

THE CLASH OF LEGAL CULTURES: THE TREATMENT OF INDIGENOUS LAW IN COLONIAL AND POST-COLONIAL AFRICA

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The historic Berlin Conference on Africa in 1885 is often credited with the official beginning of colonialism in Africa. However, this Conference, held among the principal colonial European powers (Germany, France, Britain, Belgium, and Portugal), essentially marked the agreement among those powers to define territorial areas of influence in Africa. Long before this Conference, individual European powers had reached their own accommodation with indigenous peoples of Africa in various corners of the continent.

Thus, in the southern part of Ghana, then called the Gold Coast, the Bond of 1844 was signed by the British and the local chiefs in the southern part of the country under which the locals accepted British sovereignty or dominion over them in exchange for protection from their warlike neighbors further to the north. Indeed, Europeans interacted with the peoples of Africa for centuries before 1844. In the Gold Coast, for example, as far back as 1475, the Portuguese had set foot at a coastal place they called Elmina (Portuguese for “the mine”). However, the Portuguese did not have much success with colonialism in West Africa. In the Gold Coast, they were kicked out successively by the Dutch and then the English, and the territory became a British colony.

The story of the legal relationship between European and African legal systems that intrigues comparative lawyers starts in the 19th Century. As part of the Colonial Administration, the British naturally wanted to enforce law and order and to generally regulate the lives and habits of the people that they conquered. This was not always easy for the British, both as a practical matter and as a matter of legal doctrine and ideology. They encountered a legal system quite different from their

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own legal traditions. They had to deal with a religion-based legal system simultaneously meant for secular application that was unlike other forms of religious law, such as Canon Law, which largely applied to the spiritual realm of life. They also faced hostile reaction from strong indigenous cultures which were not necessarily prepared to accept the assumptions of the Western cultural mind. Ultimately, the culture accepted the creation of legal pluralistic systems in which the English dominated, but indigenous law also was maintained up to a certain point.¹

In other parts of Africa, it was not simply the clash between European and indigenous African cultural norms, but between European and Muslim or Islamic Law as well. A cultural influence of a different sort had already taken root. People had converted to Islam in some parts of Africa,² and indeed in sections of the same community, while others in the same society had embraced Christianity. This was the beginning of the “triple heritage” of the African legal system: traditional, Judeo-Christian, and Islamic legal culture.³

At the start of the legal history that we are concerned with, the characteristics of African society were either pre-industrial or traditional. Society was characterized by a subsistence level of living, using the sociological classificatory scheme of societies based on their level of socio-technical complexity.⁴ African economy at that point was heavily agrarian.⁵ Societies tended to be organized in small groupings, and “[t]he most important basis for [a] relationship was kinship.”⁶ Sociologists refer to them as “kin-dominated” societies.⁷ However, there were other factors that bound together individuals, such as their economics, politics and religion. Thus, these societies are also referred to as “multiplex” societies.⁸ Because of these socio-economic characteristics, there inevitably was a close identification of traditional society with customary law. Individuals’ roles typically were allocated “on the basis of ascriptive criteria” or birthright-related characteristics, which

1. See ANTONY ALLOTT, *NEW ESSAYS IN AFRICAN LAW* (Allott ed., Butterworth & Co. Ltd. 1970) (referring to adoption of some customary laws while implementing statutory regulation).

2. David S. Clark, *The Idea of the Civil Law Tradition*, in *COMPARATIVE AND PRIVATE INTERNATIONAL LAW* 12-16 (David S. Clark ed., 1960).

3. *Id.*

4. JOHN H. BARTON ET. AL., *LAW IN RADICALLY DIFFERENT CULTURES* 40 (West Publishing Co., 1983).

5. *Id.* at 41.

