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The Moral Resources of Constitutions in Africa and the Three Problems to Interpretation?

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Abstract
This paper attempts to conceive the constitutions of African states in the post-colonial context, especially Ghana and Nigeria, as laws in a manner that will reflect the moral resources necessary to protect the wellbeing of their people. This is expected to be done through judicial interpretation of the constitutions. But this project might be frustrated by three problems. The problems of the multicultural strings; the colonial and post-colonial dualism; and the transitional democratic premises of these states. Notwithstanding these problems, I argue that the best value by which constitutions in Ghana and Nigeria can be assigned through judicial interpretation is adherent to a particular theory of law that priorities reason over the positivist character of the constitutions.
Keywords*:* Constitution, Positivism, Constitutional Interpretation, Multicultural Strings, Post-Colonial Dualism, Transitional Democratic Premise, Moral Resources of Constitution, Fundamental Law, Human Rights, Rule of Law, Constitutional Positivism.
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1. Introduction

In the early parts of 1950s in Africa, anti-colonial rhetoric was always unambiguous about the values of law to the colonies - law must serve our interest, the nationalists said.[1] Their objective was to ensure that laws of general application enacted by the Imperial Parliament actually benefited people in the colonies, rather than permitting the exploitation of their natural resources by others.[2] There was justifiably a high sense of contempt for colonialism in the sense of its negative impact on the natives' economic and political advancement. Nationalist leaders demanded of the Imperial Parliament laws that were sensitive to their wellbeing.

Indeed, it is possible to discern beneath this rhetoric, Joseph Raz's conception of the virtue of the rule of law as the virtue of a good knife – there is recognition here that law, like a knife, can be used for good or bad depending upon the purposes of those who use it. Law, like a knife, can be good for the purpose of advancing the course of colonial peoples through clear cut propositions, and can as well do badly by facilitating a quick dissipation of their natural resources to Europe. Law in the latter sense is what the colonial people deny, but welcome law in the former category as it adds quality to their impoverished conditions and emaciated dignity. This is what Dyzenhaus makes us believe is the rule of good law.[3] Good law is thus that law that does what is in the collective wellbeing of the people whose obedience is required of it. This was the core of the demand of the nationalists.

Legal systems in post-colonial Africa like Ghana and Nigeria deserve and must show similar concerns of the status of law. Law must be of a legitimate fundamental moral value that contributes to the dignity of the people and aspire to serve them in the best moral light.[4] For Raz, the journey to this level in a legal system rests on law's ability to exhibit respect for a certain internal criteria of legality not unlike Fuller's "internal morality of law". As a positivist, however, Raz denies that these criteria will make the law good law, though it may make it a better law than mere arbitrary rules of men. In other words, the purpose of Raz's internal criteria is not to make the law intrinsically morally good, but rather, an efficient law. His view may therefore be limited to an account of law as an efficient instrument for those who wield political power, a view which Dyzenhaus sees as a conduit for a society to launch into substantive injustice with an efficient law.[5]

Within this context, the constitutions (like law) of African states in their present legal environment must contain a certain moral resources that reflects reason, justice, equity and fairness all geared toward protecting the welfare of the people. The authority of these constitutions and the legitimacy of their interpretation depend on the deployment of these moral resources by the courts with interpretive and enforcement jurisdictions.

[1] See Toyin, Falola, (edt.), *The Dark Webs: Perspectives on Colonialism in Africa*,(Durham, N.C.: Carolina Academic Press, 2005), Walter Rodney, *How Europe Underdeveloped Africa* (London: Bougle-L'Ouverture Publications, 1978); and Timothy, Fernyhough, "Human Rights and Pre-colonial Africa" in *Human Rights and Governance in Africa (edt.)* Jan Berting et al.(Westport, Conn.: Meckler, 1993).
[2] See K. Mann and R. Roberts, eds., Law in Colonial Africa, (Portsmouth, NH: Heinemann, 1991); Rizzo Lorena, The Elephant Shooting: Colonial Law and Indirect Rule in Kaoko, Northwestern Namibia, in the 1920s and 1930s (2007) 48 The Journal of African History 245; John R. Schmidhauser, "Legal Imperialism: Its Enduring Impact on Colonial and Post-Colonial Judicial Systems", (1992) 13 International Political Science Review 321
[3] Frederick Pollock, *The Expansion of the Common Law* at 220
[4] Fuller L.L. *Morality of law* and Dworkin R, *The Law's Empire*
[5] Frederick Pollock, *The Expansion of the Common Law* at 222

Constitutions in post-colonial environment are expected to have a claim and legitimacy of authority. This is good if we are to see the objects and subjects of the constitutions interact meaningfully within the states. Usually the authority of the constitutions are dependent upon their properties. But we cannot get these properties just by way of a causal explanation or retrospective interpretation of such constitutions where judges merely focus on retrieving actual historical intentions or motives of the makers. Alternatively, we cannot discover the authority of constitutions by looking at the conscious mental state of the constitutions authors, rather the focus should be discovering that purpose that makes sense of the collective moral aspiration of the people.

In this paper an attempt is made to conceive the constitutions of African states in the post-colonial context, especially Ghana and Nigeria, as laws in a manner that will reflect the moral resources necessary to protect the wellbeing of their people. This is expected to be done through judicial interpretation of the constitutions. But this project might be frustrated by three problems. The problems of the multicultural strings; the colonial and post-colonial dualism; and the transitional democratic premises of these states. Notwithstanding these problems, I argue that the best value by which constitutions in Ghana and Nigeria can be assigned through judicial interpretation is adherent to a particular theory of law that priorities reason over the positivist character of the constitutions.

2. The Three Problems to Constitutional Interpretation.

Before considering the theory of law that should underpin constitutional interpretation in both countries in an attempt to discover their moral resources, we will, in this part, consider three problems that might affect this enterprise. This section states and engages these problems in order to understand whether they really do provide any sustainable fear for interpreting the constitutions of these states as reflective of a fundamental law of law reason. In other words, are constitutional courts (Supreme Courts) in these Republics disabled by these problems from conceiving law/constitution as having the sort of moral resources that will enhance the collective wellbeing of the people? Will there be a "common reason" for a theory of fundamental law of reason to discover and apply these states?

2.1 Multicultural Strings in Constitutional Interpretation

Ghana and Nigeria are multicultural societies.[1] There are not only numerous ethnic groups with varied cultural practices and norms,[2] but also in both states, more than 200 distinct local languages thriving on thousands of dialects. In both colonial and post-colonial constitutional arrangements, the different cultures in these states were recognised and conceptualised around their traditional political institutions (chieftaincy)[3] and customary laws[4]. In thinking through the status of local law and custom in Ghana and Nigeria, I think it is important to take a step backward into a brief colonial history in order to be as clear as possible on the legal foundations and limitations of these laws and customs from the British perspective.

