TOWARDS AN INCLUSIVE VISION OF LAW REFORM AND LEGAL PLURALISM IN GHANA

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Abstract

In post-colonial Ghana, some rules of customary law have been criticised as being inimical to the rule of law and to socioeconomic development. As such, customary law has been a key focus of legal reform.

There has been resistance to law reform efforts, especially from communities in rural areas because the state and customary legal systems have failed to reconcile their perceptions of law and legal responsibilities. Taking these legal conflicts as its starting point, this dissertation explores the mechanisms for effective reforms of customary law in a legally plural Ghana. One key objective is to consider the types of legal reforms that might be agreeable to rural dwellers in ways that ensure compliance with state law.

Drawing on legal pluralism as a guiding framework for analyzing the relationship between state and customary legal systems, and focusing on intestate succession as one concrete example, I argue that in order for legal reforms to be embraced, especially by rural dwellers, the state must adopt an inclusive vision of law reform, by modifying the machinery of law reform to meet the particular needs of its people. In the context of intestate succession, I argue that the courts should be given discretion, based on suggested guidelines, to vary the extended family’s portion of intestate property. In addition, I argue that changes to intestate law must also be accompanied by political, economic, educational and even psychological changes to the structures that frame the customary legal system. In sum, legal reform must also mean social, political and economic reform. It must also mean establishing and nurturing meaningful reciprocal
relationships among legal systems and empowering people to consider engaging with and accepting opposing views, with a view to managing conflicts.
Preface

This dissertation is the original, unpublished, independent work by Ama Fowa Hammond.
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Dedication

This dissertation is dedicated to the loving memory of my dearly departed uncle,

Prof. John Evans Atta-Mills.

You made this possible by your many acts of indescribable selflessness.

Rest in Perfect Peace
Chapter 1: INTRODUCTION

In Ghana, the reform of customary law has been proceeding with greater intensity in recent years, necessitated by the perceived need to accelerate socioeconomic development. The focus of the law reform exercise has been customary law, as some of its rules have been criticised as being inimical to the rule of law, socioeconomic development and modern human rights norms. The attempts at reforming customary law by the State have been met with resistance, especially by rural dwellers.

My own interest in customary law reform was triggered during my short experience as a private legal practitioner in Accra. This period brought me into contact with the chief of a village in the Eastern Region of Ghana.¹ In a discussion about the workings of state law, he remarked mockingly in twi,² “nkran fuo ne mo mbra nkô” to wit, ‘the laws of Accra are for the people of Accra.’ This statement represents one of the most profound insights I have ever gained into the divide between state law and customary law and the undeniable importance of customary law in the lives of those in the rural areas.

I had no doubt that the chief was very serious about his views on state law and was sharing an opinion that seemed to be widely held. He explained further how his life and that of his people were regulated by customary law, which included the occasional edicts he and his elders made. When asked how he enforced rules of custom, he replied defiantly, “wo wu a memba!” meaning, ‘if you (the transgressor) die, I will not

¹ Ghana is divided into ten administrative regions of which the Eastern region is one. For a better appreciation of the divisions, see “Ghana,” online: <http://www.ghana.gov.gh/index.php/about-ghana/regions>.
² Twi is a local dialect spoken by most of the Akan tribe of Ghana.
attend your funeral,’ an act he explained was so humiliating no one wanted to endure it.
It was from these statements, that this research project was sown.

I began to take more of an interest in customary law, a law I had studied very little as a law student. Additionally, my work as a member of the National Steering Committee on the Ascertainment of Customary Law Project (ACLP)\(^3\) took me to the countryside where I realized first-hand that state law had very little impact in villages. I also became more involved with some of my distant relatives and other rural folk with whom I had previously had limited relationships because our life experiences seemed worlds apart. I listened to them, read about them and tried to understand their mode of reasoning. Sometimes I did, other times, I did not.

However, I realized that customary law was understudied and its efficacy, pervasive influence and power were lost on reformers, resulting in reforms that were hardly followed in the countryside.\(^4\) Also, I became more conscious of how some of these reforms shortchanged the local people as the more educated made demands based on their perceived rights at customary law, but resisted customary responsibilities, having circumscribed their obligations in light of state law, basically exploiting the benefits of both legal systems.

\(^3\) In Ghana, the National House of Chiefs (NHC) and the Law Reform Commission (LRC) are undertaking a joint project called the Ascertainment of Customary Law Project. It seeks to ascertain and document customary law. This project started in 2007.

In my dealings with local people, I was affected the most by their sincere belief in the legitimacy of their law. I know that for most people sincerity of itself is not an excuse to disregard state law or perpetuate abusive practices, but it was enough for me to embark on a journey aimed at finding ways to include their subjugated voices in national discourse. It was an opportunity to stress the importance of traditional understandings about law, rights and responsibilities and why these must be reflected in legal reforms.

Perhaps it is worth stating that as a Ghanaian, addressing the interface between the customary and formal legal systems in the law reform policy of Ghana is not entirely an academic question, as my own life experiences have been influenced by both systems. While I am by virtue of my academic and social experiences committed to the state legal system, I am also a product of the customary legal system. This largely explains my vacillating sympathies throughout this dissertation.

I come to this project as a legal reformer. My commitment to customary law reform centers on those customary law rules that may be potentially harmful to the people they seek to serve. I argue for a process of legal reform in which the state and customary legal systems work together in ways that protect the interests of Ghanaians, especially those who live in rural areas. This dissertation proceeds on the assumption that customary law reforms are necessary, as certain traditional practices potentially infringe upon socioeconomic rights.⁵

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1.1 RESEARCH QUESTION AND THESIS STATEMENT

My foregoing experience has culminated in a desire to explore the question: what are the mechanisms and strategies required by the state to ensure that customary law rules, which have the potential to infringe upon human rights,\(^6\) are reformed in a manner that is agreeable and comprehensible to the rural people, and thus, effective in ensuring compliance with the state law?

Drawing on legal pluralism as a guiding framework for analyzing the relationship between state and customary legal systems, and focusing on intestate succession as one concrete example, I argue that for customary law reforms to be embraced, especially by those in the countryside, the state must adopt an inclusive vision of law reform by modifying the machinery of law reform to meet the particular needs of its people.

In the specific context of intestate succession, I argue that the courts should be given discretion, based on suggested guidelines, to share intestate property in a manner that acknowledges the importance of the extended family to the Ghanaian society. More generally, I argue for the adoption of a multilayered and inclusive approach to law reform. This requires firstly, that the concept of law, and invariably legal pluralism, is

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\(^6\) Woodman, “Legal Pluralism”, supra note 5; Isser, supra note 5.
conceptualized differently. Specifically, there must be a clear distinction between legal rules and law because law is a much broader concept; moreover, there are different concepts of law. If the distinction is made, it will become evident to the state that its past reforms have focused only on one aspect of law, that is, legal rules. Secondly, and related to the first point, law must be re-conceptualized to include its social dimension. Hence, law reform should be synonymous with social, economic and political reform. In other words, legal rules must be changed alongside socioeconomic development. Lastly, law embodies values; both legal systems make claims to promoting and protecting the welfare of their people. Thus, for reforms to be effective, law reformers must continuously appeal to these inherent values. A deeper understanding of the various legal systems will show that they are not too far apart in their conceptualization of these values. Thus, reformers must identify and utilize these values as a basis for reconciling the customary and state legal systems.

This chapter will provide an outline of the Ghana legal system, explaining its political structure and sources of law. This will be followed by a brief account of the history of law reform in Ghana. The background to the research problem will be detailed, after which I will explain and justify my use of legal pluralism and why I see it as the most appropriate analytical framework for this project. I will explain my sources and give an outline of what each chapter entails.

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In this research, I use the expression, “Natives” to refer to those Africans who were born and lived in the Gold Coast, now called Ghana. I use this term mostly in Chapter Two of this dissertation to distinguish Ghanaians from Europeans colonists. Even though almost all Ghanaians or ‘Gold Coasters’ may refer to themselves as indigenous peoples, I refrain from classifying them as such because the modern application of the expression is restrictive. The ‘Natives’ as used in this dissertation, do not constitute the non-dominant group in the country. Everyone in the Gold Coast (Ghana) identifies as a Native by virtue of birth. I also use the expressions, “countryside dwellers” or “rural population” to refer to those who live in the villages or the rural areas of Ghana. The expressions, “African customary law”, “Native customary law” and “non-state law,” as used in this dissertation, refer to the totality of norms and rules of custom recognized by the various communities in Ghana. I use these terms consistently with the existing literature. While the terms do not mean that there is a single uniform set of customary law rules in Ghana, the rules need not be affirmed by the judiciary.

1.2 OUTLINE OF THE GHANA LEGAL SYSTEM

Ghana is a West African English-speaking country. It has a population of approximately 25.9 million and has over a hundred ethno-linguistic groups which are further

8 Muna Ndulo describes customary law as the indigenous law of the various ethnic groups of Africa. Muna Ndulo, “African Customary Law, Customs, and Women’s Rights” 18:1 Ind J Global Legal Stud 87 at 88. However, Juma is of the view that African customary law refers the rules of custom which have been endorsed by the Courts. In his opinion, practiced or living customary law is better described as “African customary practices, beliefs or value systems.” Juma, supra note 5 at 464.

9 This is the position of the Constitution of Ghana. The Constitution, supra note 7, art 11.

subdivided into numerous cultural and linguistic units, accounting for the legal and cultural pluralism in Ghana.\textsuperscript{11} Ghana became the first sub-Saharan country to gain political independence from Britain in 1957, and became a Republic in 1960.\textsuperscript{12}

Ghana is a unitary state with a unicameral legislature.\textsuperscript{13} Though it is divided into ten administrative regions, none of the regions possesses legislative authority. Ghana is a democracy and has an executive president who may be elected to serve up to two four-year terms.\textsuperscript{14} The parliament of Ghana is made up of 275 members who exercise legislative power.\textsuperscript{15} The Judiciary is headed by a chief justice\textsuperscript{16} and it has jurisdiction in all civil and criminal matters.\textsuperscript{17} The judiciary consists of the Supreme Court, which is the highest court of appeal in all matters; the Court of Appeal; the High Court and Regional Tribunals.\textsuperscript{18} The judiciary also includes lower courts.\textsuperscript{19} Currently, there are two groups of lower courts. The conventional state courts are the Circuit Courts, District courts and Juvenile courts, (in descending order of importance). The traditional courts are the National House of Chiefs, Regional Houses of Chiefs and the Traditional councils (in

\begin{thebibliography}{9}
\bibitem{11} E Kofi Agorsah & G Tucker Childs, \textit{Africa and the African Diaspora: Cultural Adaptation and Resistance} (Indiana: Authorhouse, 2005) 50.
\bibitem{12} UNDP in Ghana, “About Ghana,” online: <www.gh.undp.org/content/ghana/en/home/countryinfo/>.
\bibitem{14} The Constitution, \textit{supra} note 7, art 66 (1) & (2).
\bibitem{15} \textit{Ibid}, art 93 (2).
\bibitem{16} \textit{Ibid}, art 125 (4).
\bibitem{17} \textit{Ibid}, art 125 (5).
\bibitem{18} \textit{Ibid}, art 126 (1) (a).
\bibitem{19} \textit{Ibid}, art 126 (1) (b).
\end{thebibliography}
descending order of authority).\textsuperscript{20} Other lower courts may be established at the discretion of the Chief Justice.\textsuperscript{21}

Ghana’s legal system is based on the English common law and customary law. In 1876, the common law, the doctrines of equity, and the statutes of general application which were in force in England on 24\textsuperscript{th} July, 1874, became part of the laws of the Gold Coast.\textsuperscript{22} The laws of Ghana, according to the 1992 fourth republican Constitution comprise the Constitution; enactments made by or under the authority of the Parliament established by the Constitution; Orders, Rules and Regulations made by any person or authority under a power conferred by the Constitution; the existing law; and the common law, which includes the doctrines of equity and the rules of customary law, including those determined by the Superior Courts.\textsuperscript{23} Islamic law is applied by the courts as customary law.\textsuperscript{24}

This dissertation focuses on three types of law: state law, judicial customary law, and living customary law. “State law” in this dissertation, refers to the laws passed by Parliament and signed into law by the President.\textsuperscript{25} It also refers to the laws of foreign origin, including the English common law, the doctrines of equity, and the statutes of

\textsuperscript{20} Ibid, art 39.
\textsuperscript{21} Ibid, art 39 (e).
\textsuperscript{22} The Gold Coast Supreme Court Ordinance (No. 4 of 1876) s 14 [Supreme Court Ordinance]. On the current application of the English Statutes of General Application, the Courts Act states that until provision is made by law in Ghana, certain Statutes of England including the Charitable Trusts Act, 1868 (s.12) and the Trustee Act of 1843 (s. 1-5 & 7:34) shall continue to apply in Ghana. However, these Acts are subject to “any statute” in Ghana. See s 119 of the Courts Act, 1993 (Act 459) and the second schedule to the Act [Courts Act].
\textsuperscript{23} The Constitution, supra note 7, art 11.
\textsuperscript{24} See the case of Brimah & Cobsold v Asana, [1962] 1 GLR 118.
\textsuperscript{25} This includes those Acts which have changed aspects of customary law, e.g. Intestate Succession Law, 1985 (PNDC Law 111) (Laws of Ghana (Rev. Ed. 2004), Vol V, 1951) [PNDC Law 111].
general application. Technically, judicial customary law is state law because it is living customary law which has been modified by the judiciary,\textsuperscript{26} using the principles of natural justice, equity and good conscience.\textsuperscript{27} However, I distinguish it from state law because of its origin. Living customary law refers to the rules of law developed and applied within particular communities in Ghana, which have not been modified by the state or any of its organs.

Economic productivity in rural areas is relatively low, decent medical care is limited, and formal education is often not a priority, due to labour intensive and agricultural economies. The central government focuses most of its development activities in cities at the expense of rural areas. Livelihoods are sustained mainly by subsistence farming. These communities are far removed from the central government; they are characterized by a strong belief in the metaphysical realm of life and they regulate their societies largely according to customary law.\textsuperscript{28} It is estimated that approximately half of Ghana’s population lives in rural areas.\textsuperscript{29}

\textsuperscript{26} Any court of competent jurisdiction established under the Courts Act has the authority to modify the rules of customary law. Courts Act, supra note 22 at s 117.

\textsuperscript{27} Ibid as 54.

\textsuperscript{28} Brian Tamanaha explains that “customary normative systems continue to exert the strongest influence in places that have undergone limited penetration from modern economic systems, mass media, government institutions, and public education.” Brian Z Tamanaha, “Understanding Legal Pluralism: Past to Present, Local to Global” (2008) 30 Sydney L Rev 375 at 409 [Tamanaha, “Understanding Legal Pluralism”]; see also Juma, supra note 5 at 487. He explains that these communities significantly depend on traditional African beliefs and customs as a means of regulating societal life.

1.3 RESEARCH PROBLEM AND THE HISTORY OF LAW REFORM EFFORTS IN GHANA

In Ghana, it is no secret that those who live in urban areas and those who live in the villages or countryside are governed by virtually different set of laws, especially in the areas of marriage, land ownership and succession to property. While state law largely regulates the lives of those who live in these urban areas, the lives of those in the countryside are regulated by customary law. Research indicates that several reasons account for this state of affairs. A significant number of rural dwellers have no knowledge of state law. Additionally, a number of local communities are unwilling to surrender their cultural heritage and embrace a legal system that they can hardly identify with. Also, most of them may not have the requisite capacity to engage with the formal state system and its institutions.

It is well documented that customary law used to govern almost exclusively the lives of all the people of Ghana (formerly the Gold Coast) before the advent of colonialism. The beginning of law reforms in the Gold Coast is traced to the famous bond of 1844 which ostensibly, empowered the British colonialists to reform the laws of the people of

30 Kutsoati & Morck, supra note 4 at 23-24.
Cape Coast, the administrative center of the British settlements in the Gold Coast. Thereafter, many other pieces of legislation were passed to make significant modifications to the existing customary law. One of the most important reformatory pieces of legislation passed during the colonial era was the Supreme Court Ordinance. As earlier indicated, by this Ordinance, the common law of England, the doctrines of equity, and the statutes of general application became part of the laws of the Gold Coast.

Significantly, this Ordinance determined the application and development of customary law in the Gold Coast. Though it formally recognized its existence and application, thereby formally recognising legal pluralism in the Gold Coast, it subordinated customary law to the laws of foreign origin. Indeed, the colonial era saw the gradual liberalization of customary law by both the native and state courts where the rules of custom had to pass a foreign standard of equity, good conscience and natural justice.

Writing about British West Africa in 1971, Nii Amaa Ollenu, a legal scholar, explains

34 Supreme Court Ordinance, supra note 22 at s 14.
36 Ollenu, supra note 33 at 158; Sally Moore also explains that “customary law is endorsed provided it is congruent with a British conception of natural justice, morality, or legality.” Sally Falk Moore, “Treating Law as Knowledge: Telling Colonial Officers What to Say to Africans About Running ‘Their Own’ Native Countries” (1992)26:1 Law Soc’y Rev 11 at 18.
that the guiding principle of customary law reforms was to mould customary law to the general principles of British law.\textsuperscript{37}

The introduced laws were based largely on imported liberal notions and discourses of the fundamental freedoms\textsuperscript{38} which were propagated as being universal, natural and capable of arising only from the foreign law or the law of the state.\textsuperscript{39} It would seem, however, that the imposed law did not permeate every legal space in these societies as state law and judicial customary law are barely adhered to in rural Ghana. It has been confirmed that “while the lives of some people were completely transformed, [under colonial rule] others hardly knew the European rulers were here before they began to leave.”\textsuperscript{40} Ade Ajayi, a historian, suggests that the changes brought about by colonialism simply did not change the consciousness of some of the people in these societies.\textsuperscript{41}

Law reforms in post-colonial Ghana have generally proceeded on two fronts, namely the judicial and the statutory process. Postcolonial courts\textsuperscript{42} continue to apply the same liberal tests used in the colonial era in order to ensure that customary laws are

\begin{flushright}
\textsuperscript{37} Ollenu, \textit{supra} note 33 at 159.
\textsuperscript{38} Cruickshank, \textit{Eighteen Years on the Gold Coast of Africa, Including an Account of the Native Tribes, and Their Intercourse With Europeans} (London: Hurst and Blackett, 1853) 26.
\textsuperscript{39} David Trubek & Marc Galanter explain that the liberal legalist model of law in society assumes that state institutions are the primary enforcers of social change even though it is well established that tribes exert greater control on people than the state. See David Trubek & Marc Galanter “Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States” (1974) Wis L Rev 1062 at 1080.
\textsuperscript{41} \textit{Ibid} at 200.
\textsuperscript{42} Nii Amaa Ollenu explains that post-colonial courts have not shown any originality in law reform especially in cases such as negligence and defamation etc. He elucidates that they disregard local conditions and that “English decisions …, [are] slavishly accepted and applied,” Ollenu, \textit{supra} note 33 at 159. Presently, even though English decisions are only of persuasive influence, it is arguable that English notions of justice are decisive in determining customary law cases before the Ghanaian courts.

\end{flushright}
redesigned to adapt to the notions of rule of law, democracy, equality and modernity. Since state law cannot use custom without turning it into something else, the courts have only succeeded in creating a version of customary law that is different from what is practiced by the local people and which is referred to as judicial customary law.

Statutory reforms by parliament have also altered the customary law significantly. The laws of Ghana have outlined the procedures for the application, ascertainment, recognition, assimilation and declaration of customary law generally. Through Acts of Parliament, changes have been made to the laws on land tenure. Laws have also been passed to criminalise customary practices such as widowhood rites, ritual servitude and female genital mutilation because of the view that these practices do not meet modern human rights standards. Significantly, the Intestate Succession Act, (PNDC Law 111) was also passed in 1985 in reaction to both local and international pressure on the government to respond to the changing notion of family, and consequently, the distribution of intestate property. More importantly, it was to provide especially for women and children who were denied the property of their intestate deceased husband and father respectively because of the different modes of allocation of intestate property

48 Hereinafter referred to as PNDC Law 111.
defined by the matrilineal system of inheritance. The Intestate Succession Law is discussed extensively in Chapter Three and Four as it is the focal point around which this dissertation will devise strategies for the effective reform of customary law.

The important question to ask is the extent to which these judicial and legislative changes have been heeded by Ghana’s rural population. As Antony Allott, a Professor of African Law, puts it bluntly, “they carry on as if the new law had not been passed.”

Even though Samuel Asante, a legal scholar, thinks that the legislature is the more effective instrument for the reforms generally, Gani Aldashev et al explain that “solutions imposed by legislative fiat tend to have dismal results because they inevitably create misunderstandings, uncertainty, and disputes.” Thus, Gani Aldashev et al suggest that customary law be allowed to evolve and modernize through court decisions.

The Law Reform Commission of Ghana, established in 1968, has also been instrumental in reforming the country’s laws. The Commission receives, considers and...


50 Samuel Asante holds the view that we cannot entrust meaningful legal reforms to the courts because the judicial machinery is slow. He explains that nearly all major reforms of common law rules in Ghana have been accomplished by legislative action. He admits, however, that the courts are more likely to be sensitive to customary law. See SKB Asante, “Over a Hundred Years of a National Legal System in Ghana: A Review and Critique” (1988) 31:1-2 J Afr L (Essays in Honour of A. N. Allot) 70 at 81-83.


52 Aldashev et al, supra note 51 at 798.
makes proposals for the initiation and reform of any law in the country;\(^{53}\) it makes practical proposals for the development, simplification and modernization of the law;\(^{54}\) it advises the supervisory Minister of State on policies for law reform;\(^{55}\) it undertakes the examination of particular areas of the law and formulates proposals for reform after appropriate research;\(^{56}\) and lastly, it obtains information on the legal systems of other countries that may facilitate the performance of its functions.\(^{57}\) The procedures used by the Commission seek, as much as possible, to obtain input from relevant stakeholders. The Commission tries to publicize relevant issues and holds hearings to promote public awareness and debate. Despite these efforts, customary law reforms have not been successful in the country side.

Under the Chieftaincy Act of Ghana, the National and Regional Houses of Chiefs are assigned important roles in the process of applying, assimilating, declaring and ascertaining of customary law.\(^{58}\) However, in practice, this seems to be the function of the judiciary. The recommendations made by the Houses of Chiefs are subject to both substantive and procedural limitations by the Executive arm of Government.\(^{59}\)

Indeed, the state has not been able to make deliberate changes to practiced customary law, and judicial customary law (the customary law made by judges) is hardly enforced in local communities. Consequently, Edward Kutsoati and Randall Morck have said that

\(^{53}\) Law Reform Commission Act, 2011 (ACT 822) s (3) (a).
\(^{54}\) Ibid at s (3) (c).
\(^{55}\) Ibid at s (3) (d).
\(^{56}\) Ibid at s (3) (e).
\(^{57}\) Ibid at s (3) (g).
\(^{58}\) Chieftaincy Act of Ghana, 2008 (Act 759) ss 49-55.
\(^{59}\) Ibid at ss 51, 52, 54.
formal legal reforms have a very limited impact on most Ghanaians, but are useful to the few who are connected to the formal economy. They explain further that the reforms are hardly helpful to those who live in villages and are dependent on the traditional economy. What then is the best way of reforming customary law to make it implementable, especially in rural Ghana? This is the central question that this dissertation seeks to answer.

1.4 CONTRIBUTION OR JUSTIFICATION

My dissertation seeks to provide insights to the government of Ghana to help determine its vision for law reforms, and accordingly, streamline its policies to ensure that reforms are effective. It is only when a clear vision of law reform and the particular facts of customary law reform are worked out that informed steps can be taken towards reforming the law successfully. I hope the state will be better equipped to decide on the principles by which it should be guided.

Also, this dissertation will argue that law reform is also about establishing and nurturing meaningful reciprocal relationships with other legal systems. It is about engaging with other systems in a respectful way, and sustaining these relationships through cooperation, compromises and negotiations. My work will emphasize the uniqueness of all legal systems and focus on their distinctive strengths, abilities and needs. It will

60 Kutsoati & Morck, supra note 4 at 15.
advise the state that acknowledging and respecting other legal systems in the context of alternative beliefs and traditions is essential to Ghana’s future.

As a document directed principally to government authorities, my dissertation will suggest that a fragmented approach to law reform, which focuses on the modification of legal rules, as opposed to a holistic approach, which advocates the promulgation of more equitable rules and the implementation of socioeconomic development as a vehicle for reforms, is socially costly. It undermines the rule of law and inevitably, socioeconomic development. Ultimately, I hope that the conclusions reached by this dissertation will empower the state to realize the inevitable connection between legal reforms and development.

This research will also put the spotlight on the unintended effects of the internationalization of law making, which in fact, largely characterizes legal developments in Ghana. Acts of parliament are made to give effect to international obligations or standards. My dissertation will suggest that laws that are promulgated without due regard to the social context of the recipient country are a threat to sustainable legal development. I hope this realization will place the state on the path to developing legal reform strategies that embrace social circumstances and result in the making of laws that are relatable and implementable.

Furthermore, my work will suggest that law reform is about empowering people to make different, but informed choices. It is about enabling people through the provision of education and related resources to consider engaging with and accepting opposing
views, with a view to managing conflicts and building stronger relationships. I hope that my work helps the state to realise that by empowering its people, it will be promoting their autonomy and giving them real choices, which in turn, can yield effective reforms.

This dissertation devotes much attention to the meaning and scope of law. I contend that law is a very broad concept that includes the sociocultural reality that it administers, and I hope this sparks debate about the kinds of professionals that must be charged with the task of reforms. It is also envisaged that the state will appreciate the need to involve professionals other than legal professionals, in the reform of law so that all the dimensions of law and of lawmaking are expertly considered.

My research could be beneficial to many other countries, especially post-colonial African countries that are at a crossroads in their attempts at managing the tensions that result from the plurality of legal systems. I hope they will be inclined to the creation and promotion of an inclusive vision of legal pluralism and legal reforms. I hope that the state will be more focused on the common boundaries that it shares with the customary law system because it is a prerequisite to an effective law reform exercise. Also, I hope that the state comes to terms with the fact that the efficacy of State-led reforms depends largely on the extent to which they reflect the core values of the customary legal system.

Finally, a successful execution of the project could help customary law reforms to take place in a way that reflects the lived experiences of Ghanaians living in rural areas, and involves their genuine input. This will result in the readiness of these people to embrace the changes introduced by the reforms. Ultimately, it will help strengthen the human
rights protection and promotion mechanisms derived from international law and incorporated into the Constitution of Ghana.

1.5 ANALYTICAL FRAMEWORK: LEGAL PLURALISM

Ghana’s legal system is legally pluralistic. The concept of legal pluralism, generally, describes situations where two or more legal orders exist within the confines of a given space. In Ghana, such pluralism manifests itself in the co-existence of state law with judicial customary law, the living customary law of the various ethnic groups and Islamic customary law. The central argument of legal pluralism is that various normative orders or social fields exist in most societies and that state law is not the only regulatory system in a state. In the words of John Griffiths, one of the key modern proponents of legal pluralism, “not all law is state law nor administered by a single set of state legal institutions.”

Griffiths, like most legal pluralists, rejects the ideology of legal centralism which asserts the supremacy of state law and maintains that “law is and should be the law of the state, uniform for all persons, exclusive…and administered by a single set of state legal

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62 Even though the courts in Ghana regard Islamic law as customary law, it is doubtful that it is so perceived by Muslims.
63 It would seem that the concept of legal pluralism gained momentum with Griffiths’ article, “What is Legal Pluralism” (1986) 24:1 J Legal Pluralism 1-55. The fact remains though that the concept is not new. Legal pluralism was the normal state of affairs for at least 2000 years of European history. From the mid-to-late medieval period there were various types of law, sometimes conflicting, occupying the same space and lacking any overarching hierarchy or organization. These forms of law included various versions of local customs, Germanic customary law, feudal law, lex mercatoria, and the canon law of the Roman Catholic Church among others. These existed actively until the establishment of the state system, which came with the belief that Government and law were the instruments needed to achieve social objectives. See Tamanaha, “Understanding Legal Pluralism”, supra note 28 at 377-381.
64 J Griffiths, supra note 63 at 5.
institutions." He argues that the ideology of legal centralism simply reflects the moral and political claims of the modern nation state. Accordingly, he embraces the fact of legal pluralism which he recognizes as a situation whereby:

law and legal institutions are not all subsumable within one 'system' but have their sources in the self-regulatory activities which may support, complement, ignore or frustrate one another, so that the 'law' which is actually effective on the 'ground floor' of society is the result of enormously complex and usually in practice unpredictable patterns of competition, interaction, negotiation, isolationism and the like.66

Thus, there are multiple self-regulating normative orders which interact between and among themselves in various societies; in practice, law is shaped through these interactions. Griffiths' vision of legal pluralism exposes the myth and illusion of legal centralism67 and aptly captures the reality of "the phenomenon of law beyond the state."68 His description of legal pluralism appropriately describes the essence of classic legal pluralism which exists in most post-colonial societies where foreign legal systems were imposed on the native ones, leaving the transplanted law and the customary law to co-exist within the boundary of the nation-state.69 Classic legal pluralism is the most pronounced form of pluralism in Ghana. It is worth mentioning that since Griffiths, many other approaches to legal pluralism have emerged,70 some seeking to expand the

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65 Ibid at 3.
66 Ibid at 39.
67 Ibid at 4.
69 J Griffiths, supra note 63 at 8.
70 One such approach is new or State Legal pluralism. See Gordon Woodman, "Ideological Combat and Social Observation: Recent Debates about Legal Pluralism" (1998) 42 J Legal Pluralism 21-59 [Woodman, "Ideological"]; Sally Moore, "Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study" (1973) 7:4 Law & Soc'y Rev 719-746; Marc Galanter, "Justice in Many
frontiers of the concept and others seeking largely to bring more conceptual clarity to the concept.

It is important to note that legal pluralism means different things to different people or professionals. International lawyers, sociologists, legal anthropologists and social scientists may understand the concept differently, as they may have different goals and “political purposes.” Benda-Beckmann explains that the confusion surrounding legal pluralism is as a result of the fact that authors look for “the one” correct or useful concept for both lawyers and social scientists, without appreciation of the fact that the other is engaged in a different enterprise. Socio-legal theorists, for instance, are interested in developing a sophisticated analytical approach to contemporary legal forms while social scientists are dedicated to working out a social scientific approach to law.

An acknowledgment of a multiplicity of normative orders inevitably leads to questions about how these different legal orders may co-exist and interact meaningfully. Questions relating to possible modes of interaction are important because of the inequalities and the struggles for dominance that are bound to exist among them. In

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71 Tamanaha, “Understanding Legal Pluralism”, supra note 28 at 391.
73 Tamanaha, “Understanding Legal Pluralism”, supra note 28 at 391.
Ghana, for instance, even though customary law is recognized as one of the country’s sources of law, in practice, limitations are placed on its content and application.

I contend that legal pluralism is the most suitable framework for analyzing the relationship between differently positioned normative orders. This is, first, because it seeks to create awareness about the existence of multiple legal spaces and their complex and dynamic interaction; it draws attention to other systems and discourses, especially, those obscured by the state. For this reason, it has been described as a sensitizing concept.  

Secondly, it challenges the States’ claim to exclusive legal validity and legitimate power and illuminates the actual power of the seemingly lesser systems. Thirdly, legal pluralism largely rejects the state as a standpoint from which to analyze law. Fourthly, it elucidates the complexity of law as it raises important questions about the meaning and scope of the concept of law; and lastly, it raises even more fundamental questions about the location and constitution of power in a social field or legal system. Legal pluralism is not a “creature of the law schools” or “something that academic lawyers do;” it is an unavoidable social fact.

74 Franz and Keebet Von Benda-Beckmann, “The Dynamics of Change and Continuity in Plural Legal Orders” (2006) 53-54 J Legal Pluralism 1 at 14. They hold the view that Legal pluralism is not an explanatory theory, but primarily, a sensitizing concept. See also Westermark, who explains that the “general value of an interactional orientation toward legal pluralism is that it acts as a sensitizing concept which calls attention to neglected aspects of social life.” George D Westermark, “Court Is an Arrow: Legal Pluralism in Papua New Guinea” (1986) 25:2 Ethnology 131 at 147.


77 Ibid at 97.
1.5.1 Limitations and Justification of Theoretical Framework

Though a very useful framework, legal pluralism has significant drawbacks, two of which are most pertinent to my research. Firstly, it offers very little on the question of how plural legal systems could best interrelate and gives no direction for law reform,\textsuperscript{78} other than being a constant reminder of the fact that different normative orders can exist in a given space. Secondly, it suffers from a major conceptual problem of not being able to provide “a criterion for distinguishing non-state law from anything else that has a normative dimension.”\textsuperscript{79}

The principal contribution of legal pluralist scholars has been to destabilize the concept of legal centralism.\textsuperscript{80} It would seem that most of the views expressed about legal pluralism remain merely descriptive and do not go beyond a sociological or anthropological acknowledgement of the phenomenon. Sally Merry confirms this when she points out that “Legal pluralism is not a theory of law or an explanation of how it functions, but a description of what law is like. It alerts observers to the fact that law takes many forms and can exist in parallel regimes. It provides a framework for thinking about law, about where to find it and how it works.”\textsuperscript{81} This explanation illustrates the extent to which the concept has been rendered docile. However, it must be infused with the power to solve the problems it exposes. Not only has legal pluralism as a concept

\textsuperscript{78} Miranda Forsyth, \textit{A Bird That Flies With Two Wings: the Kastom and State Justice Systems In Vanuatu} (Canberra: ANU Press, 2009) 48.
\textsuperscript{79} Kleinhans & MacDonald, \textit{supra} note 70 at 32.
\textsuperscript{81} Sally Engle Merry, “Legal pluralism in Practice” (2013) 59:1 McGill LJ 1 at 2 [Merry, “Legal pluralism in Practice”].
become immobile, it does not seem to aid our understanding of how legal systems should interrelate.\textsuperscript{82} The evidence reveals that there are many incidents of competition and undue dominance among legal systems and so legal pluralism must be able to rise to the occasion of providing a mechanism for fair interactions. Lastly, legal pluralism does not seem to offer any direction for legal change or law reform.\textsuperscript{83} This is unsatisfactory for a concept that is touted as providing an alternative approach to re-conceptualizing the relationship between law and society because legal change is the bedrock upon which socioeconomic developments occur and thrive.

But is legal pluralism really immobilized because it is framed largely as a descriptive concept or is it simply an underutilized concept? Legal pluralism holds the potential to be more than just a descriptive concept; it can aid the facilitation of legal change if legal scholars would envision law in its entirety. My work will show that it is possible \textit{to do} legal pluralism and to use it to solve relational conflicts. In fact, legal pluralism should reject its reputation of being just a sensitizing concept, a pool of stagnant water and embrace a vision of a “flowing river of living water.”\textsuperscript{84} This will be discussed further in Chapter Five as part of efforts to construct a multilayered concept of legal pluralism.

The second major deficiency of legal pluralism is its inability to distinguish what is legal from what is not. As an analytical tool it has been criticized as standing upon an unstable analytical foundation and “tenuous footing”\textsuperscript{85} which will eventually lead to its

\textsuperscript{82} Forsyth, \textit{supra} note 78 at 44.  
\textsuperscript{83} \textit{Ibid} at 48.  
\textsuperscript{85} Tamanaha, “Understanding Legal Pluralism”, \textit{supra} note 28 at 392.
This is largely because of the lack of success in attempting to formulate a single scientific or cross-cultural definition of law. Various definitions of law abound. Some of them envision law as being primarily for the maintenance of social order and conclude that since every society is able to maintain some kind of order, they all have law. Others see law as being governmental social control, meaning that law is determined by the state, and lastly, others focus on its content, the fact that it must be inherently just. Fundamentally, almost all the definitions, while very insightful, are “extraordinarily expansive” and essentially, blur the divide between the legal and non-legal. It has thus been recommended that the concept must be entirely reconstructed, or retired. Certainly, legal pluralists may have been unable to find a universal definition of law, but for most purposes, I maintain that an analysis of relationships between plural legal systems can be done without having such a definition. Ironically, Brian Tamanaha, a legal scholar, who makes most of these criticisms, illustrates with a great degree of

86 Brian Z Tamanaha, “The Folly of the 'Social Scientific' Concept of Legal Pluralism” (1993) 20 JL & Soc'y 192 at 192 [Tamanaha, “Folly”].
87 Significantly, many definitions of law have been proposed by legal pluralists. To cite a few, Gordon Woodman suggests that “law covers a continuum which runs from the clearest form of state law through to the vaguest forms of informal social control” Gordon Woodman, “Ideological”, supra note 70 at 45. Likewise, John Griffiths asserts that “all social control is more or less legal”, J Griffiths, supra note 63 at 39; Paul Berman also thinks that law can be found in “day-to-day human encounters such as interacting with strangers on a public street, waiting in lines, and communicating with subordinates or superiors.” Paul Schiff Berman, “The Globalization of Jurisdiction” (2002-2003) 151:2 U Pa L Rev 311 at 505.
88 Brian Z Tamanaha, “Law” (2008) St. John’s University School of Law Legal Research Papers Series 08-0095, 1 at 6 [Tamanaha, “Law”]; see also Tamanaha, “Understanding Legal Pluralism”, supra note 28, 375 at 393. Brian Tamanaha asserts that “hence there are many legal orders in society, including the family, corporations, factories, sports leagues, and indeed just about any social arena with social regulation.
89 Tamanaha, “Law”, supra note 88 at 6-10.
90 Tamanaha, “Understanding Legal Pluralism”, supra note 28 at 393.
91 Tamanaha, “Folly”, supra note 86 at 193.
success that it is possible to study legal pluralism without a definition of law. In fact, he goes as far as to suggest that we accept that there is a “plurality of legal pluralisms.”

Nonetheless, does the inability of scholars to find an acceptable definition for law undermine the quest to understand other legalities? I contend that it does not. In fact, what is law is never in doubt by those who live by the law. As a matter of fact, if we cast our vision beyond what is convenient to the many problems of the world dependent on law for a solution and to the wider purposes of law, we will accept without doubt that our mission to find a universal definition of law is time unfruitfully spent. While we may never have a “God-given” definition of law, we are reminded that the tag “law” should not only be given to the dictates of an elected group of people nor must it necessarily be written. The absence of a “formal structure staffed by wigged and learned gentlemen” does not mean the absence of law. Indeed, the meaning of law has never been resolved in legal philosophy, and there are compelling reasons to believe that it is incapable of resolution. More importantly, the absence of an acceptable definition of law should not hinder the development of new approaches to law reform.

92 Tamanaha, “Understanding Legal Pluralism”, supra note 28 at 392.
93 Ibid at 392. This image of pervasive pluralism has not, however, gone unchallenged. For some critics, the objection is overtly ideological, legal pluralism undermines respect for the Rule of Law. This is essentially the point argued by JPB Josselin de Jong, “Customary Law: A Confusing Fiction” in AD Rentein & A Dundes Folk Law: Essays in the Theory and Practice of Lex Non Scripta (New York: Garland, 1994) 111. See also Kleinmans & Macdonald, supra note 71 at 32.
94 Allott, supra note 49 at 121-122.
95 Ibid at 51.
96 Ibid at 53.
97 Tamanaha, “Understanding Legal Pluralism”, supra note 28 at 392. This is because theorists have different intuitions about what law is and that these intuitions are influenced largely by their perception of what law ought to be, not to mention that fact of their different backgrounds and objectives. Tamanaha “Law”, supra note 88 at 6.
The very fact of not being able to agree on a definition of law has the advantage of opening up dialogue about its purposes.\(^9^8\) It invites us to rethink the notion of law and to realize that "the very concept of law must change [in order] to justly recognize the differently-positioned identities that constitute human social life."\(^9^9\) Legal pluralism questions positivist ways of thinking about legal validity as it embraces other socio-cultural regulatory systems. And for the purpose of my work, it brings other marginalized ‘legal’ discourses such as practiced customary law within the domain of Law. The ability of legal pluralism to spur reflection on the nature of law far outweighs its conceptual deficiencies.

In some respects, my approach to legal pluralism is qualitatively different from the socio-legal and anthropological perspectives on the concept.\(^1^0^0\) These perspectives are relevant to my work to the extent that they indicate that state law is not the only important and effective normative order in people’s lives. My work is not about legal pluralism simpliciter, it is about legal pluralism and law reform. More specifically, my work seeks to design law reform strategies from a legal pluralistic perspective. Thus, I now review the literature on pluralist approaches to legal reform.

\(^9^8\) Merry, “Legal pluralism in Practice”, supra note 81 at 8.
\(^1^0^0\) There is a vast body of literature on legal pluralism: see Sally E Merry, “Legal Pluralism” (1988) 22 Law & Soc’y Rev 869 [Merry, “Legal pluralism”; J Griffiths, supra note 63 at 1-55; MacDonald & Kleinhaus, supra note 70 at 25-46; Moore, supra note 70 at 719-746; Tamanaha, “Folly”, supra note 86 at 192-217; Tamanaha, “Understanding Legal Pluralism” supra note 28 at 375-411; F Von Benda-Beckmann, supra note 72 at 37-83; Woodman, “Ideological”, supra note 70 at 21-59.
1.6 SCHOLARLY VIEWS ON LEGAL PLURALISM AND LAW REFORM

Bradford Morse and Gordon Woodman, like Miranda Forsyth, are among the very few scholars to have attempted to develop a legal pluralist approach to law reform.

Focusing on how the state may relate to customary law, Morse and Woodman explain that the state may choose to reform or conserve customary law or it may choose to combine these options. Morse and Woodman point out that the law reform method used by the state depends on the relationship that the lawmaker has with customary law and the lawmaker's attitude toward it. If the lawmaker is “unaware” of customary law or is “antagonistic” toward it, reforms are more likely to be of the negative class, which are generally unsympathetic. When lawmakers are knowledgeable about customary law, the reform strategies are more likely to be of the positive class, which are more accommodating.

Morse and Woodman explore a variety of legal measures that the state can adopt in its relationship with customary law, classified broadly as negative and positive. The negative measures describe state measures that contradict norms of customary law by prohibiting, either directly or incidentally, a permitted norm or conduct of customary law. State law may also directly or incidentally negate a customary norm of validation.

\[\text{\textsuperscript{101}}\text{Bradford W Morse and Gordon R Woodman, “Introductory Essay: The State’s Options” in Morse and Woodman, eds, } \textit{Indigenous Law and the State} \text{(Providence, Rhode Island,: Foris Publications, 1988) 5 at 6.}\]

\[\text{\textsuperscript{102}}\text{Ibid at 21.}\]

\[\text{\textsuperscript{103}}\text{Ibid.}\]

\[\text{\textsuperscript{104}}\text{Ibid at 7-10.}\]
and nullify the effects of such norms.\textsuperscript{105} Prohibition involves the active deployment of state powers to discourage social acceptance of customary law.\textsuperscript{106} These negative measures characterize the competition that may exist among normative orders. Negative measures are inspired by a commitment to the goals of nation building and economic development, which non-state law is generally believed to inhibit.\textsuperscript{107}

Positive measures capture the various ways in which the state may recognize, incorporate and acknowledge customary law.\textsuperscript{108} Recognition may be by admitting customary law as fact, though this does not entail an acceptance of the legal nature of customary law.\textsuperscript{109} In this regard, state law may, in sentencing a convicted criminal, take into account customary law as part of the convict’s social environment and beliefs. This, however, does not involve any adjustment to state law in response to customary law.\textsuperscript{110}

Woodman and Morse’s positive measures also include the acknowledgment of existing legitimate powers held by a customary institution. State law may confer on a state institution powers concurrent with those granted or recognized as held by a customary institution.\textsuperscript{111} The writers admit that the problem with this approach is the determination of how conflicts will be resolved, unless there is an “all-embracing law” with norms superior to those of the two bodies in conflict.\textsuperscript{112} Woodman and Morse hold the view

\textsuperscript{105} Ibid at 7-10.
\textsuperscript{106} Ibid at 7.
\textsuperscript{107} Ibid at 21.
\textsuperscript{108} Ibid at 10.
\textsuperscript{109} Ibid at 10-11.
\textsuperscript{110} Ibid at 10.
\textsuperscript{111} Ibid at 19.
\textsuperscript{112} Ibid at 20.
that measures of acknowledgment are less likely to distort the social reality of customary law. These measures describe how legal systems may complement and depend on each other. They largely exemplify ‘active’ legal pluralism, where each system is given a voice and comparable levels of recognition to be able to hold its own.

Another positive measure is the incorporation of customary law. Here, the state incorporates into its own norms a customary norm or a portion of it. In this regard, imperative norms of customary law are enforced by the state, or norms of validation are incorporated into state law, giving the norms the same legal effect in state law as they have in customary law or a customary law concept is given the same or similar meaning under state law as it has under customary law. Though he is cautious about generalizing the effects of incorporation, Woodman argues that the incorporation of norms usually entails their distortion, as the laws stated are not coterminous with the customary law norms. The laws do not represent the cultures from which they are derived. Incorporation privileges the state and ingrains legal centralism.

Morse and Woodman are the principal contributors to the development of a legal pluralist approach to law reform. Their analysis of the different measures of acknowledgment is an important start to the development of an analytical framework.

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113 Ibid at 20.
114 Ibid at 11.
115 Ibid at 11.
116 Ibid at 12.
117 Ibid at 12.
118 Ibid at 15. This view is attributed to only Gordon Woodman.
119 Forsyth, supra note 78 at 48.
120 Ibid at 49.
However, Miranda Forsyth concludes that their discussion demonstrates that no comprehensive framework has yet been proposed by legal pluralist scholars or law reformers and thus, suggests her own strategies.\textsuperscript{121}

Forsyth examines the issue of conflict management between the state and customary legal systems in Vanuatu. Discontent with the fact that conflict management strategies by the government and donor agencies have focused on building the capacity of only state institutions, Forsyth argues for the extension of such services to the customary or ‘Kastom’ legal system. However, she recognizes that the state and non-state systems must have a relationship for this to be possible. She examines how constructive interaction can be fostered between the two systems, and concludes that despite the differences between the two, it is possible for them to work together in a mutually beneficial manner. This, she says, requires changes to the structural relationship between them.

In support of her conclusion, Forsyth, whose pluralistic approach to legal reform focuses on “doing” legal pluralism,\textsuperscript{122} presents seven types of relationships that may exist between the state and non-state justice systems.\textsuperscript{123} These describe the interaction, competition, collaboration and interdependence that may characterize relationships among various normative orders. Apart from assessing the potential advantages and disadvantages of these relationships based on their effectiveness, she evaluates the various internal changes and mutual adaptation measures that the various systems will

\textsuperscript{121} Ibid at 52.
\textsuperscript{122} Ibid at xix.
\textsuperscript{123} Ibid at 201-264.
have to effect in order to develop meaningful collaboration between and among them. Finally, she designs a methodology for implementing the types of relationships identified.

Forsyth’s first model involves the state actively repressing a non-state justice system by formally legislating to ban the latter from exercising any adjudicative powers it may have. In the second model, the state unofficially encourages reliance on the non-state justice system though no formal recognition is given to its operation; the state turns a blind eye to the fact that the non-state justice system arbitrates the majority of disputes. In this model, while the state does not actively suppress the non-state justice system, it does not support it in any way.124

In Forsyth’s third model, there is no formal recognition, but active encouragement of the non-state justice system by the state and greater collaboration between the two systems. This model, according to Forsyth, is the result of the awareness by government of the limitations of the state justice system and the effectiveness of the non-state justice system in certain respects.125 The support given to the non-state system by the government is active though informal. The legal systems “reinforce each other’s legitimacy, as they are perceived as working together rather than in competition with each other.”126

124 Ibid at 207.
125 Ibid at 208.
126 Ibid at 209.
Under the fourth model, the state gives formal acknowledgement to the jurisdiction of the non-state justice system. This model involves the state giving limited legislative recognition to a non-state justice system, but no exclusive jurisdiction, no coercive powers and minimal financial support. Though there is some collaboration between the two systems, the state does not lend to the non-state its enforcement mechanisms.\textsuperscript{127}

Forsyth’s fifth model involves the state formally recognizing the legitimacy of the non-state system exercising \textit{exclusive} jurisdiction within a defined area or on a specific subject matter. Under this model, the non-state system has the right to enforce its judgements since it is independent of the state.\textsuperscript{128} The principal advantage of such a system is that it allows non-state systems to function without interference from the state system, which in fact might undermine their effectiveness or interfere with their integrity.\textsuperscript{129} In the sixth model, the state formally recognizes the adjudicative functions of the non-state and actually gives its coercive powers to the latter.\textsuperscript{130}

Forsyth’s last model involves incorporating the non-state justice system entirely into the state system.\textsuperscript{131} The significant advantage of this model is that it fosters cross-fertilization of ideas and procedures between the two.\textsuperscript{132} Non-state systems are made to conform to state constitutions.

\begin{footnotesize}
\begin{enumerate}
\item\textsuperscript{127} \textit{Ibid} at 210.
\item\textsuperscript{128} \textit{Ibid} at 214.
\item\textsuperscript{129} \textit{Ibid} at 216.
\item\textsuperscript{130} \textit{Ibid} at 217.
\item\textsuperscript{131} \textit{Ibid} at 222.
\item\textsuperscript{132} \textit{Ibid} at 223.
\end{enumerate}
\end{footnotesize}
1.6.1 Response to Scholarly Views

The delicate networks of possible interactions between the state and non-state actors described by these scholars exemplify the various degrees of communication involved in “doing” legal pluralism. It demonstrates that legal pluralism does not just consist of the presence of different legal orders co-existing within a given space; it consists of the interaction, collaboration, intercommunication, interdependence, reciprocity and competition that exist between and among various normative orders. It also demonstrates that law reforms involve more than just changing legal rules and that law reform also involves establishing and fostering relationships.

