Problems of Intestate Succession and the Conflict of Laws in Ghana**

All lawyers and judges use fiction in their arguments. Legal fictions and similar metaphors are valuable implements of jurisprudence which render traditional procedures available for new purposes of justice which ease the path of progress for less agile and more conservative minds, and which speed the persuasion of mechanical phrase-bound logicians.¹

The ultimate purpose of the legal profession in Ghana is to promote a dynamic compromise between the technicalities of comparative jurisprudence and what some may refer to as the needed requirements of justice, with the hope that the flexible application of the doctrine of repugnancy and of *stare decisis*² would help unify the plurilegal system of Ghana. But after administering the law of succession,² both testate and intestate, for over a hundred years, Ghanaian courts still have an uncertain grasp of this subject. It is regrettable to note that the Ghanaian courts' attempt to state this branch of customary law has been troubled by conflicting decisions.

The important question to ask regarding problems of succession in Ghana is what law should govern the devolution of the estate of a person who has died

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²The Editorial Reviewer for this article was Linda S. Foreman, assisted by student editor Thomas G. Yoxall, Senior Editor of *The International Lawyer*.

¹Editor's Note: All technical terms are defined in the Appendix.


2. Succession refers to the legal disposal of rights and duties of a person in favor of a son, daughter, relative or a subsequent valid holder. According to the principles of law, it can be done (1) *inter vivos* and (2) *post mortem*.
intestate. The difficulty of choice of law in Ghana often arises from the fact that the intestate has in his lifetime professed Christianity, Islam, patrilineal, or matrilineal succession. Thus, when a legal dispute arises, it is often difficult to determine which law to apply. Past experience also has influenced Ghanaians to support the view that the British colonial policy must be blamed for increasing the legal options and parallel possibilities within the legal system. The parallel possibilities created in Ghana by the English Crown undoubtedly are the primary source of choice of law problems. Despite British rule, however, Ghana would experience intercultural conflicts of law because customary law is comprised of different tribal laws recognized and applied in Ghana. These local variations in the customary law are one source of internal conflict of laws.

The purpose of this study is to examine the problems of intestate succession in Ghana and to lay bare its conflict of law problems, with a view toward proposing a solution.

I. Intestate Succession: An Overview

An initial question that arises is: What law governs the succession of movable and immovable property? Legal scholars of the sixteenth and seventeenth centuries destroyed the Roman law concept of universality of succession by considering property ("statutes") under two rubrics—personal and real. By this method of classification, immovable property was referred to as "real" and succession to immovable property was determined by the lex loci rei sitae. Movable property was classified as "personal," and succession to it was determined by the personal law of the decedent.

Ghanaian courts, influenced by English law, have always followed the maxim *mobilia sequuntur personam*, which means movables follow the person. This rule has remained the guidepost in many countries in the Western Hemisphere including the United States.

The second question which arises is: What law must be applied when the property or estate of a *propositus* has been properly administered, in that liabilities with respect to debts and other obligations have been settled? According to

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English conflict of laws, succession to immovable property is governed by the *lex situs* and succession to movable property is determined by the deceased’s last domicile. Operation of these rules, however, varies depending upon the operative facts in a given case.

Succession under a will is quite a different matter. Where a person dies testate, it is necessary to refer to the law of the testator’s domicile at the time that the will was executed. On the other hand, if the will is one of “appointment,” reference should be made to the law that created the “appointment,” the reason being that “the donee is considered to be disposing of the property of the donor.”

The title to movables, however, is governed by the situs rule and not the deceased’s last domicile. Thus, if a person dies intestate in a foreign country without any next-of-kin or successor domiciled in the country where he died, and the foreign country claims his movables in Ghana as ownerless property, the Government of Ghana’s claim to the movables as *bona vacantia* would supersede the right of claim of the foreign state. In such circumstances the foreign state’s claim is not by way of succession. On the other hand, if the foreign country claims under *ultimus heres*, its claim would, of course, be preferred to that of the Ghanaian Government’s claim, which simply means that a true claim of succession is governed by the law of the domicile of origin of the *de cujus*.

At common law, provisions of a will relating to immovable property must be made to comply with the situs rule, while provisions relating to movables must be made to comply with the testator’s last domicile. The latter rule had created confusion and hardship, especially in cases where a testator had acquired a domicile of choice after executing his will. Courts in European countries and elsewhere historically have resorted to the doctrine of *renvoi* to provide flexibility to this rule by giving effect to wills that can be deemed to have satisfied either domestic probate law or the laws of the last domicile.

Under customary law, there is no distinction between movable and immovable property. Such a distinction is a considerably new phenomena in West Africa,

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13. Id.
14. Id.
15. Id.
16. Id. at 390–91.
17. MARTIN WOLFF, PRIVATE INTERNATIONAL LAW 579 (2d ed. 1950).
18. Id. at 579–80.

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including Ghana. It is therefore difficult to deal with conflict between foreign law (for example, English law, French law, or American law) and a tribal law.

Under Ghana’s customary law of succession, wives have no succession rights to their husbands’ intestate property, especially if married under native law. There is, however, an ill-defined right passed on from generation to generation that a wife has the right to live in the late husband’s house and to be maintained by the late husband’s successor or successors. English law or common law, however, gives the wife equal share in the matrimonial property.

Prior to 1900, the principles of primogeniture and coparcenary applied to the inheritance of the real estate. Where there were two males of equal status in a family, the eldest was given the right to inherit. If a family included only daughters, all of the daughters inherited the estate together as coparcenaries. With respect to real estate, sons and daughters received equal share.

Under Ghana’s customary law, the husband’s rights of succession to the wife’s estate are minimal. Such rights, if they do exist, are inferior to the rights of the wife’s son. In most tribes in Ghana, such rights are extinguished if the wife gives birth to a baby boy. Under English law and under the laws of other common law jurisdictions, however, a husband has a well-defined right in the wife’s estate, both movable and immovable.

Ghana’s customary law also provides for group succession, whereby the children of a propositus, as a group, rightfully could succeed to his intestate property in undivided shares. The property thus becomes jointly owned by all other members of the family. Arguably, if the application of English law of intestate succession is permitted, it would destroy the institution of family property in Ghana. Furthermore, while successors at common law succeed to the estate’s assets, succession under customary law is not limited to the inheritance of property. Rather, successors under customary law also assume the debts, other duties and obligations attached to the estate of the deceased. Under customary law, a successor may have to assume personal responsibility for all the deceased’s debts and, in some cases, the deceased’s wife. Customary law differs markedly from American law and English law in that the deceased’s debts, duties, and obligations, if not terminated by his death, must be met by the remaining assets. If the assets are insufficient to pay off the creditors, the creditors have no other recourse.

27. Id. at 150.
28. Id. at 154–55.
31. Id. at 573–74.
32. See Parry, supra note 26.
II. The Nature of the Problems of Intestate Succession in Ghana

Perhaps the most fascinating and vexed subject in conflict of laws in Ghana is the law of succession, both testate and intestate. Arguably, the problem inherent in Ghana's law of succession is its diversity. Not only are there differing forms of succession laws in Ghana, but these laws must coexist with marriage laws and the "received English law." These parallel bodies of law relating to succession created internal and external conflict of laws problems.

Nevertheless, the expanding frontiers of the plurilegal system in Ghana have no more interesting new grounds to cover than indigenous law, especially in its conflictual sphere of operation. After colonial attempts to solve these problems, and the resultant creation of uncertainty as to how to bring these problems under control, some conflict scholars are now questioning the desirability of the old order and whether positive law should be allowed to take the place of the traditional classificatory system. It is true that no man claims perfection, but constant practice can provide something nearer to perfection. Ghanaian courts, therefore, would not be at a disadvantage by experimenting with Professor Currie's interest analysis and Professor Baxter's comparative impairment methodology when dealing with issues of conflict of laws in cases of intestate succession.

Problems of intestate succession in Ghana may be attributed to the application of English law of intestate succession, patrilineal succession, matrilineal succession, the patriarchal rules of primogeniture and ultimogeniture, Islamic rules of succession, and the different marriage systems. The primary causes of this diversity of applicable laws include both national and historical circumstances and the British colonial policy of reconciliation and accommoda-

41. See Mensah-Sarbah, supra note 24, at 100–13; Ollenu, supra note 24.
42. Inyang v. Ita & Ors., [1929] 9 N.L.R. 84, 85.
44. Mohammedan's Ordinances Cap 129 (1951 Rev.).
tion. Moreover, the ambiguous definition of the family under customary law and what constitutes family property, coupled with the failed attempt to adequately explain the full implication of succession as of right, and automatic succession in both patrilineal and matrilineal communities, add to the problems of intestate succession.

The choice of law dilemma in Ghana is compounded by the fact that learned text writers and the courts have indulged in sweeping generalizations that, upon death intestate, the self-acquired property of a deceased person becomes family property. Generalizations such as this have colored people’s conception of the law and, to date, many still believe that throughout Ghana it is the family that succeeds to the self-acquired property of an intestate person. These generalizations unfortunately have not been adequately supported.