6. *Id.*

7. *Id.*

8. *Id.* at 42.

consequently depended on one's "sex, kinship, nob[ility of] birth, age and . . . birth order."⁹ The people were soaked in traditionalism and custom. Their mindset was: "[P]erform the ritual customs because your ancestors did so," and "stick with something that seems to work."¹⁰

The starting point of custom is of course practice or long usage. In traditional African societies, custom became the principal, if not the only, source of law. Kings or chiefs occasionally issued edicts, but custom was decidedly the main source of law. The chief himself was bound by custom and indeed was the repository of custom. Thus, in Western discussions of sources of law, the focus on this epoch in Africa would not be on legislative or judicial formulations, but rather on custom; viewed as usage of a long duration. Usage led to custom, and part of custom eventually became customary law. Customary law comes partially from the customs of the people, that is, that portion of customs that the people have accepted as community-governing principles, the violation of which would result in punishment. The rest of custom, that is non-legal custom, would not normally lead to punishment when violated, but could still effectively regulate norms of conduct. Custom itself emerged not simply from what was practiced, but also from the highly influential morals and religious beliefs of the people.

Traditional or customary law at that time was wholly unwritten for the simple reason that it was not a literate culture. Even today, much of customary law is unwritten, but there has been a growing corpus of treatises and court decisions setting down customary rules of law as the authors judge them to be.¹¹ Therefore, it is now much easier to state the rule of customary law on a particular issue.¹²

Indigenous or customary law in pre-colonial Africa is simply defined as rules of custom, morality, and religion that the indigenous people of a given locality view as enforceable either by the central political system or authority, in the case of very serious forms of misconduct, or by various social units such as the family. In terms of Western literature on the nature of law, jurists in these African societies were much closer to philosophies articulated by the German Karl von Savigny, and others in the historical school of jurisprudence. The core tenets of African customary law are its emphasis on collective responsibility, respect for the elderly, collective rights, and respect for

9. *Id.*

10. *Id.*

11. RENE DAVID & JOHN E. C. BRIERLEY, MAJOR LEGAL SYSTEMS IN THE WORLD TODAY 566 (3d. ed. 1985).

12. *Id.*

long-established institutions.

However, this indigenous body of law began to face an assault from external influences in the form of Christian colonial power and Islamic religion. Would the new colonial powers reject African Law outright as somehow inconsistent with the primary imperative of colonialism to dominate the colonized people? If customary law was not to be accepted, could European law rule both European and non-European peoples in the enlarged colonial community? In any case, what should be the actual content of customary law in the new, multi-ethnic, African colonial states, where there are vastly different cultures and languages within one community? This was a problem, because if custom partially defines customary law, and if custom itself is something that emanates from the people, then there would be as many customary laws as there were different communities. In the Gold Coast, for example, there were at least ten major ethnic groups. In terms of custom and customary law, whose customary law should the British apply? Further, assuming the British knew what customary law consisted of, would they automatically apply it? Now that the British were the unchallenged colonial masters, intent on keeping their own proud tradition and culture, executing their so-called dual mandate in Africa, protecting the possessions of the Empire, and concurrently civilizing the peoples of Africa in the European ways, what were the British to do with the cultural norms of the conquered indigenous population?

By way of comparison, a similar problem also arose in Latin America at the start of Spanish and Portuguese rule there. Woodrow Borah, writing on the accommodation of Spanish and Indian law in colonial Mexico, noted that during the mid-16th century, a series of discussions among Spanish policy-makers had “attempted to settle [the nature of] the relations[hip between the ruling Spanish group] and the subjugated communities.”¹³ This discussion took center stage particularly “from . . . 1511 on[wards when] some members of the [Spanish] bureaucracy, disturbed by the destruction of the Indian population in the Antilles and on the mainland, [sought to establish] less murderous systems of exploiting the colonies.”¹⁴

13. WOODROW BORAH, *JUSTICE BY INSURANCE: THE GENERAL INDIAN COURT OF COLONIAL MEXICO AND THE LEGAL AIDS OF THE HALF-REAL* 27 (University of California Press) (1983).

