A Value Analysis of Ghanaian Legal Development Since Independence

William Burnett Harvey

*Indiana University School of Law - Bloomington*

Follow this and additional works at: [https://www.repository.law.indiana.edu/facpub](https://www.repository.law.indiana.edu/facpub)

Part of the African Studies Commons, Comparative and Foreign Law Commons, and the Legal Education Commons

**Recommended Citation**

[https://www.repository.law.indiana.edu/facpub/1188](https://www.repository.law.indiana.edu/facpub/1188)

This Article is brought to you for free and open access by the Faculty Scholarship at Digital Repository @ Maurer Law. It has been accepted for inclusion in Articles by Maurer Faculty by an authorized administrator of Digital Repository @ Maurer Law. For more information, please contact rvaughan@indiana.edu.
A VALUE ANALYSIS OF GHANAIAN LEGAL DEVELOPMENT SINCE INDEPENDENCE

WILLIAM BURNETT HARVEY *

MR. Chairman, My Lords, Your Excellencies, Ladies and Gentlemen: Before turning to my subject, I would beg your indulgence for a few very personal words. As I approach the end of my first year in the University of Ghana, I am encouraged by the significant development in legal education which has occurred. In this, many people have played important roles, but two groups merit special mention.

The first of these is the General Legal Council of Ghana. The Council is a statutory body including all of the justices of the Supreme Court, the Attorney-General, certain appointees of the Minister of Justice and the Chief Justice, and representatives elected by the Ghana Bar Association. In my capacity as Dean of the Faculty of Law I have the honour of serving with this able and dedicated group which has been charged by Parliament with a wide range of responsibility for legal education, admission to the Bar of Ghana, and the good government of the legal profession. An important ingredient in the success of any law faculty is the confidence and support it receives from the leaders of the Bench and Bar. The General Legal Council, representing every segment of the profession in Ghana, has been generous and unfailing in support of the Law Faculty of the University. I would therefore, with respect, pay full tribute to all members of the Council, and especially to its distinguished Chairman, Sir Arku Korsah, Chief Justice of Ghana.

The members of the Faculty of Law as well deserve full recognition for the vital part each has played in our work. In this period when the tasks to be performed have so completely challenged the human and physical resources at our disposal, they have laboured well for the present and built solidly for the future. The capacities and scholarly integrity of these men have placed this Faculty in the forefront of legal education in Africa: Nii Amaa Ollenu, Robert Seidman, Samuel Asante, Kwame Afreh, William Ekow Daniels, Thomas Rose, Joseph Agyemang and Kwasi Gyeke-Dako. A time-honoured tradition provides me the opportunity to address you on

* The author was formerly Dean of the Faculty of Law, University of Ghana. The text is the inaugural lecture delivered in the Lecture Theatre, Commonwealth Hall, University of Ghana, on May 24, 1963.
this occasion. The honour you pay the Faculty of Law by your presence here this evening, however, is equally due to each of these men whom I am privileged to have as both colleague and friend.

**THE CONCEPT OF LAW**

I shall speak to you this evening about certain aspects of the law of Ghana. If we are to avoid confusion in discussing law, it is essential at the inception that we specify our meaning of this central concept. The nature of law has been a perennial problem of jurisprudence, and a preoccupation with it has doubtless contributed much to the tedium of the subject. Thurman Arnold once observed that “most of the literature of jurisprudence . . . is tedious, not as hard subjects like physics and mathematics are tedious, but as throwing feathers, endlessly, hour after hour, is tedious.” Without being, I hope, more than necessarily tedious, I shall indicate briefly what I mean when I speak of law.

For many of its votaries, law involves some essential order of values. These values may make positive demands for implementation by the manipulation of public force or may play only a negative role, setting the outer boundaries beyond which the public force may not go. In this view, any enactment not serving the postulated values would not be law. To others, law, as such, is value-neutral, being merely a technique of social ordering available for use in support of any value judgment that the manipulators of the technique entertain. In this view the technique finds its essential identification in an ultimate reliance on the organised force of a society. I am of this latter mind. Like most men, I could, if called upon, suggest those values which represent my preferences or my strongly-held convictions of what a decent life requires. At the same time I must recognise that many men do not share my preferences, and a number of legal orders do not protect my fundamental decencies. Nevertheless, I recognise the apartheid enactments of South Africa, which I abhor, as law in as full a sense as the prohibitions of racial discrimination in American legislation, which I strongly support.

