

## CUSTOMARY LAW AND THE RULE OF LAW: EVOLVING TENSIONS AND RE-ENGINEERING

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*The third wave of democratization<sup>1</sup> in many African countries witnessed the adoption of constitutions which preserved pre-colonial traditional legal and political systems within the new governance architecture. In the context of Ghana's legal history, customary law has proven resilient and its evolution has survived many attempts at suppression. Consequently, the guarantee of customary law within the pluralist legal system of Ghana has meant that the thorny and complex issues surrounding its operation, especially in a modern governance context, have equally survived. Thus, in addition to the enduring critiques of patriarchy, anti-human rights dimensions, and a primordial orientation leveled against the guaranteed customary law, the regime has been chastised for failing to meet contemporary standards of the rule of law and administration of justice. In this regard, customary law's failure to devise and/or advertise a pathway of its evolution remains a blotch on its prospects and presents a critical challenge for its future as an effective legal category within the pluralist regime in Ghana.*

*In this article, I argue that the current arrangement in which the constitution seemingly guarantees customary law as a legal sub-unit but detached and independent of other sources of law is a legal fiction and remains unsustainable in practical terms. I assert that not only is the attempt dubious in terms of the realities confronting its operation, but that the whole effort is premised on assumptions which are not only counterfactual but wholly misread. I further argue that as a mechanism for addressing colonial distortions suffered by the law in the past, this attempt ignores key systemic pressures confronted by customary law in the context of the pluralist regime of Ghana's legal system. I will consequently review how the current position of the law implicates broader questions bordering on the rule of law and other connected sub-themes contained within the constitutional framework.*

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<sup>1</sup> SAMUEL P. HUNTINGTON, THE THIRD WAVE: DEMOCRATIZATION IN THE LATE TWENTIETH CENTURY (1993).

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## I. INTRODUCTION

Far from effectively restoring a pre-colonial heritage and instituting an African concept of law following the demise of colonialism, the guarantee of customary law as a question of law in many countries on the continent has been fraught with difficulties and complexities.<sup>2</sup> Thus, for the more than fifty years since the restoration of the legal status of that body of law, customary law has yet to achieve the transformative impact that informed its restoration in the legal paradigm of post-colonial African states following the attainment of independence.<sup>3</sup> In many of the countries where customary law underwent similar structural and systemic evolution, the law has continued to occupy a peripheral and alternate position within the scheme of legal preferences reflecting the colonial treatment of the regime coupled with the legal as well as psycho-social impact of colonial regulation of the law. Surprisingly, however, both the scholarship and standard works on the subject have either avoided or ignored the issue of sub-optimality of customary law and its peripheral status, choosing to focus instead on the dangerous side effects of formalizing customary law in its relationship with other categories of law within the legal system.<sup>4</sup> As Ghana proceeds down the path of governance reform, the

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<sup>2</sup> See A.N. Allot, *The Judicial Ascertainment of Customary Law in British Africa*, 20 MOD. L. REV. 244 (1957).

<sup>3</sup> Derek Asiedu-Akrofi, *Judicial Recognition and Adoption of Customary Law in Nigeria*, 37 AM. J. COMP. L. 571 (1989).

<sup>4</sup> See generally T.W. Bennet & T. Vermeulen, *Codification of African Law*, 24 J. AFR. L. 206 (1980); W. Twining, *The Restatement of African Customary Law: A Comment*, 1 J. MOD. AFR. STUD. 221 (1963); Brett L. Shadle, *Changing Traditions to Meet*

place and development of customary law in the plural architecture of the legal system has generally been taken for granted.<sup>5</sup> From a policy standpoint, the constitutional guarantee of customary law has been based upon the assumption that the law will invariably be generally applied alongside others and will consequently enjoy the same degree of effectiveness as contemporary state law.

Given that the institution of chieftaincy, which is charged with the primary mandate of leading the progressive reform of customary law, has lost its sphere of influence within the governance space,<sup>6</sup> the development of customary law, as an integral component of that institution, has suffered if not stagnated in the process. On the other hand, the adoption of a rule of law-based approach to governance has implied that guaranteed legal sub-units within the various sources of law provided invariably face continuing compliance issues with core constitutional norms on human rights, the rule of law, and general constitutional supremacy. The complex web of upholding the independence of customary law within the context of legal pluralism while enforcing constitutional supremacy generates complicated questions that remain unanswered. Even more critically, the perennial preference for modern state law over customary law in adjudication and other official actions and transactions implicate fundamental questions bordering on the rule of law, access to justice, and regime equity.

As Ghana consolidates the gains of constitutional rule, issues of the guarantee, development, and effectiveness of customary law as an identifiable legal sub-unit cannot be taken for granted any longer. Constructing an analytical framework that takes a practical view of the evolutionary experiences of customary law as a source of law in the daily lives of citizens while reviewing the comparative benefits of adopting a particular model in its reform remains key to the future growth of the law. In this regard, it bears mentioning that while past reform efforts may have been premised on wrong “equivalency impressions” of customary law relative to modern state law, the reality remains that the present approach of insulating customary law in the midst of constitutional regulations presents a confusing scenario whose ultimate effect undermines the stability and development of customary law.<sup>7</sup>

## II. ANTINOMIES OF STRUCTURE AND SYSTEM?

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*Current Altering Conditions: Customary Law, African Court and the Rejection of Codification in Kenya 1930-60*, 40 J. AFR. HIST. 411 (1999).

<sup>5</sup> Samuel K.B. Asante, *Interests in Land in the Customary Law of Ghana: A New Appraisal*, 74 YALE L. J. 848 (1965).

<sup>6</sup> The modern Ghanaian state has struggled to devise a place for the institution of chieftaincy within the governance framework adopted after independence. This has been reflected in the tenuous and often ambivalent relationship that has existed between chiefs and the new political elites. This is explored a little further below. Manfred O. Hinz, *Traditional Governance and African Customary Law: Comparative Observations from a Namibian Perspective*, in HUMAN RIGHTS & THE RULE OF LAW IN NAMIBIA 59 (Nico Horn & Anton Bösl eds., 2008).

<sup>7</sup> Anthony Diala, *The Concept of Living Customary Law: A Critique*, 49 J. LEGAL PLURALISM & UNOFFICIAL L. 143 (2017).

Following the demise of colonialism, the institution of chieftaincy was adopted as a matter of course and retrofitted upon the new political establishment handed over by the departing colonial administration.<sup>8</sup> Consequently, the originality in conception and design that typically characterizes the adoption of political institutions was absent as chieftaincy was foisted onto the new legal and political systems adopted in many African countries such as Ghana's at the end of colonial rule. It was therefore not surprising that from the very onset, the relationship between and the new political elites got off to a thorny start and witnessed an era of conflict and tensions.<sup>9</sup> Just as it is the case in contemporary political encounters, the conflict between chiefs and the elites of the post-colonial polity centered on the clamor for space, authority, and influence within the new regimes.<sup>10</sup> Thus, while chiefs saw the new elites as lacking substantive legitimacy to govern in much the same way as the very colonial state that bred them, the elites viewed and dealt with chiefs in an historical terms regarding them as anachronistic and a relic of the past whose functional utility had been spent.<sup>11</sup>

The conflicts characteristic of their relationship predated the granting of independence.<sup>12</sup> Indeed the quest for recognition on the part of the chiefs as the sole and rightful heir of political power in a post-colonial Gold Coast (Ghana) was played out in the attempt by some chiefs to scuttle the demand for political independence within the timeline sought by the Convention Peoples' Party and the independent movement.<sup>13</sup> While the petition to the British government to delay the grant of independence has been critiqued by some as representing a deliberate obstacle designed to favor the opposing the United Gold Coast Convention, it is important to appreciate the strategic effect of the action by the chiefs.<sup>14</sup> Thus, in

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<sup>8</sup> The debate over the relevance of chieftaincy to the modern African political environment is raging. The institution has been denounced for being largely archaic and anachronistic. Opponents of this stance point to the reality of the influence of chiefs in the political landscape of Africa and how chiefs continue to exact compliance and a following in the daily lives of Africans. *Id.*

<sup>9</sup> Following the attainment of independence, various legislations were passed designed to regulate the operation of chieftaincy. The immediate goal appeared to be the desire on the part of the newly independent state to assert itself and consolidate its hold on the newly bequeathed political space in which it exercised hegemonic influence. Through a series of legislations such as the Houses of Chiefs Act of 1958 and the Chieftaincy Act of 1961, the judicial powers of chiefs were abolished if not substantially curtailed.

<sup>10</sup> Ernest Kofi Abotsi & Paolo Galizzi, *Traditional Institutions and Governance in Modern African Democracies: History, Challenges, and Opportunities in Ghana*, in *THE FUTURE OF AFRICAN CUSTOMARY LAW* 266 (Jeanmarie Fenrich et al. eds., 2011).

<sup>11</sup> Hinz, *supra* note 6 at 59.

<sup>12</sup> Rod Alence, *The 1937-1938 Gold Coast Cocoa Crisis: The Political Economy of Commercial Stalemate*, 19 *AFR. ECON. HIST.* 77, 79-80 (1990).

<sup>13</sup> Richard Rathbone, *Kwame Nkrumah and the Chiefs: The Fate of 'Natural Rulers' under Nationalist Governments*, 10 *TRANSACTIONS ROYAL HIST. SOC'Y* 45, 57 (2000).

<sup>14</sup> Many political and constitutional historians have argued that the events leading up to independence for Ghana raised important constitutional issues such as the rightful

addition to asserting their right to inheriting political power from the departing British, the tensions between the chiefs and the new political elites effectively drew attention to the duality of power bases within the Gold Coast and the need to prioritize chiefly authority in the distribution of power under the new system within the nascent country. That notwithstanding, the government adopted a political framework that was Eurocentric in nature and mirrored the transplanted institutions of the metropolitan colonial power. In this system, chiefs were considered players and actors, broadly speaking, but were nonetheless powerless to shape even key policies affecting traditional governance reform. Chiefs were largely tolerated rather than appreciated and remained peripheral to the legal and political process. This outcome proved resilient and endured the various mutations in political arrangements and governments in the 1960s, 1970s, and 1980s.<sup>15</sup>

This reality can be explained on a number of grounds. In addition to the foregoing, the patrimonial relationship that existed between the two groups resulted in chiefs being ‘subjugated’ to the new establishment through the assertion of authority by the elites who ran the new polity.<sup>16</sup> In the view of these western educated elites, the institution of chieftaincy was primordial and backward.<sup>17</sup> The resentment generated by this attitude on the part of chiefs further deepened whatever schism existed between them and further undermined the prospect of integrating the institution within the general political establishment.<sup>18</sup> Thus, beyond the broad systemic issues surrounding the integration of chieftaincy into the new political reality, the more complex issue of the lack of mutuality of respect and interest acted as a powerful obstacle to any meaningful attempt to engage and evolve a workable regime between chiefs and the new political elites and system.<sup>19</sup>

Yet, it is noteworthy that since the inception of colonialism through the post-colonial era, the institution of chieftaincy has complemented and reinforced

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heirs of political power in independent Ghana. Advocates for traditional leadership argued that since the pre-colonial trustees of political power in the Gold Coast were the chiefs, they were the rightful persons to whom power should be handed following the departure of the colonial administration. Yet the elites, usually referred to by the name “intelligentsia,” on the other hand thought of themselves as the most organized and capable group deserving of leadership in the new polity created out the colonial territory of the Gold Coast.

