EXPLAINING LEGAL PLURALISM IN AFRICAN COUNTRIES: GHANA AS A CASE STUDY

1 INTRODUCTION: HOW IT ALL BEGAN:

Until 1957, Ghana was called the Gold Coast. It was the colony of the Dutch, the French, Germans and lastly Britain. By far the colonial power which has had the greatest amount of influence over the colony of the Gold Coast and later Ghana was Great Britain.

When the British came to the then Gold Coast, they met Africans who leading what were called communal lives. By that was meant the Africans had their own laws and regulations for controlling the societies in which they lived. At the head of each community was what was and still is called a chief. He was some sort of local ruler and was called at the same time the traditional ruler. The expression “traditional” meant a lot to the local citizenry. “Tradition” connoted the rules, habits and norms of a group of people within a known area.

The colonialists introduced their own concept of laws and justice into the colonies. With specific reference to Ghana, the law was the common law which is often distinguished from the Roman Dutch or Continental law.

The colonialists did not do away with the African laws and traditions which they met on the ground. They allowed the traditional laws to operate side by side with the common law.

Beside the laws applicable, legal pluralism connoted the structures for dispute resolution. The imported laws implanted the courts as the structure for settling disputes. The traditional system had what is called customary arbitration by which chiefs and opinion leaders settled disputes among the Africans. The two methods have subsisted up till today.

These in brief were how legal pluralism began in the Gold Coast which has been called Ghana since Independence in 1957.
The same methods were applied in all African countries. With particular reference to Ghana, the local laws were allowed to be highly developed. The result is that we now have a compendium of laws applicable exclusively to the indigenous citizens on the one hand and the common law as introduced to the colonies by colonialists applicable at the same time and side by side with each other. This is the genesis of legal pluralism in the country. Similar systems will be found in African countries which were colonized by foreign powers as described above.

PERSONS REGULATED BY COMMON LAW AND TRADITIONAL LAW

A distinguishing feature of legal pluralism is that the laws apply to different people at the same time although we all live in the same community. The common law originally applied to the colonialists, their families, businesses and business partners. The traditional laws applied to indigenous Africans of the colonies. Such was the state of affairs until the influx of other nationals into Ghana. The common law was then made applicable to other citizens who were not African. They applied also to Africans living in Ghana but who were not Ghanaians.

Naturally, the traditional laws applied to the original indigenous Africans and such other person as may be living in the country who may volunteer or consent to be bound to it.

ATTITUDES OF COLONIALISTS TO TRADITIONAL LAWS

The colonialists did not place the quality of the local laws on the same level as that of the imported laws. In some areas, they considered the imported laws more superior to the traditional laws. To allow the traditional laws to operate, the colonialists prescribed their own criteria for validating traditional laws. It was the rule set by them that for the traditional laws to be valid and enforceable, it should not be against equity, common sense and good conscience. These were described as the repugnancy rule. If a case went to court and the judge decided the traditional rule was against equity, common sense and good conscience, the rule will not be applied.

JUDGES AND JUDICIAL OFFICERS
Initially, all judges and judicial officers were Europeans. With time, some Africans and non-Europeans were appointed to the judiciary and the Bench. Today all judges are Ghanaians.

CONFLICT OF LAWS

What is the position where the traditional laws and the common law conflict? In the first place the traditional law must comply with the repugnancy rule before it will be applicable by the courts. In the second place, where the common law and traditional a law conflict, the rule used to be that the common law prevailed. The current law is that in the event of such conflict, the personal law of the parties will be the determining factor. The determination of issues of such nature is by the courts where the case has been filed.

LEGAL PLURALISM IN REAL PERSPECTIVE: THE ROLE OF CHIEFS

In modern times, the legal position of the traditional laws and the common laws has been largely conditioned and regulated by various Constitutions and statutes passed by Parliament. The result is that traditional laws have now gained really effective and in some cases entrenched and almost immutable positions. This is particularly applicable with regard to the position of chiefs.

As was stated at the beginning of this paper, Africans were ruled by chiefs or traditional rulers before the arrival of the colonialists in the country. In modern times, the laws of the country have been so structured that chiefs wield a large measure of independence of the Central Government, especially in the determination of disputes involving chiefs. In the terms of the Constitution, art 270 and the Chieftaincy Act, 1971 (Act 370), disputes involving chiefs can only be determined by the chiefs themselves.

To that extent, there is a four tier system of tribunals or adjudicating institutions set up by law to handle various aspects of disputes involving chiefs. The institutions are judicial committees of divisional councils, judicial committees of traditional councils, judicial committees of regional houses of chiefs and judicial committees of the National House of Chiefs. In terms of hierarchy, cases start from the divisional or traditional council and
progress on appeal through the Regional House of Chiefs to the National House of Chiefs.

The courts of the land are as follows:
Supreme Court.
Court of Appeal
High Court
Circuit Court
District Courts and
Juvenile Courts.

None of these courts has jurisdiction to handle any dispute involving chiefs, except the Supreme Court which sits on appeal over cases decoded by the National House of Chiefs. By the Courts (Amendment) Act, 2002 (Act 620), the judicial committees are part of the judiciary but are assigned exclusive responsibilities to settle chieftaincy disputes.

JUDICIAL REVIEW

As explained by Her Ladyship the Chief Justice, the High Court and the Supreme Court have been given supervisory jurisdiction to exercise what has been called judicial review over all courts. Since judicial committees which are responsible for exercising the judicial powers of the chieftaincy institutions form part of the courts, the two Superior Courts have similar judicial review powers over judicial committees.

These powers are exercised by the use of orders of prerogative writs over the decisions of judicial committees or court directions given to control those decisions. If they take any decision by which they exceed their jurisdiction as imposed by the Constitution or any statute, the High Court will use its supervisory powers to review those decisions.

The review may result in the decision or order being quashed. It may also result in the superior court issuing order of mandamus or order of prohibition against the judicial committee.

JUDICIAL PRECEDENTS
As part of the legacy from the British system of court administration, Ghana courts practice the system of judicial precedents by which decisions of superior courts are recorded. They are cited and relied on in subsequent cases where the facts in the previous case are similar to the facts of the new case and therefore principle used to decide the previous case may conveniently be applied to resolve issues arising for determination in the subsequent case.

S. A. BROBBEY
JUSTICE OF THE SUPREME COURT