It is unnecessary here to offer further explanation or defence of this completely instrumental conception of law. Even those who reject it or in some way limit it will nevertheless recognise, I believe, that its use can open wide ranges of fruitful social inquiry. In any society those who manipulate the technique, which I call law, reflect their value judgments as they select the purposes or ends in aid of which the technique will be used. As a mere hypothesis at this

1 Arnold, “Institute Priests and Yale Observers—A Reply to Dean Goodrich” (1936) 84 U. of Pa. L. Rev. 811.
section, I would offer the suggestion that the values selected for implementation through the systematic application of public force rank high in the hierarchy of goods perceived by those able to commit the force. Thus, if the data in the legal storehouse are carefully studied and analysed, one should be able to outline the organising values of a society and to sense at least the tension points at which the muscular pull of change challenges the bony commitments to the past.

It is within this conceptual framework that I propose to examine briefly certain developments in the law of Ghana since independence. First, these developments will be described and analysed in their purely positivistic dimensions. It will then be possible to consider their value implications.

**LEGAL DEVELOPMENTS SINCE INDEPENDENCE**

**Constitutional changes**

The transfer of sovereignty from the United Kingdom to an independent Ghana on March 6, 1957, brought changes of profound significance in the legal order. Most obvious of these, of course, was the transfer of full power over and responsibility for the management of the public force to African hands. Less obvious but equally significant were the developments, some brought into operation on independence and some occurring thereafter, by which legal power was structured and allocated among the various organs within the new state.

Through most of history the people who lived in the area of modern Ghana were little influenced toward unity by either their indigenous leaders or the Europeans. Even when the European presence on the Guinea Coast was no longer dispersed in national economic rivalries, British administration of the Gold Coast dealt with the Colony, Ashanti and the Northern Territories as discrete units. Until 1946, when the Burns Constitution\(^2\) included five Ashanti members in the Legislative Council sitting in Accra, the law-making function for Ashanti was totally in the British Governor and imperial agencies. Representation from the Northern Territories in the central legislative body did not come until the Coussey Constitution of 1950.\(^3\) Thus until virtually the eve of independence the colonial power deferred basic steps which might have fostered in the British dependencies of the Gold Coast some greater preception of interrelation.

\(^2\) The Gold Coast Colony and Ashanti (Legislative Council) Order in Council (S.R. & O. 1946 No. 353), 1948, Vol. IX, 673.

\(^3\) The Gold Coast (Constitution) Order in Council (S.I. 1950 No. 2094).
William Burnett Harvey

British colonial policy, as formally announced, attempted to nurture and support the institutions of indigenous government. In southern and central Ghana these found their characteristic expressions in the small Akan state, the independent town or village of the Ga-Adangbe people, and the Ewe division. While various combinations of these units were formed from time to time, largely for military purposes, no stable grouping ever emerged except in Ashanti. There, under the leadership of the Paramount Chief of Kumasi, as Asantehene, a powerful military confederation was formed, but civil government remained almost exclusively a function of the constituent states. Nevertheless the sense of a larger regional identification which developed early in Ashanti played an important role in the processes by which public power in independent Ghana was later to be structured.

As has been noted, constitutional changes in 1946 and 1950 forged some links between the Colony, Ashanti and the Northern Territories, but the rapid drive toward independence brought into sharp focus the basic lack of a common identification within the new country.

The Reports of the Watson Commission in 1948 and of the Coussey Committee in 1949 considered not only reforms in the constitutional structure of the central government but also the allocation of powers and functions among regional and local units. Both of these Reports recommended a substantial decentralisation, but the underlying theory throughout was that regional administrations were to be merely agents of the central government exercising such powers and functions as might be defined by legislation. With the organisation of the National Liberation Movement in September 1954, however, the nature of the debate over the structuring of the Independence Constitution and the status of regional organs underwent a significant change. The issue was no longer the rational allocation of functions between a supreme central government and its regional agents; the issue raised was the very nature and power of the central government itself.

The constitutional platform of the N.L.M. was federalism, a division of powers and functions between the central government and regional agencies, each of which would have its constitutionally defined areas of competence. It is noteworthy that the N.L.M. had its greatest support in Ashanti, where the Confederation had fostered a strong regional loyalty. The Convention Peoples Party, on the

5 Report to His Excellency the Governor by the Committee on Constitutional Reform, 1949, Colonial No. 248 (H.M.S.O. 1949).
other hand, did not oppose some dispersion of governmental functions among regional organs, but its central conviction on the constitutional allocation of power was unwavering: the central government must be supreme.

It is unnecessary now to review in detail the work of Sir Frederick Bourne, who as Constitutional Adviser rejected federalism, the parliamentary elections demanded by the British Government to determine the extent of popular support for C.P.P. views, or the last-minute negotiations of Mr. Lennox-Boyd, the Secretary of State for the Colonies, seeking a reconciliation of the competing views. The Independence Constitution itself was a compromise, though in the main the views of the Convention People's Party prevailed.

