordinance concerned only the wages and earnings of married women and the property acquired with such wages and earnings, empowering them to maintain actions even during coverture to enforce any claims connected with them; it did not confer testamentary capacity on married women. It would mean that by the strict application of the Wills Act, 1837, a married woman could not make wills in Ghana. Again it is worthy of note that no cases have been reported in the whole century of our courts when the validity of a married woman’s will was contested on the ground of a lack of testamentary capacity under section 8 of the Wills Act, 1837.

It would appear that the controversy has now been resolved, if ever a controversy it was, in favour of the testamentary capacity of a married woman. For it is now provided in section 1 (1) of our Wills Act, 1971, that, with exceptions for insanity or infirmity of mind, “Any person of or above the age of eighteen years may in writing and in accordance with this Act make a will.” It is submitted that “any person” within the legislative intendment includes married women. It is submitted further, therefore, that whatever the hesitations and doubts may have been under the old law, our Wills Act, 1971, expressly confers the
testamentary capacity on all Ghanaians including married women who are at least eighteen years old.

THE WILLS ACT, 1971

For almost a whole century the English Wills Act, 1837,\(^{15}\) applied to the statutory wills made in this country. Since the inception of the Supreme Court of the Gold Coast in 1876, by virtue of section 83 of the Courts Ordinance, which provided for the enforcement in the colony of English statutes of general application in force in 1874, the English Wills Act of 1837 remained in force until it was repealed as from 1 June 1971, by our Wills Act, 1971. Even though this nineteenth century Act had been amended in several respects in the country of its origin, it remained in force in Ghana practically unamended until 1971. Certain anomalies were, therefore, retained with the old law.

The Wills Act, 1971, which replaced the 1837 English Wills Act is not in essence a new or a revolutionary piece of legislation. It re-enacts most of the provisions of the 1837 Act. Most of the existing case law on the subject may, therefore, continue to be authority for the exposition of the new law. Furthermore, most of the innovations in the 1971 Act may be traced to post-1874 English legislation which did not previously apply in Ghana. The interpretation and application of the 1971 Act may, therefore, continue to be aided by current English decisions, at least as persuasive authority in our courts.

One great merit of our Wills Act, 1971, is that it is a Ghanaian enactment and, in search of the law on wills, one would no longer have to scan the aged pages of a nineteenth century English statute book. One still wonders why it took us a whole century to achieve this. Although the ghost of the 1837 Act will continue to haunt us for a considerable time, we now have an Act which is both modern and simple. Indeed simplicity is also one of the great merits of our Wills Act, 1971. As recent legislation it is expressed in comparatively simple language, generally comprehensible to the reader. It discards the obsolete and spent words and the verbiage of the nineteenth century legislative draftsman in favour of current usage.

The Wills Act, 1971, introduced several changes in the substantive law and some of these may be noted.

(i) Testamentary capacity

As has been noted earlier, whatever the doubts were in the old law, section 1 of the Wills Act, 1971, now confers the testamentary capacity on all Ghanaians, subject only to qualifications of age and soundness

\(^{15}\) 7 Will. 4 & 1 Vict., c. 26.
of mind, whether such capacity exists in the applicable customary law or not.

(ii) Minimum age

Under section 7 of the Wills Act, 1837, no person under the age of 21 years could exercise the testamentary power, and this was the law in Ghana until 1971. The minimum age for testamentary capacity has now been reduced to eighteen years in Ghana by section 1 of our Wills Act, 1971.

(iii) Witness-beneficiary

At least two changes have been effected in the position of the witness who would be also a beneficiary under a will. Under section 15 of the Wills Act, 1837, a gift to an attesting witness or his or her spouse in a will attested by him or her was void. Although the gift to the witness or his or her spouse was void, the will itself could remain valid and the gifts to other donees could be enforceable. However, where a witness or his or her spouse took as a trustee under the will and not as beneficial owner, the statutory provision did not apply and the gift was effective. Furthermore, where a witness or his or her spouse took as a beneficiary in a trust arising under a will attested by him or her, the gift did not fail; for he or she was regarded as having taken dehors the will.

Now, under section 3 of our Wills Act, 1971, the mere fact of attestation by a beneficiary does not invalidate the gift to him. If the signature of the witness-beneficiary is superfluous in the sense that there are at least two other competent attesting witnesses who are not beneficiaries under the will, the witness-beneficiary may benefit under the legacy or devise to him. Perhaps the rationale behind the new provision is that with the presence of two other competent and disinterested witnesses, the danger of fraud or undue influence may be eliminated or reduced.

A further change in the law is that a gift in a will to the spouse of an attesting witness is now not void under section 3 of our Wills Act, 1971. It is yet to be seen whether this is a desirable change in the law. The principle under the 1837 Act was apparently based on the unity of the personality of both a man and his wife in a marriage in Christendom, a voluntary union of one man and one woman to the exclusion of all others for life. Even without appealing to such a doctrine, practical experience would indicate that a spouse would be normally very interested in the property expectations of his or her partner. Therefore, the presence of a spouse at the execution of a will in favour of the other partner would involve the same risks as the presence of the partner himself or herself.
(iv) A will ambulatory as regards donees

The 1971 Wills Act has extended further the principle that wills are ambulatory. Under section 24 of the Wills Act, 1837, the principle that a will was ambulatory meant that a will was construed, with reference to property, as if it was executed immediately before the death of the testator, unless a contrary intention appeared from the will. Consequently if Noamesi had only three houses at the time of the execution of his will, and stated in his will “I give all my houses to Gabianu,” but subsequently acquired more houses and died possessed of five houses, Gabianu was entitled to all the five, including the two acquired after the execution of the will. This presumption, however, did not extend to donees; for section 24 of the Wills Act, 1837, in express terms was limited only to property covered by the will.

Under the old law, because a will was not ambulatory as regards donees, where a donee was designated by a description, such as “my son’s wife,” but she ceased to be the son’s wife at the time of the testator’s death, prima facie she nevertheless remained entitled to the gift; for she satisfied the description at the date of the execution of the will. This could work injustice as the result might be unintended by the testator.

In the Wills Act, 1971, the position, it is submitted, has been changed by the broader provision in section 7 (1) that, “A will shall take effect as if it had been executed immediately before the death of the testator, unless a contrary intention appears from the will.” This new provision does not restrict the ambulatory nature of wills to property covered by the will. As the whole will is to take affect as if executed immediately before the death of the testator, the donee designated by a description will prima facie be the person who satisfied the description at the time of the death of the testator. In the example already given, where property is given to “my son’s wife,” the woman entitled to take under the Wills Act, 1971, would now be the son’s wife at the time of the death of the testator. Cases of divorce and re-marriage may, therefore, affect entitlement to property by such a donee. Again one cannot be certain that this is the intention of the testator. It is possible that the testator had a special affection for the woman who was his son’s wife at the time of the execution of the will and intended her as an individual to be an object of his bounty.

(v) The commorientes rule

The Wills Act, 1837, provided no clue to a situation in which a testator and a beneficiary under his will died in circumstances in which
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their deaths appeared to be simultaneous and it was not possible to
determine who died first. The resolution of the problem, however,
could be crucial because the gift lapsed if the donee predeceased the
testator. Under the old law the general principle enunciated in Re
Phene's Trusts17 applied and the evidentiary rule of the burden of
proof decided the issue of which of them died first.