14. *Id.*

Borah notes that in general there were three schools of thought on this matter.¹⁵

One [school] . . . held that the Indians, having developed their own [organized] society, were entitled to [keep] their own institutions and laws. Should they come under the rule of a foreign sovereign [such as] the Spanish King, he was bound to uphold and defend native institutions and laws . . . since he [in effect] served as the native prince. The most that might be conceded [in the name of] . . . change was the minimum necessary for extirpating idolatry and introducing Christianity.¹⁶

The second school of thought focused on the idea of one society, which signified a determined assimilation of the Indians into Castilian institutions.¹⁷ This view was held by most crown jurists involved in “developing a unitary legal system which would replace feudal diversity with a uniform royal administration [based in Spain].”¹⁸ The third school “urged . . . the Indians and Spanish [to] be organized into two separate commonwealths, each with its own laws, customs and systems of government.”¹⁹ An extreme exposition of this view held “that the Indian commonwealth be so completely separate that it would be linked with the Spanish only by being subject to the same [metropolitan ruler].”²⁰ The difference between the first and the third schools appeared to be that in the first, the Spanish and Indians would be within the same political and legal community, whereas the third school envisaged a kind of federalism or separate states both working toward the potentate in Spain.

As Borah notes, the official Spanish response was ambivalent but did suggest a rejection to a large extent of the “two republics idea” and the approximation of the first school of thought.²¹ This response was somewhat predictable. Indeed, this appeared to be one of the imperatives inherent in the imposition of alien sovereignty and religion, as well as the settlement of an alien upper class.

[I]t was unthinkable that the Spanish [would] permit the continued practice of idolatry and human sacrifice, and the continued existence of the heathen religious hierarchies. It was equally unthinkable that the Castilian crown . . . officials [would leave intact] the old native

15. *Id.* at 28.

16. *Id.*

17. *Id.* at 28-29.

18. *Id.* at 29.

19. *Id.*

20. *Id.*

21. *Id.* at 31.

political superstructures and their administrative hierarchies.²²

Moreover, on the level of human relations, there eventually developed a considerable intermingling between Spanish and Indians. As “Spaniards took up residence in Indian towns . . . to establish businesses and care for properties, large numbers of Indians were drawn into Spanish households as permanent or semi-permanent workers.”²³

In colonial Africa, the merger of the two cultures occurred as the British accepted customary law to some extent, but also riddled it with so-called repugnancy clauses, in order to avoid those aspects of African customs that European culture found most appalling, ridiculous, or simply unhelpful to the inculcation of Christian ideals.²⁴ The British colonial administrator and lawyer, R.S. Rattray, in his book entitled *Ashanti Law and Constitution*²⁵ provides several good examples of the kinds of crimes and civil offenses among the Ashantis of Ghana in the 19th Century that the British would have found extremely strange, disgusting, amusing, or simply intolerable. Predictably, the colonial masters would battle with many of them.

Several examples of criminal offenses can be provided. The Ashantis, who inhabited the Gold Coast, referred to crimes as “Oman Akyiwade,” literally meaning “[t]hings hateful to the Tribe.”²⁶ In Western jurisprudential language, they might be referred to as offenses against the state (even though we should remember that the state in the Western sense was not always present in 19th Century African communities).

These [offenses] were looked upon as sins . . . which the central authority was bound to take immediate official notice, lest [the] supernatural . . . [powers of the tribe] wreak their vengeance upon [the chiefs and subchiefs] whose paramount duty it was to protect the interest of the group.²⁷

Two things particularly baffled the British. One was the crime of suicide, and the other was witchcraft.

The Ashanti crime of suicide refers to successful suicide and not attempted suicide, which is viewed as a crime in many non-African legal

22. *Id.* at 35.

23. *Id.* at 32.

24. *See infra* notes 61-66.

25. R. S. RATTRAY, *ASHANTI LAW AND CONSTITUTION* (Vivian Ridler ed., Oxford University Press 1969) (1929).

26. *Id.* at 294.

27. *Id.*

systems as well.²⁸ It was a crime to commit suicide, with only a few exceptions where suicide was excused.²⁹ For example, it “was considered as honourable and . . . praiseworthy to kill oneself in war by taking poison or sitting on a keg of gunpowder to which a light was supplied, rather than to fall into the hands of the enemy; or to return home from war to a tell of defeat.”³⁰ It was also excusable “to take one’s own life in order to accompany a beloved master to the world of the spirits.”³¹ Apart from these and other similar situations, suicide was considered to be a serious crime for which the society provided serious consequences.³² “[T]here was always a legal presumption that the motive for self destruction had been evil.”³³

