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ARTICLES IN THIS ISSUE **Page**

TITLES

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HISTORICAL FOUNDATION OF THE SOURCES OF LAW AS ENSHRINED IN THE 1992 CONSTITUTION: A CRITICAL LOOK AT ARTICLE 11

CHRISTOPHER AMOASI[1]

ABSTRACT

Ghana is considered one of the most peaceful countries in the Sub-Saharan region. On Ghana's journey to peace, she has been marred with political turmoil and social unrests. This nation has evolved from parliamentary supremacy, where the constitution did not create any legal obligations enforceable by a court of law, to an era where there is constitutional supremacy. This has been possible because the Constitution, 1992 is the Supreme law and any law or action found to be inconsistent with any provision in it shall to the extent of the inconsistency be void[2]*. The evolution of the Ghana's legal system stems from the Common Law or the English legal system. Our legal system was inherited from the English common law and doctrines of equity as well as the English legal tradition through colonization but like any other inherited culture, it has undergone change and adaptation to suit the Ghanaian society. The main purpose of this article was to critically analyse the foundations of the five sources of Ghanaian law as enshrined in Article 11 of the Constitution, 1992. It was revealed that the sources of law in Ghana, as set out in Article 11 of the 1992 Constitution, do not constitute an exhaustive list of all applicable legal sources in the country. Additionally, the arrangement under Article 11 does not necessarily establish a strict hierarchy of laws. The analysis further demonstrated that there are other legally recognised sources both primary and secondary that play a complementary role in the development and application of Ghanaian law.*

Key Words: Constitution, Ghana legal System, Common Law, Equity, Shall, Supreme law

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[2] Robert Burt, 'The constitution in conflict' (1992) Harvard: University Press; Article 1(2) of the 1992 Constitution.

1.0 INTRODUCTION

In Ghana, the sources of law are the foundational pillars that give legitimacy, authority, and structure to the legal system. The Ghana's legal framework draws from a harmonious blend of received English law, customary law, statutory enactments, judicial precedents, and international law. These diverse yet interconnected sources reflect the country's colonial legacy, indigenous traditions, and modern constitutionalism, collectively shaping the administration of justice and the rule of law in Ghana. Ghana's sources and hierarchy of laws can be traced back to the common law of the English legal system and the Bond of 1844. The English legal system is made up of three phases. The first was the development of common law; this was followed by the development of equity and finally the fusion of the common law and equity to form the English legal system. Ghana inherited the common law from the British through colonialism. The common law comprises of Judge made cases, Acts of the United Kingdom Parliament and legislations, that is to say case law and statutes. The common law came into being from the history of the Norman Conquest. In the context of Africa, colonial law or Western law refers to British, French, Spanish, or Portuguese law. Until March 6, 1957, Ghana was a British colony. In 1844, the present-day Ghana was formally brought under British law[3]. A Supreme Court was founded in 1853. The Supreme Court Ordinance of 1876, on the other hand, represents the birth of Ghana's modern legal system. This ordinance established a superior court of record with the same jurisdiction as the English High Court.

Section 17 of the Supreme Court Ordinance in 1876 explained that:

"All imperial laws declared to extend or apply to the colony or the jurisdiction of the court shall be in force as far only as the limits of the local jurisdiction and local circumstances permit, and subject to any existing or future Ordinance of the colonial legislature."

Furthermore, Section 18 provided for the concurrent administration of law and equity, stating that when there is conflict between the rules of law and equity, the principles of equity would prevail, much as they did under the English Judicature Acts of 1873 and 1875. This was augmented by the establishment of indigenous courts based on indigenous institutions and the application of customary law. The Supreme Court Ordinance, on the other hand, did not define customary law. The law of custom was neither static nor uniform. As a result, rules for determining customary law had to evolve. In ***Angu v Atta***[4], it was held that customary law had to be proved. The application of Islamic law was, in any case, greatly affected by colonial policy; it was regarded only as a variation of customary law. Old legislation continued to apply in the colonies long after they had been altered, revised, or redesigned in England, which was a troublesome part of this received law. It is against this backdrop

[3] Victor Essien, 'Sources of Law in Ghana' (1994) Journal of Black Studies, 24(3), pp.246-262

[4] Angu v Atta (1874-1928, Privy Council)

that this paper will discuss the historical development of common law, the evolution of Ghanaian legal system and sources of law in Ghana.

This background serves as a crux for this paper in discussing the historical foundation of the sources of law in Ghana as enshrined in the 1992 Constitution, specifically, article 11 of the 1992 Constitution. The paper is structured into five parts. The first part of the paper which is this introduction, the second part looked at the development of the common law and equity as that forms the foundation of the sources of law of Ghana. The third part of the paper looked at the political evolution of political system of Ghana, where the juxtaposition was made to the various constitutions that Ghana has adopted for itself over the years and the nature of the government system practised. The fourth part dealt with the sources of law of Ghana based on the preceding discussion. The fifth part presents on the discussion where various arguments are made in line with the sources of law. It has been presented that the sources of law as provided under article 11 is actually not in a hierarchical form in addition to the actual nature of the sources of law. The final part dwelled on the conclusion, summarising and providing a succinct overview of the paper.

