CORRESPONDENCE

To the Editor,
The Journal of African Law

Sir,

I would be grateful if you would give me space to reply to Mr. Read's letter published in your issue, Vol. II, No. 3, 1958.

I am only too pleased to accept Mr. Read's proposition that native custom should be considered to be law in the context of traditional African society. Furthermore I would be quite prepared for the building up of a system of case law founded on native court cases, were it not for a fundamental difficulty which is ever present in a country like Ghana. Native court decisions are founded essentially on agreement between the parties to a suit within a given social structure, as opposed to our concept of law being founded upon judicial precedent, and, as there is present the right of appeal from the native courts to the British type court, there can be, it is suggested, no other approach to the question as to what is law than the one ordinarily recognised by such courts. That is to say, as is pointed out in my article in your issue, Vol. II, No. 2, 1958, p. 101, native custom cannot be considered to be law *per se*. Because of this right of appeal to a British-type court it is merely academic speculation to argue that the native custom as propounded by the native courts can be deemed to be law. I do not think therefore that, as Mr. Read suggests, any unfortunate result ensues from the attempt to force African customary law into the method of the English legal system. Certainty in the law is always an essential. I agree that there is an urgency to develop the African law and that, due to the paucity of material, the courts have on occasion fallen into error. I do not feel however that anything is served by accepting, as law, court decisions based on a different jurisprudential approach to that held by the appellate courts.

I feel that the answer lies in the suggestion put before the course held at the School of Oriental & African Studies in June, 1959, that there should be a restatement of African custom. This should rest on field investigation and the sociological background, which would incorporate African and superior court decisions, and which would be considered by a local panel representing the traditional customary law authorities before being reduced to final written form. The suggestion then continues: " It is suggested that the restatement would be semi-official in character. It would not be a code, but a record of customary law for a particular locality; it would be prima facie evidence of the custom; and the burden of proof would be on any person wishing to show that the customary law differed—for any reason—from the law as restated . . . with the passage of time the restatement would acquire increasing authority

when supported by judicial decision. It would be open to modification by (i) judicial decision (ii) change in practice (iii) resolution of a competent local authority."

Yours truly,

A. St. J. J. Hannigan.

12th July, 1959.
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https://doi.org/10.1017/S0021855300000413 Published online by Cambridge University Press