<sup>15</sup> Kwame Bofo Arthur, *Chieftaincy in Ghana: Challenges and Prospects in the 21<sup>st</sup> Century*, 2 AFRICAN & ASIAN STUDIES 125 (2003); Marfo Samuel & Musah Halidu, *Examining the Position of Chieftaincy Institution in Modern Political System of Ghana*, 6 J. SOG’Y & SOC. WORK 64 (June 2018).

<sup>16</sup> See generally Michel R. Doortmont, *Producing a Received View of Gold Coast Elite Society? C. F. Hutchison’s “Pen Pictures of Modern Africans and African Celebrities”* 33 HIST. AFR. 473, 473-93 (2006).

<sup>17</sup> Moses A. Awinsong, *The Colonial and Post-Colonial Transformation of African Chieftaincy: A Historiography*, <https://www.academia.edu/3397290>

7/The\_Colonial\_and\_PostColonial\_Transformation\_of\_African\_Chieftaincy\_A\_Historiography (last visited Mar. 03, 2020).

<sup>18</sup> *Id.*

<sup>19</sup> Rathbone, *supra* note 13.

the effectiveness of the modern post-colonial state.<sup>20</sup> During the colonial era, chiefs were an indispensable medium for the implementation of the policy of indirect rule and acted as a cohesive unit for social mobilization and implementation of official colonial policy.<sup>21</sup> In addition to providing an organized fulcrum for articulating policy objectives of the colonial government while minimizing resistance, chiefs assisted the colonial government to better understand the socio-cultural dynamics of the natives in relation to colonial policy. In the post-colonial era, chiefs continued to collaborate with state authorities in the area of local government.<sup>22</sup> Like the experience of the colonial era, the statutory power of the post-colonial Ghanaian state has been used to establish a regulatory framework and delimits the political and legal space for chiefs.<sup>23</sup> The legal effect of this regulation will be revisited in subsequent discussions in this article. It suffices for now to state that these statutes have one fundamental feature: the circumscription of the scope of authority and role, if any, of chiefs in the new political dispensation.<sup>24</sup> In many ways, it became obvious that the ostensible goal for the regulation of chieftaincy in post-colonial political arrangement is to minimize the incidence of conflict between chiefs and the central government by defining the parameters of operation for the respective political entities. Yet, as has been the case since independence, the regulatory apparatus of the state has been hijacked by vested political interests who have exploited this to parochial ends.<sup>25</sup> In addition, recurrent intermeddling in the affairs of chieftaincy continue to affect the relationship between chiefs and central government. Just as the colonial government before it, post-colonial governments in Ghana have been accused of interfering in the administration of the institution of chieftaincy.<sup>26</sup> Governments have been accused of influencing the selection process of new chiefs and interfering with the outcome of conflicts between chiefs. This has resulted in post-colonial governments in Ghana losing the standing of neutrality in the affairs of chiefs and with it, the deficits of such a perception.<sup>27</sup>

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<sup>20</sup> Kwame Poku Annor, *Cultural and Social Identities in Africa: Chieftaincy and Political Change in Ghana*, 18 VERFASSUNG UND RECHT IN ÜBERSEE 153, 153-58 (1985).

<sup>21</sup> See Roger Gocking, *Indirect Rule in the Gold Coast: Competition for Office and the Invention of Tradition*, 28 *Revue Canadienne des Études Africaines* [Canadian Journal of African Studies] 421 (1994).

<sup>22</sup> See Monika Rozalska, *Between Tradition and Modernity – The Role of Chiefs in the National Development and Local Governance in Ghana*, 42 *AFR. STUDIES* 379 (2016).

<sup>23</sup> For example, the Constitution of Ghana has defined the space for chieftaincy and forbidden chiefs from participating in active partisan politics; see CONSTITUTION OF THE REPUBLIC OF GHANA (1992) art. 276.

<sup>24</sup> *Id.*

<sup>25</sup> See Victor Le Vine, *Corruption in Ghana*, 47 *Indiana U. Press* 48 (1975).

<sup>26</sup> *Political Interference is an Unhealthy (sic) in Chieftaincy Issues*, <https://www.newsghana.com.gh/political-interference-is-an-unhealthy-in-chieftaincy-issues/>.

<sup>27</sup> See Richard Rathbone, *Kwame Nkrumah and the Chiefs: The Fate of 'Natural Rulers' Under Nationalist Governments*, 10 *TRANSACTIONS ROYAL HIST. SOC'Y* 45 (2000).

It is significant to mention that the legal and political relationship model that exists between chiefs and the state reflects a continuing search for a viable form of engagement between the two sets of actors. As a pre-colonial authority, chieftaincy occupies a political space within which the state asserts an influence and control.<sup>28</sup> Notwithstanding the general peace characteristic of their relationship, the fact that the political and economic power bases of chiefs have been removed or taken away has led to steep erosion in the authority of chiefs, and for that matter, animosity towards the modern state.<sup>29</sup> In some cases, chiefs have become nothing more than symbolic figureheads providing cultural leadership for their people and lacking any real legal or political authority to influence governance.<sup>30</sup> The political leadership of the chief has come to be exploited and “re-appropriated” by political actors of the modern state to promote selfish political objectives. In spite of these challenges undermining the institution’s potency as a political force within the governance dynamic of the post-independent African state, arguments seeking to challenge the continuing importance of chieftaincy have generally failed to address the practical issues involved in any attempt at abolishing the institution.<sup>31</sup> Besides the virtual impossibility of phasing off the institution, the role of chiefs today remains extremely important to the modern Ghanaian state. Chiefs have acted as complementary agents of government playing important roles at the local level within the context of local government. Thus, not only is the issue of their abolishment daunting from a practical point of view, but it may in fact be considered undesirable to the ends of governance.<sup>32</sup>

### III. THE NEW RULE OF LAW REALITY: SCOPE AND CONTEXT

The 1992 constitution of Ghana introduced a governance framework anchored on a rule of law ethic.<sup>33</sup> In addition to protecting the rights of citizens against the

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<sup>28</sup> See e.g. CONSTITUTION OF THE REPUBLIC OF GHANA (1992) art. 270.

<sup>29</sup> *Id.* at art. 174. The power of taxation has been vested in the legislative organ of government thereby depriving chiefs of the power to raise income and funds through taxation.

<sup>30</sup> By a ruling of the Supreme Court of Ghana, a law which criminalized the failure to attend to the summons of chief was declared void as infringing the fundamental human rights of citizens. See *Adjei-Ampofo v. Attorney-General and President of the National House of Chiefs* 2 SCGLR 1104 (2011); see also Chieftaincy Act § 63(d) (2008).

<sup>31</sup> Rathbone, *supra* note 13.

<sup>32</sup> It has been the practice for the regular courts to consult chiefs on the meaning of specific customary laws as they go about their interpretive responsibilities. This provides a mutuality of opportunity for the courts and the institution of chieftaincy to progressively develop customary law in an incremental but pragmatic way. See *Badu v. Boakye*, GLR 283, 288-89, (1975) (Ghana); *Billa v. Salifu*, 2 GLR 87, 91-92 (1971) (Ghana).

<sup>33</sup> The concept of the rule of law has been said to imply a number of things with different authors having been said to mean or imply different things when they used the term. Part of the problem could be the multi-layered conceptual character of the rule of law under

larger political establishment, the new rule of law was also designed to play the key role of standardizing disparate systems, rules, and institutional heritage operating together within a uni-lineal political framework. Consequently, the constitution instituted certain core governance values such as accountability, equality/non-discrimination, certainty, in rules and fairness in adjudication as abroad constitutional baselines.

These constitutional mores were broadly derived from the concept of the rule of law which essentially advocated the supremacy of law over human actor preferences in the governance of a given state.<sup>34</sup> The chief proponent of this theory has been A.V. Dicey who laid down the broad outlines of the concept through which he insisted that the best means of securing the liberty of the citizens is to elevate the law above the arbitrary decisions of state officials.<sup>35</sup> In a subsequent elaboration on Dicey's position, which has been said to be limited to the formal characteristics of constitutional government or the *Rechtsstaat*,<sup>36</sup> Lon Fuller listed eight criteria by which a given legal system can be said to be characterized by the rule of law namely: clarity, stability, publicity, congruence between declared rules and acts of administrators, non-contradictoriness, generality, non-retroactivity, and capability

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which the concept implies different things at different levels. This is in addition to the politically opportunistic uses of the term both in development circles and governance reform in general. See Thomas Carothers, *The Many Agendas of Rule of Law Reform in Latin America*, in *RULE OF LAW IN LATIN AMERICA: THE INTERNATIONAL PROMOTION OF JUDICIAL REFORM 4-15* (Pilar Domingo & Rachel Siedar eds., INST. OF LATIN AM. STUDIES 2001); Frank Upham, *Mythmaking in the Rule of Law Orthodoxy* (Carnegie Endowment for International Peace, Working Paper No. 30, 2002).

<sup>34</sup> See A. V. DICEY, *INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION* (8th ed. 1915).

<sup>35</sup> *Id.*; see also Aristotle, *THE POLITICS* 142-143 (T.A. Sinclair trans., book III, part 16 1962) wherein he noted, "He who asks Law to rule is asking God and Intelligence and no others to rule; while he who asks for the rule of a human being is bringing in a wild beast. . . . In law you have intellect without passions."; Alvaro Santos, *The World Bank Uses of the "Rule Of Law" Promise in Economic Development*, in *GEORGETON LAW FACULTY PUBLICATIONS AND OTHER WORKS* (2006); Alvaro Santos, *The World Bank's Uses of the "Rule of Law" Promise in Economic Development*, in *THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL 253-300* (David Trubek & Alvaro Santos eds., CAMBRIDGE UNIV. PRESS 2006).

<sup>36</sup> Svend-Erik Skaaning, *WHAT EXPLAINS RESPECT FOR THE RULE OF LAW? EVIDENCE FROM A CROSS-NATIONAL ANALYSIS OF STRUCTURAL CONDITIONS* (66 MPSA ANNUAL NATIONAL CONFERENCE 2008). *Rechtsstaat*. (German: *Rechtsstaat*) is a doctrine in continental European legal thinking, originally borrowed from German jurisprudence, that can be translated as "legal state," "state of law," "state of justice," "state of rights," or "state based on justice and integrity." It is a "constitutional state" in which the exercise of governmental power is constrained by the law and is often tied to the Anglo-American concept of the rule of law, but differs from it in that it also emphasizes what is just (i.e., a concept of moral rightness based on ethics, rationality, law, natural law, religion, or equity). Thus, it is the opposite of *Obrigkeitsstaat* (a state based on the arbitrary use of power). *Rechtsstaat*, WIKIPEDIA, <http://en.wikipedia.org/wiki/Rechtsstaat> (last visited Oct. 6, 2014).



of compliance.<sup>37</sup> The interactive effect of these features in any given legal system was understood to promote an overall protection of the rights of the individual and guarantee his liberties against the political establishment.<sup>38</sup> In this regard, the formal characteristics of the rule of law reinforced the binary distinction between the individual as the repository of rights on the one hand, and the state as the trustee of legal and political authority on the other. Thus, while the formal characteristics of the concept address the key issues of individual rights and liberty, the rule of law has come to symbolize more than a compendium of formal rules governing citizen-government engagement, but also a value-laden theoretical framework in which governance is expected to meet certain basic and minimum standards of behavior.<sup>39</sup> In his normative political work, Rawls argues that the rule of law is part of his theory of justice.<sup>40</sup> His argument that the effectiveness of the formal characteristics will invariably result in the advancement of the ends of justice follows from an admission that each of the formal elements of the concept contains minimum normative standards. In this vein, one can view the formal characteristics of the rule of law as broad dictates whose application are designed to promote certain normative outcomes.