2.0 DEVELOPMENT OF COMMON LAW AND EQUITY

Before the Norman Conquest, there were different county customs dotted around England to form what we call present day England. The Saxon Kingdom of German origin was located at the south west of present-day England and was practicing the Saxon law. The Vikings were also found at the north-eastern part of England and were also practising the Dane law. The Norman Conquest was the beginning of the English legal system which has spread out or been adopted by so many countries around the world such as Canada and the United States of America. The common law in some countries such as India and Pakistan were adopted to co-exist with some other Islamic and local laws. For some African countries, it was brought to them during the colonial period. Some of these countries are Nigeria, Kenya, Zimbabwe, Botswana and Ghana.

William the Conqueror led the Norman dynasty before conquering England. He defeated the Anglo-Saxons in the battle of the Hastings in 1066.

Before William conquered England, there was no centralized administration of the legal system. This was basically because each county was practicing its own legal system. After taking control of England, he established a centralised administration of justice for the country. The earlier feudal courts were run by the lessor lords for their tenants, courts in manors and special courts for the villains. The royal hunters were applying the forest laws. Also, the miners in Devon and Cornwall were running their own Stannary Courts. Schools and churches were applying the Canon law which mostly dealt with ethical and religious (Christianity) issues. William the Conqueror stopped all the tribal and feudal systems and created a feudal system of which he was the overlord. William the Conqueror created a uniform 'common law' which was derived from the unification of diverse local customary laws. He created the King's Court (Curia Regis) which exercised the executive, legislative and judicial powers.

The King's Court at first use to hear issues related to the Crown. They were normally graver crime (pleas to the Crown) which included crimes that disturbed the crown's tranquillity, the 'royal peace', property and other crimes which included the King's immediate feudal tenants.

The King's Court was later divided into three, namely;

a. Exchequer
b. Common pleas
c. Kings bench

The Court of Exchequer was an appellate court for common law civil actions. The Court of Exchequer heard references from the King's Bench. In cases of exceptional importance such as **the Case of Mines**[5] where twelve common law judges, four from each division below, sitting in the Exchequer Chamber, might be asked to determine a point of law, the matter being referred by the court hearing the case rather than the parties. The Court of Common Pleas originated from Henry II's assignment in 1178 of five members to hear pleas (civil disputes between individuals), as distinguished from litigation to which the crown was a party. Finally, the Kings Bench was the apex court for criminal cases in England. It exercised supervisory jurisdiction over all inferior criminal courts. It was based on the principle of pleas heard regularly and formally within the king's immediate purview even if not always in his actual presence. They were all located at Westminster. Also, they started what was known as Assizes, where judges moved around the country to adjudicate cases.

The judges would travel twice a year around England to adjudicate. Serious cases were sent to Westminster. This basically led to the reduction of the local courts' jurisdiction and hence the spread of the common law. Later in the 15th and 16th century, when similar cases occurred, the earliest judgments were applied. This led to the system of precedent and hence the development of Stare Decisis (standing by previous decisions). Civil actions in the common law were built around the writ system. The writ was to be obtained by the plaintiff whenever he desires to commence an action. The writ was a command written in the King's name and they were;

a. Trespass vi it armis (an action for damages resulting from an intentional injury to person or property).
b. Detinue (wrongful detention of goods or personal possessions)
c. Trespass on the case

This led to so many problems associated with the common law. Some of these problems were;

a. These commands were of a highly rigid structure.
b. The writs were too expensive and if a previous writ has not been issued about your case, then you cannot utilize the courts. This discouraged potential litigants.
c. There was corruption in the issuance of the writ.

[5] The Case of Mines (1568) Exc. 13

d. The writs during the common law could only offer remedy of damages.

Due to these problems people encountered with the common law courts, they started addressing issues to the King in Council. The principal civil minister in charge of such cases was the Lord Chancellor. He got around of the common law and decided cases with the use of, natural justice common sense and fairness. These principles over time became known as Equity. He was able to grant reliefs such as specific performance to compel a person to perform his obligations. This was possible because equity was more flexible and accessible. Equity was based on the discretion of the Lord Chancellor hence the statement that "Equity varies with the length of the Chancellor's foot". Some of the maxims of equity developed were;

i. Equity follows the law.
ii. Equity aids the vigilant not the indolent.
iii. Equity delights in equality.
iv. Where equities are equal the law will prevail.

To formalize the system of equitable remedies, the Chancellor started the common law principle of Stare Decisis. This made equity popular and led to friction between equity and common law. In the **Earl Oxford Case**[6], Coke CJ challenged the powers of the Lord Chancellor. This made King James I issue a command indicating that, where equity conflicts with common law, equity will prevail. The passing of the **Judicature Act in 1873-75** allowed for the amalgamation of common law and equity to form one English Legal System. This led to the reduction of conflict and friction between equity and common law. This also meant that a person could seek damages (common law) and specific performance (equitable remedy) in the same suit (see **Dudley v. Dudley**[7]) and in the same court.