But so what? In the “right to life” discourse, the bottom line is who has the right, if it exists at all? In this traditional society the life and the body of individuals were supposed to belong to the community, and the central authority was the only party which had the right to take a life. Therefore, the central authority viewed with disfavor any attempt to interfere with “its prerogative as the sole dispenser of capital punishment.”³⁴ It was also said that “the tribal authority may have placed suicide [among the capital offenses out of] a dislike [for] evil[-inclined] disembodied spirits wandering about in its midst.”³⁵

The spirit of the suicide became . . . a ghost wandering about in search of an abode; for it was debarred from entering the land of spirits until the expiration of its destined time upon earth, which it had itself wrongfully curtailed.³⁶

But since the person who committed the act of suicide was already dead, one might ask what difference it would make even if what he had done amounted to a crime. Surprisingly, the dead person would be brought back from his grave, if he had already been buried, “to stand . . . trial before the Council of Elders.”³⁷ The “dead body was addressed by the Okyeame,” spokesperson of the Chief.³⁸ “As soon as the Okyeame delivered his oration (basically condemning the dead man for

28. *Id.* at 299.

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.* at 299-300.

38. *Id.* at 300.

committing suicide), the Chief's executioners would step forward and decapitate the dead body. Thus, suicide was a capital offense because it involved the losing of one's head.³⁹ "The kinsmen of the suicide [then] . . . had to produce every bit of his personal private property, which was then confiscated by the Chief."⁴⁰

The second cause for consternation for the British was the crime of witchcraft or "Bayie." "Witchcraft all over Africa was [something] regarded by the community with particular dread and abhorrence."⁴¹ Of course, Western folklore is replete with stories of witches and ghosts, but to consider witchcraft as a criminal offense was a step apart. "Witchcraft was essentially the employment of anti-social magic."⁴² The sorcerer, or the one who practiced witchcraft, would be put on trial, either "by having [him] tracked down by a witch finder, or as [a] result of an ordeal."⁴³ If found guilty, "the witch was either driven out with a fire-brand in his or her hand, to die of starvation, or was smeared all over with palm oil and cast into a fire, clubbed, strangled or drowned."⁴⁴

Apart from the question of proof, another problem the British Colonial Jurists confronted in dealing with witchcraft was the legal options open to the victim or to his relatives. Was it appropriate, or legally excusable, to kill someone believed to be a witch? More particularly, was it legally excusable to kill a witch in an anticipatory strike, in the manner of self defense? For example, if Mr. X had a spiritual experience or dream that someone planned to kill him by witchcraft, and preempts the attack by killing the person, should such homicide be excused as self defense? The suggestion that it was legally excusable to kill to preempt or prevent witchcraft baffled European jurists for years in Colonial African courts.

There was yet another criminal act among the Ashantis, this time of a sexual nature, that seemed ridiculous to the European mind, but vividly demonstrated the thought-process of a mind steeped in animism. In the belief system of animism, the gods are supposed to lurk in the bushes, rivers, mountains, trees, and in the elements in general. Basically, it illustrates the impact of religious beliefs on law and on people's attitudes toward punishment. Rattray described this offense as "sexual intercourse in the leaves," and in the Twi language of the Ashantis was referred to as

39. *Id.*

40. *Id.* at 301.

41. *Id.* at 313.

42. *Id.*

43. *Id.* Ordeal was favored as a mode of trial for witches. *Id.*

44. *Id.* at 313.

“ababantwe” or “ahahantwe.”⁴⁵ A better English translation is having sexual intercourse in the bush. It was not that the Ashanti culture was unromantic, but no form of romance could come close to the defilement or desecration of the Goddess Earth, which the Ashantis called “Asaase Yaa.”⁴⁶ Thus, an act which otherwise would not be a sin was regarded as such because of the impudence displayed in the face of the great supernatural powers.