Woodman and Morse, unlike Forsyth, do not provide us with concrete examples of how the measures actually work. Also, stopping at the presentation of the interactional approaches fails to acknowledge those other realities which encompass the totality of law and of legal pluralism. Apart from acknowledging one “mutual adaptation” measure, that is, the importance of law makers in having appreciable knowledge of customary law, Woodman and Morse do not consider those circumstances under which the recommended relationships might work. The closest to an admission of the existence of such circumstances is their declaration that “[t]he next stage is a classification of the policies which may be manifested in these measures, along with a

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133 A number of legal pluralists have emphasized the intercommunication between legal systems. For instance, John Griffiths in his What Is Legal Pluralism discussed the “patterns of competition, interaction, negotiation, isolationism” among legal systems. J Griffiths, supra note 63 at 39.

134 This fact is also acknowledged by Forsyth, supra note 78 at 50.

135 These are measures that facilitate the working of the typologies. See Forsyth, Ibid at 225ff.

136 Morse & Woodman, supra note 101 at 21.
study of the relations of those policies to social, economic and political circumstances."¹³⁷ They leave this task for another day. I owe Woodman and Morse a measured evaluation of their work, as they indicated that they were merely trying to initiate the development of a general theory of legal pluralism and law reform, rather than to present a finished framework.¹³⁸

I argue that legal reforms do not occur just by implementing the typologies described. The current Intestate Succession Act of Ghana incorporates some of the demands of customary law of succession into the state law, but this has not accelerated compliance to an appreciable level in rural Ghana. Therefore, using a specific typology or combining typologies, I argue, will not result in workable reforms. I maintain that such reforms can only thrive in the right environment; in rural Ghana, the reforms will be successful if the right social, economic and political environment is created.

I give Forsyth credit for suggesting mutual adaptation strategies to facilitate the effective working of her proposed typologies. She recognizes that reforms do not occur just by interacting, and especially, on a constricted plane of legal rules. As part of her mutual adaptation measures, she suggests the adoption of a less adversarial approach to litigation since many aspects of customary justice systems are closer to the procedures and approaches of the inquisitorial system used in many civil law countries than the adversarial approach used in common law countries.¹³⁹ Furthermore, she advocates for the reform of the laws of evidence to make them less complex and more culturally

¹³⁷ Ibid at 21.
¹³⁸ Ibid at 7, 20-21.
¹³⁹ Forsyth, supra note 78 at 229.
relevant.\textsuperscript{140} On the other hand, she invites the customary justice system to introduce good management initiatives, such as record keeping in its justice system in order to ensure consistency in its decisions.\textsuperscript{141}

Even though she recognizes that other factors must exist for interactions to be possible, Forsyth’s suggestions do not reflect the fact that reforms are more likely to be effective if the economic, social and political playing fields of the legal systems are levelled. There must be a foundation upon which to build the mutual adaptation measures.

Moving away from legal pluralism as solely a theoretical construct, my dissertation builds on the works of Morse and Woodman and Forsyth. To this end, I seek to advance a comprehensive concept of legal pluralism, one that makes a distinction between legal rules and law, understands law to include its social dimension, and prioritizes the values inherent in law. In this dissertation, I begin to develop what I regard to be workable adaptation measures needed to facilitate reforms. I argue that if legal pluralism is understood in its entirety, it has the potential to offer a range of possible approaches and legal solutions to specific issues.\textsuperscript{142} Legal pluralism has been described and analyzed by many scholars, but as Forsyth argues, it can also be \textit{done} and this is what my research seeks to demonstrate. By suggesting that the state facilitates reforms to the political, socioeconomic and even psychological structures that frame the customary legal system, and to some extent, its own, I consider myself to be “doing” legal

\textsuperscript{140} \textit{Ibid} at 230.
\textsuperscript{141} \textit{Ibid}.
pluralism, as I am advocating a level playing field for all legal systems. As an analytical concept put into practice, legal pluralism may offer solutions to problems of legal reform.

I concede that my very pragmatic approach to legal pluralism and law reform in Ghana may appear to be inconsistent with prevailing views on legal pluralism. In fact, some may even find my approach as opposed to legal diversity and cultural identity. It is important to note that I am not suggesting that state law be the benchmark against which the legitimacy of other laws is determined. Nor do I agree that a single view of legality can be imposed on varied legal experiences. However, I maintain that it is possible to celebrate diversity by actively practicing and promoting inclusiveness and relationality between state and customary law.

1.7 METHODS AND SOURCES

I study and analyze the attempted reforms to the law of intestate succession, as an example of how customary law reforms have been done. Based on this example, I make recommendations about the effective process for law reform. My work analyzes documents from the following sources.

1.7.1 Historical Documents

I investigate the relevant historical records, using them primarily as a source of examples of policy designs. These include quasi-constitutional documents such as the Bond of 1844 by which it is believed that the natives of the Gold Coast gave the British the right to reform their laws. Discussing the Bond invites debate on whether the natives
of the Gold Coast surrendered their legal rights, and if so, how that impacted law reform, especially during the colonial era. Apart from being essential to understanding and judging past events, the historical documents offer me an opportunity to evaluate and synthesize evidence in order to establish facts as well as draw informed conclusions about past events which have shaped both state and Customary law and which can also provide useful insights into how they may be reconciled. In using these documents as a source of knowledge, I am mindful of the trap of drawing conclusions about history based entirely upon current concepts and understandings.

Additionally, I examine institutional records indicating the trajectory of reforms over time. These records give an insight into existing power relations and structures and how they play out in the interface between the state and customary legal systems. I examine official reports of parliamentary debates to reveal attitudes to customary law reform. These records are examined and interpreted to provide an understanding of the policy decisions about customary law reform, their limitations if any, and the lessons and opportunities they offer for novel approaches to and perspectives on customary law reform in Ghana. I also assess NGO reports, including a report submitted by Women in Law and Development (WiLDAF-Ghana) on the implementation of the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW). This report

sheds light on attitudes toward gender and customary law, but equally important, the nature of the pressure on government to change its unsatisfactory customary practices and laws that do not favour nuclear families. An investigative report published by the Commission on Human Rights and Administrative Justice (CHRAJ) is also examined as an example of the factors that are prerequisites to meaningful law reforms. This report is central to my thesis because it substantiates the findings on what is lacking in the reform of the intestate succession law and law reform strategies, generally.

1.7.2 Court Decisions

I examine both pre and post-colonial court cases, using them as a site for thinking about what judges say and how they say it. Most of the cases involve the application of the law of succession, particularly intestate succession. I also use the cases as illustrations of the kinds of customary practices that have been abolished. Additionally, I use them to demonstrate how law reform happens and the changes that have been made to the reformatory strategies over the years. The colonial and immediate post-colonial court decisions are examined to explain the legal processes and strategies, such as the repugnancy clause test, which were used by the State courts to almost extinguish customary law. I also examine contemporary court decisions to illustrate judicial attitudes. This will enable me, in formulating a new law reform model, to draw conclusions on whether or not the judiciary can reform laws in a manner that reflects the

\[^{145}\text{Courts Act, supra note 22 at s 54.}\]
lived experiences of rural dwellers. The cases will focus largely on testate and intestate succession.

1.7.3 Legislation

I explain and analyze past legislative efforts. I assess pieces of legislation such as the British Settlements Act of 1843\(^\text{146}\) and the Supreme Court Ordinance of 1876\(^\text{147}\). I use the laws as examples of policy designs. I also examine some of the more recent legislation, especially, the Intestate Succession Law of Ghana (PNDC Law 111)\(^\text{148}\). I pay attention to the specific practices that have been changed and the reasons offered for the change. It is important in attempting to reconcile customary law and state law that my research assesses the supposed harm that the state seeks or sought to cure. This highlights the areas of conflict and provides an avenue for reconciling differences. I pay particular attention to the language used in the explanatory memoranda\(^\text{149}\) so as to unearth preconceived notions, if any. This is helpful to the reconciliation process as my research examines the foundations of these notions and uses the insights gained to promote reconciliation. Focusing on the language of the legislation also helps to determine whether the legislature is likely to be able to reform customary law in a way that will not strip it of its essence.

\(^{146}\) The British Settlements Act of 1843.
\(^{147}\) Supreme Court Ordinance, \textit{supra} note 22.
\(^{148}\) PNDC Law 111, \textit{supra} note 25.
\(^{149}\) This usually accompanies an Act of Parliament and it outlines the reasons for the promulgation of the law.
1.7.4 Commentaries

I will evaluate various commentaries and scholarly articles. The works of S.K.B. Asante, Antony Allott, Nii Amaa Ollennu, J.M. Sarbah, Ekow Daniels and Roger Gocking are particularly helpful in providing the historical context to law reforms in Ghana. It is interesting to see through the works of these writers the trajectory of customary law and what is possible in reforms.

1.7.5 Ethnographic Research Data

I rely on ethnographic research data to confirm various facts such as the level of compliance with the Intestate Succession Law, (PNDC law 111) in rural Ghana. I also rely on these reports to furnish me with some of the reasons for the assessed compliance level. Victor Gedzi, in his research on the level of compliance with the Intestate Succession Law, surveyed 150 respondents and made some interesting observations and conclusions about rural attitudes towards reformed customary law.

Similarly, Edward Kutsoati and Randall Morck in their 2012 research paper, *Family Ties, Inheritance Rights, and Successful Poverty Alleviation*, surveyed 322 widows living in four villages in Southern Ghana. Their survey revealed, among other things, that many

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151 Gedzi, *supra* note 31 at 108.

152 *Ibid* at 112.

years after the passage of PNDC Law 111, traditional inheritance norms persist.\(^{154}\) I will rely on these works as reliable sources of the state of Intestate succession in rural Ghana. Though I am aware of the limitations of surveys, when the conclusions are consistent with those of other writers, I deem them reliable as primary sources. Also, in view of the fact that the studies are specific to certain rural communities, I realize that there is a limit to the generalizations I can make.

1.8 ORGANIZATION OF CHAPTERS

Chapter Two delves into Ghana’s colonial history with a focus on its legal history to show the historical conflicts between the state and the customary legal system. I will discuss the trajectory of customary law in Ghana, showing how it existed before colonialism, and the changes it underwent during the colonial era up to the immediate post-colonial period. I will emphasize what the lessons of the past suggest about what legal reforms are likely to work.

Chapter Three explores how the statutory and customary law of intestate succession currently functions in present day Ghana. I explain the old rules of succession in matrilineal societies and their impact on women and children especially. I detail the pressure that was exerted on the government to abolish the customary law rules and promulgate a law that supposedly reflected the changing face of the family in Ghana. Also, I evaluate the effectiveness of the law and explain the main sources of conflict between the state and customary legal systems in the area of intestate succession. This

\(^{154}\) *Ibid* at 3.
chapter is intended to open up debate about what the state’s vision for law reform should be.

Chapter Four presents the first part of my two-level strategy for the reform of the law of intestate succession in Ghana. It analyzes current reform efforts aimed at bridging the gap between state law and living customary law and then, proposes specific recommendations to the Intestate Succession Law. The chapter attempts to balance conflicting values that the state and customary legal systems hold in order to find common ground between them. Accordingly, it argues that the socioeconomic role played by the extended family in the life of a deceased relative should be considered by the courts in determining the portion of intestate property that should devolve to the extended family. The recommendations aim at giving the extended family a fair chance to make a case for what is arguably, its due share of intestate property.

Chapter Five discusses the second part of my proposed strategy for the effective reform of customary law by the state. The strategies proposed in this chapter are more general. The main argument made in this chapter is that effective law reform must recognize and incorporate aspects of the body of law it is trying to reform. This chapter takes the works of Miranda Forsyth, Gordon Woodman and Bradford Morse, explained above, a step further. This is done by analyzing law (and legal pluralism) to include its social, economic and political dimensions, and arguing that these dimensions must also be reformed for any proposed measures to work. Expanding the ambit of the concept provides an opportunity to objectively assess the nuances of law and the important demands of law reform.
The concluding chapter ties together and synthesizes the various issues discussed and arguments made in this dissertation. It discusses the lessons learned and the policy and theoretical implications of my proposals. It also suggests areas that need further research and highlights the limitations of my study.
Chapter 2: THE DEVELOPMENT OF CUSTOMARY LAW REFORM IN GHANA

2.1 INTRODUCTION

This chapter describes the political and legal history of Ghana to reveal how the current customary law regime developed. As earlier indicated, this dissertation centers on three types of law: state law, judicial customary law, and living customary law. These have emerged in competition with one another as a result of Ghana’s history. Customary law has undergone significant changes as a result of colonialism, western education systems and religion, socioeconomic advancements and judicial and legislative interventions. These interactions have given rise to a population that is arguably undecided about state law and judicial customary law, but more faithful to living customary law and its value system. This is a problem for law reform. Though this attitude toward state law is pervasive in most post-colonial states in Africa, it is underappreciated by urban-based technocrats and professional reformers. Also, the impact of reforms has been felt less in the rural areas than among urban dwellers. This is hardly surprising as most reforms to-date have not been based on existing traditional understandings about law.

In order to understand the current state of customary law in Ghana, its nature and place among Ghanaians, especially those in rural areas, and what is possible in reform, I will trace the development of customary law, emphasizing what the lessons of the past suggest about what is likely to work and what is likely to fail in legal reforms.
I will show how customary law existed before colonialism and the changes it underwent during the colonial era through the end of the twentieth century. With regard to precolonial customary law, the discussion will center on a description of the traditional legal order, showing the institutional structures through which customary law operated. It will also explore the sources of customary law in order to give deeper insight into the workings of the system. A discussion of the foregoing will help illuminate the status of customary law among the natives of the Gold Coast. This chapter will also pay particular attention to the operation of customary law during the colonial period, as Ghana’s current complex system of legal pluralism, which forms the basis of the problem that this paper seeks to address, can be attributed largely to her colonial past. Indeed, “colonialism shaped a framework for the politics of legal pluralism.” Lastly, I will analyze the relevant pieces of legislation, emphasizing how they have shaped customary law.

2.2 A DESCRIPTION OF THE PRECOLONIAL TRADITIONAL LEGAL ORDER

A description of customary law in precolonial Ghana is essential to understand its existing status and to understand why legal reforms today remain challenging. This account will show that customary law does not just represent a phase in the legal and political development of Ghana, but rather that it is an established and structured way of

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1 It is a fact that in Ghana and in most postcolonial states in Africa, legal pluralism existed before the advent of colonialism. Commenting on Nigeria, Abdulmumin Oba describes the nature of ethnic pluralism in precolonial Nigeria which had over 250 tribes. However, this pluralism was complicated by the introduction of British or foreign law. See, Abdulmumin Adebayo Oba, “The Sharia Court of Appeal in Northern Nigeria: The Continuing Crises of Jurisdiction” (2004) 52:4 Am J Comp L 859 at 859.

life which is grounded on certain core social beliefs and values. This discussion will focus on the legal roles of the major traditional functionaries like the chiefs. It will also give insight into the nature and objectives of the customary law system. An overall appreciation of how the system works and the values it prioritizes, while unraveling what is possible in reforms, will also shed light on my main argument that law reform methods must be adapted to the distinctive needs of the people.

Customary law existed in the Gold Coast before colonialism. It is well-documented that customary law governed almost exclusively the lives of the natives of the Gold Coast before the advent of colonialism in the beginning of the nineteenth century.³

John Mensah Sarbah, a distinguished Gold Coast lawyer and nationalist, writing in 1897 confirms that as far back as 1665 there was in the Gold Coast, “an organized society having kings, rulers, institutions, and a system of customary laws,”⁴ most of which he explains remained at the time he was writing. The period Sarbah refers to pre-dates even the unofficial colonization of the Gold Coast. Similarly, Joseph Casely-Hayford,⁵ a Gold Coast lawyer and politician, points out that “[u]nlike …other colonies of Great Britain…, on the Gold Coast, you had to deal with an aboriginal race with distinctive

⁵ Joseph Ephraim Casely-Hayford (1866-1930) was also a teacher and author. He served on the Gold Coast Legislative Council in 1916 and received an MBE in 1919.
To further buttress the integrity of the precolonial traditional governance system, Casely-Hayford insists that:

if you are free to admit it, you will see that you find here [in the Gold Coast] already a system of self-government as perfect and efficient as the most forward nations of the earth today can possibly conceive. A people who could, indigenously, and without a literature, evolve the orderly representative government which obtained in Ashanti and the Gold Coast before the advent of the foreign interloper, are a people to be respected and shown consideration when they proceed to discuss questions of self-government.

Pre-colonial Ghana consisted of both centralized and non-centralized states. My description of the customary legal system in precolonial Ghana focuses on the more centralized states of the Gold Coast, as the customary systems in these areas were relatively more developed, and could be said to represent the ideal of traditional government for the majority of Ghanaians. The Ashanti, Akim and Kwahu tribe were organized into highly centralized states under well-established political authorities. They were headed by Paramount chiefs or kings who were the executive heads, and were supported by councils of elders or councillors. These kings had executive, religious, legislative, judicial and military responsibilities.

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6 Joseph Ephraim Casely-Hayford, *Gold Coast Native Institutions* (London: Sweet & Maxwell, 1903) 10. (emphasis added) The established legal system that Casely-Hayford seems to describe is hardly surprising because among other reasons, the Gold Coast has a unique history of close interaction with other ‘kingdoms’ existing at the time. For instance, the Gold Coast had strong trade relations with some of the empires, especially in Northern Africa before actual ‘foreign’ contact. These trade relations continued into the eighteenth century; the Portuguese also participated in it after their arrival on the Gold Coast in 1471. See “Trade in Ghana,” online: <http://www.ghanadistricts.com/home/?_=49&sa=4768&ssa=773>.

7 Casely-Hayford, supra note 6 at 128-129.

8 These tribes are part of the Akan ethnic group, which is the largest ethnic group in modern day Ghana. It should be noted that there are different systems of customary law applicable to the various Akan communities in the Gold Coast (and present-day Ghana) even though there are striking similarities among them.

It has been noted that “[t]hese states had all the elements of an Austinian state - a political sovereign backed by well-organised law enforcement agencies and habitually obeyed by the citizenry.”\textsuperscript{10} Also recognised is the fact that “infractions of well-articulated legal norms attracted swift sanctions imposed by state officials.”\textsuperscript{11} Samuel Asante, a distinguished legal scholar, explains further that these tribes boasted an elaborate court system and that “[t]he concept of law in these states was, in substance, hardly distinguishable from that of a modern state.”\textsuperscript{12} In support of this assertion, he elaborates that “[t]he old western myth about the prevalence of a barbarous anarchy in Africa before the civilising mission by Europeans has long been exploded by more perceptive observers.”\textsuperscript{13} In this regard, he cites Hoebel as having written about the Ashantis thus:

> with the Ashanti of the Gold Coast of West Africa, we are confronted with an elaborate primitive social system that is sophisticated in political structure and to a certain degree in matter of law. Theirs is a massive military state with cities and towns that had all the elements of a nascent civilisation save writing ... In general terms their law was comparable to that of the ancient civilisation so ably analysed by Sir Henry Maine. ... The viability of the primitive Ashanti state provided the structure that made it possible for the Ashanti (with the Fante) to be the first native African state in modern times to emerge from colonial ‘tutelage’ into the fellowship of free nations.\textsuperscript{14}

Though Asante admits that most of the societies in the Northern territories of the Gold Coast were not as centralized as those in the southern part,\textsuperscript{15} he blames Western jurists and anthropologists for declaring these societies lawless, merely because of their

\begin{itemize}
  \item \textsuperscript{10} \textit{Ibid} at 83.
  \item \textsuperscript{11} \textit{Ibid}.
  \item \textsuperscript{12} \textit{Ibid}; see also Casely-Hayford, \textit{supra} note 6 at 128-129. But Cruickshank refers to accounts such as these as “exalted conceptions of their...kingly state and of the traditionary glory of their ancestors...” See Brodie Cruickshank, \textit{Eighteen Years on the Gold Coast Of Africa, Including An Account of The Native Tribes, and Their Intercourse With Europeans}. (London: Hurst and Blackett, 1853) 7.
  \item \textsuperscript{13} Asante, “Hundred Years” \textit{supra} note 9 at 83.
  \item \textsuperscript{14} Adamson Hoebel as cited in \textit{Ibid} at 83.
  \item \textsuperscript{15} Asante, “Hundred Years” \textit{Ibid} at 83.
\end{itemize}
perceived absence of an “equivalent to the Austinian sovereign.”\textsuperscript{16} He notes that such a declaration simply demonstrates a lack of appreciation of the dynamics of the traditional legal processes. Asante further elucidates that in precolonial Ghana, there were traditional functionaries learned in the law, who had special responsibilities in directing the proceedings in the chiefs’ courts and acted generally as legal experts. He explains that among the people of the Ashanti Kingdom, every Chief had a linguist who was the chief’s spokesperson as well as the ‘attorney-general’ of the state. These legal experts and the elderly in society helped to transmit customary law from one generation to the next.\textsuperscript{17}

Within the customary legal system, dispute settlement focused on conciliation and reconciliation. The goal of dispute settlement was not the punishment of murderers and other criminals, though admittedly, this was necessary for the maintenance of public peace, but the promotion of reconciliation and the facilitation of amicable dispute resolution. It has been observed that the most important function of the court was “the determination of differences between man and man, the redress of private wrongs, the regulation of the rights of persons and communities in the quiet enjoyment of their possessions. And most important of all, the adjustment from time to time of the machinery of the social organization so as to keep pace with the operations and requirements of the community in the process of its development.”\textsuperscript{18} It would seem that

\textsuperscript{16} Ibid at 84.
\textsuperscript{17} Ibid at 83.
\textsuperscript{18} JM Sarbah “Maclean and the Gold Coast Judicial Assessors” (1909-10) Journal of the African Society 349 at 357-358 [Sarbah, “Maclean”]; See also JH Driberg who explains that African law is actually based
the customary legal system acknowledged the importance of keeping laws at pace with socioeconomic developments.

The objectives of the customary law system were not necessarily different from those of the imported system. According to Cruickshank, the British legal system focused on “the equal distribution of justice to [the] rich and poor,” and the protection of rights. Court decisions were impartial and restitution was rigidly enforced when someone was wronged. He also indicates that the legal system punished acts of oppression, sought to maintain order and believed that the principles of justice had to be enforced for the general good of society.

The fundamental difference between the two systems would be that unlike the imported system, the customary law system determined rights and responsibilities largely on grounds of age, gender, kinship, and birth order. This determination and a number of other customary practices and procedures described would be challenged during the colonial era as backward, and attempts would be made to reform them.

2.3 SOURCES OF CUSTOMARY LAW

Knowledge of the sources of customary law is essential for a better understanding of why reforms and their implementation are onerous and why such reforms need to be
purpose and strategic. For instance, understanding the religious underpinnings of the law will promote debate on what the current vision for law reform should look like and the kinds of professionals or persons who must be entrusted with customary law reforms.

2.3.1 Custom

The main source of customary law in pre-colonial Ghana was custom, which was derived from the usages of the community. In many respects, the nature of native custom could be likened to the English common law, though unlike in the lawmaking process in the common law system, the traditional courts were not solely responsible for making law.24 Although the traditional courts made and applied law, they were for all intents and purposes simply offering a platform for the application of well-established community norms.25 These traditional courts were not “specialised organs for recording, systemising and shaping the growth of the law.”26

The judicial process was open to the whole community and most men and women participated in it. The elders of the various communities were regarded as the “natural repositories of the law,” which they handed down orally. It would seem that the absence of written records of custom did not affect the operations of the traditional courts. Traditional functionaries such as the linguists have also been interestingly described as

24 Asante, “Hundred Years”, supra note 9 at 84.
25 Ibid.
26 Ibid.
being “well-versed in forensic science and learned in the law.”²⁷ As has been indicated, they were the “legal experts” and responsible for the proceedings in the traditional courts.²⁸

2.3.2 Subsidiary Legislation

Another source of law was subsidiary legislation. This consisted of decrees issued by the various chiefs or kings and their councillors and promulgated by the “beating of the gong-gong.”²⁹ Essentially, the king made law with his council of elders and these laws were brought to the attention of the people by playing the gong-gong drum. It is important to note that the traditional legal system had a concept of notice, to ensure that new laws were communicated to the people. The traditional system was largely democratic; lawmaking was not entirely in the hands of the king and his elders, and public participation was a key feature of the system. As earlier noted, the law making process was open to the whole community who could at public meetings pass resolutions.³⁰

2.3.3 Religion

Yet another source of customary law was religion. Religion permeated and still permeates every aspect of native life. In fact, “[t]he dichotomy between private and public offences, the whole systems of land-ownership, the functions and status of

²⁷ Ibid.
²⁸ Ibid.
²⁹ This is a drum with a high pitch used for long distance communication in rural Ghana.
³⁰ Asante, “Hundred Years”, supra note 9 at 84.
political dignitaries all revolved around religious precepts. In short, law reflected indigenous cosmological ideas.” Commenting on the native belief in the supernatural, Casely-Hayford says that "[t]he native of the Gold Coast profoundly believes in the world of Spirits." He adds that the native earnestly believes that the “spirit of the departed relative hovers around him by day as well as by night and he has both the physical and the spiritual sense to perceive its presence.” He observes that “his [the Native’s] sense of smell detects the presence of a ghost in a house.”

The king or the Paramount chief, in the Native system, was the Spiritual head of his people. But the actual working of the system was in the hands of the priest through whom the dead communicated with their living relatives and vice versa. Writing about the Ashanti customary law, Rattray emphasizes the indisputable fact that “religion …is inseparable from law” and explains that religion is the foundation upon which the customary legal system is built. But with a deep belief in the spirit world came practices like human sacrifices. These practices became the focus of the Bond of 1844.

31 Ibid.
32 Casely-Hayford, supra note 6 at 3.
33 Ibid at 102.
34 Ibid.
36 The religious fervor of the Native is demonstrated especially in his or her relationship with his or her land, which is regarded as an ancestral heritage. Land in Ghana, according to traditional philosophy, is sacred. While some ethnic groups in northern Ghana regard the earth spirit as “the giver of life and the wherewithal to live,” the Ashantis regard it as “as a supernatural female force - the inexhaustible source of sustenance and the provider of man's most basic needs.” Land, it was believed, could not be individually owned as absolute ownership would deprive future generations of their share. Additionally, it was believed that it would sever the links between the ancestors, those living, unborn and future generations. SKB Asante, “Interests in Land in the Customary Law of Ghana-A New Appraisal” (1965) 74:5 Yale LJ 848 at 852 [Asante, “Interests in Land”].
2.3.4 Summary

This brief description of the precolonial legal order seeks to stress the fact that before colonialism, there was a structured traditional legal system which regulated the administration of justice, among other functions. The traditional system, it could be argued, had most of the qualities of a modern state. It should also be clear that the absence of a complicated dispute settlement system ensured closeness between the people, who actually participated in the law-making process, and the functionaries. Paying close attention to the role of religion in the customary legal setup is very important because it casts doubt on the appropriateness of reforming customary law simply by legislation. Customary law may have been unwritten, but this undoubtedly did not affect the administration of justice as understood by the natives. What actually affected the administration of justice, as defined by the imported legal system, was the nature of some traditional practices and the beliefs that engendered them. These practices and beliefs contravened the English notions of justice and morality, not only because they were brutal, but also because they were sometimes misunderstood. Traditional Court procedures were also regarded as backward, while the authority wielded by the chiefs was considered excessive and its exercise, undemocratic. These issues would be the focus of the customary law reforms during and after the colonial period.
2.4 DEVELOPMENT OF CUSTOMARY LAW DURING THE EARLY COLONIAL ERA: 1821-1944

With the beginning of colonialism came significant changes to the customary laws of the people of the Gold Coast. Customary law reform in the colonial era generally proceeded through legislative and judicial means. Though some of the reforms were the result of the perceived barbarity of the customary laws, others resulted from ignorance. For example, the movement from traditional communal ownership of land to the more westernized individual ownership during the colonial era was based on the view that the former inhibited individual enterprise.\[^{37}\] It is not surprising then that one is cautioned to “be gentle with custom, more particularly when …[one is] not fully acquainted with it [as] custom is the outcome of generations of experience under conditions which [one] can hardly fully appreciate, and as a working principle [one] shall do well to assume that no custom is entirely foolish or groundless.”\[^{38}\] Though the British were not the first Europeans\[^{39}\] to arrive on the Gold Coast, they were the ones who eventually colonized

\[^{37}\text{See Asante’s discussion on this issue. Asante, “Hundred Years”, supra note 9 at 88.}\]
\[^{39}\text{Though the Portuguese were the first Europeans to arrive on the Gold Coast in the fifteenth century, their focus was not to colonize the region, but to engage in the trade of gold, among other goods. To solidify their base on the Gold Coast and to ward of trading competitors, the Portuguese built castles and forts within which they observed their own laws. It is reported that by an agreement with the people of Elmina, where the São Jorge da Mina castle was built, the “right” of a Portuguese city was conferred on the castle. Subsequently, visitors who trooped to Elmina to trade with the Portuguese were also made subject to the Portuguese code of laws. The Portuguese were followed by the Dutch, the French, Swedes and English traders who fought their way to the Gold Coast to partake in the booming gold, ivory and slave trade. There seems, however, to be no evidence of any significant attempt to interfere with the existing laws of the Gold Coast by the Portuguese, Dutch and French. Kofi N Awoonor, Ghana: A Political History from Pre-European to Modern Times (Accra: Sedco and Woeli publishing, 1990) 52.}\]
the Gold Coast and introduced a new legal system based on English Common law, which gradually undermined customary law. According to Ekow Daniels, a Ghanaian legal scholar, “[t]here can be no doubt that British colonialism posed the first challenge to the existence of our customary laws.”

Colonialism in the Gold Coast began effectively in 1821. With the establishment of a petty claims court in Cape Coast, and the appointment of British merchants sitting as magistrates, incursions were made into African customary law. These courts tried both civil and criminal cases in and outside of the forts (among the locals) even though their jurisdiction was officially limited to the forts.

Colonial interference in the operation of customary law accelerated after 1828 with the appointment of George Maclean as governor of the Gold Coast. Like the former

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40 The English Common Law emerged in England in the Middle Ages and was applied in most British colonies the world over. In Ghana, by virtue of the Supreme Court Ordinance, the Common law of England became part of the laws of Ghana. The Gold Coast Supreme Court Ordinance (No. 4 of 1876) s.14 [Supreme Court Ordinance]; see also Nii Amaa Ollennu, “The Changing Law and Law Reform in Ghana” (1971) 15:2 J Afr L 132 at 158 [Ollennu, “Law Reform in Ghana”].
41 Daniels, “Development”, supra note 38 at 70.
42 Ekow Daniels explains that even though the Gold Coast was officially declared a colony in 1874, the dissolution of the African Company of Merchants which traded in Africa and the subsequent vesting of all their possessions including, the forts and castles in the British Crown marked the actual (though unofficial) colonization of the Gold Coast. The African Company of Merchants was established by the British and it monopolized access to the British market. See Daniels, “Development”, supra note 38 at 70-71; Ollennu also explains that it was in 1821 that the British crown, by virtue of the commonwealth Act (1 & 2 Geo. IV, c. 28) and Letters patent of 1821, officially took over the administration of the forts that had been acquired previously by the British merchants in the Gold Coast. See Nii Amaa Ollennu, The Law of Testate and Intestate Succession In Ghana (London: Sweet and Maxwell, 1966) 4 [Ollennu, “Succession”].
43 It should be noted that the British governor appointed to the Gold Coast was vested with judicial powers. Ollennu, “Succession” supra note 42 at 4.
44 In 1928, the British crown re-vested their authority in the Committee of Merchants, which in 1830 appointed George Maclean to serve as Governor of British forts on the Gold Coast.
administration, he exercised “irregular jurisdiction” outside the forts,\textsuperscript{45} reportedly at the invitation of the natives who voluntary submitted themselves to British equity.\textsuperscript{46} According to an English judicial assessor, Cruickshank, the natives were awed by British justice since their own ideas of justice “were not of that enlightened character,” but influenced by “the prejudices of a dark superstition and traditionary customs.”\textsuperscript{47}

Cruickshank described the natives as ignorant and absurdly superstitious and insisted that abstract reasoning with such people was just impossible and unlikely to achieve sustainable reforms.\textsuperscript{48} Describing what he thought was an effective law reform strategy in the Gold Coast between 1847 and 1853, Cruickshank asserted that reforming customary law required that the natives had “an implicit faith in the benevolent intention of the law giver, a consciousness of his general superiority, and of the advantages of obedience, occasional demonstrations of his power, and the certainty of power in withstanding it.” He described these as “essential to the abolition of a confirmed custom.”\textsuperscript{49} This strategy, in his opinion, worked because of what he perceived to be a

\textsuperscript{45}Maclean and the British merchants commissioned as magistrates, administered English law in the forts. The ‘irregular’ jurisdiction exercised outside of the forts was normalized in the subsequent series of bonds with the natives. For instance, the Bond of 1844 which was signed with some of the chiefs in Cape Coast. Antony Allott, “Native Tribunals in the Gold Coast 1844-1927: Prolegomena to a Study of Native Courts in Ghana” (1957) 1:3 J Afr L 163 at 163; Ollenu, “Succession”, supra note 42 at 5.

\textsuperscript{46}Ollenu, “Succession”, supra note 42 at 4; Allott, “Native Tribunals”, supra note 45 at 163; Jörg Fisch claims that ‘British law’ was not imposed on the natives and that it was rather claimed by them as it was a privilege to be allowed to live under European law. Jörg Fisch, “Law as a Means and as an End: Some Remarks on the Function of European and Non-European Law in the Process of European Expansion” in W. J. Mommsen & J. A. De Moor, eds, European Expansion And Law: The Encounter Of European And Indigenous Law In The 19th and 20th Century Africa And Asia (New York: Berg, 1992) 15 at 31.

\textsuperscript{47}See Cruickshank, supra note 12 at 7.

\textsuperscript{48}Ibid at 27.

\textsuperscript{49}Ibid at 27-28.
semblance of conformity to colonial laws by the natives, but I contend that the supposed conformity was, in fact, superficial.\textsuperscript{50}

The popularity of Maclean’s court, I believe, encouraged the British to promote their justice system as Governor Maclean took his powers a step further and sought to abolish the “more pernicious or barbarous practices of customary law.”\textsuperscript{51} With the additional goal of fulfilling the aims of the colonial enterprise, various pieces of legislation were passed to solidify British rule and law and to subjugate customary law to it. For instance, in 1843, the Foreign Jurisdiction Act regularized Maclean’s jurisdiction by officially appointing him judicial assessor and stipendiary magistrate\textsuperscript{52} with the authority to advise on issues of customary law.\textsuperscript{53} According to Cruickshank, Maclean was empowered to administer the whole country “\textit{not in accordance with the strict form of English law, but with a large discretionary power to assimilate native law and practice to English ideas of justice}.”\textsuperscript{54} To this end, Maclean opted to serve as judge

\textsuperscript{50} Cruickshank asserts that the native was submissive to Europeans in order a “to obtain some bribe or concession” and “to obtain new privileges”, \textit{Ibid} at 28-29.
\textsuperscript{51} Even though the main preoccupation of Maclean and his fellow magistrates was to protect commerce, the reform of customary law became very important to him. He took securities from certain principal chiefs to ensure his control over the administration of justice in the local communities. The chiefs were compelled to lodge in the Cape Coast castle a greater portion of their gold as guarantee of their good conduct and their willingness to appear before the governor if they were summoned. Cruickshank, \textit{Ibid} at 14; See also John Mensah Sarbah, \textit{Fanti National Constitution: A Short Treatise on the Constitution and Government of the Fanti, Ashanti, and Other Akan Tribes of West Africa} (London: William Clowes & Sons limited, 1906) 80 [Sarbah, “National Constitution”]. Maclean also stationed a soldier in each important district, thus ensuring that cases of oppression and injustice were brought to his notice, and that chiefs answered his summons to the Governor’s Court at the Cape Coast Castle. Allott, “Native Tribunals”, \textit{supra} note 45 at 164.
\textsuperscript{52} This was a salaried British magistrate who is a professional lawyer appointed under statutory provisions to act instead of or in cooperation with lay justices of the peace. Online: \texttt{<http://www.merriamwebster.com/dictionary/stipendiary%20magistrate>}. \textsuperscript{53} Sarbah “Maclean”, \textit{supra} note 18 at 350.
\textsuperscript{54} Cruickshank, \textit{supra} note 12 at 195. (Emphasis added). Allott disagrees with Cruickshank’s assessment and insists that Maclean was simply an advisor to the Native chiefs who had to decide cases in
instead of assessor on cases of customary law, with the local chiefs and elders rather serving as assessors.\textsuperscript{55}

It is interesting that Maclean would assume the role of making decisions on cases of customary law brought before the courts instead of simply assisting the chiefs to decide cases. This would substantiate my observation that there was no desire to guide the growth of customary law, but rather to alter it because customary law had to resemble English law if it was to be taken seriously. In fact, the task given to the colonial officers was to “\textit{observe, such of the local customs \ldots as may be compatible with the principles of the law of England}”.\textsuperscript{56}

The British colonists regarded customary law as backward and incapable of providing the legal and social framework that the colonialists considered essential for the execution of the colonial agenda. But what they failed to realize was that while it was fairly easy to integrate customary law into British colonial law, it was virtually impossible to assimilate native values and sensibilities into British ones. This agenda would

\textsuperscript{55} Ollenu, \textit{“Succession”}, supra note 42 at 7. This is also confirmed by a later assessor, Sir James Marshall, who described his function as follows: “As Judicial Assessor I was a sort of head chief and sat with the local chiefs in Court, hearing cases brought by natives among themselves.” Allott, \textit{“Native Tribunals”}, supra note 45 at 167.

\textsuperscript{56} On September, 3, 1844 an Order-in-Council was made requiring judicial authorities in the Gold Coast, to observe those local customs that were compatible with the British law. Order of September 3rd, 1884, (6 & 7 Vic., c 94) s 2 (Emphasis added).
inevitably create variations in customary law, some versions more in tune with British laws\textsuperscript{57} and values, and others, virtually untouched.

The British Settlements Act of 1843 would also significantly determine the fate of customary law;\textsuperscript{58} it continued the gradual assimilation of customary law, thus forcing it to fit itself into an unfamiliar frame.\textsuperscript{59} Perhaps it is an understatement to suggest that African customary law had to compete with the received law, as the British Foreign Jurisdiction Act stated in no uncertain terms the status of customary law vis-a-vis foreign law thus:

\begin{quote}
Whereas by treaty, capitulation, grant, usage, sufferance, and other lawful means Her Majesty hath power and jurisdiction within diverse countries and places out of Her Majesty's dominions: and Whereas doubts have arisen how far the exercise of such power and jurisdiction is controlled by and dependent on the laws and customs of this realm, and it is expedient that such doubts should be removed: Be it therefore enacted by the Queen's most excellent majesty . . . that it is and shall be lawful for her majesty to hold, exercise and enjoy any power or jurisdiction which her Majesty hath now or may anytime hereafter have in any country or place out of her Majesty's dominium's in the same and as ample a
\end{quote}

\textsuperscript{57} Jörg Fisch claims that colonial law was not necessarily English law, but “of European origin or inspired by such law…” Fisch, supra note 46 at 33; Robert Seidman also asserts that “English law may have nominally been the general law of the colonies; but it was a peculiar form of English Law that had excised from it corpus any of the democratic forms or economic protections.” He also described colonial law as a truncated version of English law unsuitable for the colonies. Robert Seidman, “The Reception of English Law in Colonial Africa Revisited” (1969) 2 East Afr L Rev 47 at 78; see also Bonny Ibhawoh who describes it as “lower standard of English law.” Bonny Ibhawoh, \textit{Imperialism and Human Rights: Colonial Discourses of Rights and Liberties in African History} (Albany: State University of New York Press, 2007) 65.

\textsuperscript{58} The British Settlements Act of 1843 s 2 established the Gold Coast as a distinct territory, and gave the British Crown legal authority to make orders-in-council, as well as establish courts for the purpose of preserving law and order and facilitating the administration of justice; The Act also empowered the Queen-in-council to confer criminal, civil, original or appellate jurisdiction on any court. (s 4).

\textsuperscript{59} Driberg, supra note 18 at 231. Driberg suggests that the distinction between criminal and civil law is meaningless to the native African. He is of the opinion that if the native Africans did make the distinction, they would speak of private and public law. Rattray has his doubts about the use of the expressions public and private law. See Rattray, supra note 35 at 286.
manner as if her Majesty had acquired such power and jurisdiction by the cession or conquest of territory.\textsuperscript{60}

This Act, therefore, put all doubts about the supremacy of foreign law over customary law to rest. Together with the British Foreign Jurisdiction Act, 1843, the British Settlements Act aided the extension of British hegemony and sovereignty by insisting that customary legal systems give way to the imported system and “exist at the pleasure of British legal concepts or principles.”\textsuperscript{61}

The Bond of 1844 appears to have officially sanctioned the reform of native custom. The famous Bond was signed by Commander Hill, the first governor of the Gold Coast, with the Fanti\textsuperscript{62} chiefs at Cape Coast.\textsuperscript{63} The Bond permitted the Queen’s judicial officers sitting with the chiefs to mould the customs of the country to the general principles of British law. Specifically, it states that:

1. Whereas power and jurisdiction have been exercised for and on behalf of Her Majesty the Queen of Great Britain and Ireland, within divers countries and places adjacent to Her Majesty’s forts and settlements on the Gold Coast, we, the chiefs of countries and places so referred to, adjacent to the said forts and settlements, do hereby acknowledge that power and jurisdiction, and declare that the first objects of law are the protection of individuals and of property.

\textsuperscript{60}See the preamble to the Foreign Jurisdiction Act, 1843. (Emphasis added). On the issue of\textit{ cession or conquest of territory}, Justice Marshall in the case of\textit{ Johnson v. M’Intosh}, 21 U.S. (8 Wheat.) 543 (1823) explains that a title obtained by conquest is acquired and maintained by force and that conquest actually does give legal title to land; also in the case of\textit{ United States v. Percheman} (1833) 32 U.S. at 86–87, Justice Marshall explains that “a cession of territory [which is usually by treaty] is never understood to be a cession of the property belonging to its inhabitants.”

\textsuperscript{61}Daniels, “Development”,\textit{ supra} note 38 at 72.

\textsuperscript{62}This is a subgroup of the Akan tribe. Most Fanti’s live in the Central Region of present-day Ghana.

\textsuperscript{63}This is a coastal town and the capital of the Central Region of present-day Ghana.
2. Human sacrifices and other barbarous customs, such as panyarring, are abominations and contrary to law.

3. Murders, robberies and other crimes and offences will be tried and inquired of before the Queen’s judicial officers and the chiefs of the district, moulding the customs of the country to the general principles of British law. Whether or not the Bond in fact gave the British legal authority to reform the customary laws of the Gold Coast is still debatable. Tracing the legal history of Ghana, Nii Amaa Ollennu explains how the Bond gave the colonialists legal authority to rule the people of the Gold Coast, and to modify their laws according to the principles of British law. He holds the view that the Bond laid the legal foundation for the subsequent colonization of the Gold Coast and also granted the British judicial powers. He however points out that “it never was in the contemplation of the Chiefs and people of the British West African countries that by accepting British rule, and by the establishment of courts to administer English law, they were abrogating their own laws and customs, and their right to exercise jurisdiction in accordance with the principles and practice of these laws and customs.” They may not have intended to abolish their laws and customs, but did they not appreciate the fact that they had given up their right to exclusive judicial authority? Sarbah seems to suggest that they were somewhat aware of this fact. He points out that the native rulers did not give exclusive judicial power to the British since criminal trials, as indicated in the Bond, were to be conducted before the Queen’s officers and the

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64 This is a practice whereby a creditor temporarily detains a person from the debtor’s household as collateral for the repayment of a debt.
65 The Bond of 1844 (6th March 1844) s 1-3.
chiefs. He adds that the chiefs "did not divest themselves of their judicial rights in civil or all criminal matters."^67

While it would be interesting to ascertain exactly how the chiefs understood the implications of the Bond, in the words of the Privy Council, “there is no presumption, that a native of Ashanti, who does not understand English, and cannot read or write, has appreciated the meaning and effect of an English legal instrument, because he is alleged to have set his mark to it by way of signature."^68 This view is supported by Kofi Awoonor who describes the Bond as a "monumental fraud" and contests its legality based on his contention that it was signed by chiefs who were not literate in the English language. Referring to the chiefs, he questions, “who translated the document for them?” and concludes that “it was the same British agents,"^69 casting doubt on the widely purported legality of the document. In spite of his concerns and accusations, he admits that the Bond provided the basis for the subsequent introduction of a legal system that disregarded African aspirations.^70 But Cruickshank, a British judicial assessor from 1847-1851, when describing the legal history of the Gold Coast makes a valid observation about the legal relationship between the Gold Coast and Britain during this period. He states that: “Indeed we had no legal jurisdiction in the country [Gold Coast] whatever. It had never been conquered or purchased by us, or ceded to us. The chiefs, it is true, had, on several occasions, sworn allegiance to the crown of Great

^68 Atta Kwamin v Kufuor, [1914] P.C. 261 The case involved a lease signed between a Gold Coast chief and an English gold prospector. All the Africans involved in the transaction were illiterate and did not understand the Memorandum of Agreement.
^69 Awoonor, supra note 39 at 80.
^70 Ibid at 83.
Britain; but by this act, they only meant the military service of vassals to a superior. Native laws and customs were never understood to be abrogated or affected by it.”\textsuperscript{71}

2.4.1 Relationship between the Customary and Imported Legal Systems

On the relationship between the customary and imported legal systems during this period, it should be pointed out that in spite of the growth of British law on the Gold Coast and its influence on Native law, it would seem that there was less friction between the two\textsuperscript{72} because their paths met mainly in the forts and less frequently in the protectorate where the chiefs’ courts dominated. This may be attributed to the fact that there was not much of a relationship between the Native and British courts. Essentially, the Native courts\textsuperscript{73} were allowed to operate as before, though certain criminal offences were dealt with by the British courts\textsuperscript{74} and civil appeals were referred to the judicial assessor. Also, judicial assessors did not have the right to supervise the Native courts or interfere in local government duties.\textsuperscript{75} The minimal-interventionist policy may have accounted for the rather peaceful coexistence of two seemingly opposed systems.

Furthermore, the supposed harmony between the two systems may also be attributed partly to the nature of the customary law reform strategy that Maclean adopted. In a glowing tribute to Maclean, Sarbah, describes him as having “a most abiding belief in

\textsuperscript{71} Cruickshank, supra note 12 at 186-187.
\textsuperscript{72} Describing the operations of the Native’s Courts from 1843 to 1850, Allott records that during this period there was no conflict between the customary and British legal system. Allott “Native Tribunals”, supra note 45 at 165.
\textsuperscript{73} These courts were otherwise called African, customary, or local courts); primarily, these courts administered African customary law. Allott, “Native Tribunals”, supra note 45 at 163.
\textsuperscript{74} These were the “superior courts of a territory;” they administered mostly English law. Ibid.
\textsuperscript{75} Ibid at 165.
the overruling direction of Providence.” Sarbah reports that Maclean constantly explained his decisions thus: “I assure you this gives me no uneasiness at all; sooner or later the truth will appear, and God would never permit such wickedness to prosper.” It would appear that Maclean was able to touch on a subject, religion or belief in the supernatural, which the natives were all too familiar with. The African, having been described as incurably and notoriously religious, might well have connected with a reform strategy that hinged on such beliefs.

Additionally, Maclean made efforts to educate the natives on the value of the imported norms and practices. He spoke with the chiefs and made them understand the basis of his decisions. Also, the reforms took into consideration changes for which the Gold Coast was developmentally ready. The reform strategies adopted during the colonial period will be discussed further in this chapter.