The historical foundation of Ghana's legal system indeed traces back to the Bond of 1844, a pivotal event that laid the groundwork for the country's constitutional framework.[8] The Bond was signed by nine Fante Chiefs, marking a significant turning point in Ghana's colonial history. J.B. Danquah's assertion that this document was a source of the Constitution reflects its importance in shaping Ghana's legal and political structures. The Chiefs from various regions, including Denkyira, Assin Attandansu, and Cape Coast, agreed to the Bond, with Commander Hill acting as a witness. This event also saw the subsequent involvement of other powerful Kings and Chiefs from areas like Gomoa, Mfamu, and Wasa Amenfi, further solidifying the significance of the Bond.[9] It was a means to formalize the relationship between the local kingdoms and the British colonial powers, particularly in matters of governance, trade, and the establishment of a legal system. The Bond served as an early precursor to Ghana's constitutional development, showcasing the complex interplay between

[6] Earl Oxford Case (1615) 21 ER 485

[7] Dudley v. Dudley (1705) Prec Ch 241: 24 ER 118

[8] John Mensah Sarbah and others, 'African Legal Tradition' (1987) J Afr L 31, 44

[9] Ibid p. 4.

indigenous legal traditions and colonial influences. From a modern perspective, the Bond reflects the negotiation and assertion of indigenous authority under colonial pressure, setting the stage for future movements towards self-governance and independence.

3.0 POLITICAL EVOLUTION OF GHANA'S LEGAL SYSTEM

Ghana gained independence on the 6th of March, 1957. Over the years Ghana has had Constitutions most of which were abrogated until the 4th Republican Constitution, 1992. The 1957 constitution allowed for the Monarchical system of government of which the British Monarch was the Head of State and Dr Kwame Nkrumah being the first prime minister. In 1960 Ghana became a republic on the 1st of July, 1960 with Dr Kwame Nkrumah as the first President of Ghana. In 1964, the 1960 Constitution was amended and Parliament voted Dr Kwame Nkrumah as President for life[10]. The 1958 Preventive Detention Act was passed, which conferred powers on the executive to detain and arrest persons without trial for up to five years subject to renewal. In 1966 the 1960 Constitution was abrogated by the military and police force led by C.K Kotoka in a coup d'état[11].

The country returned to constitutional rule in 1969 under the 1969 Constitution which allowed for the parliamentary system of government with a President and also a Prime Minister. In 1972, the 1969 Constitution was abrogated in another coup d'état led by Colonel Kutu Acheampong[12]. As the Supreme Military Council went through various changes, with a view of returning the country to constitutional rule, they were also overthrown by the Armed Forces Revolutionary Council (AFRC) which was led by Ft. Lt. J.J Rawlings[13]. The AFRC embarked on what was called the 'house cleaning' where all military officers and executives involved in any alleged corruption scandal were killed. In 1979, the country returned to constitutional rule under the 3rd Republican Constitution. The 1979 Constitution allowed for the Presidential system of government where the President was the Head of State and also the Head of Government. In 1981, Ft. Lt. J.J Rawlings initiated another coup d'état[14]. A consultative assembly was subsequently established under **PNDC Law 253** to collate the views of various stakeholders in writing of a new constitution[15]. This gave birth to the 1992 Constitution which came into effect on the 7th of January, 1993[16].

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[10]Constitution (Amendment) Act, 1964 (Act 224)

[11] Proclamation for the Constitution of National Liberation Council (NLC) 1966

[12] National Redemption Council (Est) Proclamation 1972.

[13] Armed Forces Revolutionary Council (Est) Proclamation 1979.

[14] Provisional National Defense Council (Est) Proclamation 1981

[15] Owusu-Ansah, 'The Provisional National Defence Council of Ghana; A Move Towards Consolidation' (1989) International Third World Studies Journal Review, pp 213-218

[16] Kwabena Yeboah, 'The History of the Ghana Legal System: The Evolution of a Unified National System of Courts' (1991-92) 18, Review of Ghana Law 1

4.0 THE SOURCES OF GHANAIAN LAW

Article 11(1) of the Constitution, 1992 indicates the laws of Ghana. The laws are presumed by many to be hierarchical, which means that the one at the top of the hierarchy is of a higher authority. The presumed hierarchy is rebuttable and shall be examined in detail under one section of this paper.