The adoption of the rule of law as a foundational concept under the 1992 constitution is ostensibly influenced by the wanton abuse of power and individual rights by the regimes of the past, especially those of the military era. These regimes were particularly characterized by disregard for due process, human rights abuses, autocratic suppression of the law, and arbitrariness in the distribution of rights and punishments, as well as marked uncertainties in legal entitlements and liabilities. It is significant to state the fact that these experiences tended to perpetuate a certain counter-ethic in which compliance with due process was routinely considered an obstacle to be negotiated, if not avoided altogether, in the decision-making process.<sup>41</sup>

On the other hand, the success or failure of the rule of law in a given country depends on a number of context dependent variables. For example, it has been argued that while the theory may have its own internally consistent principles capable of cross-national application, its effectiveness depends on the functioning of the legal system and a host of other factors.<sup>42</sup> Thus, the operation of a weak legal

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<sup>37</sup> LON FULLER, *THE MORALITY OF LAW* (2nd ed., Yale Univ. Press. 1969).

<sup>38</sup> DICEY, *supra* note 34, at 13.

<sup>39</sup> JOSEPH RAZ, *THE RULE OF LAW AND ITS VIRTUE IN THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORTALITY* (Oxford Univ. Press 1979).

<sup>40</sup> JOHN RAWLS, *A THEORY OF JUSTICE* (Harvard Univ. Press 1971).

<sup>41</sup> The experiences during Ghana's military regimes saw the triumph of impunity by persons in authority and other public actors. With the inception of constitutional rule, these actors often saw the rule of law as an obstacle and it is commonplace for both culprits and victims to negotiate their rights/duties and interests when it matters rather than articulating or upholding them in given cases.

<sup>42</sup> The theory of the rule of law has always been known to be a culturally dependent concept. Indeed, Max Weber's work on legal rationality typifies the comparative differences and approaches to the notion of the rule of law and how different societies/countries deal with the law and compliance in general.

system will invariably lead to responses from citizens whose effect will ultimately lead to the sidelining of the legal system to the point of oblivion. Tamanaha was apt when he asserted that

When the background conditions that support legal systems are woefully inadequate, as is the case in many development contexts, the legal system will be dysfunctional, reform efforts will be stymied, and the populace will avoid or despise the legal system. As one development practitioner in Africa noted, more “than 80 to 90 percent of day-to-day disputes in Africa are said to be resolved through non-state systems such as traditional authorities” (Piron 2006, 291). The UK Department for International Development estimates that “in many developing countries traditional or customary legal systems account for 80% of total cases” (Golub 2006, 118). This might well be an understatement...

Thus while the rule of law can generally promote a degree of attachment to the state and its institutions, inherent weaknesses in institutions tasked with the implementation of the mandate can lead to alienation from that system and whatever public goods it promises.<sup>43</sup> The failure of legal institutions to uphold the dictates of the rule of law creates a situation in which these institutions lose the bases of their authority as they assume the impression of being capricious and generally illegitimate.<sup>44</sup> In the case of legal systems, institutions tasked with the mandate of delivering on rights protection and punishments of wrongs tend to lose the trust and confidence of the public in terms of their capacity to interface the citizen-state relationship and defend the law in that equation.<sup>45</sup>

As mentioned earlier, however, there are different understandings and approaches to the concept of the rule of law. Santos identifies four different conceptions of the rule of law classified around distinctions between antinomies.<sup>46</sup> His classifications revolved around distinctions between the institutional and substantive on one hand, and instrumental and intrinsic conceptions on the other. In his view, the institutional conception of the rule of law is concerned with the efficacy of a system of rules. As developed by Raz, this leg of Santos’ classification harbors sub-components and further implies the fact that governmental actions should be authorized by law and also that the law should provide a guiding authoritative framework around which people will order their lives.<sup>47</sup> The

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<sup>43</sup> See Timothy Basely & Maitreesh Ghatak, *Public Goods and Economic Development*, UNDERSTANDING POVERTY (Oxford Univ. Press 2006), (prepared for Polices for Poverty Alleviation).

<sup>44</sup> Lauren Benton, *Not Just a Concept: Institutions and the "Rule of Law,"* 68 J. ASIAN STUDIES 117 (2009).

<sup>45</sup> *Id.*

<sup>46</sup> Santos, *supra* note 35.

<sup>47</sup> Aleardo Zanghellini, *The Foundations of the Rule of Law*, 28 YALE J. L. & HUMAN. 213, 217 (2016).

substantive conception of the rule of law goes beyond the institutional conception and requires the prevalence of certain rights as minimum guarantees of good governance. In this regard, the substantive conception of the rule of law is value-oriented and asserts the inherence of certain rights in a legal system built on the rule of law. Amartya Sen<sup>48</sup> articulates a version of the substantive aspect of the rule of law characterized as intrinsic by Santos which states that a legal system should be assessed by the extent to which it permits the expression and enjoyment of peoples' rights.<sup>49</sup> Writing from a developmental perspective, Sen advocates an understanding of the concept of development in which legal and economic development are not only considered reconcilable but also that they are integrally related to each other.<sup>50</sup> Appreciating Sen's conception of the rule of law as a variable of development is vital to an understanding of the law and development mix in Ghana relative especially to the complexities of law reform efforts and legal pluralism.<sup>51</sup> The fact that key failures in the enforcement of customary law impacts the development prospects of large sections of the adherents of this law is a reality that can hardly be overemphasized.<sup>52</sup> In a report issued by the World Bank, the Bank noted that:

The rule of law is essential to equitable economic development and sustainable poverty reduction. Weak legal and judicial systems undermine the fight against on many fronts: They divert investment to markets with more predictable rule-based environments, deprive important sectors of the use of productive assets and mute the voice of citizens in the decision-making process. Vulnerable individuals, including women and children, are unprotected from violence and other forms of abuse that exacerbate inequalities. Ineffectual enforcement of laws engenders environmental degradation, corruption, money laundering, and other problems that burden people and economies

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<sup>48</sup> Amartya Sen, *What is the Role of Legal and Judicial Reform in the Development Process?* (World Bank 2000), [siteresources.worldbank.org/INTLAWJUSTINST/Resources/legalandjudicial.pdf](http://siteresources.worldbank.org/INTLAWJUSTINST/Resources/legalandjudicial.pdf) (lecture delivered at the first World Bank conference on Comprehensive Legal and Judicial Development, Wash. D.C.).

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> Peer Zumbansen, *The Rule of Law, Legal Pluralism, and Challenges to a Western-Centric View: Some Very Preliminary Observations*, (Osgoode Hall Law School Legal Studies Research Paper Series, Paper No.2017-05), <https://digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?article=1197&context=olsrp>; see also Kevin E. Davis & Michael Trebilcock, *The Relationship Between Law and Development: Optimists Versus Skeptics*, 56 AM. J. COMP. L. 895 (2008).

<sup>52</sup> Pluralist systems like Ghana's are fundamentally characterized by large sections of the populace living under customary law and accordingly, a failure of that system to effectively cater to the needs of these people leads to a situation of exclusion.

around the world.<sup>53</sup>

The Bank's conception of the rule of law is central to its lending and development assistance policy<sup>54</sup> But beyond that, its understanding of the interplay between the rule of law and economic development challenges Ghanaian jurists into a paradigm shift in their construction of the role and application of customary law in legal developmental context. Inherent weaknesses in the application of the law within the broader legal system can significantly undermine the developmental prospects of its subjects. Maximizing the gains of the rule of law involves mainstreaming the application of the customary law in its conception, framing, and articulation. This subject will be discussed throughout this article.

#### IV. CUSTOMARY LAW AND THE CONSTITUTIONAL RULE OF LAW

Considering the operation of customary law within the prism of the rule of law politic is utterly important to an understanding of the future role and stability of customary law within the Ghanaian legal system. As previously discussed, the operation of the rule of law in Ghana establishes a system-wide normative framework for an articulation of the rules and values advanced by the laws guaranteed under the plural regime of the 1992 constitution.<sup>55</sup> In this regard therefore, not only does the rule of law provide a benchmark for ascertaining standards of propriety in issues of governance and legality, but also the concept forces a rethink of evolving legal relations and relationships within the context of legal pluralism in new and developing legal systems.<sup>56</sup>

Given the fact that legally plural regimes incorporate disparate sub-units of law with diverse orientations, philosophies, and origins in one systemic structure, the installation of regulatory systems has always been an integral aspect of regimes operating legal pluralism.<sup>57</sup> In the case of Ghana, the 1992 constitution guaranteed customary law in the context of its own superior norms as well as those of the other legal sub-units such as the common law.<sup>58</sup> Many of these values are expressed in the concept of the rule of law and include the principles of legal certainty, non-retroactivity, natural justice, rules against bias, as well as equality before the law.<sup>59</sup> Notwithstanding the fact that customary law can be said to be reconcilable with

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<sup>53</sup> WORLD BANK ANNUAL REPORT 77 (2002).

<sup>54</sup> Santos, *supra* note 35.

<sup>55</sup> *See, e.g.*, CONSTITUTION OF THE REPUBLIC OF GHANA (1992) art. 11.

<sup>56</sup> The 1992 constitution establishes a regime anchored on the rule of law and promotes such principles as legal equality and human rights. Yet the constitution equally contains provisions which states that rules of custom that dehumanize people are liable to being struck down and repealed as being unconstitutional and this creates continuing tension between broad constitutional and statutory norms and customary rules of law. CONSTITUTION OF THE REPUBLIC OF GHANA (1992).

<sup>57</sup> *See e.g. id.* at art. 26(2).

<sup>58</sup> *Id.* at art. 11.