2.5 FORMAL RECOGNITION OF CUSTOMARY LAW: SUPREME COURT ORDINANCE, 1876

Having laid the requisite legal and political foundation, the British declared the Gold Coast a Colony with its own executive and legislative council on 24 July 1874. The

76 Sarbah “Maclean”, supra note 18 at 351.
77 Ibid.
78 Ibid at 356. Cruickshank also seems to think that abstract reasoning with the natives was impossible given that, in his view, they were ignorant and superstitious. See Cruickshank, supra note 12 at 27-28.
Supreme Court Ordinance of 1876 created a national judicial system and marked the beginning of Ghana’s modern legal system. ⁷⁹

Among many other changes, the 1876 Ordinance reformed the application and administration of customary law. The Ordinance sought to make provision for the administration of justice and gave statutory backing to the application of customary law, which was now to be administered in the higher levels of the judicial hierarchy. Though customary law was formally recognized, its application was to be done by British or British trained judges whose philosophical orientation was analytical positivism and who regarded the rather severe doctrine of stare decisis as central to the judicial process. ⁸⁰

By this Ordinance, the common law, the doctrines of equity and the statutes of general application which were in force in England on July, 24, 1874, were made part of the laws of the Gold Coast. ⁸¹ Inevitably, the common law and the rules of equity “were set as the standard of justice and righteousness” ⁸² by which the appropriateness of the customary law was to be judged. Of particular interest is section 19 which states that:

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⁷⁹ An earlier Supreme Court Ordinance of 1853 was limited to coastal settlements and gave no prominence to customary law. No wonder it has been described as “an attempt to marginalize indigenous jurisprudence.” Trevor R Getz, Slavery and Reform in West Africa: Toward Emancipation in Nineteenth-Century Senegal and the Gold Coast (Ohio University Press, 2004) 104. The jurisdiction of the Supreme Court of her Majesty’s forts and settlements was limited to coastal settlements. The court had both civil and criminal jurisdiction and the local chiefs who attempted to adjudicate the more serious criminal offences found themselves in breach of the jurisdiction of the British. Such attempts often resulted in hostile relations with the Governor. Roger Gocking explains that in 1865-66, King Aggrey of Cape Coast attempted to imprison some of his subjects without first appealing to the British courts and this resulted in hostilities with the then Governor of the Gold Coast. See Roger Gocking, “British Justice and the Native tribunals of the southern Gold Coast Colony” (1993) 34 J Afr Hist 93 at 96 [Gocking “British Justice”].

⁸⁰ Asante, “Interests in Land”, supra note 36 at 848-849.

⁸¹ Supreme Court Ordinance, supra note 40 at s 14.

⁸² Ollenu, “Law Reform in Ghana”, supra note 40 at 158.
Nothing in this Ordinance shall deprive the Courts of the right to observe and enforce the observance, or shall deprive any person of the benefit, of any native law or custom existing in the Gold Coast, such law or custom not being repugnant to natural justice, equity, and good conscience, nor incompatible either directly or by necessary implication with any ordinance for the time being in force. Such laws and customs shall be deemed applicable in causes and matters where the parties thereto are natives, and particularly, but without derogating from their application in other cases, in causes and matters relating to the tenure and transfer of real and personal property, and to inheritance and testamentary dispositions, and also in causes and matters between natives and non-natives where it may appear to the Court that substantial injustice would be done to either party by a strict adherence to the rules of English law. No party shall be entitled to claim the benefit of any local law or custom, if it shall appear either from express contract or from the nature of the transactions out of which any suit or question may have arisen, that such party agreed that his obligations in connection with such transactions should be regulated exclusively by English law: and in cases where no express rule is applicable to any matter in controversy, the Court shall be governed by the principles of justice, equity, and good conscience.  

It should be emphasized that throughout the colonial era, customary law was allowed to exist simultaneously with the introduced British law; what the Supreme Court Ordinance of 1876 did was to define its scope of application, specifically, the subjects and the conditions of its application by the courts.

Section 19 suggests that the application of customary law by the courts was dependent on proof that the said law or custom actually existed in a given locality. The court held in Welbeck v. Brown that a legal rule had to be proven to have existed from “a time to which the memory of man runneth not to the contrary.” Not only was this task virtually impossible, it also suggested that customary law was unchanging. Native law was

83 Supreme Court Ordinance, supra note 40 at s19.
85 Welbeck v. Brown, (1884) Sar FCL 185 at 188. This decision was frequently criticised and was thus not followed.
foreign law in its own land and had to be proved in the Courts as the British and British-trained judges were unfamiliar with its rules. The often-quoted case of *Angu v. Attah* explains:

> As is the case with all customary law, it has to be proved in the first instance by calling witnesses acquainted with the native customs until the particular customs have, by frequent proof in the courts, become so notorious that the courts will take judicial notice of them.  

Furthermore, customary law was to be applied in matters between the natives of the Gold Coast, though it could be extended to a matter between a native and a non-native where the courts found it just to do so. The specific circumstances under which this power could be exercised are not stated, thus allowing the courts wide discretion. Customary law would not be applied in a case, if the courts determined by the wording or the nature of the agreement between the feuding parties that they intended their transaction to be regulated exclusively by English Law. It would seem that there was a presumption in favor of the initial application of customary law until the courts found a reason not to apply it.

Also striking is the limited sphere of operation of customary law. Without stating expressly that customary law was to be applicable only in matters involving land, inheritance and marriage, customary law governed these areas.

Additionally, British and British trained judges were to ascertain the existing rules of customary law on issues brought before them; however, they were not mandated to

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apply the ascertained rules to the case if the customary law rule violated the principles of natural justice, good conscience and equity. The notorious repugnancy test clause, with no defined method of application, was a license to simply change customs that the courts just did not like, though it did not authorise the substitution of an ‘invented’ customary law. As Asante would say, “official contempt for ‘native’ law was hardly veiled.”

Furthermore, where the courts found no express rules on a given subject before them, they were to be guided by the principles of natural justice, good conscience and equity. It is important to note that by this provision, both British and British trained judges were inevitably to apply British notions of justice which impliedly, were universal and embodied a higher set of values. According to Elias, the demands of the repugnancy clause were in reality not easy to implement because of the absence of a clear criterion to determine the prescribed standard. He says that this was especially difficult for the colonial judge who was torn between applying the standard of purely English morals or the local sentiments of right and wrong, which were sometimes at variance with the former. Apparently, the standard was “impliedly incorporated in English law or…at least revealed to the eyes of the English judges.” Nevertheless, Allott explains that the repugnancy clause was only used to a limited degree to strike down certain features of

88 Asante, “Hundred Years”, supra note 9 at 86.
the customary laws which were felt to be unjust. The clause was finally removed from the law in 1960 because it was considered “unfitting to the dignity of the indigenous laws of the people of Ghana.”

Perhaps, a more serious and related problem was the legal uncertainty that this provision posed for not only the judges, but even more importantly, the litigants whose conduct, according to principles of natural justice, must be based on prior knowledge and understanding of the existing customary law. Nonetheless, judicial decisions were made based on the prescribed ‘external’ principles and through these decisions, cultural convictions about inferiority and superiority were produced. These convictions had force and power because they were institutionally backed; the colonial judges spoke with the authority of the colonial state. The perceived inferiority of customary law aided the gradual detachment of the burgeoning educated middle-class Ghanaians from their native law and its institutions. These elite had misgivings about native law; they feared

92 The repugnancy clause had hitherto been re-enacted as s 87(1) of the Courts Ordinance, Cap 4 (1951 Rev.) which provided for the continued application of laws were not “repugnant to natural justice, equity and good conscious” and not “incompatible either directly or by necessary implication with any ordinance for the time being in force.” This provision was replaced by the choice of law rules in the Courts Act, 1960 (C.A. 9), s. 66, but this Act did not re-enact the repugnancy clause. Presently, customary law will not be applied if it is injurious to the health and wellbeing of a person. See Article 39(2) of the Constitution of the Fourth Republic of Ghana, 1992 (Laws of Ghana (Rev. Ed. 2004), Vol I, 140).
94 Sally Engle Merry, "Courts as Performances: Domestic Violence Hearings in A Hawai’i Family Court" in M. Lazarus-Black and S. F. Hirsch, eds, Contested States: Law Hegemony and Resistance (New York: Routledge, 1994) 35 at 36 [Merry, "Courts as Performances"]. Merry argues that court hearings serve as critical sites for the creation and imposition of cultural meanings.
95 Sally Engle Merry, Colonizing Hawai’i: The Cultural Power of Law (Princeton: Princeton University Press, 2000) at 265-266 [Merry, "Colonizing Hawai’i"].
that it would undermine their credibility as educated and enlightened Africans, a problem which would later on affect the reform of customary law.

Equally significant is the fact that under section 19, a customary law rule was inapplicable to any case brought before a court if the rule contravened existing or future colonial legislation. This undermined customary law given that English law and customary law were two very different systems of law, and were based on different values, principles and societal expectations; it is to be expected that their rules on the same issue may differ. Daniels suggests “it is difficult to understand the import of this provision in view of the fact that the regime of the operation of each law was meant to be generally separate.” On this particular requirement, Allott also submits that:

On the whole, it is unreasonable to invalidate a rule of customary law because it is inconsistent with an introduced rule of English law. Unless the English law was introduced specifically so as to remedy some defect in the customary law, then the customary law should prevail (or at least be administered without modification).

The Supreme Court Ordinance had important implications for the application and development of customary law in the Gold Coast. Though it formally recognized its existence and application, thereby formally endorsing legal pluralism in the Gold Coast, 

96 Kwabena Ofori-Attah explains that such traditional customs and practices were regarded as uncivilized. In some elite organizations, it was unacceptable to speak any language apart from English. These elite adopted Christian names and dressed like Europeans. Kwabena Dei Ofori-Attah, “Urbanization and schooling in Africa: Trends, Issues, and challenges from Ghana during the colonial era” in William T. Pink, George W. Noblit, eds, International Handbook on Urban Education (Dordrecht: Springer, 2008) 23 at 43-45; Mensah Sarbah also explains that respect for native law and custom degenerated to the point where in 1889 the Mfantsi Amanbuhu Fekuw, i.e. the Fanti National Political Society (later known as the Aborigines Rights Protection Society) was forced to adopt various measures to “stimulate pride among Africans in their culture.” Sarbah, “National Constitution”, supra note 51 at xii.
97 Daniels, “Development”, supra note 38 at 75.
it put customary law beneath English law and the principles of equity, natural justice and good conscience. However, in spite of the far reaching implications of the 1876 Ordinance for the administration of customary law, it had no real effect on the lives of the vast majority of Gold Coasters who did not have access to the formal courts. Their version of customary law did not have to compete with other laws. However, the Africans who interacted more with the received law, gradually fell for its appeal. The spread of Christianity and education, and increased access to economic opportunities accounted for the growing acceptance of the received law and resistance to certain customary law practices.

2.6 FACTORS THAT ACCOUNTED FOR CHANGES TO THE CUSTOMARY LAW

2.6.1 Christianity

The growth of Christianity was one of the factors that accounted for the dissatisfaction with customary law. The nineteenth century saw intense propagation of the gospel throughout the Gold Coast. Missionaries established schools and those who graduated from these schools acquired notions of justice and fairness that were largely different from those endorsed by customary law or African traditional religion. Those

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99 JF Ade Ajayi, “The Continuity of African Institutions under Colonialism” in T. O. Ranger, ed, Emerging Themes of African History (East Africa Pub, House, 1968) 189 at 195. Ajayi indicates that Christianity “shook the people’s confidence in the old gods and the old social order” and “encouraged a scientific disbelief in the direct intervention of supernatural forces in human society.” These factors, he claims “destroyed faith in the traditional sanctions that held society together.”

100 Ofori-Attah, supra note 96 at 31-32.

101 Ibid at 43-44.
who converted to Christianity were encouraged to turn their backs on their past which included their culture.\textsuperscript{102}

Having acquired different perspectives on certain customary law practices, the leadership of the various churches saw the need to sidestep traditional norms and introduce their own. For instance, the Basel mission,\textsuperscript{103} which had profound influence in the Greater Accra and Eastern regions of modern day Ghana, introduced ‘Christian marriage,’ which is a union of a man and a woman, unlike the customary marriage which could be polygamous. Also, unlike the customary law system where intestate property belonged to the extended family, the Mission introduced inheritance rules which were aimed at ensuring that the nuclear family enjoyed a reasonable portion of the intestate’s estate.\textsuperscript{104} Such reforms influenced other religious denominations who went as far as to suggest the extension of benefits offered to widows and children of those married under the 1884 Marriage Ordinance to their counterparts married under the customary law system.\textsuperscript{105} Even traditional councils\textsuperscript{106} and individual chiefs passed

\textsuperscript{102} Jones Darkwa Amanor, “Pentecostalism in Ghana: An African Reformation”, online: Cyber Journal for Pentecostal Charismatic Research 1 at 1 \textless www.pctii.org/cyberj/cyberj13/amanor.html\textgreater . (This article is not dated).

\textsuperscript{103} The early Basel Missionaries laid the foundation for the Presbyterian Church of Ghana. The said churches evolved a system of succession, the rules of which were applicable to the estates of members of the Church who died intestate, subject in most cases to the family members’ acceptance of the Church system.

\textsuperscript{104} Gocking, “British Justice”, supra note 79 at 106-7.

\textsuperscript{105} The Superintendent Minister of the African Methodist Episcopal Zion Mission at Winneba (This is a coastal town in the Central Region of present-day Ghana) in 1933, made a proposal to the Central Province Provincial Council Meeting of chiefs in Saltpond, (This is also a coastal town in the Central Region of Ghana.) to extend the benefits offered to widows and children of those married under the 1884 Marriage Ordinance to their counterparts married under the customary law system. This proposal was not accepted as it did not seem to have the support of the majority. \textit{Ibid} at 107-108.

\textsuperscript{106} The Akim Abuakwa State Council proposed that a third of the estate of a person who died intestate be shared equally among his children. Roger Gocking explains that this was proposed as a bylaw. It had no
resolutions for the equitable sharing of intestate property to take care of widows and children,\textsuperscript{107} in line with the Christian prescription for intestate succession.\textsuperscript{108} It must be noted, however, that such extra-legal systems developed by the churches for the distribution of intestate property were not considered part of the laws of the Gold Coast; the rules were therefore not enforceable in a court of law.\textsuperscript{109}

Juristic developments in the Gold Coast also influenced attitudes toward customary law. Asante explains that the evolution of western land interests such as the common law freehold, with its focus on exclusive ownership, seemed attractive to the natives and challenged the dominion of the Stool.\textsuperscript{110} This greatly undermined the power and authority of the chiefs and inevitably, the integrity of customary law.

2.6.2 Creolization, Economic Progress and Education

Another factor that influenced attitudes towards African customary law was creolization. I use the expression to describe the phenomenon of Africans emulating the European way of life. I refer not only to the euro Africans, but also to the Africans who were

\textsuperscript{107} The Winneba State Council is reported to have passed a resolution recommending that one-third of the property of a male intestate should go to his wife and children. \textit{Ibid.}

\textsuperscript{108} See the case of Frempoma \& ors v Buxton, cited in Ollenu, “Succession”, \textit{supra} note 42 at 148.

\textsuperscript{109} \textit{Akyeampong v Marshall}, as reported in AKP Kludze, \textit{Modern Law of Succession in Ghana} (Dordrecht: Foris Publications, 1988) at 278-279.

\textsuperscript{110} According to Asante, a stranger-purchaser had absolute ownership of the land in the proprietary sense and unlike the native usufructuary interest holder, the stranger could alienate the land without reference to any authority. He was also not mandated to render any services to the grantor-stool after payment of the purchase price. Asante suggests that the quantum of the interest which passed to the stranger was considerably more substantial than the classical usufruct which traditional law accorded to the individual. Asante, “Interests in Land” \textit{supra} note 36 at 861.
economically well off, largely educated and who copied the European way of life.\textsuperscript{111} Creolization started initially in Cape Coast, the administrative center of the British settlements on the Gold Coast. Cape Coast was as a “small westernized society along the Coast of West Africa”\textsuperscript{112} that became partially creolized through its contact with European traders in the seventeenth century.\textsuperscript{113} The people, who did not refer to themselves as creoles, served as intermediaries between the Europeans and their African counterparts by spreading Christianity and Western civilization to their “less fortunate” fellow Africans who lived inland.\textsuperscript{114} They also acted as agents between the African producers’ stationed inland and the European trading interests on the coast.\textsuperscript{115} It is alleged that these elite, described as standing “between two radically different worlds” believed that “they were destined to replace Europeans as the main agents of “civilization.”\textsuperscript{116}

The people of Cape Coast were generally well educated. For instance, Philip Quarcoe (1741-1816), the first African to be educated in Oxford University, returned to the Gold Coast and is reported to have “imparted light to his countrymen” and also established a school.\textsuperscript{117} The number of educated people increased greatly during the colonial era due to the establishment of a number of elementary and secondary schools by missionaries.

\textsuperscript{111} Roger Gocking explains that by the mid-nineteenth century the term creole was used to describe all those who emulated the creole way of life. Roger Gocking, “Creole Society and the Revival of Traditional Culture in Cape Coast during the Colonial Period” (1984) 17:4 Int J Afr Hist Stud 601 at 602 [Gocking, “Creole Society”].
\textsuperscript{112} Ibid at 601.
\textsuperscript{113} Ibid at 602.
\textsuperscript{114} Ibid.
\textsuperscript{115} Ibid.
\textsuperscript{116} Ibid at 602, 605.
With a large pool of beneficiaries of ‘western’ education, it was not unexpected that there would be demands for changes to the customary law.

Most of these ‘creoles’ were economically well-off and thereby largely self-reliant. They openly castigated certain customary law practices, especially in the area of succession to property. For instance, the Gold Coast Independent, a newspaper founded in 1918 by Hon. Dr. Frederick Victor Nanka-Bruce, a Gold Coast doctor, politician and member of the Legislative Council, reported in 1932 that the matrilineal family was “a primitive idea which every people at one stage of their evolution must pass through.”\textsuperscript{118} This feeling was widespread among the elite. It would seem that because they were property owners, the elite were reluctant to have their extended family members inherit their self-acquired property on their death intestate.

In fact, with the elite’s western education and changed values, the customary system did not seem to meet their needs. Gocking suggests, “Conflict between the matrilineage and the nuclear family was an inevitable by-product of the success of Westernization, particularly in the coastal towns of the Gold Coast.”\textsuperscript{119}

There were also economic benefits in shunning the traditional system.\textsuperscript{120} Embracing western notions such as the concept of the nuclear family meant that they could renege on their responsibilities towards their extended family members.\textsuperscript{121} Inevitably, in 1946,  

\begin{itemize}
  \item \textsuperscript{119} \textit{Ibid} at 604.
  \item \textsuperscript{120} \textit{Ibid}.
  \item \textsuperscript{121} Ajayi, supra note 99 at 196.
\end{itemize}
changing conceptions about the constitution of the traditional customary family began to show up in the courts. In one such case, the judge emphasized the effect of western ideas on the development of customary law. He quotes Sarbah as having said that “with the exception of the coast[al] towns where there is much contact with European ideas, self-acquired or private property in its strict sense does not exist over the whole country.”

The educated Africans formed groups such as the Gold Coast Youth Conference established in 1929 by J.B. Danquah, a statesman, lawyer and historian, and J.E. Casely-Hayford, a lawyer and politician. It is said to have been limited to the “quality’ elite among the youth who were to become the next generation of middle-class urban professionals.” In 1938, the Conference published its views on how intestate property had to be divided, while religious leaders and the press, among other organized groups, also advocated for the extension of rights enjoyed by women married under the ordinance to those married under customary law.

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122 In the case of Araba Busumafie v Hydecooper, the deceased died intestate. She was survived by her sister, the 1st defendant. She also left behind a self-acquired house. As the rightful heir of the deceased, the 1st defendant took possession of the house. After many years, she sold it to the 2nd defendant. The plaintiff-appellant, cousin of the 1st defendant and the deceased, sued to set aside the sale of the house to the 2nd defendant. The Plaintiff argued that the house in question was family property and therefore, her consent was a necessary condition for the validity of the sale. The Court held that the house passed as ancestral property to the 1st defendant, who could sell the property without reference to anyone since she (the 1st defendant) had no children or sisters. Araba Busumafie v Hydecooper (1946) DC (Land) ’38-’47, 245. This was an appeal from the Native Court of Cape Coast.

123 Per Jackson J, ibid at 246.


The educated elite greatly influenced the judicial system. For instance, they replaced the chiefs, sub-chiefs, linguists and councillors in the native courts set up by the Governor who was empowered under the Native Courts (Colony) Ordinance\textsuperscript{126} to appoint those he deemed fit to manage the courts. More educated people were thus appointed to such advisory positions and with the change in membership, there were bound to be changes in the customary law that these courts applied. It must be mentioned that together with the Native Authority (Colony) Ordinance,\textsuperscript{127} the Native Courts (Colony) Ordinance actually marked the end of ‘tribal’ administration of customary law.

As the substantive customary law was being changed by statute and by the socioeconomic changes in the Gold Coast, the legal procedure in the native courts was also affected.

Allott explains:

These institutions [native courts] were left in place, and originally were given considerable freedom to function in a traditional way. Reforms however were gradually introduced, which led to the native courts being progressively anglicised in their jurisdiction, their personnel, and their procedure. Clerks to keep the records; court records reporting the decisions and their reasons in some instances; the use of written process to summon parties and witnesses; the training of court members; the eventual selection of court members on the basis of their qualifications rather than their customary position - all these changes were gradually introduced in most of the British territories. The end result was that by the closing period of British colonial rule, the so-called native courts - now

\textsuperscript{126} Native Courts (Colony) Ordinance 1944 (No. 22).
\textsuperscript{127} Native Authority (Colony) Ordinance 1944 (No. 21).
often renamed local courts, African courts, or customary courts - bore little resemblance to the traditional institutions which they gradually replaced.\textsuperscript{128}

The new court personnel, educated natives, were trained as court registrars and as the main legal advisors to chiefs\textsuperscript{129} as the uneducated struggled with the technical rules regulating appeals to the higher courts. Commenting on the role of these registrars with respect to customary law reforms, Gocking suggests “[t]he complex interplay between customary law and the English common law on the colony often required that they act as law “modifiers” and “amenders’ of customary law.”\textsuperscript{130} But one wonders where the allegiance of these registrars lay. Was it to their employers who had elevated them to a position which was previously the exclusive preserve of certain members of society, or to the values underlying native custom? Was it to their changed notions of individual rights and liberties, or to the traditional communal need for the maintenance of social equilibrium? It did not take long to find out. Gocking indicates that one of the more important registrars, W.Z. Coker, allowed couples living in concubinage to bring their cases before the courts as though they were married. This, Gocking explains, was hitherto not possible and he accuses Coker of “sanctioning an alternative to native marriage.”\textsuperscript{131}

With these changes in outlook, taste and perception resulting from western education, creolization, economic progress and Christianity, agitation for changes to the customary law persisted.

\textsuperscript{128} Allott, “African Customary Law”, supra note 87 at 58.
\textsuperscript{129} They were trained in evidence giving, English composition, police duties, native history, law and custom. Gocking, “British Justice”, supra note 79 at 105.
\textsuperscript{130} \textit{Ibid} at 105-106.
\textsuperscript{131} \textit{Ibid.}
2.7 WHAT IS MISSING IN LAW REFORM? LESSONS OF THE PAST AND REFORM IMPLICATIONS

In spite of the factors discussed above, customary law still thrived. Perhaps the changes brought about by colonialism did not change the consciousness of some in the Gold Coast.

In fact, even the most creolized resorted to local customs when necessary. It was not uncommon for these elite to turn to traditional customs and institutions to challenge British policy. 132 They also resorted to the judicial assessor’s court, which determined cases involving customary law, to hide from their creditors by having family members assert that their mortgaged property belonged to the traditional family. 133 The extended family, apart from being a reliable source of labor for their rich, educated relatives, also made family land, property and gold dust available to them. 134 By so doing, the elite were endorsing the very institutions which by virtue of their social standing they were expected to reject. "Such involvement with the traditional order presented this elite with a continuing dilemma that they were never able to resolve satisfactorily." 135 It should also be recognized that the process of creolization was never really complete in the relevant towns of the Gold Coast. 136 For instance, the creoles were never geographically cut off from their homes and were not completely cut off from native society. In these partially creolized communities, matrilineal ties persisted and

133 Roger Gocking, “Competing Systems of Inheritance”, supra note 118 at 606.
134 Ibid.
136 Ibid at 605.
influenced succession to property. "In general, traditional culture maintained a powerful re-assimilative appeal."137

Though Christianity played a pivotal role in attempting to change the consciousness of the Africans, it has been argued that the God that Christianity presented to the Africans was alien to African culture, and the lack of effort to “build bridges between [Christianity] and the cultural milieu of the people it sought to win over” resulted in the production of Christians who were so “only in the mind but not in the heart.”138 The legal reforms made to the customary law were therefore not likely to be fully embraced.

Many reasons account for the problems encountered by the colonial state in the middle of the 19th century in its attempt to reform customary law, especially in the countryside. Even though the relationship between the British and customary legal system, as earlier indicated, was amicable up until the middle of the 19th century, it changed soon thereafter.139 This was primarily the result of the ideological differences between the two systems which manifested themselves in many ways. These differences affected the manner of customary law reform. I will briefly discuss some of my observations about the reform methods that were used.

First, the Supreme Court Ordinance of 1876 abolished the position of Judicial Assessor. Based on the evidence, it seems as though abolition may have affected the guided development and reform of customary law. It appears that the assessors were in very

137 Ibid.
138 Amanor, supra note 102.
139 Allott “Native Tribunals”, supra note 45 at 169.
close contact\textsuperscript{140} with the natives and had a reasonably thorough appreciation of customary law and of the natives themselves and thus, may have conducted reforms in a manner that took the particular needs and personalities of the natives into consideration. For instance, David Patrick Chalmers, a judicial assessor in the Gold Coast from 1869 to 1872 is said to have “addressed himself to the study of the customary laws,”\textsuperscript{141} in order to help promote the administration of justice in the Gold Coast. He is also reported to have been the “first judicial assessor to record systematically Native law and customs enunciated by the Chiefs.”\textsuperscript{142} With this knowledge, one gets the impression that the judicial assessors were able to ensure that the reforms sat well with traditional views and understandings. I maintain that the first step to customary law reforms is an exhaustive understanding of the system and the world view that informs it and it seems that some of the judicial assessors were committed to doing so. This may explain why the relationship between the imported and customary legal systems seemed relatively good during the period when assessors were still part of the legal system.

Commenting on the role of Sir James Marshall who served as judicial assessor from 1872-74, Ollennu credits him with having “helped to mould the customary law and to regularize customary procedure in the local court; particularly...in bringing out the best in the customary law of the various tribes among whom he worked, in providing a

\textsuperscript{140} Sarbah “Maclean”, \textit{supra} note 18 at 351, 355-356. Sarbah describes some of the assessors as being in very close contact with the natives.

\textsuperscript{141} \textit{Ibid} at 355.

\textsuperscript{142} \textit{Ibid.}
written record of the customary law, and in disseminating it.”\(^{143}\) I find it very important that Marshall, unlike even modern day judicial officers, did not pretend that the whole country was guided by just one system of customary law. He acknowledged the fact that the various tribes had different versions of customary law. Marshall could only have achieved this because he was knowledgeable about the law and the local people. A better insight into Marshall’s reform strategy can be gleaned from his counsel:

The result of my own experience is that the way to rule and improve these Native populations is to take them as we find them, making use of what we believe to be good and harmless, whilst repressing what is cruel and unjust. And one who treats these Natives with consideration and, as far as possible, with respect for the beliefs, law, and customs which are theirs, and which have come down to them from their forefathers, soon finds that he gains an influence among them which nothing else will bring him. Instead of starting a steam-engine and smashing the cart, get into the cart and ride with the Native driver, and do what you can to make him improve his cart, so that in time he may prefer the engine and take to it. Even in their fetish superstitions there is no use treating them as folly. Fetishism is a tremendous power throughout Africa, and cannot be put down by ridicule and contempt.\(^{144}\)

His insight into African customary law and how to change it is remarkable and profound. He highlights that there is something useful and important about customary law. This will be discussed further in Chapter Five, as part of my attempt at re-conceptualizing legal pluralism. He also stresses the importance of customary law and fetishism to the natives, hence cautioning against treating them with contempt. Marshall knew that the natives had to be treated with respect in order to gain their trust. He may not have genuinely respected the customary system, but at least, he understood it and this helped him to succeed at his job. Most satisfying is Marshall’s analogy of the cart and

\(^{143}\) Ollennu, “Succession”, supra note 42 at 7.
\(^{144}\) Sir James Marshall as quoted in Sarbah “Maclean”, supra note 18 at 355-356.
steam engine and accordingly, his realization that economic and social developments are critical to legal reforms, though the results from such developments may take a while to be realized.

Brodie Cruickshank was also a judicial assessor who stayed in the Gold Coast for 18 years and was in close contact with the native peoples. His knowledge of customary law has been described as “extensive and exact.”\footnote{Sarbah, \textit{Ibid} at 351.} Interestingly, he spoke Fanti, a local dialect, fluently.\footnote{\textit{Ibid}.} This is significant as knowing the local dialect, presumably, helped him to bond with the locals. It may also have helped him to understand the culture since knowledge of a language, its proverbs, sayings, and folklore, potentially, opens doors to the people’s minds. He seemed to have understood native law to the extent that he suggested that its reform required the “watchful and resolute caution of a skillful reformer.”\footnote{Cruickshank, \textit{supra} note 12 at 24.} In my opinion, Cruickshank’s pronouncements about the natives and customary law, discussed earlier,\footnote{\textit{Ibid} at 7.} depict his bias against both, but he understood that reforming customary law was more than correcting technical errors.

Arguably, the most celebrated British judicial assessor, George Maclean, was also fairly fluent in Fanti,\footnote{Sarbah, “Maclean”, \textit{supra} note 18 at 351.} suggesting that legal reforms require a more intimate relationship with the recipient community. He held this position from 1843 to 1847. Maclean has been praised by Gold Coasters for disseminating justice throughout the country. In fact, Allott explains that most of the assessors, including Marshall, Chalmers, and surprisingly,
Cruickshank, “expressed their favourable opinion of native customary law as the appropriate legal system for natives.”\textsuperscript{150} With the judicial assessors, the middlemen between the native and English courts gone, the natives were faced with the harsh reality of dealing with a foreign and often incomprehensible system of justice.\textsuperscript{151}

The second reason that accounts for the problems encountered by the colonial state in its attempt to reform customary law was that the reforms did not seem to take into consideration the changes that the natives could relate to. This, I contend, is very important, as reforms must respect sociocultural realities as well as the economic environment. John Mensah Sarbah explains that during the administration of the Merchant Government in 1829, the court, which involved the chiefs, “admirably” took into consideration “the extent of the reformation which the country was at any time capable of bearing,” in introducing customary law reforms.\textsuperscript{152} If this was possible then, it should be now.

Thirdly, the earlier reforms involved educating and negotiating with the locals. Sarbah explains that Maclean turned the courtroom into a “lecture room” where he virtually reasoned with the chiefs and the natives who gathered daily in the courtroom.\textsuperscript{153} He

\textsuperscript{150} Allott, “Native Tribunals”, supra note 45 at 167, Fn 2.
\textsuperscript{151} In spite of the role played by the judicial assessors, Mensah Sarbah reports that by 1869, there was “too much law and too little equity” in the judicial assessors court. He indicates that the object of appointing the judicial assessor seems to have been forgotten. See Sarbah, “National Constitution”, supra note 51 at 105.
\textsuperscript{152} These courts were located in the forts and castles. JM Sarbah, “Maclean”, supra note 18 at 356-367.
\textsuperscript{153} Ibid at 356; but Cruickshank described the natives as ignorant and absurdly superstitious and explained that abstract reasoning with such people was just impossible. He asserts that reforming customary law required “an implicit faith in the benevolent intention of the law giver, a consciousness of his general superiority, and of the advantages of obedience, occasional demonstrations of his power, and
says that these courtrooms were always crowded with listeners from the remotest communities. At such sessions, he explains further, the “principles of justice were disseminated” and the chiefs learnt that injustice done in their judicial capacities could affect them individually. Law reform involves negotiations, but it seems that after Maclean’s tenure, it became a lost art; its reformist impact was lost on reformers.

Fourthly, reforms must be done by qualified people who know what is at stake. Sarbah explains that in the past, a person could only be appointed a Magistrate after a year of local residence in the Gold Coast. He clarifies that the purpose of the residency requirement was to acquire “local experience” and laments its abolition. This is important to my argument that customary law reforms cannot take place in a vacuum; they must take account of the local environment. Sarbah compares the crop of judicial officers in the Gold Coast to the British Bench at the time and commends the latter for its “training and experience.” He describes the members of the British Bench as being “[s]prung from the people” and praises them for being “familiar at first hand with the social conditions, speaking the common language and in close touch more or less with current events.” He accuses District Commissioners in the Gold Coast of having “no experience whatever of anything worth mentioning” and “having to pick up knowledge

the certainty of power in withstanding it, are essential to the abolition of a confirmed custom.” See Cruickshank, supra note 12 at 27-28.
155 Ibid at 356-367.
156 These courts were located in the forts and castles. Ibid at 357.
157 Ibid at 356.
158 Ibid at 356-357.
159 Ibid.
160 Ibid.
from the Court Registrar or law practitioners as [they] go along.”¹⁶¹ In his opinion, the absence of these qualities on the Gold Coast Bench explains its inability to make meaningful reforms, thus stressing the fact that the competence of those who reform the law matters.

Furthermore, Sarbah was not mistaken about the enormity of the task of the reformer. To him, customary law reform was not simply the correction of a “technical error;”¹⁶² it constituted a fundamental change to the way of life of the natives. Consequently, he suggested that it be done by judicial officers who had “highly trained faculties,” were “intelligent,” “open-minded” and “ready to receive new light.”¹⁶³ They required the capacity to “look[] at law in its widest aspects,”¹⁶⁴ and never lose sight of its aims. Such officers, he said, had to be “associated with intelligent Chiefs and other fit persons disinterestedly giving him information of present-day condition of things.”¹⁶⁵ With such cooperation, Sarbah was confident that a judicial officer “could effect by way of reforms what the [then] Legislative Council… [could not] even attempt.”¹⁶⁶ Sarbah understood that reforms did not have to be left entirely to lawyers; judicial officers had to work with chiefs who were custodians of customary law and other professionals.

Additionally, the conflict between the two systems emerged from the fact that the British colonial officers disrespected the customary law system. Sarbah does not fail to touch

¹⁶¹ Ibid.
¹⁶² Lawrence Friedman, “Is there a Modern Legal Culture?” (1994) 7 Ratio Juris 118 at 119.
¹⁶³ Sarbah, “Maclean”, supra note 18 at 359.
¹⁶⁴ Ibid.
¹⁶⁵ Ibid.
¹⁶⁶ Ibid.
on the obvious disregard for the native courts and rulers. Firstly, he chides the judges and magistrates for failing to pay heed to the Supreme Court Ordinance,\textsuperscript{167} which empowered them to try cases with the assistance of native chiefs or experts in native law.\textsuperscript{168} He questions the inability of the courts to take advantage of the flexibility of customary law to reform it to suit the needs of the people. He also queries the failure of the courts to refer matters to the native courts even when it is so prescribed by law and criticizes the tendency to focus solely on the application of English law. Sarbah knew that customary law reforms could not take place without the cooperation of the traditional rulers. Just as changes to state law involve government functionaries, changes to native law must involve the traditional government.

Lastly, it would seem that reforms will be successful if the natives themselves, as well as customary law, are respected. Sarbah describes the failure of the “English courts to explain and interpret their decisions to the litigants, as a “very grave mistake.”\textsuperscript{169} He says that “[w]hether parties are represented by Counsel or not, understand English perfectly or otherwise, a Judge's decision, except in petty cases, ought to be interpreted so as to be understood [sic], of the people within hearing, for only by such means can the public… find out the best way to apply its principles to the various needs of to-day.” I contend that while this approach would have helped the natives to relate to the foreign law, it would also have enabled them to realize that the foreign law, like their customary law, can also protect their rights and liberties. Moreover, the state could have

\textsuperscript{167} Supreme Court Ordinance, \textit{supra} note 40 at s 81.
\textsuperscript{168} Sarbah “Maclean”, \textit{supra} note 18 at 356-357.
\textsuperscript{169} \textit{Ibid} at 358.
succeeded in developing a truly unified court system. The incomprehensibility of the courts’ decisions to the natives may have held them back from accessing the introduced court system. No wonder the courts soon grew apart from the people. With the introduction of the English legal principle of stare decisis, customary law progressively moved away from representing the practices of the people to being what the judges thought the law ought to be. Thus, there developed in Ghana what is termed judicial customary law, the law recognized by the courts, and which differs from the customary law actually practiced by the people whose law it was.

2.8 CUSTOMARY LAW IN THE POST-COLONIAL ERA: ASCERTAINMENT AND APPLICATION, 1957-2015

Ghana currently has a unified court system. There are no native or local courts in Ghana. According to Sally Merry, “contemporary elites in Africa see modernization and nation-building as requiring a unified legal system, often drawing on models of European law.” Post-colonial Ghana did not alter the course of the customary law reforms already underway in the country. Ghana was “hardly in a ‘post-colonial’ moment. The official apparatus might have been removed, but the political, economic and cultural links established by the colonial domination still remain[ed] with some

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alterations.” In 1958, the Local Courts Act abolished the native courts and created a number of local courts to replace them.

The process of absorbing the native courts into the bequeathed British court system was fairly smooth, as the modifications made to the courts throughout the colonial period had prepared them for their eventual integration. Lay magistrates and not Chiefs presided over these local courts. It is worth remarking that the local courts, by law, could try civil cases and only three specific customary offences, namely, putting a person into fetish, recklessly, unlawfully or frivolously swearing an oath; and possessing any poisonous, noxious or offensive thing with intent to use such thing to endanger or destroy human life or to hurt, aggrieve or annoy any person. These offences were later abolished by the Courts Decree of 1966, which also abolished the local courts. The current Criminal Offences Act of Ghana does not recognize

172 The Local Courts Act, 1958 (no.23) s.4. The process of eliminating the native courts or tribunals was actually meant to be gradual. The first local courts were not established until December 1959. These local courts were later abolished by the Courts Decree in 1966. William Burnett Harvey, “The Evolution of Ghana Law since Independence” (1962) 27:4 Law & Contemp Probs 581 at 585 [Harvey, “The Evolution of Ghana”].
173 These are ordinary people with no legal qualifications that make decisions in magistrate courts.
175 This may be described as an appeal to a fetish, [a spirit that has a permanent presence in its shrine] to bring judgment upon another. This is usually done through a fetish priest, the medium and mouthpiece of the fetish. Judgment may take the form of death. See the case of Obeng Alias Nkobiahene v Dzaba, [1976] 1 GLR 172-177, where the plaintiff “swore a fetish” on the defendant.
176 Courts Act, supra note 172 at s 10-11 & the First Schedule, s 9.
177 The Courts Decree, 1966 (NLCD 84). The customary offences indicated, which were spelt out in previous enactments, ibid, were left out of NLCD 84. Furthermore, none of the courts set up in NLCD 84 were entrusted with jurisdiction to try any specified customary offence.
customary law offences.\textsuperscript{178} In theory, the customary perception of wrong and right has been eroded and the imported notions are now applied nationally. On this point, Allott conjectures thus:

> It would be interesting to debate the issue of unified criminal law, since much of criminal law expresses a social and moral attitude. Whose moral and social attitude is to be expressed by the criminal law, and what concessions, if any, should be made to differences of opinion or even of behaviour? The answer generally is that it is the law-making elite which imposes its view of these matters, though when, say, the offence of bigamy is abolished as being inconsistent with African acceptance of polygamous unions, we can say that the elite view coincides with the popular view.\textsuperscript{179}

Nonetheless, it has been accurately observed that “we all know that day in and day out, that in the self-created tribunals of our traditional rulers and elders, the citizens are punished for various customary offences.”\textsuperscript{180} Indeed, state law or state recognized customary law has little impact in the countryside and state law cannot compel action\textsuperscript{181} unless it embraces local circumstances and traditional understandings of law.

Focusing on two important pieces of legislation, I will briefly describe the current regulatory framework for the assimilation, declaration, ascertainment and application of customary law.

\textsuperscript{179} Allott, “African Customary Law”, \textit{supra} note 87 at 65; however, Ollennu says that the Natives themselves realized that the English criminal justice system was better than theirs because it was more effective in dealing with crimes. Ollennu, “English Law”, \textit{supra} note 66 at 25.
While in theory, the various Houses of Chiefs are tasked with the responsibility of assimilating the customary law into the common law, subject to Executive approval,\(^{182}\) in practice, this seems to have been almost exclusively a judicial function. The National House of Chiefs may on its own initiative or upon the request of the Minister or a joint committee comprising representatives of all the Regional Houses of Chiefs, consider whether a rule of customary law should be assimilated by the common law. If the proposal is favorably considered, a draft declaration prepared by the National House shall be forwarded to the Minister who shall give effect to it by legislative instrument, after consultations with the Attorney General.\(^{183}\)

Where a rule is declared to be assimilated it becomes part of the common law and is referred to as “a common law rule of customary origin.”\(^{184}\) But what is the rationale for categorizing the resulting rule as either common law or customary law as the resulting rule would derive its force from the enacting statute or legislative instrument?\(^{185}\) It has been argued that “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

\(^{182}\) Chieftaincy Act, 2008, *supra* note 174 at s 54(1); Chieftaincy Act, 1971 (Act 370) s 45 [Chieftaincy Act, 1971].

\(^{183}\) Chieftaincy Act, 2008, *supra* note 174 at s 54(1-3). A similar provision was found the in Chieftaincy Act, 1971, *supra* note 176 at s 45. The main difference being that the draft declaration prepared by the National House of Chiefs under the 1971 Act had to be submitted to the President who would consult with the Chief Justice to make a legislative instrument giving effect to the recommendations of the National House of Chiefs. The National House of Chiefs is an ‘association of chiefs’ with defined adjudicatory and advisory functions. Its functions include: (a) advising a person or an authority charged with a responsibility under the Constitution or any other law for any matter related to or affecting chieftaincy; (b) undertaking the progressive study, interpretation and codification of the customary law with a view to evolving, in appropriate cases, a unified system of rules of customary law; (c) undertaking an evaluation of traditional custom and usage with a view to eliminating custom and usage that is outmoded and socially harmful. Chieftaincy Act, *supra* note 174 at ss 1 & 3.


\(^{185}\) Harvey, “The Evolution of Ghana” *supra* note 172 at 596.
application and their future treatment in the legal order are also basically changed.”¹⁸⁶ The alteration of a rule of customary law follows a similar procedure.¹⁸⁷

On the issue of declaring customary law, the current Chieftaincy Act states that where a Traditional Council considers the customary law which is in force within its area to be uncertain or desires to have it modified or assimilated by the common law, the Council shall make representations on the matter to the House of Chiefs in the region.¹⁸⁸ The House of Chiefs on its own initiative or at the request of the traditional council shall draft a declaration of what the customary law is for a given area and forward this to the National House of Chiefs.¹⁸⁹ The National House shall in turn submit it with the necessary modifications, if any, to the Minister of State who may give effect to the law by legislative instrument.¹⁹⁰ Thus, even though the various houses of chiefs have legally prescribed roles to play in the reform of customary law, these roles, as earlier mentioned, are circumscribed.

Regarding the ascertainment of customary law, prior to the promulgation of the 1960 Courts Act, customary law was a question of fact and had to be proved by evidence; it is now a question of law.¹⁹¹ As a question of law, the courts¹⁹² are no longer mandated to

¹⁸⁶ William Burnett Harvey, “A Value Analysis of Ghanaian Legal Development since Independence,” online: (1964) Articles by Maurer Faculty Paper 1188 <www.repository.law.indiana.edu/facpub/1188> [Harvey, “A Value Analysis”].
¹⁸⁷ Chieftaincy Act, 2008, supra note 174 at 52(1-4).
¹⁸⁸ Ibid at s 50.
¹⁸⁹ Ibid at s 51(1) (2).
¹⁹⁰ Ibid at s 51(4).
ascertain the customary law, but to treat it like other law. In the resolution of disputes, the courts are permitted to consult reported cases, textbooks and other appropriate sources if there is any doubt about the content of a rule of customary law. This is not mandatory. The courts may also invite written opinions from a House of Chiefs, Divisional or Traditional Councils or experts in customary law. As a result of these permissive provisions, the Ghanaian judiciary rarely resorts to expert witnesses to help ascertain the applicable customary law in cases before them. Customary law is determined according to judicial precepts and the related doctrines of equity, natural justice and good conscience.

Nevertheless, by virtue of the doctrine of precedent, which underpins the borrowed English judicial system, and which is inevitably applicable to customary law, the growth of customary law has been suppressed. The content of what is described as judicial customary law is at variance with practiced customary law. However, the binding force of customary law depends on its acceptance and use by the people whose lives it regulates. Once it is settled by a judicial decision, its binding force now depends on courts, and it ceases to be customary law.\textsuperscript{193}

The choice of law rules embodied in the Courts Act\textsuperscript{194} determine how customary law should be applied vis-à-vis common law rules. The Act states that in determining the


\textsuperscript{194} The Courts Act, 1993, supra note 191 at s 54.
law applicable to an issue arising out of any transaction or situation, the courts shall apply the law intended by the parties to the transaction.\(^{195}\) If it is with regard to the devolution of a person’s estate, the courts shall apply their personal law in the absence of any intention to the contrary.\(^{196}\) Where the parties are subject to the same personal law, the courts shall apply that law, but where they are subject to different personal laws, the court shall apply the relevant rules of their different systems of personal law to achieve a result that conforms to natural justice, equity and good conscience.\(^{197}\)

In spite of these provisions, under the Courts Act,\(^{198}\) unless a party to the suit makes a case for the application of customary law, the court is not obliged to find a reason to do so, thereby annulling the presumption in favor of the application of customary law to cases where the parties are natives. Harvey suggests that the Courts Act “improves the status of the common law… in its competition with indigenous legal norms.”\(^{199}\) The fact of the matter is that even though the Courts Act makes room for the application of customary law in cases brought before the courts,\(^{200}\) neither litigants nor the courts take advantage of this provision; the application of English common law is almost automatic.

In spite of the effect of judicial and legislative changes, and other factors such as western education systems, religion, changed notions about property rights, the

\(^{195}\) Ibid.
\(^{196}\) Ibid.
\(^{197}\) Ibid.
\(^{198}\) Ibid at s 54 (1).
\(^{199}\) Harvey, “The Evolution of Ghana”, supra note 172 at 600.
\(^{200}\) Courts Act, 1993, supra note 191 at s 54 (1) (5) & (6).
evolution of the concept of family and socio-economic advancement, living customary law continue to exist. According to Woodman:

> It would be difficult to find any individual, in the past or today, who has abandoned the entirety of their indigenous culture and replaced it by taking the imported culture as the sole guide to their social relations. Those who, often skilfully and with conviction, adopted the imported culture for some parts of their lives, continued to live other parts according to one or another of the indigenous cultures.201

2.9 CONCLUSION

This chapter has attempted to show the historical evolution of the reform of customary law generally. It described the precolonial customary law governance institutions as well as the key features of the law in order to show how the system works and clarify the values it prioritizes. It has highlighted the changes that customary law underwent during the colonial era and what remains of it. The colonial period challenged the customary law system, which largely existed at the pleasure of the colonialists, especially in the major towns where British contact was greater. This chapter examined how creolization and economic progress, education and Christianity aided in seemingly detaching the natives from their traditional system. However, these influences were stronger in the cities than in the countryside and, in fact, even in these cities the influences were not strong enough to eradicate customary law. The realization that these changes hardly affected practiced customary law merged into a discussion about the strengths and

limitations of the law reform methods adopted during the colonial and immediate post-independence period. Those entrusted with the responsibility of reforming customary law must be capable of the task; they must appreciate the demands of legal reforms. They should withhold their prejudices and respect the customary system, have in-depth knowledge about the people and their law. They must also recognize that reforms must consider what the country is capable of accommodating, given its particular circumstances; they should have a clear vision of what they seek to achieve and be realistic as to what is possible in reform. This chapter also explored the post-colonial legislative efforts at managing the development of customary law. The next chapter examines how the law of intestate succession currently functions in Ghana. It discusses what has been reformed, what necessitated the reforms, whether the lessons from the past were heeded and whether the reforms have been effective, especially in the countryside.
Chapter 3: THE INTESTATE SUCCESSION LAW, PRESSURES FOR CHANGE AND THE IMPACT OF REFORMS

3.1 INTRODUCTION

This chapter explores how the statutory and customary law of intestate succession currently functions in Ghana. My intention is to use the law of succession as the focal point from which to assess the effectiveness of customary law reform strategies. To provide the needed context, I provide a brief overview of the general principles of the customary law of intestate succession as they pertained to matrilineal communities in Ghana before the Intestate Succession Law, PNDC Law 111, 1985. This is followed by a discussion of the limitations and the alleged abuses that characterized the matrilineal system of inheritance, resulting in immense pressure on the government to reform the system, to bring it into conformity with international standards.

This discussion is followed by a description of the relevant provisions of PNDC Law 111, which is applicable to all Ghanaians irrespective of their religious affiliation and traditional family membership.¹ My intention is to provide enough information about the law to show how it works, and also enhance the ensuing discussion about the current advocacy activities in Ghana. I then analyze the continued importance of customary law, both judicial and practiced, to the statutory law of succession. My goal is to provide a balanced view of how the law actually functions; showing the gap between the two strands helps to focus attention on the shortcomings of customary law reform methods.