Article 11(1) of the 1992 Constitution states that:

> "The laws of Ghana shall comprise—
>
> (a) this Constitution
> (b) enactments made by or under the authority of the parliament established by this Constitution.
> (c) any Orders, Rules and Regulations made by any person or authority under a power conferred by this Constitution.
> (d) the existing law; and
> (e) the common law."[17]

4.1 The Constitution

'This Constitution' as indicated in article 11(1) (a) refers to the 1992 Constitution. This is the Supreme law of Ghana, the highest on the hierarchy and also every other law in Ghana is subject to the provisions of this Constitution. This means that no law overrides any provision in the 1992 Constitution. The 1992 Constitution is made up of the title, preamble, twenty-six chapters, two hundred ninety-nine articles and the schedules. Again, the mention of 'this Constitution' in article 11(1) (a) of the Constitution, 1992 means that all the previous Constitutions abrogated are not part of the laws Ghana. Article 1 (2) of the 1992 Constitution states;

> "This Constitution shall be the Supreme law of Ghana and any other law found to inconsistent with any provision of this Constitution shall, to the extent of the inconsistency, be void."[18]

This clearly shows how supreme the Constitution, 1992 is, and that no law overrides its provisions. Thus, this constitutional provision unequivocally and authoritatively establishes the Supremacy of the Constitution 1992[19]. This doctrine implies that parliamentary enactment presently and those of previous legislations are subject to the provisions of the 1992 Constitution. In the case of the ***New Patriotic Party v Attorney General (31st December Case)***[20], Aikins JSC said:

> *"In my view, even though parliament has the right to legislate, this right is not without limit and the right to enact a law that 4 June and 31 December should be declared public holidays cannot be left to linger in the*

[17] Article 11 of the Constitution, 1992

[18] Article 1(2) of the 1992 Constitution

[19] Emmanuel Kweku Quansah, *The Ghana Legal System* (Black Mask Limited: Accra 2012)

[20] New Patriotic Party v Attorney General [1993-94] 2 GLR 35 at 137-138

realm of public policy. Such legislation must be within the parameters of the power conferred on the legislature, and under article 1(2) of the Constitution, 1992 any law found to be inconsistent with any provision of the Constitution (Supreme law) shall, to the extent of such inconsistency, be void."

As the custodian of the 1992 Constitution, the Supreme Court has the exclusive original jurisdiction in the interpretation of the 1992 Constitution as stated in Article 2(2). Article 2(3) indicates that any person to whom an order or direction has been given under Article 2(1) of this Constitution shall, duly obey and carry out the terms of the order or directions. Article 2(4) also indicates that failure to perform or carry out the order given by the Supreme Court under article 2(1) of this Constitution constitutes a high crime [failure to duly obey and carry out the terms of order or direction addressed by the Supreme Court] and shall, in the case of the President or Vice President be a ground for removal from office. The Supreme Court has an exclusive original Jurisdiction on the interpretation of the 1992 Constitution and that no other judicial body can exercise that power. In ***Republic v Maikankan and Others***[21], it was held that the lower courts are not obliged to refer every submission alleging as an issue for constitutional interpretation to the Supreme Court. This means that if a lower court judge thinks the provision is clear and unambiguous, a ruling can be delivered on that and normal appeal can be filed if litigants are not satisfied with the rulings. Furthermore, in the case of ***Republic v Special Tribunal; Ex Parte Akorsah***[22], it was held that to bring an action for interpretation to the Supreme Court, the following grounds must be satisfied:

a. Where the provisions of the Constitution are imprecise, unclear or ambiguous.
b. Where rival meanings have been placed by the litigants on the words of any provision of the Constitution.
c. Where there is conflict in meaning.
d. When there is a conflict between the operation of institutions set up or established under the Constitution.

From this position established in the **Special tribunal case supra**, the long-standing position established in the **Maikankan case supra**, by Bannerman CJ seems to have been whittled down in recent times. In ***Republic v High Court, General Jurisdiction Division, Ex Parte Zenator Rawlings***, Atuguba JSC (as he then was) stated that:

"It has to be realized that the initial stance of the Supreme Court exemplified by cases such as Republic v Maikankan (1971) 2 GLR 473, S.C, Republic v Special Tribunal; Ex-parte Akosah (1980) GLR 592 C.A, Aduamoa II v Adu Twum II (2000) SCGLR 165 which laid emphasis on the plain meaning of a statute preceded the new era of constitutional interpretation based on the now dominant principle of purposive construction of statutes, particularly the constitution. Indeed, beginning with Republic v High Court (Fast

[21] Republic v Maikankan and Others [1971] 2 GLR 473, SC

[22] Republic v Special Tribunal; Ex Parte Akorsah [1980] GLR 592-608

Track Division) Accra; Ex parte Electoral Commission (Mettle-Nunoo & Others Interested Parties) [2005-2006] SCGLR 514 the tide against ready referral for interpretation began to change"

This presupposes that where the ordinary meaning of the provision parties litigating about will defeat the spirit of the constitution, then it is imperative that the lower court stay proceedings and refer the matter to the Supreme Court for interpretation of that particular provision.[23]

4.2 Acts of Parliament

The second of law enshrined in the Constitution are enactments made by or under the authority of parliament established by the Constitution as stated in article 11(1)(b) of the 1992 Constitution. Article 93(2) of the Constitution, 1992 indicates that legislative powers are vested in the Parliament and exercised in accordance with the provisions of the 1992 Constitution. In **Mensima v Attorney General**[24], the majority of the Supreme Court held that, section 3(1) of the Manufacture and Sale of Spirits Regulation, 1962 (LI239) was inconsistent with the letter and spirit of the 1992 Constitution, particularly article 21(1) (e), which relates to the freedom to join an association. Again article 3(1) of the Constitution, 1992 clearly indicates that parliament cannot enact a law to establish a one-party state. Also, article 106 establishes the procedural by which bills can be passed by parliament and assented to by the president Before parliament passes a Bill, it goes through various stages, which are; introduction and first reading, committee stage and second reading, consideration and third reading and finally Presidential assent.