<sup>59</sup> DICEY, *supra* note 34, at 1.

these principles and values broadly speaking, the application of constitutional values in specific cases can have a significant effect on the efficacy of customary law within a pluralistic legal regime. More importantly however, the application of substantive constitutional values as barometers has served to undermine the claim to protective insularity within the Ghanaian legal system.<sup>60</sup> In other words, the application of “invalidating clauses” within the constitution has had such an intrusive effect on the operation of the customary law and subjected its development to the overall constitutional and statutory regime.<sup>61</sup> The absence of active reform mechanisms routinely applied on the basis of need has implied that customary law reform has lagged behind the constitutional standards and expectations.<sup>62</sup>

For example, under article 19(11), the 1992 constitution prohibits the enforcement of any law which seeks to punish a person for an offence unless the law, together with the prescribed penalty, is in writing.<sup>63</sup> Given the generally oral character of customary law, and the claim to internal systemic coherence within that body of law, it stands to argue that the most audacious effect of this provision is to outlaw and invalidate all customary offences to the extent that they seek to impose penalties or sanctions for the breaches of those offences.<sup>64</sup> Legal realists and followers of Maine<sup>65</sup> will invariably discount the effect of this provision by drawing

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<sup>60</sup> Mikano E. Kiye, *The Repugnancy and Incompatibility Tests and Customary Law in Anglophone Cameroon*, 15 AFR. STUDIES. Q. 85 (2015); see also Victor Essien, *Sources of Law in Ghana*, 24 J. BLACK STUDIES 246 (1994).

<sup>61</sup> See generally Kiye, *supra* note 60, at 88.

<sup>62</sup> See CONSTITUTION OF THE REPUBLIC OF GHANA (1992) art. 11(3); See Janine Ubink, *The Quest for Customary Law in African State Court*, in THE FUTURE OF AFRICAN CUSTOMARY LAW 83 (Jeanmarie Fenrich, Paolo Galizzi & Tracy E. Higgins eds., Cambridge Univ. Press 2011) (Where she defines customary laws as embodying a minimum of two elements namely (1) a fixed line of behavior, and (2) normative moment. This definition which represents the generality of scholarly position on the conceptual character of customary law is precisely the difficulty with the issue of customary law reform. For a revised law to therefore gain the force of law it must not only be changed through the contemplated medium of change but must also pass the test of repetitive compliance and application); see also Charles Ogwurike, *The Source and Authority of African Customary Law*, 3 UNIV. GHANA L. J. 11, 17 (1966) (“these rules of traditional customs which are discoverable by judicial inquiry and which are enforceable because they are acceptable as conforming to what ought to be the current values in society.”).

<sup>63</sup> CONSTITUTION OF THE REPUBLIC OF GHANA (1992) art. 19(11).

<sup>64</sup> *Id.*

<sup>65</sup> See ANTONY ALLOT & GORDON WOODMAN, *PEOPLE’S LAW AND STATE LAW: THE BELLAGIO PAPERS* (Foris Publication 1985) (A big community of scholars who chide and are opposed to the codification of customary law has formed, especially in circumstances where the said codified rules do not coincide with the relevant practice); Jacques Vanderlinden, *Return to Legal Pluralism: Twenty Years Later*, 21 J. LEGAL PLURALISM UNOFFICIAL L. 149 (1989); John Griffiths, *What is Legal Pluralism?* 18 J. LEGAL PLURALISM & UNOFFICIAL L. 1 (1986); Boaventura de Sousa Santos, *Law: A Map of Misreading: Towards a Postmodern Conception of Law*, 14 J. L. & SOC’Y 279 (1987); Bradford w. Morse & Gordon R. Woodman, *How State Courts Create Customary Law in Ghana and Nigeria*, in INDEGENOUS LAW AND THE STATE, (Foris Publication 1988); Gordon R. Woodman, *Judicial Development of Customary Law: The Case of Marriage Law in*

attention to the fact that such a provision can only reinforce the gap between theory and practice of customary law. In this regard, these realists will argue that while the courts will declare as invalid any such custom coming before them, these customary rules will continue to enjoy acceptance and enforcement on the ground as chiefs and the people will uphold it without the necessity of a formal declaration by any court. While this position may be undoubtedly true given the reality of structural dualism at the very local level, it is important to state that the constitution's adoption of Hinz's<sup>66</sup> strong, regulated dualism in this regard represents a big signal to the need in Ghana to harmonize the operation of customary law with the modern state law for at least two fundamental reasons. First, harmonization through integration has the benefit of maximizing or optimizing the enforcement of customary law. By incorporating customary law within the mainstream enforcement structures of state law, the state prioritizes customary law in both its articulation and impact.<sup>67</sup>

Second, harmonization can effectively aid the development of the law through judicial application and the employment of reform initiatives applicable to state law. The reality of courts having shown marked reticence to gain a deep insight or understanding of the customary law relative to the modern state law can be addressed by harmonizing the operation and administration of the customary law with modern state law.<sup>68</sup> A major critique of the codification and restatement project has been the fear of customary law becoming ossified and frozen in time.<sup>69</sup> It is argued that since there is no instrumental mode of deliberately updating the customary law when codified, reform efforts through codification would destroy the prospects of a flexible evolution through traditional systems and processes.<sup>70</sup> The fear of ossification has provided a powerful pedestal for a rejection of any attempt at formalizing or mainstreaming customary law through conventional state

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*Ghana and Nigeria*, 14 U. GHANA L. J. 115 (1977); Terence Ranger, *The Invention of Tradition in Colonial Africa* in *THE INVENTION OF TRADITION* 211, 251 (Eric Hobsbawm & Terence Ranger eds., Cambridge Univ. Press 1983); Chuma Himonga, *The Future of Living Customary Law in African Legal Systems in the 21<sup>st</sup> Century and Beyond With Special Reference to South Africa*, in *THE FUTURE OF AFRICAN CUSTOMARY LAW* (Jeanmarie Fenrich, Paolo Galizzi & Tracy E. Higgins eds., Cambridge Univ. Press 2011).

<sup>66</sup> Hinz, *supra* note 6, at 4.

<sup>67</sup> See Buluma Bwire, *Integration of African Customary Legal Concepts Into Modern Law: Restorative Justice: A Kenyan Example*, 9 SOCIETIES, MDPI/OPEN ACCESS J. <https://ideas.repec.org/a/gamjsoc/x/v9y2019i1p17-d210645.html>

(Because of the effectiveness of institutions of state in the enforcement of modern state laws, mainstreaming customary law only allows the enforcement of the law *pari passu* customary law in their respective breaches).

<sup>68</sup> See Lessons from Land Administration Project: A Review of Project Performance Assessments, <https://ieg.worldbankgroup.org/evaluations/lessons-land-administration-projects-review-project-performance-assessments>

(Mar. 21, 2016), Some degree of harmonization, albeit very shallow, has been undertaken by the World Bank through the Land Administration Program (LAP) in Ghana).

<sup>69</sup> See generally Evadne Grant, *Human Rights, Cultural Diversity and Customary Law in South Africa*, 50 J. OF AFRICAN L. 2 (2006).

<sup>70</sup> *Id.*

structures and institutions.<sup>71</sup> Yet the paucity of alternative models offered to deal with the issue of sub-optimality law compels a deeper review of the current approach. On the other hand, reform difficulties of customary law should force us to examine the relative impact of systemic dualism on the enforcement of customary law relative to other laws. In this regard, the persistence of structural insularity of customary law within Ghana's legal pluralism reflects the tension between various reform models and uncertainties the choices made between these models.

As argued earlier, the current arrangement reinforces a subsidiarity of customary law, but more critically, weakens its overall claim to being a source of law. Thus, in spite of the fact that the constitution guarantees the place of customary law within the framework of rules contained in it, a claimant seeking to enforce his rights under any specific rule of customary law under the constitution must still go through processes that resemble the colonial scenario of repugnancy. For example, a claimant appearing in a court of law seeking to enforce a specific rule of custom must be able to prove the following: (1) that the rule of law is indeed a customary rule of law; and more critically (2) that not only is it the personal law of all parties to the suit, but also that it informed the basis of the transaction or subject matter of the dispute.<sup>72</sup> These standards of enforcement invariably ratchet up the obligations incumbent on a party seeking to rely on customary law in a given case. In more than one case, the parallel existence of customary law with other legal sub-units within the pluralist regime of Ghana might have encouraged this state of affairs.<sup>73</sup> This situation might have been accentuated by the complex historical evolution of customary law and the regime's own failure to adopt a workable model for its development. On the other hand, some will argue that this situation was inevitable. While we speak of customary law as if it were a unified field of law and homogenous in character, the reality is that that body of law is a disaggregated and highly diverse area whose disparate operations and underlying philosophies make it harder, if not impossible, to construct a united and coherent "national" development orientation in the absence of deliberate state intervention.<sup>74</sup>

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<sup>71</sup> *Id.*

<sup>72</sup> Essien, *supra* note 60, at 256.

<sup>73</sup> For example, Article 11 of the constitution defines the common law of Ghana as embedding customary law thereby both reinforcing and diminishing the effect of customary law at one and the same time. CONSTITUTION OF THE REPUBLIC OF GHANA (1992) art. 11. In one sense, the treatment of common law as customary law should make its application easier but given the confusion and lack of understanding characterizing its application, customary law has nearly always been ignored in the application of the common law in Ghana.

<sup>74</sup> The constitution itself alludes to the heterogeneous character of customary law when it defined that body of law as the law applicable to "the rules of law, which by custom are applicable to particular communities in Ghana." CONSTITUTION OF THE REPUBLIC OF GHANA (1992). The multiplicity of laws applicable to the various communities in Ghana makes the ascertainment and application of customary law in Ghana a rather daunting exercise.

Given the role and essence of the post-colonial state in Africa, the idea of promoting the development of the customary law without mainstreaming it through a conscious process of integration is not only romantic, but bound to perpetuate the low-level impact and general ineffectiveness of the regime within the corpus of legal sub-units within the Ghanaian legal system. From business relations to governance, the structure of the political economy of many African countries, including Ghana's, have tended to undervalue informality in official terms and have consequently limited the capacity of actors in that area to maximize the outcomes of their transactions when the enforcement powers of the state are ultimately sought.<sup>75</sup> Customary law suffers from this quagmire as it strives to remain detached yet equal to the other legal sub-units, which the state has invariably prioritized over it in real terms. In this regard, a constructive shift from the pre-colonial features of the law could prove positive and helpful for its future development. Understanding the comparative weaknesses of customary law in a modern legal system remains central to its reform prospects. Notwithstanding the fact that past reform projects may have been inspired by faulty assumptions, in which reformers sought to equalize customary law to the common law or statute in terms of content and outlook, that in and of itself cannot be a basis to denounce the importance of reforming the law altogether as the need to integrate the articulation and enforcement of custom remains present and ardent. In addition, the enforcement of the customary law would necessarily have to deal with and overcome the strictures of the rule of law regarding legal certainty and general worries of fairness. Customary law's inextricable connection with chieftaincy makes it amenable to that institution's internal dynamics. In other words, the fact that the ascertainment and development of the law is primarily within the province of chiefs is an issue that needs to be appreciated and approached properly if any reform effort is to succeed.

## V. CHIEFTAINCY AND LEGAL PLURALISM

Legal pluralism<sup>76</sup> has provided the regime framework around which the legal systems of post-colonial states have revolved.<sup>77</sup> Legal pluralism establishes a system in which a multiplicity of laws and systems operate within a larger legal order. Conceptually, then, legally plural systems recognize the co-existence of

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<sup>75</sup> U.N. HUMAN RIGHTS OFFICE OF THE HIGH COMMISSIONER, HUMAN RIGHTS AND TRADITIONAL JUSTICE SYSTEMS IN AFRICA, U.N. Doc. HR/PUB/16/2, U.N. Sales No. E.16.XIV.1 (2016).