The Constitution required that Parliament should establish in each of the five regions of Ghana a regional assembly to exercise effective powers in the fields of local government, agriculture, animal health, forestry, education, communications, medical and health services, public works, town and country planning, housing, police and such others as Parliament might determine. Within each of these fields, however, the Constitution made quite clear the supremacy of the central government as well as the fact that any specific power or function in the several fields could devolve on the regional assemblies only by Act of Parliament.

The only constitutionally assured function of the regional assemblies was to review certain kinds of proposed legislation with the possibility of exercising a qualified veto. In certain areas Parliament could legislate only by a procedure which included approval by two-thirds of the regional assemblies, including any assembly directly affected. These specially protected areas included the modification of those provisions of the Constitution which defined the basic governmental structure and the public service, guaranteed regional organisations and chieftaincy, and assured compensation on the compulsory acquisition of property. The same procedure was required for any bill abolishing or suspending any regional assembly or diminishing its powers or functions. Other provisions of the Constitution were designed to protect the territorial integrity of the regions from action by the central government.

Thus it can be said that the constitutional order with which Ghana achieved independence reflected a variety of local loyalties and considerable suspicion of unified national authority. No initiative for legal or governmental developments was given to sub-national bodies, however; their constitutional function was entirely negative—

7 The Ghana (Constitution) Order in Council (S.I. 1957 No. 277).
to check, delay or prevent certain kinds of action by the central government.

At the time of independence, no regional assemblies existed. These were later established by the Regional Assemblies Act of 1958, their functions being limited to advising and making recommendations to Ministers of the central government. The constitutive Act does not make it entirely clear whether a regional assembly might take the initiative in giving advice and making recommendations or whether even this function was to be performed only on ministerial request. Nor did the assemblies themselves survive long enough to permit experience to define more fully their role in national life.

There is little reason at this time to speculate on the course of development that might have occurred if the opposition political groups had not decided to boycott the first regional assembly elections in 1958. That decision was in fact taken, and only candidates for the Convention People's Party stood for election. Thereafter with C.P.P. forces fully in control of both the central government and the regional assemblies, and against the background of recurrent political boycott by opposition groups, it is hardly surprising that steps were taken immediately to consolidate governmental power at the centre. In December 1958 Parliament passed an Act to repeal the constitutional restrictions on its power which had required the assent of regional bodies for amendment of the Constitution and certain other purposes. In accordance with the constitutional requirement being repealed, this Act was approved by the regional assemblies. The clear legislative supremacy of Parliament, thus established, was almost immediately exercised in the repeal of the Regional Assemblies Act and the dissolution of the existing assemblies.

The legal framework of national unity thus seemed complete. Nevertheless, the Government in submitting to the people in 1960 a White Paper on a republican constitution asked for a further mandate to maintain the unity of Ghana. This was given, and the present Constitution declares that Ghana is a "sovereign unitary Republic." Only by a popular referendum can the unitary and republican form of government be altered.

Less dramatic than the constitutional structuring of unified national power, but in many ways as important, have been the statutory enactments by which local government has been reorganised

---

8 Act No. 25 of 1958.
11 Republican Constitution, art. 4.
and related to the centre. It is possible here only to summarise these developments. A much fuller analysis of the evolving formal structure is needed, supported by thorough empirical studies of these institutions of government which stand closest to the ordinary citizen in his daily life.

On the eve of responsible African government in the Gold Coast, local government powers and functions were vested in Native Authorities created by order of the Governor. While the legislation authorising establishment of the Authorities made it entirely clear that designation depended on the fiat of the central government and not on chiefly status as such, the Colonial Government in general followed the practice of designating as the Native Authority for an area a chief and his council. Since the same persons also functioned as the State Councils in the various states of the traditional order, it was often difficult to determine the capacity in which they acted in taking a particular step. The Native Authorities system did not work well, and even the Coussey Committee, on which the traditional authorities had strong representation, conceded in 1949 that "the existing system of local government has proved unable to meet the requirements of an efficient and democratic administration." The correctives applied by the central government since 1951 have related directly to the structure of local government; they have also affected profoundly the status and functions of the traditional authorities themselves.

Local government

Almost the first major piece of legislation enacted under Dr. Nkrumah's Government was the Local Government Ordinance of 1951. It authorised the creation and grant of local government functions to Local, Urban and District Councils on which popularly elected members would ordinarily constitute a two-thirds majority. The remaining one-third were to be appointees of the traditional authorities. The performance of the new councils was disappointing, in large part because many were established on the geographical base of small, traditional states which possessed neither the population nor the resources to permit them to organise local services.