There were several gradations of this offense, including some regarded as criminal, and others regarded merely as disgusting forms of civil misbehavior.⁴⁷ It was considered a capital offense to have sexual intercourse with a married woman in the bush through seduction or use of force.⁴⁸ It was not so much the rape aspect or the woman’s marital status that attracted this type of punishment, but the fact that it was done in the special preserve of Asaase Yaa (in the bush). At the very least, this required a high degree of propitiation, but in some cases the punishment was death. If the sexual act was committed with the woman’s connivance or consent, the male culprit, besides paying customary damages to the victim’s husband, and “was also fined a sheep which was sacrificed upon the spot where the adulterous act had taken place.”⁴⁹ The following prayer in propitiation accompanied the ritual:

Thursday’s Earth Goddess (i.e. Asaase Yaa), a man has a room, he has a mat, yet he seduced a woman here on the bare ground; because of that we have brought you this sheep. Moreover, if any one does so again, grant that the deed may be publicly known and “come out.”⁵⁰

This incantation, couched in language of ridicule, was in itself an effective sanction among the proud Ashanti. However, if the male culprit committed the sexual act in the bush without consent, then the Ashanti would inflict capital punishment, and “that almost invariably removed the necessity for any further formalities in the nature of propitiation.”⁵¹

Outside the criminal law, there were other practices that baffled the Victorian morality of the British colonials. The Masai ethnic group in Kenya practiced self help in which it was the prerogative of a murdered person’s family to go after the murderer, subject to the possibility of

45. *Id.* at 308.

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

accepting so called “blood-money” as civil damages, in lieu of death.⁵² Additionally, there was the general practice of widow inheritance. There was an “obligation [of the] widow to marry . . . a relative of the deceased husband.”⁵³ There was also differential law of adultery by which the “husband could legally complain about his wife’s extra-marital affairs” and claim damages, but a wife could not do the same.⁵⁴

In some parts of Africa, there was “the absolute claim of the husband to legal paternity” despite the natural parenthood of the child.⁵⁵ Thus, in the famous Zimbabwe case of *Vela v. Mandanika and Magutsa* (1936 S.R. 171) plaintiff, M’s husband under customary law, successfully sued Defendant, the wife’s lover who had been living with her, for the custody of M’s children, fathered by Defendant.⁵⁶ The Igbera tribe in Nigeria had the rule “that any child born within ten calendar months of a divorce could become the property of the former husband,” in spite of the well-known rule that a child’s best interest is of primary importance.⁵⁷ There was a practice of domestic slavery, along with other deprivation of personal freedom that had many of the attributes of slavery.

In the area of succession or inheritance, the practice among the matrilineal communities of Africa, such as my own, was that one’s children had no right of inheritance. The property went to one’s maternal nephews and nieces.⁵⁸ This might have been very strange to the English, who at one point practiced the rule of primogeniture. There was a clear lack of sympathy for individually-owned landed property in many parts of Africa, which led to the Ghanaian customary law that the individual’s acquired property would become “family property” (property of the clan or lineage) if the so-called owner utilized the help of other family members in construction of a house or the cultivation of a farm.⁵⁹

In the face of this clash of cultures and of legal thought, what were the British to do in Africa? As with the Spanish and the Portuguese in Latin America in the 16th Century, the matter had to be resolved one way or another.⁶⁰ At least in some parts of Africa, the indigenous

52. ALLOTT, *supra* note 1, at 164.

53. *Id.* at 166.

54. *Id.*

55. *Id.* (noting that they are questionable under repugnancy laws).

56. *Id.* at 167.

57. *Id.* at 172.

58. *Id.* at 173 (citing *Danmole v. Dawodu*, [1958] 3 F.S.C. 46 (Nigeria)).

59. *Id.* (citing *Larbi v. Cato*, [1959] G.L.R. 35, H. Ct.).

60. STUART B. SCHWARTZ, *SOVEREIGNTY AND SOCIETY IN COLONIAL BRAZIL, THE HIGH COURT OF BAHIA AND ITS JUDGES 1609-1751*, at xiv-xv, 173-74, 185-86, 293-94, 304-05 (Lloyd

communities had very ancient and proud cultures. Their animist religious beliefs were strong and they were not about to give up their way of life and their core beliefs, despite the overwhelming military and political presence of the British. Were they to be physically exterminated? Were they to be allowed to maintain themselves as a people. If so, what should happen to their body of laws and customs? The British eventually accepted customary law but put limitations on their content and application.⁶¹ The British had to retain their status as an imperial power as well as their public posture of introducing the indigenous people to the civilized ways of Britain.