In the colonial context, the key historical instrument for the identity of law in Ghana for instance was the *Supreme Court Ordinance*, 1876, which introduced English law and affirmed the continuity of local customary laws in the Gold Coast Colony. Section 14 introduced the common law and equity as well as English statutes of general application. Section 17 provided that these English laws were to be applied subject to local conditions and circumstances, and could be altered by local legislation. And section 19 provided that, where appropriate, courts were to apply local laws and customs so long as they were not "repugnant to justice, equity and good conscience." This basic legal duality—an English-based common law system plus local customary law—continued after independence with each successive constitution.[5]

> *I assume a similar set of instruments and provisions exists for Nigeria, but it would be nice to be specific here too and cite at least the initial English law reception ordinance or statute, and the ordinance or statute that confirmed the continuity of local laws and customs. I also understand that, in the colonial period, both countries had extensive systems of so-called Native Courts for the application of local customary laws, which were integrated into a regional system of appeals, with a common West African Court of Appeal, and, ultimately, an appeal to the Judicial Committee of the Privy Council in London. See R.E. Robinson, "The Administration of African Customary Law" (1949), 1 Journal of African Administration 158,*

[1] Here, "multiculturalism" is to be referred not only to demographic realities, but also to the distinct normative cultural values.
[2] Marcellina U. Okehie-Offoha & Matthew N. O. Sadik, *Ethnic and Cultural Diversity in Nigeria*, (Trenton, NJ: Africa World Press, 1995); Chunun, I.P. "Cultural Pluralism and Nigerian Federalism" in Elaiggu et al (ed); *Federalism and Nation building in Nigeria The Challenges of the 21st Century* (Abuja, NCIR, 1994) pp. 13-15
[3] See Martin Klein, Traditional Political Institutions and Colonial Domination (1971) 4 African Historical Studies 659
[4] James S. Read, "Customary Law under Colonial Rule", in H.F. Morris, and J.S. Read, eds., Indirect Rule and the Search for Justice: Essays in East African Legal History, 167-212. (Oxford: Clarendon Press, 1972); Gordon R. Woodman, "Customary Law, Modern Courts, and the Notion of Institutionalization of Norms in Ghana and Nigeria" in *People's Law and State Law: The Bellagio Papers* Allot, A & Gordon R. Woodman,(eds.) (Dordrecht: Foris, 1985)
[5] See in general S.Y. Bimpong-Buta, "Sources of Law in Ghana" (1983-86) 15 Review of Ghana Law 129, at 131-32.

at 170-172.

But in this historical overview, it will be important to fit the colonial systems into their larger imperial constitutional context, especially the relationship between the *Colonial Laws Validity Act* of 1865, and different customary laws. The basic point of the Colonial Laws Validity Act, 1865, was to confirm that laws made in the colonies that were repugnant to an Act of the imperial (or UK) Parliament, or an order made under such an Act, that extended to the colony, were of no force or effect (section 2). But it also confirmed that colonial laws that were repugnant to the "Law of England" were *not* void, unless, in violating the Law of England, they also violated an Act of Parliament or order made there under extending to the colony (section 3). In fact, the 1865 Act was intended to dispel the notion that colonial legislative authority was in some sense bound by vague notions of humanity or equity associated with the Laws of England. The Act confirmed that the only legal limitation on colonial legislative authority was the express terms of Acts of the imperial Parliament, or orders made there under, that extended to the colony in question. [1]

The crucial point here is that it was not the Colonial Laws Validity Act, 1865, as such, that made local customary laws void if repugnant to principles of equity. Rather, it was the terms of the colonial ordinance that confirmed the continuity of native or local customary law, which, in the case of Ghana, said (as noted above) that these local laws and customs were in force so long as they were not "repugnant to justice, equity and good conscience."[2] Indeed, this proposition merely affirmed a principle of common law (see below). The rationale for this [i.e., that customary laws repugnant to equity were void] is rooted in the claim that the colonial legal systems in Ghana and Nigeria were appendages (or really components) of the empire, and subject to the sovereign and supreme will of the British Parliament[3] (the Colonial Laws Validity Act affirmed this principle). But the caveat here is that the supremacy of the "laws of England" was not as firm a principle.

First of all, colonial laws *could* alter, amend, repeal or override the "law of England" as it applied within a colony, unless expressly prevented from doing so by an Act of Parliament or order made there under extending to the colony. This point is made explicit in section 3 of the Colonial Laws Validity Act. The history of this Act confirms that the legislative intent behind section 3 was to affirm that colonial laws could even trump fundamental principles (e.g., of equity or good conscience) that formed part of the Law of England (unless, of course, to do so violated an Act of Parliament or order made there under extending to the colony). This is not to suggest that the assertion, that customary laws in Ghana and Nigeria repugnant to equity were void, is wrong. In fact, it is right. But the source of that limitation on customary law was not the "laws of England" as such, but the local colonial ordinance that affirmed the continuity of local customs so long as they were not "repugnant to justice, equity and good conscience."

The core aim of this brief survey of legal history is to convey the idea that legal pluralism, reflecting cultural and ethnic diversity, is a deeply rooted aspect of the legal traditions in Ghana and Nigeria. Therefore legal pluralism is not something that was wholly contingent upon some local colonial ordinance. It was, rather, itself a fundamental principle of common law—though not the common law of England but rather the common law of the British Empire, to which Ghana and Nigeria were part. The continuity of local laws and customs after the assertion of Crown sovereignty over a colonial territory was a principle of imperial *common law*: judges would presume that local laws and customs, not English law, was in force, at least among native peoples, so long as these laws and customs were not inhumane or repugnant to good conscience or morality, or inconsistent with British sovereignty, at least until legislation provided otherwise.[4] In other words, the local colonial ordinances that confirmed the continuity of customary laws subject to good conscience and equity in Ghana and Nigeria merely affirmed a basic or fundamental principle of continuity embraced by British imperial common law.

In the colonial context and as far as the legal pluralism or multiculturalism in its modern sense is concerned, there are a rich line of cases in which British judges tried to recognize and apply customary laws. For example, in actions for a declaration of title to chieftaincy,[5] family ownership of land,[6] and rights of "white cap chief" to certain family property.[7] By the early twentieth century, the Judicial Committee of the Privy Council had developed a fairly robust approach to protecting the continuity of local customary laws. In *Amodu Tijani v. The Secretary, Southern Nigeria*,[8] an appeal involving "one of the Idejo White Cap Chiefs of Lagos", it was held by

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[1] For an insightful summary of the history of the 1865 Act, see Mark D. Walters "The Common Law Constitution in Canada: Return of *Lex Non Scripta* as Fundamental Law" (2001), 51 *University of Toronto Law Journal* 91-141.

[2] See A.N. Allot, The extent of the operation of native customary law: Applicability and Repugnancy (1950) 2 Journal of African Administration 4; William Twining, The *place of customary law in the national legal systems of East Africa: lectures delivered at the University of Chicago Law School in April-May, 1963* (Chicago: Law School, University of Chicago, 1964)

[3] Kofi Kumado C.E., "Judicial Review in Ghana since Independence" (1980) 12 Review of Ghana Law 67 at pp.70 and see also A.N. Allot, The authority of English decisions in colonial courts (1957) Journal of African Law 23

[4] The classic case on these points is *Campbell v. Hall* (1774), Loft. 655 (per Lord Mansfield)

[5] *Adanji v. Hunvoo* (1908), 1 Nig. L.R. 74 (Nigeria S.C.)

[6] *D.W. Lewis v. Bankole* (1908), 1 Nig. L.R. 81 (Nigeria S.C.)

[7] *Oduntan Onisiwo v. The Attorney-General* (1912), 2 Nig. L.R. 79 (Nigeria S.C.)

[8] [1921] 2 A.C. 399 (P.C.)

Viscount Haldane that judges were to be careful when applying "the various systems of native jurisprudence throughout the Empire" to avoid the tendency of unconsciously equating legal concepts with those with which they were familiar under English law.[1] This is not to say that British judges were never culturally insensitive or never displayed Eurocentric cultural superiority. Of course, they did. *In re Southern Rhodesia*[2] is a sad example of this. But it is perhaps worthwhile noting that the common law sought to reconcile the unity of imperial authority with the diversity and plurality of local customary legal systems within Africa, in part out of respect for ethnic and cultural difference, and these leading cases are an important part of that story.