12 The relevant legislation for the several administrative divisions was found in Native Authority (Colony) Ordinance, No. 21 of 1944; Native Authority (Ashanti) Ordinance, No. 10 of 1935; Native Authority (Northern Territories) Ordinance, No. 2 of 1932; Native Authority (Southern Section of Togoland under British Mandate) Ordinance, No. 7 of 1949.
13 Gold Coast: Report to His Excellency the Governor by the Committee on Constitutional Reform, 1949, p. 14, Colonial No. 248 (1949).
14 No. 29 of 1951.
effectively. In 1959, the Government introduced corrective legislation; the old District Councils were abolished, and on ministerial orders many of the small Local Councils were consolidated into larger units. At the same time, the members of all councils who had been appointed by the traditional authorities were eliminated, and all local government bodies became entirely elective. The present scheme of local government, organised under the post-republic Local Government Act of 1961, involves about sixty-five urban and local bodies which are supervised and related to the central government by administrative personnel responsible in each region to a Regional Commissioner, a political functionary with the rank of Minister to whom certain local government functions are delegated by the Minister of Local Government. In this scheme, the traditional, sacred and local repositories of authority and responsibility have been definitively replaced by elective, secular organs related to the national centre under articulated criteria of rationality and efficiency.

**INTERACTION OF ENGLISH LAW WITH CUSTOMARY LAW**

*The pre-republican system*

Turning now from the formal structures of public power, within and through which legal force is directed and applied, let us consider the evolving content of the legal norms themselves. In the first instance it is desirable to consider this matter at the general level. Specific enactments may be considered later.

A cardinal feature of the legal order inherited by Ghana from the United Kingdom was a pervasive dualism, that is, a body of law derived from the colonial power and applied in a discrete system of courts co-existed with a body or bodies of indigenous or customary law applied mainly in a system of so-called Native Courts. In order to avoid chaos some scheme was necessary to delimit the sphere of operation of each body of law and each system of courts and, in so far as these spheres coincided or conflicted, to determine which should prevail.

The general standards defining the relations between English-derived law and customary law in the pre-independence Gold Coast were posited by the imperial power in the Courts Ordinance of 1935. These standards employed two different techniques for relating the

17 This was effected for the Municipal Councils of the larger cities by the Municipal Councils (Abolition of Traditional Members) Act, 1959 (No. 15 of 1959).
19 No. 7 of 1935.
different categories of legal norms. The first, which can be called the technique of horizontal ordering, involved the assignment of discrete areas of application to each set of norms in the system. The second, which we will refer to as vertical or hierarchical ordering, related the bodies of law and applying courts as superiors and inferiors. While both these techniques were used in the pre-independence Gold Coast to relate the norms of English-derived law and those of customary law, there was an ultimate resort to hierarchical ordering, that is, the imperial power defined the hierarchy itself and assigned to each set of norms its areas of application.

The elements of English-derived law applicable in the Gold Coast, briefly listed in the order in which they would prevail in any case of conflict among them, were imperial laws expressly applicable in the Gold Coast or brought into effect there by Order in Council, ordinances enacted by the local legislative body, statutes of general application which had been in force in England on July 24, 1874, doctrines of equity and finally rules of the common law. Clearly reflected in this hierarchy are the idea of legislative supremacy and the moderating influence of English equity. It should be observed also that an historical test determined the reception of English statutes of general application. The use of such a test created a number of troublesome mechanical problems for the Gold Coast lawyer attempting to find the local law and also tended to preserve in the Gold Coast legal norms which had been changed or abolished by reform legislation in England.

This body of English-derived law coexisted with a number of bodies of customary law in force in various parts of the Gold Coast. The relations between the two systems were defined by a horizontal order whose criteria were primarily ethnic. In causes to which the parties were "natives," the primary law presumptively applicable was customary law. A "native" could lose the benefit of customary law, however, if it appeared either from an express contract or by implication from the nature of the transaction out of which the question arose that he had agreed to have his obligations regulated exclusively by English law. On the other hand, if the parties to the cause included both "natives" and "non-natives," English law was presumed to control. This presumption was rebuttable, however, and the courts were authorised to apply customary law if they determined that "substantial injustice would be done to either party by a strict adherence to the rules of English law."

Even within the areas thus assigned to it, customary law was not supreme, but was hierarchically related to certain limiting principles. Customary law could be applied in any court only in so far as it was not "repugnant to natural justice, equity and good
conscience" or "incompatible either directly or by necessary implication with any ordinance." These limiting criteria were interpreted and applied by the courts, in the main, by the superior courts staffed principally by English personnel, though it was, of course, possible for a Native Court to exclude customary law on such grounds.

The formidable range of problems arising in the administration of this pluralistic legal order can only be suggested here. Some problems arose out of the interpretation of the provisions of the Courts Ordinance itself. Did the cut-off date in 1874 which clearly limited the reception of English statutes of general application apply to English common law and equity as well? What is a statute of general application? May parts of a statute be of general application and thus received, though other parts clearly are not? In what circumstances would an agreement between "natives" that customary law should not govern be implied? In what circumstances would the court's perception of injustice foreclose the application of English law where not all parties to the case were "natives"? Many questions such as these were not fully and satisfactorily answered before the Courts Ordinance itself was finally repealed.