<sup>76</sup> For general discussions on the subject see Jacques Fremont, *Legal Pluralism, Customary Law and Human Rights in Francophone African Countries*, 40 VICTORIA U. WELLINGTON L. REV. 149 (2009).

<sup>77</sup> Engle Merry, *Legal Pluralism*, 22 LAW & SOC'Y REV. 869, 869-96 (1988).



different, and often disparate, systems within one legal system and polity which are supposed to interact with minimal conflict. In many ways, therefore, legal pluralism in Africa reflects a post-colonial reality.<sup>78</sup> Following the demise of colonialism, the emergent states on the continent were confronted with the challenge of administering the implanted legal traditions alongside the customary laws of the various tribal groupings.<sup>79</sup> The maintenance of customary law within the new state created a legally plural system given the diversity of native and transplanted laws operating simultaneously.<sup>80</sup> It is significant to state at this stage that while the adoption of the colonial arrangement led to the establishment of legal systems with features of pluralistic regimes, the fact that subsistent tensions during the colonial era were not dealt with during the establishment phase of post-colonial legal systems continues to pose a serious challenge for the stability of the legal systems on the continent.<sup>81</sup> For example, in Ghana, the suppressive approach adopted towards customary law during colonial rule led to a reduction in the legal competency of the regime and created a subsidiarity relationship between customary law and the colonial common law.<sup>82</sup> Thus, while customary law needed to pass the test of repugnancy or risk consignment to consideration as a question of fact, the common law was applied as a matter of law and invariably provided the benchmark for the ascertainment of what constituted a legally repugnant scenario.<sup>83</sup>

The end of colonialism did nothing to resolve the problematic legal history of customary law. In the case of Ghana, successive post-independence governments pursued the rather simple path of guaranteeing customary law as a legal norm, and the implicit belief was that this approach would succeed in restoring the pre-colonial legal character of customary law. While this appeased the large number of adherents to the traditional system of law, it did little to address the prevailing structural and systemic issues that affected the inefficiencies and general lack of effectiveness of the regime during the period of colonial rule and after.<sup>84</sup> Different scholars of different persuasions have approached the issue differently. The general, and perhaps most important, approach has been to propose and defend a

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<sup>78</sup> MARIE SEONG-HAK KIM, *LEGAL PLURALISM AND COLONIAL CUSTOMARY LAW*, <http://rfiea.fr/articles/legal-pluralism-and-colonial-customary-law>; see also Tracy E. Higgins & Jeanmarie Fenrich, *Customary Law, Gender Equality, and the Family: The Promise and Limits of a Choice Paradigm*, in *THE FUTURE OF CUSTOMARY LAW* (Jeanmarie Fenrich, Paolo Galizzi & Tracy E. Higgins eds., Cambridge Univ. Press 2011).

<sup>79</sup> Essien, *supra* note 60, at 248-51.

<sup>80</sup> *Id.*

<sup>81</sup> Muna Ndulo, *African Customary Law, Customs, and Women's Rights*, 18 *INDIANA J. OF GLOBAL LEGAL STUD.* 87 (2011).

<sup>82</sup> See, *Angu v. Atta* (1916) P.C. 48 (Ghana); See also, *Welbeck v. Brown* (1884) Sar. FCL. 185 (Ghana).

<sup>83</sup> The tripartite standard used in the determination of repugnancy namely, that the said custom is not repugnant to equity, good conscience and natural justice, is implicitly built on conceptions of justice. derived from the common law and its legal narratives.

<sup>84</sup> Jeanmarie Fenrich & Mary McEvoy, *Promoting the Rule of Law in Customary Tribunals in Ghana*, *HARV. HUM. RTS. J.* (Nov. 6, 2014) <https://harvardhrj.com/2014/11/promoting-rule-of-law-in-customary-tribunals-in-ghana/>.

model in which the customary law and institution of chieftaincy are insulated from the interactive impact of the modern legal system. In its pure form, this school advocates a complete insulation of customary law and the institution of chieftaincy from any form of regulation and progressive adaptation. A more pragmatic approach has been to argue that customary law should not be subjected to the mechanisms of integration such as ascertainment and codification but must be allowed to develop within its own defined trajectory.<sup>85</sup> Proponents of this school consequently argue that an attempt must be made to avoid the presumptive domination of statutory rules over customary law arising out of the assumption that the former was superior to the latter.<sup>86</sup>

The latter school is advanced by the pioneering work of scholars like Pimentel<sup>87</sup> who virulently rejects any attempt at the formalization of customary law in a manner that subjects it to the values of statutory law.<sup>88</sup> Pimentel argues that attempts at codification and general formalization of the customary law contained subtle attempts at the subjection of the law to state law—a product of a complex mix of evolutionary variables. Thus, during the colonial era, the repugnancy clause was used as a means of asserting the cultural superiority of the implanted common law over the pre-existing customary law of the natives. In a similar vein, the application of a variety of mechanisms as sifting mechanisms of customary law in its relation to constitutional and statutory provisions of the post-colonial state served to maintain superiority of the modern state law. This also serves to reinforce the subtle suppression of customary law within the larger contemporary legal tradition and system. In a poignant reaction to this state of affairs, Pimentel asserts as follows,

... The colonial approach was built on the premise that the colonial power retained ultimate authority; local authorities could govern only to the extent that the colonial regime chose to allow. Any serious conflict with the colonial power was certain to result in the restriction of local authority. Now that the colonial regimes

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<sup>85</sup> T.W. Bennet & T. Vermeulen, *Codification of Customary Law*, 24 J. AFR. L. 206 (1980).

<sup>86</sup> Mikano E. Kiye, *supra* note 60, at 22.

<sup>87</sup> David Pimentel, *The Rule of Law Without Cultural Imperialism? Reinforcing Customary Justice Through Collateral Review in Southern Sudan*, 2 HAGUE J. ON RULE L. 1 (2010).

<sup>88</sup> See generally Eugene Cotran, *The Law of Marriage And Divorce*, in REVIEWS, vol. I (SWEET & MAXWELL 1968); Eugene Cotran, *Restatement Of African Law: Kenya*, in REVIEWS, vol. II. (SWEET & MAXWELL 1968); see also Eugene Cotran, *Kenya The Law Of Succession*, in REVIEWS, vol. II (SWEET & MAXWELL 1969); J. O. Ibig, *Restatement Of African Law, Malawi I: The Law Of Marriage And Divorce*, in vol. 3 (SWEET & MAXWELL 1970); J. O. Ibig, *Malawi II: The Law Of Land, Succession, Immovable Property, Agreements, And Civil Wrongs*, in vol. 3 (SWEET & MAXWELL 1971); Simon Roberts, *Restatement Of African Law, Botswana I: Tswana Family Law*, in vol. 5 (SWEET & MAXWELL 1972); A.K.P. Kludze, *Restatement Of African Law*, in GHANA: EWE LAW OF PROPERTY vol. 6 (1973); see also Janine Ubink, *supra* note 62, at 11.

have, for the most part, folded up their tents and gone home, the governments of newly-independent states are assuming the role of ultimate authority. Many of their constitutions recognize the validity of customary law and of customary courts-non-state institutions-but the superiority of the state institutions is assumed. The result is a superior state approach to legal pluralism, in which state institutions always trump the customary ones, often through the power of appellate review...

The issue of devising an appropriate model that regulates the relationship between customary law and modern state statutes is thorny. This is due to the emotive character of the reactions to colonial attempts at redefining not only the parameters of customary law application, but the very juridical foundations of the law and consequently what nature the post-colonial response should take.<sup>89</sup> During colonial rule in the then Gold Coast (Ghana), the dominating influence of the regime was mainly demonstrated in its general application of the transplanted common law and a tactical exclusion of customary law in given cases.<sup>90</sup> Thus, contrary to the assertion of Pimentel to the effect that there was a broad acceptance of the validity of customary law and the legitimacy of the chiefs applying it, the evidence suggest that the overall approach adopted by the colonial administration to the application of customary law was one of tolerance and regulation.<sup>91</sup> In other words, the colonial administration permitted the application and enforcement of customary law for both pragmatic and convenient reasons as it promoted the policy of indirect rule practiced by the colonial government.<sup>92</sup> As generally accepted by historians and scholars, the policy of indirect rule provided a powerful motivation for the maintenance of customary law as an effective tool for the administration of the colony.<sup>93</sup> This pragmatic motivation did little to help overcome the problem of regulation and conflicts between the received rules on the one hand, and customary law on the other. In this regard, an acceptance of the assertion of recognition of

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<sup>89</sup> Asante, *supra* note 5, at 853.

<sup>90</sup> See generally, Samuel K.B. Asante, *Over a Hundred Years of a National Legal System in Ghana: A Review and Critique*, 31 J. AFR. L. 70 (1987), (explaining that the repugnancy clause contained in the Supreme Court Ordinance that established Ghana's legal system allowed the colonial courts unfettered discretion to decide which customary laws passed the test of civility to be applied as law. This was in addition to the general requirement under that law that all customary laws were to be pleaded as questions of fact and not of law, and were only to be applied as a matter of course after they had gained such sufficient notoriety and the courts had taken judicial notice of them).

<sup>91</sup> Joseph B. Akamba & Isidore Tuffuor Kwadwo, *The Future of Customary law in Ghana*, in *THE FUTURE OF AFRICAN CUSTOMARY LAW* 202, 275 (Jeanmarie Fenrich et. al. eds. 2011).

<sup>92</sup> Roger Gocking, *Colonial Rule and the Legal Factor in Ghana and Lesotho*, AFRICA: J. INT'L AFR. INS. 67, 61 (1997).

<sup>93</sup> A.N. Allot, *New Essays in African Law*, (1970); see also T.W Bennett, *Conflict of Laws: The Application of Customary Law and the Common Law in Zimbabwe*, THE INT'L. & COMP. L. Q. 59 (1981).

customary law by the colonizing force would be to concede a degree of altruism on the part of the colonial government toward the development of customary law as a system of law. Even though the conceptual basis of the repugnancy regime in the Gold Coast may appear to provide broad regulatory guideposts for the development of customary law, it is noteworthy that the jurisprudence on the subject betrays a tendency to constrict the scope of operation of customary law without a court making the necessary readjustments to shifting circumstances within which the law should apply.<sup>94</sup> In other words, by striking down customary laws that were deemed to be in violation of the principles of equity, good conscience, and natural justice, the colonial regime systematically discouraged the enforcement of customary rules of law at least within the formal system, while implicitly subjecting its core principles to that of the transplanted common law.<sup>95</sup>

Consequently, while an assertion that the colonial government actively sought to eradicate the application and enforcement of customary law would fly in the face of the stated policy of indirect rule, the converse would be equally hard to defend. Indeed, the persistent view is that colonial policy at the time was generally hostile to the general application of customary law and the jurisdictional competency of chiefs that went with it.<sup>96</sup> Indeed, the introduction of the concept of recognition for the exercise of chiefly title reflected an implicit understanding by the colonial government that the exercise of traditional authority was contingent upon a chief meeting the set criteria of the colonial government. Failing this, chiefs were derecognized and had the bases of their legitimacy undermined.<sup>97</sup> The fact that many chiefs pandered to the superintending influence of the colonial policy for recognition is ample testament of the reality that traditional authority during the colonial era was exercised at the sufferance of the colonial government and scholars generally agree on this fact to merit further elaboration here.<sup>98</sup> On the other hand, an acceptance of this proposition will invariably lead one to question any claim to commitment by the colonial government on the issue of customary law development and the institution of chieftaincy which acted as the institutional fulcrum for its deployment and exercise.