¹ See the memorandum to the Intestate Succession Act, 1985 (PNDC Law 111) (Laws of Ghana (Rev. Ed. 2004), Vol V, 1951) [PNDC Law 111].
I then discuss the limitations of PNDC Law 111 and the recent NGO-led demands for further reforms in the law of succession. I examine existing research data to show the extremely low level of compliance with PNDC Law 111, especially in rural Ghana, and explore the main factors that account for this. Finally, I evaluate the effectiveness of the current reform efforts aimed at bridging the gap between judicial and practiced customary law. This sets the tone for the introduction of alternative reform strategies in the next chapter.

3.2 THE PRE-1985 STATUS QUO: THE DEVELOPMENT OF CUSTOMARY LAW THROUGH THE LAW OF SUCCESSION TO PROPERTY

This discussion focuses on the law applicable to intestate succession in matrilineal societies in Ghana. I do not discuss the customary law of succession as it relates to patrilineal communities or to Muslims. I have chosen to concentrate on the matrilineal system because its rules on inheritance are arguably more controversial. Before the enactment of PNDC Law 111, various rules and laws governed the distribution of intestate property. The applicable rules depended on whether the deceased was married under the Marriage Ordinance or was a Muslim whose marriage was registered under the Marriage of Mohammedan’s Ordinance (Cap 129), or whether the

2 The Marriage Ordinance, 1884 (Cap. 127) Laws of the Gold Coast, (1951. Rev.) [Marriage Ordinance]. This Ordinance provided rules for the devolution of intestate property and these were applicable to those who married under the Ordinance as well as their children, even if their children were not married under the same. This Ordinance is currently cited as Marriages Act, 1884 – 1985 (CAP. 127), Part III (Laws of Ghana (Rev. Ed. 2004), Vol V, 3801).

3 On the death intestate of a Muslim, the devolution of his property was determined or regulated by Islamic Law. The succession provisions in the Marriage of Mohammedans Ordinance were applicable only if (1) the deceased was of the Muslim faith, (2) married according to Mohammedan rites, and (3) the marriage was registered as required by the Ordinance. See, Marriage of Mohammedans Ordinance (Cap
deceased belonged to a matrilineal or patrilineal family system. Each of these systems of distribution had deficiencies.  

3.2.1 The Traditional Family

The customary law of inheritance is founded on the rules of matrilineal or patrilineal descent. Consequently, all analysis of the law of succession begins with the traditional family. Depending on an individual’s parentage and the particular ethnic group to which one belongs, one is deemed to be from either the matrilineal and patrilineal family systems. Every individual is believed to belong to one or the other. The matrilineal family is deemed to consist of all persons, male or female, who are in the direct female line of descent from a common female ancestor. As earlier stated, the patrilineal system is not the focus of this research.

The traditional family is the most important social institution and political unit in the customary legal system because it determines access to political and socioeconomic rights. For instance, it determines the enjoyment of rights in land and movable


8 To date, the traditional family continues to determine the political and socio-economic rights that one may be entitled to under customary law and even statute law. Under the current Intestate Succession Act,
property, succession to property and hereditary offices. The family includes dead relatives, and individual wrongdoings affect the whole family unit which must of necessity atone for the 'sins' of the individual. Responsibilities towards the family are legal and moral.

Generally, under customary law, upon one's death intestate, one's self-acquired property becomes family property. In matrilineal communities, the devolution of property upon death intestate is determined by tracing descent through one's mother. While the wider or maximal lineage has a right of control over the estate, the right of immediate enjoyment is the prerogative of the sub-lineage. Even though the entire

...portion of the intestate property devolves according to the rules of the customary law of inheritance and the beneficiaries of this portion are determined by the rules of customary law.

Awoonor explains that the fulfillment of responsibilities to the dead relatives is believed to determine the general success and well-being of those living. Kofi N Awoonor, Ghana: A Political History from Pre-European to Modern Times (Accra: Sedco and Woeli publishing, 1990) 4.

Ibid.

One is entitled to make a will to change this outcome, though not entirely. Every Ghanaian of sound mind and of age can make a will. One can either make a customary law will (oral will) known as samansiw, or one can make a will in accordance with the Wills Act 1971(Act 360) (Laws of Ghana (Rev. Ed. 2004), Vol VII, p. 4401). It would seem that under customary law, a testator cannot disinherit his successors completely. According to Ollennu, the customary law prohibits a man from disposing of the whole or the majority of his property to persons outside the circle of family and dependents, dependants being his wife and children. Nii Amaa Ollennu, “Family Law in Ghana” in Le Droit De La Famille En Afrique Noire et À Madagascar-Surveys made at the request of UNESCO (Paris: Editions G.P. Maisonneuve Et Larose 11, rue Victor-Cousin, 1968) 159-194,181. [Ollennu, “Family Law in Ghana”]. Allott also explains that “[i]f there was one thing which customary laws abhorred, it was the idea that the holder of property should be able to deprive his customary heirs and successors of their inheritance by a unilateral act of his own not sanctioned by his family.” Antony Allott, “What Is to Be Done with African Customary Law? The Experience of Problems and Reforms in Anglophone Africa from 1950” (1984) 28 J Afr L 56-71, 62 [Allott, “African Customary Law”]. Also under state law, if the High Court is of the opinion that a testator has not made reasonable provision whether during his lifetime or by his will, for the maintenance of his or her father, mother, spouse or child under 18 years of age, and that hardship will be caused as a result, the High Court may, taking account of all relevant circumstances, notwithstanding the provisions of the will, make reasonable provision for the needs of such father, mother, spouse or child out of the estate of the deceased. Wills Act 1971(Act 360) (Laws of Ghana (Rev. Ed. 2004), Vol VII, 4401) s 13(1).

Ollennu explains that even though the whole family has a stake in the property of their deceased relative, the courts have gradually confined the beneficiaries to a very small group such as the children and very close relatives of the deceased. Ollennu holds the view that this trend is the result of
estate devolves on one’s customary family, a customary successor is appointed to administer the estate on behalf of the family. This successor was under a legal obligation to look after the surviving children and spouse from the proceeds of the estate, but this did not always happen. Daniels summarizes the matrilineal system of inheritance as follows:

Our inheritance law may be said to have been based on at least three main ideas or concepts ...(a) that men are regarded and treated, not as individuals, but always as members of a particular group, e.g. a gens, house, clan, lineage or family; (b) that the society has for its units not individuals, but groups of men united by the reality or the fiction of blood-relationship; and (c) that the group which we call the family was considered to be a corporation which never died. Thus, the traditional family is the centre around which the socio-economic and political organization of the society revolves. Individual rights and liberties are determined by membership in the family. The traditional family also emphasizes the physical and convenience, the influence of the common law, and a misconception of those who constitute one’s family under customary law. He insists that the judicial position is definitely not the customary law. Nii Amaa Ollennu, “Changing the law and Law Reform in Ghana” 15:2 J Afr L 151 [Ollennu, “Law Reform in Ghana”].

13 This is a family member appointed by the customary family to administer the estate of the deceased for the benefit of the whole family, including himself. He “steps into the shoes” of the deceased and ensures that the rights of the surviving spouse and children are honored. It should be noted that a customary successor is not the same as an executor, an heir or next of kin. An heir in most jurisdictions takes the property for himself or herself and can do whatever he or she likes with it; nobody has a right to question him or her if he or she wastes or even sells the estate. Successors in other countries too have similar rights, but the Customary Successor in Ghana has no such right of ownership, he is a caretaker with a beneficial interest.” The English law of succession does not recognize the concept of a customary successor. See Nii Amaa Ollennu “Family Law in Ghana,” supra note 11 at 187.

14 It was common to find the family ejecting the widow and children from the deceased spouse’s home, leaving them destitute. See EVO Dankwa, “Adwoa Dankwa, the Helpless and Hopeless, Poor and Pesewaless Widow” (1974) 6 RGL 136. See Akua Kuenyehia, “Women, Marriage, and Intestate Succession in the Context of Legal Pluralism in Africa” (2006) 40 UC Davis L Rev 385 at 392.

15 According to Ekow Daniels, “[i]n the eyes of customary law, the family is regarded like a corporation aggregate which consists of several members related genealogically. It has the distinctive characteristic that it never dies. The death of a member made no difference to the collective existence of the aggregate body.” Ekow Daniels, “Development of Customary Law” (1991-92) 18 RGL 68 at 88 [Daniels, “Development!”]; See also Awoonor, supra note 9 at 3.
sacred connection between the individual and his or her community and requires its members to think of themselves as part of a group. A person is judged according to how well he or she serves the wider family interest. The family is regarded as a legal entity with dispositive rights, rights it exercises to ensure that its members are well taken care of. The family is regarded as a legal entity and is usually compared to a corporation, which legally, is designed to outlive its founder. Its membership may change, but it lives on as that pillar that binds its members together and holds them accountable for looking after the interests of the whole group.

3.2.2 The Matrilineal Family System: The Property Rights of Spouses

I use the earlier case law to explain living customary law because these cases emerged during the period when the courts accepted the living customary law presented to it by feuding parties. In matrilineal communities, spouses are completely excluded from inheriting any part of each other’s estate. The customary position is that spouses in matrilineal communities do not belong to each other’s family, and that one can only inherit property from a blood relation. Evidently, under the matrilineal system of inheritance, consanguineal ties are superior to affinal ties. It may be appropriate to describe the traditional family as “a nucleus of blood relatives surrounded by a fringe of spouses” as opposed to “a nucleus of spouses and their off-spring surrounded by a

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17 Agbosu, supra note 7 at 96.
18 Quartey v Martey, [1959] GLR 377 [Quartey].
fringe of relatives.”\(^{20}\) Spouses hold separately the property they acquire individually during the subsistence of their marriage. Such property is not regarded as joint property. Justice Hayfron-Benjamin explained in the case of *Yeboah v Yeboah*\(^ {21}\) that joint ownership of property by persons not connected by blood is not a principle of customary law, but adds that customary law does not prohibit the creation of such joint interest.\(^ {22}\) Sarbah also advises that “[m]arried people have no community of goods, but each has his or her particular property.”\(^ {23}\)

In matrilineal communities, customary law gave a wife no legal entitlement to property she had helped her spouse to acquire; she only had a right to be maintained out of the intestate estate. Ironically, a female spouse was obliged under customary law to assist her husband in his occupation.\(^ {24}\) The case of *Adom and another v Kwarley* thus held that a wife who assists her husband in his trade does not become a joint-owner of the property acquired therefrom.\(^ {25}\) This rule is based on the fundamental principle of customary law that a wife and child were dependent on their spouse and father respectively for their livelihood.\(^ {26}\)

In sum, it would seem that the matrilineal system of inheritance was both legally and socially unfair, especially to surviving spouses who through hard work had helped their


\(^{21}\) *Yeboah v Yeboah*, [1962] 1 GLR 305.

\(^{22}\) *Ibid* at 114.

\(^{23}\) Sarbah, "Fanti Customary Laws", supra note 6 at 6.

\(^{24}\) *Quartey, supra* note 18 at 377.

\(^{25}\) *Adom & another v Kwarley*, [1962] 1 GLR 112.

\(^{26}\) *Abebreseh v Kaah & others*, [1976] 2 GLR 46 [“Abebreseh”].
deceased spouses to acquire property, and yet could not lay claim to any portion of the property.

### 3.2.3 The Matrilineal Family System: The Property Rights of Children

Legally, children born to a man from a matrilineal family, unlike those born into the patrilineal family, are not considered part of their father’s family. As a result, they could not succeed to any of his self-acquired property on his death. In fact, they had no legal right to any specific portion of their father’s estate. They also had a responsibility to assist their father in his trade or business, though that assistance did not entitle them to any specific beneficial interest in the property which the father acquired with the earnings from the said trade. However, the principles of customary law impose on a father in a matrilineal community an indisputable obligation to house, support, and advance his children. Accordingly, the children, while young, had to be supported financially from their father’s estate by his customary successor. Sarbah explains authoritatively on the position of children born in matrilineal communities as follows:

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27 With specific respect to the treatment of children, the perceived injustices in the matrilineal communities were graver than what pertained in patrilineal communities. Children born in patrilineal communities unlike those in matrilineal families belong to their father’s family. For this reason it has been said that the children of an intestate were entitled to succeed to their father’s estate as of right. Addo and another v Manko, [1976] 2 GLR 454 supports the view that in Patrilineal communities’ children succeed to their fathers’ self-acquired property as of right. This has been disputed by others who assert that the self-acquired property of the deceased from a patrilineal community became by operation of law the property of the family to which he belonged on his death intestate. See Budu v Ampontah and Others, [1989-90] 1 GLR 150, see also AKP Kludze, Ewe Law of Property (London: Sweet & Maxwell, 1973) 290-291 [Kludze, “Ewe Law of Property”].

28 See Fordwour, supra note 19 at 305.


30 Ibid; see also Agyei v Addo, (1950) DC (Land) ’48-51, 288.
When a person such as A dies, having his own acquired property, moveable and immoveable, he is not succeeded by his sons, free-born or domestic, whose only right is that of a life interest in the dwelling-house built by their father, the deceased, on a land not family property. For if the house be built on family land, the children have only right of occupation during good conduct. If anyone living in the house of his father deny the right of the proper successor, or commit waste or injure the house, or encumber or sell it, he thereby forfeits his life interest. Such person must make the necessary repairs, and may quit if the successor requires it for himself as a residence.\(^{31}\)

Thus, the customary legal system offered very little protection to children born into matrilineal families. These children could not depend entirely on the intestate estates of their deceased fathers to provide for their education and general sustenance. Such incidents flowing from the traditional family system were viewed as unfair by some Ghanaians and were challenged during and after the colonial era.

### 3.2.4 Problems with the Matrilineal System of Inheritance

Admittedly, some of the customary law rules were harsh while others were simply abused. For instance, a surviving widow and children were entitled to reside in a house built by their deceased husband and spouse respectively, but this right was subject to the condition of good conduct.\(^{32}\) This rule was potentially harsh and worked to the disadvantage of widows and children. Indeed, it was not uncommon for a surviving widow and children to be ejected from the matrimonial home on the death of their spouse and father respectively. Invariably, the deceased’s young children were badly

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\(^{31}\) Sarbah, *Fanti Customary Laws* supra note 6 at 105.

affected, and in some cases, had to drop out of school. In sum, they were left destitute.\textsuperscript{33}

This was especially unfair to widows who had contributed to the acquisition of the property in question, but could not prove their contribution. This was normal as the customary system, having patriarchal tendencies, did not discourage women from allowing their husbands to register jointly acquired properties in the husband’s name. Bernice Sam, a lawyer and Elizabeth Ardayfio-Schandorf, a social scientist, explain that when cases to determine property ownership ended up in court, it was difficult for adjudicators to make a finding of co-ownership if women could not give evidence of such. In addition, they discovered that even where the women had made direct financial contributions, the property was acquired or registered in the name of the man alone as there seemed to be a view that “custom demands that property must be owned by a man” and “registered in his name.”\textsuperscript{34} Also, the customary law rule that a woman was required to assist her husband in his occupation, though such assistance did not confer on her any inalienable rights in property acquired thereby, inevitably resulted in far more impoverished widows than widowers.\textsuperscript{35}

\textsuperscript{33} Dowuona-Hammond, \textit{supra} note 4 at 140-141, 145. See also Kuenyehia, \textit{supra} note 14 at 392. See also J Ofori-Boateng, “The Courts and Widows in Distress” (1973) 5:2 RGL 106-119.

\textsuperscript{34} See Bernice Sam & Elizabeth Ardayfio-Schandorf, “Consensual Unions in the Western Region of Ghana: their Relation to Violence against Women and Property Rights” (Women in Law and development in Africa [WILDAF], 2006) 56. I doubt the accuracy of these statements as Mensah Sarbah has explained that “[m]arried people have no community of goods, but each has his or her particular property”. Sarbah, \textit{“Fanti Customary Laws”}, \textit{supra} note 6 at 6.

\textsuperscript{35} Dowuona-Hammond, \textit{supra} note 4 at 132.
Moreover, it was not unusual for some customary successors to abuse their positions of trust by reneging on their responsibility to provide for the surviving spouse and children. Customary successors were generally required to ensure equity in the distribution of property. Akua Kuenyehia, a legal academic, explains that customary successors in the past discharged this obligation “with all seriousness,” but blames the “present individualistic age” for their neglect of duty.\textsuperscript{36} The inability of customary successors to ensure equity in the distribution of property called the effectiveness and fairness of the customary law rules into question. The customary legal system seemed to have no mechanism for ensuring the protection of rights or for ensuring that its rules were complied with, and this greatly undermined its efficacy as a legal system intent on promoting the general well-being of its members.

3.2.5 State Intervention

The colonial government had in 1884 attempted reforms with the promulgation of the Marriage Ordinance\textsuperscript{37} which introduced European concepts of marriage and family. This was seen as an attempt to abolish customary values.\textsuperscript{38} The consent of the traditional family to customary marriages was mandatory among most ethnic groups. However, with the growth of Christianity and formal education, some people did not find this consent necessary and did not seek it.\textsuperscript{39} These people usually contracted their marriages according to the rites of their religious denomination; these marriages were

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\textsuperscript{36} Akua Kuenyehia, supra note 14 at 392-393. See also Dowuona-Hammond, \textit{Ibid.}
\textsuperscript{37} Marriage Ordinance, supra note 2.
\textsuperscript{38} Daniels, “Development of Customary Law”, supra note 15 at 85.
\textsuperscript{39} Nii Amaa Ollenu, “Succession”, supra note 16 at 239-240.
}
not legally enforceable. On the death intestate of any of the parties to such marriages, the traditional family of the deceased failed to provide for the surviving spouse and children because such a spouse was regarded as a concubine. The Marriage Ordinance was thus passed to create a system of marriage other than the customary law marriages. The Ordinance was also passed to legalize the existing marriages solemnized according to religious rites and to provide for succession to the estate of persons who married under the Ordinance and their children on their death intestate. It is important to note that a person who married under the Ordinance and their children could hold family property in respect of which they had no testamentary powers. This happened if they were appointed customary successor to a deceased family member or head of his or her family. However, under the Ordinance, family members could not succeed to the self-acquired property of relatives who married under the Ordinance. As a result of the protests against this injustice, the Ordinance was revised (section 48) to incorporate new rules of succession applicable to those who legalized their union pursuant to it.

Section 48(1) of the Ordinance provided that where a person subject to native law or custom contracted a monogamous marriage under the Ordinance and died intestate, two-thirds of his or her property was to devolve on his or her widow and children in accordance with the law of England on the distribution of intestate property in force on

40 Ibid.
41 Ibid at 240.
42 Ibid at 241-242.
43 Ibid at 241.
44 Ibid at 243-244.
the 19th of November, 1884. The remaining one-third was to be distributed in accordance with the customary law of the intestate. Also, the property of a child born to parents married under the Ordinance was to be disposed of in the same fashion.  

The significance and overall impact of the provision was limited given that only a few natives married under the Ordinance. It is estimated that more than 80% of marriages in Ghana are contracted under customary law.

The mid-twentieth century saw a significant influx of English juristic, economic and social ideas into the Gold Coast, which resulted in calls by the natives for changes in the laws of succession. On 9 May, 1959, the Government appointed a Commission of Inquiry to study the existing forms of the customary law of inheritance and make recommendations. As a result, in May of 1961, the Government published a White Paper on Marriage, Divorce and Inheritance which presented its proposals and asked

45 In furtherance of the Marriage Ordinance, the court in the case of Vanderpuye v. Golightly and Others was prepared to set aside a land transaction after 15 years and hold that “the land in dispute was the self-acquired property of the plaintiffs’ father and upon his death intestate they [the plaintiffs] had acquired interest in two-thirds of it by virtue of the Marriage Ordinance, in spite of succession being matrilineal among the Ga Mashi.” Under the Ordinance, the remaining one-third was to be given to the customary family. Interestingly, this law applied to children of such marriages even if they did not contract their marriages under the Ordinance. Vanderpuye v Golightly & Others [1965] GLR 453.

46 The Ordinance was not suited to African conditions. It was also difficult to ascertain and interpret the applicable English rules on the devolution of property. Most of the rules dated as far back as the 17th century. Additionally, determining the various fractions required by the law was very challenging, especially, when the deceased left behind a huge estate and was also survived by most of the people entitled to succeed under his estate. See Memorandum to Law 111, supra note 1 at i & ii; See also AKP Kludze, “Problems of Intestate Succession in Ghana” (1972) 9 UGLJ 89 at 97-98 [Kludze, “Succession in Ghana”]. Section 48 has been repealed by section 19b of the Intestate Succession Act, 1985 (PNDC Law 111) (Laws of Ghana (Rev. Ed. 2004), Vol V, 1951) [PNDC Law 111].

47 Steven J Salm & Toyin Falola, Culture and Customs in Ghana (Westport CT: Greenwood Publishing Group, 2002) 131.

the general public for comments. The White Paper, among many other recommendations, proposed the abolition of section 48 of the Marriage Ordinance which gave a third of intestate property to the extended family. Basically, it proposed that no property should devolve on the extended family if the deceased left behind a spouse, children or their descendants. The extended family only got a share if the deceased left behind only a spouse or no other close family members. It is reported that three bills were published pursuant to these proposals and the comments received, though none of them was passed into law because of “opposition from various sections of the community.” In view of this, the judiciary took up the mantle of leadership and made various changes to the law of succession, generally.

### 3.2.6 Judicial Reforms

The plaintiffs in most of the cases brought before the courts were women. This is because in most parts of Ghana, customary law does not envision the possibility of a man succeeding to his wife’s property. First, the judiciary reacted to the customary law principle that a spouse had no interest in property she had helped her husband to acquire because she was obliged to help under customary law. This reaction was in the form of an obiter dictum in 1962 where the court seemed to draw a distinction between

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49 It is reported that the response was tremendous and that various proposals were submitted by traditional authorities, religious bodies and individual citizens. WC Ekow Daniels “Recent Reforms in Ghana’s Family Law,” (1987) 31:1&2 J Afr L (Essays in Honour of A. N. Allott) 93-106, 95 [Daniels, “Reforms in Ghana”]; See, Ollennu, “Family Law in Ghana”, supra note 11 at 191-192.

50 Ollennu “Family Law in Ghana”, supra note 11 at 191-192.

the monetary and non-monetary contribution of a spouse and said that where the wife’s assistance took the form of substantial financial contribution, she was entitled as of right to a share in the properties acquired by the husband.\textsuperscript{52} This dictum was a clear departure from the customary law, but it should be noted that a spouse’s entitlement was dependent on a “substantial” financial contribution. This notwithstanding, the courts were emboldened to make future definite pronouncements on the entitlement of spouses.

In 1976, the courts confirmed this dictum unequivocally in the case of \textit{Abebreseh v Kaah \& others},\textsuperscript{53} where the wife contributed one half of the purchase price of the plot of land on which the matrimonial home was built. The husband’s successor sold the house and the wife sued claiming it was joint property. Sarkodee J (as he then was) said “[t]aking the evidence as a whole I am of the view that the part played by the plaintiff in the construction of the house…was more than mere assistance given by a wife married under customary law to her husband.”\textsuperscript{54}

The rights of children in matrilineal communities also got judicial attention. In 1963, the Supreme Court decided the case of \textit{Manu v Kuma}.\textsuperscript{55} In this case, the defendant was the customary successor of the deceased who died in 1939 and who left behind a spouse, children and a large estate. Though the deceased’s properties including his cocoa farms and houses were in the custody of the defendant, he failed to use them for the

\textsuperscript{52} \textit{Gyamaah v Buor}, [1962] 1 GLR 196.
\textsuperscript{53} \textit{Abebreseh, supra} note 26 at 46.
\textsuperscript{54} \textit{Ibid} at 54.
\textsuperscript{55} \textit{Manu v Kuma}, [1963] 2 GLR 464-471.
benefit of the surviving spouse and children. The widow, as a result, single-handedly supported her children for ten years after the death of her husband. The widow, the plaintiff in this case, relying on an arbitration award confirmed by the West African Court of Appeal, instituted an action to recover from the defendant the cost of maintaining and educating her children.

The defendant argued that the arbitral award was merely advisory and that it did not create a binding and enforceable obligation on him to maintain and educate the children of the deceased. He contended that they were the responsibility of the plaintiff’s matrilineal family. He argued further that under customary law there was only a moral and not a legal obligation on a successor to educate the children of the deceased to any specific advanced level. The court sought to decide this last issue. Relying on the works of anthropologists such as Robert Rattray and M.J. Field and other scholars such as Mensah Sarbah and J.B Danquah to foreground the customary responsibilities of a father towards his children, the Court held:

The customary law is a progressive system. Its basic principles are so elastic in their application as make them capable of application to any stage of the cultural, social and economic progress of the nation and tribes. At a stage of development when agriculture and craftsmanship in their various forms were the thing of the time for men, and rudimentary house-craft was the prime concern of women, the father’s responsibility which his successor assumed would extend to such training as would fit the child for that society.\(^{56}\)

The court held inter alia that the duty of a successor under customary law to maintain and educate the children of a deceased was legally enforceable. But this responsibility

\(^{56}\) *Ibid* at 468.
was also legally enforceable under customary law. By custom it was the legal responsibility of the customary successor to provide for the surviving widow and children out of the estate of the deceased.\(^\text{57}\) This obligation was based on the belief that the deceased's responsibility to train and educate his children extended beyond his death. These duties were limited to the volume of the property left by the deceased. The fact that the duty of a successor under customary law to maintain and educate the children of a deceased was legally enforceable, did not derogate from the customary law rule that a child had no right to succeed to a definite portion of the estate of his deceased father.

Notable changes were also made to the rights of widows under customary law. A widow was now entitled to claim from her husband's estate any money she may have used to maintain herself and her children as well as their medical expenses.\(^\text{58}\) The Court reiterated that these changes were based on the customary law principle that a man is responsible for the maintenance of his wife and children.

Prior to this decision in 1975, the court held in \textit{In Re Appiah (Decd.); Yeboah v. Appiah},\(^\text{59}\) that a widow has a possessory right of occupation in the self-acquired house of her deceased husband. It held further that the widow and children had an exclusive right of possession to the self-acquired matrimonial home of a deceased husband and father where the facts and circumstances were such that inconvenience would be

\(^{57}\) Kuenyehia, \textit{supra} note 14 at 392.  
\(^{58}\) Manu, \textit{supra} note 55 at 465.  
\(^{59}\) \textit{In Re Appiah (Decd.); Yeboah v Appiah} [1975] 1 GLR 465.
caused to the widow and children by admitting members of the family of the deceased.\textsuperscript{60}

The right of the children to reside in their father’s self-acquired property was subject to their being of “good behavior.” This principle was also challenged by the courts who felt that the qualification in practice undermined the full enjoyment of the right by surviving widows and children.

Wiredu J. in \textit{Amissah-Abadoo v. Abadoo} observed in obiter:

\begin{quote}
The injustices and hardships caused to children and widows by tacking on the phrase ‘subject to good behaviour’ as a limitation to their rights to reside in houses which their deceased father and husband respectively die possessed of, irrespective of how they came by such property have been ignored indiscriminately in the past to the detriment of children and widows. The conduct of the family flowing from this neglect must be frowned upon as behaviour not countenanced by customary law and calls for an urgent need for a more realistic and practical re-appraisal of this aspect of the customary law in view of the fast social changes in the community caused partly by the high rate of inter-tribal marriages and partly by the development of the money economy which has provided other modes of acquiring wealth.\textsuperscript{61}
\end{quote}

By 1979, the courts had made a definite pronouncement on the requirement of good behavior demanded of children for their continued stay in their father’s self-acquired property. Justice Osei-Hwere in the case of \textit{Amissah-Abadoo v Daniels and Others} noted that the aforementioned right was for the life of the children and not conditioned upon good behavior.\textsuperscript{62} He described the children as “their own masters in the house”\textsuperscript{63} and their interest in the house as possessory and added that “[a]ny attempt by their father’s successor or head of family to implant members of the family in a father’s self-

\begin{footnotes}
\item[60] \textit{Ibid} at 223.
\item[61] \textit{Amissah-Abadoo}, supra note 32 at 131.
\item[62] \textit{Amissah-Abadoo v Daniels & Others}, [1979] 509 at 516.
\item[63] \textit{Ibid} at 518.
\end{footnotes}
acquired house to the diminution of the comfortable life-style to which the children had been accustomed must be considered an undue interference against their possessory interest which they were entitled to resist."\(^{64}\)

_Eshun and Others v Johnfia_ also challenged the customary law rule which permitted children to be evicted from their father’s home in some extreme cases, such as when the customary successor required the use of the house for himself or any member of the matrilineal family.\(^{65}\) Sarbah explains that this was permissible as the children were only entitled to enjoy their matrilineal family property.\(^{66}\) The court did not mince words in proclaiming that the customary law rule did not have any “moral or legal justification whatsoever in the present day Ghana.”\(^{67}\) The court stated per curiam that:

> Indeed, we consider this view outmoded and not in keeping with the present state of our national development and should not be countenanced by the courts in modern Ghana. In this era of our social development and transformation, progressive thinking demands that the estate of the deceased father should be charged with some of the late father's obligations towards his children and it will be inequitable to oust the children from their late father's house on that flimsy ground.\(^{68}\)

The court prayed that no other court would entertain such “an unconscionable claim.”\(^{69}\)

Perhaps the biggest blow to customary law was the High Court decision by Justice Archer in _Re Antubam (dec’d); Quaicoe v Fosu & Anor_ as he challenged the very

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\(^{64}\) _Ibid_ at 510.
\(^{65}\) _Eshun, supra_ note 29 at 105.
\(^{66}\) Sarbah, _“Fanti Customary Laws, supra_ note 6 at 105.
\(^{67}\) _Eshun, supra_ note 29 at 108.
\(^{68}\) _Ibid_.
\(^{69}\) _Ibid_ at 109.
composition of the matrilineal family. In this case the plaintiff and head of family of the deceased brought an originating summons for the determination, inter alia, of whether the wives and children had any interest in the estate of the deceased. Relying on the customary law as recorded by Sarbah in 1903, counsel for the plaintiff averred that the children of the deceased were not entitled to any specific portion of the deceased’s estate as they did not belong to their father’s family and argued that the extended family was entitled to the estate absolutely. The judge explained in obiter dictum:

Since these pronouncements were made in the last quarter of the last century, customary law in Ghana has progressed and developed in accordance with the tempo of social, commercial and industrial progress. So far as land tenure is concerned, farming rights have been converted into building and residential rights, customs which appear to be repugnant to natural justice, equity and good conscience have been gradually extinguished by judicial decisions. The then legislature played a less effective role in these spontaneous developments engineered by public opinion. The courts have embraced these developments without adhering strictly to the original customary rigid rules.

Ghana is a developing state with remarkable social and economic transformations which render some of our customary rules antediluvian. If the customary law is to retain its place as the greatest adjunct to statutory law and the common law, it cannot remain stagnant whilst other aspects of the law are in constant motion. Justice Archer was determined to deliver his judgment in what he called “the true spirit of the Ghana Constitution.” In this regard, he relied on his “constitutional license,” namely, Article 42(4) of the Constitution, which permitted the High Court to disregard

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70 In Re Kofi Antubam (dec’d); Quaicoe v Fosu & Another, [1965] GLR 145.
71 Ibid at 138-145.
72 Ibid at 144.
73 Ibid at 145.
According to Justice Archer, Justice of the High Court (as he then was) “My conviction is that decisions of the Privy Council, the former West African Court of Appeal and the former Court of Appeal are no longer binding by the iron nexus of binding judicial precedent. Nevertheless the decisions of these courts have to be treated with the greatest respect.” See *Ibid.*

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74 Ibid.
75 Ibid.
76 Ibid.
77 Ibid.
to his property. As I have already argued if the basis for this exclusion does not make sense then the exclusion itself cannot stand.\textsuperscript{78}

Justice Archer’s comments should not be taken lightly. The insubstantial entitlements of spouses on the death of their spouses intestate may have been criticised by many people as being unfair, but for a judge or any other person to criticise the very composition of the family system was unconventional, to say the least. However, his comments do not seem to me to reflect a growing intolerance toward the traditional family system per se, but rather anger about what seemed to be an abuse of the vulnerable.

Collectively, these decisions reveal some facts about customary law that are pertinent to my dissertation. Firstly, the decisions seem to agree that customary law is flexible and versatile. This constitutes one of the greatest strengths of customary law in that it makes it amenable to change. To a large extent, it can transform itself to solve the ever-changing needs of its people. While reformers can capitalize on this quality of customary law, it is important to consider the degree to which it is flexible and versatile because customary law is not susceptible to every wind of change.

Secondly, they all seem to admit that the country has progressed socioeconomically and they demand that customary law lives up to these changes, but it does not seem that much consideration is given to whether these developments have impacted the areas and the people whose lives are governed almost completely by customary law. Having been left out of the economic security and social renewal, it is arguable that

\textsuperscript{78} \textit{Ibid.}
these faithful adherents of customary law do not have the capacity to help facilitate legal change.

Nonetheless, with the growth in urbanisation and its attendant notions and assumptions, as well as increased economic development and opportunities in Ghana, came changing notions about the family. The nuclear family now formed an economic unit that seemed more capable of supporting itself; it no longer had to rely on the extended family for financial support. There was also a movement towards the involvement of women in economic activities outside the home and this also greatly improved the fortunes of the nuclear family. It was doubtful that customary law could support an urban population structured around the nuclear family. This signalled the need for a law that would suit the emerging trends. As a result of the problems posed by the customary system of inheritance and the socio-economic reforms indicated, there was pressure, both local and international, on the government to change its laws on intestate succession.

79 Henrietta Mensa-Bonsu explains that PNDC Law 111 is based largely urban-based assumptions including the assumption that the customary family no longer serves any purpose during the life or upon the death of a person. She explains that the family has always been a source of moral and financial support to its members. Mensa-Bonsu, supra note 51 at 109-110.

80 Ibid at 105-106.
3.3 INTERNATIONAL PRESSURES FOR CHANGE

Ghana has signed and ratified various human rights conventions including the International Covenant on Economic, Social, and Cultural Rights,\textsuperscript{81} the Convention on the Elimination of All Forms of Discrimination against Women,\textsuperscript{82} the United Nations Convention on the Rights of the child\textsuperscript{83} and the African Charter on Human and Peoples Rights.\textsuperscript{84}

These conventions place an obligation on the government to protect the rights of women in all aspects of their lives, as well as to protect children from abusive practices. Though these conventions were initially of just persuasive influence in Ghana, it is the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), which Ghana signed onto in 1980, that really influenced the passage of PNDC Law 111. To a large extent, the government has taken its international obligations seriously as failure to do so could cause reputational damage. In response to these obligations, the government has promulgated or amended some pieces of legislation to conform to international standards. For instance, it has amended the Criminal Offenses Act to criminalize female genital mutilation and harmful traditional widowhood practices.\textsuperscript{85} It

\textsuperscript{81} International Covenant on Economic, Social and Cultural Rights, 999 U.N.T.S. 3 [hereinafter referred to as ICESCR]. The Covenant was adopted on December 19, 1966, and entered into force on January 3, 1976. It was ratified by Ghana on 7 Sep 2000.


\textsuperscript{83} This was signed by Ghana on the 29\textsuperscript{th} of January, 1990.

\textsuperscript{84} This was adopted on June 27, 1981 and entered into Force October 21, 1986.

\textsuperscript{85} Female circumcision-sections 69A; Cruel customs or practices in relation to bereaved spouses- section 88A of the Criminal Offences Act, 1960 (Act 29) (Laws of Ghana (Rev. Ed. 2004), Vol III, 1701).
has also enacted the Children’s Act to better protect the rights of children, and the Intestate Succession Law and its amendments to safeguard the property rights of the nuclear family.

CEDAW also requires signatories to “modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.” This provision demanded far-reaching changes to customary law, a system of law that determines rights and responsibilities on the basis of gender and age, among other criteria. Demands such as these gave the government the impetus to change its laws of succession in spite of the opposition that I believe it knew it would face, especially from the rural folk. The Committee on the Elimination of all Forms of Discrimination against Women adopted a General Recommendation which states that:

There are many countries where the law and practice concerning inheritance and property result in serious discrimination against women. As a result of this uneven treatment, women may receive a smaller share of the husband's or father's property at his death than would widowers and sons. In some instances, women are granted limited and controlled rights and receive income only from the deceased’s property. Often inheritance rights for widows do not reflect the

88 CEDAW, supra note 82, art 5(a).
\footnote{Under CEDAW, a member state must submit national reports at least every four years on measures taken to comply with their treaty obligations.
\footnote{Kuenyehia explains that social research and public debate before the passage of the law were virtually absent. See Kuenyehia, \textit{supra} note 14 at 398.
\footnote{PNDC Law 111, \textit{supra} note 1.}}}

Parties to these international agreements are not only legally bound to operationalise these provisions, but are also required to submit progress reports periodically.\footnote{Under CEDAW, a member state must submit national reports at least every four years on measures taken to comply with their treaty obligations.
\footnote{Kuenyehia explains that social research and public debate before the passage of the law were virtually absent. See Kuenyehia, \textit{supra} note 14 at 398.
\footnote{PNDC Law 111, \textit{supra} note 1.}} The burden of having nothing to show could be heavy as it affects a member state’s reputation and credibility, not to mention the potential economic and political risk it poses for a developing country that relies on foreign aid to meet even its basic needs.

\section*{3.4 THE INTESTATE SUCCESSION LAW, 1985, (PNDC LAW 111)}

The Intestate Succession Law was thus promulgated in 1985 in an attempt to find a solution to the injustices and inequities inherent in the existing systems of inheritance. The Law was passed by the then military government of Ghana, the Provisional National Defense Council. In the absence of a parliament and the presence of a debatably executive-controlled judiciary, it was easy for the government to pass this law after minimal consultation with stakeholders.\footnote{Kuenyehia explains that social research and public debate before the passage of the law were virtually absent. See Kuenyehia, \textit{supra} note 14 at 398.} The Law was intended to provide uniform rules of succession applicable in Ghana irrespective of one’s religious or family membership or the type of marriage contracted.\footnote{PNDC Law 111, \textit{supra} note 1.}

It was not surprising that the passage of the much awaited PNDC Law 111 drew positive remarks from many quarters. Jeanmarie Fenrich & Tracy Higgins have
observed that “[t]he changes the Intestate Succession Law made to customary law were momentous: for the first time, a surviving spouse had a legal claim to a portion of the estate.”

Christine Dowuona-Hammond, a legal academic, also described the law as “a bold and significant effort to achieve equity and justice for the nuclear family” and as constituting an “attempt[] to alleviate the misery of widows and children.”

The promulgation of the law was particularly liberating for those urban dwellers that had developed different notions of justice and rights and felt entitled to more than the former laws offered. Even those whose spouses died before the promulgation of the law clamoured to have their cases heard by the courts claiming that their cases were already pending before the court, a chief or a head of family. The courts revelled in the opportunity to give a purposive interpretation, instead of a strict, literal and grammatical interpretation, to the word pending so as to have more cases determined by PNDC Law 111. In one case the court held:

Since it was clear from the memorandum on PNDCL 111 that the object of section 21(2) was to give expression to the concern of the courts which had constantly lamented their impotence to remedy the customary law which they had often considered to be unjust, the legislature would not in the circumstances limit their concern to only cases physically pending before the courts.

94 Dowuona-Hammond, supra note 4 at 166.
95 See the following cases: Kyei and others v Atriviie, [1992] 1 GLR 257; In re Sackey ( dec’d); Ansaba v Mbeah, (1992) 1 GLR 214; In Re Armah; Armah v Armah, [1991] 1 GLR 140. If the cases were pending before the court, a chief or a head of family, they could be determined according to the new Intestate Succession Act.
96 Section 21(1) of PNDC Law 111, supra note 1 states specifically that “the Law is applicable in the settlement of any claim or adjudication pending before the court or a chief or head of family under customary law in respect of the administration or distribution of the estate of an intestate who died before the commencement of the Law.” For those who died before the enactment of the law, the legal position was that their rights had already accrued under the old laws which included customary law.
Accordingly, a liberal construction would be offered for section 21(2) of PNDCL 111 and it would be interpreted to include cases which were commenced after the promulgation of PNDCL 111 as also pending before the courts, especially since it should be borne in mind that at that time the old laws had been repealed.\textsuperscript{97}

The memorandum to the law explained that the existing laws appeared to have been “overtaken by changes in the Ghanaian family system.”\textsuperscript{98} Admitting the role of global social influences on the changing notions of family in Ghana, the memorandum explains that “the importance of the extended family is gradually shifting to the nuclear family as pertains in other parts of the world.”\textsuperscript{99} It further explained that “[t]he growing importance of the nuclear family brings with it its own logic of moral justice.”\textsuperscript{100} Commenting on how these changes were likely to impact the customary legal system, the memorandum elucidated that “[t]his brings with it a corresponding weakening of the extended family which is therefore less likely to be able to support the widows in the family.”\textsuperscript{101} But the victory was short-lived, and clashes between the state and customary legal systems were soon to emerge.

\section*{3.4.1 Understanding the Intestate Succession Law}

PNDC Law 111 has provisions on how the intestate estate should be divided, presumptions made by the law on the issue of survivorship, the effects of intermeddling with the estate and the penalties for ejecting a spouse from the matrimonial home,

\textsuperscript{97} Re Armah, supra note 95 at 140. (Emphasis added).
\textsuperscript{98} PNDC Law 111, supra note 1 at 1.
\textsuperscript{99} Intestate Succession Bill, 2013 [The Bill].
\textsuperscript{100} PNDC Law 111, supra note 1 at 1.
\textsuperscript{101} Ibid.
among other provisions. Here, I will describe those provisions that acknowledge the customary law of intestate succession.

PNDC Law 111 applies to cases of full and partial intestacy and is only applicable to the self-acquired property of the deceased. It excludes stool, skin and family property. The Law prescribes a formula for the distribution of the estate, a formula which has been criticised for its disregard for the polygynous nature of most marriages in Ghana.

Under the law, where the deceased leaves behind a house, the spouse and children are entitled to the house and hold it as tenants-in-common. In addition, the law confers on them an absolute legal interest in the household chattels. The rest of the estate is referred to as the remainder or residue; the mode of distribution of this portion depends on those who survived the deceased.

Where the deceased is survived by a spouse, child and parent, the estate is divided into 16 parts; three parts are given to the surviving spouse, nine to the surviving children,

102 Literally, a stool refers to the seat (throne) that traditional rulers or a chief sits on; it is a source and symbol of authority. Most ‘stools’ have property of which land is usually one. Stool property is that property owned by communities and held in trust for the people by the stool. The legal title of all the stool property is vested in the stool itself and never in the occupant of the stool. Daniels, “Development” supra note 15 at 68.

103 Chiefs or kings in the Northern region of Ghana sit on the skins of wild animals like lions or leopards. The skin is the equivalent of a stool or throne.

104 PNDC Law 111, supra note 1 at s 1 (2). All property acquired with family resources or property devised to the family is family property. GR Woodman, “The Acquisition of Family Land in Ghana” (1963) 7:3 J Afr L 136-151,136-138 [Woodman, “Family Land in Ghana”]. The traditional family head may hold the property in trust for the family.

105 PNDC Law 111, supra note 1 at ss 3 & 18. Under the Law chattels include: “jewelry, clothes, furniture and furnishing, refrigerator, television, radiogram, other electrical and electronic appliances, kitchen and laundry equipment, simple agriculture equipment, hunting equipment, books, motor vehicles other than vehicles used wholly for commercial purposes and household livestock.”
two to the surviving parents and two parts are distributed in accordance with the rules of customary law. Second, where the deceased is survived by a spouse and parents but no child, the residue is divided into four parts, with two parts going to the spouse, one part to the parents and one part devolving according to the rules of customary law. Third, where the deceased is survived by only a child and parents, the estate is divided into eight parts; six parts go to the surviving child or children, one part to the parents and one part devolves according to the rules of customary law. Fourth, where the deceased is survived by only a parent, the estate is divided into four parts, with three parts going to the surviving parents and one part devolving according to the rules of customary law. Finally, where the Intestate is not survived by a spouse, child or parent, the entire estate devolves in accordance with the rules of customary law, making the customary family the sole successor.\footnote{106}

Two things must be noted from this summary: (1) the nuclear family was strengthened financially, and socially. It was elevated as the more acceptable and authentic family unit. (2) The extended family was for all intents and purposes, marginalized, disempowered and dethroned as the legitimate family unit in Ghana.

The Intestate Succession Bill currently before Parliament is strikingly similar to PNDC Law 111. Like the latter, the bill seeks to provide a uniform system of intestate succession applicable throughout Ghana, irrespective of the traditional family system to which one belongs, the type of marriage contracted or the religion to which one

\footnote{106 PNDC Law 111, \textit{supra} note 1 at s 11.}
subscribe.\textsuperscript{107} The new provisions in the law seek to further protect the nuclear family. For instance, the bill makes provision for the sharing intestate property in a polygamous family.\textsuperscript{108} It also makes specific provision for instances where a surviving spouse may have contributed to the acquisition of the matrimonial home.\textsuperscript{109} For the first time, provision is made for estranged spouses, and judges are given discretion to decide how much to give such a spouse, though the allocation cannot be less than 30 percent of the estate.\textsuperscript{110} The provisions that are more relevant to my dissertation are those that focus on the share that devolves according to customary law. The current law introduces new criteria for the distribution of property. These take into consideration whether the deceased was in a polygamous relationship\textsuperscript{111} or is survived by a spouse and “children of another woman.”\textsuperscript{112} For clarity, I will consider only those provisions that have equivalents in PNDC Law 111. Where the deceased is survived by a spouse, child and parent, the portion that devolves according to customary law in the bill is 5 percent;\textsuperscript{113} under PNDC Law 111, it is 12.5 percent. In the bill, if the deceased is survived by a spouse and parents but no child, 5 percent devolves according to the rules of customary law\textsuperscript{114} whereas it is 25 percent under PNDC Law 111. Also, where the deceased is survived by a child and parents, 12.5 percent devolves according to the rules of customary law.

\textsuperscript{107}See the Memorandum to the Intestate Succession Bill, \textit{supra} note 93.
\textsuperscript{108}Ibid at s 6. The Intestate Succession Act does not indicate how property is to be shared in a polygamous family. The Act assumes that all families are monogamous. Dowuona-Hammond describes this problem as “one of the most fundamental problems affecting the practical implementation of Law 111.” Dowuona-Hammond, \textit{supra} note 4 at 154.
\textsuperscript{109}Memorandum to the Intestate Succession Bill, \textit{supra} note 93 at s 8 & 10.
\textsuperscript{110}Ibid at s 7.
\textsuperscript{111}Ibid at s 6.
\textsuperscript{112}Ibid at s 15.
\textsuperscript{113}Ibid at s 5 (1).
\textsuperscript{114}Ibid at s 13(1).
customary law under PNDC Law 111 and 5 percent in the bill. Lastly, in the bill, where the deceased is survived by only a parent, 10 percent and 25 percent devolve according to the rules of customary law in the bill and under PNDC Law 111 respectively. Evidently, the bill seeks to reduce significantly the portion that goes to the extended family. It should be noted that the family is not mentioned directly as an entity entitled to an interest in the intestate estate. However, it is entitled to a portion of the estate that devolves according to customary law.

3.5 HOW RELEVANT IS CUSTOMARY LAW TO THE CURRENT LAW ON INTESTATE SUCCESSION

In spite of its limitations, customary law is still a significant source of law. Regarded as a legacy handed down from generation to generation, customary law enjoys wide acceptance among many Ghanaians. Presently, the state recognizes customary law in the areas of marriage and divorce, land ownership, chieftaincy, and intestate succession, though it recognizes them on its own terms.

115 Ibid at s 14(1).
116 Ibid at s 16.
117 Eighty percent of marriages in Ghana are still celebrated under customary law. These marriages are considered marriages properly so called. Fenrich & Higgins, “Promise unfulfilled”, supra note 93 at 284. A peculiar feature of a customary law marriage is that “it is not just a union of this man and this woman: it is a union of the family of ‘this man’ and ‘this woman.’” Per Ollennu J. (as he then was) in the case of Yaotey v Quaye, [1961] GLR 573.
118 With respect to land, seventy-eight percent (78%) of it is owned by traditional authorities. (stool, skin, clan and family land) Both customary and common law rights exist in land, sometimes such rights may exist in the same piece of land. Officially, the State is in charge of the administration of customary lands.
Demonstrating the importance of customary law to the full operation of statutory intestate succession is a fairly simple task and showing how the state, through the courts, has chosen to recognize customary law for its purposes is no different, though judicial customary law has not always been consistent. But the fact is that simply describing these does not provide a true picture of what the customary law (of succession) is and how it functions in Ghana today. This is because in reality, customary law exists on two major planes, the state and customary legal planes. It also exists on several sub-planes within the customary legal system; that is, the various ethnic groups and communities have different versions of customary law.