Some of the most difficult problems arose in ascertaining the customary law when the general hierarchy of norms indicated its applicability. This was, of course, less a problem in the Native Courts, where the members were presumed to know the custom and could apply it on the basis of their own knowledge, than in the superior courts whose judges were actually forbidden to rely on such knowledge of customary law as their prior experience might provide. In the superior courts, therefore, a party relying on customary law was required to plead and prove it. While the Judicial Committee of the Privy Council had recognised the possibility of the courts' taking judicial notice of certain customs which had become notorious through frequent proof, this means of avoiding the inconvenience and difficulty of extended proof was not in fact utilised by the courts. Proof of the customary law continued to be offered in the form of authoritative books or manuscripts, such as the work of John Mensah Sarbah on Fanti law, or by the testimony of chiefs, linguists or others who could be qualified as experts.

The proof of customary law in each case by the introduction of evidence may certainly be criticised on the grounds of inconvenience and expense. The method also touched the sensitive nerve of emergent national pride, since to require proof by witnesses suggested that customary law was not real law but merely an operative fact.


Yet there were advantages in the method. The strongest claim to respect which customary law can make is that it reflects the consensus of the community as manifested in actual usage. In the constant flux of society such usage will change. Proof of the customary law on a case by case basis, therefore, should provide the maximum assurance that the law applied will keep in step with the changing life of the people. There is surely less certainty that this will occur if customary law is established by judicial notice of what has been proved in earlier cases, or by the binding declarations of traditional councils, another method authorised by Gold Coast legislation.22

The grant of independence to Ghana in 1957 did not alter in detail the order of legal norms just described. To be sure, the supreme position in the hierarchy was occupied after March 6, 1957, by the constitutional Order in Council rather than imperial legislation of the British Parliament. Otherwise the pre-independence body of law was left intact.

Re-organisation since the Republican Constitution

(1) New doctrine of stare decisis. The most important revisions in the hierarchy of legal norms of Ghana became effective on the creation of the Republic on July 1, 1960. These deserve careful analysis in detail, but here we can do no more than suggest changes which may prove to be especially significant.

First, the Republican Constitution contains a novel set of provisions dealing with the cardinal feature of a common law system, that is, the doctrine of precedent or stare decisis.23 The doctrine itself is not, of course, a new arrival in Ghana. During the colonial period the courts in the Gold Coast were bound by the decisions of the West African Court of Appeal and of the Judicial Committee of the Privy Council. On the other hand, decisions of the English Court of Appeal and the House of Lords were in theory not binding but in practice were treated as if they were. On the advent of the Republic, the possibility of appeal to the Privy Council was eliminated and the Supreme Court of Ghana became the tribunal of final resort. Thus the question was posed—what effect in republican Ghana would be attributed to pre-republican decisions of the Supreme Court and of various English tribunals.

Article 42 of the Republican Constitution speaks to this question with superficial clarity:

"The Supreme Court shall in principle be bound to follow its own previous decisions on questions of law, and the High Court

22 See, for example, the Native Law and Custom (Ashanti Confederacy Council) Ordinance, No. 4 of 1940.
23 Republican Constitution, art. 42 (4).
shall be bound to follow previous decisions of the Supreme Court on such questions, but neither court shall be otherwise bound to follow the previous decisions of any court on questions of law."

This article appears to be an unequivocal declaration of independence for the superior courts in so far as the decisions of non-Ghanaian courts are concerned. The stability of legal institutions and the relative conservatism of judicial attitudes, however, make it inevitable that English decisions will enjoy for a long time a high degree of persuasiveness in Ghana. One may hope nevertheless that the Supreme Court and High Court will not be reluctant to re-examine long-established English precedents to determine their responsiveness to the developing needs of this country.

When one turns from the status of foreign decisions to the functioning of the doctrine of *stare decisis* within the present judicial hierarchy of Ghana, much of the certainty in article 42 disappears. If only the decisions of the Supreme Court are in the future to be binding, what is the “Supreme Court” for this purpose? Is the court as constituted under the Republican Constitution to be deemed to be a new court, so that only decisions under the Republic are fully authoritative? Or is a theory of antecedent and continuing existence to be applied? If the court is deemed to have had a pre-republic existence, how far back in time will its earlier life be traced—back to independence in 1957 or some earlier date? These questions remain unanswered.