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<sup>94</sup> Janet L. Banda, *Romancing Customary Tenure: Challenges and Prospects for the Neo-Liberal Sutor*, in *THE FUTURE OF AFRICAN CUSTOMARY LAW*, 312

(Jeanmarie Fenrich et. al. eds. 2011); see also Kwamena Betntsi-Enchill, *The Traditional Legal Systems of Africa*, in *INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW* 6 PROPERTY AND TRUST 68 (Ulrich Drobnig et. al. eds. 1975).

<sup>95</sup> See Bennett *supra* note 85, at 34.

<sup>96</sup> A.N. Allot, *What Is to Be Done with African Customary Law? The Experience of Problems and Reforms in Anglophone Africa from 1950*, 28 No. 1/2 J. OF AFR. L. 56, 57 (1984); Ejembi Anefu Unobe, *Class-formation, State Construction and Customary Law in Colonial Nigeria*, 14 No. 4 AFR. DEV. 95 (1989).

<sup>97</sup> Ernest Kofi Abotsi & Paolo Galizzi, *Traditional Institutions and Governance in Modern African Democracies: History, Challenges & Opportunities in the Future of African Customary Law*, in *FUTURE OF AFRICAN CUSTOMARY LAW* 266, 270-1 (Jeanmarie Fenrich et. al. eds. 2011).

<sup>98</sup> See Martin Klein, *Traditional Political Institutions and Colonial Domination*, 4 No. 3 AFR. HIST. STUD. 659 (1971) (book review).

Even though the evolution of customary law remains central to its identity and future prospects, the exact treatment of customary law reform by the institution of chieftaincy is unclear at best especially in its dealings with the post-colonial Ghanaian state. As mentioned earlier, identifying the relationship that exists, or ought to exist, between customary law and the statutes of the modern state leads any reviewer to confront complex questions. As a starting point, the analytical model used by Pimentel could prove a useful framework in evaluating the relationship between the state and customary law, as well as in reviewing the place of chieftaincy within that milieu.

### **A. Pimentel's Superior State Approach**

Pimentel's view of the relationship between the post-colonial state and traditional institutions such as chieftaincy and customary law, mainly centered on what he termed the "Superior State Approach."<sup>99</sup> He broadly defined this as a relationship in which the state and the collectivity of its apparatus are deemed to stand in a superior position to the pre-colonial traditional regimes, which survived it and were incorporated into the new state.<sup>100</sup> This view of the state/traditional institution dynamic reflects an assumption in which there exists some degree of tension between the two realities whose ultimate resolution would involve the regulation and refinement of traditional institutions to conform to the values and mores of the modern state. He asserts, "the practical application of the Superior State Approach, therefore, may include attempts to codify customary law into state law and to assert the primacy of statutory courts over customary adjudication . . ."<sup>101</sup>

The position advanced in Pimentel's thesis rejects the unitary application of the customary law in a way that formalizes it through codification and also subjects it to the review jurisdiction of the regular courts.<sup>102</sup> His position can be divided into two broad parts, namely, a critique of codification and formalization of customary law, and the exercise of jurisdiction by the courts on customary law.<sup>103</sup> Thus, not only is Pimentel against the formalization of customary law through the process of codification and suchlike mechanisms, but he also rejects attempts at assimilating customary law rules and principles through the means of adjudication and administration.<sup>104</sup> As will be discussed in this article, similar attempts have led to the creation of versions of customary law previously unknown and distinguishable from those which exist in practice among the people. This has been

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<sup>99</sup> David Pimentel, *Legal Pluralism in Post-Colonial Africa: Linking Statutory and Customary Adjudication in Mozambique*, 14 *YALE HUM. RTS. DEV. L. J.* 59, 67 (2011).

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> David Pimentel, *Rule of Law Reform without Cultural Imperialism: Reinforcing Customary Justice through Collateral Review in Southern Sudan*, *HAGUE J. ON RULE L.* (2010).

<sup>103</sup> *Id.*

<sup>104</sup> David Pimentel, *Legal Pluralism in Post-Colonial Africa: Linking Statutory and Customary Adjudication in Mozambique*, 14 *YALE HUM. RTS. & DEV. L.J.* (2011).

called lawyers' customary law and it is generally critiqued for departing from substantive customary law in essence and core principles.<sup>105</sup>

### 1. Formalization Model and Its Critiques

The project on formalizing is perhaps one of the most repeated critiques against customary law reform projects, especially in Africa.<sup>106</sup> In its purest form, it denounces any attempt to formalize customary law systems through the process of codification and restatement, among others.<sup>107</sup> Its milder version may accept some degree of codification even if with a substantial degree of doubt throughout the process.<sup>108</sup> It is imperative to state from the outset that the critique against formalization is based on the general assumption that the colonial enterprise generally undermined the development of customary law and so has the post-colonial state proceeded to complete the assimilation project hitherto started. In this regard, the post-colonial state with its inherited structures and institutions has been seen as mirroring the value orientation of the colonial state whose original mandate it ostensibly seeks to accomplish.<sup>109</sup>

While colonial policy towards the development and application of customary law was mainly negative, the design and orientation of the legal systems of contemporary post-colonial states, such as Ghana's, exhibit peculiar characteristics that continue to negatively impact the development of customary law.<sup>110</sup> First, the interactive nature of legal sub-units within pluralistic regimes implies that the customary law, like other laws, would have to be applied in the light of the overall mandate and focus of the legal system. Thus, the argument which

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<sup>105</sup> See generally Gordon Woodman, *Some Realism About Customary Law-The West African Experience*, 1969 WIS. L. REV. 128, 146 (1969); Abdulmumini Oba, *The Future of Customary Law in Africa*, in THE FUTURE OF AFRICAN CUSTOMARY LAW; Mudiaga Odje, *The Repugnancy Doctrine and the Proper Development of Customary Law in Nigeria*, in 37 (Yemi Osinbajo & Awa U. Kalu eds., FEDERAL MINISTRY JUST. L. REV. 1991); Peter Fitzpatrick, *Traditionalism and Traditional Law*, 28 J. AFR. L. 20, 21-22 (1984); PEOPLES LAW AND STATE LAW: THE BELLAGIO PAPERS, *supra* note 65 at 11; J. Vanderlinden, *Return to Legal Pluralism: Twenty Years Later*, 28 J. LEGAL PLURALISM 149 (1989); Santos, *supra* note 10 at 7; Woodman, *How State Courts Create Customary Law in Ghana and Nigeria*, *supra* note 65 at 11; Woodman, *Judicial Development of Customary Law: The Case of Marriage Law in Ghana and Nigeria*, *supra* note 20, at 11; T.R. Ranger, *supra* note 65, at 11; Himonga, *supra* note 65, at 11.

<sup>106</sup> See generally Thomas V. McClendon, *Tradition and Domestic Struggle in the Courtroom: Customary Law and the Control of Women in Segregation-Era Natal*, 28 INT'L J. OF AFR. HIST. STUD. 527, 527 (1995).

<sup>107</sup> Thomas McClendon, *Tradition and Domestic Struggle in the Courtroom: Customary Law and the Control of Women in Segregation-Era Natal*, 28 INT'L J. OF AFR. HIST. STUD.No. 3 (1995).

<sup>108</sup> See generally Bennet *supra* note 85.

<sup>109</sup> Crawford Young, *The End of the Post-Colonial State in Africa? Reflections on Changing African Political Dynamics*, 23-49 (Jan. 2004).

<sup>110</sup> See CONSTITUTION OF THE REPUBLIC OF GHANA, art. 11 (1992).

projects regime insularity on the part of customary law is not only problematic to the extent that this proposal lacks a practical basis, but also that when implemented, insulation would rather work against the prospects of customary law development.<sup>111</sup> The truth remains that following the establishment of the post-colonial state in Ghana, like elsewhere in Africa, there came into being two sub-regimes: one dominant and the other minor.<sup>112</sup>

In this regard, even though the transplanted common law and statutory laws enacted by legislative bodies became dominant and applied as a matter of course without any pre-evaluation as to their applicability and choice of law, customary law was *cautiously* applied and with prior justification as to its applicability and justiciability.<sup>113</sup> In addition to rapid socio-political changes, variables such as migration, rural-urban drift, cosmopolitanism, and western education, many former subjects of customary law have come to live in oblivion of the law and its application.<sup>114</sup> The result has been that increasingly, the scope and application of customary law has dwindled and continues to be whittled down by its own evolutionary challenges and experiences. Thus far, from enjoying the harmony it might have once had, these changes have invariably affected the development of the customary law in a way that threatens its stagnation to a point of becoming sidelining altogether.<sup>115</sup>

Also, the inception of constitutional invalidation of impugned customary laws on grounds of incompatibility forces us to reconsider the critique against formalization.<sup>116</sup> The age-old worry of ossification of the law resulting from its writing without a corresponding mechanism of reform remains extant. This is further compounded by the potential disjuncture that could be created in the event of a gap developing between the written law and the actual application of the law. These challenges, however, do not, in the view of this author, trump the more critical issue of dealing with the deficits in the law. These include the baseline standards required by the rule of law in a pluralistic regime such as Ghana's. For example, the provision in Article 19 (11) to the effect that nothing can be considered as a crime in Ghana unless it is in writing with a penalty that is prescribed in law.<sup>117</sup> Given the unwritten nature of customary law, a standard application of this provision will result in the automatic invalidation of all customary law crimes, and for that matter, virtually all traditional public law.<sup>118</sup> As a matter of practical consequence, the issue of formalization in this regard assumes an importance that

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<sup>111</sup> The Ghanaian situation typifies this problem as in reality customary law is sidelined in favor of western law in regular adjudication scenarios. *See id.*

<sup>112</sup> *See generally*, Merry, *supra*, note 77.

<sup>113</sup> *See* Angu v. Atta, *supra* note 82.

<sup>114</sup> Migration and integration of many cultures have and continue to impact the sustainability of many customary laws. I assume it was meant to be plural

<sup>115</sup> Samuel K.B Asante, *Over a Hundred Years of a National Legal System in Ghana: A Review and Critique*, 31 No. 1/2 J. AFR. L 70. (1987).

<sup>116</sup> CONSTITUTION OF THE REPUBLIC OF GHANA, art. 26(2). (1992)

<sup>117</sup> *Id.* at art. 19(11).

<sup>118</sup> *Id.*

transcends academic polemics and the romantic idea of maintaining the pre-colonial character of customary law as a legal category *per se*.

Opponents of formalization appear to worry about the prospects of customary law being absorbed or extinguished as a result of a gradual change in character through the process of restatement or codification.<sup>119</sup> It is suggested that a well-tailored harmonization of customary law with other legal sub-units within the Ghanaian pluralistic regime should help avoid this outcome.<sup>120</sup> Given the uncertainty inherent in the nature and scope of any given rule of customary law and for that matter boundaries, a degree of formalization presents an opportunity to engineer a relational path for the law in the light of the law reform agenda in Ghana overall.