The President shall signify within seven days after the presentation to the Speaker, that he assents to the bill or not, unless the bill has been referred to the Council of State by the President under article 90 of the 1992 Constitution[25]. Where the President refuses to assent, He shall within fourteen days, state in a memorandum to the Speaker the provision to be reconsidered by Parliament or inform the Speaker that he has referred the bill to the Council of State for consideration[26]. Parliament shall reconsider the comments made by the President or the Council of State and where a bill is reconsidered and passed by a resolution supported by the votes of not less than two-thirds of all members of Parliament, the President shall within 30 days assent to it after the passing of the resolution[27]. Based on this In Ezuame Mannan v AG , Kulendi JSC indicated that failure of parliament to debate on Section 43 of Act 1019 amounted to not only a direct violation of the letter of article 106 of the 1992 Constitution, but also a violation of the spirit of the law.

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[23]See Article 130(2) of the 1992 Constitution

[24] Mensima v Attorney General [1996-97] SCGLR 676

[25] Article 106(7) of the 1992 Constitution

[26] Article 106(8) of the 1992 Constitution

[27] Article 106(9) and (10) of the 1992 Constitution

This means that one can only challenge the constitutionality of a law if it has been enacted into law. In the recent cases of ***Richard Sky v Parliament of Ghana & AG*** and ***Dr. Amanda Odoi v Speaker of Parliament & AG***, where there was a legal conundrum over the LGBTSQ+ Bill, there was a contention that the bill violated fundamental human rights provisions, particularly Articles 12, 15, 18, 21, and 33(5) of the Constitution. Prof. Mensah-Bonsu JSC emphasized that the bill had not yet been assented to by the President, meaning it was not an enacted law under Article 2(1) of the Constitution. The Court thus lacked jurisdiction to address the constitutional validity of the bill. Ackah-Yensu JSC concurred, stating the plaintiff failed to establish grounds for constitutional interpretation as required by **R v Special Tribunal; Ex Parte Akorsah**. Moreover, the bill was not yet an Act, so the Court could not declare it unconstitutional. The implication of the Court's decision clearly shows that a bill cannot be considered an Act, and thus not subject to judicial review, until the President assents.

4.3 Subsidiary Legislations

The third law according to article 11(1)(c) of the Constitution, 1992 is the Subsidiary or Delegated or Subordinate Legislation. Article 11(1)(c) indicates that the laws of Ghana shall include; any orders, rules and regulations made by any person or authority under a power conferred by this Constitution. Article 11(7) states;

> "Any Order, Rule or Regulation made by a person or authority under a power conferred by this Constitution or any other law shall—
>
> a. Be laid before Parliament
> b. Be published in the Gazette on the day it is laid before Parliament; and
> c. Come into force at the expiration of twenty-one sitting days after being so laid unless Parliament, before the expiration of the twenty-one days annuls the Order, Rule or Regulation by the votes of not less than two-thirds of all members of Parliament"[28].

This means an order, rule or regulation made by a subsidiary body which does not go through this process, shall be deemed to be null and void. There are basically two forms of subsidiary legislations, namely;

a. Statutory Instruments; which refers to instruments made under a power conferred by an Act of Parliament. There are two kinds, which are, legislative instruments and executive instruments.
b. Constitutional Instrument; which refers to instruments made under the powers conferred by the Constitution.

4.4 Existing Laws

The fourth of law stated by article 11(1) (d) is the existing law. Article 11(4) indicates that existing law shall comprise of written and unwritten laws, any Acts, Decree, Law or statutory instrument issued

[28] Article 11(7) of the Constitution

before the coming into force of the 1992 Constitution. Article 11(5) also indicates that subject to the provisions in this Constitution, the existing law shall not be affected by coming into force of this Constitution. Article 11(6) also states that the existing law shall be modified or amended to be consistent with the provisions in the Constitution, 1992. In ***Kangah v Kyere***[29]**,** the Supreme Court held that, the Chieftaincy Act, 1971 (Act 370) should be construed as an existing law as it did not contradict with any provision of the Constitution, 1979. In ***Ellis v Attorney General***[30], the Supreme Court held that the PNDC Law 294 was consistent with the 1992 Constitution although it was enacted before coming into force of the 1992 Constitution.

4.5 Common Law

The last source of law in Ghana stated in 11(1) (e) is the Common Law. According to article 11(2) of the Constitution, 1992 the Common Law comprises the rules of law generally known as common law, rules generally known as doctrine of equity and rules of customary laws including those determined by the Superior Courts of Judicature. **The Interpretation Act, 2009 (Act 792)** defines customary law as comprising of rules of law which by custom are applicable to a particular community in Ghana. In ***Attah v Essoun***[31], the Court of Appeal held that the customary principle which allowed landlords to enter and collect at will fruits of labour of his tenants ceases to be law.