The legal strategy was to introduce “repugnancy clauses” into the definition of customary law. These clauses defined the portions of African customs that were to be viewed and applied as law within the colonial legal system.⁶² Not all customs would be tolerated as having the force of law under the British dispensation.⁶³ Further, the content of customary law was subject to a time limitation.⁶⁴ Customs did not have to exist from time immemorial, but such customs should at least have come into existence by the establishment of the colonial legislature in that particular territory (e.g. 1876 in the case of the Gold Coast).⁶⁵ Finally, any customary rule that was inconsistent with colonial legislation would be declared invalid.⁶⁶

The repugnancy clauses were meant to rule out laws and customs perceived to be against Christian values and morality or cruel and unusual by the standards of the colonizers.⁶⁷ There were various formulations of these clauses. Some stated that the rules should not be “repugnant to natural justice, equity and good conscience.”⁶⁸ Others read: “Not contrary to [religious] justice, morality or order.”⁶⁹ Still others read: “Not repugnant to morality, humanity or natural justice or injurious to the welfare of the natives.”⁷⁰ The repugnancy clauses were typically contained in a statutory definition of customary or native law.⁷¹

Linford ed., University of California Press 1973). *See also* BORAH, *supra* note 13.

61. ALLOTT, *supra* note 1, at 158.

62. *Id.*

63. *Id.*

64. *Id.* at 150.

65. *Id.* at 151.

66. *See id.* at 175-77.

67. *Id.* at 162.

68. *Id.* at 158 (quoting Sierra Leone Local Courts Act 1965, § 76).

69. *Id.* (quoting Sudan Native Courts Ordinance 5.9(I)(a)).

70. *Id.* (quoting the African Courts Proclamation of Bechuanaland § I(2)).

71. *Id.* at 146 (noting that a typical formulation existed in the 1942 Native Court Proclamation of Botswana, at that time called Bechuanaland. That proclamation read as follows:

Natural justice is supposed to encompass such propositions as follows:

No man should be a judge in his own cause . . . ; [n]o man is to be condemned unheard . . . ; [a] man is entitled to know the particulars of the charge or claim against him . . . ; [d]ecisions should be supported by reasons . . . ; and [p]unishments and rewards should not be excessive, but should be proportionate to the circumstances of the offense.⁷²

As used in this legislation, the term “equity” did not refer to technical equity or to the body of rules formerly administered in the English Court of Chancery, but to equity in the sense of fairness.⁷³ “This would permit a judge to waive technicalities of either English or African law and to disregard contemporary rules of law which would produce manifestly unfair results.”⁷⁴

“‘Morality’ or ‘good conscience’ is the least precise component of the repugnancy clauses.”⁷⁵ It refers to morality in the general sense and thus lead to the inadmissibility of slavery, many forms of marriage without both parties’ consent, and many other invasions of freedom.⁷⁶ However, it was not morality in any particularly English sense because much of what the “English might have been tempted to call immoral was not always declared repugnant by the colonial system of justice.”⁷⁷ It is also quite clear that the standards of morality in different communities are by no means the same. In fact, one British judge in a 1938 Tanzanian case stated frankly:

I have no doubt whatever that the only standard of justice and morality which a British court in Africa can apply is its own British standard. Otherwise we should find ourselves in certain circumstances having to condone such things, for example, as the institution of slavery.⁷⁸

The results of such determinations were not always predictable. For example, neither the form of marriage consideration, known in some

“Native law or custom” and “Native custom” mean in relation to a particular tribe or in relation to any native community outside any tribal area the general law or custom of such tribe or community except so far as the same may be incompatible with the due exercise of His Majesty’s power and jurisdiction, or repugnant to morality, humanity or natural justice, or injurious to the welfare of the natives.

72. *Id.* at 159-60.

73. *Id.* at 160.

74. *Id.*

75. *Id.* at 162.