The commorientes rule has, however, now been introduced into
our law but in somewhat confusing and possibly inconsistent provisions
in two different enactments. The earlier provision is in section 7 (7) of
the Wills Act, 1971, wherein it is enacted that:

"7 (7) Where a testator and a beneficiary under his will die in
circumstances:

(a) in which it appears that their deaths were simulta-

neous; or

(b) rendering it uncertain which of them survived the

other,

the beneficiary shall be deemed to have survived the testator
for all purposes affecting the entitlement to property under the
will of that testator . . ."

This provision by itself is clear and should present no particular
difficulties. It became effective from 1 June 1971, and changed the old
law to this extent.

About four months later, however, the Courts Act, 1971,18 was
enacted and became effective from 22 September 1971. The Courts
Act, 1971, by virtue of its section 111 (2) incorporated into the laws of
Ghana section 184 of the English Law of Property Act, 1925, which
provides that:

"In all cases where, after the commencement of this Act, two or
more persons have died in circumstances rendering it uncertain
which of them survived the other, such deaths shall (subject to any
order of the court), for all purposes affecting the title to property,
be presumed to have occurred in order of seniority, and accord-
ingly the younger shall be deemed to have survived the elder."

It may not be always possible to reconcile the two provisions. If the
beneficiary under a will is younger than his testator, the two provisions
can be reconciled; for, if they both die in such circumstances that it is
uncertain who died first, by the application of either of the rules the
beneficiary will be deemed to have survived the testator.

If the testator was younger than the beneficiary under his will, and
they both died in circumstances rendering it uncertain who died first,
the different provisions would lead to conflicting conclusions. Under section 7 (7) of the Wills Act, 1971, the beneficiary, though older, would be presumed to have survived the testator and his estate would be entitled to the gift to him in the will. However, by the application of section 184 of the English Law of Property Act, 1925, the beneficiary, because he was older, would be presumed to have died first and the gift to him would lapse by reason of the presumption that he predeceased the testator.

As the Courts Act, 1971, was later in point of time, it may be contended that, in accordance with the normal rules of construction, as a later enactment it amends the Wills Act, 1971, being an earlier enactment, to the extent of any inconsistency. The argument is, however, more complicated. The Courts Act, 1971, says in section 111 (4) that the English statutes incorporated under section 111 (2), which include section 184 of the English Law of Property Act, 1925, "shall be treated as if they formed part of the common law, prevailing over any rule thereof other than a rule 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."

As a common law rule, the provisions of section 184 of the English Law of Property Act, 1925, cannot in principle override or amend the statutory provision in section 7 (7) of the Wills Act, 1971. If this argument should find favour, the provision in section 7 (7) of the Wills Act, 1971, would prevail and the beneficiary would always be presumed to have survived the testator where, from the circumstances of their deaths, it is not possible to establish by admissible evidence the order in which the deaths occurred. Furthermore, the courts have a discretion to order that the deaths may not be presumed to have occurred in order of seniority. It may well be that, in deciding whether to exercise the jurisdiction to make or not to make such an order, the courts will have regard to the provision in section 7 (7) of the Wills Act, 1971, where it is applicable, to avoid intestacy.

(vi) Gifts saved by issue

The old rule under section 33 of the Wills Act, 1837, was that a gift to a child or other issue of a testator did not lapse in the ordinary way even if the child-donee predeceased the testator, provided the child-donee was survived by issue living at the time of the death of the testator. In that event the child-donee was presumed to have died immediately after the death of the testator. The result was that the gift was saved for the estate of the child-donee who had in fact predeceased his parent-testator. It did not necessarily mean that the gift would ensue to
the benefit of the testator’s grandchild who saved the gift; for it formed part of the estate of the deceased child and devolved according to the terms of his will (if any) or the rules of intestacy.

The position has been changed now by section 8(2) of the Wills Act, 1971. Now, as before, a disposition in a will to a descendant, which is not for a life estate measured by the life of the said descendant, does not lapse even if the descendant predeceases the testator, provided the descendant dies leaving issue surviving the testator. However, under the Wills Act, 1971, the gift which is saved by such an issue does not form part of the estate of the deceased donee but goes to the issue who saved the gift. The issue would take per stirpes and not per capita.

(vii) Marriage

Under the provisions of section 18 of the Wills Act, 1837, a subsequent marriage of a testator automatically revoked any will made by him. Although by section 177 of the English Law of Property Act, 1925, the provision was amended so that a will expressed to be made in contemplation of a marriage was no longer revoked by the solemnisation of the marriage contemplated, this amendment never applied in Ghana and all subsequent marriages continued to automatically revoke wills. What was not quite clear was whether the taking of a second or a third wife by a customary law marriage, in a polygamous system, meant that each such marriage operated as an automatic act of revocation of an existing will. Since these polygamous marriages are recognised as valid marriages by the Ghanaian lex domicilii, on principle they should have the revocatory effect contemplated by the statute.

Revocation of a will by a subsequent marriage is not retained in the Wills Act, 1971. As from 1 June 1971, therefore, a subsequent marriage of a testator does not automatically revoke a will previously made by him.

Marriage, however, may still affect a gift in a will. In section 38 of our Matrimonial Causes Act, 1971, it is provided that:

“Any gift to or appointment in favour of one spouse in the will of the other shall be invalidated if the marriage has been terminated under this Act by divorce or annulment, unless the will contains an express provision to the contrary.”

This provision does not revoke the whole will. Only the gift to a spouse by the testator becomes invalid if the marriage is terminated otherwise than by death; but the will as a whole may remain valid. It is not clear...
why this provision appears in the Matrimonial Causes Act rather than the Wills Act.

(viii) Provision for dependants

The Wills Act, 1837, did not impose any limitations on testamentary freedom. A testator could dispose of all his property to whomsoever he pleased. He could choose to leave nothing for his spouse, children, near relatives and dependants. The concept of a legitima portio in European continental jurisprudence has never been applicable in this country. However, it is now provided in section 13 of the Wills Act, 1971, that certain dependants, who might become destitute because nothing was left for them in a will, may apply to the court for an adequate provision to be made for them out of the testator’s estate. That section provides that:

“If upon application being made, not later than three years from the date upon which probate of the will is granted, the High Court is of the opinion that a testator has not made reasonable provision whether during his lifetime or by his will, for the maintenance of any father, mother, spouse or child under 18 years of age of the testator, and that hardship will thereby be caused, the High Court may, taking account of all relevant circumstances, notwithstanding the provisions of the will, make reasonable provision for the needs of such father, mother, spouse or child out of the estate of the deceased.”

The section, therefore, confers jurisdiction on the High Court to amend a will to provide for dependants. The application, it may be noted, may be made within three years of the grant of probate; the period is not reckoned from the date of death. The class of persons in whose favour the jurisdiction may be exercised is understandably narrow.

It is to be hoped that this jurisdiction will be exercised only in the clearest of cases to relieve hardship. A testator who chooses to leave nothing for such persons as his surviving parents, or spouse, or young children, may have a good reason for his decision. If he were not silenced by the icy hands of death, such a testator might very well be able to justify his action. Great caution would, therefore, be counselled in any decision to interfere with the testamentary dispositions of a man who died of sound mind and who, in disposing of his property by will, may be presumed to have appreciated the claims on his bounty by his dependants and loved ones.