Even with respect to decisions of the Republican Supreme Court, the stringency of the commitment to *stare decisis* is unclear. In Great Britain the view now prevails that the House of Lords is absolutely bound by its own prior decisions. If the ravages of time render their principles disfunctional to social needs or the demands of justice, the Lords are incapable of applying correctives other than through the technical creation of distinctions. Any outright overruling of established doctrine requires an Act of Parliament. Does the Republican Constitution of Ghana commit the Supreme Court to such futility in the face of its earlier decisions which may call for modification? Arguably an affirmative answer is required, since article 42 declares that the “Supreme Court shall in principle be bound to follow its own previous decisions on questions of law.” In this provision, however, the key words seem to be “in principle.” If they mean only that nothing in a case shall bind except its “principle,” the words are patently redundant. Not even the most devoted adherent to *stare decisis* has ever suggested that any aspect of a case is binding other than its “principle” or *ratio decideni*. If one assumes, therefore, that the constitutional fathers did not intend a redundancy, what purpose do the words “in principle”
serve? I would suggest that they might be taken to mean "in general" or "ordinarily." If so interpreted, the stringent English doctrine of precedent would not prevail in Ghana by constitutional mandate.

These questions do not represent a mere academic exercise. They go to the heart of the role of the judiciary in keeping the tension between stable legal institutions and social needs and values within tolerable limits. It seems to me at least doubtful that legislative bodies in most countries today have either the time or the interest for making those periodic adjustments in established doctrine that social change may demand. Within rather broad limits I think the courts are the agencies best equipped to perform this function. I would therefore hope that the Supreme Court of Ghana in interpreting the Constitution and defining its own role in the processes of legal change will shun English judicial passivity and claim for itself a more affirmative, creative function.

(2) The place of customary law. The second significant change in the structure of legal norms effected on the creation of the Republic has to do with the status of customary law. It will be recalled that in the older order there was an initial presumption that customary law was applicable in any case between "natives," and, in causes between "natives" and "non-natives," it applied if the court concluded that injustice would result to either party through the strict application of English law. The Courts Act of 1960 makes an understandable effort to avoid such an ethnic criterion for determining the applicable legal rules. The details of this effort need not concern us here. It suffices to observe that the old starting presumption of the applicability of customary law has been replaced by a presumption that common law prevails. This presumption is, of course, rebuttable, but any person who wants his cause controlled by customary law must act affirmatively to establish to the satisfaction of the court that there is a relevant rule under some body of custom that the person can claim as his "personal law."

The term "common law" has a much broader inclusion under the Republican legislation than the older English usage would suggest. It includes the traditional common law rules, the doctrines of equity, the English statutes of general application which had been in force in Ghana immediately before the Republic, and any rules

24 C.A. 9, s. 66.
25 The Interpretation Act of 1960, C.A. 4, s. 17 (1).
26 Technically these statutes are not part of the common law but are to be treated as part thereof. For the provisions which somewhat circuitously retain the
of customary law which may be assimilated because of their suit-
ability for general application. Thus the common law which now
enjoys an initial presumption of applicability need not be entirely
the English law which has been received but may include as well
certain rules of customary origin.

The procedures by which customary law rules may be assimilated
into the common law of Ghana are provided by the Chieftaincy Act
of 1961. They have not yet in fact been used, and no customary
rule has yet been assimilated. It would now be hazardous indeed
to attempt to predict the future of this assimilation technique. Even
should it be employed frequently, the resulting common law rule of
customary origin would differ basically from the traditional customary
law. Common law is national, while customary law is essentially
local. Common law is built around the stabilising frame of stare
decisis, while customary law reflects more directly the evolving life
of the community. Thus, to bring into the common law the customs
of some particular community does not merely alter the term by
which they are described. Their scope of application and their future
treatment in the legal order are also basically changed.

Programme of Law Reform

The third significant development in the legal order of Ghana can
only be suggested here. Adequate discussion of it would require
several substantial volumes. This is the major programme of
legislative reform which was begun in 1960. Mention has already
been made of the fact that much of the applicable legislation in
Ghana had been received from the United Kingdom as of July 24,
1874. Once received, this legislation was unaffected
by later reforms
in Britain which altered or repealed it domestically. Equally
important was the fact that some major legislative innovations in
Britain were never made applicable to the Gold Coast or Ghana.

Since the creation of the Republic, a sweeping attack has been
made on these legislative inadequacies. Much of the old received
legislation has been repealed, thus clearing the ground for new
building. Measures which have stood the test of time and still seem
appropriate in Ghana’s circumstances have been put into modern
language and re-enacted by Parliament. Some partial codifications
have been attempted, as in the Contracts Act of 1960. In some
instances legislative efforts have been preceded by major studies

English statutes of general application in force on July 24, 1874, and provide for
their treatment as part of the common law, see the Courts Act, C.A. 9, s. 154 (4);
Republican Constitution, Act 40; and the Interpretation Act, C.A. 4, s. 17 (3).
27 Act 81, s. 62 (2).
28 Act 25.
which examined the relevant problems in depth and proposed solutions. Such a study by Professor L. C. B. Gower, then of the London School of Economics, has produced a Companies Code Bill. Another by a commission under the chairmanship of Mr. Albert Adomakoh led to draft proposals for an Insolvency Bill and another on Companies Liquidation. A new Criminal Code and Code of Criminal Procedure have been enacted. Many more examples could be cited.

