CORRESPONDENCE

To the Editor,
The Journal of African Law.

Dear Sir,

When Mr. Hannigan presents (in his article on " Native Custom " in your current issue, [1958] J.A.L. 101) " a complete rejection of the idea that Native custom can be treated as being akin to law " he is clearly prepared for others to disagree with him. One is, of course, entitled to use the word " law " just as one likes, but these views would seem to have the practical result of undermining the present emphasis on research in customary law, at least if it is done by lawyers.

There is little doubt, he says, " that the courts have rejected any idea of Native law as being law '*per se*'." This remarkable view is not supported by the Gold Coast cases he cites. It stems from the definition of law which he quotes, with its reference to " the judicial tribunals of the State ". These, for Mr. Hannigan, appear to be merely the English-type courts of magistrates and High Court Judges. Hence any rules which they do not directly administer are not " law " within his definition. But in fact the customary or traditional African courts are themselves " judicial tribunals of the State "—not merely, and obviously, of the traditional African State in question, but also, because of Indirect Rule, of the British and post-British territories. The fact that African customary law is not within the jurisdiction of the superior courts by no means proves that it is not law *stricto sensu*.

Mr. Hannigan points out that " Native custom ", as he prefers to call it, is treated by the superior courts in many ways similar to conventional custom in the courts of England (although it is surely pedantic to discuss whether the test of immemorial antiquity in the English sense should apply—and this notwithstanding *Welbeck* v. *Brown*). But it is not a logical deduction that because XYZ are characteristics of A and of B that A and B are necessarily the same.

It is on his assertion that there is a " sense of implied agreement " that Mr. Hannigan really rests his assimilation of " Native custom " to " conventional custom ". He indicates the " assent of the community to a given custom " which is required for the courts to accept it. But is it really this assent which gives force to the custom, even as a " custom " ? A conventional custom would not exist at all if the parties had not agreed to adopt it, even though only by implication. But surely a " native custom " may exist, for example, because a Native court had so decided, even if the parties did not agree with the decision; or because the rule had been promulgated in accordance with the customary legislative

system, even against the views of a large number of the community concerned (Prof. Schapera has described in *A Handbook of Tswana Law and Custom* the legislation, sometimes unpopular, of various Tswana chiefs, e.g., the Sabbatarian rules of Kgama among the Ngwato and Lentswe among the Kgatla, and the prohibition of polygamy among the Ngwaketse).

Is the " general " assent of the community which Mr. Hannigan describes, anything more than the common acceptance of its laws which is found in any non-revolutionary society ? If not, this definition of conventional custom would seem to include all law which receives the general assent of a community. Custom, we are told, is not valid *per se*. Neither then is law itself, says the formidable modern American school of jurisprudence, except as predictions of what the courts will do in fact.

Such views are a new indication of the unfortunate results of attempting to force African customary law into the inappropriate mould of English legal structure and terminology, and re-emphasise the urgency of evolving a synthesis of new " African law " which will preserve what is good in the old with what is most appropriate in the " new " English law which has been introduced. Meanwhile, there is no reason to regard " Native custom " as anything other than law *proprio vigore* in the context of traditional African society.

Yours truly,

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October 20th, 1958.
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