In the post-independence period, this duality of legal norms did not fade off.[3] There has been a sustained attempt to recognize the customary laws of the various ethnic groups as part of the corpus of constitutional law in Ghana and Nigeria. For instance, Article 11(2) and 11(3) of the Ghanaian constitution provide that the "common law of Ghana" includes not only the rules of law generally known as the common law, but also "rules of customary law" or "rules of law which by custom are applicable to particular communities…." I think it is rather interesting that, in Ghana, the common law embraces both general common law and particular local customary norms. The Nigerian Constitution suggests that provision is made for a Sharia Court of Appeal and a Customary Court of Appeal for the Federal Capital Territory, Abuja (Articles 260-269), and a Sharia Court of Appeal and a Customary Court of Appeal for each State needing one (Articles 275-284) in service of the values and practices of her varied cultures.[4] It is inescapable that the multiplicity of these customary codes is a legal reality in these states.

The fear for us here may thus be apparent. These various cultures and customary laws may be said to represent a web of conflicting cultural norms—strings of multiculturalism as it were—that tie down and restrict the judicial interpretation of the Ghanaian and Nigerian Constitutions. How the theorists do relied upon in this work below—who advance a non-positivist liberal conception of law premised upon the idea of a transcendent or fundamental law of reason—get us out? The question is not whether the legitimate multicultural values in each country are given recognition by their constitutions, but rather whether the constitutional recognition of these legitimate multicultural values is consistent with the theory of constitutional interpretation developed in this paper.

2.1.2 Confronting the Challenge of Multicultural Strings

The question posed above is problematic if it is presumed either that the constitutions of these states and their authoritative traditions of interpretation have been developed to the exclusion of, or without reference to, the cultures that constitute these states[5] or that the claims of cultural recognition within the constitutional institutions of these jurisdictions and their authoritative traditions of interpretation are blind to the principles of fundamental law of reason urged here. Certainly, both of these presumptions are either wrong or capable of being conversely sustained. In fact, both constitutions have made customary law and by implication the values of the various cultures in Ghana and Nigeria part of the legal norms within the respective countries, and yet have also recognized human rights on a universal basis.

There appear to be good reasons to think, then, that the theory of fundamental law of reason and public law rights is not restricted to monocultural jurisdictions. It may be the case, for example, that such a theory of law may work in a multicultural jurisdiction with the appropriate qualification on the reach of cultural diversity claims. It is this latter supposition that interests me, as the former claim may be rebutted on the account that the legal systems of the United States and Britain, where the works of most of the non-positivists relied upon here are focused, are not monocultural states. There is some sense of cultural pluralism in both states supported by the existence of different cultural values and tensions among Hispanics, African-Americans, Indians, and Asians in the United States, and Irish, Scottish, Welsh, English and even citizens of the larger Commonwealth in Britain.

What then is the nature of the qualification on the cultural diversity claim that makes reliance on the non-positivists and common law notion of fundamental law of reason ideal in Ghana and Nigeria? In answering this question, it must be said that the argument that multiculturalism implies the application of restrictive interpretive strings in the application of the theory of constitutional interpretation considered in this paper is, on the appearance, seductive, but a fallacious one. As noted by a famous Ghanaian philosopher, Gyekye Kwame, "cultural pluralism…does not necessarily eliminate the possibility of horizontal relationships between individual cultures".[6] It is justifiable to recognize and accommodate a fair degree of cultural diversity within Ghana and Nigeria without necessarily suggesting that such cultures cannot be disciplined by the central values of the

[1] Ibid at p. 403. For other cases where British judges defended customary laws to chieftainships or royal property in West Africa see *Eshugbayi v. Government of Nigeria*, [1928] A.C. 462 (P.C.), and *Oyekan and others v. Adele*, [1957] 2 All E.R. 785 (P.C.).
[2] [1919] A.C. 211 (P.C.)
[3] See Marouf A., Jr. Hasian, *Colonial Legacies in Postcolonial Contexts: A Critical Rhetorical Examination of Legal Histories* (Peter Lang Pub Inc, 2002)
[4] See also, A.N. Allot, 'Local and customary courts in former British territories in Africa' in *Etudes sur l'organisation judiciaire en Afrique noire*, ed. J. Gilissen Brussels, (1969)
[5] For similar treatment on indigenous or aboriginal identity issues in a multicultural constitutional context, see James Tully, *Strange Multiplicity: Constitutionality in an age of diversity* (Cambridge University Press, 1995)
[6] Gyekye Kwame, *An Essay on African Philosophical Thought: The Akan Conceptual Scheme* (Cambridge University Press, 1987) at 191

fundamental law of reason.

Note however that I am not suggesting the revival of what might resemble colonial judges assertion of limitations on customary law derived from "justice, equity and good conscience" during the colonial era. The problem for us today with this limitation, as it was applied by British judges in the colonial context, is that it was motivated by attitudes of Eurocentric cultural superiority and paternalism, and judicial opinions often contained expressions, e.g., barbarism versus civilization, offensive to us now. So, it would be potentially controversial to invoke this old colonial rule in support of the argument here. But I want to take away the Eurocentric rhetoric, and assume that the judges adopting this approach are now Ghanaian and Nigerian, not British. Besides, the basic gist of the argument I am making is similar to the one that used to be made. For example, Lord Atkin, in *Eshugbayi v. Government of Nigeria* [1928] A.C. 462 (P.C.), said the following:

> An interesting question arose at the hearing as to the modification of an original custom to kill [a deposed chief] into a milder custom to banish. Their Lordships entertain no doubt that the more barbarous customs of earlier days may under the influences of civilization become milder without losing their essential character of custom. It would however appear to be necessary to show that in their milder form they are still recognized in the native community as custom, so as in that form to regulate the relations of the native community *inter se*. In other words, the Court cannot itself transform a barbarous custom into a milder one. If it still stands in its barbarous character it must be rejected as repugnant to "natural justice, equity and good conscience." It is the assent of the native community that gives a custom its validity, and therefore barbarous or mild, it must be shown to be recognized by the native community whose conduct it is supposed to regulate.

There is, once we eliminate the culturally and historically loaded language of barbarism and civilization from this statement, something very compelling about this what is said. The judges are saying, in effect, that the normative force of customary law must emanate from the community itself, not from the judges, and so long as the customary law is consistent with justice and humanity it can receive judicial recognition; but the judges will not impose their view of justice and humanity to make a customary norm something that it is not. This seems to be an attempt to reconcile local cultural and legal diversity with a fundamental common law notion of reason—which is what I am arguing for. It is thus possible and ideal on these qualified terms to ground the varied cultural values or rights in the fundamental law of reason that holds humanity sacrosanct and support claims that seek to validate human dignity, welfare and livelihood. Besides, this will engender the evolution of a comprehensive human rights regime for the people

It is the very paradox at the heart of the human condition that underlies the argument that the legal recognition and protection of multicultural values within the constitutional orders must be subject to them being consistent with justice and humanity, principles central to the fundamental law of reason. While all cultures seem committed in principle to valuing human livelihood and wellbeing fastened to a fundamental conception of human rights and dignity, there may exist disturbing cultural practices that deviate from that commitment and offend these values. For instance, human sacrifice as it may happen in some communities either as part of religious rituals or cultural rituals to accompany dead chiefs are a marked negation of the value of life and livelihood. Or, to take another example, the practice of *Trokosi* in Ghana not only poses a challenge to the fundamental of reason, but also constitutes a blatant travesty of justice to hundreds of children who are victims to this practice.[1]

This cultural practice allows children, especially girls to be sent into "cultural slavery" in service of a priest of a community shrine in order to atone for sins committed by a family member.[2] Not only this, but a good number of girls in Ghana and Nigeria are victims of the cultural practice of female genital mutilation (FGM)[3], a practice that kills many and facilitates among them the spread of sexually transmitted diseases – HIV/AIDS - and forced marriage. Moreover, women, more often than not, are subjected to dehumanizing widowhood rights, and several forcibly taken to camps, generally referred to as witches' camps on the basis of certain conceived "cultural crimes".[4] Such cultural practices need a rigorous judicial discipline within the constitutional arrangements of Ghana from the perspective of law as reason. The existence of multicultural values therefore