THE ORDINANCE MARRIAGE AND CUSTOMARY LAW WILLS

Today it would seem to be settled law that a Ghanaian who is competent to make a customary law will may continue to exercise the
power even after a change in his or her marital status. For this purpose it does not now matter whether the marriage is contracted under the Marriage Ordinance or under customary law.

This area of the law, however, had been bedevilled with judicial inconsistency over the hundred years of the existence of our courts. The early judicial opinion, to be found in authoritative decisions of the courts, was that a Ghanaian who chose to marry under the Marriage Ordinance could not after contracting such a marriage make a will in accordance with the customary law. After opting for a marriage under the Marriage Ordinance, an English form of marriage implying a more "civilised" mode of living, a Ghanaian, it was thought, could not relapse into his old ways and purport to make a will under customary law. Today these arguments seem to us unconvincing: unconvincing because it is difficult to see the necessary nexus between marriage and testamentary capacity. They, however, made "sense" until about two decades ago.

In the early case of *In re Anaman* the issue arose. In that case the deceased, Isaac Anaman, had in 1887 married Amelia Grace Anaman in the Wesleyan Church at Anomabo. This was a marriage under the Marriage Ordinance. After the said marriage, the deceased, Isaac Anaman, purported to make a customary law will disposing of his property, and he died the day after the said will, survived by his wife. The Marriage Ordinance provided that where a person married under the Ordinance died intestate and was survived by a spouse, succession to his estate was to be regulated by English law. There was, therefore, the question whether Isaac Anaman had died intestate. This in turn depended on whether the customary law will made by him was valid. If the customary law will was valid, he could not be said to have died intestate and English law could not be invoked to regulate succession to his property. It was contended by Sarbah that the deceased did not die intestate because he had exercised his right to make a will under customary law, and consequently that the devolution of the deceased's estate could not be regulated by English law. Sarbah's argument was regarded by the courts as simply ingenious, and apparently it did not very much impress the court. Of the argument that the deceased's testamentary capacity was not affected by marriage under the Marriage Ordinance, Francis Smith J. said:

"... Mr. Sarbah cleverly argues that the deceased and the widow being natives of the colony, native law and custom must, in terms of sect. 19 of Ordinance No. 4 of 1876, bind them. the Legislature

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20 (1894) Sar.F.C.L. 221.
21 Ibid. at pp. 222-223.
having provided that such law and custom shall be deemed applicable in causes relating to testamentary dispositions; that, as by native law testamentary dispositions mean verbal dispositions, writing not being necessary by native law, a native who makes such verbal disposition cannot be said to die intestate.

That the word 'intestate' in the Marriage Ordinance means a person dying without making a will, either in accordance with native law—that is, verbally—or in accordance with English law; that the rules 21 and 22 of Order 51, 2nd Schedule, Supreme Court Ordinance, 1876, are merely rules of procedure, and cannot override the substantive law . . .”

These submissions were rejected. The issue appeared so well settled and clear to the court that, in the face of these submissions, Francis Smith J. apparently had no hesitation in saying22:

“It requires no argument to show that the status of persons who are married under the Ordinance is entirely different from that of those married according to native law. Rights are conferred by the former which not only are not enjoyed by those married according to native law, but are also inconsistent with the provisions of the native law. Disabilities are created which are not known to native law. But it is contended that it is only in case of intestacy that these rights can be enforced, that is, where a person died without making a will either according to English or native law. Against this contention there is this argument: The word 'intestate' occurs in an Ordinance dealing with marriage on the same footing as the law of England, and is used in connection with the devolution of personal property according to English law. The Ordinance does not regulate the relationship between a man and a woman married according to native law. Not, therefore, regulating native marriages, except by imposing certain restrictions on persons already married according to native law wishing to be married according to English law, the meaning of the word 'intestate' must be found from its connection with the subject of the legislation. And as it is used in connection with English law, its English legal signification must be ascribed to it and not its native legal import. And this view is further strengthened by the consideration of the duty imposed on the registrar to explain to the parties the prohibited degrees of kindred and affinity, and the effect as to the succession of the property of either dying intestate.”

The learned judge consequently held that a person who married under the Marriage Ordinance died intestate unless he made a will under the

22 Ibid. at pp. 224–225.
then Wills Act, 1837; for, as he further held, the application of the customary law in such cases was incompatible with the provisions of the Marriage Ordinance and a person married under that Ordinance could not prevent intestacy by making a customary law will.

Some 30 years later the same view of the law was applied in *In re Otoo*. In this case, one Timothy Mensah Otoo, who had in 1890 contracted a marriage under the Marriage Ordinance, 1884, had died leaving a customary law will made on his death-bed. The issue was whether the customary law will was valid, so that he could not be said to have died intestate. In this also Michelin Ag. C.J. said:

"I am compelled to hold, however, that when a person who is subject to native law or custom, alters his legal status, by contracting a marriage under the Marriage Ordinance, 1884, he is incapable of making such a will (i.e. *samansiw*) and this Court cannot give effect to a will so made by him. The only form of will which he can legally make, is one in accordance with the provisions of English law."

Both these decisions, which remained the law on the principle of stare decisis until recently, have been rightly condemned by Ollennu as erroneous. For the mere contraction of a marriage under the Marriage Ordinance cannot operate to deprive a party to such a marriage of the benefits and obligations under the customary law.

Before Ollennu wrote, however, the decisions in both *In re Anaman* and *In re Otoo* had been declared by the Ghana Court of Appeal to be not good law. In *Coleman v. Shang* the Court of Appeal said:

"We are of opinion that a person subject to customary law who marries under the Marriage Ordinance, does not cease to be a native subject to customary law by reason only of his contracting that marriage. The customary law will be applied to him in all matters, save and except those specifically excluded by the statute, and any other matters which are necessary consequences of the marriage under the Ordinance... We think it would be unreasonable, and repugnant to natural justice, to hold otherwise, as such a proposition would in effect exclude from access to Native Courts all persons married under the Ordinance, because it would follow from such an opinion that they had by their marriage choice elected to make themselves 'non-natives'. To state the matter in this way clearly indicates the absurdity of the proposition, and its inherent improbability."

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23 (1927) D.C. '26-'29, 84.
24 Ibid., p. 86.
The Court of Appeal went on to explain further:

"Similarly, in our opinion, the right of a married person to make a will depends on the law of his domicile relating to wills, and not upon the system of his marriage, unless there is a special provision in the laws relating to marriage which regulates the testamentary rights of a person who so married.

In this country there are two forms of wills—the will made in accordance with English law, and the will made in accordance with customary law (samansiw, a nuncupative will). Each of these may be valid, if the peculiar requirements for making it are complied with. The making of a will is not a matter which arises out of the contract of marriage, consequently a person subject to customary law, though he may be married under the Marriage Ordinance, may in our opinion make a valid samansiw (nuncupative will). We find it difficult to approve the dictum of Michelin Ag. C.J. in *In re Otoo.*"

To leave no doubt, the Court of Appeal further declared that "We are of the opinion, therefore, that the case of *re Otoo* (deceased) was wrongly decided."28

It may be contended that the opinion of the Court of Appeal on the question of the testamentary capacity of a person married under the Marriage Ordinance was strictly speaking an obiter dictum in *Coleman v. Shang.* For in *Coleman v. Shang* no issue turned on the validity of a customary law will, although Coleman was once married under the Marriage Ordinance.29 However, an obiter dictum from the highest court of the land may mark a turning point in the law. It is submitted, with respect, that in *Coleman v. Shang* the Court of Appeal authoritatively and correctly restated the law after many years of error.