Neither are these generalizations true for all peoples of Ghana. For example, Ghanaian courts have misconceived the structure of succession laws in the Volta region, the Upper region, and the Northern region. While matrilineal succession may be accepted and operative among some tribal communities such as the Ashantis, the Fantis, and the Gas, it is not true of other tribal communities such as the Ewes, the Adangbes, and the Gonja tribe. Among the Ewe, children, and not the family, succeed as of right to the intestate estate of their father. This may also be true of the Adangbe. Conversely, among the Gonja tribe, the patrilineal junior brother of the intestate, as opposed to the family, is allowed to succeed. Despite these tribal differences, the influence of this general proposition was so successful that today there exists what Professor Kludze calls “judicial customary law” and “practiced customary law.”

For my part, I cannot see any justification for the difference between judicial customary law and practiced customary. If indeed the courts are declaring the customary 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.
The problem of intercultural conflict of laws in Ghana, however, cannot be blamed solely on the difference between judicial customary law and the practiced customary law. Instead, the source of the problem stems from the plurilegal nature of Ghana’s legal system. The customary law would be better understood if the courts would base their judgments on thorough and adequate research rather than rely on sweeping generalizations not true of all tribal communities in Ghana. The application of English law and the recognition and acceptance of differing local personal law regimes within a unitary state such as Ghana, created room for litigating parties to have multiple legal options.

The statutory definition of common law ex-hypothesi does not include all rules of customary law generally recognized by custom. Thus, under the Courts Act, section 154(4), now reenacted in the Courts Decree, 1966, N.L.C.D. 84, paragraph 93(2), all the tribal laws in Ghana generally are not accepted as part of the common law. Given this statutory lapse, internal conflicts of law problems will remain not merely a possibility, but a reality if the received common law is applied without regard to Ghanaian circumstances. As a result of these problems Ghanaians today are faced with pronounced diversity and conflicts in their laws that urgently need solution.

Scholars who have studied the issue have concentrated on the problem of the interaction between the various tribal laws and the English common law at different levels. For example, native Ghanaian law of intestate succession conflicts with the common law rules of succession in many complicated circumstances. Under the general custom of Ghana, if an “estate” is disposed to two or three members of a family with the sole aim that it should benefit all of them, it legally becomes family property jointly owned by all other members of the family. The custom, however, does not explain whether it is the conjugal

60. In Ghana, tribes such as the Fanti, Twi, Akim, and Ashanti accept the practice of matrilineal succession; the Lobi tribe, a section of the Dagarti tribe, the Tampolense, the Baga or Vagala tribes of the Northern and Upper Regions are also matrilineal communities. One may also include Ga Mashi-Accra Town and Tamale Town in the Northern Region. Matrilineal here means that children could not inherit from their father but are qualified to inherit from their maternal uncle. Patrilineal is the opposite of matrilineal succession. The tribal community in which the patrilineal system obtains is the Ewe of the Volta region; e.g., Anlo (Keta). The Anlo System, however, is made up of a blend of patrilineal and matrilineal systems. The Lobi, the Vagalas, Lobi-Dagarti, Ga-Adangbe, the Guam, the Kyerepong of the Eastern region and the Odum part of Kumasi all subscribe to the rules of Patrilineal Succession. See OLENNU, supra note 25.

61. See The Interpretation Act § 17 which provides as follows:

(1) The Common Law is comprised in the Laws of Ghana consists in addition to the rules of law generally known as the Common Law, of the rules generally known as the Doctrine of Equity and of Rules of Customary Law included in the Common Law under any enactment providing for the assimilation of such rules of Customary Law as are suitable for general application. (2) In case of inconsistency an assimilated rule shall prevail over any other rule, and a rule of equity shall prevail over any rule other than an assimilated rule. (3) While any of the statutes of general application continue to apply by virtue of the Courts Act 1960 (CA 9), they shall be treated as, i.e., they form part of the Common Law as defined in Subsection 1 prevailing over any rule thereof other than an assimilated rule.


family or the extended family. At common law, on the other hand, the property would only be vested in the two or three members of the family as joint tenants or tenants in common.\(^65\)

The promulgation of new choice of law rules in 1960 did not resolve these issues.\(^66\) The new rules, which failed to take into account the different tribal laws in Ghana, were inadequate to handle the conflict of laws problems within Ghana. For example, the 1960 legislation provides no proper rule for determining a dispute over a conflict in relation to intestate succession of an African who marries according to the Marriage Ordinance\(^67\) and dies intestate with customary law as his personal law. In this case, does it mean that because he married according to the principle of English law, the devolution of the intestate estate be determined according to English law? Conflicting answers given by African courts arguably have unlocked a Pandora’s box of uncertainties and perhaps magnified the problem.\(^68\)

The *locus classicus* in explaining the subject is *Cole v. Cole*.\(^69\) There, William Cole, a native of Lagos, left Lagos for Sierra Leone in 1863 where in the same year he married the defendant according to Christian rites, and had a son, Alfred Cole, who was alleged to be lunatic. He never lost his domicile of origin and later returned to Lagos in 1866. In 1897 William Cole died intestate in Lagos and was survived by his wife, his son, and a younger brother, A. B. Cole. The younger brother brought a legal action against those likely to inherit the intestate estate of William Cole, claiming that he should be declared, according to customary law, the heir of his brother, William Cole, and the trustee for Alfred Cole, the only son of the deceased. The learned trial judge held that with respect to section 19 of the Supreme Court Ordinance, the plaintiff was the customary heir of his brother since they were born of the same father, and that customary law should govern the intestate estate of William Cole. On appeal, however, Justice Griffith took quite a different position, when he stated:

Christian marriage imposes on the husband duties and obligations not recognized by native law. The wife throws in her lot with her husband, she enters his family; her property becomes his (these parties were married in 1863 and at any rate until 1876, were under the English law). In fact a Christian marriage clothes the parties to such marriage and their offspring with a status unknown to native law.\(^70\)

The court held that customary law could not apply and that English law of succession must apply to avoid a possible miscarriage of justice. The court noted:

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\(^67\) Means, *English Principles of Marriage* Cap 127 (1951 rev.). In other words, it follows all the principles of monogamous marriage in England.


\(^69\) [1898] 1 N.L.R. 15.

\(^70\) Id. at 22.

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Were such a contention to hold good, then an educated native Lagos gentleman—maybe a doctor, or a barrister, or a clergyman, or a bishop (for these are all such)—marrying an educated native lady out of the Colony and coming to reside permanently in Lagos would have his estate subject to native law in case he died intestate, his widow being required by a strict undiluted native law to act as wife to her brother-in-law to obtain support. 71

The court failed to make reference to the intentions, manner of life, or education of William Cole and his widow. In doing so, the court sidestepped the application of customary rules of intestate succession.

The court’s statement that Christian marriage is quite different from native marriage and that it creates a complete change of status not commonly known in customary law, logically supports the view that in this type of case, Christian marriage creates a legal bond between a man and his wife, which in itself automatically points to the application of English law governing intestate succession. The Cole decision merely consecrated the notion that whenever an individual during the course of his life married according to the rules of English law, 72 and died without having a will, English rules of succession must be applied and that the English Statute of Distribution 1670–1685 should be the best rule of law if the marriage took place within the Colony. A different result would occur if the marriage were celebrated outside the Colony of Lagos. In that event, the “English common law of succession involving declaration of an heir and the widow’s right to dower” would have to be preferred to customary rules of succession.

A critical review of the Cole facts, however, does not support the court’s analysis or holding. The Cole decision appears to have been based on the “inherent incident theory,” which provides that intestacy rights are an inherent part of a statutory marriage, and therefore, must be determined by the very law which gave legal effect to the marriage. 73 This analysis cannot stand the test of any critical analysis primarily because the question of status in customary law was not considered in the application of the English law. Under this analysis, English rules of succession would apply where an African or a Ghanaian married an English woman by customary Ghanaian law in England. By the same logic, such a rule would not command the opinion juris in the Commonwealth, for before an English judge would apply English rules of succession he would have to refer either to African customary law or Ghanaian rules of succession to determine the personal law of the husband, or resort to the application of jus gentium to resolve the case. 74 For these reasons, the status of a marriage in internal conflict of laws should not be the basis for determining succession rights. 75