To do justice to this discussion, I consider the judicial customary law of intestate succession, but also throw some light on practiced customary law, where possible, so as to give a fair picture of how the customary law of intestate succession currently operates.  


120 Gordon Woodman explains that the rules applied by state courts under the name of customary law are not necessarily those observed by subjects outside the ambit of the state courts. Gordon Woodman, “Ghana: How Does State Law Accommodate Religious, Cultural, Linguistic And Ethnic Diversity?” in Marie-Claire Foblets, Jean-François Gaudreault-Desbiens & Alison Dundes Renteln, eds, Cultural Diversity And The Law: State Responses From Around The World (Brussels: Bruylant, Éditions Yvon Blais, 2010) 255-280; Brian Tamanaha also explains that official customary law, unlike living customary law, develops in accordance with the modes, mechanisms, requirements, and interests of legal officials among others. Brian Tamanaha, “Understanding Legal Pluralism: Past to Present, Local to Global” (2008) 30 Sydney L Rev 375 at 380 [Tamanaha, “Understanding Legal Pluralism”].
The continued relevance of customary law in the distribution of intestate property is unquestionable. For instance, since most marriages in Ghana are contracted under customary law, one must resort to the applicable customary law principles on marriage to determine who a spouse is for the purposes of PNDC Law 111. In theory, the courts claim to determine this by reference to the rules on marriage applicable to the traditional community in question. However, in practice, the courts have established what they deem to be the essential elements of a valid customary law marriage and have in some cases decided the existence of a marriage even where none seems to exist under practised customary law.\textsuperscript{121}

Thus, in Ghana, when determining who is a spouse under customary law for any purpose, including intestate succession, the courts seek to determine whether there exists an agreement between the parties to live together as man and wife, whether the families of the parties consent to the marriage and lastly, if the marriage was consummated.\textsuperscript{122} If the facts of a case presented to the courts meet these guidelines, a customary law marriage is said to exist. But do these so-called essentials constitute the customary law, properly-so-called, of Ghana? At best, this may be the customary law of those who live in the cities and are more likely to have their matrimonial issues adjudicated upon by the courts, but I maintain that this does not aptly represents the customary law of Ghana, that is, if there is such a thing as the customary law of Ghana. The various tribes of Ghana have their own versions of customary law, so it would not

\textsuperscript{121} See Justice Nii Amaa Ollennu in Yaotey, \textit{supra} note 117 and Quaye v Kuevi as reported in Yaotey, \textit{supra} note 117 at 573; Essilfie v Quarcoo, [1992] 2 GLR 180.

\textsuperscript{122} These essentials were enunciated by Ollennu J. (as he then was) in the case of Yaotey, \textit{supra} note 117 at 573 and later slightly modified in the case of \textit{In re caveat by Clara Sackitey}, [1962] 1 GLR 180.
be wholly accurate to refer to ‘the customary law of Ghana’ even though the courts continue to try to harmonize the rules of customary law.

I cannot say with certainty what would constitute a valid customary marriage among the various ethnic groups in Ghana and this is because the essential requirements differ in form and procedure from community to community. In fact, the courts have also made this observation thus, “[i]n Ghana there are various forms of marriage within the various ethnic groups. In Ashanti . . . there appears to be at least six forms of a valid customary marriage . . . [and] various forms of Ga customary marriages exist.”

With reference to the essentials laid down by the courts, it is noteworthy that in practice, parental consent is not a necessary precondition for a valid customary law marriage. At least, this is not the customary law of the Fanti tribe as practiced and ascertained by John Mensah Sarbah. Secondly, it is highly improbable that consummation of a union is an essential requirement given that under customary law, marriages may be conducted by proxy. It is a well-known fact in Ghana that Ghanaians abroad who cannot for some reason go back to Ghana to marry partners they may have left behind do so by proxy. Usually, a relative of the absent prospective spouse represents the latter during the customary ceremony. Thus, the requirement that a marriage be

123 Afrifa v Class-Peter, [1975] 1GLR 359.
124 Mensah Sarbah explains that where the consent of a woman's family cannot be gained, either because they reside in such a distant place that it is impossible to obtain such consent, a man and a woman who voluntarily agree to live as man and wife for life, can contract a valid marriage provided that such agreement is expressly made in the presence of credible and respectable witnesses, or in the presence of the chief or headman of the place, followed by the man and the woman living as husband and wife. Sarbah, “Fanti Customary Laws”, supra note 6 at 49.
consummated to be valid as established by the courts is a judicial creation borrowed from the common law.

Whether or not the judicial prescriptions demonstrate the imposition on customary law of concepts and presumptions unknown to it is not in doubt. Dowuona-Hammond confirms that [t]he intestate succession law... appears to be a superimposition of legal prescriptions on existing social structures and institutions which have no place for the values or concepts espoused by the Law."\textsuperscript{125} The fact remains that not only will about half of the population of Ghana not subscribe to PNDC Law 111, most of them will also determine the validity of their marriage according to the laws of their respective ethnic groups or communities.

Likewise, customary law remains relevant in the distribution of intestate property as it may also determine who a child is or parent is.\textsuperscript{126} According to PNDC Law 111, a child “includes a natural child, a person adopted under an enactment or under customary law relating to adoption and a person recognised by the person in question as the child of that person or recognised by law as the child of the person.”\textsuperscript{127} The term “child” in customary law is not limited to one’s biological children. Ollennu explains that a man’s children include his brother’s children and a woman’s children include those of her

\textsuperscript{125} Dowuona-Hammond, supra note 4 at 133.
\textsuperscript{126} A parent is defined to include a “natural mother and father and a person recognised by law [and this includes customary law] as the mother or father of the intestate.” PNDC Law 111, supra note 1 at s 18.
\textsuperscript{127} Ibid. (Emphasis added). The Courts said that “the central question for any judge faced with the issue of whether or not a person is a child within the meaning and intendment of section 18 of PNDCL 111 is whether the deceased recognised the person as his child.” \textit{In Re Koranteng-Addow (Decd); Koranteng-Addow v Koranteng}, [1995-96] 1 GLR 252. See Dictum of Justice Georgina Wood, Justice of the Court of Appeal (as she then was) 252 at 257.
sister.\textsuperscript{128} For the purposes of succession under customary law though, it has been indicated, that the most important question is not necessarily who the children of the deceased are, but rather, who by custom is entitled to succeed to the property of the deceased.

The state, in determining who is a child, also recognises what is termed customary adoption.\textsuperscript{129} The courts have laid down the guidelines for determining a valid customary adoption though most of these guidelines are not supported by any authority.\textsuperscript{130} Where community practices have fallen short of these guidelines, the courts have referred to the traditional practices of the community in question as “unessential frills” and have held such adoptions to be valid.\textsuperscript{131} Also, ethnic distinctions have been ignored and where the courts have been reminded about them, they have justified their decision by claiming that the customary law rules among various communities are the same or that the parties had failed to prove that there was a difference.\textsuperscript{132}

Customary law may also determine whether or not a person died intestate since a will is defined under the \textit{Wills Act} of Ghana to include what is commonly referred to as a

\begin{itemize}
\item \textsuperscript{128} See Ollenu, “Family Law in Ghana”, \textit{supra} note 11 at 178. Ollenu explains that this is especially so where the biological parents are dead or are incapable of exercising parental rights and obligations.
\item \textsuperscript{129} Customary adoption is a form of fosterage where children are voluntarily handed over by their natural parents to another person to raise without reference to state legal processes. See Estelle M Appiah, Protecting the Rights of Children In Ghana: The Legal Framework and Ancillary Matters, online: \texttt{<http://www.cepa.org.gh/researchpapers/Protecting69.pdf>}. Estelle Appiah was the Director of the Legislative Drafting Division of the Attorney General’s Department, Ministry of Justice, Ghana.
\item \textsuperscript{130} See the judgment of Anin J. A. in \textit{Plange v Plange}, [1977] 1 GLR 312-323.
\item \textsuperscript{131} \textit{Tanor & another v Akosua Koko}, [1974] 1 GLR 451-464.
\item \textsuperscript{132} Justice Anin, \textit{Plange}, \textit{supra} note 130.
\end{itemize}
customary law will or *samansiw*,\(^{133}\) and other forms of wills recognised by customary law. Though the formalities for making a valid *samansiw*, as determined by the courts, are uncertain, it is still recognised by the state, but again, on its own terms. Citing no authority for his decision and contrary to known customary law rules,\(^{134}\) Justice Ollenu in the case of *Abadoo v Awotwi* decided that the *samansiw* was a deathbed declaration or had to be made in immediate fear of death.\(^{135}\) Again, basing his decision on no authority, he held that a *samansiw* made under the influence of alcohol, in anger or extreme happiness is voidable, but not void, and could be revoked by the testator on regaining his mental capacity.\(^{136}\) There are two basic problems with this decision. First, it attempts to import into customary law the common law concept of the revocability of wills. Second, the concept of ‘voidability’ is unknown to customary law.\(^{137}\) It need not be emphasised then that the judicial guidelines may only be useful to the urban dweller who chooses to make an oral will; to the rural Ghanaian, these are virtually unknown and of little value. Commenting on the judicial guidelines for the making of a customary law will, Kludze notes that:

> the superior courts [are] laying down elaborate procedures to be followed in making wills under the customary law. In so doing the Courts do not claim to be formulating their own rules because they are not clothed with jurisdiction to legislate. It follows that the decisions of the courts, if they are correct, must be merely declaratory of the customary law as practised by the communities to which they relate. Yet we are faced with the chaotic situation where the practice

\(^{133}\) A *samansiw* is also referred to as an oral will. It would seem that this type of will is known mostly to the people of Southern Ghana. See AKP Kludze, *The Modern Law of Succession*, (Dordrecht, Foris Publications; 1988) [Klundze, “Modern Law of Succession”].

\(^{134}\) Sarbah, “*Fanti Customary Laws*”, *supra* note 6 at 99.

\(^{135}\) *Abadoo v Awotwi*, [1973] 1 GLR 393.

\(^{136}\) *Ibid*.

\(^{137}\) Kludze, “*Modern Law of Succession*”, *supra* note 133 at 127-128.
is different from the law of the statutory courts….But surely, if there exists a divergence between the practised customary law and the judicial customary law, one of them must be wrong; for both cannot be correct.\textsuperscript{138}

Finally, the traditional family to which one belongs is still relevant in the distribution of intestate property. Sections 5 to 10 of PNDC Law 111 recognise the right of the traditional family to a portion of the estate. In fact, under section 10, the traditional family inherits the entire estate if the deceased does not leave behind a nuclear family.\textsuperscript{139} In this regard, the property is divided based on the rules applicable to the traditional family to which the deceased belonged. As expected, the courts have tried to institute principles to modify the rules on inheritance by modifying the concept of family. Indeed, the reforms made to the customary law of succession have been necessitated largely by changing notions of the composition of the family. But what does the term “family” really mean in Ghana, given that both legal systems, the state and customary legal system, interpret it differently? Which group of persons do we envisage when we talk about family?

It has been explained that even though the term, family, has become “a term of art in the law of Ghana,” its meaning remains largely unclear.\textsuperscript{140} Neither the courts nor lawyers are certain about its meaning as the term is sometimes used in reference to only a few persons and at times, a large group of persons, that is, the descendants of a

\textsuperscript{138} Kludze, “Succession in Ghana”, supra note 46 at 92.
\textsuperscript{139} PNDC Law 111, supra note 1 at s 5-10.
\textsuperscript{140} Kludze, “Succession in Ghana”, supra note 46 at 110.
remote ancestor. This problem is to be expected as the concept of the nuclear family is unknown to customary law.

Western influences have created changes in the perception of the composition of the family that is supposed to inherit property. Ollennu contended that even though the whole extended family has a stake in the property of their deceased relative, the courts have gradually confined the beneficiaries to a small group of people including the children and close relatives of the deceased. Ollennu holds the view that this change is the result of convenience, the influence of the common law, and a misconception of those who constitute one’s family under customary law. He insists that the judicial position is definitely not the customary law.

It is clear from the foregoing that judicial customary law is different from practised customary law and that an appreciation of both is essential to understanding the customary law landscape as well as the different values, needs and considerations that underlie the different systems. On the divergence between practiced and judicial customary law, Anselm Kludze, a legal scholar, indicates:

I cannot see any justification for the difference between judicial customary law and practiced customary law. If indeed the courts are declaring the customary

141 Ibid; see also Dowuona-Hammond, supra note 4 at 134.
142 Ollennu, “Law Reform in Ghana”, supra note 12 at 151. It is not settled in law which family inherits the intestate estate. The case of Ennin v Prah, (1959) GLR 44, seems to suggest that it is the immediate family. Justice Ollennu in Kwakye v Tuba says that the intestate estate devolves upon the immediate and wider family together but the right to the immediate enjoyment of the beneficial interest in it and control thereof vests in the immediate family. Also in the case of In Re Atta (Dec’d); Kwako v Tawiah [2001-2002] SCGLR 461 Justice Adzoe Justice of the Supreme Court (as he then was) “whenever the self-acquired property of a deceased intestate is said to become family property, it is the immediate family of the deceased that takes the property.”
law (as practiced) then the difference can only be explained on the basis that the courts have been wrong. If what is declaratory of practice differs from the actual practice, then the purported declaration must be wrong.\textsuperscript{144}

But Poulter cautions that despite the skepticism about the usefulness and legitimacy of judicial customary law, a researcher who chooses to ignore it does so at his or her risk.\textsuperscript{145} He says that the decisions are “very much ‘the law.’”\textsuperscript{146}

\textbf{3.6 CURRENT PRESSURES FOR CHANGE AND THE CONSTITUTION}

In 1986, after the passage of PNDC Law 111, Ghana signed and ratified the African Charter on Human and Peoples' Rights and this has greatly informed further reforms to the Law and current agitations for change. In fact, the Charter does not just require the government to adopt legislative or other measures to give effect\textsuperscript{147} to the freedoms in the Charter, but also to “promote and ensure through teaching, education and publication, the respect of the rights and freedoms contained in the present Charter and to see to it that these freedoms and rights as well as corresponding obligations and duties are understood.”\textsuperscript{148}

These obligations are extensive and entreat the government to promulgate laws to deal with the pertinent issues, and also, to actively educate its citizens and ensure that they understand their freedoms and obligations under the Charter. With particular respect to

\begin{footnotesize}
\textsuperscript{144} Kludze, “Succession in Ghana”, \textit{supra} note 46 at 92.
\textsuperscript{146} \textit{Ibid}.
\textsuperscript{148} \textit{Ibid}, article 25.
\end{footnotesize}
issues of inheritance, article 2 of the Charter requires the elimination of all forms of
discrimination against women through appropriate measures and requires member
parties to take the needed steps to ensure that widows have a right to an equitable
share in the property of their deceased husbands.149

Academics have been quick to point out these and other international obligations to the
government. Victor Gedzi, in assessing the effectiveness of PNDC Law 111 in the
protection of women’s rights, concludes that certain key provisions in the Law
contravene the equality clauses in CEDAW and hopes that the government will be
‘inspired’ to either reform or amendment PNDC Law 111.150 He suggests that the
implementation of relevant provisions of CEDAW by state parties “will enable women to
enjoy their human rights to the fullest.”151

Similarly, Kuenyehia draws attention to the various rights guaranteed by CEDAW and
suggests “[t]he importance of these international instruments in the fight for equal rights
for women cannot be emphasized enough.”152 She directs her activism at judges in
particular and describes as “progressive” those judges who in deciding cases have
“call[ed] ...to their aid”153 such international treaties when domestic legislation on an
issue is deficient. She makes reference to a couple of such judges and invites other

149 See Article 21 of the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of
Women in Africa. 11 July 2003, online: <http://www.refworld.org/docid/3f4b139d4.html>
151 Ibid at 19.
152 Kuenyehia, supra note 14 at 403.
153 Ibid.
judges in Africa to emulate this “pro-rights stance.”¹⁵⁴ Lastly, she notes that “[t]he failure of the judiciary to incorporate international human rights standards into their decisions is a sad omission, as human rights based decisions would certainly go a long way to contribute to the human rights jurisprudence in Africa.”¹⁵⁵

Tracy Higgins and Jeanmarie Feinrich have also reminded the government of Ghana of its international obligations; they have pointed out where it falls short and have made suggestions on how to address the shortcomings. They point out that Ghana’s inability to ensure that PNDC Law 111 is satisfactorily enforced is a breach of its obligations under CEDAW. In their view, the ineffectiveness of the Law is largely the result of the government’s failure to educate its citizenry about women’s rights and “to combat social resistance to the recognition of those rights.”¹⁵⁶ They urge the government to provide the needed political leadership and resources to change traditional attitudes about the status of women. They insist that even though it is a difficult task, it remains part of Ghana’s international obligations.¹⁵⁷

3.6.1 Non-Governmental Organisations

Both local and foreign non-governmental organizations (NGOs) such as the International Federation of Women Lawyers (FIDA), Women in Law and Development in Africa (WiLDAF), Leadership and Advocacy for Women in Africa (LAWA, Ghana)

¹⁵⁴ Ibid at 404.
¹⁵⁵ Ibid at 403-404.
¹⁵⁶ Fenrich & Higgins, “Promise unfulfilled”, supra note 93 at 341.
¹⁵⁷ Ibid at 341.
Alumnae Incorporated\textsuperscript{158} and the African Women Lawyers Association (AWLA)\textsuperscript{159} have also been instrumental in demanding equal rights for women and children, and obviously, reforms to PNDC Law 111.

In February 2014, non-governmental organisations such as AWLA and LAWAGHANA in partnership with the Women and Minor’s Rights Committee of the Ghana Bar Association\textsuperscript{160} and the members of the Property Rights of Spouses Coalition, submitted a memorandum on the 2013 Intestate Succession Bill to the Parliamentary Committee on Constitutional, Legal and Parliamentary Affairs.

In the joint memo, the partnership expressed its dissatisfaction with the delay in the passage of the bill. It was displeased that the 2008 bill, which in its opinion, was passed to bring the law of intestate succession into conformity with article 22, was allowed to lapse the same year. It regretted the fact that the 2009 Intestate Succession bill, which the partnership lobbied to have passed, also lapsed after its second reading in parliament the same year. The partnership in response to calls by the government for comments on the 2013 Intestate Succession bill submitted its review comments and

\textsuperscript{158} LAWAGhana is a women’s rights organization that advocates laws and policies to promote the rights of women in Ghana.
\textsuperscript{159} The African Women Lawyers Association (AWLA) is also a leading African women lawyers association. Its branch in Ghana also undertakes activities to promote the rights of women in Ghana. It has also undertaken a number of projects on women’s property rights. It has undertaken joint projects with LAWAGhana with funding from the German International Cooperation (GIZ) and from Star Ghana.
\textsuperscript{160} Constituted by the Ghana Bar Association to study, review and comment on and make as appropriate input into all bills and legislation which relate to women's and minors’ rights.
urged the parliamentary committee in charge to consider its recommendations to ensure equity and justice.\textsuperscript{161}

These NGOs have been vocal and instrumental in putting pressure on the government to respect the rights of women according to the standards expressed in international agreements. LAWA (Ghana), for instance, drafted a model law on how to ensure the equitable sharing of matrimonial property on divorce and submitted a copy to the Attorney General’s Department. In collaboration with the A-G’s Department, it also undertook consultations on the model law throughout the country. LAWA activists have been known to organize conferences and meetings to discuss similar issues while sensitizing people, especially women, to their rights and the government’s obligations towards them.

FIDA and WiLDAF have designed programs to educate people on their rights and responsibilities under various Acts including the Intestate Succession Law.\textsuperscript{162} Apart from running a Legal Aid center in the capital city, Accra, and a mobile legal aid clinic that conducts legal literacy training nationwide, FIDA also conducts media programs where people are sensitized to the contents of the Law. Additionally, FIDA has translated some of these very important pieces of legislation into local languages.\textsuperscript{163} WiLDAF also has

\textsuperscript{161} LAWA (Ghana) Alumnae Incorporated \textit{et al.} “Memorandum on the Intestate Succession Bill, 2013.” This was submitted to the Parliamentary Committee on Constitutional, Legal and Parliamentary Affairs (February 2014). The document is an unpublished manuscript on file with Mrs. Shiela Minkah-Premo, Chairperson of LAWA-Ghana Alumnae Incorporated.

\textsuperscript{162} See generally Fenrich & Higgins, “Promise unfulfilled”, supra note 93 at 259-341.

\textsuperscript{163} Dowuona-Hammond, supra note 4 at 158.
Legal Awareness Programs in Ho\textsuperscript{164} and Takoradi,\textsuperscript{165} which aim at providing legal education. Through these programs, it is reported that a number of communities have been educated and thus empowered to use the law. Additionally, their legal officers in the named localities have trained legal literacy volunteers who in turn have conducted educational sessions throughout the Western and Volta Regions of Ghana. Like FIDA, WiLDAF also has a radio program with a call-in component which allows listeners to ask questions about the law and receive feedback from the facilitators.\textsuperscript{166} The educational programs, while seeking to enhance the operation of the law, I believe, have also had the effect of broadening the support base of these NGOs, particularly in relation to their demands on the government.

3.6.2 The Courts

The courts have also subtly pushed for change. The constitution requires Ghana to observe its international obligations. It states that “in its dealings with other nations, the Government shall adhere to the principles enshrined in or as the case may be, the aims and ideals of any other international organisation of which Ghana is a member.”\textsuperscript{167} An interesting provision in the constitution, Article 33(5), also been used as a launch pad from which the courts have indirectly enforced human rights not yet ratified by Ghana. It states:

\textsuperscript{164} This is the capital town of the Volta Region of Ghana.
\textsuperscript{165} This is the capital town of the Western Region of Ghana.
\textsuperscript{166} Fenrich & Higgins, “Promise unfulfilled", \textit{supra} note 93 at 328.
\textsuperscript{167} The Constitution, \textit{supra} note 119, art 40(d)(v).
The rights, duties, declarations and guarantees relating to the fundamental human rights and freedoms specifically mentioned in this Chapter shall not be regarded as excluding others not specifically mentioned which are considered to be inherent in a democracy and intended to secure the freedom and dignity of man.\textsuperscript{168}

The court took advantage of this provision in the case of \textit{Delmas America Africa Line Inc. v Kisko Products Ghana Ltd.}\textsuperscript{169} though this was not to enforce a claim regarding inheritance. In this case, Justice Modibo Ocran, then Justice of the Supreme Court, admitted that the Convention\textsuperscript{170} he sought to apply was “not yet ratified and thus not technically part of the body of law enforced within our [Ghana] legal system.”\textsuperscript{171} but he insisted that its contents were “highly relevant” and proceeded to apply them.

The 1992 constitution captures the essence of Ghana’s international obligations. The constitution embodies political and civil rights, as well as economic, social and cultural rights. It guarantees the rights of all Ghanaians including women, children and persons with disabilities.

Article 22(1) of the Republican Constitution of Ghana stipulates that “[a] spouse shall not be deprived of a reasonable provision out of the estate of a spouse whether or not the spouse died having made a will.” The constitution also mandates Parliament to

\textsuperscript{168} Ibid art 33(5) (Emphasis added).
\textsuperscript{171} In Ghana, international conventions are not directly enforceable in national courts unless their provisions have been incorporated by legislation into domestic law. For an international treaty to be regarded as part of domestic law in Ghana, it has to be ratified by an Act or resolution of Parliament. Thus, the interpretation given to article 33(5) conflicts, at least on the face of it, with article 75 of the Constitution, \textit{supra} note 119. According to article 75 of the constitution: “(1) The President may execute or cause to be executed treaties, agreements or conventions in the name of Ghana. (2) A treaty, agreement or convention executed by or under the authority of the President shall be subject to ratification by an Act of Parliament, or (b) a resolution of Parliament supported by the votes of more than one-half of all the members of Parliament.”
enact, as soon as is practicable, legislation regulating the property rights of spouses in order to ensure that spouses have equal access to property jointly acquired during marriage and also that jointly acquired assets are distributed equitably between the spouses upon dissolution of the marriage.  

Furthermore, Article 17 of the 1992 Constitution also deals with equality and freedom from discrimination. In line with CEDAW, it defines discrimination as “different treatment to different persons attributable only or mainly to their respective descriptions by gender, race, place of origin, religion, political opinions, colour, occupation, religion or creed.”

In spite of the gender sensitive provisions in the Constitution, modern changes and the gains made by PNDC Law 111, it is an undeniable fact that presently, there are still social structures that work against women.

### 3.6.3 The Press

With press freedom at its height in Ghana, social commentators have also been very active in criticizing the government for its failure to ensure gender equity. In one notable article titled, ‘Hypocrisy! Daboya MP is not Alone in Chauvinist Beliefs about Women,’ the writer condemns a member of parliament for proposing that women who commit

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172 The Constitution, supra note 119, article 22(1). A similar provision was found in Article 32 of the Third Republican Constitution of 1979. Upon the abrogation of the Third Republican Constitution of 1979, the provisions in Article 32 were retained by sections 3 and 4 of the Provisional National Defence Council (Establishment) Proclamation, 1981.


174 Ibid.
adultery should be stoned. The writer laments the ingrained cultural biases against women in Ghana, biases he condemns as undermining gender equity. Relating these perceived biases to the delay in passing the Intestate Succession Bill, the writer notes that "[t]he deep divisions attending the very bill being debated in Parliament since November 2009, …attest to a deep-seated resistance to ensuring equity for spouses in our body politic."

The writer maintains that the legislator “only loudly stated the chauvinism against women that many institutions in Ghana tacitly endorse.” Describing what he terms “institutional sexism” the writer castigates “religious charlatans [who] malign the worth of women daily from…[their] pulpits, mosques, and traditional shrines, in the name of holy books and esoteric teachings.” He anchors himself to the ‘rights narrative’ and reminds us that Ghana’s “gender record” released by the United Nations Committee on the Elimination of Discrimination against Women (CEDAW) revealed that Ghana was “failing on many fronts.” Publications such as this are not uncommon.

175 This statement was not made on the floor of parliament.
177 Ibid.
178 Ibid.
179 Ibid.
180 The writer indicates that the report advocated that Ghana should adopt a strategy to eliminate harmful practices that discriminate against women and also ensure the full implementation of the laws criminalizing female genital mutilation and other harmful practices. The report also indicated that the perpetrators of the offences should be brought to justice.
181 The Ghana News Agency reports that the United Muslim-Christian Forum (UMCF) Ghana, a voluntary organisation that seeks to “encourage humanity and morality,” organised a series of stakeholder meetings in 2014 to discuss the Intestate Succession Bill. It brought together many Muslim organisations such as Ghana Muslim Mission and the Muslim Students Association. The objective of the meetings was to gather
Most of the criticisms against PNDC Law 111 by NGOs, the courts and academics have focused on the fact that some of its provisions, primarily those that favour the nuclear family, are not workable. The current law’s provisions on the fractional distribution of the estate have been difficult to implement. The prescribed ratios are confusing, and they make the application of the law cumbersome. It has been observed that families are more often than not left with the option of selling off the estate to be able to distribute it in accordance with the stipulated formula.¹⁸²

The law also makes unrealistic assumptions about the Ghanaian family. As earlier indicated customary marriages account for about 80% of all marriages in Ghana and can be polygamous.¹⁸³ However, the law pretends that everyone has one wife and one set of children and assigns to them one house out of the entire estate, irrespective of the number of houses that are left. Thus, surviving spouses and children are sometimes forced to share a house with strangers, who also happen to be surviving spouses and children. The courts are given no discretion to modify the proportions where the

¹⁸² Dowuona-Hammond, supra note 4 at 133. See also, Kuenyehia, supra note 14 at 398.
¹⁸³ PNDC Law 111 does not address the reality of polygamy, despite the fact that more than one in five women aged between 15 and 49 years in Ghana live in polygamous unions. Chronic Poverty Research Centre, “Challenges and Opportunities in Inheritance Rights in Ghana” online: (2011) 3 <http://www.chronicpoverty.org/uploads/publication_files/PN%20Inheritance-Ghana.pdf>.
deceased is survived by more than one spouse.\textsuperscript{184} Hence, the general view seems to be that the law has not achieved its primary aim of protecting surviving spouses and children.\textsuperscript{185}

In the midst of the pressures on government to make the law of succession more equitable, there remains a large number of Ghanaians, mostly in the countryside, who remain faithful to the customary law of succession and seem adamant in their desire to continue to regulate their lives by it. Next I will discuss the findings of researchers who have assessed the rate of compliance with PNDC Law 111 in some of these rural communities in Ghana.

3.7 THE EFFECT OF LAW REFORMS

For those who live in rural Ghana, customary law governs almost every aspect of their lives. The state has not been able to make any significant changes to the practice of customary law in the countryside,\textsuperscript{186} and what is termed judicial customary law is hardly known in these communities. Consequently, Randall Morck and Edward Kutsoati have stressed that formal legal reforms are useful for the few connected to the formal economy and have minimal impact on most Ghanaians.\textsuperscript{187} For most Ghanaians

\textsuperscript{184} For a fuller discussion about the failures of PNDC Law 111, see Dowuona-Hammond, \textit{supra} note 4 at 132-168; see also Fenrich & Higgins “Promise unfulfilled”, \textit{supra} note 93 at 295ff.
\textsuperscript{185} Dowuona-Hammond, \textit{supra} note 4 at 133.
\textsuperscript{186} Some changes have been. It is reported that even though a study by the United Nations Children’s Fund (UNICEF) has revealed widespread practice of female genital mutilation (FGM) in Ghana, the practice is declining. Myjoyonline, “UNICEF report reveals FGM still prevalent” (23rd July, 2013), online: \texttt{<http://edition.myjoyonline.com/pages/news/201307/109930.php>}.
dependent on the traditional economy, the reforms are hardly helpful. This is true of the Intestate Succession Act.

In spite of PNDC Law 111, the old laws on the distribution of intestate property continue to be used especially in the rural areas.\(^{188}\) This is expected as “[h]istory shows that, when a state legislates for a radical departure from customary practice, the legislation is apt to be disregarded.”\(^{189}\) Many reasons account for the low compliance rate including illiteracy, a general lack of education about the law, inaccessibility of state courts, fear of alienation by the community and differences in cultural values. Of these, the differences in the values underlying the customary law and state law systems of inheritance provide the most compelling explanation.

As has been explained in the previous chapter, the customary legal system is not just a legal system, but embodies a communally accepted way of life and is believed to have religious underpinnings. This is not to suggest that there is any such thing as pure customary law because there is not. In fact, customary law has been hailed for its versatility and flexibility.\(^{190}\) Under customary law, one does not confront a civilization

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188 Dowuona-Hammond, supra note 4 at 133.
190 Customary law has undergone many changes. Now, customary land transactions in particular are being evidenced in writing. See, Gordon Woodman, “A Survey of Customary Laws in Africa in Search of Lessons for the Future” in Jeanmarie Fenrich, Paolo Galizzi & Tracy Higgins, eds, The Future Of African Customary Law (Cambridge University Press, 2011) at 15-16 [Woodman, “Survey”]. He explains that the content of ‘living law’ has changed significantly in the past century and continues to do so though the various communities “exercise degrees of independence in determining their reactions” to the forces of change. According to Jeanmarie Fenrich and Tracy Higgins, Professor Takyiwah Manuh, a professor at the University of Ghana, conducted research on the application of the Law in the Ashanti Region and found that when a man dies in a village his family actually believes that it has a right to his home, but because of the influence of PNDC Law 111 and they the fact that the family members “are good”, they
with an arrested history. However, there are certain traditional values and beliefs underlying the law generally, to which customary law reforms must attempt to conform if they are to be embraced.

State law is foreign to the rural Ghanaian since it is a legal regime whose values and ideologies the rural Ghanaian can hardly relate to. It is made in the distant capital and cannot possibly be aimed at the rural folk whose economic, social and political lives the state cannot purport to understand, much less regulate. For this reason, it has been said of PNDC Law 111 that it constitutes a “foreign solution to an indigenous problem.”\textsuperscript{191} Kludze also explains:

If you …go to my village [in the Volta region of Ghana] and ask the leaders or the chiefs what type of law they are administering, none of them is going to tell you that he is administering folk law and that the courts are administering state law. What is here being called state law they would call-in a pejorative sense—‘English law,’ even though it may well have been enacted by the Parliament of Ghana.\textsuperscript{192}

In a nutshell, state law may speak about rural Ghanaians, but it does not speak to them. It is a system of law they simply do not understand. Customary law is what they know, it is what makes sense to them, it is their natural law.

Victor Gedzi in his ethnographic research on the level of compliance with the Intestate Succession Act surveyed 150 respondents. First, he clarifies that in spite of all the

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allow the widow to have one room in the home of her deceased spouse. See Fenrich & Higgins, “Promise Unfulfilled”, \textit{supra} note 93 at 325. It should be noted that under PNDC Law 111, the surviving spouse (and children) is actually entitled to the entire house. See PNDC Law 111, \textit{supra} note 1 at s 4.

\textsuperscript{191} Dowuona-Hammond, \textit{supra} note 4 at 133.

modern changes occurring in rural Ghana, the customary law of succession remains the most well-known law on inheritance among his respondents, with PNDC Law 111 being the third most popular. The popularity of the customary law of succession among rural folk is confirmed by Edward Kutsoati and Randall Morck in their 2012 research paper, *Family Ties, Inheritance Rights, and Successful Poverty Alleviation*. They surveyed 322 widows living in four villages in Southern Ghana. Their survey revealed that a quarter of a century after the passage of PNDC Law 111, it is seldom applied in rural Ghana and that traditional inheritance norms persist.

While one may be quick to point to the absence of knowledge about PNDC Law 111 as accounting for the low rate of compliance, Gedzi makes an interesting point that “even those who are aware of its [Intestate Succession Act] existence do not comply with the law.” Similarly, Kutsoati and Morck reveal that even though about half of the respondents had prior knowledge of the Law at the time of marriage or before the death of their spouse, 70% of them still settled their deceased spouses’ estates in accordance with traditional or religious customs. They explain that “[o]ur extensive survey of

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194 Kutsoati & Morck, *supra* note 187 at 20ff. About half of the respondents had prior knowledge of the Law.

195 *Ibid* at 3.

196 See Gedzi, “Dispute Resolution in Ghana”, *supra* note 193 at 112.

197 Kutsoati & Morck, *supra* note 187 at 22.
widows living in matrilineal and patrilineal traditional village societies shows that PNDC Law 111 is little used, even by women familiar with it.”

Admittedly, an important question would be, how well do these people know the law? Beatrice Duncan and Caroline Brants, according to an earlier study in the Volta region of Ghana, found that the Intestate Succession Act was the best known piece of legislation among their respondents. This suggests that the failure to use the Law is not primarily because it is not known or not well known.

Even state law enforcement agents in some of these rural areas are reluctant to prosecute or intervene in cases involving rifts between the customary and state legal systems. The evidence seems to suggest that these public servants are most often “reluctant to enforce the formal law and apply sanctions when it is violated because these same officials are often also charged by their traditional communities with upholding customary laws.” Higgins and Feinrich report that an Assistant Superintendent of Police at Ho in the Volta region of Ghana admitted that he did not attempt to enforce the criminal provisions of PNDC Law 111 protecting surviving spouses from being ejected from their matrimonial homes. When they sought an explanation from the Director of the Legal Aid Board for the Western Region, he

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198 Ibid at 46.
200 See Kutsoati & Morck, supra note 187 at 15.
speculated that male police officers “do not want to enforce [PNDC Law 111] because even they would use customary law.”

3.8 WHY REFORMS HAVE NOT BEEN SUCCESSFUL

Reforms have not been as successful because the general vision for law reforms has been the protection of individual rights, the internationalization of law making and arguably, Europeanisation. This narrow and socially costly vision has resulted in two distinct problems which will be discussed shortly.

It would be incorrect to assume that customary law reform methods in Ghana in the 21st century are any different from those of the immediate post-independence era and immediately thereafter. The modern state of Ghana is built on the same administrative structures and similar ideological perspectives as the colonial and post-colonial state, thus making reform efforts similar. According to one legal scholar, “[i]t seems that neither the colonial legislator nor his indigenous successor thought much about the interaction between law and social change.” But Blocher thinks that legal reformers should have already learned some lessons since the early law and development

201 See Fenrich & Higgins, “Promise unfulfilled”, supra note 93 at 335-336. Feinrich and Higgins suggest that “Ghana’s failure to ensure that members of the police department enforce the criminal provisions of PNDC Law 111, making it an offense to eject a surviving spouse from her matrimonial home or to interfere with her use of the property, violates its obligations under international law by denying women equal protection of the law.”

202 This means that laws are made primarily to give effect to or reflect international obligations or standards. Kenneth Keith, “Philosophies of Law reform” (1989-1992) 7 Otago L Rev 363 at 370.


204 Kofi Oti Adinkrah, supra note 20 at 1.
movement struggled when the "Western-style" legal reforms it suggested in developing countries were met with enormous cultural resistance.\textsuperscript{205}

The same conception of customary law, driven by western systems of education, human rights and the ubiquitous notion of modernization, continues unabated. Judges, in deciding cases involving customary law, have been careful to ensure that their reasoning embraces the demands of the current "age of women's liberation"\textsuperscript{206} and western standards of "decency, public morality and public policy."\textsuperscript{207} Additionally, considerations of a foreign standard of "natural justice and good conscience,"\textsuperscript{208} and individual freedoms are not uncommon.\textsuperscript{209} These are the principles of law reform that the reformers are guided by in imposing on a fiercely communalistic society, a system of inheritance that is fundamentally opposed to theirs.\textsuperscript{210}

The fact is that any nation whose legal system does not seem to embody these concepts bears the risk of being branded "backward." Such tags are destructive, especially for building any economic partnerships with other nations. Sally Merry raises a very interesting point about nineteenth-century Hawai'i where specific narratives legitimated the transfer of legal knowledge and expertise. The narratives, she points out, were about civilization, progress, and Christianity. These were the marks of a modern civilized legal system. She continues that, though today, the narrative is of

\textsuperscript{205} Joseph Blocher, \textit{supra} note 118 at 176.
\textsuperscript{206} \textit{Kombat v Lambim}, [1989-90]1 GLR 324.
\textsuperscript{207} \textit{Addae v Asante} [1974] 2 GLR 288.
\textsuperscript{208} Abebreseh, \textit{supra} note 26 at 55.
\textsuperscript{210} Keith, \textit{supra} note 202 at 363ff.
globalization, “the rule of law, democracy, and human rights remain implicit measures of civilization and acceptability to a Euro-American global order.”\(^{211}\) Merry points out that the contemporary legal reformer’s supposed vision of democracy and the rule of law are similar to those of the British colonial official’s vision of civilization. She adds that just as the British colonialist confronted signs of ‘barbarism’ which legitimated his or her intervention, so the contemporary reformer struggles against harmful traditional practices which obviously justify whatever reform method he or she may choose to use.\(^{212}\) Thus, the aims of the reformer remain the same and the reform methods also remain the same.

The first specific problem that accounts for the low rate of compliance with PNDC Law 111, especially in rural Ghana, is the meagre portion of intestate property given to the extended family, which is the backbone of the customary legal system. To reiterate, intestate property was hitherto the exclusive property of the matrilineal family. The reduced portion does not accord with the legal expectations of the rural Ghanaian. This conclusion is corroborated by Gedzi’s research, which concludes that “[i]t appears, therefore, that the different cultural groups are unwilling to surrender their legal heritages for the new law [PNDC Law 111].”\(^{213}\) This is a very important statement because it underlines the fact that to the rural Ghanaian, customary practices are not just any social practices, they are legal. Secondly, it could be inferred from Gedzi’s statement that to the rural Ghanaian, customary law is a heritage; it is an inheritance


\(^{212}\) Ibid.

\(^{213}\) Gedzi, “Dispute Resolution in Ghana”, supra note 193 at 110.
which will not be given up without resistance. Thus, PNDC Law 111 makes erroneous assumptions about the sociocultural and legal leanings of Ghanaians, especially regarding the importance of the extended family.

Many of the problems inherent in this Law are a result of the fact that there are some underlying assumptions of the Law which have been proved incorrect. One of these is that the customary family no longer serves any purpose at all during the life or upon the death of a person... these faulty assumptions have in a substantial way affected the effectiveness of the law and are in no small way responsible for the obvious shortcomings. First of all, it is untrue that the customary family serves no purpose at all during the life time of its members. Although this may be the attitude of the Urban elite it is not so for the rural people or the urban poor. Thus, the set-up within which interest in the property of a deceased would be exclusive of all others is not entirely Ghanaian. The family has always been a source of support - financial or moral - for its members.214

Membership of the extended family offers many social and economic advantages. It offers a support system that contributes to the long-term stability and wellbeing of all members.

In view of the social standing and importance of the traditional family, and the strong social ties that exist among members of rural communities, individuals are afraid of being alienated if they do not order their lives according to the customary system of inheritance. Kutsoati and Morck have explained that most poor widows are more daunted by the risk of challenging traditional norms than the financial costs involved in using state law. They explain that the consequences of openly disregarding deeply rooted custom can be devastating.215 Higgins and Heinrich also confirm that even where women understand their rights under the law and have the resources to pursue their

214 Henrietta Mensa-Bonsu, supra note 51 at 110-111.
215 See Kutsoati & Morck, supra note 187 at 15-16.
claims, they often encounter significant social pressure from their families and communities not to seek legal recourse, but rather to resolve the cases outside of the judicial system.\(^{216}\)

In addition to the fear of alienation is the “fear of spiritual reprisals from family members.”\(^{217}\) There is a belief among Ghanaians, especially rural Ghanaians, that certain individuals or groups of people have access to certain mystical or spiritual powers, which they can use for destructive purposes. Gedzi cites an example of a teacher who attributed the paralysis of her two sons to spiritual ‘attacks’ from her deceased husband’s family members, whom she prevented from taking her husband’s property.\(^{218}\) Another woman refused to claim her matrimonial home because she was afraid of similar attacks. For the same reason, another woman declined her share of her deceased spouse’s intestate property insisting that, “I prefer to live in peace with the family members.”\(^{219}\) Thus, belief in the supernatural prevents surviving spouses from defending their property rights. Until PNDC Law 111 addresses the needs and concerns of the extended family, enforcing the Law in rural communities will be a challenge.

\(^{216}\) Some cases do get to the state courts, but the moment these are filed, it signifies “a total breakdown of societal norms; it means that the elders, the chief, the pastor, all highly respected members of the community, have all failed to resolve the dispute.” This was reportedly said by As Samuel Yao Nudo, an attorney in Ho in an interview with Feinrich and Higgins. Feinrich & Higgins, “Promise unfulfilled”, supra note 93 at 334.

\(^{217}\) This was discovered in a fieldwork project among the Anlo and the Ashanti, in the Volta and Ashanti Regions respectively. Victor Gedzi, “Women and Property Inheritance after Intestate Succession, Law 111 in Ghana” (A paper presented at the IAFFE Conference Boston, MA, June, 25-28, 2009), 12, online: <https://editorialexpress.com/cqbin/conference/download.cgi?db_name=IAFFE2009&paper_id=325>.

\(^{218}\) Ibid at 13.

\(^{219}\) Ibid at 13.
The second main reason for the low compliance rate is the fact that legal reforms have focused on changing legal rules and have not given equal attention to social, economic and political reforms. As is generally known and as the cases to be discussed in Chapter Five will demonstrate, the extended family is an economic system; it is a wealth creating and wealth maximizing system. This means that laws that potentially interfere with its ability to create wealth will be resisted. Thus, legal changes must be accompanied by changes to the economic circumstances of those in the rural areas. It would seem that the state has not paid much attention to this fact. It also seems that in spite of the power held by traditional authorities, their involvement in reforms is minimal. The cases to be discussed will demonstrate the power wielded by family heads and the freedom with which these heads treat family property as their own, with minimal objection from family members. Also, as noted above, traditional authorities are so powerful that surviving spouses, especially women, are intimidated by the risk of challenging traditional norms.\textsuperscript{220} This goes to show that the power held by these authorities must be tapped into for the statutory inheritance rules to be embraced by the people. Lastly, the matrilineal inheritance rules are based on the mystical belief that family members are “nurtured by a common sacred blood in the mother’s womb.”\textsuperscript{221} It is for this reason that those who do not share this blood are excluded from inheriting family property. Education is a prerequisite to enabling people to understand that other special relationships based on love and trust exist, and that the basis of these special relationships are equally important grounds for inheriting property. Again, the fact that

\footnotesize{\textsuperscript{220} See Kutsoati & Morck, \textit{supra} note 187 at 15-16.  
\textsuperscript{221} Ollennu, “Succession”, \textit{supra} note 16 at 77.}
spouses are afraid of defending their property rights because of fear of spiritual acts of revenge highlights the importance of education as a reform intervention. The state should deploy its resources to advancing education, especially in rural Ghana. In sum, legal reforms are also about social, economic and political reforms.

3.9 CONCLUSION

I have attempted to show how the statutory and customary laws of intestate succession function in Ghana. This chapter has also explained the potential and actual abuses that have characterized the matrilineal inheritance system and the nature of the pressures that were exerted on the government, resulting in the eventual promulgation of PNDC Law 111. This Law was seen as a major victory for women and children’s rights in Ghana. It was presumed that the Act would guarantee for the first time in the history of Ghana, the financial security of women and children, especially on the death intestate of the spouses and parents respectively. However, the law has not lived up to expectations. Conflicts over property, especially between nuclear and extended families continue, while new conflicts have emerged within polygamous ‘nuclear’ families. More importantly, there is a large number of rural dwellers and some urban dwellers who for various reasons, including the fact that they cannot identify with the values inherent in PNDC Law 111 and the responsibilities it imposes, have chosen to ignore it. This should bother the state. Realizing that the fragmented approach to customary law reforms is not effective, the state must re-define its vision for legal reform. The answer to ensuring adherence to state law lies in the use of a holistic approach to law reforms and the strategy for such is what the next chapter seeks to propose.
Chapter 4: ATTEMPTS AT LAW REFORM AND THE MUTUAL CONCESSION APPROACH

4.1 INTRODUCTION

This chapter explains the first part of my two-level strategy for the reform of the law of intestate succession in Ghana. It assesses the attempts made by the Ascertainment of Customary Law Project (ACLP) and the Parliament of Ghana to bridge the gap between state law and living customary law. There are ongoing attempts by the ACLP to ascertain customary law, and Parliament in its deliberation on the Intestate Succession bill has attempted, to some extent, to throw light on the effects of ignoring customary law demands and values in the promulgation of state laws. Though it is unclear how these attempts will solve the existing problem, I discuss them to show the current efforts to give a voice to living customary law. This is followed by an explanation of the relevant provisions of the Intestate Succession Act and then a presentation of my proposed reform approach. Lastly, this chapter analyzes the advantages and disadvantages of my suggested approach.

4.2 EFFORTS AT BRIDGING GAP BETWEEN STATE LAW AND LIVING CUSTOMARY LAW

4.2.1 Current Project on the Ascertainment of Customary Law

It would seem that Ghana’s attempt to bridge the gap between living customary law and state law has been to ascertain the rules of the former. The Ascertainment and Codification of Customary Law Project (ACLP), was started in 2007 by the National
House of Chiefs (NHC) in collaboration with the Law Reform Commission (LRC) to ascertain and document the customary law on land and family. This is in line with the constitutional mandate of the NHC to “undertake the progressive study, interpretation and codification of customary law” and to evaluate “traditional customs and usages with a view to eliminating those customs and usages that are outmoded and socially harmful.”¹ It seems that the aim of the ACLP is to codify the ascertained law eventually, also in fulfillment of Article 272(b) of the constitution.²

The first phase of the project was carried out on a pilot basis from 2007 to 2011. Two traditional areas from each of the ten administrative regions of Ghana were selected for the project. Researchers were trained to collect data on land and family law from these communities after which the data was validated at workshops held in these communities. The second phase will see the collection of data from about 30 traditional areas. The final phase involves consultations with traditional leaders of areas not involved in the first and second phases. These leaders will be asked to review the ascertained law and identify variations from their communities after which there will be a final validation. According to the ACLP Secretariat, after the validation, there will be the

¹ Article 272 of the Constitution of the Fourth Republic of Ghana, 1992 (Laws of Ghana (Rev. Ed. 2004), Vol I, 140) and section 3(1)(b) and (c) ["The Constitution"].
“codification of [the] ascertained customary law and eventually, the declaration of the rules of customary law.”

Ascertainment is a popular reformatory tool that has been employed by reformers to make customary law more certain and accessible. Ascertainment refers to a “precise and juristically worded” record of the existing customary law rules and has been described as “less intrusive” than codification in that it states the law as it is without attempting much modification. Ascertaining customary law has merit; it has been hailed for ensuring greater certainty in the law even though it is not clear the extent to which writing customary law would make it more certain. With regard to the customary laws on intestate succession, I agree, to some extent, with Kludze that “the customary law on the devolution of intestate estates is certain and ascertainable in the several communities.” In fact, what is not certain is judicial customary law. Allott has no doubt that African customary law is as certain as can be. He explains that there are “many rules of African laws which are as precise and detailed as any pedantic Chancery lawyer could ask for.”