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[1] See Bilyeu, Amy Small, Trokosi - The Practice of Sexual Slavery in Ghana: Religious and Cultural Freedom vs. Human Rights (1998-1999) 9 Ind. Int'l & Comp. L. Rev. 457; Robert Kwame Ameh "Human Rights, Gender and Traditional Practices: The Trokosi System in West Africa" in Anita Kalunta-Crumpton & Biko Agozino (ed.), *Pan-African issues in crime and justice* (Ashgate Pub Ltd, 2004)

[2] Edward Kofi Quashigah, Religious Freedom and Vestal Virgins: The Trokosi Practice in Ghana (1998) 10 African Journal of International and Comparative Law 193

[3] See A. Odoi et. Al., Female genital mutilation in rural Ghana, West Africa (1997) 56 International Journal of Gynecology & Obstetrics 179; Mbacke C, et. Al., Prevalence and correlates of Female Genital Mutilation in the Kassena-Nankana District of Northern Ghana (1998) 2 African Journal of Reproductive Health 13; Lawrence A. Adeokun et. al., Trends in Female Circumcision between 1933 And 2003 in Osun and Ogun States, Nigeria (A Cohort Analysis) (2006) 10 African Journal of Reproductive Health 48

[4] See **Mensah Adinkrah,** Witchcraft Accusations and Female Homicide Victimization in Contemporary Ghana (2004) 10 Violence Against Women 325

does not represent a legal license to the various cultures to treat with contempt norms of international human rights or the principles of the fundamental law of reason.

2.2 Colonial and Post-Colonial Dualism

However, the problem here may be greater than the multicultural strings considered above. As a matter of fact, having been colonised by Britain, Ghana and Nigeria are steeped in or prone to the constitutional culture of their (former) colonial master.[1] This may be a source of a problem for a conception of law with the kind of moral resources capable of fending for the collective welfare of the people. This problem, it seems to me lies in two probable dualities. The first of these two being the internal duality, which suggests that the judiciary in the jurisdictions under study may, to a large extent, be influenced by the *colonial legal culture* where the defined role of the judge, essentially, was to administer justice under law.[2] Such a role does not entail questioning the legality of law itself, as in the nature of constitutional interpretation urged in this work. But ineluctably connected to this is a second possible dualism, which suggests that the post-independence period in these states was either one of imposed constitutions, drafted largely with a modern European (in this case, British) constitutional orientation or a product of modern constitution-making, an act whereby a people frees itself from custom and imposes a new form of association on itself by an act of will, reason and agreement.[3]

Thus the historical formation of constitutions in these states may constitute a challenge to the recognition of the current peculiar political arrangements of the states and the authoritative interpretative traditions that the courts should embrace. Judges who must work under the constitutional framework of the latter model of constitution making may sometimes find themselves not only wearing the imperial garbs of the first model, but also operating within the mind set of British constitutional system: where judges are largely constrained in reviewing the constitutionality of laws due to the legal strings of the traditional notion of parliamentary sovereignty. According to orthodox constitutional theory in Britain, courts will not entertain any legal questions pertaining to the constitutionality of a Parliamentary Act.[4] The traditional notion of parliamentary sovereignty as it exists in Britain does not permit judicial review of legislative acts.

If these dualities persist in the current constitutional context in Ghana and Nigeria, the effect on the judicial approach to constitutional adjudication may be serious. While the exercise of judicial power in constitutional interpretation would require courts in Ghana and Nigeria to interrogate the constitutionality of legislative and executive acts, the continuing influence of the colonial legal culture as well as British constitutional ideas may hinder the judicial role in this respect. As a result, reliance on the theories of Dworkin and other non-positivists in this paper may, it seems to me, prove difficult in light of this potential dualism between colonial and post-colonial judicial interpretative cultures and expectations.

2.2.1 A Response to the Culture of Dualism

It is important to observe that if these dualities are problems that may arise, perhaps it is because of one presupposition: that judges are unable to distinguish the current constitutional arrangements from the colonial legal culture and the British constitutional system. This is tied to two distinct responses. First of all, it seems to me that one simple answer to the "colonialist" claim against using "colonial"-based legal systems and their theorists is this: maybe the common law was initially imposed on Nigeria and Ghana in the nineteenth century, but when they became independent countries, the people embraced the common law tradition as their own, or as part of their own, legal tradition. There is a common law of Ghana, and a common law of Nigeria, and although these systems of law draw upon the British tradition, but they are now, really, Ghanaian and Nigerian traditions. Indeed, as noted, the common law of Ghana embraces both the "common law" narrowly defined *and* local customary laws within distinctive communities.

Secondly, it is obvious that in both Ghana and Nigeria, there are written constitutions with explicit provisions authorising the Courts to review Acts of Parliament or actions of the executive in order to safeguard guaranteed rights, and in both of these states the value of parliamentary sovereignty has been diminished on the account that the Constitutions have been declared as the supreme law. Such a constitutional structure seems to

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[1] See John R. Schmidhauser, Legal Imperialism: Its Enduring Impact on Colonial and Post-Colonial Judicial Systems (1992) 13 International Political Science Review 321; Sandra Fullerton Joireman, Inherited Legal Systems and Effective Rule of Law: Africa and the Colonial Legacy (2001) 39 Journal of Modern African Studies *571*

[2] See Julius Lewin, Native Courts and British Justice in Africa (1944) 14 Journal of the International African Institute 448; Abrahams, S., The Colonial Legal Service and the Administration of Justice in the Colonial Dependencies (1948) 30 Journal of Comparative Legislation and International Law 1; Sally Engle Merry, Treating Law as Knowledge: Telling Colonial Officers What to Say to Africans about Running "Their Own" Native Courts (1992) 26 Law & Society Review 11; Martin Chanock, *Law, Custom and Social Order: The Colonial Experience in Malawi and Zambia* (1985)

[3] James Tully, *Strange Multiplicity: Constitutionality in an age of diversity* at 60

[4] [here you could cite the classic statements on parliamentary sovereignty from Dicey's *Law of the Constitution*, and then say:] Even with the enactment of the *Human Rights Act of 1998*, courts in the United Kingdom are only under an interpretative legal duty to read domestic laws consistent with the European Convention of Human Rights (ECHR), and, if this is not possible, judges are limited to making (so-called) declarations of incompatibility, which signal a defect in the statute but do not affect the statute's legal status.

encapsulate the concern for correcting, through judicial review, in appropriate cases, both the form and content of a law or valid rules and regulations in light of constitutional standards to which the two countries in question have committed themselves.

In other words, both legal systems have consciously departed from the orthodox understandings of constitutionalism associated with colonial legal culture and the related British constitutional tradition. This departure opens interpretive possibilities that were before obscured, including the possibility of a justiciable fundamental law of reason erected upon unwritten rules of the common law and the application of non-positivist conceptions of law of reason, as urged in this paper, with the concomitant need to realign the conception and function of law towards securing justice, human wellbeing, and fairness in administrative decision making, and to advance the ideals of the rule of law, constitutionalism and human rights in a democratic state.[1]

2.3 Transitional Democratic Premise

Nonetheless, the proper recognition of the prevailing constitutional structures as well as the legal cultures in Ghana and Nigeria does not address all of the contemplated difficulties. These two states are transitional/young democracies that have emerged from periods of military dictatorship. The experience of military suppression might influence the applicability of the considered theorists in the construction of an appropriate analytical framework for the examination of constitutional law in these countries in two ways. The first is a negative influence: the judiciaries in both countries may be timid and may therefore resist the adoption of new theories of constitutional interpretation. The concern is that judges will still be influenced by the culture of oppression and silence that characterized the military governments preceding the adoption of current constitutional arrangements. In Ghana, for instance, three High Court judges were abducted and gruesomely murdered in the 1980s by the operatives of the then military government, perhaps as a means of coercing the judiciary into submission.[2] However, the second possible influence, which is positive, contemplates a courageous court which will not hesitate to adopt new approaches to constitutional adjudication as a means of consolidating substantive constitutional change in these states— so that the egregious violations of human rights experienced under military dictatorship would never be judicially tolerated again.