71. Id.
72. See The Marriage Ordinance Cap 127 & 129; The Ghana Version (1951 Rev.).
The decision in *Cole* was not only followed, but extended in *Adegbola v. Folaaranmi*.\(^76\) There, the deceased, Johnson, a Nigerian of the Oyo tribe, had married in his youth according to customary law and had a daughter, the plaintiff, out of that union. Thereafter, Johnson was sold into slavery in Trinidad, British West Indies, where during about "forty years stay there," he married Mary in a Roman Catholic church. It was clear Johnson had become a member of the Catholic Church given the manner of life he led thereafter. Johnson later returned to his native country with Mary and was received in the Roman Catholic church in Lagos. When Johnson returned to Lagos, his first wife by customary law and his daughter, the plaintiff, were both alive and doing well. The daughter soon established an amicable relation with Johnson and visited him constantly in his new house. Johnson died intestate in 1900, and Mary, his second wife, continued to live in the house until she died in 1918, leaving a will in which she declared the first defendant as her executor. The plaintiff, the only daughter of Johnson, then sought recovery of the deceased's immovable property, claiming among other things that being the only child, she was, according to customary law, fully entitled to the ownership of the father's house. The divisional court rejected her claim and the Nigerian Supreme Court affirmed the decision:

1. the presumption on the facts of this case must be that Johnson and Mary had contracted in Trinidad a valid Christian marriage which the courts of Nigeria must recognize;
2. the Christian marriage, although subsequent to the local customary marriage of which the plaintiff was the issue, was valid despite the provision in the Marriage Ordinance of 1884 that "no person can in Nigeria contract a valid Christian marriage if he is married to any other person under native law and custom," since that ordinance was enacted after Johnson's Christian marriage to Mary in Trinidad in 1876 at least;
3. accordingly, the English common law, and not the local customary law, must govern the succession to Johnson's property in Lagos and, therefore, the first defendant was entitled to it under the will of Mary who was entitled under English law to inherit Johnson's property.\(^77\)

The *Adegbola* decision is flawed for several reasons. First, the court failed to determine the status of the plaintiff under customary law. Second, the court summarily applied English law as the only means of resolving the conflict of laws dispute without first investigating which law might apply to the plaintiff's interest in her father's estate. Finally, the court in *Adegbola* failed to take into consideration the nature and incidents of Christian marriage (statute marriage) and that of native marriage. In doing so, the court ignored the principles of private international law on the issue of marriage:

If there is one question better settled than any other in international law, it is that as regards marriage—putting aside the question of capacity—*locus regit actum*. If a
marriage is good by the law of the country where it is affected, it is good by the world
over, no matter whether the proceeding or ceremony which constituted marriage ac-
cording to the law of the place would or would not constitute marriage in the country
of the domicile of one or other of the spouses. If the so-called marriage is no marriage
in the place where it is celebrated, there is no marriage anywhere, although the cere-
mony or proceeding, if conducted in the place of the parties' domicile, would be
considered a good marriage. 78

The holding in Adegbola arguably went beyond the precedent set by Cole. Not
only did the court apply English law with regard to the order of succession to the
estate of the propositus, but also extended that law to cover such factors as the status
and personal law of the individual likely to fall within the confines of the prescriptive
order of the received English law. The court, in effect, declared customary law
marriage inferior to statutory marriage by blindly applying English law. 79

If the court had not applied English law based on Cole, to determine the order
of succession, but applied the personal law of the plaintiff to determine her status
as the only child of the propositus based on the view that the prior customary
marriage was valid, the plaintiff could have qualified as the heir to her father's
house. The court, however, misconstrued the issues and mechanically applied
English law and thus bastardized a child legitimate by African standards. 80 The
law of succession is part of the personal law and therefore to apply English law
as the basis for determining the status of the plaintiff is a misplaced attempt to
promote justice.

Over time, the Adegbola decision became the accepted precedent that a “na-
tive” who entered into a Christian or civil marriage was removed from the
operation of customary law and governed by the common law. The shortcomings
of the Cole decision, however, first became apparent in Asiata v. Goncallo. 81 In
Asiata the court held that the intestate estate of the deceased should be governed
by native law, which as a matter of principle and law, permitted all the children
of both marriages to have a share in the estate or inheritance of the propositus.
The court simply chose to follow the dictates of the mixture of jus gentium and
jus naturale, which logically is a better way of promoting justice than the holding
in Adegbola.

A Ghanaian court offered a definitive explanation of this specific subject
matter in Coleman v. Shang. 82 In this case, Coleman married Adeline Johnson by
customary law. They had three children before she died after a short illness.
Coleman later married again, but this time according to the Marriage Ordinance,
and had five children by his second wife who died in 1940. During the course of

80. TASLIM OLAWALE ELIAS, THE NATURE OF AFRICAN CUSTOMARY LAW (1956); A. EPSTEIN,
JURIDICAL TECHNIQUE AND THE JUDICIAL PROCESS 23 (1954); Natalie Olwak Akolawin, Personal Law
in the Sudan—Trends and Developments, 17 J. Afr. L. 149–95 (1973); A. N. Allott, Marriage and
the ordinance marriage, Coleman lived and cohabited with the appellant who gave birth to ten children. After the death of his second wife Coleman married for the third time in accordance with customary law. He later died intestate. The only surviving child of the ordinance marriage, the respondent, applied for letters of administration as the only child of Coleman legally qualified to inherit the father’s intestate estate. The third wife, the appellant, counterclaimed on the ground that according to Ga Law of Osu, the respondent was not the only child of the deceased legally qualified to succeed, and that, according to the customary law of Ghana, as a wife, she was also legally married. The lower court entered judgment on behalf of the respondent based on the principle laid down in Coleman, and on the authority contained in the Statute of Distribution 1676–1685. On appeal, the Ghana Court of Appeals analyzed the choice of law issue as follows:

(a) a person subject to customary law who married under the Marriage Ordinance does not cease to be a native subject to customary law by reason only of contracting that marriage; the customary law will be applied to him in matters, except those specifically excluded by the Statute and other matters which are necessary consequences of the marriage under the Marriage Ordinance, Cap 45 87(1);

(b) a person subject to customary law cannot contract a valid marriage under the ordinance while the customary law subsists, nor can he contract a valid marriage under customary law during the continuance of an ordinance marriage (Marriage Ordinance, section 44); consequently, he cannot, during a continuance of the marriage under the ordinance have a legitimate child except by his wife of the said marriage (Marriage Ordinance section 49);

(c) the words “leaving a widow or husband or any issue of such marriage” in section 48(1) of the Marriage Ordinance merely indicate the condition precedent upon which English law will be applied to the estate of an intestate who married under the ordinance; they do not limit the class of those entitled to share in his estate;

(d) in the application of the Statute of Distribution which governs the distribution of two-thirds of the estate under section 48 of the Marriage Ordinance, “wife and child” mean lawful wife and lawful child by the law of domicile, and not by the law of England;

(e) if a man who is married under customary law intends to marry again under the ordinance, he must either marry the same person to whom he is already validly married according to customary law, or if he intends to marry a person other than such a wife, then he must first determine the

83. Id.
customary marriage lawfully; any marriage under the ordinance still subsists, is null and void and any children of that relation are illegitimate;

(f) Accordingly, the three children of the deceased by his first wife were legitimate and entitled equally with the surviving child of the ordinance marriage; the ten children by the appellant during the second wife’s lifetime were illegitimate by the Marriage Ordinance; the marriage between the deceased and the appellant was valid and she was entitled to a share in her deceased husband’s estate in accordance with the Statute of Distribution; and

(g) letters of administration should be granted to the appellant (who was illiterate) and the respondent (the child of the ordinance marriage) jointly on behalf of those who were entitled. 85

On further appeal, the Privy Council, upheld the appellate court’s decision that joint letters of administration be granted to the appellant and the respondent. 86 The Privy Council further directed that, however, in the interest of the estate, the respondent be allowed to administer the father’s intestate estate and other financial dealings because the appellant was illiterate.

Conscious of the improvement made in Coleman, a further consideration of the merits of the case will offer a better understanding of the law relating to the status of the ten children. If the basis of the respondent’s claim is that he is the only legitimate child to succeed to his father’s estate because the mother was married according to English law (the Marriage Ordinance), then one cannot understand, with respect to the rules of patrilineal succession, on what principle, if any, his demand for letters of administration be exclusively granted. The fact that Emma Kwaley Shang, the appellant, was married according to native law does not preclude her from having a share in the deceased husband’s estate. The validity of a marriage between a man and his wife must be determined by the law of their common domicile, and this satisfies the requirement of the statute or the principles of law. Ga-Adangbe customary law of marriage must, therefore, be referred to as the conclusive authority in determining whether the deceased’s marriage with the plaintiff was valid and not the rules of the Marriage Ordinance (English law).

Similarly, the legitimacy of a child born in Ghana by Ga-Adangbe parents must be determined by the law of the country where the parents were domiciled at the date of the child’s birth. 87 This is self-evident, for the domicile of origin cannot be acquired and abandoned animo et facto by simply marrying according to the rules of the Marriage Ordinance. It is also a settled law that no man shall

85. Supra note 82.
87. Clive Schmitthoff, THE ENGLISH CONFLICT OF LAWS 72–73 (1954). The law as stated in this book has been supported by all leading English scholars such as Cheshire & North and Dicey & Morris.