76. *Id.*

77. *Id.*

78. *Id.* at 163 (citing *Gwao bin Kilimo v. Kisunda bin Ifuti* (1938), 1 T.L.R. (R.) 403).

parts of Africa as Lobola, nor polygamy was declared as repugnant.⁷⁹ In fact, in South Africa, the African Native Administration Act of 1937 expressly provided that it would be unlawful for any court to declare the customs of Lobola and polygamy as repugnant.⁸⁰ Yet in the case involving “exchange marriages” among the Tiv in Nigeria (that is, the practice whereby “the consideration for the bride is the receipt of a bride in exchange from [the groom’s] family”), such a practice was proscribed by an administrative fiat in 1927.⁸¹

In *Edet v. Essien*, a child custody case from Nigeria, Plaintiff paid dowry for the woman while she was still a child and later that woman married another man, Defendant, who paid a second dowry to the parents.⁸² The children whose custody was at stake were issues between the woman and Defendant (the second man).⁸³ The lower court held for Plaintiff and ordered the return of the children to him.⁸⁴ However, an appellate court rejected Plaintiff’s case and said that even if the local customary law supported that result, it would not be applied as it was repugnant and opposed to natural justice.⁸⁵

Soon after Africa attained political independence, from the late 1950s onward, the African intellectual elite decided to modify the colonial repugnancy clauses. They felt insulted by the notion that their own African laws were somehow repugnant. “Repugnant to what or to whom?,” they asked. They wished to emphasize the fact that these laws represented their own ethos. Similarly the term “native law” fell into disfavor because of its colonial connotation as uncivilized. Thus, a new type of legislation emerged in countries like Ghana, Sierra Leone, and Botswana. Incompatibility with legislative enactments or of decisions of the highest court of the land became the main criteria for distinguishing between unacceptable and permissible customary rules within the legal system. Thus, as early as 1958, one year after Ghana attained independence from Britain, the Local Courts Act of Ghana defined customary law as “any uncodified rules having the force of law and not repugnant to the laws of Ghana . . . [including] any declaration of customary law published from time to time in the Gazette.”⁸⁶

In 1960, the *Interpretation Act of Ghana*, completely eliminated the

79. *Id.* at 165.

80. *Id.* n.12 (citing The South African Native Administration Act 1927 § II (I)).

81. *Id.* at 165-66 n.13.

82. *Id.* at 171.

83. *Id.*

84. *Id.*

85. *Id.*

86. Local Courts Act of Ghana (Act No. 23 of 1958).

word “repugnant.”⁸⁷ After defining customary law as rules of law applicable to particular communities in Ghana, the Act went on to state that, “[a] reference in an enactment to a customary law shall be construed as a reference to it as affected by any enactment for the time being in force.”⁸⁸ Tanzania’s *Interpretation and General Clauses Ordinance*, as amended in 1963, was even more forthright. There was no reference to repugnancy, natural justice, equity, or good conscience. It simply stated that customary law “does not include any rule or practice which is abolished, prohibited, punishable, declared unlawful or expressly or impliedly disappplied [sic] or superseded by written law. . . .”⁸⁹

It should be noted that under the Ghana Interpretation Act, customary law gained enough status that a portion of it could now be assimilated into the newly defined common law of Ghana as suitable for general application throughout the country.⁹⁰ Within this new definition, assimilated rules of customary law took precedence over the English rules of equity and the English common law.⁹¹ On the other hand, unassimilated customary law remained the customary law proper.⁹² Such customary law took precedence over the redefined common law if the parties to a suit or transaction came from the same tribal group and had the same personal law.⁹³ It was only when the parties did not have the same personal law, and neither could show why the issue at stake should be governed by his or her personal law, that the common law became the applicable law.⁹⁴

Yet one could deduce from the language of these post-colonial statutes and constitutions that customary law is still subordinate to other sources of law in the African legal systems. A hierarchy of norms had been created, and customary law was not on top of the list. Rules of customary law would be struck down if they conflicted with a superior court decision. Article 11(1) of the 1992 Constitution of Ghana clearly defines this hierarchy.⁹⁵ It enumerates the sources of law in Ghana, in

87. The Interpretation Act 1960, (C.A.4) § 18(1).

88. ALLOTT, *supra* note 1, at 176 n.11.

89. *Id.* at 180 (citing the Interpretation and General Clause Ordinance (cap I, as inserted by the Magistrates’ Courts Act 1963, Sixth Sched.) § 2 (1)).