Since the arguments about the utility of the moral resources of law in this paper frown upon judicial timidity, the transitional democratic premise in both Ghana and Nigeria is an ideal justification to enforce such constitutional values that are at the core of the people's wellbeing. This does not preclude the judges from applying theorists whose legal orders are different, but whose aims are congruent with those supported by the current constitutional arrangements in Ghana and Nigeria. Such an exercise is both important and necessary to fill gaps (created partly by military governance) in the domestic laws, clarify certain legal positions, or attempt homogenizing[3] where applicable, constitutional ideals.[4] This is not only a probable means, as the claim goes, to legal truth[5] but also nourishes a presumption that 'there is a significant degree of congruence between problems and their possible solutions across the spectrum of contemporary constitutional democracies.'[6] The courts in Ghana and Nigeria are thus encouraged to engage in comparative constitutional jurisprudence, as suggested by the considered theorists, in the course of the judicial settlement of constitutional questions.

Indeed, it will be argued that the achievement of the fidelity of law in these states will ultimately involve judicial appreciation of principles of fundamental law of reason that transcend jurisdictional boundaries. This approach affords to judicial institutions the opportunity to understand and appreciate constitutional provisions through inter-court or inter-jurisdictional dialogue and through their own participation within the larger discourse of universal norms of human wellbeing and international human rights. Perhaps this approach will allow courts in these transitional democracies to jettison the stance of mechanical approach to interpretation of law that was, in part at least, fostered during military dictatorship and to close the door on the thinking that only the intentions of the legislators or the intentions of the drafters in a legal jurisdiction matter in discovering the legal values inherent within enacted laws.

In the relevant literature, especially on -conflict/post-dictatorship problem of political violence in Ghana and Nigeria, there is a certain common dynamic within these states.[7] The initial move to independence in the 1950s and 1960s unleashed democratic forces after a long period of imposed order under colonialism. With this

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[1] C. F. Forsyth, "Of Fig Leaves and Fairy Tales: The Ultra Vires Doctrine, The Sovereignty of Parliament and Judicial Review" (1996) 55 Cambridge Law Journal 122

[2] Jacob Yidana, *Who Killed the Judges* (New Town, Accra: Bismi Enterprise, 2002)

[3] See Jeffery Goldsworthy, "Homogenizing Constitutions" (2003) 23 Oxford Journal of Legal Studies 483

[4] Note that this not an exhaustive list of the relevance of comparative legal studies generally. In fact, it said be essential for Parliamentarians interested in law reforms. See Jonathan Hill, "Comparative, Law Reform and Legal Theory" (1989) 9 Oxford Journal of Legal Studies 101

[5] Konrad Zweigert & Hein Kotz, *Introduction to Comparative Law* (Tony Weir trans., Oxford University Press, 3d ed. 1998) (1977) - "comparative law offers the only way by which law can become international and consequently a science. Comparative law has started to put an end to the narrow-mindedness. The primary aim of comparative law as all sciences is knowledge." *Ibid* at pp.15

[6] *Ibid* at pp. 8

[7] Ukoha Ukiwo, "Politics, ethno-religious conflicts and democratic consolidation in Nigeria" (2003) 41 J. of Modern African Studies 115

increased openness came expressions of identity and ambitions for political power from within many diverse ethnic and religious communities, and the resulting jockeying for power led to conflict and political violence. Next came military dictatorships, which were justified on the grounds that national-state identities had to be consolidated and built before democracy could be introduced, because democracy only led to clashes between local ethnic groups. Finally, and most recently, democracy has been restored in countries like Nigeria and Ghana, and yet, once again, political conflict, instability and in some cases violence (especially in Nigeria) have resulted between ethnic groups. From this story, what lessons emerge?

First, it is clear that the three distinct themes that I have addressed in this part of the paper, namely, multiculturalism, post-colonial dualism, and challenges of democracies emerging from periods of military dictatorship, are all, in Nigeria and Ghana, closely intertwined. They are not separate but closely related issues. They represent different aspects of a common phenomenon, and our legal-theoretical responses should (it may be argued) be global in nature.

Second, in terms of looking forward, what is the solution? Here, Ukoha Ukiwo, argues:

> This article adopts an analytical framework that holds that the interface between ethnicity and democratization is found in absence of effective citizenship and good governance in post-transition societies. In the circumstance that democracy does not go beyond the conduct of multiparty elections to include improvement in the quality of life of the people, there is frustration, and people who already feel alienated from the state are vulnerable and likely to be mobilized around counter-elites who exploit extant popular alienation from the state by whipping up sectarian sentiments.[1]

In other words, the tension between democracy and ethnic violence is exacerbated, if not caused by, failure by states to provide a just socio-economic context for peoples' lives. The solution to multicultural tension is not military dictatorship, but "effective citizenship and good governance". The problem in Nigeria, Ukoha Ukiwo argues, is that the state is still seen as a partisan participant within the political struggle for resources, not as a "neutral ground to mediate conflict" between different classes or groups.[2] He quotes a 2001 survey in which more than half of Nigerians stated that they did not view the 1999 Constitution as reflecting the nation's values and aspirations.[3] Having no trust in central or state political institutions, people turn to local ethnic groups for support and to further their ambitions, and political violence becomes more likely.

Two interesting conclusions could be drawn from this analysis. First, one could argue that there is a legal side to the author's political argument (which he does not address directly). If we accept his basic premise, that good governance, effective citizenship and neutral state institutions are necessary to address post-colonial and post-military regimes in Africa, then, surely, central to this project is the establishment of the rule of law and a very robust conception of constitutionalism, an approach to law that embraces the value of equal citizenship as inherent within the very idea of legality. Second, if it is true that citizens in post-military regimes like Nigeria do not accept the written Constitution as reflecting their values, then, aside from a process of re-writing the Constitution, which could simply breed more tension and hostility, the main way forward is to bridge the gap between values and supreme law through the adoption of the sort of interpretive approach to constitutional law that this paper offers. In short, the three problems I have addressed in this section of the paper, multiculturalism, post-colonialism, and democratic transitionalism, are all reasons *for*, not against, the adoption of the sort of theory of constitutional interpretation.

3. The Idea of Law (Constitution) with Moral Resources

The effectively deal with these problems discussed above, a certain sense of a constitution must be adhered to in these states. Constitutions must be taken seriously to have moral resources for the welfare of citizens. In this section, we take on some legal theorists in a bid to understand law (constitution) as an inspirational moral ideal for the states understudy. Following the footprints of Dworkin, Dyzenhaus reminds us that "if one takes the function of law to be to provide a framework of rules of sufficiently determinate content such that legal subjects are able to plan their lives securely, then the function is undermined on those occasions when it is not clear what the law requires of the subject".[4] If our conception of law is much broader than provided for in the written text (Constitution or Statute), a broader function of law that can diminish the short-sightedness of this settled written law is also achieved. Thus a decision in response to a legal question arising due to a gap in the explicit or written law of the legal system, would not take "place in a legal void"[5]. In part, such a conception of law finds limited support in Fuller's internal morality of law, where judges will aspire to realise principles of internal morality of law and to rely on them to settle legal questions.