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be without a domicile, that is why, in principle, the birthplace of a man automatically attributes to him the domicile of his father, normally referred to as the domicile of origin (for it is involuntary). The law regarding the legitimacy of the ten children in Coleman was made implicitly clear by Dr. J. B. Danquah:

The law, as it stands at present, recognizes as legitimate a child born to a man who had cared for an unmarried girl for whose baby he stands as putative father. Marriage is necessary to make a child legitimate, but it would seem that among the Akans a bastard child is not particularly one whose mother and father are unmarried, but one whose paternity is indeterminable. His father (or fathers) not being known. Hence, the name acquaman-ba (child of harlotry).

As a general principle of law accepted among Ghanaian tribes, a child may be legitimate even though the father never married the mother as required by law, depending on the accepted custom whether the putative father acknowledged paternity, named the child and took care of the pregnant woman until delivery. Chief Justice Osborne held, in the Nigerian case of In Re Sapara, that:

again in English law, marriage is necessary to legitimize offspring of two persons. Such offspring is illegitimate, having no right of inheritance; but under native law a child’s right of succession to his father’s property can be legalized by his mere acknowledgement of paternity without the necessity of any form of marriage between the parents. Consequently, the legal importance of the marriage ceremony is not nearly so great under native law as it is under the law of England.

In view of these authoritative holdings, there was no logical justification for declaring the ten children illegitimate because Coleman cohabitated with their mother, the appellant. Under customary law, the ten children should have been allowed also to have a share in their father’s intestate estate because the deceased Coleman, prior to his death, acknowledged their paternity and named them as required by the customary law of Osu (Ga-Adangbe community). Although in other respects the Coleman decision was fair, the court’s decision with regard to the ten children hardly reflected the true nature and practice of customary law in Ghanaian communities.

88. Id. at 74.
89. Id. at 73.
90. Id.
93. [1911] Ren. 605.
94. Id. at 606–07. Furthermore, in Cheang Thye Phin v. Tan Ah Loy, [1920] A.C. 369, it was also held by the Privy Council that under the Chinese law of marriage applicable to the Straits Settlement of Penang, a Chinaman may have secondary wives, called tsips, who have status as wives, such secondary wives are entitled upon the death intestate of their husband to share in his estate as widows. Coleman v. Shang, [1959] GHANA L. REV. 390, 407. Hence, their offsprings could also do so.
III. Theories of Governmental Interest Analysis and the Comparative Impairment Methodology

A. GOVERNMENTAL INTEREST ANALYSIS (BRAINERD CURRIE)

The governmental interest analysis was developed primarily by Professor Brainerd Currie,95 to debunk the rigid and mechanical rules of the First Restatement of Conflict of Laws (the traditional approach). Professor Currie’s attack on the traditional system was demonstrated in the case of *Milliken v. Pratt*.96 In *Milliken*, the court weighed the policies behind the laws of two states, Massachusetts and Maine. The Maine law allowed women to contract while the Massachusetts law did not allow women to contract as a surety.97 The court determined that the Massachusetts law was enacted to protect the rights of married women while the Maine law was enacted to promote and protect the security of business transactions.98 Under Currie’s analysis, such a situation represented a true conflict between the two states’ policies. In order to resolve the conflict, Currie then devised a method of detecting false conflicts by formulating a quasi mathematic table99 whereby the court kept the two states’ interest at par without advancing the interest of one over the other. Through this method, Currie was able to demonstrate accurately, with the aid of interest analysis, that each state had an interest in the application of its laws.100 Professor Currie added a new impetus to the study of the conflict of laws by introducing new ideas into the study of the subject, such as “false conflict” and the “unprovided for case.”

The central theme in Currie’s methodology is that the resolution of a conflict problem must be seen primarily in terms of the furtherance of a state’s legitimate interest as reflected in its law.101 If a conflict problem presents a situation in which only one state has an interest, then the case presents a false conflict102 and the law of the state having that interest must be applied. If, after a careful analysis, two states have an interest in the application of their respective laws, a true conflict exists and the law of the forum must be applied. If neither state has a legitimate interest, then, an unprovided-for case103 or a “zero interest”104 case is presented and the problem is solved by applying forum law.

95. See Currie, supra note 37.
96. 125 Mass. 374 (1878).
97. Id.
98. Id.
100. Id. at 77–107.
101. Id. at 201–14; Alaska Packers Ass’n v. Industrial Accident Comm’n of Cal., 294 U.S. 532 (1935); but see Paul Freund, Chief Justice Store and the Conflict of Laws, 59 Harv. L. Rev. 1210 (1946).
102. See Currie, supra note 37, at 129–72, 180.
103. Id. at 152–53.
Currie further provided that if a real conflict exists, the forum court must thoroughly explore the possibility of whether a “moderate and restrained interpretation” of the state’s competing interest could help avoid the conflict.\textsuperscript{106} Currie’s approach thus relies heavily on the \textit{lex fori}.\textsuperscript{107} Currie argued forcefully, however, against the weighing of interests:

\begin{quote}
[Assessment of the respective values of the competing legitimate interests of two sovereign states, in order to determine which is to prevail, is a political function of a very high order. This is a function that should not be committed to courts in a democracy. It is a function that the courts cannot perform effectively for they lack the necessary resources.]\textsuperscript{108}
\end{quote}

Perhaps the greatest contribution of Professor Currie to the field area of conflict of laws was his invention of the concept of false conflict. Generally his theories would be more suitable in a federal or plurilegal state, such as Ghana, than on the international plane.

\section*{B. COMPARATIVE IMPAIRMENT METHODOLOGY (WILLIAM BAXTER)}

The comparative impairment theory, which has its roots in the pioneering work done by Professor Currie,\textsuperscript{109} was first proposed by William Baxter, a former professor of law at Stanford University.\textsuperscript{110} Proponents of the theory, while accepting Currie’s methods of dealing with conflict of laws problems, adopted a variant of those methods.\textsuperscript{111}

Comparative impairment analysis is illustrated by several California cases in which there was an attempt to weigh the interest of states to determine the prevailing policy. In the words of one commentator, “the key element in the inquiry as to whether one state has greater interest than does another state in having its policy prevail, is the comparative impairment approach described by Professor Baxter: Which state’s interest would be more impaired if its policy were subordinated?”\textsuperscript{112} According to Professor Baxter, the resolution of intractable conflicts must be accepted as “essentially a process of allocating respective spheres of lawmaking influence.”\textsuperscript{113}

The comparative impairment methodology thus calls for the resolution of conflict of laws problems by reliance on the determination or ascertainment of

\begin{thebibliography}{99}
\bibitem{105} Brainerd Currie, \textit{The Disinterested Third State}, 28 LAW \& CONTEMP. PROBS. 734, 754 (1963).
\bibitem{107} Currie, \textit{supra} note 37.
\bibitem{108} Id. at 102, 357; Currie, \textit{supra} note 105, at 778; Currie, \textit{supra} note 40, at 129–72, 180, 182.\textsuperscript{109}
\bibitem{110} Currie, \textit{supra} note 37.
\end{thebibliography}
the relative commitment, if any, of the respective states. The approach incorporates and draws on several factors relating to the relationship of the states, such as the history and current status of the respective internal laws of each state.\footnote{114. See Offshore Rental Co. v. Continental Oil Co., 583 P.2d 721 (1978).} The theory technically seeks to avoid the overreliance on the application of forum law in true conflict cases, and also advocates, among other things, a means of distinguishing between true and false conflicts.\footnote{115. Baxter, supra note 38, at 9.}

In sum, Professor Baxter proposes the resolution of conflict problems under the comparative theory, thus:

When "external objectives" conflict (i.e., true conflict exists), the resolution lies in subordinating, in the particular case, the external objective of the States whose internal objective will be least impaired in general scope and impact by subordination in cases like the one at hand.\footnote{116. Id. at 17–18.}

This theory thus advocates the weighing of interest, which arguably would minimize forum shopping.

IV. Governmental Interest and Comparative Impairment Analysis as Means of Resolving the Problem

Coleman v. Shang was decided in 1959 by the Ghana Court of Appeal and Professor Currie wrote his essays about the same period.\footnote{117. Coleman v. Shang was decided in 1959 by the Ghana Court of Appeal and Professor Currie wrote his essays about the same period. See Brainerd Currie, Notes on Methods and Objectives in the Conflict of Laws, 1959 DUKE L.J. 172, 178.} Had the Ghanaian court implemented Currie’s interest analysis in Coleman, the court arguably would have applied customary law and not English law, thereby allowing all fourteen children of Coleman to qualify for a share in their father’s estate. The use of interest analysis and comparative impairment techniques would have allowed such a result.