It needs to be noted that the arguments against formalization of customary law have been well advanced over the years.<sup>121</sup> But unlike the conventional formulation of the critiques, we may better ask the question anew: Is it more feasible than not to insulate traditional institutions and/or customary law from the daily functioning of the state and its institutions as a means of guaranteeing their independence and assuring their growth? Another way of considering this question would be to ask whether, given the new state reality, it makes sense to create parallel development trajectories or paths for traditional institutions and customary law on the one hand, and the state and its institutions on the other. So formulated, the question shifts the discussion from the issue of statutory repugnancy *per se* in which there was an ostensible separation of customary law on the one hand, and state laws on the other, with the two interacting only on the point of determining whether there is a breach of state law by the former, to one in which consideration is made of whether a sustained symbiotic evolution of the two regimes is possible.

In this regard, the parallel administration of customary law and state law appears to be the reason for the seeming stagnation of customary law whose evolution could have been trapped in a state of cyclical development.

## **B. Dualism versus Integration**

The debate over the future of chieftaincy and its concomitant institutions such as customary law has often pitched it against certain binary variables, namely integration of customary law or its detachment from mainstream processes of law enforcement and reform. Cynics of formalization have advocated that the best way of maximizing the gains of guaranteeing the institution of chieftaincy is to insulate it and the rules of custom from the formal structures of state. They maintain in essence, a dual legal and political arrangement in which chieftaincy, and for that

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<sup>119</sup> Anthony Allot, *The Unification of Laws in Africa*, AM. J. COMP. LAW 51, 71 (1968).

<sup>120</sup> See Essien, *supra* note 60, at 22.

<sup>121</sup> E. Azinge, *Codification of Customary Law: A Mission Impossible*, in TOWARDS RESTATEMENT OF NIGERIA CUSTOMARY LAW (Yemi Osibajo & Kalu Awa eds., 1991).



matter customary law, evolves and operates as an independent institution is the best of guaranteeing optimal efficiency and effectiveness of the institution. In addition to the fear of the subjugation of customary law, dualists worry over the complete absorption of customary law into the formalized and ‘superior’ state law.<sup>122</sup> By adopting a uniform and lineal approach to its administration relative to the state law, dualists argue that customary law would in substance come to resemble state law because of which it would lose its peculiar characteristics.<sup>123</sup>

Proponents of the integration model advance an “efficiency-led” position in which they argue that the integration and operation of customary law and chieftaincy can promote an efficient deployment of that body of law.<sup>124</sup> Another side of the argument is the suggestion that a uni-lineal administration of the law would reinforce its effectiveness by making it automatically preferred and enforceable very much in the same manner as state law.<sup>125</sup> In this regard, the integration model<sup>126</sup> implicitly suggests that the insulated application of customary law alongside the state law invariably leads to the stagnation of the former. Thus, this not only weakens the regime efficacy of customary law but also fundamentally undermines the very claim to legality of the law in hard and concrete cases. Therefore, even though the issue of the legal status of customary law may appear to have been settled, generally speaking, following independence from colonial rule, the interaction and relationship of that regime of law to other laws has remained fuzzy and penumbral in favor of state laws.<sup>127</sup> For example, in the absence of a clearly articulated customary law and further evidence that parties have chosen a particular system of customary law to apply to their transactions, judges will apply the common law or statute as a matter of course in any given case. This simple

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<sup>122</sup> See Bennett & Vemuelen, *supra* note 4.

<sup>123</sup> See generally Bennett *supra* note 93.

<sup>124</sup> Bennett *supra* note 85.

<sup>125</sup> See I.O. Agbede, *Legal Pluralism: The Symbiosis of Imported, Customary and Religious Laws: Problems and Prospects*, in FUNDAMENTALS OF NIGERIAN LAW, 235, (M.A. Ajomo ed., 1989); *but see* CONSTITUTION OF THE REPUBLIC OF GHANA art. 131(4) (partially integrates the judicial administration of customary law by providing that an appeal shall lie from the judicial committee of the National House of chiefs to the Supreme Court in respect of matters affecting the institution of chieftaincy).

<sup>126</sup> See A.N. Allot, *What Is to Be done With African Customary Law?: The Experience of Problems and Reform in Anglophone Africa from 1950*, 28 J. AFR. L., 56 (1984); See A.N. Allot *The Codification of the Law of Civil Wrongs in Common Law African Countries* 16 *Sociologus* 101, 105-106 (defining “integration” and “harmonization”).

<sup>127</sup> CONSTITUTION OF THE REPUBLIC OF GHANA (1992). Apart from the fact that situations of conflict of laws between customary law and statute have been constitutionally resolved in favor of modern state statutes, the situation is even murkier in relation to the relationship between the common law and customary law. In the case of the latter scenario the arrangement of the laws under the sources of laws in article 11 of the Ghanaian constitution suggests a structure in which the received common law has been placed higher than the customary law. This is further reinforced by provisions of the constitution such as those contained under article 26 of the constitution which prohibits all customary practices that dehumanize or are injurious to the individual are prohibited.

example illustrates the reality of customary law/state law dynamic and how the latter invariably overshadows the former in the often taken for granted choice of law aspect of litigating in plural legal regimes. Thus, while many of these regimes may be legally plural in theory, the reality and persistence of a preferred dominant legal category remains an enduring challenge.<sup>128</sup> In this reality, customary law has been relegated to the background, and applied selectively and optionally.<sup>129</sup>

The question whether to maintain a different evolutionary trajectory for customary law or to integrate it within the evolving state system of the post-colonial state can only be properly answered and addressed from a functionalist angle. In other words, the debate ultimately reduces to the basic issue bordering on the feasibility of maintaining a distinctive path of development for customary law separate and fully independent of the law reform initiatives of the post-colonial era. While the framing of this issue may do little to ease the confusion in the dialectic, it is important in helping us better appreciate the subtle complexities involved in the adoption and operation of legal pluralism in developing legal settings. Pluralist regimes in Africa, such as Ghana's, have by experience, come to reflect a schema in which different systems of law are guaranteed with minimal regulation in terms of the hierarchical or other relationship that exists, or should exist, between them and within which there exists a dominant legal category.<sup>130</sup> Thus, in the case of Ghana, while it is clear that the constitution sits at the apex of the legal order, it is also generally agreed that statutes follow in the order of that hierarchy.<sup>131</sup> Beyond that, however, the operational relationship between the transplanted common law and customary law have been left to the uncertainties of experience which has generally not worked in favor of customary law.

A simple way to deal with this conundrum could be to resort to applicable choice of law rules to deal with domestic conflict of laws, and thereby accord customary law the same degree of enforcement in the event of a party invoking a rule of customary law on the basis of which he asserts a right. This status or effect accorded to customary law is not only practically dubious within the scheme of the legal reality of the Ghanaian example given, but also implicates two critical transitional flaws in the evolution of customary law in the post-colonial phase namely: (i) the transmutation of customary law from its 'factual' colonial impression into one recognized as being a question of law before the courts; and (ii) an insular yet structurally hierarchical ordering of the legal system in which customary law as a category of law, is related to identifiable higher norms.

The post-colonial legal system witnessed the sudden shift from the suppression model adopted during colonialism, which relegated customary law to the background and made subservient to the Eurocentric common law that was transplanted in the colony. As argued elsewhere,<sup>132</sup> this colonial development was

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<sup>128</sup> Derek Asiedu-Akrofi, *Judicial Recognition and Adoption of Customary Law in Nigeria*, 37 AM. J. OF COMP. L. 571 (1989).

<sup>129</sup> Bennett, *supra* note 93, at 34.

<sup>130</sup> CONSTITUTION OF THE REPUBLIC OF GHANA, art 11 (1992).

<sup>131</sup> See Bennet, *supra* note 93.

<sup>132</sup> Abotsi & Galizzi, *supra* note 10.

a necessary outcome of the clash of regimes between the two systems of law introduced by the colonial power and customary rules of law. Given the politico-legal hegemony exercised by the colonial government upon the establishment of the colony, the space for the recognition and enforcement of customary law became constricted, if not extinguished, necessitating its regulation.<sup>133</sup> The immediate reaction following the inception of independence was to enact legislation restoring the pre-colonial *status quo* of customary law.<sup>134</sup> The assumption, however, that a legislative restoration of the legal quality of customary law would resolve all outstanding concerns of enforcement proved fundamentally problematic as it failed to raise the law to the level of state law relative to enforcement.<sup>135</sup> For example, while the enforcement of customary law was automatic and survived on the hegemonic authority of the institution of chieftaincy during the pre-colonial era, the introduction of new political institutions during the colonial and post-colonial phase had a cataclysmic effect on chieftaincy and, for that matter, customary law.<sup>136</sup> As primary custodians of customary law, the loss of chiefly power has generally affected the capacity of chiefs to reform and enforce customary law within the Ghanaian legal system.<sup>137</sup>

The variable of *preference*<sup>138</sup> introduces even more nuanced complexities during the restorative era of customary law. This model, as mentioned earlier, was evident in the automatic application of common law in given cases unless the contrary fact justifying the application of customary law was established to the satisfaction of the court.<sup>139</sup> This situation has persisted significantly to this day. Courts invariably apply the common law with statutory modification to given cases coming before them, ignoring the applicability of customary law unless otherwise raised. While some may defend this stemming from the common law training and disposition of judges, the issue betrays a certain preference for the common law relative to the customary law. Thus, while the heterogeneity of the customary law and the accompanying issues of ascertainment practically make the judicial enforcement of customary law difficult in live cases, the preference for the common law in the absence of a contrary proof reflects an assumption in which customary law is deemed exceptional and can only be applied where and when established and proven as having been relied upon by parties to a given transaction. The application

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<sup>133</sup> See generally Pimentel *supra* note 87.

<sup>134</sup> Courts Act 1971, (Act 372).

<sup>135</sup> William Harvey, *The Evolution of Ghana Law Since Independence*, <https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=2940&context=lcp>; see also, Sandra Fullerton Joireman, *Inherited Legal Systems and Effective Rule of Law: Africa and the Colonial Legacy* J. MOD. AFR. STUD. VOL. 39 (Dec. 2001).

<sup>136</sup> Abotsi & Galizzi, *supra* note 10.

<sup>137</sup> See generally Leila Chirayath, Caroline Sage & Michael Woolcock, *Customary Law & Policy Reform: Engaging With the plurality of Justice System*, (World Bank, Paper No. 33655) (July 2005), [http://siteresources.worldbank.org/INTWDR2006/Resources/477383-1118673432908/Customary\\_Law\\_and\\_Policy\\_Reform.pdf](http://siteresources.worldbank.org/INTWDR2006/Resources/477383-1118673432908/Customary_Law_and_Policy_Reform.pdf).

<sup>138</sup> Oba, *supra* note 105, at 58.

<sup>139</sup> Ndulo *supra* note 81, at 95-96.

of customary law, especially within the context of the domestic conflict of laws rules, shows a tendency to uphold customary law only in cases where it is established that both or all parties to a transaction choose to apply the invoked customary rule in a given dispute- a marked departure from the judicial approach to the application of the common law which is deemed to hold sway as a matter of course.