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[1] Ibid at p. 120
[2] Ibid at p. 129
[3] Ibid at p. 131
[4] David Dyzenhaus, *The Constitution of Law: Legality in a Time of Emergency*(Cambridge University Press, 2006) at 61
[5] Ibid

Dworkin understands this to mean that legal norms applicable to legal questions in a common law legal order are not found solely in the rules stated in the explicit law, such that in the event of that explicit rules fail to provide clear answers judges must exercise unrestrained discretion to create new law. Rather, in such situations the judge will discover that the broader view of law, as law as integrity, provides principled responses to the legal questions which in Dworkin's view portray law in the best moral light.[1] It thus requires a thicker conception of law that extends its ambit to the best justifiable moral values not explicitly recorded in the determinate content of positive law but which are essential to human wellbeing within the legal system. This is important if we need to avoid what Dyzenhaus terms 'judicial spinelessness' in an event where an answer to a legal question is not directly supported by the explicit law. It also gives law a critical moral resource for evaluating legal responses to legal questions.

Trevor Allan's theory of constitutional justice is based upon a similar conception of law as resting upon moral grounds that speak to the collective good of the society. He claims that if law is to be valid it must be inherently moral, in the sense of being legitimate and commanding respect from the people of the legal system within which it is made; it must serve or promise to serve some moral good without which the wellbeing of the people would be impoverished. Thus the moral propriety of the law has some justification in its ability to serve the common good. Allan's defence of this idea is that the legality of law should depend on a defensible view of the common good. Law must thus conform to certain standards of justice as are essential to the common good or collective wellbeing and individual dignity.[2]He thinks that these are intrinsic features of the law and they are fundamentally legal values that a law must be attuned to even if it may for certain purposes be plausibly defined as the content of any rule whose validity is affirmed by reference to some morally neutral and purely empirical test or criteria.[3]

On this account, an initial identification of law and its concrete interpretation in seeking justice and the common good as constitutional ideals are to be affected by the moral aspirations of the legal order.[4] There is thus no basis in reason to seek a rigid distinction between the moral aspirations of the legal system and its laws as positivists generally seek to do. Casting Fuller's definition of law as one that seeks to make sense of people's moral obligation of obedience, Allan reasons that the legal validity of a law must depend on its moral legitimacy, which purpose is to enhance the individual dignity and the collective wellbeing. He says that the state's legal demands on the citizen are to be understood as making an appeal to the general good. The moral justification of law must thus be a precondition of its obligatory force and the citizens' moral judgment should be inextricably engaged in the identification of law.[5]

The moral legitimacy of law as argued for by Allan is not however, to be equated with the view that every individual in the state should always agree with the content of the law before rendering his/her obedience. That is far from the morally defensible view of the law that Allan seeks to proffer, otherwise he may reasonably be understood as advocating anarchy where everyone's conception of the law is correct. The core of Allan's argument lies in the collective good, to which the individual is a part and which forms the moral basis in reason for the obedience. In fact, this does not preclude occasional individual moral disagreements with the law, but a morally defensible common good must constitute the foundation for both the identification and concrete interpretation of the law.

It is then obvious that judges who are called upon to exercise their judicial power in the interpretation and enforcement of a particular law must reason along those lines that law is nothing but an expression of the moral postulates of the common good and the preservation of individual dignity. Equally, legal questions that cannot be answered by an explicit law where there is a gap in the law, Allan's common good can easily square with Dworkin's theory of law as integrity where the judge is under a duty in principle to interpret the law in such a manner as to render to the legal order the morally best results. Allan's concern is that the moral force of law must be coextensive with its grounds[6] and law must be consistent with the shared moral and political assumptions that underpin the legal system.[7]

Allan Trevor clearly disagrees with legal positivists by suggesting that law must both claim and possess moral legitimacy. Allan's notion of law as the moral ideal of the collective good is reflected in Tremblay's conception of law as justice, a fundamentally moral precept that must define the validity and content of positive law. Tremblay sees his theory of the idealtype of law as superior to positive law. It is the ultimate practical reason internal to the process of adjudication and represents a logical precedence of law over legislation and

[1] Ibid at 62. Dworkin, *Law's Empire*
[2] Allan T.R.S., *Constitutional Justice: A Liberal Theory of the Rule of Law* at 5
[3] Ibid at 6
[4] Ibid at 71
[5] Ibid at 75
[6] Allan ,T.R.S, Justice and Fairness in Law's Empire (1993) Cambridge Law Journal 64 at 82-6
[7] Allan T.R.S., *Constitutional Justice: A Liberal Theory of the Rule of Law at 73*

judicial decisions.[1] It claims a legal norm antecedent to the determination of the validity of a positive legal rule. So the validity and content of positive law depend upon this norm.

Central to this conception is Tremblay's view that law be viewed as one of justice. By justice, Tremblay does not, as this paper also urges, seek to resurrect and follow the Christian theory of natural law which sees God as the foundation of all laws and that all legislation must conform to some eternal morality discoverable by revelation.[2] On the contrary, Tremblay's law as justice is premised on three constitutive principles: the law is formally just, the law is materially just and the law is equitable. By insisting that law is formally just, he means that similar treatment should be given to those who are alike from a particular point of view.[3] To Tremblay, law as formally just supposes the existence of some legal norms for just treatment of cases, consistency and equality before the law. It also implies legal certainty.

But he says formal justice in this narrow sense may be an empty shell if it does not prescribe the relevant criteria for determining the similarity or dissimilarity between cases or the manner in which they should be treated. This, in his view, does nothing to impugn the relevance of formal justice to a legal order if this first principle (formal justice) interrelates with the other two constitutive principles of the idealtype of law. The first of these two principles is that law must be materially just. Tremblay thinks that the material justness of law lies in its content being acceptable as morally just.[4]This allows the judge in the course of adjudication to elaborate a substantive conception of justice as the fundamental postulate of the law. Tremblay does not however think that judges doing this must be ardent disciples of the natural law. Rather, judges would focus on the fundamental moral values of the law.

Like Dworkin, Tremblay reasons that 'for any legal question, the law always supplies one single right answer' – the morally best or acceptable answer. If that must be so, then it must be so because law must also be equitable. With this, Tremblay says clarity of a written legal norm does not mean it sufficiently contemplates all those circumstances in which it must apply in a given case. A reduction of law to this form would lead, he says, to a disregard of the fact that the law must be acceptable as morally just.[5] This requires a proper pruning of the rule enunciated by the norm in order to bring it into conformity with what is morally and materially just. A norm formally applicable can thus be set aside if it fails this test. He is nonetheless quick to observe that law as equitable read in this fashion can disturb legal certainty, but notes that this only holds good if legal certainty is regarded as rigid or absolute.

It might be reasonable to observe that Tremblay has wittingly combined the reasoning inherent in Fuller's internal morality of law and Dworkin law as integrity to propound his theory of law as justice. Of the three constitutive principles, Tremblay is seen adopting Fuller's principles of legality as his first constitutive principle of law as justice. Though he does not go to the extent of numerical prescription, as Fuller did, it is apparent that he does want to get to the core of Fuller's principles of legality. He predicates that objective on the necessity of ensuring legal certainty, consistency and equality before the law. Had he stopped at this level, he would not have advanced the argument past Fuller's internal morality of the law, and he would have been vulnerable to similar criticisms levelled against Fuller. His departure from Fuller's approach marks his association with Dworkin's. Law as justice must also include the fact that it must be materially just and equitable.