As previously indicated, Ghana does not have a unified legal system. The received English law has been modified and applies throughout the country as a general residual law along with many other different systems of tribal law.\footnote{118. See Bennion, supra note 5, at 391–407.} Most of these laws have a well-defined tribal origin linked with a particular geographical area. Similarly, Islamic law operates as a distinct secular law and readily provides an alternative customary law for certain persons who cannot be easily linked to any tribal law in Ghana. While Islamic and customary laws coalesce in certain legal matters, they differ markedly in other areas, and it is possible that while one may apply in certain cases, the other may not. They are, therefore, applied in Ghana as occasional variants to resolve internal conflicts of law.\footnote{119. See Asiata v. Goncallo, [1900] 1 N.L.R. 41; Adesubokan v. Yunusa [1971] S.C. 25, 70. Ghana is a non-Moslem country, but as a result of the spread of Islam, many tribal members have been converted into it or born into the Islamic religion because their parents previously were members.} There is thus a variety of interactions between English law, the various

\[\text{SUMMER 1992}\]
tribal laws, and Islamic law, giving birth to difficult choice of law problems. In light of these inherent problems, factors such as ethnic origin, religion, the nature of the claim, and choice of remedy \textsuperscript{120} cannot be overlooked, for these factors further compound the problem of determining which law to apply when English law conflicts with Islamic law or tribal law.

A. THE 1960 COURTS ACT

Although express provision has now been enacted to define the relationship between intercultural conflicts and external conflicts, \textsuperscript{121} it is not clear how these

\textsuperscript{120} Allott, supra note 4, at 183–254.

\textsuperscript{121} The Courts Act, 1960 (C.A. 9). Part III—Common Law and Customary Law. 66. Application of common law and customary law.—(1) Subject to the provisions of any enactment other than this subsection, in deciding whether an issue arising in civil proceedings is to be determined according to the common law or customary law and, if the issue is to be determined according to customary law, in deciding which system of law is applicable, the court shall be guided by the following rules, in which references to the personal law of a person are references to the system of customary law to which he is subject or, if he is not shown to be subject to customary law, are references to the common law:—

\textbf{Rule 1.} Where two persons have the same personal law one of them cannot, by dealing in a manner regulated by some other law with property in which the other has a present or expectant interest, alter or affect that interest to an extent which would not in the circumstances be open to him under his personal law.

\textbf{Rule 2.} Subject to Rule 1, where an issue arises out of a transaction the parties to which have agreed, or may from the form or nature of the transaction be taken to have agreed, that such an issue should be determined according to the common law or any system of customary law effect should be given to the agreement.

In this rule "transaction" includes a marriage and an agreement or arrangement to marry.

\textbf{Rule 3.} Subject to Rule 1, where an issue arises out of any unilateral disposition and it appears from the form or nature of the disposition or otherwise that the person effecting the disposition intended that such an issue should be determined according to the common law or any system of customary law effect should be given to the intention.

\textbf{Rule 4.} Subject to the foregoing rules, where an issue relates to entitlement to land on the death of the owner or otherwise relates to title of land—

(a) if all the parties to the proceedings who claim to be entitled to the land or a right relating thereto trace their claims from one person who is subject to customary law, or from one family or other group of persons all subject to the same customary law, the issue should be determined according to that law;

(b) if the said parties trace their claims from different persons, or families or other groups of persons, who are all subject to the same customary law, the issue should be determined according to that law;

(c) in any other case, the issue should be determined according to the law of the place in which the land is situated.

\textbf{Rule 5.} Subject to Rules 1 to 3, where an issue relates to the devolution of the property (other than land) of a person on his death it should be determined according to his personal law.

\textbf{Rule 6.} Subject to the foregoing rules, an issue should be determined according to the common law unless the plaintiff is subject to any system of customary law and claims to have the issue determined according to that system, when it should be so determined.

(2) Where under this section customary law is applicable in any proceedings but a relevant rule of customary law has been assimilated by the common law under any enactment such as is mentioned in section 18(1) of the Interpretation Act, 1960, that rule shall nevertheless apply in those proceedings, but in the form in which it has been assimilated.
rules can be used as a means of resolving intertribal conflicts within the same territorial jurisdiction. The rules created in the Courts Act do not relieve the problems of defining the concepts of status in succession. For example, what method is to be used to determine whether a child born by a patrilineal Hausa father and a matrilineal Akan mother is legitimate, especially in cases of intestate succession where English law conflicts with customary law? Presumably, rule 1 and rule 3 cannot be applicable in cases of this nature and these may apply also to the status of gift inter vivos. Rules 4 and 5 provide minor assistance to the courts with respect to issues relating to property concerning title to land. Rule 2 might be applicable, but it is too broad and not well-defined. These rules give the judge a wide latitude of freedom in theory to modify the customary law on the ground of repugnancy. This poses a dilemma, for it creates room for scholars to ask whether customary law is law in the strict sense.

Finally, rule 6, which provides that a court is to apply common law unless the plaintiff is subject to any customary law, gives undue advantage to the plaintiff in almost every case of conflict. This makes it almost impossible for the defendant in cases of contract or tort to have his case applied modus et conventio vincunt legem to reach customary law. The courts are left to work out their own standards and techniques in furtherance of justice. Within the framework of Ghana's choice of law rules, a new method should be developed to resolve these problems. In light of the difficulties being faced by Ghanaian courts today, it is proposed that the concept of interest analysis and comparative impairment theory be introduced into the system.

Professor Currie's governmental interest approach should be used to solve these problems. In Ghamson v. Wobill, Essie Osuomba, who was subject to Fanti law, had title to a house situated in Winneba, where Efutu law applied. Essie Osuomba died after a protracted illness. According to Efutu customary law, her house would pass on to her daughter, Essie Kuma. Under Fanti customary law, however, it would pass to Kwasi Kra, the head of the extended family. After the death of Essie Kuma, and on the assumption that the land had passed to their mother, Essie Kuma's children sold the house to Wobill, who hailed from Winneba. Wobill then sued for the possession of the house, and Kwasi Kra, the head of the family of Essie Osuomba, counterclaimed to nullify the sale of the house. The question before the court was whether succession to the grandmother's property should be regulated by Efutu law.

(3) Notwithstanding anything contained in the foregoing provisions of this section, but subject to the provisions of any other enactment—
(a) the rules of the common law relating to private international law shall apply in any proceedings in which an issue concerning the application of law prevailing in any country outside Ghana is raised;
(b) the rules of estoppel and such other of the rules generally known as the common law and the rules generally known as the doctrines of equity as have heretofore been treated as applicable in all proceedings in Ghana shall continue to be so treated.

The trial judge attempted to apply a general private international law rule by giving effect to the application of Efutu law as the *lex situs*. The West African Court of Appeals, however, disagreed with this decision and applied section 15 of the native Courts (Colony) Ordinance (Cap 98), concluding that the law binding between the two litigants was Fanti customary law. The appellate court held:

We are of the opinion that, although Fanti law would not ordinarily be binding between Wobill, and Efutu, and Kwasi Kra, a Fanti, it is in this case because Wobill's claim depends on the issue as to the succession, and he claims through the Danquahs who are in this respect subject to Fanti customary law.123 Ultimately the court simply applied the law binding between the parties,124 which was, of course, Fanti law. The appeal accordingly succeeded and the judgment of the trial court was set aside.

A conflict between two tribal laws is not clear-cut, and the application of the old mechanical rules of private international law to solve these problems could lead to inequitable results.125 Traditional rules relating to legal matters such as civil procedure, substantive law, evidence, renvoi, the *lex domicilii* with respect to the *lex fori*, have little relevance in this sphere of conflict. These rules are only helpful in certain unique cases where statute has not defined the respective areas of native law, Islamic law, and English law. The 1960 Courts Act, while providing a limited scope of operation for customary law, is not sufficiently broad to cover all aspects of the difficult conflicts remaining in intercultural conflict of laws.126

B. *Ghamson* Analyzed According to Currie Analysis

An analysis of *Ghamson* according to Currie’s theory would relieve some of the difficult questions raised by the case. Through Currie’s analysis, one can determine whether the case involved a false conflict or not.127 A true conflict arises not only when the relevant laws differ markedly, but also when the underlying policies supporting those laws call for the application of the forum law. The goal of the false conflicts methodology is to analyze the basic underlying policies of both the forum law and the law of the other jurisdiction (the *locus*) in order to determine whether, in reality, the competing laws exhibit self-limitation. In view of the facts of *Ghamson*, one can argue that there is no competing interest because succession under both laws would have produced about the same results. Efutu people are considered Fantis. The only difference is that they speak slightly different languages.

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123. *Id.* at 181–82.
In trying to analyze the *Ghamson* decision, it is proper to construct a table to determine false and real conflicts. Assume that P represents Efutu law and Q represents Fanti law based on a well-defined logical proposition that \( [(P ∋ Q) ∋ P] ∋ ~Q \). With this background it is possible to draw a true(T)/false(F) conflict table\(^{128}\) as follows.

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To offer consistency, it is postulated that if P then Q and not P, so not Q, which supports the view that implication is the relation that justifies inference. Hence column 5 may be determined by defining the implication whereby 4 is the antecedent and 2 denotes the consequent. Logically, then, ~ Efutu law ∋ ~ Fanti law, technically produces a counter implication, which means that there is no conflict between P, which represents Efutu law and Q, which denotes Fanti law. Column 5 then produces only Fs, indicating a false conflict situation. According to logical theory, this method is based on a two-valued logic system in which it is submitted that every proposition has only two possible values, true or false. One can therefore increase the permutations depending on the complexity of the case.