The evolutionary difficulty experienced by customary law during the post-colonial phase was reinforced by the structure and orientation of post-colonial legal systems.<sup>140</sup> Thus, while the restoration of the legal effect of customary law was significant in allowing the reliance by litigants and parties to transactions on customary law in their dealings and disputes, it failed to, and indeed, ignored the expressed and subtle pressures prevalent against the application of customary law as a source of law *per se*. The structural weakness of the law was reflected mainly in some contradictions inherent in the evolution of customary law and how the handling of the transitional phase of the restoration might have unwittingly further depressed the effectiveness of the regime. In this regard, it bears mentioning that the transitional process, like the contemporary ordering of legal categories in Ghana, created a kind of antinomy in which customary law clashed with the state laws of the post-colonial state with the latter indubitably given preference in these conflicts.<sup>141</sup> Contrary to the expectations of the proponents of insularity however, the claim to internal harmony of the law arising from its guarantee and insulation has been frustrated. In its place, the post-colonial era has been characterized by a tacit suppression of customary law in a way that makes the law appear both ossified and inapplicable to the exigencies of a modern transaction or dispute. While it is conceivable that a hierarchical structure can co-exist with a measure of insulation of a legal sub-category within plural systems,<sup>142</sup> it is worth mentioning the fact that insulation contains inherent impediments to the growth and development of the law considered from the standpoint of the systemic character of law itself.<sup>143</sup>

Indeed, it is significant that legal dualism has become an integral feature of most post-colonial constitutional arrangements on the continent.<sup>144</sup> This development, in many respects, is an outcome of the negotiated transitional arrangements in which traditional institutions were guaranteed both as a compromise deal and also a restoration of the pre-colonial politico-legal

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<sup>140</sup> Pimentel *supra* note 87, at 5-6; *see generally*, Leila Chirayath et al *Customary Law and Policy Reform: Engaging with the Plurality of Justice Systems* (World Bank, Working Paper No. 33655, July 2005), <http://documents.worldbank.org/curated/en/675681468178176738/Customary-law-and-policy-reform-engaging-with-the-plurality-of-justice-systems>.

<sup>141</sup> Ndulo *supra* note 81, at 95-96.

<sup>142</sup> Merry, *supra* note 77, at 870.

<sup>143</sup> Miranda Forsyth, *A Typology of Relationships Between State and Non-State Justice Institutions*, 39 J. OF LEGAL PLURALISM & UNOFFICIAL L. 67, 75-76 (2007).

<sup>144</sup> Vivek Maru, *The Challenges of African Legal Dualism: an Experiment in Sierra Leone*, in JUSTICE INITIATIVES:HUMAN RIGHTS AND JUSTICE SECTOR REFORM IN AFRICA 18, 19 (2005).

architecture in which customary law held sway as a matter of course. Hinz aptly captures the situation by asserting:

... all African legal systems that subscribe to what we call the new African Constitutionalism and have not abolished or integrated legally relevant elements of their traditions cannot but implement models of dualism that have tendencies towards a strong regulation of weak dualism....<sup>145</sup>

As argued above, however, the guarantee of customary law did little to assure against its subsidiary status relative to the common law and statutory law.<sup>146</sup> Establishing a dualist system in which customary law was to evolve on its own not only stagnates the law but also undermines its claim to preeminence in which it enjoys an equality of treatment within the established pluralist system. Operating a system in which the equality of the law is upheld would presuppose an open application of the various laws guaranteed while promoting such level of interaction deemed constructive for the growth and development of the law. Treating customary law as a closed compartmentalized system of rules, fully detached from the evolutionary effects of other sub-units within the system, could prove counterproductive.

Given the factually dualist character of the Ghanaian legal system, it is worth arguing that a stable and sustainable development of the two systems of law is dependent on the extent to which the various systems of law are adequately integrated or harmonized into a unified, coherent system. But unification in this regard is impossible in the absence of an agreement upon what it entails and implies, particularly in regard to the guaranteed operation of the customary law. It bears mentioning at this point that the concepts of integration or harmonization have generally been mistaken or misinterpreted by some as representing or harboring functionally destructive variables for the development of customary law.

First, integration has been understood as signaling a call to absolute codification of customary law, and in this regard, an attempt at equalizing the nature and dynamics of modern state law. In other words, critics of the integration model have repeatedly attacked attempts at codification<sup>147</sup> and generally denounced not only the legitimacy of the process but also the very substantive outcomes of these attempts.<sup>148</sup> Thus, while different countries have devised various models for dealing with critiques attendant on the 'modernization' effort,<sup>149</sup> critics have been

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<sup>145</sup> Hinz, *supra* note 6, at 67.

<sup>146</sup> Ndulo *supra* note 81, at 95-96.

<sup>147</sup> Gordon R. Woodman, *A Survey of Customary Laws in Africa in Search of Lessons for the Future*, in *THE FUTURE OF AFRICAN CUSTOMARY LAW* 9, 21-30 (Jeanmarie Fenrich, Paolo Galizzi, & Tracy E. Higgins eds. 2011).

<sup>148</sup> Mike Imadun Isokun, *How Customary Is the Customary Court System?*, in *TOWARDS A RESTATEMENT OF NIGERIAN CUSTOMARY LAW*, 204-09 (Yemi Osinbajo & Awa U. Kalu eds., Nigerian Federal Ministry of Justice, 1991).

<sup>149</sup> An example is the departure from the traditional model of codification and repugnancy to restatement of the law to reflect changing times and circumstances.

unwavering in their general rejection of the transformation or reinvention of customary law in tandem with the vicissitudes of governing a modern state. In this regard, the Ghanaian regime resembles what has been characterized by Hinz as a model of regulated (weak or strong) dualism being one in which

[T]he state confirms traditional governance and African customary law. Both enjoy their own places apart from the authority structures of state government and the law of the state. In other words, the overall political and legal system would be a dual, or better, plural system with the state-run system on the one side and a plurality of traditional systems on the other. Dual or plural systems are systems in which traditional governance and African customary law represent officially recognised semi-autonomous social fields as defined in the theory of legal pluralism. Whether a given dualistic situation will be called weak or strong, will depend on the degree of autonomy the state accepts to grant to those semi-autonomous social fields...<sup>150</sup>

The model of regulated weak dualism amply typifies the Ghanaian situation in which the legal system guarantees customary law as an insular field, subject only to the overriding effect of the constitution on its operation.<sup>151</sup> Unlike the contemplated model under Hinz's category however, Ghana's legal system reflects other complexities.<sup>152</sup> The social fields spoken of by Hinz is in the case of Ghana, reinforced by an attempt to promote an internal self-regulation of customary law in the midst of weak or weakened traditional structures. Thus, the existence of parallel legal sub-units reinforced the duality of the legal system. Clearly, the structure and orientation of legal pluralism in Ghana, like in many other African countries as earlier argued, appears to be based on a policy analogous to the concept of *restorative justice* in which the preservation of pre-existent rules of custom and the detachment of state authority is given the presumptive quality of legal effectiveness.<sup>153</sup> But, this attempt does not only ignore the reduced capacity of traditional institutions to superintend the development of customary law following years of colonial suppression, but also that it flies in the face of the transformative changes that have occurred in the politico-legal arrangements and social dynamics of the spaces within which traditional institutions operate. Thus, the assumption that traditional institutions and customary law will develop and evolve harmoniously without the impact of exogenous factors such as state law and other

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<sup>150</sup> Hinz, *supra* note 6, at 63.

<sup>151</sup> CONSTITUTION OF THE REPUBLIC OF GHANA, art. 11 (1992).

<sup>152</sup> The very definition of customary law mirrors this complexity. *See id.* art 11.

<sup>153</sup> Bualuma Bwire, *Integration of African Customary Legal Concepts into Modern Law: Restorative Justice: A Kenyan Example*, 9 SOCIETIES 1, 2-3 (2019).

interests is not only problematic but romantic at best.<sup>154</sup> On the other hand, the promotion of a regime of insularity continues to have dire consequences on the optimal enforcement and maximization of the customary law, as it tends to support a circular rather than incremental development of the law.<sup>155</sup>

As the institution of chieftaincy evolves and adapts to the governance paradigm, it needs to take an active interest in the development and reform of customary law as a means to advancing the interests of many people who continue to rely on it as their personal law. Continuing to proclaim the need for independence would not aid the growth and changes in the law relative to the requirements of constitutional compliance and the rule of law. Needless to say, settling on the mechanics of reform and regime adaptation would be difficult given the heterogeneous nature of the customary landscape in Ghana. In any effort at mainstreaming customary law through the integration model, relatively recent attempts in this direction have yielded some gains that could be considered a platform for learning and lessons for any future project in this direction.<sup>156</sup> The default option is simply intolerable as the increasing movement away from the customary law even at the local and traditional levels due to uncertainties in enforcement threatens the very future stability and efficacy of the law.

## VI. CONCLUSION

The future of customary law in Ghana is a contingent variable. In the context of legal pluralism as established under the Ghanaian legal system, customary law although sidelined has been premised on a puzzling promise and guarantee of independence and regime purity. These are fundamentally false promises which hurt and harm the practical development of the law and undermine the expectations of the subjects of the regime. If the state represents a corporate establishment for the promotion of a common good, then the state should assert an active role in leading efforts at the guarantee, enforcement, and development of the customary law on which a rather significant number of its populace rely.

Experience has shown that the guarantee of legal pluralism *per se* does not in and of itself assure the equal application and enforcement of the law. Deliberate steps must be taken to ensure the attainment of a state of optimal enforcement of the various laws guaranteed. On the other hand, detaching and enclosing a

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<sup>154</sup> M'Begniga Abdoulaye & Ma Guang, African Customary Law and Modern Law from Western: An Overview on Their Roles and Impacts in African Societies, 5 INT'L J. SOC. SCI. & HUMAN. RES. 188, 191-92 (2017).

<sup>155</sup> Asante, *supra* note 5, at 885.

<sup>156</sup> *See generally* The Intestate Succession Law, Provisional National Defence Council Law 111 of 1985(Ghana). This law has generally been effective in establishing a uniform standard of distributing the properties of deceased persons dying intestate following its harmonization of the customary law rules on the subject from among the various tribes in Ghana. This is in spite of admittedly core weaknesses in the operation of the law and the accusation levelled that the law deviates from standard customary practices still prevalent in many communities in Ghana.

particular regime in a compartment as customary law appears to be, can only lead to stagnation of that law as it would be left behind in law reform initiatives. Consequently, integration of customary law needs to be historicized and nuanced to reflect the vicissitudes of its development and the realities of today. A well-tailored system of integration can harmonize customary laws with state laws in a uni-lineal model of enforcement while ensuring that peculiar systems of adaptation prevalent under customary law are both applied and upheld. From a more pragmatic standpoint, this can be capped with training of judges and legislators in the complex interaction of the customary law with statute and the common law in order to avert the gradual erosion of the application and effect of the latter. As Ghana strives to deepen its system of governance and the strictures of the rule of law, customary law cannot remain insulated nor can the country continue to foreclose the binding effect customary law on such core constitutional values such as certainty and legal fairness.