5.0 UNVEILING THE ROOTS: A DEEP DIVE INTO THE FIVE PILLARS OF GHANAIAN LAW

A critical scrutiny of article 11 of the Constitution, 1992 shows the composition of the sources of laws but not the hierarchy of the laws. This sometimes, in the course of adjudication brings about an irreconcilable conflict among two or more of the laws of Ghana on a particular matter[32]. Antiedu (2019)[33] asserted that, in such circumstances, the court will have to determine which of the two laws must prevail over the other before proceeding to determine the matter in dispute. However, the hierarchy of the laws has been established in cases determined by the Supreme Court. In **Kpobi Tetteh Tsuru III v AG**[34], the Supreme Court indicated that in ascending order, the hierarchy is as follows:

a. The 1992 Constitution
b. Statutes including the existing laws
c. Subsidiary legislations
d. Common law

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[29] Kangah v Kyere [1982-83] GLR 649 SC

[30] Ellis v Attorney General [2000] SCGLR 24

[31] Attah v Essoun [1976] 1 GLR 128 CA

[32] Benjamin T. Antiedu, *Reading the Law* (1st edn, Pentecost Press Limited, 2019)

[33] Ibid (n). 12.

[34] Kpobi Tetteh Tsuru III v AG [2010] SCGLR 904

With this in mind where there is a conflict between the existing law and a statute law, that is a conflict between article 11(1)(b) and 11(1)(d), the existing law may be construed with such modifications to bring it in line with the law passed by parliament. Where the conflict is not resolved, the court may determine it by any of the three principles:

1. The rule of rank
2. Concept of *generalia specialibus*
3. The concept of implied repeal

The rule of rank is to the effect that a higher law shall precede in situations where there is a conflict between two enactments. In line with the case of **Kpobi Tetteh Tsuru III case supra**, this will not apply as statutes passed by parliament and existing laws are ranked equally. This implies that it will be wrongly construed to hold the view that statute passed by parliament in this modern dispensation is of a higher rank than an existing law. With respect to the concept of *generalia specialibus*, a general law shall not precede a specific law. Which means that in situations where the existing law deals with a specific area, an enactment passed by parliament shall not precede the existing law. In the case of ***Republic v High Court; Accra, Ex Parte PPE & Juric (Unique Trust Financial Services Ltd)*** the court held that special provisions override general provisions. On implied repeal it presupposes that where the two legislations are on the same subject matter, then it shall be construed that the latter legislation speaks the mind of the framers of the legislature.

The 1992 Constitution also derives its legal foundation from the Provisional National Defence Council Law (PNDCL) 282, which served as the enabling instrument for its promulgation and marked the transition from military rule to constitutional democracy in Ghana. It is my considered opinion that both the spirit and letter of the 1992 Constitution are, to a significant extent, influenced by the will and overarching objectives of the erstwhile military regime that preceded its promulgation. It can also be argued out that the source of Acts of Parliament is articles 106 to 109 of the 1992 Constitution as it serves as the conduit for the passage of laws. If one were to accept the notion that Article 11 of the 1992 Constitution establishes a strict hierarchy of laws, it would erroneously imply that subsidiary legislation takes precedence over existing laws. Such a conclusion, however, would be a regrettable fallacy. The consolidation of Ghanaian laws by Justice V.C.R.A.C. Crabbe (of blessed memory), as well as the Supreme Court's reasoning in Kpobi Tetteh Tsuru III Supra, affirm that Acts of Parliament and existing laws generally hold equal footing, subject to certain exceptions. This underscores the importance of interpreting Article 11 not solely through the lens of rigid hierarchy, but with a nuanced appreciation of the legal continuity and transitional provisions embedded in the Constitution.

Furthermore, in discussing the sources of law in Ghana, one must not overlook the existence and relevance of secondary sources, which, although not expressly listed under Article 11 of the 1992 Constitution, have been acknowledged and applied by the courts in various cases. These include international treaties, legal textbooks, scholarly articles, and even reputable newspaper publications. It is against this backdrop that Article 75 of the 1992 Constitution becomes significant, as it provides a

constitutional mechanism for the ratification of international treaties by Parliament. Once ratified, such treaties acquire the force of law and may be considered part of Ghana's primary sources of law under Article 11.

Again, as espoused in articles 1(2) and 125 of the 1992 Constitution, the Constitution is the Supreme law which vest the judicial power of Ghana in the Judiciary and as such the Judiciary shall have jurisdiction in all matters civil and criminal, including matters relating to this Constitution and such other jurisdiction as Parliament may, by law confer on it. However, some provisions in the constitution oust the original jurisdiction of the superior courts in certain cases. An example is the Indemnity clauses in Section 34-37 of the Transitional Provision in the 1992 Constitution. These provisions, which have stirred considerable debate, provide indemnity to individuals who were part of the Provisional National Defence Council (PNDC) regime, shielding them from legal accountability for acts committed during that period. While these clauses are undeniably embedded within the Constitution, they raise critical legal concerns regarding their compatibility with broader principles of justice and constitutional supremacy. It is my humble assertion that the influence of the PNDC regime casts a lasting shadow on the 1992 Constitution, fundamentally challenging the notion of the Constitution's sovereignty and undermining the impartiality of the legal framework in Ghana.