It may, however, not be a serious claim to make that that is what Dworkin explicitly said, but it can reasonably be implied that Dworkin's law as integrity points to similar conclusions. Law must be acceptable and morally just and shown in its best moral light in the service of the legal order. Judicial engagement in the interpretation of what counts as a true proposition of law must thus depend on whether or not such propositions not only conform to a certain empirical criteria of what law is but how such propositions can represent the fundamental moral values that are morally just. Tremblay may differ from Dworkin when he says that the ultimate norm that guides judges in the determination of what is morally best is *antecedent* to law and judicial decisions, but conforms to Dworkin's criticism of positivism that there is no room for an unrestrained judicial discretion where law runs out. There are legal principles which guide their decisions even if these principles are not a positive law. Tremblay, who terms this as *antecedent legal norms* unlike Dworkin terminology of *principles,* notes that the end of legal rules does not exhaust legally applicable norms in the resolution of legal disputes. Like Dworkin, the antecedent norms or principles will fill the void and guide the judge in explaining and justifying the law or legal answer in the best morally light.

Following similar ideas as these theorists, Nigel Simmonds, in his book *Law as a Moral Idea*, uses analytical jurisprudence to explore the debates on the nature of law. Like these scholars, Simmonds advances what might be called a version of natural law. He sets out not only to interrogate the positivist conception of law, but to develop a theory of law in which law's validity is contingent upon morality. His position is that law should

[1] Luc B. Tremblay, *The Rule of Law, Justice and Interpretation* (Montreal &Kingston: McGill-Queen's University Press, 1997) at 140
[2] Ibid at 168
[3] Ibid at 169
[4] Ibid at 171
[5] Ibid at 173

be understood as an attempt to realize an archetype of law, an archetype which is a moral ideal embedded in our 'settled intuitions'. Without doubt, those suspicious of moral ideals are not likely to find moral archetypes philosophically acceptable. Yet, if Simmonds is right, we need them in jurisprudence.[1] For Simmonds, law is dependent on our 'settled intuitions' based on our ordinary linguistic and social practices as well as our intuitive sense of how law works in a society. It would indeed appear that this point does not set Simmonds free from the camp of those he seeks to disagree with – Raz, Kramer and Hart. If law is based on these social factors, as mentioned, is he not squarely within the 'social source thesis' of his positivist opponents? The answer is, no, for Simmonds thinks that our settled intuitions reflect two features of law: the mundane view of law and the aspirational view of law, and he emphasises the latter.

Simmonds argues that the mundane view of law (which he disagrees with) only explains conventional rules that govern human conduct, while the aspirational view of law (which he agrees with) relates to justice, the rule of law and the protection of the common good. It is his aspirational view of law that is, for our project, a compelling one. The mundane view of law, as he correctly points out, does not go beyond an Austinian reductivist jurisprudence that sees law as the rules of the powerful. Mere conventional rules that govern human conduct, as the mundane view of law narrowly shows, do not sufficiently justify their normative moral application in a legal system. The aspirational view of law with its internal features, justice, the rule of law and the common good, in contrast, points to a conception of law as an aspirational moral ideal for collective wellbeing.

For Simmonds, if law must be good then it must aspire to an underlying legality or rule of law. He thinks that Fuller's inner morality of law expressed by the eight desiderata best exemplifies this. The value of legality is to set us free from the arbitrary will of the power holders and to act as a normative constraint on law-making, interpretation and enforcement. In his peculiar phrase, legality is an "independence from the power of others".[2] But this is not sufficient to suggest that law must be conceived as a moral ideal. Nor does it explain the justice and common good elements of his law as a moral ideal. If his argument is that the formal or procedural values of legality are sufficient for explaining law's moral character, then Simmonds would not be saying anything different or better from what we read in Fuller's *Morality of Law*. Perhaps one may strain seriously to find him a distinct academic contribution in the world of jurisprudence.

Yet Simmonds does provide reasons to set himself free from such charges. Like Dworkin, Simmonds addresses the situation of the hard or penumbral case. For him, this is the appropriate occasion for the invocation and application of the elements of justice and common good by the judge in interpreting the law. His vision of justice lies in a set of principles which 'apply to all cases with equality and impartiality' and judges in hard case must be guided by their own 'understanding of the value of justice'[3]. This may beg more critical questions than provide a conceptual account of the nature of law: should he be viewed as advocating an open discretion to judges in hard cases, a position Dworkin criticises as dangerous or how different is his definition of justice from Tremblay's conception of law as formally just? Perhaps one may say that his conception of justice as an *equal and impartial application of rules* in all cases looks broader than Tremblay's view on the subject, but the justification of such a position does not travel farther than the inclusion of the term "impartiality". It is probably plausible that Tremblay would cancel this worry by pointing to his more expansive conception of law as materially and morally just. If that is the case, it appears Simmonds has said very little and still has many questions on his hands to address than answers. In fact, equal and impartial application of rules by judges does not explicate the normative content of such rules. A wicked rule which is impartially applied may not be a source of a common good of the people.

However, limited as this position may appear, it would seem that Simmonds bailing point rests on the object and content of law as a moral idea. His objective is to conceive law as that normative rule which 'represents the only possible set of conditions within which one can live in community with others while enjoying some domain of entitlement that is secure from the power of others'[4]. While this does not set up "everybody for himself, God for us all" system, it does contemplate a constitutional scheme of governance where the normative value of law depends upon individual as well as collective wellbeing of the people. In such a legal system, Simmonds suggests that law "is intelligible only if we grasp the way in which it is bound up with guidance of conduct by norms: laws are intended to *prescribe* our conduct, the statements about legal rights and duties, draw conclusions about what *ought* to be done, or what is justified, in the light of such prescription"[5].

Clearly he sees law as referable to a moral ideal. He expresses this in his opposition to Hart's rule of recognition: rules as laws "always depends upon more than derivability from a basic rule of recognition. It

[1] Patrick Capps, *Review of Nigel Simmonds "Law as a Moral Iea" (2008) 28* Legal Studies *631*
[2] Nigel Simmonds *Law as a Moral Idea(*Oxford: Oxford University Press, 2007) at 152
[3] Nigel Simmonds *Law as a Moral Idea(*Oxford: Oxford University Press, 2007) 197
[4] Ibid at 143
[5] Ibid at 119. See also McIlroy, David H. *Review of Nigel Simmonds "Law as a Moral Idea".* (2008) 124 *Law Quarterly Review 339*

depends upon the approximation of the system of rules to an abstract idea of law"[1]. It would seem as true that a law which departs from the "settled moral understandings"[2] of people as to affect the moral and legal entitlements of the individual as well as the people's common good would de be denied validity. The law that must guide human conduct must aim at preserving individual dignity and happiness and the collective wellbeing. This suggests a kind of moral test for law's content as well as its processes. The validity of law will thus depend on its moral property to protect human freedom from others, yet also its ability to maintain the common good that holds the state together.

4. The Idealtype: Judicial Interpretation of Law (Constitution) as an Inspirational Moral Ideal

Our selective reliance on Allan, Dworkin, Fuller, Tremblay, Dyzenhaus and Simmonds, as shown above, to make the point that the written constitutions of Ghana and Nigeria be interpreted as a law for the aspirational moral collective good of the people, does not end the debate. We must still show why that should be the case in these countries. Thus having made this point, it is vital to return to and confront the series of questions that should form the subject of this paper. Here, I argue that common principle of constitutional interpretation is necessary for law in these states to have a fidelity because three peculiar characteristics of these states. Thus there is the need for a unified theory of law that will discipline judicial duty with respect to constitutional interpretation in order for the constitutions to serve the people and not the other way round. The justification rests in trilogy of problems below:

- Multicultural strings of the states
- post-colonial dualism traits of the states
- transitional democracy premise of the states

In fact, the concept of idealtype has been part of many disciplines of learning. Tremblay traces its roots to social theory. But what does it mean? According to Tremblay, "it is a rational, coherent and abstract mental representation of a thing (for example, social phenomena) which appears in a confused and incoherent form in the world".[3] It is represented by the constitutive features of what it purports to construct. But Tremblay does not think that the idealtype is necessarily the "moral" or an exemplification of the "true" reality.