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3 Ibid at 9.
4 See the introduction of AKP Kludze, Ghana: Ewe Law of Property V1 (London: Sweet and Maxwell, 173) (“Ewe Law of Property”).
7 AKP Kludze, “Problems of Intestate Succession in Ghana” (1972) 9 UGLJ 89 at 101 [Kludze, “Intestate Succession in Ghana”].
8 Ibid at 101. Kludze notes that there exists considerable uncertainty and confusion in customary law as found in decisions of the courts and the writings of text-writers.
Ascertainment can make the law more accessible, but to whom? It has also been said that it has the advantage of being able to provide the courts with a set of principles to aid them in the formulation of decisions.\(^\text{10}\) To what extent are the courts really aided by the rules of living customary law? Furthermore, it has been commended as being a device that can potentially harmonise the customary laws of the various ethnic groups, where possible, as well as harmonise the customary law, generally, with those laws of western origin.\(^\text{11}\)

Without attempting to reiterate the arguments against ascertaining customary law, I wish to point out that customary law is not static and its contents cannot be verified just by reference to a written document, but by constantly observing the community in question to know the rules they continue to follow and those that have been discarded. Over the years living customary law has undergone many internal changes; it has been affected by political, economic, social and juristic developments. Woodman confirms that the content of ‘living law’ has changed significantly in the past century as a result of “internally generated changes of social attitudes within communities.”\(^\text{12}\) In view of these realities, ascertained customary law stands the risk of not being in touch with practice.

In Ghana, the dangers of ascertainment were first pointed out by Mensah Sarbah who ascertained the customary law of the Fanti tribe in his *Fanti Customary Laws*. He was well aware that recording the customary law of a semi-developed state could potentially

\(^{10}\) Allott, “Ascertainment”, *supra* note 6 at 244-245.
\(^{11}\) See the introduction of Kludze, *Ewe Law of Property*, *supra* note 4.
stifle its growth.\textsuperscript{13} Even though some of the customary law rules he ascertained in the early twentieth century are still relevant, the courts have pointed out that certain concepts and conditions which prevailed when Sarbah wrote his book no longer exist.\textsuperscript{14}

It is not clear how ascertaining customary law will help to close the existing gap between state law and living customary law. Firstly, the fact that the law, as practiced by the people, has been ascertained does not mean that it is going to be applied by the courts or other relevant bodies. According to the \textit{Courts Act} of 1993, customary law can be applied by state courts if its rules meet the requirements of “equity and good conscience” and they are not incompatible with any existing statutory law.\textsuperscript{15} Thus, customary law, though a constitutionally accepted source of law in Ghana, will be modified, where necessary, before it is applied.

In fact, the project report states “[i]t is expected that some of the rules ascertained and documented from the project may be considered by the NHC to be suitable for assimilation into Ghanaian law.”\textsuperscript{16} As a result, ascertained rules will have to meet a certain standard before they can be incorporated into the laws of Ghana. The report further states that the rules adopted by the NHC shall be submitted to the relevant minister of state who after consultation with the Attorney General may make a legislative instrument giving effect to the recommendation of the NHC.\textsuperscript{17}

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\textsuperscript{14} In \textit{Re Kofi Antubam (dec’d); Quaicoe v Fosu & Another} [1965] GLR 138.
\textsuperscript{16} ACLP Report, \textit{supra} note 2 at 9.
\textsuperscript{17} \textit{Ibid} at 10.
rule shall be referred to as a common law rule of customary origin and shall be applicable to all relevant issues including those which would have been determined according to the common law or any system of customary law.\textsuperscript{18} The ascertained rules that are not considered suitable for assimilation will simply be declared rules of customary law applicable to the communities in question.\textsuperscript{19} The importance of the declaration is not clear as the assimilated rule would supersede the ones not assimilated. Evidently, this process is unlikely to result in a set of rules that the various rural communities can identify with and thus, comply with.

4.2.2 Law Reform Efforts by the Parliament of Ghana

The parliament of Ghana has also attempted to draw attention to the gap between state laws and living customary law. Given that PNDC Law 111 was passed by a military government and at a time when there was no parliament, this is the first time that the voice of the people of Ghana is being heard about the Act and the new bill. The debate on the bill has been interesting, exciting and revealing. The current parliament of Ghana is made up of 275 members. The parliamentarians represent the 275 constituencies across the country, most of which are in rural areas.\textsuperscript{20} Parliament sits in the capital city, Accra. As can be expected, the legislators bring to Parliament differing ethnic and educational backgrounds, lived experiences, biases and shades of opinion.

\textsuperscript{18} Ibid.
\textsuperscript{19} Ibid.
\textsuperscript{20} In Ghana, among other criteria, one may become a parliamentarian if firstly, one is resident in the constituency for which he stands as a candidate for election to Parliament or secondly, if one has resided there for a total period of not less than five years out of the ten years immediately preceding the election for which the person stands, or thirdly, if one hails from that constituency. The Constitution, supra note 1, art 94 (1) (b).
While some of the pronouncements made during the debate on PNDC Law 111 appeared to be deliberate attempts at bridging the gap between the two, others simply emphasized the problem. I think that one of the most important observations about the parliamentary debate, apart from attempting to close the gap between state and customary law, is the revelation that Ghanaians embody a hybrid legal identity, which I contend manifests itself in ambivalence towards state law, and overt fidelity to customary law and its value system. Ghanaians inhabit two worlds: the traditional, a product of being legally socialized by customary law, and a modern one resulting from colonialism and globalization. This dual identity impacts their receptiveness to customary legal reforms by the state. Thus, the ensuing discussion, while demonstrating the divide between state and customary law will also show how this complex dual identity influences legal reforms.  

Firstly, the parliamentarians seemed uneasy about discussing the law as they would any other piece of legislation. They were constantly reminding each other that the bill was “fundamental” and was going to “change the family structure” in Ghana and cautioned against the use of what one member described as a “hop, step and jump” approach to the deliberations. In fact, during one of such deliberations, a member

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21 In fact, the clear divide between ‘modernity,’ represented by the state, and tradition, represented by customary law, has been on display in the parliamentary proceedings on intestate succession in Ghana. The differences, I believe to some extent, account for why both the 2008 and 2009 bills lapsed and had to be re-enacted in 2013. The Intestate Succession Bill gives greater inheritance rights to spouses than the previous inheritance law (PNDCL 111 was passed in 1985). The bill is currently before Parliament, having undergone nationwide parliamentary and NGO-led consultations.


asked that the debate be postponed until the house was fuller so that more members could take part in the debate, but he was quickly reminded that the house had just debated the public health bill and was entreated to treat the intestate succession bill "as normal," that is, like any other bill. The legislators seemed edgy. Their caution in reforming the law on intestate succession and their insistence on having a fuller house, in addition to the constant reminders about the importance and implications of the bill, demonstrate a fidelity to customary law. It is an admission that customary law affects the lives of most people. It also reveals the legislators relate to the system of customary law.

Secondly, referring to the report prepared and presented to the House by the Committee on Constitutional, Legal and Parliamentary Affairs on the proposed bill, a legislator expressed concern that the report suggested that in the distribution of property, some concessions had to be made to customary law 'spouses' of persons who had earlier contracted Ordinance marriages. Legally, this is wrong. In Ghana, a man who marries under the Ordinance cannot thereafter marry another person under customary law; it is bigamous. Marriage under the Ordinance is strictly monogamous. The legal implications of the suggestion were obvious to the legislator who described it as "dangerous," "promoting bigamy" and "undermining the legitimacy"

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24 *Ibid* at para 3143 (Hon. Mrs. Opare).
26 He may marry several women under customary law as customary law marriages are potentially polygamous.
27 One may however marry the same person first under customary law and then later under the ordinance thereby converting a potentially polygamous marriage into a monogamous marriage.
of the Marriage Ordinance.\textsuperscript{28} He explained that if the country wanted to make changes to its laws on marriage then the Attorney-General had to bring a bill before parliament to repeal the Marriage Ordinance. It is not clear why the committee would consider the issue of such ‘wives’ given the illegal nature of their relationship with the deceased. There are other remedies available to these ‘customary law wives’ if they claim to have acquired property jointly with the deceased, but state law cannot purport to consider them. But, the suggestion was to be expected given the hybridity of their legal past and orientation.

I contend that most Ghanaians have a conception of marriage and of familial relationships which is shaped by customary law. Since customary marriages are potentially polygamous, those who made the unfortunate suggestion unconsciously transferred their traditional understanding of marriage onto a set of facts controlled by western-influenced laws. They inadvertently defined legal rights and responsibilities from a traditional perspective. Even though the legislators represent an arm of the state and must be seen to be promoting the ideals of ‘modernity,’ they could not resist the inner compulsion to be faithful to the customary legal system.

Another case in point is where a legislator described an incident which happened in his presence in Kumasi, the capital city of the Ashanti region. According to him, the incident, involving a Muslim woman, happened during their regional consultations with selected stakeholders. In his words:

\textsuperscript{28} Ghana, Official Report of Debates of Parliament (4\textsuperscript{th} session of the 5\textsuperscript{th} Parliament of 4\textsuperscript{th} Republic) Fourth Series Vol. 76, No. 2 (25th January, 2012) at para 86 (Hon. William Boafo) [January Parliamentary debate].
I remember in Kumasi, some ladies who were Muslims appeared before us and their concern was that ever since PNDC Law 111 was made, Muslims have always rejected it because in their opinion, the Quran is Supreme and it says that the eldest son must take the property so they would not abide by any law which says anything to the contrary.  

But another legislator, who is a Muslim, responded that “[t]he Quran does not say that. Indeed, the Quran clearly shows how the estate of a person must devolve on death intestate.” He added that “[a]nd it is the only book of religion that deals with succession on death intestate.” One wonders why the legislator is making reference to the Quran, or better still, his customary law because the Intestate Succession Act is applicable to the estate of a Muslim who dies intestate. In fact, one of the main aims of the Intestate Succession Act is to provide a uniform law applicable to all Ghanaians irrespective of their peculiar circumstances, including their religious beliefs. The current bill has been resisted most strongly by Muslims. A Chief Imam is reported to have said regarding the Intestate Succession Act and adherence to the Islamic law of succession, "[w]e continue with our law. We still go with the Koran as it says." So, the legislator was in fact drawing attention to the divide between state laws and practiced customary law. His statements give ample evidence of the prevailing ambivalence toward state law, Ghanaian legal inclinations and how these influence law reforms.

Again, a very traditional view of the method for the determination legal entitlements of surviving spouses and what it means to contribute to the acquisition of property was

29 *ibid* at 88 (Hon. Osei-Prempeh).
30 *Ibid* at 89 (Hon. Alhaji Fuseini).
31 *Ibid*.
expressed by another legislator. Explaining his view on how intestate property had to be
shared among surviving spouses, he said “the entitlement to any share of the estate of
the person must be dependent on your contribution…to the estate and not just that you
are a wife. If it is so, it does not make sense.” But legally, Ghana has moved from the
customary law notion that one must contribute financially to the acquisition of marital
property to be entitled to a share of it. Gone are the days when the courts upheld the
principle that property acquired by a spouse individually during the course of a marriage
belonged exclusively to that spouse. Currently, marital property is understood to be
“property acquired by the spouses during the marriage, irrespective of whether the other
spouse has made a contribution to its acquisition.” But a legislator, described as a
pharmacist, barrister, diplomat and politician, could not help but display his devotion to
an age-old principle of customary law, which by virtue of his socialization, appeals to his
sense of justice.

In another startling submission, a legislator, described as an agriculturist with a Ph.D.
(Agronomy) from the Imperial College, University of London, UK, seemingly unaware
of the objective of the bill, suggested the introduction of a clause that would recognize
cultural diversity in the sharing of intestate property, especially among the children of
the deceased. He expressed his opinion thus:

33 July Parliamentary debate, supra note 22 at para 3156 (Hon. Joseph Y. Chireh).
37 Profile on Ghana Parliament website: <www.parliament.gh/parliamentarians/63>, (Hon. Joseph Y.
Chireh).
38 Profile on Ghana Parliament website: <www.ghanamps.gov.gh/mps/details.php?id=2677>, (Dr. (Alhaji)
Ahmed Y. Alhassan).
Even though this law [the Intestate Succession bill] recognizes all children to be equal, in certain traditions..., particularly in Islamic tradition, where you have more males in a particular society the distribution is according to a certain formula. In other words, males and females are not weighted equally. So there are fundamental difficulties and we need to do some reflection and consultation in arriving at this. *We need to have an omnibus clause to give recognition to certain cultures and the way they distribute property intestate.*

I find this shocking for many reasons. The bill is meant to create a uniform system of intestate succession irrespective of tribal and religious considerations. It is to ensure that all Ghanaians, male and female, are equal before the law and have equal share in the estate of their deceased parent. It is not clear why is the legislator is concerned about traditional beliefs and practices when members of the house have been reminded time and again that the proposed bill was an opportunity to “migrate from...traditional and cultural values and practices to the modern concepts.”

The legislator clearly understands the import of the proposed bill, that all children are equal and yet, cannot seem to resist the urge to hold on to tradition. His suggestion about the insertion of an omnibus clause recognizing cultural diversity in the sharing of intestate property substantiates the fact that “[n]either Oxford nor Harvard has succeeded in extricating the educated Ghanaian from the intricate web of obligations implicit in the traditional family system.”

The most interesting submission came from the Honorable Cletus Avoka who, while advocating that the public be well educated about the requirements of the proposed law in order to ensure compliance, seemed at the same time to demand that the customary

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law on the issues in question be maintained in order to help build a more cohesive society. Referring to the Bill as a “radical…intrusion into our customary system,” he called for the provision of extensive education through the various Houses of Chiefs and district assemblies in order to sensitize people to the changes being made to the law. He cautioned that “if we do not do that, we are going to have a lot of chaotic developments in our communities because of the radical departure from the traditional system of inheritance to the system that we are going to have.” Then he plunged into a most interesting address:

Madam Speaker, even though it [PNDC Law 111] has a popular appeal, the challenges to this bill becoming law are enormous too. We have grown as a society because of certain traditional values, cultural values that we know of, and that is why people envy us. Madam Speaker our tradition has it that one is one’s neighbours keeper; one is one’s brother’s keeper but the effect of this bill will mean that we are limiting this responsibility to the core of the nucleus family and that is why I think it is a challenge. We have seen examples already in the system - relatives who are discharged from hospitals, mental hospitals or other areas have been abandoned and that is because of the collapse of the traditional or the cultural values of our society. So if the introduction of this bill and its implementation at the end of the day will lead to further neglect of our compatriots, I think that there must be some moderation or there must be some intervention somewhere along the line where we can still have some benefit of our traditional values while at the same time ensuring that we bring some equity in the inheritance system that we have in the country. It is important to do so otherwise, the law might become un-implementable. It is easy to pass a law in this House but the question of implementation is going to be a challenge to us…. [T]here must be serious and intensive education at all levels of our society so that people can understand and appreciate it, otherwise, it will be an exercise in futility.

The legislator, firstly, extols the virtues of customary law values. He believes in the customary law and the values that underlie it. He believes that these values account for

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43 Ibid, para 91 (Hon. Cletus Avoka).
44 Ibid, para 90-92 (Hon. Cletus Avoka).
the solidarity within families and among the people of Ghana. It is interesting that he believes that Ghanaians are envied because of what their traditional values have molded them into. He makes a case for the extended family system without necessarily indicating how he wants the law modified to accommodate their needs. He obviously understands the dynamics of the family system in Ghana and its role as a system of social security.\[45\]

The legislator knows that a bill that seeks to reduce the extended family’s share of intestate property could affect the meaningful role that it plays in ensuring income security in Ghana. But the legislator also seems to appreciate the presumed justness of the external standard and finally, seems to be saying that he wants the best of both worlds. It is uncertain whether the legislator is for or against the bill and the specific modifications to the bill that he desires, if any.

Collectively, the views expressed by the foregoing legislators reveal some important truths about attitudes toward state law and customary law in Ghana. First, there is a big gap between state law and practiced customary law and bridging this gap will be challenging. Secondly, customary law still enjoys wide acceptance and support. It is not for nothing that one member described herself as a “proud member of a polygamous family.”\[46\] The legislators demonstrated that Ghanaians are unwilling to surrender their legal heritage or their personal law, hence the suggestion that there be “some


46 July Parliamentary debate, supra note 22 at para 3157 (Hon. Mrs. Osei-Opare).
moderation” in promoting the proposed changes or “some intervention somewhere along the line” so that Ghanaians can enjoy simultaneously the benefits of the traditional and state law of inheritance. Third, there seems to be a general ambivalence toward state law and this affects how state law is perceived and received. This is perhaps what Mensa-Bonsu describes as “the total indifference to the law…that the average person displays.” It appears that there is a general lack of confidence and trust in the state system. Fourth, there is a willingness to accept state law, but on condition that it reflects traditional values and is thus relatable. The parliamentarians know the actual value of state laws that are not relatable. They recognize that the “Laws that [they] make are meant to be obeyed,” and so are disturbed that the proposed law, if alien in its demands, would “be observed more in breach than in compliance.”

The debate on PNDC Law 111 clearly highlights the dilemma that legislators and policy makers face in managing and reconciling diverse legal systems. The legislators seemed genuinely concerned about making a piece of legislation that reflects customary values. However, I maintain that the final piece of legislation will not represent their apprehensive voices as the country strives to modernize its laws for political and strategic reasons. Moreover, one legislator made it clear that the House had “looked at the best practice and what is taking place in other jurisdictions where the emphasis

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48 Ibid at para 92 (Hon. Cletus Avoka).
51 Ibid at para 89 (Hon. Osei-Prempeh).
today is on the nuclear family." Additionally, the concerns of the legislators do not include a very important aspect of my proposed reform strategy, addressing the socioeconomic and political circumstances of rural Ghanaians. In view of this, I present my approach.

4.3 UNDERSTANDING THE CONFLICT

The tension between the state and customary legal systems with regards to the rightful beneficiaries of intestate property is a conflict between individual and community aspirations. It stresses the divide between liberalism and communitarianism. The intestate Succession Act is grounded on the idea that in the distribution of intestate property “the importance of the extended family is shifting to the nuclear family, as pertains in other parts of the world.” Moreover, the Courts have held that “[w]e need strong nuclear families to build strong nations.”

However, Agbosu, a legal scholar, accuses those who are against the extended family inheriting intestate property as being influenced by “Anglo-American conceptions of tenure and the intrusion of capitalist ideas of private enterprise which stress private ownership of the means of production.” He explains further that, “the socio-economic

52 Ibid at para 82 (Hon. Mr. Yaw Baah).
53 This is a political theory that emphasizes the notions of individual rights and personal freedoms, among other notions. Will Kymlicka, Contemporary Political Philosophy: An Introduction, 2nd ed (New York: Oxford University Press, 2002) 212.
54 Communitarianism is a social philosophy that emphasizes the interest of communities and societies over those of the individual. Communitarians believe that liberals neglect the extent to which individual freedom and well-being are only possible within community. Ibid at 208-209, 212.
55 Memorandum to the Intestate Succession Bill, 2013 [The Bill].
56 Neequaye & another v Okoe, [1993-94] 1 GLR 538 at 547 ("Neequaye").
underpinnings of the doctrine [of the nuclear family] is movement away from the traditional, communal, ethical and economic value systems concerning property rights which lay emphasis on social cohesion and strengthening of family bonds.”

To Agbosu, capitalism will disrupt the ‘community economy’ and impede social cohesion. My aim is to balance conflicting values that the state and customary legal systems hold, in order to find common ground. This balancing act is important because:

In the exegesis of the customary law, it must continually be borne in mind that we are not making a law for the minority of the urban community alone…..And that [t]he fact that such individualisation policies are acceptable to the urban minority and the educated elite does not necessarily mean that it will be healthy for the rural community or the country as a whole.

To achieve this balance, I propose what I deem must form the basis of an intestate succession law in Ghana.

4.4 THE BASIS OF AN INTESTATE SUCCESSION LAW IN GHANA

Generally, the rules of intestacy should be designed to reflect the presumed intention of the deceased; to meet the needs of the survivors; to recognize the contribution of the survivors to the accumulation of the intestate’s estate, and to promote the institutions of the nuclear and extended families. Lastly, the mode and pattern of distribution must be seen as fair by potential beneficiaries and should not create disharmony or disdain for the legal system.

Ibid at 108.
Ibid at 110.
I maintain that the intestate succession law of Ghana must be premised on three fundamental ideas. First, rules of intestacy should reflect the presumed intention of the intestate. This may be at odds with customary law; however, this recommendation does not represent an assertion of unrestrained individual volition, knowing that this freedom could be abused. Hence, the intention of the intestate should be determined in light of reasonable community expectations. Though a liberal approach, it is important to determine the intention of the intestate because my aim is to balance interests and not to cater solely to the needs of the customary legal system. Moreover, a number of Ghanaians live at the intersection of state law and customary law and must also be given a voice.

The courts should be able to balance individual and community goals relying on my proposed mutual concession approach. Among other methods, the ‘presumed intention’ must be measured by the reasonable expectations of those similarly culturally and socio-economically situated as the deceased. Understandably, this argument raises justifiable questions about what constitutes “reasonable expectations” and those “similarly socio-economically situated.” While, in theory, explaining these expressions may be challenging, I contend that this may be less so in practice. Those “similarly socio-economically situated” may be described, simplistically, as a group of people with similar social and financial circumstances, and the views of such people on intestate succession may describe their “reasonable expectations.” I agree that my answers to the meanings of the expressions used are rather simplistic, but my intention is to
provide a framework for considering the issues highlighted, and not to provide conclusive answers.

Furthermore, I maintain that the intestate succession laws should distribute the estate of the deceased person according to the collective view of the community as to what is fair and equitable in the circumstances. What constitutes fairness and equity may seem obvious, but it is not, given the fact that it is the varying meanings placed on these expressions that accounts for the different systems of intestate succession in Ghana. While the customary legal system questions why the spouse of a deceased, not being a member of the deceased’s traditional family, should have alienable rights in the intestate estate, the state also questions why surviving spouses and children should be deprived of the benefit of their deceased spouses’ and parents’ estates, especially when they may have contributed to their acquisition, directly or indirectly. Arguably, both systems have different notions of what constitutes fairness. This situation requires, inevitably, that the law respects legal diversity. If the society in question is one that values blended families or other forms of relationships, and in the case of rural Ghana, the extended family, the rules must as much as possible be made to accommodate such familial relationships.

Lastly, for the purposes of intestate succession in Ghana, the rules must reflect the importance of the matrilineal and patrilineal family systems upon which the system of customary intestate succession is based. By so doing, the rules would inevitably reflect the need to reward kindness and create an incentive for people to invest in others, like the extended family has a reputation for doing. In Ghana, the family is recognized as a
legal entity which plays various meaningful roles in the lives of its members “from the cradle to the grave.”⁶⁰ Among the things which a Ghanaian treasures most is belonging to a family. The family is believed to be united by blood ties. As Ollennu explains, “the family denotes a group of all the members each of whom was fed and nurtured by a common sacred blood in the mother’s womb.”⁶¹ All members of the family who do not share this blood are outside the lines of inheritance.

These proposals reflect the Ghanaian fact-situation. The current allocations to the beneficiaries in the Intestate Succession Act are based on the assumption that there have been considerable changes to the concept of family in Ghana. But upon what basis was this assumption made? Just by observing the lives of those who live in the urban areas? Upon my proposed basis of an intestate succession law, I now analyze my preferred reform approach which I term a mutual-concession approach, a pluralist approach to law reform.

4.5 PREFERRED TYPOLOGY: THE MUTUAL CONCESSION APPROACH

As discussed in Chapter One, Gordon Woodman and Bradford Morse are among a few scholars who have attempted to show how legal pluralism is done; they outline a legal pluralist approach to law reform. They seek to explore a range of formal legal measures that the state can adopt relating to customary law. However, they do not demonstrate how the proposed measures actually work since their aim was to contribute to a general

theory of legal pluralism.\textsuperscript{62} Miranda Forsyth has also presented a number of models for determining the relationship between the state and non-state actors, but has gone a step further to provide the methodology for doing so. She concentrates on practical ways of employing a pluralistic approach to solving compatibility problems that may exist between a state and non-state actors.\textsuperscript{63} The mutual concession approach merges Woodman and Morse’s incorporation and acknowledgement models. It also includes similar aspects of Forsyth’s fourth and fifth reform models, where the state gives formal acknowledgement to the jurisdiction of the non-state system,\textsuperscript{64} and limited legislative recognition to a non-state system respectively.\textsuperscript{65}

Like PNDC Law 111, my preferred approach limits intestate property to one’s self-acquired property. As indicated in the current law, the property considered for distribution must exclude family, skin and stool property.

\subsection*{4.5.1 Sharing the Estate}

To reiterate the relevant provisions under PNDC Law 111, where the deceased is survived by a spouse, child and parent, the estate is divided into 16 parts, three parts are given to the surviving spouse, nine to the surviving children, two to the surviving parents and two parts are distributed in accordance with the rules of customary law. Second, where the deceased is survived by a spouse and parents but no child, the

\begin{itemize}
  \item \textsuperscript{63}Miranda Forsyth, \textit{A Bird That Flies With Two Wings: the Kastom and State Justice Systems In Vanuatu} (Canberra: ANU Press, 2009).
  \item \textsuperscript{64}\textit{Ibid} at 210.
  \item \textsuperscript{65}\textit{Ibid} at 214.
residue is divided into four parts, with two parts going to the spouse, one part to the parents and one part devolving according to the rules of customary law. Third, where the deceased is survived by only a child and parents, the estate is divided into eight parts; six parts go to the surviving child or children, one part to the parents and one part devolves according to the rules of customary law. Fourth, where the deceased is survived by only a parent, the estate is divided into four parts, with three parts going to the surviving parents and one part devolving according to the rules of customary law. Finally, where the Intestate is not survived by a spouse, child or parent, the entire estate devolves in accordance with the rules of customary law, making the customary family the sole successor.66

The mutual concession approach is open to the state incorporating norms of customary law into state law, thus formally acknowledging the legitimacy and the operation of the customary law of succession. However, the incorporated norms must, as much as possible, adequately reflect the customary norms. Evidently, PNDC Law 111 incorporates customary norms into state law and in this regard, norms of customary law are enforced by the state. It also recognizes the importance of the traditional family system and acknowledges the existing legitimate powers held by a customary institution, the traditional family.67 However, the customary norms incorporated into the PNDC Law 111 do not fairly represent the norms of the customary law of succession. Specifically, the allocations made to the extended family are not coterminous with

67 Morse and Woodman, supra note 62 at 19.
customary norms. I argue that at the very least, the allocations should reflect the role that the extended family plays in the lives of its members, especially in rural areas. Not only do the negligible allocations counteract the acknowledgement given to the extended family, they also undermine the legitimate legal and sociocultural expectations of rural Ghanaians. It is one thing to acknowledge customary law as a distinct and separate legal system and another to deprive it of functioning as such by virtue of the limited acknowledgement given to it.

Thus, the mutual concession approach proposes to share the entire estate differently. Under PNDC Law 111, the allocations made to the extended family depend entirely on those who survived the deceased. The allocations are fixed and are not dependent on the particular circumstances of the deceased, such as the role that the extended family may have played in the acquisition of the deceased’s property. The mutual concession approach advocates a deviation from the one-size-fits-all approach to the distribution of property to a method that divides intestate property on a case-by-case basis. Not all cases before the courts must be treated equally, because the circumstances of deceased persons differ. The courts must be allowed to exercise discretion in determining the entitlements of the various classes of beneficiaries. In view of this, I propose a law that allows the courts to take the following important guidelines into consideration.

In sharing intestate property, the courts should determine the financial investment that the extended family may have made in the deceased. For instance, the courts should consider whether the deceased’s education was paid for by his extended family. If there
is sufficient evidence to support such an investment, a reasonable portion of the estate should be given to the family. This is fair, equitable and largely consistent with the legal views of the customary legal system. Fenrich and Higgins explain that some of the people they met in Ghana in the course of their research, expressed the view that the share of intestate property given to the traditional family under PNDC Law 111 was not sufficient, given the importance of the family to most Ghanaians. They report that in an interview with the late Justice George Acquah, then a Supreme Court Judge and later a Chief Justice of Ghana, he gave an example of a man whose education was funded solely by his brother, only for his estate to be inherited by his wife and children under PNDC Law 111.68 According to Mensa-Bonsu, there are several prominent persons in Ghana whose education was sponsored by family members, using their own resources or family resources, and that such people “represent a family investment which by reason of [PNDC Law 111] would yield no dividend.”69 It should be recognized that there is an expectation of reciprocity when one is cared for by the extended family; it is a social security system, where members are obligated to help each other. I maintain that Individuals who are cared for by their extended families lose the right to provide for only their nuclear family; they must give back. The requirement of reciprocity is captured in a Ghanaian proverb, *if your elders take care of you while cutting your teeth, you must in turn take care of them while they are losing theirs.*

68 Fenrich & Higgins, *supra* note 32 at 324, fn 312.  
69 Mensa-Bonsu, *supra* note 49 at 111.
It must be recognised that the extended family also constitutes an economic system in which “skills are funnelled through co-operative effort in the exploitation of resources and their equitable distribution.”70 In Re Krah, a head of family ensured that family resources were used to purchase a large tract of land for the use of family members.71 In addition, the family decided to “utilise revenue from family lands to acquire new farming lands for the benefit of family members.”72 Portions of the family land were also leased to strangers. Such investments ensure that all family members, especially the poor ones, have an opportunity to improve their standard of living. Thus, the opportunities created for the deceased by his or her extended family should be taken into consideration by the courts in sharing intestate property. It is fair to recommend that the court should also take into account whether the deceased has, to some extent, reciprocated the assistance given him or her. For instance, the court may consider whether the deceased financed the education of other family members or acquired property for the family during his life time. If the deceased has done any of these, it should inform how the allocations are made by the courts.

Second, the courts should consider the extent to which the deceased’s source of livelihood could be traced to his or her family. It is a fact that some individuals trace their wealth directly to their extended families. It is not uncommon to find individual homes built on family land or land handed over to family members for their personal use. A Ghanaian legislator observed that the fact that a person has registered a house in his or

70 Agbosu, supra note 57 at 108.
71 In Re Krah (Decd); Yankyeraah & Others v Osei-Tutu & another, [1989-90]1 GLR 638-670 [Re Krah].
72 Ibid at 666.
her name does not mean that it belongs to him or her and that “we all know in this country [Ghana], “[t]here are countless cases...where [the] family might have given [one] money to buy the house.”\textsuperscript{73} In \textit{Re Krah}, a head of family, the testator, instructed the first plaintiff, “the family cashier,” to use family money to acquire a large tract of land for family use. As head of family, the testator, who was wealthy prior to his appointment, gave out portions of the land to family members, labourers and other strangers on various terms. In his last will,\textsuperscript{74} he gave the farms that he had developed on family property to his grandson, the third defendant. The plaintiffs brought an action against the beneficiary claiming that the farms belonged to the family and could not be devised to the defendant. The Court held that there was sufficient evidence to show that the disputed farms belonged to the family, even though the head of family treated them as his own.\textsuperscript{75} The deceased may have been wealthy before his appointment as family head, but that did not change the fact that he used family resources to his advantage. In sharing the property of such a person, the courts should be mindful of this fact. It is important to note the power wielded by the testator over family resources, to the extent that it appeared as if the property in dispute was his. According to the court, “[i]t is not surprising that... in perfect freedom”\textsuperscript{76} the deceased dealt with family property like it was his own.\textsuperscript{77} It added that “[t]he fact that he gave away pieces of those lands by himself is

\textsuperscript{73} July Parliamentary debate, \textit{supra} note 22 at para 3147 (Hon. Dr Prempeh).
\textsuperscript{74} An earlier will made by the testator did not devise the properties in question. However, his last will revoked the earlier one and devised only the three farms. The rest of his property fell into intestacy.
\textsuperscript{75} \textit{Re Krah}, \textit{supra} note 71 at 638-670, 640.
\textsuperscript{76} \textit{Ibid} at 660.
\textsuperscript{77} In view of the seemingly unlimited powers of the head of family in dealing with family property, the Head of Family (Accountability) Law, 1985 (PNDC Law 114) was passed to make the head of family accountable to the family for his management of family property. According to the Law,
in keeping with his traditional role as head of family.”

The nature of the political power held by the family head and how it may be exploited to facilitate reforms is discussed in the next chapter as part of my broader vision for law reform.

Also in the case of Badu v Kra, a testator devised a house to his children, the plaintiffs. Members of his extended family, the defendants, challenged the gift, contending that the house in question was family property because the deceased acquired it from proceeds of family farms he inherited in his position as customary successor. The Court held that when a person inherits family property, any subsequent property he acquires does not become family property and that the evidence showed that the testator acquired the house through his own hard work. Had this case been about intestate succession, the mutual concession approach would have demanded that the courts give serious consideration to the defendants’ claim and compensate them. This is because one cannot benefit from the customary legal system, especially by virtue of one’s position as customary successor, and then make a will giving all that one has acquired to one’s nuclear family. No wonder when the will was read, members of the extended

“1(1) notwithstanding any law to the contrary any Head of family or any person who is in possession or control of, or has in his custody, any family property shall be accountable for such property to the family to which the property belongs. (2) Every Head of family or any person who is in possession or control of, or has in his custody, any family property shall cause to be taken and filed an inventory of all such family property”.

Kludze asserts that the old rule of customary law that the head of family was not accountable for family property held by him was actually judicial customary law based on a misinterpretation of a statement made by Mensah Sarbah that “no junior member can claim an account from the head of family.” According to Kludze, under practiced customary law, the head of family has always been accountable for family property held or administered by him. AKP Kludze, “Accountability of the Head of Family in Ghana: A Statutory Solution in Search of a Problem” (1987) 31:1-2 J Afr Law (Essays in Honour of A. N. Allott) 107 at 107-108.

78 Re Krah, supra note 71 at 660.
family were “annooyed” and “protested against” the will.\textsuperscript{80} The house in question may not strictly have been family property, but it would seem that the family property that the deceased inherited was useful to him. The courts must ensure that the extended family is not unduly exploited for individual gain.

Third, the courts should consider whether the extended family was socially and morally supportive of the deceased. In this regard, the courts should determine whether the family cared for the deceased, especially when he or she was sick. It is not uncommon in Ghana to find spouses taking their sick spouses to their relatives to be taken care of, particularly when death is imminent. A legislator pointed out that the current bill on intestate succession does not reflect the importance of the extended family. He observed, “[w]e all know that in… other jurisdictions, especially those advanced ones, there are …proper and well-packaged welfare systems to take care of the physically challenged. But in our situation, many of the physically challenged continue to depend on the family.”\textsuperscript{81} In \textit{Re Sackey}, a widow was accused by the family of her deceased husband of having deserted him for five years before his death, two of which he was bedridden. The extended family, the defendants, led evidence to show that the widow, the first plaintiff, deserted her husband. The family contended that during this critical period, it cared for the deceased. Whilst admitting that she went to live in another town during this period, the widow claimed that she did so with the consent of her husband. She also claimed that the move was to enable her to work and provide financially for her

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\textsuperscript{80} \textit{Ibid} at 564.
\textsuperscript{81} January Parliamentary debate, \textit{supra} note 28 at para 82 (Hon. Yaw Baah).
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husband and children and that she went back home to visit every weekend. The Court said that “[i]f what the first plaintiff said was the truth it would appear to be an arrangement between the married couple which was not known to outsiders.”\textsuperscript{82} However, the Court admitted that “if the defendants deposed that the first plaintiff deserted the husband they would be speaking the facts as they honestly knew them to be true.”\textsuperscript{83} This case illustrates how the extended family is relied upon to care for their sick relatives when the need arises. These services should be rewarded. In fact, PNDC Law 111 makes similar arguments in favour of surviving spouses. According to the Act, “a surviving spouse [must] be compensated for his or her services to the deceased spouse.”\textsuperscript{84} It goes on to say that “[i]t is right that the husband…she [surviving spouse] has probably served, is the person on whose property she must depend after his death.”\textsuperscript{85} What the state is saying is that those who render services to the deceased during his life time must be compensated. It seems hypocritical that the state would assume that in a communalist society like Ghana, the only person likely to render valuable services to the deceased is the surviving spouse. The same argument made for the surviving spouse, and which is a basis for which the spouse is entitled to a decent portion of intestate property, should also be made in favour of the extended family. However, the courts should determine if the caretakers were paid for their services and take this into account in sharing property.

\textsuperscript{82} In Re Sackey (Decd.); Ansaba & another v Mbeah & another, [1992] 1 GLR 214 at 221.
\textsuperscript{83} Ibid.
\textsuperscript{84} PNDC Law 111, supra note 66 at i.
\textsuperscript{85} Ibid at i.
Fourth, the courts should invite evidence of the involvement of the deceased in the affairs of his or her extended family and vice versa. They should ascertain whether the deceased held any customary position in the family. Whether he or she attended family meetings and other related functions, and paid his or her share of family dues is also important.\(^{86}\) This may be indicative of his or her intentions. The very nature of the relationship that the deceased had with his extended family should raise a presumption of an intention to bequeath property to them. In *Re Wiredu*, the deceased, who died intestate, had during his lifetime acquired a house and invited his nephew and other family members to move in. The nephew, the defendant, lived in the house for more than ten years. On the death of the intestate, the defendant sought to claim the house as his own, but could not prove ownership.\(^{87}\) The kindness that the deceased showed his family in his life time suggests that he wanted the family to be well taken care of.\(^{88}\) The deceased demonstrated a commitment to family and an intention to support them. It does not mean that once you support someone you intend that person to benefit from your estate. The nature of the support must be examined; if transcends what is usually done, it suggests a close relationship and an intention to care for the receiver. Such acts done by the deceased during his lifetime should guide the courts in determining his or her intentions toward the extended family and influence how the deceased’s property

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\(^{86}\) Being a member of either the matrilineal or patrilineal families involves certain obligations like having to pay dues to meet some of the financial responsibilities of the family.

\(^{87}\) During his lifetime, the deceased bought a house on hire purchase and invited his nephew and other family members to live with him. On his death, his first cousin, who was appointed as his customary successor, applied for letters of administration to administer the estate and to enable him have his name substituted for that of deceased. The application was caveated by his nephew, claiming that the house actually belonged to him. The Court held that in the nephew’s unsuccessful application for letters of administration, he made a clear admission against his interest by deposing that the house actually belonged to the deceased.

\(^{88}\) *In Re Wiredu (Decd.); Osei v Addai*, [1982-83] GLR 501-509.
is shared, unless there is reason to believe that the deceased intended the assistance to stop after his death.

In *Re Sackitey*, the testator went as far as to open a bank account with his niece so that she could manage his financial affairs. The testator's nephew also lived and worked with him for a period; they had a very close relationship. The fact that such relationships raise a presumption of an intention to support was proven by the deceased, who in his will, gave a decent portion of his estate to his family members. According to the court, “[h]is magnanimous side was reflected in the distribution of his estate to every deserving member of his family.” Thus, the court must examine the relationship that the deceased had with his extended family and how involved the deceased was in their lives. This should enable the courts to decide the portion of the estate that should go to the family. By so doing, the court will be giving effect to the intention of the deceased, in light of reasonable community expectations.

Fifth, the courts should consider the persons who will bear or who bore the funeral cost of the deceased. Under customary law, the extended family is under an obligation to give the deceased a funeral befitting the status of the deceased and that of the extended family. It is the family's prerogative to decide when and where to bury the deceased. Usually, every family member is levied to pay the cost of the funeral. The family focuses on providing the deceased with a decent burial, because of traditional

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89 *In Re Sackitey (Decd.); Sackitey & another v Dzamioja*, [1987-88] 2 GLR 434 at 442.
90 Ibid at 437.
91 Neequaye, supra note 56 at 548.
92 Mensa-Bonsu, *supra* note 49 at 111; *ibid* at 546.
beliefs in life after death and the role of ancestral spirits in the lives of living family members. This is done without first considering whether the deceased left behind enough money for the necessary rites. Belonging to a family includes the concept of the individual being under the control of the family. According to an editorial report, “[h]ardly ever a somber, low-key affair, Ghanaian funerals are a social event attended by a large number of mourners, which could reach hundreds - the more, the better.” The report continues that “[a]n average funeral should cost between $15,000 and $20,000.” The courts must ascertain the extended family’s contribution and take this into account when sharing intestate property. According to a Ghanaian proverb, which was analyzed by the High Court, “he who buries the leper is the person who is entitled to have the leper's sandals,” meaning, “the family responsible for the burial of a deceased person inherits his property.” Mensa-Bonsu asks: “what would be the justification for levying every member when the family would derive no benefit from the deceased? Why should the family organise the funeral (even of its indigent members) when any property there is would go to somebody else?” The answers to these questions should help the courts adjust the allocations accordingly; otherwise, Ghanaians will lose the much-cherished support of the extended family.

93 Paula Newton, “The long goodbye: Why funerals are big deals in Ghana” (Tuesday March 11, 2014, online: <http://www.cnn.com/2014/03/11/world/africa/on-the-road-ghana-funerals/>). In the absence of official figures on the cost of an average funeral, it is hard to tell whether the amounts stated are accurate. 94 Neequaye, supra note 56 at 545. 95 Mensa-Bonsu, supra note 49 at 111.
4.5.2 Sharing Small Estates

Under the current law, a sole surviving parent or child is entitled to the whole estate if it does not exceed a sum fixed by the sector Minister.96 This is to ensure that the estate is not fragmented and devalued. My approach to sharing a small estate differs. The courts should give the extended family a token to acknowledge its importance as a system of social security. The reality is that some people leave behind small estates and the extended family will be needed to play its traditional role. Even the state expects this of the extended family. According to PNDC Law 111, “it is expected that the legal and moral responsibilities of the members of family toward the welfare of the children will not be remitted.”97 Especially in rural areas, “it cannot be denied that ‘families can deliver far more than the state. They look after nearly all the nation’s children, while state authorities only look after a tiny minority.”98 It has been the practice that in case of hardship encountered by a person, family members rally to provide relief. “One great advantage of the traditional family is that… they offer the best hope that unwanted children or spouses or grandparents will not be cast aside.”99 Unlike most developed countries, Ghana does not have a meaningful and workable system of social security. This role resides with the customary family. Through this system, people have been given opportunities for education, been set up in trades and have had their children and spouses well taken care of on their death. Hopefully, the token will encourage the family, if need be, to assist the surviving child, spouse or parent.

96 PNDC Law 111, supra note 66 at s 12.
97 Ibid at ii.
98 Daniels, supra note 60 at 184.
99 Ibid.
4.5.3 Recognising Limits

Like PNDC Law 111, there are limits to what the extended family can inherit under the mutual concession approach. The mutual concession approach is aimed at balancing interests and does not support an approach that seems to favour one group of beneficiaries. Thus, where the deceased is survived by a spouse, children and parents, the portion given to the extended family should not exceed 25 percent of the estate. If the deceased leaves behind a child and spouse, or a child and parent or a spouse and parents, the extended family should not be entitled to more than 30 percent of the estate. Again, where the deceased is survived by a spouse or a child, or parents only, the portion given to the extended family should not exceed 50 percent. In this regard, the difference between PNDC Law 111 and the mutual concession approach is that the percentages prescribed by the latter are based on what seems to be a fair amount if divided equally among the classes of surviving relatives.

In dividing the estate, the courts should endeavour, as much as possible, to ensure that surviving spouses and children are given the matrimonial home and chattels of the deceased. This proposal is to ensure that a surviving spouse and children are not left homeless and without the basic facilities that they have become accustomed to.

The portion given to the extended family, after the courts determination, may then be shared strictly according to customary law. Under customary law, the properties, particularly, the immovable ones are usually not shared among members. These belong
to the entire family and are managed by the customary successor of the deceased.\textsuperscript{100} While satisfying the presumed intention of the deceased, the mutual concession approach also furthers the collective view of the community as to what is fair and equitable in the circumstances.

4.5.4 Assumptions

The mutual concession approach rests on certain fundamental assumptions: that law embodies values and that a deeper understanding of the various legal systems will show that the state and customary legal systems are not too far apart in their conceptualization of these values. The approach also assumes that both the state and customary legal systems are committed to furthering the common good which, I argue in the next chapter, is the basis of legal pluralism. The state has declared its commitment to liberty, equality of opportunity and prosperity; friendship and peace; freedom, justice, probity and accountability; the rule of law; unity and the protection and preservation of fundamental human rights and freedoms.\textsuperscript{101} The customary legal system on the other hand, “does that which is reasonable;”\textsuperscript{102} is “all about truth and reforming the bad in the society”\textsuperscript{103} and ensures that members are each other’s keepers.\textsuperscript{104} Under the system, compatriots are not neglected, the physically challenged are cared for.\textsuperscript{105}

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\textsuperscript{100} Ansaba & ano v Mbeah & ano [2010-2012] 1GLR 682 at 691.
\textsuperscript{101} The Constitution, supra note 1, the preamble.
\textsuperscript{103} Commission on Human Rights and Administrative Justice, “Trokosi as a Form of Customary Ritual Servitude” (2008) 1 at 55 [CHRAJ Report].
\textsuperscript{104} January Parliamentary Report, supra note 28 at 90-92 (Hon. Cletus Avoka).
\textsuperscript{105} Ibid at para 82 (Hon. Yaw Baah).
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and resources are equitably distributed. In sum, both the state and customary legal system are committed to promoting the welfare of the people, their rights, security and general prosperity. The mutual concession approach is based on the assumption that law reformers can appeal to these inherent values, as a basis to reconcile the customary and state legal systems.

4.6 ADVANTAGES OF THE MUTUAL CONCESSION APPROACH

The mutual concession approach suitably merges Morse and Woodman’s “incorporation approach,” which Woodman argues entails the distortion of customary law, with their acknowledgement approach, which recognizes the competence of the customary law system to perform all the functions related to the distribution of family property. The approach, thus, minimizes the full impact of the presumed adverse effects of the incorporation approach. Merging the incorporation approach with the acknowledgement approach, recognizes the customary legal system as a distinct and legitimate legal system, and ultimately paves the way for effective reforms.

Another advantage of the mutual concession approach is that it is unlikely to recreate the problems that necessitated the passage of PNDC Law 111, specifically, the problem of the extended family not using the resources it inherits from the deceased to care for the surviving spouse and child. This is because, with the mutual concession approach, the family is compensated for what is has already done. No one loses if the family does

106 Agbosu, supra note 57 at 108.
107 Morse and Woodman, supra note 62 at 15.
not perform its customary role, though it is expected that it will, especially in rural communities, where failing to protect the needs of surviving spouses and children is frowned upon.\textsuperscript{108}

My suggested approach is about balancing interests. It challenges the customary law principle that intestate property is exclusively extended family property, but it also contests the state’s preoccupation with catering almost solely to the needs of the nuclear family. The mutual concession approach requires of both systems to make adjustments to their respective positions on the determination of qualified beneficiaries. It ensures that the extended family, and what it stands is for, is not sacrificed in the process of trying to protect the nuclear family. Neither is the nuclear family deprived of a decent share of intestate property.

The mutual concession approach draws on the values of custom and human rights to enhance custom and advance the application of human rights.\textsuperscript{109} Traditional concepts of law recognize that the surviving spouses and children must be taken care of; such concepts also reflect the belief that aged parents must be provided for. This explains why the traditional system of allocation makes provision for these groups of people. It must be stressed that the customary legal system thrives on being regarded as a fair system. The rural communities believe that the customary legal system is “all about truth and reforming the bad in the society.”\textsuperscript{110} Thus, it is reasonable to assume that since both the state and customary legal systems essentially seek the well-being of the

\textsuperscript{109} Forsyth, supra note 63 at 233.
\textsuperscript{110} CHRAJ Report, supra note 103 at 55.
surviving family, though with different emphases, it is possible to have a law that can capture the demands of both. The mutual-concession approach, therefore, has the advantage of taking people back to the drawing board to focus on the true meaning of the common good, the basis of legal pluralism.

Again, the importance of the mutual-concession approach lies in the fact that it allows cross fertilization of ideas and procedures between the two systems. It fosters greater interaction between legal systems and reminds them that their presumed independence and freedom requires a commitment to engage with changing values in order to perpetually promote the common good. It would seem that this is what Allott meant when he suggested that reformers, after abstracting from customary law what is of benefit should seek “to dovetail this with the imperatives of life in a society which grows steadily more complex and more closely orientated towards the world outside.”\textsuperscript{111}

Also, this approach fulfills the prescription of sensitivity that many scholars have been advocating for years.\textsuperscript{112} It demonstrates respect for the customary legal system as a legal system in its own right, as the proposed legislation will reflect the basic concepts of customary law.\textsuperscript{113} Furthermore, it empowers local communities within the context of their traditional cultures.\textsuperscript{114} They are not just empowered within the context of state law, but also empowered within the context of their own traditions.


\textsuperscript{113} Kludze, “Intestate Succession in Ghana”, supra note 7 at 100.