Although the Indemnity clauses in Section 34-37 of the Transitional Provision are part of "this Constitution", the author in alignment with the views of Kumado C. E. K[35] can firmly put across that the Indemnity clauses were not established by a neutral body but were instead crafted by the beneficiaries of the PNDC regime and inserted into the Constitution through surrogates within the Constitutional Consultative Assembly. This raises a significant legal concern: these clauses may not reflect the supremacy of the Constitution in the true sense but rather the supremacy of the PNDC regime. As a result, the presence of these indemnity provisions in the 1992 Constitution challenges the integrity of the Constitution itself, as they were inserted under circumstances that arguably bypassed transparent legal processes.

Moreover, from an international law perspective, the inclusion of such indemnity clauses within the Ghanaian Constitution raises a stark contradiction with widely recognized international legal norms, particularly those governing the accountability of state actors. International human rights law, as well as various regional agreements such as the African Charter on Human and Peoples' Rights, restricts the ability of states to grant absolute immunity to individuals who may be implicated in grave violations of human rights, such as war crimes, crimes against humanity, and other forms of gross violations of international law. By incorporating these indemnity clauses, Ghana may be in violation of these internationally binding legal obligations, as the clauses effectively shield individuals from legal repercussions that may otherwise be pursued under international criminal law. From the author's

[35] C. E. K. Kumado, 'Forgive Us Our Trespasses: An Examination of the Indemnity Clause in the 1992 Constitution of Ghana' [1993-95] VOL. XIX UGLJ 83—101.

perspective, the existence of the indemnity clauses within the 1992 Constitution casts a shadow on the constitutional integrity and the broader legal framework of Ghana. While these provisions were inserted into the Constitution during the PNDC era, they may also be viewed as a challenge to Ghana's adherence to international legal standards. The perpetuation of such clauses not only undermines the principle of judicial independence but may also obstruct Ghana's commitment to international law, particularly in ensuring justice and accountability for actions taken by state actors during the period of military rule.

Also, with respect to the "existing laws", most of them were enacted under the military regime but are being applied. This shows a defect of the 1992 Constitution in my opinion, because most of these decrees proclaimed during the military regime from the writer's standpoint were for personal motives which in one way or the other affected the fundamental human rights of citizens as enshrined under Chapter 5 of "this Constitution". Furthermore, the 'soul' of the abrogated constitutions in the author's humble opinion, continue to prevail in existing laws of the 1992 Constitution until repealed. Although article 1(2) of the Constitution, 1992 gives an automatic repeal mechanism of existing laws which are in contravention with the Constitution, 1992. In ***Mensima v Attorney General***[36], Acquah JSC said:

> *"In my view therefore, article 1(2) of the Constitution, 1992 is the bulwark which not only fortifies the supremacy of the Constitution, but also makes it impossible for any law or provision inconsistent with the Constitution, 1992 to be given effect to. And once the Constitution, 1992 does not contain a schedule of laws repealed by virtue of article 1(2), whenever the constitutionality of any law vis-à-vis a provision of the Constitution, 1992 is challenged, the duty of this court is to examine the relevant law and the Constitution, 1992 as a whole to determine the authenticity of the challenge.* ***And in this regard, the fact that the alleged law had not specifically been repealed is totally immaterial, and affords no validity to that law. For article 1(2) of the Constitution, 1992 contains an in-built repealing mechanism which automatically comes into play whenever it is found that a law is inconsistent with the Constitution, 1992****. It therefore follows that the submission based on the fact that regulations 3(1) and 21 of LI 239 had not specifically been repealed, and therefore valid, misconceives the effect and potency of article 1(2) of the Constitution, 1992 and thereby underrates the supremacy of the Constitution, 1992." (Emphasis added)*

However, until alleged under article 2(1) that such law is inconsistent with the 1992 Constitution, article 1(2) of the 1992 Constitution is hardly felt. Case laws are abundant to show that until the courts rule to the effect that a provision is in contravention with the 1992 Constitution, Article 1(2) hardly takes precedence. In the case of **Martin Kpebu v Attorney General**[37], the Supreme Court ruled that Section 104(4) of Act 30 was in reality inconsistent with article 14 of the 1992 Constitution. The argument is that until 2015 when Section 104(4) of Act 30 was repealed by the Supreme Court, it was

[36] Ibid p. 9.

[37] Martin Kpebu v AG Unreported, Writ No J1/7/2015, Supreme Court, Accra, 1 December, 2015

still in use and people were victims although article 1(2) has been indicated to take precedence. Again, in another **Martin Kpebu v Attorney General**[38], the Supreme Court held that Section 96(7) of the Criminal and Other (Procedure) Act, 1960 contravenes article 19(2)(c) of the Constitution, 1992 and is null, void and of no effect.