**Intestacy under the Marriage Ordinance**

When the Marriage Ordinance was enacted in 1884, it was considered that any person who opted for that type of marriage would have thereby indicated that he would not like the succession to his property to be regulated by customary law. Even as late as 1927 the courts were explaining that a person who married under the Marriage Ordinance had by that choice alone altered his status and indicated that he no longer wished to have his affairs regulated by the customary law, especially as regards the devolution of his property.30 Whether this was the reason or not, when the Marriage Ordinance was enacted in 1884, it was

27 Ibid. at p. 402.
28 Ibid. at p. 403.
29 Cap. 127 (1951 Rev.).
30 *Re Otoo* (1927) D.C. '26-'29, 84.
provided in section 41 thereof that where a person married under the Ordinance died intestate survived by a spouse or an issue of such a marriage, or where the intestate was an issue of a marriage under the Ordinance, the whole of the property of such intestate should be distributed in accordance with the provisions of the law of England relating to the distribution of the personal estates of intestates, notwithstanding any native law or custom to the contrary. The intention of the legislature was clearly to oust the application of the customary law to the estates of such persons, and to apply English law to them.

It would appear that this provision was unpopular. For it made it legally impossible for a Ghanaian who married under the Marriage Ordinance to have intestate succession to his property governed by the applicable customary law. As a concession to these objections, the Ordinance was amended in 1909 to provide that in the case of intestacy of a person married under the Ordinance who is survived by a spouse or issue of such marriage, and also in the case of death intestate of a Ghanaian who was an issue of an Ordinance marriage, devolution of one-third of the estate shall be in accordance with the customary law of the deceased, and two-thirds according to the law of England governing the devolution of the personal estates of intestates as at 19 November 1884. Perhaps this was a popular amendment. It is nevertheless true that a good number of people, especially women married under the Ordinance, still cherish the belief that it is the entire intestate estate which devolves according to the applicable English rules. The explanation for this may be found in the fact that, as compared with the customary law rules, the applicable English law rules favour the female spouses in the distribution of the intestate estates of their deceased husbands. What is not insignificant is that the popularity in Ghana of the new provision, allowing for the customary law to apply to one-third of the estate, has not been such as to induce a similar change in the law in other Commonwealth West African countries. In Nigeria, for instance, the old provision has to date been retained that the entire estate of the intestate who was married under the Marriage Act\(^3\) devolves according to English law.

The reference to the English law of 1884 for the devolution of intestate estates in Ghana creates problems both of interpretation and application. It may be noted in the first place that the applicable English law rules are those which in 1884 applied to intestate personalty (or movables). Therefore, while in Ghana two-thirds of the entire estate, including both movable and immovable property, would be subject to the English rules of devolution, the English rules would be

\(^3\) The equivalent of our Marriage Ordinance with which the provisions are generally identical, both being products of colonial legislatures under imperial Britain.
only those which applied to intestate personalty or movables in 1884. The more frustrating aspect of the provision, however, is the reference to nineteenth century English law. The rules which applied in 1884 in England are still applied in Ghana without the changes or amendments thereafter made to them in their country of origin. Our own legislature has not as much as tried to effect local changes in the application of these old English rules. In commenting on this in 1972 the present writer observed:

“One would say that 19 November 1884 is nearly a century ago and that there is a need to revise the law in this regard. That, however, would be an under-statement. A reference to the law of intestate succession to personalty in force in England in 1884, in fact means the application of English legislation dating as far back as the seventeenth century. For, apart from the common law, the law governing intestate succession to personal estates in England on 19 November, 1884 includes the Statute of Distribution, 1670, the Statute of Frauds, 1677, the Administration of Estates Act, 1685, the Statute of Distribution, 1685, and the Matrimonial Causes Act, 1857. To state it mildly, it is a most nauseating task attempting to spell out the law from such ancient legislation with all the obsolete, spent or unnecessary words therein employed.”

The position has not yet changed. One would like to believe that it is not a vain hope that some day this vital area of our laws of succession to property will be reformed.

Another undesirable feature of the provision for the application of English law to intestate estates under section 48 of the Marriage Ordinance is that it involves complex mathematical computations. The old English rules already involve the fragmentation of the property. The fractions allotted by the 1884 English rules are in fact fractions of two-thirds of the estate of an affected Ghanaian. Where, for instance, the English rule provides that if a man dies intestate leaving a widow and issue, the widow is entitled to one-third of the personal estate, it means in our Ghanaian circumstances that the widow takes one-third of two-thirds of the entire estate, both movable and immovable. These fractions may not leave any of the beneficiaries with viable portions of the estate. For example, a widow who takes one-third of two-thirds, i.e. two-ninths of a house of three or four rooms may not be entitled to a room for herself. The complex fractions are attempted at pages...

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33 A draft Decree on Intestate Succession has recently been published by the Law Reform Commission.
The Law Reform Commission has announced its programme of work to include proposals for the legislative reform of the law of intestate succession in Ghana. The proposed legislation, if enacted, would remove the present difficulties and anomalies in the application of section 48 of the Marriage Ordinance to persons who marry under that Ordinance.

**Succession under the Marriage Ordinance**

It is provided in section 10 of the Marriage Ordinance that: “On the death of a Mohammedan whose marriage has been registered under the Ordinance, the succession to his or her property shall be regulated by Mohammedan Law.” In this provision the invocation of that section of the Ordinance is not conditional on death intestate. It is enough that the deceased was a Mohammedan who had duly registered his marriage under section 5 of the Ordinance. This is different from the provision of the Marriage Ordinance. Under section 48 of the Marriage Ordinance, other conditions being satisfied, English law would only apply if the person affected died intestate.

In *Brimah v. Asana*, Ollennu J. (as he then was) explained that the mere profession of the Muslim faith would not mean that Muslim law would regulate succession to one’s property on death, He said:

“It is wrongly assumed that because the deceased was a Moslem, his personal law as to succession must be regulated by Islamic law. That assumption is a grievous error. A Ghanaian can opt for any religious faith or creed, but that choice which he freely and voluntarily makes cannot operate to deprive him of rights and privileges under the law, neither can it exempt him from his liabilities and duties under it.”

Earlier, Ollennu J. had explained in another case:

“It is only a Muslim who married according to Mohammedan law, and had his said marriage registered under the Ordinance in the manner provided under the Ordinance whose succession shall be regulated by Mohammedan law. In the eyes of our law, a marriage by a Mohammedan according to Mohammedan law is at its very

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34 Cap. 129 (1951 Rev.).
36 Ibid. at p. 119.
best a marriage by customary law and does not affect succession
to his estate, unless the said marriage is registered under the
Ordinance. Therefore if a Mohammedan died not having married,
or if married not having had his said marriage registered under
the Marriage of Mohammedans Ordinance, the only law which
can regulate succession to his estate is his personal law, *i.e.* the
customary law of the tribe to which he belonged.*”

Most Mohammedans are unaware of the requirements of the
Ordinance. Most of them wrongly believe that the mere conversion to
Mohammedanism is enough to attract the provisions of Muslim law to
regulate succession to their property and they do so wish; for the Holy
Koran contains detailed provisions governing succession to property
on death. It even imposes limitations on testamentary capacity, so that
a Muslim may not dispose of all his property by will.