The American pattern of legal writing is most centered on detecting the false conflict either theoretically or by quasi-mathematic means. Once a false conflict is discovered, the problem ultimately becomes easier. Professor Currie suggests that if upon an examination of the governmental interest it is clear that there is no conflict, then only one state (tribe) will have an interest in having its law applied, and the application of this law must be done such that it is not inconsistent with the interest of the other state (tribe).\(^{129}\)

C. Determination of True Conflicts in Ghana

To construct a true conflict table, a hypothetical case may be considered. Thus, A, whose mother was from the tribe Manprusi in the Northern territory, was pledged into a contract of service under African law among the Akin Abuakwa

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family for payment of a debt. The Manpruis practice patrilineal system of inheritance while the Akin Abuakwa family was subject to matrilineal rules of succession. A's mother died intestate, leaving behind certain self-acquired property. But since the mother had lived among the Akin Abuakwas, determining her personal law was difficult. If Akan rules of succession were applied, A could not succeed to her mother's property as of right, and the intestate property would become family property.130 On the other hand, if Manprusi law were applied, A, being the only daughter, would succeed as of right.131

The rules of real private international law, based on the concept of the lex domicilii should not be applied in this hypothetical because this case does not involve territorially separated legal systems. Rather, a conflict arising between different tribal laws coexisting with each other in the same country, such as between Akan law and Manprusi law, could be resolved through Professor Currie's governmental interest analysis. In applying Currie's governmental interest analysis, a determination must first be made whether a true or a false conflict exists. An assumption can be offered based on, if P then Q and P so Q. Here, one is simply drawing conclusions from premises based on the view that implication is the relation which logically justifies inference.

\[ P \supset Q \text{ (if } P \text{ then } Q \text{) is an implication, therefore, in this instance } P \text{ is called the antecedent and } Q \text{ the consequent, hence } P \text{ is the sufficient condition and } Q \text{ the necessary condition. Thus } P \text{ then } Q \text{ and } P \text{ so } Q \text{ represents } [(P \supset Q) \& P] \supset Q. \]

It is possible now to determine whether there is a true conflict or not by saying that P should represent Akan law and Q should represent Manprusi law.

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By inferential logic it can be seen clearly that columns 1 and 2 give all the possible combinations of "truth values" of P and Q. Column 3 on the other hand is determined by implications where column 1 is presumed to represent the proposed antecedent and 2 the consequent. Again, column 4 is determined by having regard to the definition of the conjunction where 3 and 1 are the con-
juncts, which means that the statement of conjunction is true only when both the conjuncts are true. Finally, by drawing on all these analyses, column 5 will be determined by a logical implication, whereby 4 is the antecedent and 2 the consequent.\textsuperscript{133} The inference as to whether this case is a false conflict or real conflict is valid if and only if the final column on the table, column 5, consists entirely of Ts (true).

D. \textsc{Use of Baxter's Comparable Impairment in a True Conflict Case}

With a true conflict analysis, it would be beneficial to merge Professor Currie's interest analysis and Professor Baxter's comparative impairment idea into one, thereby substituting concerned individual tribal interest for "interested state" under the government interest approach to resolve the true conflict. Under this theory, the forum would apply the tribal law whose underlying interest would be most impaired. In the above hypothetical, Manprusi tribal law would be most impaired if not applied because, under Akan law and custom, children of an intestate do not inherit as of right. In order to avoid disinheriting A, according to Professor Baxter, then Manprusi tribal law must be taken as controlling. Baxter further assumed that the states (tribes) involved or concerned must agree upon the interest that would be least impaired.

In the United States, California courts have been influenced by Professor Baxter's theory and have followed it in adopting a modest standard and technique that involves the weighing of relevant and significant interests of concerned states. A striking example is afforded by the case of Bernhard v. Harrah's Club.\textsuperscript{134} There, Bernhard, the plaintiff, brought an action in California court against the defendant, Harrah's Club of Nevada, for selling liquor to an already intoxicated California resident who drove into California and injured Bernhard while he was operating his motorcycle. The state of California supports the imposition of civil liability on tavernkeepers for injuries caused by their patrons,\textsuperscript{135} while the state of Nevada does not support such a law.\textsuperscript{136} The Supreme Court of California held that the Nevada tavernkeeper was liable vicariously under California law, and relying on the comparative impairment theory, found that California's interest in protecting its residents would be seriously impaired if the court did not apply its law. In light of the decision in Bernhard, if Nevada had been the forum, its courts would have approved the application of California law. Yet, California went ahead and applied the comparative impairment methodology.

\textsuperscript{133} See A. Luce, \textsc{Logic} 149–54 (1961); H. Harve, \textsc{An Introduction to the Logic of Sciences} (1960).
\textsuperscript{134} 546 P.2d 719 (1976).
Thus far, an attempt was made to show by example how the comparative impairment methodology can be applied. In this instance it is plausible to structure the issues of *Bernhard v. Harrah's Club* into a bivariate model to see whether there is any possibility of arriving at the same result.

For the purpose of analysis, a general assumption can be made in linear terms that \( Y = F(X) \) where \( F(\mathbf{X}) \) represents a functional relationship. By reasonable estimation, in order to project the significant impairment of California's interest, \( F(X) \) must be made operational by specifying the relationship between the variables. The linear model may thus be reformulated as follows:

1. \( Y = B_1 + B_2 (\text{Nevada law, no liability}) \times X \)
2. \( Y = B_1 + B_2 (\text{California law, liability}) \times X \)

Both equations will logically show the impact of each law on \( Y \). \( Y \) then would be used as the basis for determining the comparative ratio of the impact of Nevada law and California law, respectively. A combined impact of \( B_1 \) (Nevada law) and \( X \) will significantly be greater than the combined impact of \( B_2 \) (California law) and \( X \) respectively on \( Y \). Logically, therefore, it can be concluded that the law of the forum, which is California, if not applied, will be most impaired for the issues of the case revealed that the forum law supports the imposition of civil liability on irresponsible tavernkeepers while Nevada law does not.

E. The Inadequacy of Private International Law

Ghanaian courts may be tempted to apply the rules of English private international law by analogy to resolve a conflict of law problem. In such circumstances, the issues would be characterized as a method of determining the connecting factor. If English principles are applied in the Manprusi hypothetical, the domicile of A's mother will be used as the guidepost in the determination of the applicable law. It is therefore likely that Akan rules of succession would be applied. This method, however, would be subject to question, for domicile of choice can only be acquired *animo et facto* by voluntarily fixing one's residence in a particular place with the aim of residing there forever. But in this case, A's residence was not freely chosen but was dictated by an external necessity of a limited duration after which she could return to her tribal homeland. Arguably the decision of the court to apply Akan law would not be free from doubt because A's mother had not lost her domicile of origin. "A domicile of origin cannot be lost by mere abandonment. It can only be lost by the acquisition of a domicile of choice,"137 by the combination of residence and a positive intention of an indefinite abode.138 It is not immediately clear whether the grandparents of A were members of the Manprusi tribe because they had previously lived among other

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tribes, but their daughter, the mother of A, was pledged into service while they were residing among the Manprusis. This makes it quite difficult to apply Manprusi tribal law for it is not clear the parents of the propositus had a domicile of origin before they moved to live among the peoples of Manprusi.

In view of these problems, it is important to bear in mind that what may appear to be a good conflict doctrine in private international law with respect to succession laws may prove inadequate in resolving conflicts involving two tribal litigants within one national system. The concept of domicile, for example, could adequately be applied on the international plane but not in intercultural conflict of laws. Conflicts between natives of different tribes are totally removed from the sphere of conflicts between "territorially separated legal systems," and conflicts between a patrilineal Manprusi woman and matrilineal Akan head of family are not international, and hence, would be considered to fall within the sphere of internal conflict of laws.\(^{139}\) Bartholomew once observed that:

Indeed some of the concepts of Private International Law become meaningless if applied in the field of Private Interpersonal Law. For example the concept of the \textit{lex fori} entirely loses its significance if there are two or more personal laws applied by the tribunals of the forum. The same applies to the \textit{lex loci contractus}. Even the concept of the \textit{lex domicilii} requires supplementing, since the mere establishment of domicile gives no indication as to the law to be applied in matters of personal status.\(^{140}\)

Matson, former judicial adviser of the then Gold Coast, now Ghana, supported Bartholomew's thesis:

Clearly the English rules of private international law, such as that referring matters of procedure and evidence to the \textit{lex fori}, have little relevance to conflicts in this sphere, though they would form a useful guide in cases of interlocal conflict considered herein, if the courts cared to use them.\(^{141}\)

Arguably, intercultural conflict of laws and external conflict of laws can be considered as one generic legal discipline. It is expedient, however, to develop different methods of tackling these problems respectively. Intercultural conflict of laws is an antithesis to private international law.\(^{142}\) But it must not be forgotten that one can learn from the experience of private international law in generating adequate methods and techniques in dealing with problems of internal conflict situations.\(^{143}\) The English principles that were employed in the hypothetical could not produce equitable results. The concept of domicile is insignificant in cases where the judge would have to choose between two conflicting tribal laws within one national system in which the individual tribal custom operates as a


\(^{141}\) J. N. Matson, \textit{Internal Conflicts of Law in the Gold Coast}, 16 Mod. L. Rev. 409, 473 (1953).