Last but not the least, with respect to Article 11(1) (e) which comprises the rules of law generally known as the common law and doctrines of equity, also show a defect of "this Constitution". The fact is that Ghana inherited its legal system through colonisation by the British which basically shows that it is still under colonisation in that regard. The author is of the opinion that provisions of "this constitution", Acts and Laws made which are similar or are prototypes of that of our colonial masters and do not depict the culture of Ghana should be repealed. Rwanda recently did same by scrapping all laws formulated based on German and Belgian origin and their Minister of Justice, asserted that, laws enacted based on colonial laws are enacted for the colonial metropole (i.e. the homeland or central territory of a colonial empire), not for colonies[39]. He further indicated that *"scrapping these laws means that we are and will be governed by laws made by us for us".*

6.0 CONCLUSION

The primary objective of this article was to conduct a thorough analysis of the foundational sources of Ghanaian law as enshrined in Article 11 of the Constitution of Ghana, 1992. This article explored the historical and legal evolution of Ghana's legal system, tracing its roots to the English legal system established during the colonial period. The influence of British law on Ghana's legal framework was a direct result of colonization, which brought with it the common law, as well as certain statutory laws and legal principles that have persisted over time. However, it is important to note that while Ghana inherited many aspects of the English legal system, the legal framework has evolved to meet the distinctive needs of Ghanaian society, reflecting local customs, traditions, and social dynamics.

The evolution of Ghana's legal system has been a continuous process, marked by significant changes across different political regimes. From the First Republic to the present Fourth Republic, various political shifts and legal reforms have been implemented to tailor the legal system to the country's evolving political, social, and economic circumstances. These changes have resulted in an ever-adapting legal system that, while rooted in its colonial past, now reflects a more indigenous and contextually relevant approach to law making and legal interpretation. This article underscores that the legal transformations Ghana has undergone demonstrate the flexibility of its legal system, which has adapted to the various constitutional frameworks and political ideologies that have characterized each republic.

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[38] Martin Kpebu v AG Unreported, Writ No J1/13/2015, Supreme Court, Accra, 5 May, 2016

[39] Mohammed Awal, 'Rwanda scraps over 1,000 colonial-era laws passed by Germany and Belgium' (7 October 2019) https://face2faceafrica.com/article/rwanda-scraps-over-1000-colonial-era-laws-passed-by-germany-and-belgium accessed on 17th August 2021

As outlined in Article 11 of the 1992 Constitution, the primary sources of law in Ghana are pivotal to the functioning of the legal system not overlooking other sources of law. These sources include the constitution, legislation, customary law, the common law, doctrines of equity, international treaties, legal books and judicial precedents, all of which contribute to the development and interpretation of law in the country. The article examines these sources in detail, illustrating how they work in practice and interact with one another within the Ghanaian context. The role of decided cases, or judicial precedents, is particularly significant, as the decisions made by the judiciary help shape the application of both statutory and customary law. Ghanaian courts have consistently referred to past decisions when interpreting the Constitution and applying legal principles to cases before them. This judicial practice not only promotes consistency and certainty in the application of the law but also ensures that the legal system adapts to contemporary issues and challenges faced by Ghanaian society.

Moreover, Acts of Parliament continue to play a central role in shaping the legal landscape of Ghana. As the legislative arm of government, Parliament enacts laws that regulate the conduct of individuals, businesses, and government institutions. These laws, often enacted to address specific needs within society, provide the foundation for the rule of law in Ghana, ensuring that all citizens are held accountable under the law. Customary law, which is based on the customs and traditions of the various ethnic groups in Ghana, also constitutes an essential source of law. It plays a particularly significant role in areas such as land tenure, family law, and inheritance. Customary law is unique in its flexibility, as it evolves with the changing customs and traditions of local communities while still being recognized and applied by the formal legal system. This coexistence of customary law alongside statutory and common law allows for a legal framework that acknowledges and respects indigenous traditions and practices.

Additionally, the doctrines of equity play a crucial role in ensuring that justice is served in situations where strict legal rules might otherwise lead to unjust outcomes. These doctrines allow courts to apply fairness and justice, ensuring that legal decisions reflect moral principles alongside the strict application of the law. The Constitution of Ghana, 1992, stands at the apex of these sources, as the supreme law of the land. It provides the legal framework within which all other sources of law are interpreted and applied. As the Constitution establishes the supremacy of law, it guides both judicial decisions and legislative processes, ensuring that all legal actions align with the principles enshrined within it.

Ultimately, this article contributes to the broader understanding of Ghana's evolving legal system by offering a detailed exploration of the sources of law and their historical, practical, and legal significance. It highlights how Ghana's legal system, shaped by both colonial legacies and indigenous influences, continues to adapt to the changing needs of its society. Through the integration of judicial precedents, legislation, customary law, and the doctrines of equity, Ghana's legal system reflects a dynamic and comprehensive approach to governance, offering a framework that serves the needs of both its citizens and the broader international community. This analysis not only underscores the

importance of understanding these legal foundations but also emphasizes the ongoing relevance of Ghana's legal system in shaping the future of its governance and legal practices.