It would seem that it is time to amend or repeal the law. One reason
for urging an amendment or repeal is that the provision for the registra­
tion of Muslim marriages is largely a dead letter.38 Officers expected
to carry out registration of Muslim marriages under section 5 of the
Ordinance probably do not know of its existence. Those who contract
such marriages are unaware of the provision for registration. One
cannot remember when the last Muslim marriage was registered, or
how many have been registered in the country since the enactment of
the Ordinance.

The strong stand hitherto taken by the courts against the applica­
tion of Islamic law to the estate of deceased Ghanaian Muslims would,
however, merit a reappraisal. As stated in the explanation given by
Ollenu J., as he then was, in both *Kwakye v. Tuba*39 and *Brimah v.
Asana*,40 the rejection of Islamic law as a religious prescription was
based on the premise that the law of succession in this country could
not be based on mere religious persuasion. It is submitted, with respect,
that on this issue a new consideration has been introduced by the Courts
Act, 1971 (Act 372). In section 49 of the Courts Act, 1971, effective from
22 September 1971, there are choice of law rules to regulate internal
conflict situations and to clarify doubtful cases. In rule 2 in section 49
of the said Courts Act, 1971, it is now provided that: “*In the absence
of any intention to the contrary,* the law applicable to any issue arising
out of the devolution of a person’s estate shall be the personal law of

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28 See Anderson, J. N. D., *Islamic Law in Africa* (1954) p. 250, where it was concluded
by that scholar after a survey that the provision for the registration of Muslim
marriages in Ghana had been ignored in practice. It is submitted that there has
been no improvement or change in the position.


that person." According to the rules "personal law" means the customary law of the deceased.

What rule 2 of section 49 of the Courts Act, 1971, says is that the customary law shall not automatically apply to the devolution of the estate of a deceased Ghanaian. Now the devolution of the estate of a deceased Ghanaian will only be governed by the applicable customary law if the deceased did not declare a contrary intention. In other words, it is now open to a Ghanaian to indicate in advance that on his death a particular regime of law, other than the customary law, shall regulate the devolution of his estate. This is a new provision which did not exist in either the old Courts Ordinance, the former Courts Act, 1960 or the repealed Courts Decree.

The Courts Act, 1971, does not prescribe any particular mode in which a Ghanaian may indicate an intention that customary law shall not apply to the devolution of his estate on intestacy. It is submitted that this may be done either orally or in writing, or even by mere conduct. The declaration of such a contrary intention is not necessarily a testamentary act and need not satisfy the formalities of the Wills Act as regards writing or attestation. It is further submitted that a contrary intention, ousting the customary law, may be indicated by adopting a religious faith, an inseparable part of whose doctrines includes a precept on the devolution of estates on death. This is the case with the Mohammedan religion. The Mohammedan religion implies the acceptance that the Holy Koran is a divine ordinance from God and that it binds all Muslims. The Holy Koran in a detailed form contains rules which should regulate the devolution of estates of all Muslims. It is regarded as perfection itself, coming, as they believe, from Allah Himself. Any Ghanaian who joins the Mohammedan religion thereby indicates that he wishes the devolution of his estate to be regulated by the Koranic law. Even before the passage of the Courts Act, 1971, that was the attitude of the Ghanaian Muslims, as witness the arguments rejected by the court in both Kwakye v. Tuba and Brimah v. Asana. It is submitted, therefore, that with the new provision in our law permitting Ghanaians to opt out of the customary law, the case of Islamic law as regards the estates of Ghanaian Mohammedans may have to be re-examined.

**Testacy Under Customary Law**

It is generally accepted that before the introduction of European rule and, therefore, before the establishment of the modern courts, there existed under the indigenous legal system a recognised form of testation.

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41 Italics supplied.
42 Cap. 4 (1951 Rev.), (repealed in July 1960.)
43 C.A. 9 (repealed).
44 N.L.C.D. 84 (repealed).
It is an oral declaration before witnesses regarding the devolution of property of the declarant and to take effect upon his death. It is now generally known as samansiw. Rattray says it is known among the Ashanti as samansie, etymologically explained as "that which has been left by the spirits." As an institution, the samansiw is indigenous. In particular it is known among the Akan and the Ga; but it seems to be unknown among the Ewe and the Adangbe; and very little has been heard of its existence among the communities of the Northern and Upper Regions. It is, therefore, respectfully submitted that the samansiw is not a recognised form of testation throughout the country. Among the Ewe, for instance, there does not appear to be a name for this type of disposition, and this may be a pointer to the conclusion that as an institution the samansiw or nuncupative will is unknown to Ewe law.

According to Sarbah, the samansiw is of recent origin, though it may not be possible to say when it started. Ollennu, however, says that it is "as old as the right of individual ownership of property." Ollennu does not cite any authority for his conclusion, nor does he refer us to any direct authority on the point beyond the observation made by Henry Maine in his monumental work *Ancient Law*. However, it is respectfully submitted that Henry Maine never suggested that the power of testation is inherent in the law of nature. The only positive statement of Henry Maine on this point is his logical observation that individual ownership of property precedes the development of the power of testation: for, until the notion of private or individual ownership of property developed in contrast with communal ownership, there could be no possibility of effective directives on post mortem devolution of property.

However, as Henry Maine must also have recognised from his study of some Asian communities, the accuracy of the observation that the power of testation was preceded by the individual ownership of property, cannot by itself determine the historical period of the development of the power of testation. There is also the analytical assessment by communist theorists like Marx and Lenin, that the power of testation followed from the evolution of the capitalist conception of private ownership of property. This again cannot fix the epoch in which the power of testation developed. Presumably it developed at different periods of history for various communities, in response to varied

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stimuli, including the existing rules for intestate devolution of property and the social organisation of the people. Thus the Akan may have found a stronger urge to develop the institution much earlier, to be able to interfere with the normal rules of succession in favour of others, say children, who are not members of their fathers' families in the matrilineal system. The development of the power of testation, therefore, cannot be said to be an index of any particular stage in the development or evolution of society. For instance, among the Ewe and the Adangbe where succession is patrilineal and children normally inherit the properties of their father, the need for an institutionalised form of testamentary disposition had not been felt. The Ewe and Adangbe experience would, therefore, falsify any theory that the power of testation is inherent in the law of nature, whatever that means.

It is not improbable that, although the customary law will or samansiw was known in its rudimentary form among the Akan and the Ga, its present form and legal consequences crystallised in the course of its enforcement by the courts. This is why a review may be desirable after a century of the existence of our courts, to appreciate the role of the courts in the crystallisation of the customary law rules.

When about twenty years after the establishment of the Supreme Court of the Gold Coast the late Sarbah wrote on the customary law will, he said⁵¹:

"[E]ven among the Romans, a will was never regarded by them as a means of disinheriting a family or of effecting the unequal more distribution of a patrimony, and the rules of Law preventing its being turned to such a purpose increase in number and stringency as the jurisprudence unfolds itself. Samansiw is, in fact, not a word that accurately conveys the conception of a will as understood by an English lawyer, for the idea of making a disposition of property to take effect after the death of the giver, as has been noticed by observant European travellers on the Gold Coast, is really opposed to the fundamental principles of the ties binding the members of the family.