\(^{142}\) See Allott, supra note 4, at 113.

\(^{143}\) See id. at 117.
personal law that accompanies a person beyond the limits of his own tribe. In Ghana, the question is not one of conflicts between two sovereign states and their territorially separated legal systems.

In Ghana, factors such as ethnic origin, religion, the nature of the claim and the question of the choice of remedy militate against the application of such private international law concepts as renvoi, lex loci contractus, lex domicilii, lex situs, lex loci celebrationis, and lex loci stabuli because these tribal laws coexist with each other and are applied by the judiciary of the same forum. The application of the rules of English private international law in the hypothetical, therefore, would produce undesirable results and no doubt a number of difficulties. In light of these difficulties, the application of English doctrines should be relegated to the background so that a combination of the concepts of governmental interest analysis and comparative impairment can be introduced into Ghana's choice of law rules.

V. Currie and Baxter: A Solution to Ghana's Conflicts Problem

A merger of Professor Currie's interest analysis and Professor Baxter's comparative impairment theory would aid in resolving the internal conflict of laws dilemma present in Ghana. For example, in *Nelson v. Nelson* the plaintiff's father, by a deathbed disposition known as *samansiw*, left specific self-acquired property to his eldest son, the first defendant, for the care of himself and his other brothers and sisters. The government later acquired a portion of the property left behind by the *propositus* and the eldest son was accordingly compensated as required by law. The eldest son used part of the compensation money to purchase the land in dispute, the conveyance having been duly taken in his own name and in English form. He then sold the land to a third defendant who leased it to the second defendant. The remaining children sued the second and third defendants for a declaration of title to the land and recovery of their deceased father's property.

The basic issue in *Nelson* involved which law to apply to determine the rights of the parties involved in this dispute, that is, whether to apply English law or customary law. It was held that the plaintiffs/appellants were wrong and guilty of laches and acquiescence for having allowed their elder brother to take a conveyance in English form. The court noted English law should be applied, based on the strength of the fact that the other litigating parties were not exclusively natives. The Supreme Court of the Gold Coast noted in agreeing with the West African Court of Appeals that customary law must apply to avoid a miscarriage.

144. See id. at 115-23.
146. [1951] 13 W.A.C.A. 248 (Gold Coast).
of justice. The court further stated that the original deathbed disposition by the plaintiff/appellant's father manifested an intention that all his children should have a joint and exclusive right or interest in his property and that the application of English law to the dispute would completely defeat the objects of the testator and this ex hypothesi notwithstanding the fact that the second and third defendants were not Ghanaians.

A careful application of Professor Currie's interest analysis and Professor Baxter's comparative impairment doctrine would have produced an equitable result. Under such an approach, first the judge would have analyzed the competing interests of all the parties in the dispute. The judge then would be able to determine which law, if not applied, would be most impaired, and then apply that law to resolve the problem. Arguably, if English law were applied by the West African Court of Appeal it would defeat the objects of the propositus and would certainly lead to a substantial miscarriage of justice, thus destroying the joint and exclusive interest held by the children in the land. A good comparative impairment ratio would always be helpful and may to some extent give a judge the freedom to put his value judgment to work.

A merger of the methods suggested by Currie and Baxter can be reformulated using the following guidelines:

1. When a judge is faced with the resolution of intercultural conflict of laws cases without any foreign element, the first step to take is to characterize the issues. This must be followed by the exploration of the concept of lex sanguinis to determine the respective tribal laws of the litigating parties; and also, the consideration of justertii should not be forgotten.

2. The next step is to substitute concerned individual tribal interest for "interested state" under the governmental interest analysis as a prelude to determining the relevant and significant interests of the concerned litigating parties.

3. If the significant and relevant interests are determined by the judge, then the bench must carefully analyze the case to determine whether it is a false conflict or not. If there is a false conflict, the judge must apply the law of the party having the only interest.

4. If the court determines that there is a real conflict or true conflict where both the plaintiff's interest and the defendant's interest point to different

147. Id.
148. Id. In Nelson the situs rule in private international law does not appear to be helpful because the determination of which law to apply depends wholly on the status of the litigating parties and the issues at stake, not on jurisdiction selecting rules. In effect, the interest of all the parties must be carefully considered to obviate a miscarriage of justice. The application of English law was therefore mistaken.

150. Baxter, supra note 113 at 1. It involves a process whereby the forum would have to apply the law of the state whose laws would be most impaired relying heavily on comparative logical ratio (interest). See also Horowitz, supra note 112 at 719.
directions, then the court must merge Professor Currie's version of the governmental interest analysis (individual tribal interest) with Professor Baxter's principles of comparative impairment to resolve the conflict as well as to avoid overreliance on forum law. This means that the Ghanaian court would have to apply the tribal law whose underlying interest would most significantly be impaired if its laws were denied; that is, the plaintiff and defendant will agree as to which tribal law is least impaired.

(5) Where the cause of action in a given case is known, both in English common law and customary law, and there is reason to believe that the application of one law would bring about or produce a different result from the logical application of the other, the desirable rule to apply is the comparative impairment doctrine to promote conflict justice.

(6) If the court determines that there is an unprovided-for case, it must resort to the application of the mixture of *jus gentium* and *jus naturale* as a means of promoting substantial justice. Here, precedent and reasonable judicial authority will be most helpful.

(7) In a case of double conflict, with a foreign element, where customary laws or some other personal laws are recognized in parallel with civil law, or Roman-Dutch law in a foreign state, the rules of private international law must be explored to determine the foreign domestic choice of law rules and which private law in the foreign state is at issue. Having completed this process, the *lex sanguinis et fori* then must be applied to determine the domestic law to which the other litigant owes allegiance. Subject to this process, the court shall be guided by the Baxter-Currie formula and the following factors to resolve the problem: (a) ethnic origin; (b) nature and where the property in question is located; (c) nature of transaction; (d) nature of claim and its effect; and (e) the life styles of the parties.

The interplay of guidelines 1, 2, 4, and 5 would give a judge the opportunity to analyze a case concerning two tribal interests, and hence, allow the judge to determine which tribal interest would be most impaired if its interest was overlooked and subordinated. The state of California has followed this practicable method of resolving interstate conflicts, where justice has been allowed to prevail through carefully weighing "state interests." These concepts may be useful in light of Ghana's plurilegal character.

In *People v. One 1953 Ford Victoria* Justice Traynor gave a good background as to how to apply the comparative impairment methodology. The basis of his opinion in the case appeared to be a variant of Professor Currie's method, because in the case of a true conflict Currie was of the opinion that the law of the

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151. 311 P.2d 480 (1957). See also Offshore Rental Co. v. Continental Oil Co., 583 P.2d 72 (1978) (the Supreme Court of California, following the reasoning behind comparative impairment theory, applied the law of Louisiana because it was reasonably persuaded that Louisiana's interest would be the more gravely impaired if its law was subordinated).
In view of Ghana's plurilegal character, it is suggested that Ghanaian courts would be better off by merging the two theories together in cases of true conflicts. A Baxter-Currie choice of law approach would also provide a useful technique through which false conflicts can be identified and possibly avoided. Take, for example, a case in which a plaintiff is of X tribe and defendant is of Y tribe and both live where Z custom prevails. What law must be applied in case of conflict? Z tribal law or Y tribal law or X tribal law? Should Ghanaian courts apply English rules of private international law, or resort to precedent, or apply the domestic choice of law rules contained in the Marriage Ordinance (section 87(1)) or the Courts Act of 1960 (sections 2 and 3)? Although these conflict rules are all well evolved, they would fall far short of providing the right answers to the hypothetical, for intertribal conflicts of law are not associated with foreign elements and therefore cannot be solved based on the analogy of private international law. At best, these rules could only offer the judge a starting point after which the whole problem becomes confused. The traditional Ghanaian legal system is not a unified one for it has been influenced by English law, Islamic law, and other related tribal laws. As a result of these factors, the lex fori, the lex domicilii, and renvoi entirely lose their usefulness with respect to determining the applicable law.

152. People v. One 1953 Ford Victoria, 311 P.2d at 482–83. The above passage may be compared with what Professor Currie said:

Assessment of the respective values of the competing legitimate interests of two sovereign states, in order to determine which is to prevail, is a political function of a very high order. This is a function which should not be committed to courts in a democracy. It is a function which the courts cannot perform effectively, for they lack the necessary resources.