Relatively little of the reform legislation has been radical in its innovation. It seems quite clear that English and Irish models have been preferred, though on occasion American experience has been examined and solutions found workable there adopted. In general, the approach has been pragmatic and eclectic. The quality of draftsmanship, particularly in the earlier Acts, has been high, though it must be said that the Marriage, Divorce and Inheritance Bill which the Government has promulgated for public criticism appears to represent the nadir of the draftsman's art. In fact, however, one is inclined to suspect that the inadequacies of this Bill arise from uncertainty and hesitation at the policy level which not even the most skilled draftsman could overcome.

Time presses further discussion of legal developments themselves. The remainder of my remarks will be directed toward an axiological examination of the major changes in the legal order of Ghana since independence. Against the limited background available, conclusions must, of course, be highly tentative. Nevertheless, an examination of legal institutions with a view to their guiding value assumption can be most revealing of certain powerful forces that, with others, trace the vector of social change.

No legal order with which I have any familiarity reflects a single, totally consistent scheme of values. Rather, the law usually reflects a number of antinomies, most of them recurrent in the various systems. For example, the law of the United States, which is frequently pictured as the last bastion of capitalistic individualism, reveals to even the most casual observer an extensive pattern of regulation in the public interest, that is, legal norms oriented mainly to the values of the community. In the Soviet Union on the other hand, the new economic policy of the 1920s did not exhaust the need to recognize more fully in the law and other official action the value of the individual, his personality and creativity. By and

31 For example, see the provisions relating to third party beneficiary contracts in the Contracts Act, 1960 (Act 25), ss. 5–6.
large, therefore, the axiological analyst sketches a value profile of a particular society by locating the critical fulcrum points where the weight of a certain value acceptance counterbalances its antinomic companion.

The value of nationhood

In the evolution of the law of Ghana over the past decade, the value of nationhood has been dominant. I use the term "nationhood" rather than "nationalism" in order to emphasise that the effort through legal, political and social means has been to create the perception of a new value and to organise its expression internally rather than to implement externally a set of developed and articulated national aims. The legacy of the colonial era to Ghana was a collection of separate territorial units having some important ethnic, economic and cultural differences and with little perception of the bonds which might draw them together. Since the advent of responsible African government, legal devices and techniques have been consistently used to neutralise sub-national power centres, particularly the traditional authorities, and to organise all legitimate power on a national basis. This is seen clearly in the successful struggle for a unified and not a federal government, in the concentration in Parliament of plenary sovereignty, except where expressly limited by a reservation of power to the entire people. It is seen also in the revisions of the legal structure of local government, and in an important course of legislation we have not had time to discuss whereby the chiefs have been deprived of independent economic power. It is manifested as well in the constant pressure on customary law, with all its local variations, in favour of a uniform body of national common and statute law.

While nationhood has thus far been the dominant value, the voice of a competitor has also been heard in the land. This is the continental thunder of Africa or, at least, of a larger unity which can erase some of the grosser irrationalities of the national boundaries bequeathed by colonialism. In the main that thunder has been remote, but it has been constant. Its sharpest peal thus far sounds in the Republican Constitution which authorises Parliament to surrender the sovereignty of Ghana to a union of African states and territories. At the political level, though thus far not perceptibly at the legal, it appears also in efforts to forge a meaningful union of Ghana, Guinea and Mali.

32 I have reference to the various measures by which stool lands and other stool resources have been brought under national administration.
33 Republican Constitution, art. 2.
One of the most persistent value competitions in legal theory and in the practical orientation of a legal order is that between the individual and the community. In the traditional orders of the Gold Coast, like most of Africa, the community represented the dominant value. The basic unit of social, political and legal life was the family, and legal institutions gave it a high degree of protection. While the evolving legal order of Ghana is certainly not directed by rampant individualism, it seems quite clear that a shift in favour of individual values has occurred. Political power is structured on a one man—one vote basis. At both the local and national levels, the new structure vests governmental powers and functions in elective bodies, leaving the traditional authorities, grounded on collective—family units, only a ritual significance. One of the most direct manifestations of this individualising process is the new Marriage, Divorce and Inheritance Bill, whose provisions on inheritance strike deep toward the legal roots which support the extended family. Others can be found in many of the major pieces of reform legislation which provide a more rational legal framework for an increasing range of individual economic activity.