Without doubt, the custom of making wills with respect to self-acquired property is of modern growth, but no one can tell when the practice first began. Death-bed dispositions, known as Samansiw, seem to be recognized, not so much because of any assumed right to make such a disposition as because, from feelings of affection, respect, or even superstition, the last wishes of the deceased are considered to be entitled to weight, among the members of his family. And this idea runs through the Customary

Law relating to testamentary disposition of property. In fact, the only disposition of property known to the early Customary Law was a transfer followed by immediate possession."

It is not unlikely that it is the courts which have given the strict binding legal effect to that which, in its original conception, was only entitled to great weight in the counsels of the family because of the respect for and the fear of the dead.

When the present writer had occasion to consider the question of the existence of the customary law will among the Ewe, he concluded:

"Strictly speaking, the making of wills is unknown to Ewe law. A dying man may declare his own wishes as regards the devolution of his property on his death. Such a declaration, especially because of a mixture of reverence for the dead and the fear of the departed spirits, is given great weight in the deliberations of the family in allocating shares to successors to the estate, and those indicated by the deceased. It is, however, not binding as a will on the family, and the beneficiary under the declaration cannot enforce his claim in Ewe law. If the deceased had wished to benefit an individual, he could have made him a gift *inter vivos* which would have vested in the deceased's lifetime."

These statements of the Ewe law on wills are hardly different from those made at the end of the nineteenth century by Sarbah on the state of the Fanti law. When those statements were made by the present writer, however, they drew a significant and rather revealing comment from a distinguished scholar and judge. Said Bentsi-Enchill:

"[Although the *samansiw* or dying declaration is, according to Dr. Kludze, not recognised among the Ewe but only 'treated with great respect', the trend of authority is such that a court could well decide to enforce the well attested *samansiw* of an Ewe. Such a decision, though not necessarily in accord with 'the practised customary law', could well be seen as a welcome development justifiable in a country where the facility of English type will is not available to everybody, including Ewes."

When Bentsi-Enchill wrote these words he was a justice of the then Supreme Court, the highest court of the land. It was in the same year that Bentsi-Enchill J.S.C. (as he then was) wrote the leading judgment in *Mahama Hausa v. Baako Hausa*, in which the essential formalities of the *samansiw* were somewhat authoritatively spelt out. It would

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Bentsi-Enchill, K., "Intestate succession revisited I" (1972) 9 U.G.L.J. 123 at p. 133.
appear, therefore, that the samansi, whatever its original conception and form, has developed and assumed a legal form and effect which may in part be attributable to judicial legislation.

The Formalities of the Customary Law Will.

As far as the customary law will or samansi is concerned, the inception of the courts as we know them today has brought about the most substantial changes in the formalities necessary for its due execution. At different times the courts have sought to state the formalities differently, with the frustrating consequence that it has been difficult to ascertain the law. The apparent but scarcely admitted legislative functions of the judges have resulted in a cleavage between what may be described as the practised customary law and the judicial customary law. The members of the relevant communities have been presumably attempting to satisfy the formal requirements of their own customary law (the practised customary law), while the judges of the superior courts have been attempting to set down elaborate and often stringent formalities which they regard as the customary law (the judicial customary law).

One of the earliest cases in our law reports on the disposition by the customary law will is Brobbey v. Kyere. In this case, originally heard in the then native court, the requisite formalities appear to be simple. The West African Court of Appeal noted with approval that:

"The native Court found that the defendant had inherited the properties in question in accordance with a death-bed declaration made by Adu Yaw in the presence of accredited witnesses, including some members of the family, and that the declaration so made was confirmed with 'great oath' by the deceased before his death. It is the usual native declaration known by native law and custom by which the declarer names the person or persons to whom the inheritance is to be distributed."

As may be noted, this decision only shows that there were accredited witnesses, and that the gift was confirmed by the donor himself with the great oath. Nothing was said of aseda, akpedanu or thanks-offering by the donee, or a formal signification of acceptance of the gift by him.

In more recent times, however, the courts have attempted to formulate more elaborate formalities to be satisfied in making the customary

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56 (1936) 3 W.A.C.A. 106.

57 Ibid.
law will. It started with the decision of Ollennu J. (as he then was) in Summey v. Yohuno.\(^{58}\) The decision in that case was that for a valid customary law will the following formalities were necessary\(^{59}\):

"(1) the disposition must be made in the presence of witnesses, who must hear what the declaration is and must know its contents;

(2) the member of the family who would have succeeded the person making the will, had the latter died intestate, must be among the witnesses in whose presence the declaration is made, and

(3) there must be an acceptance, by or on behalf of the beneficiaries, indicated by the giving and receiving of 'drinks'."

At least two new requirements, different from those in Brobbey v. Kyere, were introduced in Summey v. Yohuno. In the first place Summey v. Yohuno seeks to introduce the requirement that among the witnesses must be the person who would have succeeded the testator in the event of his intestacy. If this were indeed a formal requirement at customary law, it could be embarrassing to the testator to have the would-be successor present when he is being denied the inheritance. It could similarly embarrass the would-be successor. Furthermore, this requirement is inconsistent with the trend of judicial authority that there is no right of automatic succession to a deceased intestate at customary law.\(^{60}\) If indeed a successor could only be appointed at the discretion of the family after the death of the property owner, it would be impossible for the would-be successor to be known or identified before death, so as to be present when the customary law will is made. Perhaps this is an implicit admission that the successor may be known before death, though Ollennu would reject such an interpretation being read into it.

The second new element introduced in Summey v. Yohuno is that the gift under the customary law will must be accepted in a formal manner by the presentation and acceptance of a thanks-offering, known in Twi as aseda and which the Ewe would call akpedanu. This requirement is absent in Brobbey v. Kyere. In Brobbey v. Kyere it is not known that there was any formal act of acceptance on the part of the donee under the customary law will. On the contrary, it was found as a fact that "the declaration so made was confirmed with 'great oath' by the deceased before his death."\(^{61}\) Unfortunately it does not appear that the attention of Ollennu J. was drawn to Brobbey v. Kyere which, as a decision of the West African Court of Appeal, was binding on him.


\(^{59}\) Ibid. at p. 71.


In any event, Ollennu J. did not cite any authority for the new requirements introduced in his judgment in _Summey v. Yohuno_.

When about a year later Ollennu J. decided _Akele v. Cofie_, he formulated the formal requirements of samansiw somewhat differently from those stated by him in _Summey v. Yohuno_. In _Akele v. Cofie_, Ollennu J. (as he then was) gave the formal requirements for a customary law will thus:

"(i) the disposition must be made in the presence of witnesses;
(ii) some of the principal members of the declarant's family must be present at its making; and
(iii) there must be acceptance by or on behalf of the beneficiaries."

Unlike in _Summey v. Yohuno_, in _Akele v. Cofie_ it is only stated that some of the principal members of the declarant's family must be present at the making of the customary law will, but apparently these need not include the person who would have succeeded the testator if he were to die intestate. Although again in _Akele v. Cofie_ Ollennu J. insists on formal acceptance of the gift by or on behalf of the beneficiary, in this case he does not go so far as to prescribe any particular mode of acceptance. To this extent the formulation in _Akele v. Cofie_ is different from _Summey v. Yohuno_, while both of these cases differ from the binding decision of the West African Court of Appeal in _Brobbey v. Kyere_.