153. See Allott, supra note 4, at 115–17.

154. See Bartholomew, supra note 140, at 327.
By using Currie's technique of identifying false conflicts the hypothetical can be resolved by first explaining concisely if a false conflict exists. 155 If such is the case, the court simply applies the law of the tribe with the only interest in the case. On the other hand, if a true or real conflict exists, the court would first analyze it by using Currie's governmental interest analysis 156 and then apply Baxter's comparative impairment concept 157 to resolve the problem. Such an approach is particularly well suited for dealing with a plurilegal state where the choice of law is between two local laws and not one between forum law and foreign laws. 158 Attention, therefore, must be drawn to the increased parallel possibilities created by the colonial government and the differences that exist between the various local tribal laws.

By a reasonable accommodation of the conflicting tribal laws of X and Y, the court would be able to single out the relevant and significant interests of the plaintiff and the defendant. This identification of interests would then be followed by a comparative impairment analysis, in which the court would apply the law of the tribe whose underlying interest would by all reasonable means be most impaired if its laws were not applied. If the interest of X would be most impaired, then X tribal law must apply. Conversely, if Y's interest would be significantly impaired, then its law must not be subordinated.

The effectiveness of such an approach can be seen by a reconsideration of the holding in Adegbola v. Folaranmi. In Adegbola, the court applied the "inherent incident theory," which tied the rules of intestate succession to the marriage under the Marriage Ordinance (Cap 127). The apparent rationale for the court's application of the "inherent incident theory" was its misconception based on the Cole decision, that marriage and succession are interrelated and that the law that governs statute marriage must also govern intestate succession regardless of the nationality or tribal ties of the litigating parties. The decision is inadequate because intestacy rights are not an inherent part of ordinance marriage. This theory would always arbitrarily disinherit individuals born out of customary law marriages. Therefore, if English law gives effect to inherent rights of persons born out of Christian marriages, the same legal effect must be extended to persons born out of native law marriages, taking into consideration local cus-

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Would it be fair to say that because Johnson, an African, married according to the provision of the Marriage Ordinance, his juridical relations are precluded from being affected by customary law, and therefore, his intestate property is to be distributed according to English law to displace his only daughter born out of native marriage? Such a result offends common sense and violates not only the principles of justice, equity and good conscience contained in the residual clause of the Courts Act, but also, to some extent, downplays the import of the Courts Act, Cap 4(74).

Certainly, Adegbola was wrongly decided and the marriage under the ordinance to M should not have been used to bastardize the plaintiff because customary law recognizes her as the legitimate daughter of the deceased. She was by customary law then qualified to succeed to the intestate estate of her late father.

If governmental interest analysis is merged with the comparative impairment theory, a better result would have arisen out of Adegbola. To achieve an equitable result, guidelines 1, 2, and 4 must be applied; thus, the court may simply determine by the method of reasonable accommodation the relevant and significant interests of the plaintiff and the defendant in the case by first looking out for false and true conflicts. English law conflicts with customary law in the case to such a degree that the only reasonable method open to the court is to apply the comparative impairment theory to determine which underlying law would work significant hardship on either the plaintiff or the defendant if not applied. Guideline 4 shows that English law would work hardship on the plaintiff, and therefore, by a reasonable comparative ratio, customary law would have to be applied to obviate a substantial miscarriage of justice.

This argument can be carried a stage further. First noting that the defendant was not related to the deceased in any way, it would be wrong to assume that because the plaintiff's mother was married according to customary law, she should be excluded from the succession. For the sake of justice, such an argument must be discarded. The decision in Adegbola was, therefore, based upon a misconception and can easily be resolved by use of the comparative impair-

160. See Courts Act § 74, Cap 4, which provided that:
Native customary law shall be deemed applicable not only in causes and matters where the parties are natives, but also in causes and matters between natives and non-natives where it shall appear to the Court that substantial injustice will be done to any party by a strict adherence to the rules of any law or laws other than native law.
161. See In re Williams, [1941] 7 W.A.C.A. 156, where it was held, among other things, that upon the death intestate of a deceased who was the issue of a marriage under the Marriage Ordinance, succession is to be determined not by native law, but by the received common law which requires that the status of those claiming under the estate in question depends upon the law of the common domicile of their parents. Hence, in this instance, children born under customary law marriage are also legally qualified to succeed. Granted this, application of Professor Currie's governmental interest analysis and Professor William Baxter's comparative impairment theory to the choice of law process of Ghana is strongly recommended. This may be done by first characterizing the issues, with the aim of carefully and judiciously exploring the concept of the lex sanguinis, based on interest analysis and comparative impairment doctrine or ratio to avoid "facil syllogisms."
ment theory: \( Y = B_1 + B_2 \) (English laws, denial of succession) \( X \) and \( Y = B_1 + B_2 \) (customary law, allowing succession) \( X \).

VI. Conclusion

A more policy-conscious methodology must be developed to resolve the problems of conflict of laws in Ghana, both internal and external. The traditional-rule oriented method, although well evolved, must be relegated as a source of reference when dealing with intercultural conflict of laws.\(^{162}\) The plurilegal nature of Ghana is ripe for implementation of a Currie-Baxter analysis of conflict of laws problems.\(^{163}\) The complex nature of intestate succession presents Ghanaian courts with difficult choices when determining which law to apply, the received English law, customary law, or Islamic law. The difficulties facing Ghanaian judges would become simplified and judicial precedent would become more uniform if the courts utilized this Currie-Baxter analysis. The heavy reliance on conceptual methods in a plurilegal system, and problems of geographically complex factors have created numerous legal options that cause difficulties when courts attempt to determine the applicable law. These numerous legal options arguably would vanish if the Ghanaian courts were willing to weigh the interests supporting the respective laws and subsequently determine which law would be most impaired if not applied. Such an analysis would simplify the conflict of laws problems currently existing in Ghana and, more importantly, would promote the rights of all parties.

\(^{162}\) I was convinced at the beginning of this study, that Professor Leflar's suggestion that in later years it will be easy to merge the ideas of 'significant relationship' and 'governmental interest,' in what Professor Cavers would deprecate as a new 'jurisdiction-selection rule' would fit well into the Ghanaian system (i.e., in dealing with internal conflict of laws or intercultural conflict of laws). But after reviewing 100 cases, the present writer is persuaded that Professor Leflar's suggestion would rather work favorably on the international plane and most probably in interstate conflict of laws. It will be expedient, therefore, to advocate the merging of Professor Currie's governmental interest analysis (which needs some modification) and Professor Baxter's comparative approach as the new choice of law approach for Ghana. See Jovito R. Salonga, *Conflict of Laws: A Critical Survey of Doctrines and Practices and the Case for a Policy-Oriented Approach*, 25 Phil. L.J. 527, 536 (1950).

\(^{163}\) It is appropriate to distinguish more clearly between private international law and interpersonal conflict of law or internal conflicts law to reduce defeatist ideas because if the *lex domicilii* rule is applied based on analogy, one is likely to run into difficulties in identifying the domicile of the *de cujus*, which is not straightforward. In a sense, this concept requires the exploration of a multitude of related issues and factors and the process is not at all clearcut. Any attempt to overrely on it would obviously lead Ghanaian judges astray in developing venerable methods for resolving the choice of law problems in Ghana. It must be made clear that conflict of laws is so diverse and plentiful a field that Ghanaian courts in an attempt to develop a new system must be eclectic in their methods in order to avoid an uncharted chaos.
APPENDIX 164

Bona vacantia — [P]ersonal property which escheats to state because no owner, heir or next of kin claims it.”

De cujus — A person through whom another claims.

Donatiomortis causa — A gift made by a donor in contemplation of his imminent death.

Ex facie erroneous — Apparently incorrect.

Ex hypothesi — Upon the hypothesis or supposition.

Facto et animo — “In fact and intent.”

Intervivos — Between living persons.

Jus tertii — “The right of a third party.”

Lex domicilii — The law of the place where a person is domiciled.

Lex fori — “The law of the forum, or court.”

Lex loci celebrationis — Where a marriage is performed.

Lex loci contractus — “[T]he law of the place where the contract was made.”

Lex loci rei sitae — “The law of the place where a thing or subject-matter is situated.”

Lex loci stabuli — The law of the place where a motor car is garaged.

Lex sanguis — The law of blood ties and allegiance.

Lex situs — “[T]he law of the place where property is situated.”

Modus et conventio vincunt legem — “Custom and agreement overrule law.”

Prima facie — At first sight or from the appearance.

Propositus — The deceased or the one “from whom a descent is traced.”

Ratio decidendi — Judicial reasons essential for the logical decision of a case.

Renvoi — “The doctrine of renvoi is a doctrine under which [a] court in resorting to foreign law adopts rules of foreign law as to conflict of laws, which rules may in turn refer [the] court back to law of forum.”

Samansiw — Death bed disposition oral will under customary law.

Ultimus haevres — “The last or remote heir.”

164. The definitions found in the Appendix were drawn primarily from BLACK’S LAW DICTIONARY (5th ed. 1979).