\textsuperscript{114} See Kutsoati & Morck, supra note 112 at 48-49.
but also their own law and this has the advantage of inspiring confidence in the state legal system, a feat that a purely incorporation approach would not achieve.\textsuperscript{115}

Again, it does not create contradictions in expected obligations, a problem that legal pluralism has been accused of.\textsuperscript{116} Each system will still be permitted to operate fully within its sphere of control. This has the advantage of precluding reform methods, such as ascertainment and codification, which privilege certain voices in the determination of law.\textsuperscript{117} The fact remains that these reform methods, which record customary law at a given point in time, cease to represent the actual practices of the people as the living law changes.\textsuperscript{118}

The approach also permits the preservation of the plausible features of both legal systems, especially the customary legal system as it has the potential to keep the extended family still focused on its social responsibilities towards its members. This is in line with Allott's suggestion that reformers should abstract from customary law what is of benefit, and in this case, to all Ghanaians. Further, the approach takes into account Ghanaian fact-situations such as the importance of the extended family beyond one's

\textsuperscript{115} With this approach, the state incorporates into its own norms a customary norm or a portion of it. Woodman argues that the incorporation of norms usually entails their distortion, because the laws stated do not adequately represent the customary law norms. Morse and Woodman, \textit{supra} note 62 at 15.

\textsuperscript{116} Tamanaha explains that legal pluralism may give rise to multiple uncoordinated, overlapping bodies of law, which may make competing claims of authority and impose conflicting demands or norms. Brian Tamanaha, “Understanding legal pluralism: past to present, local to global” (2008) 30 Sydney L Rev 375 at 375 [Tamanaha, “Understanding Legal Pluralism”].


\textsuperscript{118} Likhapha Mbatha in his assessment of the effects of codification on the customary law of succession in South Africa argues that though codification makes customary law easily ascertainable, the codified law with time no longer reflects the ‘living’ customary law. Mbatha, \textit{supra} note 108 at 260-264.
childhood; the difference in perception of the marriage union among the urban elite as opposed to the rest of the society; the extent of illiteracy in the country; and the dependency of parents. It has been argued that these important factors were ”ignored, or half-heartedly recognized” in the promulgation of PNDC Law 111.\textsuperscript{119}

Furthermore, the mutual concession approach celebrates legal pluralism by embracing the different conceptions of family. Both the state and the customary legal systems must embrace legal pluralism with all its frailties because it exists and is very likely to remain part of Ghana’s legal system. The mutual concession approach recognizes the fact that the state and customary legal systems have different concepts of family, which must be balanced. Lutterodt J., then a High Court judge and the current Chief Justice of Ghana in the case of\textit{ Neequaye v Okoe} explained:

The trouble is that for the Ghanaian the word ‘family’ has a variety of meanings. Now when the educated top class Ga Mashie lawyer or doctor writes to his counterpart in the United States of America telling him he is going to the Caribbean Islands with his ‘family’ for a holiday, he no doubt means (and I am sure his friend would understand him in the same vein) that he is going away with his wife and children. I do not think that he has at the back of his mind his 60-70-year old auntie who lives at Bukom, although the possibility cannot be ruled out, especially if she happens to be a much loved auntie who has shown him extreme kindness during his school days, but ordinarily she could not be included...However, when the same Ghanaian lawyer, for example, passes by his colleagues house on Saturday afternoon and informs him that he is attending a family meeting at Bukom, his friend no doubt expects a larger group of people than those referred to above.\textsuperscript{120}

This approach accommodates all these conceptions of family. Jenny Goldschmidt underscores the need to accept the fact that there are two kinds of constitutional

\textsuperscript{119} Mensa-Bonsu, supra note 49 at 126.
\textsuperscript{120} Neequaye, supra note 56 at 547.
systems in Ghana: the national and the traditional systems. She maintains that in spite of their differences and similarities, they complement each other and cautions against damaging the integrity of either. She admits that the traditional structures are the best way for ensuring the involvement of the people in the public life of the country.\textsuperscript{121}

Finally, the mutual concession approach seeks to achieve one thing, that is, to ensure the law reforms are effective, especially in the countryside. Using this approach, PNDC Law 111 is likely to be embraced because the extended family will get its due share of intestate property. Members of the nuclear family may no longer feel obliged to comply with the traditional inheritance rules just to be at peace with the extended family because the mutual concession approach, unlike PNDC Law 111, presents a win-win outcome; you get what you work for and you enjoy your share in a manner that accords with your core beliefs.

4.7 PROBLEMS WITH THE MUTUAL CONCESSION APPROACH

My reform approach is based on compromises; it is inherently about reconciling values. As such, it invites debate about values. More specifically, my approach draws on the social values of law and custom, and abstracts from customary law what is of benefit while demanding a commitment to engage with changing values in order to perpetually promote the common good. Any project that centres on an examination or analysis of values cannot escape the problems inherent in such an elusive concept. It invites

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legitimate concerns which revolve around the meaning of values, how and who
determines them. Focusing on values shared by communities and legal systems and
even those inherent in the law is simply problematic; it presupposes that all the people
in a given community share the same set of values and aspirations. Such an
assumption is false. Do we focus then on the values of the dominant groups, if any, and
deem them representative of all the others?\textsuperscript{122} And is there always just one dominant
group?\textsuperscript{123}

Additionally, does an approach to law reform that relies on the determination of values,
not privilege certain voices in the determination of which values are important and which
ones are acceptable candidates for the reconciling process. As Robert Samek asks of
the reformer, “[w]hat right has he, it may be asked, to impose his subjective values on
the rest of us?”\textsuperscript{124} Samek insists that “he cannot force his values down other people’s
throats.”\textsuperscript{125} It is not realistic and even possible for a reformer to surrender his own
values and standards “and become [a] mere administrator[] of conventional values.”\textsuperscript{126}

\begin{footnotesize}
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\item \textsuperscript{122} Harvey explains there is always the tendency for law to draw its value content from the acceptances of
an elite group. William Burnett Harvey, \textit{Law and Social Change in Ghana} (Princeton: Princeton University
\item \textsuperscript{123} Woodman argues that it is not realistic to expect a community to have one agreed set of values and
suggests that the investigator in his inquiry should not attempt to find a single set of values but rather to
“eliminate certain lines of action.” Though he admits that the elimination would be extensive, one wonders
if the process is not susceptible to the same problems that are likely to be encountered in the process of
looking for one acceptable set of values. Gordon Woodman, “A Basis for a Theory for Law Reform”
\item \textsuperscript{124} Samek, \textit{supra} note 123 at 414.
\item \textsuperscript{125} \textit{Ibid.}
\item \textsuperscript{126} \textit{Ibid} at 429.
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Furthermore, assuming that such values exist, how does the reformer identify them? Woodman argues that it is not realistic to expect a community to have one agreed set of values and suggests that the investigator in his or her inquiry should not attempt to find a single set of values, but rather to “eliminate certain lines of action.”\textsuperscript{127} Though he admits that the elimination would be extensive, one wonders if the process is not susceptible to the same problems that are likely to be encountered in the process of looking for acceptable sets of values.

It has been suggested that the reformer should draw on his or her “‘human’ motivation” in the determination of such values, in which case he cannot renounce his own values, but simply put them into perspective.\textsuperscript{128} The reformer has been counseled to “take as his perspective those communal values which are most consistently appealed to” by the people in question.\textsuperscript{129} As much as I agree with this statement, assuming a community espouses kindness as one of its central values, there is the problem of determining what this really means to the community. Both the state and the customary legal systems have indicated their respect for human rights, but quite evidently, the concept means different things to both systems. Nevertheless, I maintain that no matter the differences, it is possible to find common ground. On the issue of determining values in the Canadian context, Samek suggests:

\begin{quote}
our preferred values should be those which we purport to prefer, and as long as we pay lip-service to them, we should be estopped from going back on them. For instance, we should not on the one hand be allowed to boast of our respect for
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\textsuperscript{127} Woodman, “Theory for Law Reform”, \textit{supra} note 123 at 17.
\textsuperscript{128} Samek, \textit{supra} note 123 at 414.
\textsuperscript{129} \textit{Ibid.}
human life and dignity, and on the other hand to support capital punishment or inhuman forms of imprisonment. To speak of law reform in this context is to abuse the term. It is true that in a pluralistic society such as ours there is no nation-wide consensus on values, unless we generalize them to such an extent that they become empty motherhood statements. We must therefore be prepared to face conflicts in value, and what is more to live with pluralism…. [W]e should engage in a living dialogue of values which will result in a richer and more open mosaic. Only human beings, drawing on their ‘human’ motivation, can bring this about.\textsuperscript{130}

Even though Samek gives these pieces of advice to the reformer in Canada, I maintain that his conclusions are largely applicable to most societies. As Samek suggests, people should be held to the values they espouse, but to reiterate, the critical issue is the meaning placed on those values by the holder. So when we are told that “[c]ustomary law does that which is reasonable,”\textsuperscript{131} we have every right to expect the system to be rational, just and fair-minded. But again, what do these expressions mean? Yes, values may conflict and may mean different things to different groups of people; for this reason, I contend that people must be empowered to assume other identities as the occasion demands in order to solve conflicts. Having said this, I maintain that all cultures and ethnic groups have identifiable values, beliefs and attitudes that are considerably unique or distinctive.\textsuperscript{132}

Admittedly, the mutual concession approach privileges the state. Like most legal pluralists, my work examines the reform of the law of succession from the perspective of

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\textsuperscript{130} Ibid at 429-430.  
\textsuperscript{131} Ollenu, “Law Reform in Ghana”, supra note 102 at 151.  
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the state, that is, I investigate the most efficient reform option available to the state.\footnote{133} This, I argue, represents the reality of what the state has come to represent. Though the state may not wield the expected moral and social power, especially in rural Ghana, it has come to be associated with economic and political power, and legitimacy. It would seem that this reputation has come to stay. According to Sally Merry, “it is essential to see state law as fundamentally different from other normative orders because it “exercises the coercive power of the state and monopolizes the symbolic power that is linked with state authority.”\footnote{134} The mutual concession approach may seem to privilege the state, however, it acknowledges the limits of legal pluralism and the state’s dominance in the modern world, in spite of its limitations.\footnote{135}

While the mutual concession approach may be more agreeable to the customary legal system than the current law, it does not purport to offer \textit{the} solution to the low compliance rate. The discussion on the matrilineal system of inheritance and the cases discussed suggest that changing legal rules must be accompanied by a change in the socioeconomic and political circumstances of those whose lives are influenced largely by customary law. The economic underpinnings of the customary norms on intestate

\footnote{133} According to Tamanaha “[t]he fact that we have tended to view law as a monopoly of the state is a testimony to the success of the state-building project and the ideological views which supported it.” Tamanaha, “Understanding Legal Pluralism, supra note 116 at 379; Margaret Davies explains that by the middle of the 20th century, law had become almost exclusively connected to the nation state that it was almost impossible to classify any other normative order as law and that evidence of other normative orders was not evidence of law properly so called, but of positive morality and custom thus making legal pluralism a contradiction in terms. Margaret Davies, “Legal Pluralism” in Peter Cane & Herbert Kritzer, eds, \textit{The Oxford Handbook Of Empirical Legal Research} (Oxford: Oxford University Press, 2010) 805 at 810.\footnote{134} Sally Engle Merry, “Legal Pluralism” (1988) 22:5 Law & Socy Rev 869 at 879. However, Woodman says Merry’s ‘reason’ for distinguishing state law from non-state law, namely, that state law has power and authority “is not a reason, but a tautology.” Gordon Woodman, “Ideological Combat and Social Observation: Recent Debates about Legal Pluralism” (1998) 42 J Legal Pluralism 21 at fn 11.\footnote{135} MB Hooker, \textit{Legal Pluralism: An Introduction to Colonial and Neo-Colonial Laws} (Oxford: Clarendon Press, 1975) 1, 8.
succession are not addressed by the mutual concession approach. It should also be
recognized that poverty and unemployment are two of the main reasons why the
extended family in the past sometimes reneged on its responsibility of caring for
surviving spouses and children, thereby necessitating the promulgation of PNDC Law
111.\textsuperscript{136} Also, the power wielded by heads of families and traditional political
functionaries is significant. It is established that this power is so daunting that surviving
spouses refrain from challenging the customary norms of succession.\textsuperscript{137} It would seem
that customary law reforms must include this group of people. Additionally, the
metaphysical beliefs about the sacredness of the blood shared by the members of the
matrilineal families\textsuperscript{138} and the spiritual beliefs that prevent surviving spouses from
insisting on their rights are not addressed by the mutual concession approach.\textsuperscript{139} Only
an effort at leveling unequal socioeconomic circumstances, as part of the reform
exercise, will engender change and foster a productive, stable long term relationship
between the state and customary legal systems. I discuss this further in chapter Five as
part of my effort to present a multilayered and inclusive concept of legal pluralism.

Lastly, the mutual concession approach does not address the relational aspects of law
reform. It assumes that legal systems will cooperate with each other, and this will result
in compromises. In actual fact, certain active measures must be instituted to ensure that

\begin{footnotes}
\footnote{Mbatha, \textit{supra} note 108 at 261.}
\footnote{Kutsoati & Morck, \textit{supra} note 112 at 15-16.}
\footnote{Ollennu, \textit{“Succession”} \textit{supra} note 61 at 77.}
\footnote{Victor Gedzi, “Women and Property Inheritance after Intestate Succession, Law 111 in Ghana” (A
paper presented at the IAFFE Conference Boston, MA, June, 25-28, 2009) 12-13, online:
\texttt{<https://editorialexpress.com/cgi-bin/conference/download.cgi?db_name=IAFFE2009&paper_id=325>}.}
\end{footnotes}
the legal systems are equipped to make compromises. Generally, the mutual concession approach will be successful if the state and customary legal systems change their attitudes about the nature of the relationship that should exist between them. For instance, the state should recognize that law reform does not mean forced assimilation, and thus desist from regarding the customary system as an inferior system that needs to be saved. The customary legal system must also respect the state as a partner in furthering the common good. A commitment to the common good may require the two systems to adopt various identities in order to solve relational conflicts. These issues will be discussed further in Chapter Five as part of my complementary approach to legal reforms.

4.8 CONCLUSION

The history of the reform of customary law bears testimony to the fact that customary law is still pervasive in Ghana; hence traditional notions of family in Ghana are still relevant. Admittedly, the urban population in Ghana is modern in its conceptions of family and of how intestate property must be distributed. Thus, there are two competing interests that must be managed. The best way of reconciling these differences is to increase the portion of intestate property given to the extended family after it has established its contribution to the life and estate of the deceased. Doing so may not entirely ensure absolute compliance with the current law; however, in view of the socioeconomic and political aspects of the customary system of inheritance, it is important that the state adopts an inclusive approach to legal reforms. An inclusive approach aims at socioeconomic integration. It focuses on improving the lives of its
people and actively involving traditional political authorities in customary law reforms. Building strategic relationships is also an integral part of the inclusive approach because such relationships hold the keys to effective reforms. These issues are the focus of the next chapter.
Chapter 5: A MULTI-LAYERED CONCEPT OF LEGAL PLURALISM AND LAW REFORM

5.1 INTRODUCTION

This chapter explores and designs complementary mechanisms for the effective reform of customary law by the state, using legal pluralism as a framework for understanding and analyzing the multifaceted relationship that exists between the state and customary legal systems in Ghana. The strategy that I propose is more general in its approach and could potentially apply to all customary law reforms, not just to the law of succession. I discussed the specific reform strategies for the law on intestate succession in Chapter Four. Both the general and the specific strategies must be merged in order to get the desired results.

As has been demonstrated in the previous chapters, there are multiple legal orders in Ghana, but there is no generally accepted strategy for effecting meaningful change to customary law. Legal pluralism has been proposed as the most appropriate framework for analyzing the relationship between different legal orders. This is because it has facilitated the investigation of non-state systems by uncovering them as a legitimate field of study and by providing many of the tools and terminology for the purpose.¹ Most of the research in this respect describes the relationship between different normative orders, but has stopped short of indicating how this relationship can be managed to

¹ Miranda Forsyth, A Bird That Flies With Two Wings: The Kastom And State Justice Systems In Vanuatu (Canberra: ANU Press, 2009) 44.
promote customary law reforms. In other words, the existing research aims at demonstrating what legal pluralism is, but not how ‘to do’ legal pluralism.

This chapter seeks to show how legal change is actually possible after having adopted any of the typologies advanced by Woodman and Morse, Forsyth, and even the mutual concession approach. This chapter examines the socioeconomic exigencies of legal pluralism and of law reform. I present a multi-layered concept of legal pluralism and assess its practical implications for the purpose of law reform in Ghana.

5.2 TOWARDS AN INCLUSIVE AND MULTI-LAYERED CONCEPT OF LEGAL PLURALISM

I hypothesize, first, that law has inherent social values, which when purposefully engaged with, hold the key to workable law reforms. Legal pluralism rests on the concept of the common good. Even though the common good is a variable concept, a commitment to it by legal systems can guarantee an agreement on a minimum standard of shared values among legal systems and this can facilitate effective legal reforms. Second, I hypothesize that the diversity that legal pluralism connotes goes beyond the existence of different legal rules in the various legal systems; it also encapsulates those factors that define a legal system: the social, economic political and the metaphysical.

First, legal pluralism is centered largely on different systems of values and principles of conduct. In Ghana, the various ethnic groups have their own versions of customary law which is grounded, arguably, on what is believed to be right and advances the well-being of the members of the society. In other words, the very diversity of legal rules is
the result of what each legal system regards as being in the best interest of its members. Accordingly, legal pluralism hinges on the concept of the common good, that which respects and promotes the welfare of members of the society, their rights, security and general prosperity. The shared belief in the common good by the different legal systems is a useful starting point for collaborative reforms, although societies are bound to differ on its meaning. However, this should not be a bar to effective legal reforms. Rather legal systems must constantly interact in order to ensure the continuous evaluation of the essence of the common good, as no single system of law fully embodies the common good. Through such interactions, the various legal systems are bound to influence each other and this will result in change. A former professor of African law, Antony Allott, notes that customary law may change through education and persuasion.\(^2\) He says that societies alter their practices as new ideas develop.\(^3\) Similarly, Gordon Woodman states that customary law may change as a result of “internally generated changes of social attitudes within communities.” He attributes these changes to modern economic and technological changes.\(^4\) It is also possible through such interactions to ensure that the system targeted for reform is empowered to participate in the reform process. But interactions must surpass the plane of legal rules to include the other legal fields; this leads to my next point.

\(^3\) Allott, *Ibid* at 60.
Second, law does not exist in isolation from its socio-economic, cultural, political, and metaphysical context. This is perhaps what one scholar refers to as “law in its widest aspects.” Law is not “an abstract concept, neutrally poised above political, social and cultural realities of a given community.” Thus, legal pluralism encompasses its socioeconomic and political context. While legal pluralism encompasses the idea that there are various conceptions of law and of legality, it connotes the fact that the reality of law consists of many different ideas, beliefs, experiences, convictions and philosophical views of the world. It must be stressed that legal pluralism is a multilayered and complex concept; it does not just define the plurality of legal rules; it defines the plurality of legal systems. This hypothesis may be likened to arguments made by Tie Warwick that law must be recognized as an aspect of the socio-cultural diversity that it administers, and Francis Deng who explains that “Law is … a normative framework that regulates the society’s constitutive processes.”

These hypotheses have two implications for law reforms. First, law reforms must also mean economic, social and political reforms. Second, legal systems must relate or interact with each other in order to safeguard the common good. Such interactions have the best chance of guaranteeing reforms if they involve the socioeconomic and political aspects of law.

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8 Deng, supra note 6 at 293.
5.3 UNDERSTANDING THE OTHER LEGALITIES

5.3.1 The Politics of Legal Pluralism

Legal pluralism captures a network of delicate relationships among various power brokers, that is, the state and traditional political authorities. The traditional political authorities in Ghana pose a challenge to the implementation of the Intestate Succession Act because the Law is a direct threat to their authority. It should be noted that the right to be a chief or hold any traditional office is based on one’s membership of the traditional family. Consequently, reform methods must accept the connection between legal pluralism and power and incorporate the fact of political diversity into legal reforms. The conflict between state law and customary law is a fight for legitimacy.9 It has been said that:

since the evolution of legal orders, both state and non-state, reflects the dynamics of power, debates about plural orders cannot be divorced from an analysis of relationships of power between and within the state and society. Given the manipulation of plural legal orders by powerful state and non-state interests, national and international power imbalances, and structural inequalities at the level of family and community, are central to any discussion of human rights and plural legal orders.10

Consequently, the dynamics of power, both visible and hidden, and how these are deployed to secure preferences and skew policies to the advantage of a few, is fundamental to understanding and managing the relationships between plural legal orders.

Deborah Isser suggests that legal pluralism is about power relations and that “in reality legal pluralism is a hotly contested arena in which all sorts of political, ideological and social agendas play out.”¹¹ Citing examples from Bolivia, Mozambique, Guatemala and Iraq about the relations between legal orders, she describes legal pluralism as an “arena in which political agendas, manipulation, and competing claims to authority are played out.”¹² Significantly, she points out that reformers who do not appreciate this important fact “are at risk” of not just being unable to make meaningful changes, but also of unknowingly supporting a particular political agenda, thereby undermining reform efforts.¹³ She hints at the need to include chiefs in customary legal reforms, specifically justice reforms, as failure to do so could lead to a “justice vacuum,”¹⁴ and I would add, a “reform vacuum.”

The customary legal system operates within a defined and well-structured political system. It is headed by traditional rulers or chiefs of varying ranks, community elders and family heads. Any changes to customary law must involve the chiefs or tribal heads and the traditional councils of the various communities. In most communities in Ghana, they are deemed to be knowledgeable people who are vested with the authority of their people to adjudicate various issues of importance and it is their pronouncements that the people regard as having the force of law and not the legal rules made by the state. It has been observed that:

¹² Ibid at 240.
¹³ Ibid at 238.
¹⁴ Ibid at 243.
The enduring social significance of customary systems of governance in Ghana is another important reason why statutory law has not been paramount. Customary rulers such as kings, chiefs and queen mothers retain their influence, especially in rural areas of Ghana, and particularly over issues related to land and family (i.e. inheritance and marriage).\(^{15}\)

In fact, the traditional set up is not a porous system simply touted as powerful; it is powerful. A Supreme Court judge noted that “the majority of people do not go to court because the Chiefs are so powerful you would not dare go over their heads.”\(^{16}\)

Thus, Joseph Blocher argues that governments should tap into the power of the chiefs or “capitalize on [their] social legitimacy” in designing their policies affecting customary law as chiefs are an important source of information for a majority of Ghanaians.\(^{17}\) Reformers must develop a contextual appreciation of the roles and purposes that the traditional government serves among its people with a view to strengthening reform mechanisms.

Certainly, the national political authorities have a role to play in the reform process, but they should work with the traditional authorities to ensure a smooth reform process. Customary law is changeable; it would seem that a system that has evidently altered some of its rules and practices by “natural adaptation,”\(^{18}\) and “persuasion,”\(^{19}\) is not immune to reform. But, customary law will respond to reasoned change fostered mostly


\(^{19}\) Allott, The Limits of the Law, supra note 2 at 236.
by its custodians. In fact, Allot has warned that customary law will not respond to changes that are “unthinking ‘unplanned [and] lacking calculation.” Admittedly, the current regulatory framework for the application, assimilation, declaration and ascertainment of customary law includes the National and Regional Houses of Chiefs, and the Divisional or Traditional Councils, but as earlier indicated, in practice, these seem to be judicial functions.

It should be stressed that the political contest is not just about legitimacy, but also about the control of resources, control over the ownership and use of land. In Ghana, seventy-eight percent of the land is owned by traditional authorities, and the alienation and management of these parcels of land is a great source of income for the traditional system. These interests will be protected. This explains why the government continues to struggle with the management of traditional land in Ghana. Traditional functionaries and state agencies still play conflicting roles in the sale and management of land resulting in multiple sales and eventually, litigation and sometimes bodily harm or death at the hands of land guards.

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20 Ibid at 61.
23 See Linda Darkwa & Philip Attuquayefio “Killing to Protect? Land Guards, State Subordination and Human Rights in Ghana” (2012) 9(17) Sur International Journal on Human Rights 141, 143. The authors define “landguardism,” as “the phenomenon of employing constituted groups of mainly young persons who engage in the use of illegitimate force to protect land and landed property in exchange for remuneration in cash or in kind.” After interviewing some land guards they explained that some of the land guards offered gratuitous services to their communities in order to protect their communal land.
We should not lose sight of the fact that legal pluralism does not describe the *peaceful* co-existence of normative orders. It is about competing claims to authority and resources. Thus, the political aspects of legal pluralism must be faced, resolved and managed, if changes to legal rules will be successful. As has been hinted at, the state must also manage the economic aspects of legal reforms.

### 5.3.2 Legal Pluralism: Economic Empowerment

PNDC Law 111 is financially unfavorable to the extended family system because it undermines its capacity to create and share wealth, and its reputation as a social security system.

Generally, rural dwellers live in reduced circumstances compared to those who live in the urban areas of Ghana. It would seem that state resources do not infiltrate these areas. There is a general lack of access to quality education and essential goods and services. There is a high rate of unemployment, a lack of readily available credit facilities to engage in productive ventures and the absence of decent health care facilities. Those employed are mostly engaged in the agricultural sector, specifically fishing and farming. Families, nuclear and extended, are relied upon to provide cheap

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labor. Most of these people eke out a living.\textsuperscript{25} Thus, the ability of the extended family to create wealth for its members is very important.

While I am in no way undermining the importance of customary law to its adherents and the religious and philosophical basis of most practices, upon what tangible basis should the extended family discontinue inheritance rules that provide them with a source of income? I contend that it will be more willing to make compromises if it is enabled to be self-sufficient.

Law reform requires a commitment by the state to improve the economic status of rural Ghanaians. The legal systems cannot effectively interact when dissimilar economic circumstances have not been corrected. Legal reform demands economic integration. This is not the same as saying that legal pluralism is an economic issue or problem and that once money is thrown at it, it will be solved. Admittedly, some customary law rules may be the result of poverty or may be encouraged by economic hardship. In fact, Tamanaha has opined that “[e]conomic policies can also be drivers for plural legal orders.”\textsuperscript{26}

Embedded in the concepts of legal pluralism and law reform is not just the notion of legality, but also, the economics of participating in the ‘legal’ life of the state. To emphasize the connection between customary law reforms and economic development, I shall examine a report compiled by the Commission on Human Rights and


\textsuperscript{26} “Human Rights Policy,” supra note 10 at 13.
Administrative Justice (CHRAJ). Briefly, the CHRAJ undertook an investigative research project in the Volta region of Ghana to ascertain, among other things, the extent of cessation of the criminalized practice of ritual servitude. Ritual servitude, also known as trokosi, is a practice whereby mostly females are held captive as ‘sacrificial lambs’ to atone for the sins of a family member. It is based on the belief that the sin committed also wrongs specific deities and ancestral spirits who must be pacified lest they visit their wrath upon the family of the wrongdoer.\(^{27}\) A priest operating the shrines and some community members claimed that the practice has the potential to prevent murder, robbery and other crimes in their communities.\(^{28}\)

With respect to ritual servitude, the report showed that it is an economic enterprise for its facilitators and to an extent, the entire community. The ‘captured’ females were used as farm hands; they provided a cheap source of labor which is crucial in the countryside where money is so scarce that paying for labor is hardly an option. The slaves who had other sets of skills also contributed to the economic fortunes of the shrine. Additionally, most of them performed house chores and traded.\(^{29}\) Basically, they helped to provide financially for the facilitators and themselves. The CHRAJ report demonstrates that some customary practices and laws fulfil not only legal and religious prescriptions, but also, an economic need.


\(^{28}\) Ibid at 17.

\(^{29}\) Ibid at 25.
As the government and some non-governmental agencies intervened to help eradicate the problem, it seems that they were faced with the dilemma of how to make up for the loss that the facilitators would suffer if the practice was discontinued. According to the CHRAJ report, upon the intervention of the government and some NGOs, some of the priests were willing to accept cows and money for their rituals instead of taking human beings captive. It would seem that this substitute was good enough to avert misfortunes from the gods. Some of the facilitators also agreed to gifts of tractors, fertilizer, Wellington boots and cutlasses for their farming activities. Additionally, some accepted cloth and alcoholic beverages, while some shrines went as far as to prescribe eight cows, a bull and GH¢3,000 in place of holding females hostage and indicated that these items were not negotiable. Another brazenly indicated his preference for cows as they would provide him with “beef for his meals.” A respondent described as an opinion leader is reported to have said plainly that the priests who manned the shrines should be supported financially in order to help curb the practice. Another is reported to have indicated that with money, the priests could hire better services. Mr. Adokpo Silvanus, the district director of Needs International, one of the NGOs mentioned in the CHRAJ report, also maintained that the “bull and heifer compensation package” was the most effective in ensuring the liberation of the captives. He explained that the priests and shrine owners view the practice as a form of livelihood and not only as a form of

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30 Ibid at 74.
31 Ibid at 18-19.
32 Ibid at 23.
33 Ibid at 26.
34 Ibid at 34. (Togbe Adevenoa).
35 Ibid at 57.
36 Ibid at 59.
religious expression.\textsuperscript{37} Indeed, “[f]rom a substantive perspective, legal reform is often synonymous with economic reform.”\textsuperscript{38}

However, it must be said that not all the respondents were willing to accept material items in exchange for imprisoning human beings. Some expressed their powerlessness to stop the customary practice, which they insisted was governed by supernatural entities. They could only stop the practice if they were permitted to do so by the gods. More specifically, a traditional leader is reported to have said that even though he had heard that the practice was illegal, he was simply not in a position to respect the law of the state because the traditional practice depended solely on the deities. He said that he was powerless.\textsuperscript{39} This proves that it is simplistic to see economic deprivation of itself as a motivation for legal pluralism, although it cannot be discounted entirely.

I submit that the provision of financial aid to the facilitators should not be seen as economic inducements for poor or perhaps greedy people, but as an essential requirement of legal pluralism and law reform. The state should be concerned about how to make it possible for the customary legal system to effectively participate in the economic life of the state in order to facilitate reforms. The issue is about equity and not about magnanimity.

With particular respect to customary intestate succession, I maintain that PNDC Law 111 stands a greater chance of success if the rural dwellers are supported to enjoy a

\textsuperscript{37} \textit{Ibid} at 71-72.


\textsuperscript{39} CHRAJ Report, \textit{supra} note 27 at 30.
similar standard of living as city dwellers or at least given the opportunities to be self-reliant. A widow will definitely not resort to PNDC Law 111 when she knows that she can barely fend for herself without the continued assistance of her deceased husband’s relatives. And she will discourage her children from challenging the mode of distribution of assets under customary law if she is unemployed or underemployed and can only educate her children with the help of their uncles and extended families.

With economic development in rural areas resulting in employment, better standards of living, and the provision of state sponsored social insurance schemes, some members of the extended family, all things being equal, will be less inclined to accept the property of the deceased, thereby leaving most of it for the surviving spouse and children. Additionally, economic development could solve a moral hazard. Those family members who do not really need help, but seek help just because it is available, and as a result deprive the surviving spouse and children of their due will now have no excuse to continue relying on the family. Gradually, the community may be able to tell the difference and show their disapproval of such attitudes.

On the other hand, economic development in the rural areas could result in a number of already poor, paid hands becoming redundant and migrating to urban areas. For instance technological progress in agricultural production (for example the tractors given them) could result in some farmhands in rural areas being made redundant. Will migration to the more culturally exposed urban areas help stimulate the mental and cultural change that the government seems helpless to achieve? Tamanaha holds the view that “capitalism driven globalisation and a massive shift around the world of
population from non-Western countries to Western countries and from rural to urban areas are remaking contemporary societies and cultures in innumerable ways.\(^{40}\) It is true that rural-urban migration is influencing cultural changes in countless ways, so, will the effect of migration accelerate customary law reforms in the rural areas?

The more educated migrants, the village school graduates, will most likely go through the rapid acculturation that comes with improved living standards. They are more likely to sever physical and psychological ties with their villages and limit their family obligations to their nuclear families.\(^{41}\) Among this group of people, the socio-economic ramifications of urban living will do for them what legal rules cannot do. The less educated, to survive in a new social environment that does not necessarily support the value orientation in the rural areas, are expected to re-socialize themselves.\(^{42}\) But can they? These “situational urbanites”\(^{43}\) tend to interact very little with city values; most of them hawk on the streets, while others work as cobblers and security guards. They maintain old kinship ties through their involvement with “urban tribal” associations and visit their villages regularly.\(^{44}\) It has been observed that these migrants “do not regard


\(^{41}\) Kwaku Twumasi-Ankrah, “Rural-Urban Migration and Socioeconomic Development in Ghana: Some Discussions” (1995) 10:2 Journal of Social Development in Africa 13 at 15; Steven J Salm and Toyin Falola also argue that rural urban migration alters the nature of social organization; it changes the nature and functions of the family in both the rural and urban areas. Migration creates new identities. And people cannot rely on the usual benefits of lineage membership due to the distance that migration creates; with economic independence the extended family loses its control over them. Some acquire formal education which gives them the status that was formerly wielded by the family elders who occupied positions of power by virtue of their knowledge of traditional culture and society. Steven J Salm & Toyin Falola, Culture and Customs of Ghana (Westport CT: Greenwood press, 2002) at 142-143.

\(^{42}\) Twumasi-Ankrah, supra note 41 at 15.

\(^{43}\) Ibid at 17.

\(^{44}\) Ibid.
the urban milieu as a proper environment for the development of the whole gamut of social relationships and all aspects of one's personality."\textsuperscript{45} Hence, they tend to be shielded from the full impact of the urban value system.\textsuperscript{46} It would seem they cannot be relied upon as significant agents of change; it is expected that the socio-economic consequences of living in urban areas will impact their lives, and the lives of those in the villages, even if only marginally.

By economic empowerment, I refer not just to the provision of tractors and fertilizer as indicated in the CHRAJ report in the context of trokosi reform. Given that there are several non-income dimensions of poverty, which cannot be solved by economic enablement alone, the state should also focus on providing quality education to enhance the employability of those in rural areas. The state must also improve governance to minimize the incidence of marginalization and focus socio-economic policies in these areas, especially on the gender aspects of poverty.\textsuperscript{47} The orthodox conception of law cannot be relied upon to recognize the economic realities of legal pluralism. Seeing law and legal pluralism as part of the political, social and cultural realities of a given community, is imperative for the reform of customary law.

\textsuperscript{45} Gus Liebenow, \textit{African Politics: Crises and Challenges} (Bloomington: Indiana University Press, 1986) 187
\textsuperscript{46} Twumasi-Ankrah, \textit{supra} note 41 at 18.
5.3.3 Legal Pluralism: Education and Psychology

Political and economic reforms must be accompanied by other shifts, including the redirection of the attention of rural dwellers from superstition, towards a different focus. Education is the key to achieving this. It is debatable whether it is possible for social transformations in people’s lives in the form of education to ‘transport’ them from one legal realm to another. I argue that reforming customary law through formal and informal education is possible. Education has facilitated change; socio-economic changes happening around the rural dwellers have also engendered change. This view is shared by a number of notable scholars.

Samuel Asante, a legal scholar, having lived and worked among various local communities in Ghana, bemoans the fact that judicial and other pronouncements constantly give the impression that African customary law is “a body of rigid rules impervious to the onslaught of economic and social pressures.”48 Explaining how the customary system responds to change, he describes how the growth of commercial agriculture prompted the traditional systems in Ghana and Nigeria to absorb the new practice. He also mentions the native systems’ “natural adaptation” of new interests in land in response to the high yields of commercial agriculture.49 He also noted the “accentuated…proprietary attitudes” of the local people which in turn undermined the chief’s control of land.50 Thus, customary law is responsive to the socioeconomic

49 Asante, “Hundred Years”, supra note 18 at 88.
50 Asante, “Interests in Land”, supra note 48 at 858.
changes around it. It is important to note that these changes are built around the cultural values of the customary legal system.

Empowering rural dwellers could help them appreciate the fact that the “sacredness” of the blood that the family members share should not preclude “outsiders,” who have married into the family, from benefitting from intestate property. Education could potentially set members of the rural communities free from “fear of spiritual reprisals from family members.” This fear is real and prevents members of these communities from fighting for their legal right to intestate property. An appreciation of these dynamics is critical, especially for the state in its dealings with customary law which is not perceived by its adherents in isolation from its social and in fact, religious context. In fact, for reforms to the political and economic aspects of legal pluralism to be possible, underlying metaphysical beliefs cannot be ignored. I now assess the CHRAJ report to substantiate my claims.

The belief in deities is further evidenced by the accounts that the respondents in the CHRAJ report gave of the roles of deities in their lives. Attributed to the deities were the functions of protecting the community against war, ridding the communities of various

52 This was discovered in a fieldwork project among the Anlo and the Ashanti, in the Volta and Ashanti Regions respectively. Victor Gedzi, “Women and Property Inheritance after Intestate Succession, Law 111 in Ghana” (A paper presented at the IAFFE Conference Boston, MA, June, 25-28, 2009), 12, online: <https://editorialexpress.com/cgi-bin/conference/download.cgi?db_name=IAFFE2009&paper_id=325>.
ailments,\textsuperscript{54} providing children for the barren, the eradication of stealing, robbery, murder and other crimes as well as land and property disputes.\textsuperscript{55} Deities were also credited with enhancing memory, protecting the people against premature death and providing them with employment.\textsuperscript{56} Also, the deities are deemed responsible for flourishing trades and business\textsuperscript{57} and “general life improvement.”\textsuperscript{58} What then is the motivation to extricate oneself from a source of power that is believed to have the capacity to do the foregoing?

These beliefs are not held by only the rural poor, but also by the state’s law enforcement personnel. Mr. Adokpo Silvanus is reported to have said that in spite of the pervasiveness of ritual servitude and its criminalization, not a single arrest has been made as the police themselves were afraid of the supposed power of the deities and were in fear of their wrath.\textsuperscript{59} They feared that if they enforced the law, adverse spiritual consequences would be visited upon them.\textsuperscript{60} Not only did they live in fear of these deities, they and some government officials sought the assistance of the deities through the shrines to deal with personal issues.\textsuperscript{61} If these law enforcers are the ones being counted on to effect legal change then the hopelessness of reforms should be obvious.

\textsuperscript{54} CHRAJ Report, \textit{supra} note 27 at 22.
\textsuperscript{55} \textit{Ibid} at 15.
\textsuperscript{56} \textit{Ibid} at 18.
\textsuperscript{57} \textit{Ibid} at 30.
\textsuperscript{58} \textit{Ibid} at 35.
\textsuperscript{59} \textit{Ibid} at 73.
\textsuperscript{60} \textit{Ibid} at 78.
\textsuperscript{61} \textit{Ibid} at 57.
even to optimists. One cannot or will not change a system from which one seeks hope, acceptance and validation.  

Accordingly, Lawrence Juma has surmised that “African Customary Law cannot be reformed by mere imposition of rules and enforcement of decrees; neither can it change its tenets based on rulings of superior courts completely removed from the daily lives and aspirations of the people.” Dowuona-Hammond, a legal scholar, agrees. With specific respect to the Intestate Succession Law, she explains:

The rules of intestate succession at customary law are founded on long standing concepts of property, marriage and inheritance rights based on traditional and religious customs and norms which have deeply influenced individual and social perspectives on inheritance rights. These rules have operated within a framework of established social structures on kinship institutions and gender segregated patterns of behaviour which can hardly be erased or changed merely by legislation.

The purpose of my dissertation is not to determine whether or not these deities really exist or if they really perform the functions attributed to them. My main purpose is to explore effective reform strategies. It is imperative to employ psychological methods, the “very complex psychological inducements” that Malinowski referred to many years ago.

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63 Juma, supra note 25 at 502.
ago. Until mindsets are changed, reforming customary law will remain “a cosmopolitan dream.”

The use of psychological mechanisms in the legal arena is not new. Legal Realists sought to investigate all the factors which influenced judges in their decision making as they asserted that legal rules by themselves do not explain a court’s decision. The sociological wing of the American Legal Realists represented by the likes of Karl Llewellyn suggests that judges are influenced in adjudication by certain local, social, moral and political traditions and shared professional norms and called for the careful study of “socio-psychological decision elements” in adjudication. Drobak and Douglass attest to this subjectivity and emphasize that “[i]t is obvious that the belief systems of judges are part of the hidden aspects of judging” and that “[m]any dissenting opinions are a testament to the differing belief systems of the various justices.” Even those who believe that judicial decision-making is predictable base that assertion on psychological factors. Brian Leiter says that judicial decisions may be predictable since the psycho-

69 Llewellyn, supra note 68 at 447 at FN 13(c).  
71 Ibid at 139.
social factors about judges are representative of a significant portion of the judiciary.\textsuperscript{72} And Jerome Frank also proposed the psychological analysis of the judiciary as a major strategy of legal reform.\textsuperscript{73}

I argue that this relationship between psychology and law holds much promise for legal reform.\textsuperscript{74} That is, psychology can be used not only to change legal doctrine, but also to influence or alter the system in which law is created and administered.\textsuperscript{75} Legal psychologists can identify and clarify those conditions not immediately apparent to law reformers. They can signal when the people are ready for change. If legal change occurs without an informed populace or before the public is ready to move, the public can undermine reforms and change.\textsuperscript{76}

Psychological and legal aims are not always at variance. In fact, Darley suggests three approaches to encouraging compliance from psychology: first, create a set of laws that embodies moral intuitions of the people; second, create a legal authority that people trust so that they accept its pronouncements as guides to morally proper behavior; and third, create a set of law enforcing procedures that give citizens the respect that enables them to regard themselves as valued members of the community even if legal decisions...
go against their interests.\(^{77}\) His response embraces the idea of tapping into traditional understandings about law and exploiting the social values embedded in law. It also embraces the idea of establishing trust between the state and its people, which I argue is exactly what my mutual concession approach seeks to do.

This dissertation was not designed to recommend psychological methods to shift mindsets and eventually alter behavior; however, I will attempt a suggestion based on my reading of the CHRAJ report. As I read the report, I was struck by the fact that the facilitators of ritual servitude have such developed senses of self and group integrity. Most of the respondents, especially the priests, were disturbed about the bad reputation of the practice. I realized that the facilitators were determined to protect the integrity of the customary legal system as the system trades on its reputational capital. I will substantiate these assertions with a number of comments from the CHRAJ report.

First, one respondent insisted that there was a clear distinction between the practice and voodoo and that conflating them had given the practice a “bad name.”\(^{78}\) Other respondents, were concerned about the “false” information being disseminated that the ‘captives’ were not given the opportunity to attend school,\(^{79}\) that they were sexually abused,\(^{80}\) or were confined in the shrines and not allowed to see family members.\(^{81}\)

They were particularly unimpressed about the information published by researchers


\(^{78}\) \textit{CHRAJ Report, supra} note 27 at 17-18.

\(^{79}\) \textit{Ibid} at 16.

\(^{80}\) \textit{Ibid} at 19.

\(^{81}\) \textit{Ibid} at 23.
who they had cooperated with, and who had “twisted the facts”\(^82\) for monetary gain.\(^83\) According to the report, the functionaries expressed “grief” about this.\(^84\) To elevate the practice, a Chief Priest mentioned that he had joined the national health insurance scheme so that the ‘captives’ could also enjoy free medical care.\(^85\) A chief and respondent insisted that the practice should be stopped as the practice offered a fair means of judging issues.\(^86\) The chief further indicated that he was not happy about the “dirty words”\(^87\) used by expatriates to describe the practice. He asked that the captives not be described as slaves since the term did not aptly represent their situation. He insisted on this even if there was no English equivalent of the term trokosi.\(^88\)

It became obvious to me that one way of effecting change is to rely on the integrity of the traditional system. Based on the report, it seems clear that communicating the adverse effects of certain customary practices to the communities does threaten the integrity of the traditional functionaries. For this reason, the functionaries will always rationalize the purpose and effect of such abusive practices, and as a defense mechanism, deny their harmful effects. In the CHRAJ report there were clear attempts to rationalize the effect of the practice. According to some respondents, it helped to stop crime and antisocial behavior and this may be true.

\(^82\) Ibid at 24.  
\(^83\) Ibid at 29.  
\(^84\) Ibid at 24.  
\(^85\) Ibid at 29.  
\(^86\) Ibid at 58.  
\(^87\) Ibid at 59.  
\(^88\) Ibid.
The self-affirmation theory, as advanced by various psychologists, suggests a technique for overcoming defensiveness to threatening information. Though this theory is used mostly in the health sector, it may be a useful tool for effecting legal change. It affirms the self by having one reflect on oneself, thereby giving one a sense of integrity. Once secure in one’s overall self-integrity, it is believed that one is better able to handle threats. This allows one to accept that there is a risk and to change one’s behavior accordingly. It has been observed that in spite of its shortcomings, self-affirmation interventions lead to positive responses to threatening information; it increases intentions to act and possibly, subsequent behavior change. This could be employed to help rural dwellers reconsider some of the customary practices.

It is very important to note that suggesting the use of psychology as a reform method is not meant to disrespect the customary legal system or undermine cultural integrity or legal pluralism. The self-affirmation theory is simply meant to enable the customary legal system to come to terms with the fact that some of its rules are potentially harmful. It seeks to reassure the system that it has a lot to offer Ghanaians, that it offers support, nurturing and hope. According to the self-affirmation theory, once the system realizes how much it is appreciated, it may be comfortable enough to accept that no system of law is perfect. I concede that suggesting psychological interventions may seem drastic in the context of intestate succession, but if one considers the lives that are lost through female genital mutilation and the damaging effects of ritual servitude on the innocent virgins, my approach to law reform may be better appreciated.
5.4 ADVANTAGES OF A MULTI-LAYERED CONCEPT OF LEGAL PLURALISM

The advantage of a law in context approach to law reform is that it does not demand a distinction between law and non-law in order to facilitate legal reforms. This is because the various sources of law are captured in the multi-layered approach; the emphasis is on creating equal opportunities for all the people. This approach accommodates the full extent of the relationships and constructive dialogues that exist or should exist among legal systems for meaningful law reforms. The adoption of such an all-inclusive approach inevitably results in accusations of having “juridified the social [and possibly the economic] world.”

But as earlier indicated, the determination of the meaning of law seems to be beyond resolution and for this reason I argue for an approach to legal pluralism that leaves the ‘legal’ field open to empirical investigation. Another advantage to this approach is that it “pierce[s] the veil of legal appearances, and... get[s] down to the social nitty-gritty” of law. It offers a pragmatic approach to legal reforms and it does not pretend that law is separate from its socio-cultural context. This approach to legal pluralism does not recognize law reform as “a rational, non-political activity,” but as “one ...having social values.” Simply put, it takes legal

90 Brian Tamanaha’s conventionalist approach to law also views law as “whatever people identify through their common usage and treat through their social practices as law.” Though he explains that his definition pays attention to ordinary social actors, solves the problem of over inclusiveness or under inclusiveness that most definitions of law suffer from, Tamanaha admits that his approach could potentially create uncertainty as to what the law is, who determines what the law is and the number of people who must endorse a practice it for it to be labeled as such. Consequently, he admits that his definition is just intended “to set a low threshold for inclusion.” Brian Tamanaha “A Non-Essentialist Version of Legal Pluralism” (2000) 27:2 JL & Soc'y 296 at 315-319.
92 Ibid at 412.
reform “out of its cramped legal ghetto, and put[s] it fairly and squarely in the open field of social reform to which it belongs.”\(^9^4\) A multilayered concept of legal pluralism looks beyond legal rules. A reform approach that focuses on rules may seem easier in theory, and in practice, but it has no enduring effects for social change. Modifying legal rules does not always remedy social problems: “it merely changes the scenery on the stage; the play goes on.”\(^9^5\) My suggested approach unpacks law and creates an opportunity for a more focused resolution of the underlying problems.

This perspective also has the advantage of questioning the capacity of those long believed to be in charge of the reform process. It underscores the fact that law reforms cannot be undertaken by law reform commissions as they are currently constituted in most jurisdictions, neither can parliament be solely responsible for the exercise. Judges and lawyers are experts in legal doctrine, and arguably, have the needed analytical and research skills for law reform, but their expertise embraces only one aspect of the legal reform process.\(^9^6\) According to J.N. Lyon, a legal scholar, “[o]ne can simply challenge as nonsense the notion that law professors, superior court judges and senior lawyers are expert in matters of law reform… to force all reform activities into a model designed, by this group of experts is to ensure failure by neglecting systematic development and treatment of the rest of the process.”\(^9^7\) It invites the combination of a multiplicity of

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\(^9^3\) Ibid at 414.
\(^9^4\) Ibid at 415.
\(^9^5\) Ibid at 412.
\(^9^7\) Ibid at 427.
skills.\textsuperscript{98} Henrietta Mensa-Bonsu, a legal academic, reflecting on the low levels of compliance with PNDC Law 111 in relation to the obvious external values embedded in it, wonders about the extent to which other professionals like sociologists were given an opportunity to make input in the law.\textsuperscript{99}

Law, in fact, does not operate in a straightforward manner as a package of rules. There are… hosts\textsuperscript{s} of countervailing forces, lurking like an iceberg below the surface. In practice, a lawyer knows this only too well. Where his bread and butter is concerned, he is not fooled by the legal paper world. But when he puts on his teaching or law reforming hat, he speaks and thinks ex cathedra.\textsuperscript{100}

Thus, law reform cannot be left to the legal profession. Professionals like sociologists, anthropologists and psychologists among many others must participate. Also, the rural communities or the people to be affected by the reforms must participate.