To him, quoting Max Weber, it is formed by "onesided *accentuation* of one or more points of view and by the synthesis of a great many diffuse, discreet…*concrete individual* phenomena"[4]. This is not to say that Tremblay and Weber had the same concept of analysis in mind. Tremblay acknowledges that the Weberian idealtype in sociology is a means of understanding human actions and institutions and how these interrelate. Yet Tremblay does not see any good reason to confine the idealtype to these purposes. To him, the "idealtype is best seen as a tool for understanding in a clear and pragmatic way the various ideas, concepts or beliefs that govern human conducts, practices, and discourses that are more or less clearly defined, articulated, or rigorously understood by those whose actions and discourses are consciously determined and constituted by them".[5] Accordingly, it can be used to clarify and describe a body of ideas or concepts which may make sense of the various features of law.

Similarly, it would seem that a conception of law can be a composite of varied ideas or beliefs but which can be brought together as a fundamental body of beliefs and ideas that judges can rely on in the course of interpretation in order to make sense of the law in a legal system. As judges concern themselves with the meaning of the legal norms, Tremblay does not think it wrong that they determine such normative meaning in accordance with a number of idealtypes.[6] That is, judges can depend on both the written constitution and a sense of law as an inspirational moral ideal as the the basis and sources of adjudication. Surely, this may look problematic at least on one account. Indeed, it is true that constitutional supremacy represents a certain conception of law which imparts upon legal reasoning. Positivist judges will normally say that anything that is not supported by the written text is not law. Accordingly legal validity of a norm entirely depends on the written constitution. It is thus obvious that a suggestion that a certain unwritten moral ideal as law be part of the ideals in understanding a written constitution will not have a place in such a framework of legal reasoning. Why should judges rely on rules that are unwritten to impugn written rules of law, the question would fairly be asked?

The difficulty here, I suggest, is not only one of the "writteness" of the constitution or the fact that it has been declared the supreme law of the land, but also the conception of law that says that unwritten fundamental rules will not count in determining the content and validity of legal norms. I concede that the written constitution is important for purpose of certainty in governance, but seek to argue that it is not exhaustive of the legal norms or the fundamental basis for determining the content and validity of law in a legal system such as Ghana and Nigeria. To the extent that they add quality to law and enrich the moral content of law, judges must consider a

[1] Ibid at 130
[2] Ibid at 190
[3] Luc B. Tremblay, *The Rule of Law, Justice and Interpretation* (Montreal &Kingston: McGill-Queen's University Press, 1997) at 137
[4] Ibid
[5] ibid
[6] Ibid at 138. He relied on Dixon to make this point. Dixon, The Law and the Constitution 51 (1935) Law Quarterly Review 590

conception of law in these legal systems as the idealtypes that incorporate the fundamental principles of the unwritten law into the body of the constitutional law that governs. An account of law as an aspirational moral idea is enhanced by such incorporation.

The importance of the written text is manifested in a conception of law that ensures that it exemplifies those fundamental values of the people that make sense of their collective wellbeing. Rigid focus on the framers intentions may displace the vital role played by the unwritten fundamental law in shaping the constitutions as that body of values capable of protecting individual dignity and providing, sustaining and enhancing the collective wellbeing or moral good of the citizens. The idealtype of law would thus be constitutive of principles of the fundamental principles of the unwritten law and such principles as expressed in the constitution the enforcement of which enhances the common good.

The object of law as an inspirational moral ideal does not necessarily contradict Allan, Dworkin and Tremblay. Repugnancy, reason, justice and custom as the defining elements of law as an inspirational ideal may not be the explicit law in a given state, but are nonetheless the foundation to all enacted laws. Their service to the legal order lies in controlling both executive and legislative arms of government from making rules or laws that do not advance the collective wellbeing of the people. Its principles of moral and ethical precepts define law as an aspirational moral ideal for the common good. Their status and role do not change even if one's focus is on a written constitution which declares itself as the supreme law of the land. The legal superiority of the constitution is not merely to be explained by its written character or the self-declaration that it is supreme. Rather, its superiority is justified in the morally acceptable content it provides for the collective wellbeing of the people. A judge may thus accept the declaration that it is supreme yet interpret its provisions with the notion of the fundamental law in order to render the constitution as the best emblem of the aspirational moral ideal of the state.

In spite of the written constitutions, law as inspirational moral ideal can serve as anchoring foundational principles of these constitutions. They will serve to unite the enduring values of the past and current "practices, expectation and necessities".[1] If this dominates the constitutional imagination of transitional democracies like Ghana and Nigeria, a more plausible foundation is laid for judges to "speak to the law" without necessarily being seen as its "architects".[2] That is, the law as inspirational moral ideal and its immutable principles of liberty, non-repugnancy, reason and justice, shall not depart from the constitutions of these countries. Despite its historical English roots, it is capable of useful and sustainable local expression founded on justice, human happiness and the collective wellbeing, ends which law should seek to promote and maintain.

The political and social anxieties confronting these transitional democracies are not distinct in character and scope from those that occasioned the emergence of the immutable principles of the fundamental law (an idea very similar to ours) in feudal and medieval Europe. Substantive equality, justice, human dignity and human welfare are as important in their modern context as they were in their distant past. It is not a coincidence that fundamental law discourse emerged at its strongest in England during the 17th century, when England itself was, in today's terms, in a "transitional" state from absolutism to constitutionalism. History and geography though important, do not sufficiently preclude a firm understanding of the realities of these anxieties faced by emerging democracies in Africa.

Current interstices of constitutional discourses should thus focus on attempts to diminish the effects of these apprehensions.[3] There is a supreme gift in conceiving the constitutions in these countries as containing a core of values both explicit in the written text and those external, attainable through the application of the principles of the fundamental law of reason and justice. In that case, we should be suspicious of grand narratives of law that suggest that law is merely what is posited by lawmakers who follow some preordained or officially accepted rules regardless of its moral propriety.[4] If law does not serve humanity, then it better not disserve, but as we cannot live without law, unless we desire a return to the Hobbesian state of nature, so must we have law that will serve. Such a service must have a notion of reason and justice and pass a test of morality.

This demands a broader liberal view about the nature of law in a modern state and to impugn the known rigidity of positivism account of law as determinate propositions achieved through accepted official criteria. The virtues of law as inspirational moral ideal must mediate just not in the construction and interpretation of constitutions in Ghana and Nigeria, but the conception of the valuableness of ordinary laws in expressing norms of human dignity and welfare and justice. The force and persistence of such values must be shown in these legal systems as foundational ideas that protect individuals' rights and freedoms[5] from the mundane whims of politicians and to distinguish our enduring values from temporary premonitions of leaders controlled by other less compelling considerations.

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[1] P. Selznick, *The Moral Commonwealth: Social Theory and the Promise of Continuity* (Berkley: University of California Press, 1992) at 450
[2] F. Pollock, The Continuity of the Common Law 11 (1898) Harvard Law Review 423 at 433
[3] Tracy Robinson, Gender, Nation and the Common Law Constitution 28 (2008) *Oxford Journal of Legal Studies* 735-76
[4] Ibid
[5] Ibid

5. Conclusion

A constitution mirrors the hopes of a state. It is a reflection of the aspirations of the people whose obedience is required of it. Therefore, judicial duty in such a state in constructing the provisions of the constitution as law must take seriously the expectation of the people as having the constitution as reflection of such hopes and aspirations. Though this is not easily achieved as there might be some hurdles as seen in the cases of Ghana and Nigeria: multiculturalism, colonial and post-colonial dualism and transitional democratic premise, a certain judicial temperament is required. In addition, an idea of law as an aspirational moral ideal should form the guiding principle of judicial interpretation of the constitution. This will allow the constitutions to have some fidelity to the people.

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