It must be re-emphasised that the aggrandisement of individual values just suggested stands out mainly in relation to the traditional order which the colonial régime at least attempted to nurture. While it seems clear to me that legal developments in Ghana since independence have moved the individual closer to the centre of the stage, he does not occupy it alone. Community values have surely prevailed in the project for public development of the Volta Basin and in the creation and operation of the harbour facilities at Tema, as well as in the legal devices for national administration of stool lands and other resources. Nevertheless, the guiding values of most legal change in independent Ghana appear to be predominantly individualistic.

The competition between individual and collective values is often paralleled by that between democracy and autocracy. As Ghana's legal development has tended to stress individualism, the legal structuring of its basic governmental institutions has been guided by democratic values. Popularly elected governmental bodies at both local and national levels, the elimination of special representation from the traditional authorities and major economic interests, the constitutional affirmation of popular sovereignty and the entrenchment of certain constitutional devices to permit their change only after a referendum of the people, all these reflect an option for democratic principles. On the other hand, the attraction of autocratic

34 Republican Constitution, art. 1.
direction may be seen in the declared preference for a one party system, in the move, which was firmly rejected by Dr. Nkrumah, to make him President for life, and in the provisions of the Republican Constitution, thus far unused, granting special legislative powers to the first President of Ghana. It may be fairly said that thus far the democratic values have predominated in the formal structuring of legal and governmental institutions, while the autocratic values have tended to determine the realities of political life in Ghana. In this respect, of course, Ghana's experience is not unique. In most of the new countries, the leadership group which has directed the successful drive toward independence has tended to claim a dominant or exclusive role in guiding the early years of post-independence development.

In Roscoe Pound's famous epigram that "law must be stable and yet it cannot stand still," is summed up one of the most persistent value competitions of all legal orders. I would be inclined to reject the notion that stability is a necessary characteristic of some objective concept or idea of law. At the same time, I would insist that the value of stability, of a fairly deep and firm channel to control the currents, whirlpools and eddys of social life, has been at all times and in all places perceived as a guiding value in law. The sharpness of the perception, the firmness of the value acceptance has, of course, varied with time and place. The currents of social life always challenge to some extent the restraining channel. If the restraint is too great, there is flood which finds or cuts a new channel that better accommodates the pressures of the flow. One should not press this analogy to the point of assuming, however, that the process always runs from social pressure as cause to legal change as effect. The analogy might be corrected by observing that a skilled engineer can cut a new channel into which at the appropriate time the stream may be diverted. So, to some extent at least, can the legislator, the judge, the administrator, affect the flow of social life by innovations in the legal order. I say to some extent because we still know far too little about the extent of effectiveness of law as an instrument of planned social change. I do not assume the infinite plasticity of social life; thus I do not assume that it can be shaped and directed fully at the will of the manipulator of the legal technique.

At the moment, with respect to developments in Ghana since independence, we do not need to determine where the principal well-springs of legal change may lie—in the broad social group or in a narrower élite. Our question is merely this—which value,

35 Republican Constitution, art. 55.
stability or change, has dominated the legal order. The answer seems
clear indeed. Changes in the formal structure of legal power, in the
extent and variety of official functions, in the relations between
constituent elements in the pluralistic legal order, and in the various
substantive aspects of public and private law have been great. Some
of the more significant have been summarised earlier. On occasion
changes have been made too precipitately; errors have occurred which
greater deliberation would have avoided, and correctives have been
called for.

Again, however, a word of caution is needed. The force of “the
wind of change” in Ghana, to use Mr. Macmillan’s felicitous phrase,
has been strong indeed but it has not been cyclonic. The changes
have been ordered within a continuing legal tradition. Only in fixing
the ultimate locus of legal power has the break with the past been
complete. The constituent elements of the old legal order have
been preserved, though the relations among them have been altered.
Models to be considered in drafting new statutes have been sought
first of all in familiar systems of law. The basic techniques of
legislation, of interpretation and of common law trial and decision
have been preserved. Nor has reliance on familiar customary
patterns been foreclosed despite the attractions of a uniform national
law.

I have attempted to articulate some of the guiding value
judgments in Ghana’s legal development in the familiar terms of the
legal theorist. Other terms having their own significance have been
used by political leaders. We have heard much of the development
and expression of the African personality, in law as well as other
spheres. If such expressions have tended to suggest the postulation
of an inflexible governing concept, of an overriding doctrine, they
are refuted by the actualities of Ghana’s legal development over
the past decade. That development has been peculiarly non-
doctrinaire. At the formal opening of the Ghana Law School in
January 1962 Dr. Nkrumah declared that “the law should be the
legal expression of the political, economic and social conditions of
the people and of their aims for progress.” Such a relativistic and
pragmatic approach has in my judgment led to the implementation
of the value acceptances described in the evolution of the law of
Ghana since independence.