5.5 RELATIONAL ASPECTS OF LEGAL PLURALISM AND LAW REFORM

There are relational aspects of legal pluralism and law reform. Law reform is about establishing and nurturing meaningful reciprocal relationships with other legal systems. Regarding the relationship that should exist between legal systems to facilitate reforms, I envision an interdependent relationship between the state legal system as hospitable host and the non-state as gracious guest. I recognize that the guest-host metaphor may seemingly embed inequality because of the right of a host to ask a guest to leave his or her house, but it is used for two purposes. First, the guest-host relationship in Ghana is based on the highest form of respect and cordiality. It is socially unacceptable to even

\begin{flushleft}
\textsuperscript{98} Ibid at 427. \\
\textsuperscript{100} Samek, supra note 91 at 411.
\end{flushleft}
enquire of a guest how long he or she intends to stay. Guests are given latitude to enjoy their visit, even if this may be inconvenient to the host. In fact, a host is expected to give up most of his rights to accommodate the guest. The right to ask a guest to leave is hardly ever exercised. Second, the guest-host metaphor acknowledges the status of the state and the limits of legal pluralism. The state is arguably, the central and highest political authority in society. And according to M.B. Hooker, “the form of political organization within which plural legal systems exist today is the nation state.”

The interdependent relationship between the state and non-state legal systems is a beneficial interactional relationship between an independent guest and host expressed through an equitable obligation, and arguably, a legal obligation on the state to provide and receive both material benefits such as the provision of social amenities and non-material benefits such as letting go of perceived and actual rights. Legal pluralism, for the purpose of law reform, may thus be described as the interaction between multiple legal systems in a given space, the fullness of which depends on the fulfillment of the equitable obligation to provide and accept like socioeconomic circumstances and the ability to adapt to relational dynamics.

For this beneficial interactional relationship to work, legal systems must develop various identities that will enable them to navigate the complex chain of relationships inherent in law reforms. Both systems may not always entirely agree with each other about how to

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promote the common good, especially in view of how deeply ingrained customary beliefs can be, but they should be able to assume ‘compromising attitudes’ to help resolve conflicts. The fact is that customary law will always be a significant source of law in Ghana and among Ghanaians. It will always occupy a place in their lives and influence how decisions are made about the most important aspects of their lives. In view of this, I maintain that the best way to effect reforms is to equip the people with the skills and the capacity to respect rules and practices they would otherwise disregard. Adherents of customary law may not affirm state law, this is not what the multilayered approach seeks to achieve. It simply seeks to enable people to respect differences and be open to other viewpoints, even if they do not agree with them. The multilayered approach is about equipping people to learn to make compromises. Thus, reformers must concentrate on changing attitudes toward the reception of unfamiliar ideas. This process, I maintain, is possible if the other aspects of law, discussed above, are reformed alongside legal rules. The end result will be a people who are willing to make concessions and accommodate other views as the occasion demands. And this is possible. Victor Gedzi quotes a paramount chief as having expressed the opinion that “after all, every system has its own flaws and weaknesses. There is no need to replace the old system with a new one, which in any way has its own weaknesses and flaws instead of improving upon or correcting the anomaly in the old system of inheritance.”^103

The traditional ruler admits that the customary system of inheritance may have

problems. Perhaps he came to this conclusion because of the changing social and legal environment in Ghana. He seems to agree that there is the need to correct these problems. This suggests that it may be possible for both legal systems to reach an agreement on a minimum standard of shared values as they interact and influence each other. The acknowledgements by the traditional ruler signal hope and suggest that the customary legal system may be prepared to make concessions. It is not clear the extent to which it may be willing to go, but at least it is prepared to make a shift in its position.

Being able to learn to navigate this complex world of diplomacy requires a certain mindset and the adoption of various identities. Sometimes, these identities must be negotiated. Such negotiations may include economic inducements. As shown in the CHRAJ report, the provision of cows to the shrine owners helped to negotiate an identity that was willing to make compromises, though in actual fact, the owners may have been skeptical about changing the subject matter of the ritual. Thus, attitudinal change and the adoption of various identities are possible with education and socio-economic development. Consequently, for the purposes of law reform, I view legal pluralism as a kind of relational pluralism, a form of relationship that stresses the multiple and sometimes conflicting identities that the people in the various legal systems may have to adopt in order to work together to solve conflicts and promote law reforms. Under the Mutual Concession Approach, the fact that the portion given to the extended family, after the courts determination, may be shared according to customary

Relational pluralism exists when actors maintain multiple kinds of relationships with one another and develop multiple identities as a result. Andrew Shipilov et al, “Relational Pluralism Within and Between Organizations” (2014) 57: 2 Acad Manage J 449 at 449.
law means that the customary legal system after having assumed a ‘state-like’ identity in furtherance of the common good can reassume its own identity and participate in its own legal realm, still in furtherance of the common good.

As part of ensuring a mutually beneficial relationship, the subject matter of the invitation must be meaningful to the guest, that is, the customary legal system. Otherwise, this can undermine the host-guest relationship and the reform efforts. In other words, reform mechanisms must be considerate of the changes that the customary legal system can relate to. For instance, a call to obey a law regarding the use of seat belts is meaningless to the countryside dweller who does not have a car. This takes us back to the example of the steam engine and cart used by Sir James Marshall in explaining that legal reform is a gradual process and must also suit local conditions: “Instead of starting a steam-engine and smashing the cart, get into the cart and ride with the Native driver, and do what you can to [help] him improve his cart, so that in time he may prefer the engine and take to it.”105 Reforms must take into consideration the extent of transformation that the country is capable of managing. The intended changes must be introduced, but the process must be gradual and must involve the simultaneous operation of the other legalities discussed above. In the example given about the law on seatbelts and the rural dweller, the law will become meaningful and capable of participating in if it is introduced at the right time and if the rural dweller is also invited to share in the economic life of the state. If the rural dweller is economically empowered to own a car or, at least, use one, then he or she can appreciate, at least to some extent,

105 Sarbah, supra note 5 at 355-356.
the demands of the law. Most legal systems are open to change, but such openness is dependent, primarily, on the feasibility of what is proposed. As part of determining what is feasible, the state must, where necessary, provide the people with alternatives with a view to promoting trust, the common good and implementable reforms. This was done by the state to help curb the practice of ritual servitude. The state presented the shrine owners with an alternative ‘victim’ for ritual servitude and also reframed the contentious issue to reflect traditional understandings about law, while achieving a human rights objective. The government relied on traditional understandings of law, the belief that sins must be atoned for with something tangible, but provided the shrine owners with an alternative. The practice of ritual servitude was not necessarily abolished; its form was simply altered. It was the use of humans that was proscribed. The government aided the people to realize that the same result could be achieved using inanimate objects as objects of sacrifice instead of human beings. Reforms must be meaningful and relatable to be effective. Reforming custom is about reframing the issues so that the rural communities may view existing information differently, and hence, reshape their responses. Through reframing, new options are made possible that would otherwise not be feasible or acceptable. The importance of the recognition and application of the traditional understandings of law in ensuring the enjoyment of the

\[107\] The Criminal Code (Amendment) Act, 1998 (Act 554) s 314A criminalizes customary or ritual enslavement of human beings. It states that:

(1) Whoever (a) sends to or receives at any place any person; or (b) participates in or is concerned in any ritual or customary activity in respect of any person with the purpose of subjecting that person to any form of ritual or customary servitude or any form of forced labour related to customary ritual commits an offence and shall be liable on conviction to imprisonment for a term not less than three years. (Emphasis added). According to the CHRAJ Report, *supra* note 27 at 78, the Government succeeded in convincing some fetish priests to stop using virgins and to accept cows as objects of sacrifice.
modern forms of rights is critical. In sum, reforms must respond to the distinctiveness of Ghana’s developmental conditions.

5.6 CONCLUSION

Law is not simply legal rules; it includes varying forms of social, economic, political and metaphysical experiences. Indeed, these aspects of law determine the viability of legal systems. The state must visualize law in its entirety. It is only by so doing that governance strategies can be geared towards improving the lives of those in the rural areas, selecting the right people to reform law, and generally, formulating comprehensive law reform strategies. Additionally, the state must deem itself bound to its equitable and in fact legal obligation to improve the lives of the people in the countryside. Legal rules by themselves cannot compel change, but advancing and enriching the lives of people can. The state must not see itself as better than the other systems and thus attempt to forcefully assimilate them; it must see and treat them like partners in nation building and thus forge meaningful mutualistic relationships with them to enhance reforms. Legal pluralism as a theory and social fact lies at the heart of a clear understanding of the relationship between law and society. A lack of understanding of the operation of legal pluralism has many negative ramifications. It promises to hamper socio-economic development and obstruct human rights protection efforts. Thus, the key to meaningful reform lies in an appreciation of the nuances of legal pluralism, particularly, the interdependence among normative orders that it

108 The Constitution, supra note 102, art 36 (1) & (2).
represents. It should be noted that legal pluralism does not just describe a state of affairs, embedded in the concept is a solution for those who see it as a problem or a “troubled concept” and a strategy for those who see it as an opportunity. At the very least, legal pluralism must be seen as a celebration of legal, social, political and cultural diversity.

109 Tamanaha, “Understanding Legal Pluralism”, supra note 40 at 395.
Chapter 6: CONCLUSION

This study explores various mechanisms for the effective reform of customary law in a legally plural Ghana. More specifically, it investigates the question: what are the strategies required by the state to ensure that customary law rules, which have the potential to infringe upon socioeconomic rights, are reformed in ways that ensure compliance with state law, especially by rural dwellers? Accordingly, my dissertation describes the trajectory of customary law in Ghana and examines how lessons from the past can aid current reform efforts. My work draws on legal pluralism as a guiding framework for analyzing the relationship between state and customary legal systems, and uses intestate succession as an example of how reforms have been undertaken in the past. I conclude that reforms can be successful if the state aligns PNDC Law 111 with the legal expectations of Ghanaians and facilitates political, economic, educational and even psychological changes to the structures that frame the customary legal system, and to some extent, its own. This concluding chapter will discuss the lessons learnt and the policy and theoretical implications of my conclusions; it will indicate areas that need further research and highlight the limitations of my study.

6.1 MOTIVATION

This research was borne out of a desire to extend the reach of state law to rural Ghana in order to protect the rights of the vulnerable in these places, and to help improve the quality of their lives. Generally, customary law is not retrogressive, but I was of the opinion that merging it with state law could open up life-enhancing opportunities for rural
dwellers. More specifically, it might help to create for them alternative ways of protecting rights in a society that is becoming more global in its outlook, and inevitably, more complex. I examine the field of intestate succession in particular because it is a contentious area of law that questions longstanding traditional beliefs and practices; I was motivated by the fact that a resolution of its problems would not only make an interesting discussion, but would, more importantly, highlight the incidence of deprivation and social exclusion in rural Ghana. Also, it would promote debate about the state’s commitment to protect rights and put the spotlight on the importance of traditional understandings about life, law, rights and responsibilities and why these must be considered in legal reforms.

6.2 LESSONS LEARNT AND CHANGING COURSE

My dissertation has been a learning experience for me. Through conducting my research, I have come to realize that I am at a crossroads regarding my own allegiance to state law and customary law. As I stated in Chapter One, my life experiences and legal training may suggest a closer relationship with and allegiance to the state legal system, but I have also come to realize my attachment to customary law. This may be because customary law is a way of life rather than a set of rules, and it permeates the lives of most Ghanaians, without their realization. The effect of being unconsciously socialized in the ideals of the customary law system and at the same time being consciously socialized in the ideals of the state legal system is that my sympathies kept swaying throughout this dissertation. In spite of this, I believe that I was impartial in my
analyses and that most of the observations and conclusions I made were based on evidence.

I came to the project with a very specific focus, which is, reconciling the cultural differences between the state and customary legal systems in order to ensure effective reforms. Initially, my research sought to highlight how cultural differences between the state and customary legal systems were the main obstacle to implementable reforms and how the state had a responsibility to understand Ghanaian culture for progress to be made in implementing reforms. Accordingly, I perceived a solution that addressed only the cultural differences. I sought to use as a complementary framework for analyzing my proposed strategies, legal culture as espoused by Lawrence Friedman.1 As I examined the issues more deeply, I realized that even though cultural differences do hinder law reform efforts, there were other equally important, if not more important, factors that made it virtually impossible for rural dwellers to appreciate the significance of reformed customary law or better still, state law. These factors: - the social, economic, political and metaphysical aspects of law - informed my reconceptualization of law and of legal pluralism and shaped my arguments. Simply put, I attained a better understanding of how legal reforms are intertwined with the overall socioeconomic development of Ghana.

In view of my new focus, my dissertation moved from stressing that for the reforms to be embraced, especially by those in the countryside, they had to be based solely on

1 Lawrence Friedman, “Is there a Modern Legal Culture?” (1994) 7 Ratio Juris 117 at 118.
recognizable social standards and existing traditional understandings about law. This became a minor argument and the main argument was that for customary law reforms to be embraced, especially by those in the countryside, the state had to adopt an inclusive vision of law reform and of legal pluralism by modifying the machinery of law reform to meet the particular needs of its people. In this regard, I proposed a two-part solution that required the courts to share intestate property in a manner that recognized the importance of the extended family to the Ghanaian society. More importantly, I argued that changes to intestate law must also be accompanied by socioeconomic development.

6.3 USING LEGAL PLURALISM AS AN ANALYTICAL FRAMEWORK

To foreground my claims, I argue that legal pluralism is the best framework to analyze the relationship between differently-positioned legal orders. Initially, legal culture, as articulated by Lawrence Friedman\(^2\) seemed the most appropriate framework. It refers to “the ideas, values, attitudes, and opinions people hold, with regard to law and the legal system.”\(^3\) This seemed an appropriate premise on which to demonstrate the various attitudes and ideas that people had about the law and how this generated legal differences and resistance to law reforms. I was not discouraged by the criticisms levelled against legal culture. I was not convinced that the concept was vague and difficult to separate from the entire range of research in sociology of law\(^4\) or that it was

\(^2\) *Ibid* at 117.
\(^3\) *Ibid* at 118.
“ultimately theoretically incoherent.” Nevertheless, legal pluralism became my preferred option because it embraces the very concept of legal culture and more. It encapsulates the attitudes and values that people hold with respect to the law and the legal system, but it is also about how these attitudes and values coexist and interact. Legal pluralism provides a framework for analyzing the dynamics of relationships, and this was critical to my work. Again, legal pluralism rejects a restricted focus on formal law and state institutions and offers an image of law as dynamic and open to other suppressed legal orders. It gives suppressed discourses a voice and by so doing sensitizes people to the nature, benefits and the vision of other legal systems. But more importantly, it enables the ‘doing’ of legal pluralism by inherently embodying practical mechanisms for law reform. I am aware of the shortcomings of legal pluralism, as I pointed out in Chapter One, but I insist that it remains the most appropriate framework for analyzing a range of possible relationships between plural legal systems and how these relationships could be harnessed to foster legal change.

### 6.4 POLICY IMPLICATIONS OF RESEARCH

The conclusions drawn from this research demand the adoption of certain policy and theoretical changes. I recommend that the state must embrace the true meaning of legal pluralism because accepting legal diversity does not undermine state sovereignty. Also, the state should not view law reform as a purely legal exercise because doing so precludes the involvement of other very important professionals. Again, the state should

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be mindful of the tactless internationalization of laws, which I argue, detaches the law from its social fabric and results in low levels of compliance. Furthermore, the state must recognise that advancing the lives of the people of Ghana is an inevitable prerequisite to effective law reforms. The curriculum for legal education must also be modified to include a reasonable focus on customary law with a view to heightening interest in the subject and promoting a better understanding of it. Also, the judiciary should be better equipped to appreciate and respect customary law. Lastly, I recommend the need to improve access to education, especially for women, so that they can facilitate the process of refining cultural practices to reflect modern needs.

6.4.1 The State Must Be Open to Legal Pluralism; it does Not Undermine Sovereignty

I recommend that the state should embrace legal pluralism by interacting meaningfully with the other legal systems and desisting from seeing them as threats to its sovereignty. It has been argued that legal pluralism undermines and threatens state sovereignty, specifically, the state’s monopoly of law. Jacques Derrida, a philosopher, expresses similar concerns about the fears of the state in collaborating with other legal systems. He explains that the state fears any entity that sets itself up as having the right to do the things it deems to be exclusively within its authority. He captures this view in a characteristically most interesting way. “What the State fears … is not so much crime … The State is afraid of fundamental founding violence, that is violence able to justify, ….

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to legitimate…or to transform the relations of law…, and so to present itself as having the right to law.”

It would seem that this explains why in Ghana, the traditional authorities have not been fully engaged by the state even in customary legal reforms; the functions of these authorities seem to have been overtaken by the judiciary.

Examining legal pluralism in Papua New Guinea, Bruce Ottley and Jean Zorn argue that the state legal system has failed to incorporate customary law into the state system because the state believes that the customary system is a threat to the system of legislation and case law which evidently, reinforces the authority and legitimacy of the State. They explain that:

[b]y monopolizing the law and its processes, the state reifies itself. Customary law, then, is viewed by the government, whether or not correctly, as a direct attack upon the legitimacy of the state. The government and the propertied classes that the state protects believe that by taking force into their own hands and solving disputes using their own methods, clans are, in effect, communicating to the state that it is not needed and that its monopolies over basic areas of social control will not be respected.

These fears are largely invalid because legal pluralism does not threaten state sovereignty; it complements state sovereignty. It is rather the pretense of legal centralism that undermines the state and its institutions because centralism attributes to the state what it is not in practice. It thereby sets up acts contrary to state dictates as potentially subversive, when in fact, those acts represent the expression of Ghana’s rich history, which must rather be celebrated and exploited to promote and protect rights. State sovereignty and ‘native sovereignty’ can coexist; the diversity that legal pluralism

offers has the advantage of offering a range of possible legal solutions to specific issues.⁹ State sovereignty in Ghana is rather undermined when legal experiences are determined in light of a single set of experiences. One-size-fits-all solutions should be a thing of the past, especially as the world moves towards diversity, and acceptance of such, in all aspects of human endeavors.

Admittedly, embracing the customary legal system and preserving some of its more controversial rules, is a threat to certain interest groups protected by the state, especially the educated elite who in one breath seek to utilize the benefits of the customary legal system and yet are quick to determine their rights under the state legal system when they have to reciprocate the benefits obtained. In spite of these enduring interests, it is important that it be recognized that legal systems need each other now more than ever as the world changes and demands quicker changes and accountability from all units of social control.

After all, as Desmond Tutu has stated, “[w]e live in a universe marked by diversity as the law of its being and our being. We are made to exist in a life that should be marked by cooperation, interdependence…and complementarity….Our survival as a species will depend not on …eliminating those who are different and seeking only those who think

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and speak and behave and look like ourselves. That way is stagnation and … and disintegration.”

6.4.2 Is Law Reform Just A Legal Exercise?

Secondly, law reform should not be seen as the preserve of only those in the legal profession. In most jurisdictions, it seems that legal reforms are considered, essentially, a legal exercise, and by legal, I refer to a modification of legal rules. This has fundamentally influenced how law reform commissions and other related bodies are constituted; this must change. If law really embraces the social, the economic, the political and even the metaphysical, then law reforms must embrace the services of a wide range of professionals. Law reform commissions are not the only ones responsible for considering and making proposals for the initiation and reform of laws in Ghana. Parliament has a similar mandate. In Ghana, the judiciary and the Attorney General’s department also play complementary roles in reforming laws. But, to what extent are the courts, the Attorney Generals’ office and the Law Reform Commission equipped to deal with the policy issues that must be examined before laws can be reformed? It cannot be said, with certainty, that they have the range of skills, including non-legal, and the resources to address these issues.


Under the Law Reform Commission Act, the governing body of the Commission is chaired by a lawyer who must have at least fifteen years standing at the Bar.\textsuperscript{12} Five of the seven members of the governing body must also be lawyers at of least eight years at the Bar.\textsuperscript{13} This is a clear departure from the earlier Act where members did not have to be lawyers.\textsuperscript{14} The change seems to be based on the assumption that law reform is a purely legal exercise.\textsuperscript{15} Such Commissions could be reconstituted to include sociologists and anthropologists, among other professionals; we need interdisciplinary commissions. Alternatively, the Commission could consider using for specific projects, expert committees, made up of specialists from various fields.

The Commission also needs to be equipped with people who have the capacity to engage in meaningful research and produce in-depth reports that reflect the reality of Ghanaian circumstances, especially when the law under review includes aspects of customary law. The institution must be managed by very capable professionals who must be motivated to see their job as having far-reaching implications for national development and integration. Admittedly, Ghana has made some gains in its efforts at changing customary law and shaping the law generally. For instance, the procedure which the Commission follows before deciding on the feasibility of a law has often required input from interested parties and groups. This is also true of the parliamentary

\textsuperscript{12} The Law Reform Commission Act, 2011 (Act 822) s 4(1)(a).
\textsuperscript{13} \textit{Ibid} at s 4(1) (b).
\textsuperscript{14} The Law Reform Commission Act, 1975 (NRCD 325) s 3(3).
\textsuperscript{15} I was a member of the Law Reform Commission of Ghana when this change was made. I believe the change was made on the assumption that the mandate of the Commission could be better executed by members of the legal profession or by lawyers. Presently, I hold a different opinion. I think both lawyers and 'lay' persons must work together to effect reforms, especially of customary law.
procedure for making laws. Both the Commission and Parliament have made strides in involving the public in the legal process by publicizing the relevant issues, holding hearings and promoting public awareness and debate on relevant issues. But if reformed customary law is hardly implementable in rural Ghana, then it suggests that there is a lot more to achieve, especially to ensure that legal changes genuinely involve those whom the laws will affect the most.

6.4.3 Ghana and the Internationalization of Lawmaking

Thirdly, Ghana should be cautious in its efforts to modernize its laws and legal system. The state should not just internationalize its laws without due regard to existing socioeconomic circumstances at home. This derails law reform efforts and makes a mockery of state law. Ghana has been advancing in many spheres at a very fast rate. For many obvious reasons, one has to move along with a world that is fast advancing technologically and socio-economically. In my opinion, most African countries feel compelled to sign on to treaties that they realistically cannot implement to the fullest, or at all. Where these laws are not as a result of treaties, they are copied from other countries with different socioeconomic circumstances. It appears that legal reforms in Ghana are about copying laws from other countries. It has been observed that “ease of communication and growing familiarity with other countries and their cultures, as well as the internationalization of commerce and politics, are encouraging a greater unity and
harmony of legal rules throughout the world. So the trend is towards similarity rather than distinctiveness.”

This may be true, but not much is gained from copying laws without due regard for local circumstances. Acts of parliament are enacted to implement these foreign laws or transplants, and as has been demonstrated with the Intestate Succession Law, the result is usually the death of the “transplanted oak tree.” The claims that “law possesses a life and vitality of its own” and that a successful borrowing of laws could be made from one legal system to another in spite of their differing cultural, social or economic circumstances are doubtful. This view is simplistic; legal rules have context and this context is as important as the legal rules and must be factored into reforms strategies. Perhaps what is debatable is what the context is or should be.

Admittedly, the internationalization of lawmaking has the advantage of helping countries to envision greater aspirations. Yes, legal rules may also embody aspirations, but I insist that one can only aspire realistically, that is, given one’s socioeconomic circumstances. What one commentator said 50 years ago about law reform remains relevant, “[w]hat is suitable in one state may be inappropriate in another. An assessment must be made of the general state of its law, the previous pace of law

16 Mason, supra note 11 at 1170.
17 Lord Denning, an English judge, compared the English common law to an English oak tree and warned that “[y]ou cannot transplant it to the African continent and expect it to retain the tough character which it has in England. It will flourish indeed, but it needs careful tending,” Nyali Ltd. v. Attorney-General, (1956) 1 QB 1 at 16.
reform, and professional attitudes towards it. Moreover, these matters must be constantly reassessed to keep pace with growing demands and aspirations in law reform.\textsuperscript{20}

Learning from our legal history, recounted in Chapter Two, is important. John Mensah Sarbah recounting the legal reforms that took place during the administration of the Merchant Government in 1829 explains that “the extent of the reformation which the country was at any time capable of bearing,” was “admirably” taken into consideration in introducing customary law reforms.\textsuperscript{21} Without compromising the social and economic wellbeing of the people of Ghana, this lesson must be respected.

6.4.4 Advancing the Lives of the People

The state owes it to its people to empower them to change their lives. It is only by so doing that law reforms will be implementable. This must be done consciously. Chapter Six of the Constitution of the Republic of Ghana, titled the Directive principles of state policy, states that:

(1) The State shall take all necessary action to ensure that the national economy is managed in such a manner as to maximize the rate of economic development and to secure the maximum welfare, freedom and happiness of every person in Ghana and to provide adequate means of livelihood and suitable employment and public assistance to the needy.

(2) The State shall, in particular, take all necessary steps to establish a sound and healthy economy whose underlying principles shall include (d) undertaking even and balanced development of all regions and every part of each region of Ghana, and, in particular, improving the conditions of life in


\textsuperscript{21} JM Sarbah “Maclean and the Gold Coast Judicial Assessors” (1909-10) J Afr Soc’y 349 at 356.
the rural areas, and generally, redressing any imbalance in development between the rural and the urban areas.\textsuperscript{22}

And this chapter has been held by the Supreme Court of Ghana to be justiciable\textsuperscript{23} so the obligation that the government has to improve the lives of its people is not simply equitable; it is, in fact, legal. Legal reforms, as earlier indicated, are really not about integrating customary law into state law or even sharing jurisdiction in some matters. It is about improving the standard of living of the people and giving them the opportunity to discover and accept alternative ways of doing things; undeniably, socioeconomic progress has the potential to accelerate reforms. Law reform is about empowering one’s citizens to learn to reconcile differences respectfully and considerately. Keeping people ignorant may have the advantage of stirring up less agitation, as the people may be oblivious to their entitlements, but it also has the disadvantage of making governance difficult and of stifling all efforts aimed at promoting human rights. So this is my solution to law reform: both the state and customary legal systems must be empowered to respect opposing views, with a view to managing conflicts and building stronger relationships. They may not affirm the laws of each other, but they will respect them and make the needed compromises.


6.4.5 Changing the Focus of Legal Education in Ghana

Legal education in Ghana must change. It is important to note that in Ghana, legal education was introduced after the colonial period and it was modeled on European patterns. William Harvey explains that the program of study of legal education in Ghana was initially supervised by professors from Britain, Australia and India and the first head of the department of law in the University of Ghana was a British solicitor.24 This makes sense, as a ‘foreign’ legal system required foreign-trained personnel to man it. Under the supervision of foreigners it is understandable to have a curriculum that pays scant regard to customary law, but this is expected to change under the supervision of Ghanaians. It must be realized that “Law taught amidst the social, economic and cultural conditions of the society it is to serve is law accepted and revered by the people as their own, nourished and nurtured on native soil, even though part of it has had to be grafted on as well as transplanted from alien climes and folk.”25 In view of such sentiments, and given the importance of African customary law, one would have thought that law schools in post-colonial Africa would teach it as a course on its own or at least, give it a reasonable amount of attention, but that is not the case. Perhaps, one can agree with Rina Williams that “[t]he end of colonial rule clearly did not mean the end of colonial influence.”26 To date, the curriculum of all law schools in Ghana and in most of Africa remains British; the study of customary law is hardly a priority. Given these facts,

how can lawyers then appreciate the value of legal pluralism? How can law reformers rid themselves of their biases toward customary law and adopt meaningful law reform strategies? Why will the judiciary not modify customary law without reference to any existing law? So, the ‘westernization’ and ‘indoctrination’ that western education consistently stands accused of, continues post colonialism.

6.4.6 The Judiciary

Related to the preceding recommendation, the judiciary needs to be better equipped to appreciate and respect customary law. The judiciary in Ghana is built on similar administrative structures as the colonial state. The court structures have not changed much and the caliber of people who man these courts, in terms of the content of their legal education, has not changed much either. Firstly, the rules of common law and the principles of equity transplanted to most colonies continue to flourish with very few changes and this includes the rules which have been repealed in Britain. It must be conceded, though, that some laws have seen remarkable change. Secondly, in deciding cases, judges continue to rely on foreign cases and scenarios, sometimes making virtually no effort to consider local circumstances. Complaining about the virtual absence of judicial creativity in the Ghanaian courts, Asante laments using Lord Denning’s famous oak imagery, that the “oak still flourishes with virtually all its English

27 In Ghana, the common law rules on the Law of torts, especially the rules governing the concept of ‘Occupiers’ Liability,’ have not changed much.
28 These include the Companies Act, the Wills Act and the Contracts Act; the Wills Act in particular has provisions which recognize particular local circumstances.
foliage, and the established practice of judiciary in Ghana over the past hundred years has been one of blind adherence to the substance of English law.”\textsuperscript{30} He points to the courts unhesitating acceptance of English legal reasoning as troubling.\textsuperscript{31} Unfortunately, the ubiquitous rule that laws and decisions must accord with their social context, seems to be lost on some postcolonial judiciaries and this problem extends to many parts of the African continent. A former Dean of the Faculty of Law of the University of Khartoum, Dr. Saced El Mahdi, is reported to have commented that,

The colonial powers left behind a legal heritage that is still followed. Cultural and legal imperialism are still with us in spite of attaining political independence and hoisting national flags. Judges still think in terms of London, Paris, Lisbon, Madrid, Rome or The Hague. \textit{The justice and judicial systems we had in Africa are poor carbon copies of European justice} complete with bowler hats, pipes, ivory towerism, Chancery lane suits, Oxonian accent, conservatism, robes [and] gowns.\textsuperscript{32}

Regarding judicial decision making on issues regarding customary law, it would seem that the courts are continuously caught up with trying to determine how customary law rights and responsibilities find expression in modern common law terms. But must we always analyze legal or even social concepts through a common law lens? Is it the only system of law that is capable of effectively ordering the lives of people? Assuming that it is, what I do not see in the reform process is a commitment to the determination of customary law rights by comparing its practices and culture to the common law and other imported rules in a culturally sensitive manner. All I see is an imposition of foreign rules. But then again, are the judges capable of using any other lens in view of their

\textsuperscript{30} Ibid at 78.
\textsuperscript{31} Ibid at 75.
\textsuperscript{32} Ibid at 82.
training? I think that the ability to observe any phenomenon and assess it in its own right does not come naturally; one must be trained to do so. Lawyers and judges are trained to reason inductively and analogically, and so will always respond to the impulse to transfer a customary law concept into a realm that is familiar, that is the common law, and then proceed to assess the concept using the parameters defined by the familiar model. In view of this, law reform cannot be left entirely to lawyers or legally trained personnel, who by virtue of their training may not be responsive to local aspirations. Going back to the law reform lessons enunciated by John Mensah Sarbah and explained in chapter two, judges must have “highly trained faculties.”

He explained that they had to be intelligent and open-minded and “read[y] to receive new light.”

They require the capacity to “look[] at law in its widest aspects” and never lose sight of its aims. Such officers, he said, have to be “associated with intelligent Chiefs and other fit persons disinterestedly giving him information of present-day condition of things.” With such cooperation, a judicial officer, Sarbah believes, can achieve what the parliament cannot even attempt.

6.4.7 Women and Access to Education

The effects of customary practices on women have been obvious throughout this dissertation. Women in matrilineal communities have in many cases borne the brunt of the mismanagement of the customary law of inheritance. As earlier indicated, the

33 Sarbah, supra note 21 at 359.
34 Ibid at 359.
35 Ibid.
36 Ibid.
37 Ibid.
Intestate Succession Law was passed to protect the property rights of women and children, especially. Admittedly, some gains have been made in this regard. But the research work done by Morck, Kutoatsi and Gedzi proves that Ghana is still struggling to protect the rights of these vulnerable groups even though these are rights embedded in the constitution of Ghana and also mandated by the various treaties that Ghana has signed.

Some of the rules and practices of the customary law of intestate succession perpetuate the inequalities between women and men, and in some cases contribute to illiteracy, poverty and hopelessness. This is significant since education is the key to most gender issues. Among other factors, PNDC Law 111 is unpopular in rural Ghana because women, whom the law seeks to protect, value cultural identity more than their right to their deceased spouse’s intestate estate. They want to be validated by their communities. It would seem that the fulfillment that they get from their ‘certified’ identity cannot be replaced in any way by the material benefits that PNDC Law 111 offers them.

But how can these women be made to appreciate the fact that cultural identity and human rights can coexist? I maintain that with the benefit of education, it is possible for these women to facilitate the process of reformulating these cultural ‘policies’ within their communities in a manner that would ensure that modern rights and their cultural identities are protected. As a party to CEDAW and the African Charter on Human and Peoples’ Rights, the government owes the women and children the invaluable opportunity to gain formal education and be empowered to contribute meaningfully to nation-building. It is only through education that sustainable solutions to the problem of
harmful cultural practices, particularly those perpetuated against women and children, can be overcome. In this direction, the government of Ghana has introduced a number of interventions. For instance it has introduced the Free Compulsory Universal Basic Education (FCUBE) for all children from grade one to twelve\(^ {38} \) and is in the process of extending this to senior high schools.\(^ {39} \) It has also provided free school uniforms for pupils in the rural areas, introduced the school feeding programme to serve free lunches in these schools\(^ {40} \) and donated free sanitary towels to female students who, unfortunately, absent themselves from school during their menstrual cycle because they cannot afford to buy sanitary towels.\(^ {41} \) Some of the programmes, like the school feeding programme, have encountered a number of financial problems, but it is hoped that all these measures, and other necessary ones, will cumulatively promote formal education in the countryside, and ultimately, positively impact customary law reforms.

6.5 ACHIEVEMENTS (AND THEORETICAL IMPLICATIONS)

My work contributes to the existing works on law, legal pluralism and law reform. It suggests a different approach to solving an identified problem. So far, the works

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recommending a pluralist approach to law reform have focused largely on recommending various typologies and mutual adaptation measures. My work, however, analyzes law and legal pluralism to include vital, but overlooked aspects of these concepts. I examine the concept of legal pluralism from a different perspective.

First, I suggest a new approach to the sharing of intestate property. I also put a spotlight on the basis of legal pluralism, that is, the common good. Again, I highlight the fact that law (and legal pluralism) includes the other dimensions of law. Lastly, I broaden the concept of legal pluralism, for the purpose of law reform, to include the concept of relational pluralism and an equitable obligation to improve standards of living.

One of the most important contributions of this dissertation is my development of a new approach to sharing intestate property. I suggest that the courts should be given discretion to share intestate property on the basis on five key principles. These recommendations are important because they balance the interests of the state and customary legal systems and allow them to make feasible compromises. The recommendations, which are based largely on the principles of reciprocity and equity, can help ensure greater compliance with PNDC Law 111.

My work succeeds in throwing light on the basis of legal pluralism, namely, the common good. Focusing on the role that the extended family plays in the lives of its members, how its rules actually provide for the upkeep of the nuclear family on death intestate and how it has relieved the state of its responsibilities toward the socioeconomically deprived, my work demonstrates that the customary legal system has something to
contribute to the well-being of its people and the common good. This suggests that the customary legal system is not an ill-intentioned system aimed at abusing rights. “It is injurious to this very important source of law that a lot of the literature produced about it focus largely on its seeming variance with international human rights norms.”42 My dissertation moves the debate from focusing on the “evils” of the customary law system to concentrating on its virtues. It highlights the fact that the aims of the customary legal system are no different from those of the state and that law reform should basically underscore the need to reconcile the varying concepts of the common good and the modes of realizing them.

Again, my dissertation analyzes law as being different from legal rules. This distinction is not new. Scholars like Jerome Frank insist that rules and principles “[v]iewed from any angle… do not constitute law”43 and that it is “mistaken”44 to equate the two. Tie Warwick and Francis Deng, among other scholars, have made similar arguments about the real scope of the concept of law. Accordingly, my work, with the aid of the CHRAJ report, actually demonstrates the authenticity of the claim that law encompasses more than just legal rules, that it includes the social, economic, political and metaphysical components. For instance, I demonstrate that metaphysical issues to the rural dweller are part of the concept of law; the shrine operators in most cases claimed they had to seek the permission of the gods in order to abolish a practice that has been criminalized

44 Ibid.
by the state. This, I believe, will spark further debate about the meaning of law and hopefully, substantiate my view that what is law must be open to empirical evidence. It must be emphasized that this all-embracing concept of law and of legal pluralism, is very important to effective reforms because it dissects the concept of law and uncovers its fundamentals and results in an understanding of what must be reformed - the social, political and economic.

My dissertation reassesses legal pluralism for the purpose of law reform, to include the notion of relational pluralism. I explain that for compromises to be made by the legal systems, they need to assume different identities at different times. Law is a nuanced concept that constantly requires legal actors to make various mental adjustments in order to build a just society. Navigating the legal world can be difficult and the language of law can be complicated. Sometimes, law is about choosing the lesser of two evils. A certain logical mindset is required to understand how the system works. For instance, a certain mindset is required to understand why a suspected criminal is freed based on a legal technicality when all evidence points to guilt, or why the courts may in a case, dispense with the need for writing to ensure that a party who has fulfilled his or her obligations under an oral contract is not prejudiced, while the other party hides behind the requirement of writing to perpetrate fraud. What happens to those affected in these instances? Similarly, a certain mindset is required to understand why only those who share common blood are permitted to inherit each other's property. Thus, law requires actors to play different roles, to make an effort to understand why the system must work a certain way and to gather the courage to live with the consequences of how it works,
even if they are at the receiving end of the not-so-pleasant consequences of the law. A system that remains within a single identity is incapable of living out the true purpose of law. Systems must change. Some of the identities must be negotiated for the purpose of effecting reforms and systems must be amenable to such negotiations in order to further the common good. Significantly though, legal systems need not lose their identities in the reform process. With their enhanced capacities acquired through constant interaction and education, they are able to assume the needed identity with the sole aim of solving a problem.

As part of re-assessing legal pluralism, I explain that for the purpose of law reform, embedded in the concept of legal pluralism is an equitable or legal obligation on the part of the state or the seemingly dominant system to level all socio-economic and political playing fields. The fulfillment of this obligation is the primary factor upon which any law reform method will be successful. One may appeal to the values inherent in the law or adopt any of the typologies recommended by Woodman and Morse, Forsyth or even the mutual concession approach, but the changes in social attitudes will be realized by the fulfillment of the legal obligation to improve the standard of living of the countryside dwellers. In fact, where legal systems cannot work together to promote the common good, it is a signal to the state that it is falling in its obligation to provide for its people. In this respect, I hope my work has succeeds in drawing attention to the fact that law reform is not “some sort of technical error or failure, that… (jurists, technicians of law,
drafters of documents) must simply ...bring their tools, and fix." It is about real lives and how these must be changed.

My work underscores the fact that the Ghana must reformulate its vision for law reform and introduce polices that will promote the realization of this vision. It stresses the importance of a holistic law reform approach and the disadvantages of a fragmented approach, which focuses simply on changing legal rules. This dissertation also draws attention to the unintended effects of internationalizing laws without due regard to existing socioeconomic circumstances and emphasizes the need for an inclusive approach to law reform and legal pluralism. Hopefully, legal reformers in Ghana will be guided by more realistic reform principles.

Last but not least, my dissertation adds emphasis to the important point that customary law is a unique system of law that law reformers cannot treat like any other due to its nature. It is based on history, beliefs, common symbols and myths, legends and a way of life which, among the people, is characterized by respect for traditional authority, a commitment to family ties and obligations, reverence for departed family members and a fear of the supernatural, respect for culture and customs, superstition, deep-seated convictions, dependency, trust and a love for the simple things of life. Reforming such a system requires more than changing or making rules.

45 Friedman, supra note 1 at 130. The qualifier ‘legal’ does not point to practices of professional groups or institutions. To Friedman, legal culture describes values, ideas and opinions about law and the legal system.
My dissertation suggests that legal pluralism can be done. Legal pluralism is not just a sensitizing concept. It is about the relationship between legal systems and their accommodation of diversity. Ultimately, it is also about equity and fairness.

6.6 LIMITATIONS OF STUDY AND MATTERS ARISING

6.6.1 Interdisciplinary Approach

Adopting an approach to research that requires a relatively interdisciplinary approach is very useful. Hadfield speaks to the usefulness of this approach when she indicates that:

for those of us who seek to improve understanding through interdisciplinary conversation and convergence: we will travel further if we understand what each has to offer and look for the places where we can accomplish more of the goal we all share - a better understanding of law and how it operates in and produces the world.46

Using an interdisciplinary approach which draws on sociology, anthropology, psychology, philosophy and political science has been a useful endeavor in that it has facilitated the development of new intellectual approaches to the complex problem of legal pluralism and customary law reform. Such an approach accommodates the reality that law includes social, economic and political aspects. Samek hints at the utility of an interdisciplinary approach when he points out that “social” law reform may use a host of methods, such as political action, moral suasion, economic measures, psychological treatment, education, and community planning, to achieve its object.”47 Kahn48 argues

for the incorporation of other “knowledge-based” disciplines into legal reasoning.”49 He believes law must be understood in a socio-political context “not captured by the categories and descriptions of law.”50

However, an approach to legal analysis that draws on other disciplines is not without problems as a researcher is required to move out of his or her comfort zone into other relatively unknown arenas. For this research, I had to consider psychology and to try to understand its relationship with law and how this impacts reforms. In spite of the caveat that I am not an expert in psychology, I believe that with in-depth knowledge of the field, I could have confidently advanced alternative theories and expertly evaluated them. I doubt that I was able to fulfil Hadfield’s vision of understanding “what each [discipline] has to offer.”51

6.6.2 Legal Pluralism and Issues Arising

As a concept, legal pluralism has been criticized as having the potential to undermine the rule of law and national sovereignty and as a theoretical framework, it has been criticized for its inability to distinguish law from non-law and its inability to offer direction on how legal systems could best relate to each other. I attempted in Chapter One and in this very chapter to address some of these criticisms and as such I will not revisit those issues. What I will discuss is my own struggle with the concept as I delved deeper into it.

49 Ibid at 145.
50 Ibid at 146.
51 Hadfield, supra note 46 at 235.
I have to admit that in my reading of the CHRAJ report especially, I had to contend with the issue of whether or not legal pluralism represents real legal diversity or is merely a society’s reaction to the weaknesses or limitations of the state.\(^5^2\) This is because in the CHRAJ report, one of the respondents explained that ritual servitude had to continue in order to curb murder, robbery and other crimes. He added that to stop the practice, “the Government must make sure to put in necessary measures to curb crimes such as stealing, robbery and murder.”\(^5^3\) The point he is making is that the government is reneging on its responsibilities and so the traditional government has taken it upon itself to curtail criminal activities and ensure the safety of the members of the community. It would seem then that there is some truth to the suspicion that legal pluralism has a relationship with the ability of the state to reach and manage its rural population.\(^5^4\)

However, suggesting that a weak state is the cause of legal pluralism, meaning the customary laws are applied because of the weaknesses of the state, seems to trivialize the lived experiences of most people in the countryside who have virtually no contact with the state. Customary law attaches to the person and may manifest itself in many ways even in the presence of a strong state. For example, the occurrence of customary


\(^5^4\) This view seems to be held by scholars like Tamanaha, who in his discussion of legal pluralism and the rule of law explains that rule of law efforts may be concentrated in states that lack a solidified legal system, among others. He says that in such states the “presence and power of the state legal system may be weak or may have a limited reach (e.g. hardly any presence in distant or inaccessible rural areas ineffective on the slums of megacities). Brian Tamanaha, “The Rule of law and Legal pluralism in development” in Tamanaha *et al*., eds, *Legal Pluralism and Development: Scholars and Practitioners in Dialogue* (NY: Cambridge University Press, 2012) 34 at 35.
law marriages between Ghanaians living in North America is a reality. This means that customary law fulfils deeper personal and collective needs; it remains significant with or without the state. It is a personal law that defines the individual and shapes his or her actions irrespective of his or her physical location.

6.7 AREAS FOR FUTURE RESEARCH

As I wrote this dissertation, a number of issues for future research came to mind. I was interested in finding out how law and psychology could work together to promote legal reforms. These two branches of law may appear to have conflicting claims, but in actual fact, they do not. They can be fashioned to complement each other to produce the needed results. In Chapter Five, I suggested the use of self-affirmative theory in promoting law reforms. I made this suggestion based on the evidence that it is a good method for ensuring change. It would be interesting to see how this method can actually aid law reforms. Also, I am interested in knowing what psychologists or even law reformers may propose as alternative psychological methods and how these methods may work in practice. Is it really possible to rid people of ingrained superstitious beliefs?

It has been said time and again that the machinery of law reform should be adapted to the particular needs of each country. Basically, whether foreign laws are copied directly from other countries or are the results of signed treaties, they must reflect what is locally feasible. To a large extent, I agree. But in reality, is it possible to do this without watering down the intended effect of these international treaties? This issue is worth exploring. If doing so really does diminish the envisioned effect of the international
treaties, what are the options available to the government as it tries to undertake law reforms while attempting to ensure that human rights are respected?

Furthermore in Chapter Four, in advancing what I deem must be the basis of an intestate succession law in Ghana, I suggested that the rules of intestacy should reflect the presumed intention of the intestate. Furthermore, I maintained that intestate succession laws should distribute the estate of the deceased person according to the collective view of the community as to what is fair and equitable in the circumstances. In this regard, I think that a survey to determine the foregoing would greatly complement my work. Simply, a study of testator habits and distribution preferences and public opinion on such, not only in rural Ghana, but also in the cities may be useful in shaping the law for the future. Generally, I think that it is important that the government commissions a study to determine how well Ghanaians understand their laws and comply with them, especially reformed customary law. This is very important as it would give the government useful ideas about the possible changes it needs to make in order to improve its law reform procedures and strategies. It will also help the National Commission on Civic Education (NCCE), the government agency responsible for educating Ghanaians on civic matters, and other related bodies streamline their advocacy and empowerment programmes to cater to the shortfalls in the system.

Furthermore, while discussing the ‘economic legality’ in Chapter Five, I sought to discuss, though very briefly, the effect of rural-urban migration on law reforms. Basically, I wanted to investigate whether migration could do what legal rules have not been able to do in rural Ghana. My discussion of the issue was very short as the
relationship between migration and law reforms is a broad and nuanced topic that could actually form the basis of another dissertation. This issue is actually worth exploring as it would greatly complement my work.

### 6.8 CONCLUSION

This dissertation sheds light on the various factors inhibiting the successful reform of customary law in Ghana and to explore possible solutions. As indicated earlier, most of the studies conducted on the level of compliance with the Intestate Succession Law in Ghana have revealed that it is hardly enforced in the country side. Evidently, we are slow to embrace change because we thrive and persist by being able to predict our environment. Change potentially unsettles our equilibrium and threatens to compromise our sense of safety. The things that we have been socialized in since childhood, like customary law, are the most difficult to change; they define our early conceptions of the world and shape our future worldview. Customary law reforms have been relatively successful, principally, in the urban areas where people have been conditioned, through education and other modern influences, to believe that they are entitled to a certain set of rights. Even in these areas a lot more work needs to be done to bring people on board the ‘modern’ band wagon. We may have to accept that for those who live in the rural areas and whose lives are constantly governed by customary law, change will take a lot of effort and time because they have been socialized to believe in the legitimacy of their law and the sacredness of traditional African family systems. I believe that in spite of the establishment of customary law in the psyche of most rural dwellers, change is not impossible and can be relatively smooth if people are equipped with the skills to
make changes and cope with changed circumstances. Change is a process and reforming customary law must be envisioned as a process of remodeling an identity, as most aspects of our personalities and beliefs are built upon our conceptions of life. However, I believe that we can only remodel an identity by developing its capacity to receive, analyze, interpret and filter information in light of the bigger picture and also compare it with previous knowledge and make informed decisions. Improving the people’s standard of living plays an important role in shaping how people perceive the world. It can influence the way people think and act toward others. It can alter how they value their time and effort, how they prioritize. Thus, law reform must also be viewed as knowledge reform. I contend that a person’s failure to change is not so much a lack of willingness as it is a lack of understanding. Consequently, for reforms to be effective, the state must simply envision law very broadly to include its socio-economic dimension and law reforms to include the state’s obligation to improve the standard of living of its people. I hold the view that doing so will not eradicate African customary law, but it will help its adherents to streamline its views and perhaps rules, as best as possible, to serve the aims of the state. I must reiterate that change may not result in the rural communities affirming state law; rather, it may result in their willingness to respect state law and make the needed compromises in order to protect rights. This is what the inclusive vision of law reform and legal pluralism seeks to achieve. Ghana owes it to itself to make strides in its fight against harmful cultural practices and to protect its people, especially the vulnerable, against needless traditional practices. The challenge belongs to the state; there are no short-cuts. Surely, change may come to us in snippets, but eventually, it will be worth the time and effort.
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