For about a decade the law appeared to be as stated in _Summey v. Yohuno_ and _Akele v. Cofie_, so far as these cases could be reconciled. It was unsatisfactory. The reported cases show that the formalities prescribed in these cases were not being observed by customary testators and their purported customary law wills were being set aside as invalid. For instance, in _Summey v. Yohuno_ and _Akele v. Cofie_ the customary law wills were held to be invalid because they offended against the formal requirements insisted upon by the courts. That was also the case in _In re Abakah_.

Bentsi-Enchill criticised the formal requirements stated in the earlier cases, declaring that "it is easy to envisage many situations when there is neither the possibility nor the expectation of a formal signification of acceptance." He concluded that "the crucial issue must without doubt have been the manifestation of the testator's intent to make the gift and the family's acquiescence therein." The family's
acquiescence, it may be mentioned, was not stated as one of the require-
ments in either Brobbey v. Kyere, Summey v. Yohuno or Akele v. Cofie.
The present writer also in 1972 criticised the formalities of a customary law will as spelt out in Summey v. Yohuno and Akele v. Cofie, doubting
whether were they correct statements of the customary law.

In 1972 there appeared, apparently for the first time, serious and
direct judicial disagreements on the formalities of a customary law will.
In Abenyewa v. Marfo, Taylor J. was called upon to decide on the
formal validity of a customary law will. He examined the authorities,
including the judicial decisions and the legal literature. In particular,
Taylor J. examined the different formulations of the formal require-
ments by Ollenu J. (as he then was) in Summey v. Yohuno and Akele v. Cofie.
and he found them inconsistent. It was, therefore, concluded
by Taylor J. that:

"Because of this somehow inconsistent formulation of the require-
ments of a valid customary law will (samansiw), it is in my view
difficult to accept without question, the 1960 formulation by
Ollenu J. in the Summey case and it becomes necessary to examine
the authorities and to elicit the principles from them."

He similarly rejected the formulation in Akele v. Cofie. Taylor J. then
said:

"Indeed from the text writers and the decided cases discussed
therein, it is my view that the requirements of a valid customary law will are as follows: (1) Only the self-acquired property of a
testator of sound mind can be disposed of by samansiw: (2) The disposition must be made in the presence of witnesses one
of whom at least it seems must be a member of the testator's family
and the witnesses must be told that the bequests are his samansiw
to take effect after his death; (3) The family of the testator must
know and consent to the disposition; (4) There ought to be an
acceptance of the gift evidenced by the offering of aseda or the
exercising of acts of ownership or any act from which an
acceptance can be inferred depending on the circumstances of the
case."

He emphasised further that "the consent or approval of the family is
the paramount requirement." This is not insignificant. The consent or
approval of the family had not been stated as even a formal requirement

72 Ibid. at p. 167.
in the earlier cases. It is not only new but was considered by Taylor J. to be more important than all other requirements.

Less than a year later, Edward Wiredu J., faced the same problem in Abadou v. Awotwi\textsuperscript{73} but refused to follow the earlier decisions, including Abenyewa v. Marfo. In this case, Edward Wiredu J., also examined the authorities afresh. He rejected the formulations of the essential requirements by Ollennu J. as he then was, in Summey v. Yohuno and Akele v. Cofie declaring that, "It could be seen from the above analysis that both the Summey and Marfo cases do not, with respect, accurately state the formulation of the essential requirements."\textsuperscript{74} Edward Wiredu J. also strongly disagreed with the declaration by Taylor J., in Abenyewa v. Marfo that the consent of the family was the paramount necessity for the validity of a customary law will. On this point, Edward Wiredu J. said\textsuperscript{75}:

"The Marfo case did not give due consideration to the development of the customary law and appeared to have advocated for the resurrection of the old customary law notion which places fetters on the rights of an individual to deal with self-acquired property in any way he pleases during his lifetime. The notion has long been exploded and is quietly resting with its proponents in their graves."

From his own analysis, Edward Wiredu J. held the following to be essential to the validity of a customary law will\textsuperscript{76}:

\begin{enumerate}
\item The declaration must be made in anticipation of death, i.e. it must be a death-bed declaration or the declarant must be in immediate fear of death;
\item The declaration must be in respect of the self-acquired property of the declarant;
\item The declaration must be made in the presence of witnesses (preferably including some members of the declarant's family);
\item The witnesses present must hear the subject-matter of the declaration and understand it as representing the dying wishes of the declarant, and be able to know who received what in order to testify about the same."
\end{enumerate}

A new element was thus introduced by Edward Wiredu J. insofar as he held that the customary law will must be a dying declaration from the

\textsuperscript{73} [1973] 1 G.L.R. 393.
\textsuperscript{74} Ibid at p. 415.
\textsuperscript{75} Ibid. at p. 409-410.
\textsuperscript{76} Ibid. at p. 415.
death-bed. The learned judge cited no authority for this proposition, which is in conflict with Sarbah’s view that:

"It is not only on the death-bed that a man can make testamentary disposition. A person can make his testamentary disposition while enjoying perfect health; but at the time it is made, the witnesses must be distinctly told by him that his words are his samansiw, to take effect after his death."

It is, however, to be seen whether the restriction of the samansiw to a death-bed declaration will receive approval in other judicial decisions.

Where judges of co-ordinate jurisdiction disagree on the law, in our system of jurisprudence, based on the principle of stare decisis, the hope is that the highest court of the land may eventually hand down an authoritative decision to end the controversy and to ensure a measure of certainty in the law. The Court of Appeal came near discharging this function in Mahama v. Baako Hausa. In this case all the justices of the Court of Appeal were of the view that Ollennu J. (as he then was) went too far in the formulation of the requirements of a valid customary law will. It was observed that Ollennu J. did not profess to be following any authority when he laid down what he called the essential requirements of a valid customary law will. The Court of Appeal, therefore, indicated that it did not consider that the decisions in Summey v. Yohuno and Akele v. Cofie were good law. The decision of Taylor J. in Abenyewa v. Marfo had not by then been reported and was apparently not brought to the notice of the Court of Appeal which in any event was not bound by it; consequently no comment was made on that lower court’s decision. The decision in Abadoo v. Awotwi was given a little later but again the decision of the Court of Appeal in Mahama Hausa v. Baako Hausa had not been reported and the attention of Edward Wiredu J. was apparently not drawn to it.

The words falling from the justices in the Court of Appeal may be strictly regarded as only obiter dicta in Mahama Hausa v. Baako Hausa for the issue in that case did not appear to turn on the formalities of a customary law will. The Court of Appeal, however, had the opportunity recently in Awotwi v. Abadoo to expound the law on the issue. This case was heard on appeal from the decision of Edward Wiredu J. in Abadoo v. Awotwi. In affirming the decision, the learned justices of the Court of Appeal adopted the words of their brethren in Mahama Hausa v. Baako Hausa, thereby raising the exposition therein beyond mere obiter dicta. The Court of Appeal in Awotwi v. Abadoo said:

80 Ibid. at p. 378.
"No doubt Ollennu J. was endeavouring to bring some order in an area of law where the legislature has been silent, and the mere fact that he cited no authority is no ground for rejecting his view; he was endeavouring to create a precedent which in any case must start from somewhere. Nevertheless I agree that the evidentiary requirements stipulated by him are so stringent as to be almost destructive of a person's capacity to make a nuncupative will.