90. The Interpretation Act 1960, (C.A.4) § 18(I)(I). *See also*, 1992 GHANA CONST. Ch. 4., art. 11.

91. BENTSI-ENCHILL, GHANA LAND LAW 85-86 (Sweet & Maxwell, Ltd.) (1964).

92. *Id.* at 86.

93. *Id.* (referencing Rule 2).

94. *Id.* (referencing Rule 3).

95. 1992 GHANA CONST., Ch. 4, art. 11.

part, as follows:

- (1) The laws of Ghana shall comprise-
 - (a) this Constitution;
 - (b) enactments made by or under the authority of the Parliament established by this Constitution;
 - (c) any Orders, Rules and Regulations made by any person or authority under a power conferred by this Constitution.
 - (d) the existing law; and
 - (e) the common law.
- (2) The common law of Ghana shall comprise the rules of law generally known as the common law, the rules generally known as the doctrines of equity and the rules of customary law including those determined by the Superior Court of Judicature.
- (3) For the purposes of this article, “customary law” means the rules of law, which by custom are applicable to particular communities in Ghana.⁹⁶

The 1992 Constitution (the current Ghanaian Constitution), has thereby retained the 1960 approach of permitting part of customary law to become part of the common law.⁹⁷

There is, however, an unfortunate drafting problem in Article 11 (3), which defines customary law, “for the purpose of this article” (i.e. for the whole of Article 11), as rules of law which, by custom, are applicable to particular communities in Ghana.”⁹⁸ If part of customary law can become part of the common law, which are rules of general application in Ghana, then the entire body of customary law should not simultaneously be defined as rules applicable to particular communities in Ghana. The distinction elegantly drawn in the 1960 Act between assimilated customary law of general application and the remaining corpus of customary law applicable only to particular communities, was not fully captured in the present constitutional definition.

The Judiciary in Africa still has some juridical problems in

96. *Id.* (eliminating sections 4-7).

97. See ALLOTT, *supra* note 1.

98. 1992 GHANA CONST., Ch. 4, art. 11 (3).

applying customary law as a source of law. First, at least a portion of customary law is still the law of particular ethnic or tribal groups or communities in Africa and not necessarily the general law. Second, certain aspects of those rules are outmoded and inconsistent with modern ideas of morality, even as viewed by Africans. Third, some customary norms may be inimical to development. Thus, rather than being ultranationalist in our attitude as jurists, the task is to modify customary law in aid of modernization. The judiciary and legislature need to adapt African indigenous law to make it a tool of socio-economic development without sacrificing the core values of African society: the values of fellowship, of being each other's keeper, and the notion that the free development of each is indeed a condition for the free development of all.

The modern African judge will be the first to acknowledge that, in many senses, the problems faced by the British judges in colonial Africa have not vanished.⁹⁹ Almost one hundred percent of the African judiciary is now African.¹⁰⁰ But even though there is no longer the gross disparity of national origin between a judge and his community, a judge often does not come from the particular locality whose ethnic law he is administering.¹⁰¹ Apart from this ethnic question, there is an enormous educational and cultural gap between a senior judge with a Western education and the ordinary families he may deal with. Thus, the judicial system may have moved from a problem of race and ethnicity to one of class.

The promise of legal pluralism is still dear to us, but the fundamental difficulties in its administration are real. Jerome Frank, one of the theorists of American Legal Realist school, in his 1949 book entitled *Courts on Trial*, discusses what he calls "the myth about the non-human-ness of judges."¹⁰² In a chapter entitled "Are Judges Human," Frank notes that "legal rules express social policies . . . and a judge's conception of such policies respond more or less to his social, economic and political outlook, which usually derives from his education, his social affiliation and his social environment."¹⁰³

In our own time, the Critical Legal Studies scholars have restated this point of view in more radical terms, much to the annoyance of other

99. ALLOTT, *supra* note 1, at 255.

100. *Id.*

101. *Id.*

102. JEROME FRANK, *COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE* 147 (Jerome Frank ed., Princeton University Press 1973) (1949).

103. *Id.* at 148.

contemporary legal theorists. But the gravamen of their complaint, and their determination to blow away the myth of the universally objective judge, is very real. It is real even with African Judges when they are called upon to apply or reject certain norms of African customary law.