We have considered the views expressed in the *Yohuno* and *Baako Hausa* cases, and have come to the conclusion that even if Ollennu's views represent a correct statement of the law in its pristine form . . . we prefer the opinions expressed in the *Baako Hausa* case; for customary law has been developing rapidly . . ."

Then the Court of Appeal declared, "We think failure to pay an aseda should not avoid or nullify a bequest." The Court of Appeal concluded its judgment with the categorical statement of the law that:

"On consideration of the relevant authorities, we will with respect adopt the reasoning and the exposition of the law as contained in the judgments of the *Baako Hausa* case. In our view it is sufficient: (a) if the declaration was made in contemplation of death; (b) credible witnesses were present who could testify that the disposition was made in their presence and to their hearing; (c) the dispositions concern his self-acquired properties."

And so some of the issues appear to be settled, at least for the moment, by this decision of the Court of Appeal. It would appear, therefore, that the customary law will, though it must be made in contemplation of death, need not necessarily be a death-bed disposition. Being an oral will, it can only be proved by the testimony of witnesses; consequently there must be credible witnesses present at the declaration, but it does not appear necessary that these should include the would-be successor or even members of the testator's family. Neither did the Court of Appeal prescribe any minimum number of witnesses. The presentation of aseda, akpedanu or thanks-offering is not necessary for the validity of a customary law will; but there was no clear opinion expressed on the need for a formal acceptance of the gift. The consent or approval of the family does not seem to be essential for the validity of the customary law will.

It has been a long and tortuous journey to the present decision of the Court of Appeal in *Awotwi v. Abadoo*, the path being strewn with inconsistent and conflicting dicta from the judges of the superior
courts. As of now the law appears to be settled. It may, however, be that the last word has not yet been written.

**INTESTATE SUCCESSION**

The courts have been no less involved in the evolution of the customary law of intestate succession. The customary law regulates intestate succession if no contrary intention was expressed, and if no statute, such as the Marriage Ordinance or the Marriage of Mohammedans Ordinance can be invoked.

The general rule enforced by the courts is that upon death intestate the self-acquired property of a deceased Ghanaian becomes family property. This proposition is supported by a number of decisions. While it may be true of some communities, it would appear to be a sweeping generalisation which cannot be true of all communities. Among the Ewe, it would appear that it is the children who succeed to their father’s properties as of right. The same is true of the Adangbe. We also know that among the Gonja the intestate estate does not become family property but is inheritable by the patrilineal junior brother of the deceased. It would appear then that what is held out to be a general proposition is an attempt to impose a uniform rule that self-acquired property becomes family property on death intestate. This, of course, is the result of judicial pronouncements since the inception of our courts.

The authorities, which suggest that self-acquired property becomes family property on intestacy, are not agreed on who would constitute the “family” for such a purpose. One line of cases would hold that the family means the wider or ancestral family, a large unit of persons tracing lineal descent from a common ancestor or ancestress. Other

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83 See the Courts Act, 1971 (Act 372), s. 49.
84 Cap. 127 (1951 Rev.).
85 Cap. 129 (1951 Rev.).
authorities, however, are to the effect that on death intestate the self-acquired property vests in the immediate family.\textsuperscript{92} In order to settle these issues, the authorities seem to be anxious in every case to categorise every group of persons as a family within the contemplation of the customary law. They have gone as far as describing the children of a deceased person as his so-called immediate family,\textsuperscript{93} a notion unknown to the customary law. Not only is the notion unknown, but such a terminology does not make for clarity and is unhelpful in our understanding of the law. It is submitted with respect that it is more in accord with our thinking in this country, and greater clarity is achieved in the law, if the children of a deceased person are simply referred to as his children. For there should be no practical problems in determining who is a child.

**Conclusion**

The above analyses show the extent to which existing customary law rules, as far as they affect succession, both testate and intestate, have undergone both evolution and change in their application by the courts since 1876. In certain cases we may even say that some of the present rules are the product of judicial legislation, whether acknowledged or not. Some of these judge-made rules may not be exactly what the customary law rules are or were, and it is a moot point whether such changes are necessary or even desirable.

One can perhaps appreciate the frustration of litigants who see the divergence between the practised customary law and the judicial customary law, especially in view of the conflicting decisions from the courts in certain cases. Of course, this raises the question of what is customary law. Is the customary law what the judges declare, or what can be ascertained as the practices and rules accepted in the relevant community? It is conceded that in pure, abstract theory the customary law is not enacted by the judges, nor by the legislature; it is evolved by the people and hallowed by long usage and general acceptance by members of the community. As society undergoes inevitable transformation in its organisation and structure, as new frontiers of knowledge open and economic and social factors interact with increased complexity, the customary law itself undergoes changes to meet new situations and new challenges. The problem in such a situation is the machinery for determining the contents of the customary law rule on any given issue at any given time. This declaratory function is conferred on our courts by our basic laws,\textsuperscript{94} and on no other organ.


\textsuperscript{93} Yawoga v. Yawoga (1958) 3 W.A.L.R. 309.

\textsuperscript{94} See the Courts Act, 1971 (Act 372), s. 50(1), re-enacting the Courts Act, 1960 (C.A. 9), s. 67(1) (now repealed).
of society. For the purposes of ascertaining the law, the courts may inform themselves by consulting textbooks and works of repute, as well as individuals whose knowledge of the customary law must be respected; but the courts are given ultimate responsibility for the declaration of the law. This, however, does not imply judicial infallibility or omniscience. Hence we may criticise the judges; but in our present legal system their pronouncements are capable of that finality which will continue to be necessary for the resolution of legal disputes.

It is hoped that in the succeeding years our courts will play an even greater and more meaningful role in the declaration of the law and its evolution. This way the law develops and greater certainty in the law may be attained. Whatever the criticism against them may be, particularly in the area of succession to property, the courts should assist in the evolution of a fair and equitable system of customary law rules to reflect changes in our society. For the law cannot and must not operate in a vacuum or without a purpose.
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ESSAYS IN GHANAIAN LAW
1876–1976

THIS collection of essays written in commemoration of the Centenary of the Supreme Court of Ghana is not—and that bears repeating—is not an exercise in self-congratulation by members of the academic branch of the legal profession. Its initial mood is critical—historical, where Justice Amissah examines the origins of the legal profession, and Justice Ollennu assesses the contribution chiefs have been able to make within the confines of the law imposed upon them. Mr. Gyandoh’s essay on liberty calls for sober reflection by all citizens. Professor Daniels unapologetically questions the whole rationale of Ghana’s marriage and marriage-related laws. Can, and if so, should government control everyday agreements to ensure a modicum of fairness to both contracting parties? Is the purpose of statutory corporations profit or maximum employment? These are among the questions posed by Drs. Turkson and Date-Bah. Professor Woodman goes beyond the normal confines of law to query the whole basis of the accumulation of wealth through land-owning. In his examination of the economics of private practice Dr. Luckham lays bare the personal trials lawyers experience in their efforts to serve the public—and themselves. Corporate endeavour is the subject of Dr. Fiadjoe’s exhortation to economic progress through a revitalised company law. The last word is fittingly reserved for Dr. Kludze’s appraisal of the law of succession—surely Ghana’s most vexed subject.

This is a forward-looking book appealing to all forward-looking people who care about the development of the laws which govern them, their land, their business and their families.

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