

The Role and Future of Customary Tort Law in Ghana: A Cross-Cultural Perspective

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Good morning. Our paper is on the role and future of customary tort law in Ghana. I'll begin by telling you a bit about customary tort law in Ghana and how it relates to the tort law with which most of you are so familiar. Then I'll turn it over to my co-author, Dominic Dagbanja. Dominic is a Ghanaian lawyer. As the only participant who is writing not about her own legal system, I feel obliged to give some background on this project. This topic began to interest me when my Ghanaian colleague, Kojo Yelapaala, suggested that it ought to be included in *Global Issues in Tort Law*, a small book by Paul Hayden and me that is designed to introduce U.S. law students to topics of international and comparative tort law. Dominic, who was then practicing as a barrister in Ghana, assisted in obtaining relevant cases and materials, and there is a short section on this topic in the book. When the AALS' call for papers went out, it was an opportunity to explore this topic in much greater depth. Dominic had then completed an LL.M. at Pacific McGeorge, was commencing another at The George Washington University, and was willing and eager to collaborate. He will talk about the legal status of customary law in Ghana and its future.

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As many of you know, Ghana is a country in West Africa. There are at least 46 distinct ethnic groups within Ghana, and just as much language diversity. The country was first visited by the Dutch and Portuguese and ultimately colonized by the British. It spent 140 or so years as a British colony, gaining independence in 1957. Today, its official language is English, making Ghana law and legal scholarship very accessible for research purposes.

As in most of Africa, the law prior to colonization was exclusively customary law. Customary law is a set of established norms, practices and usages derived from the lives of people. Given the ethnic diversity within Ghana, there were and are many different sets of customary practices and laws. These practices, lived by the people and administered through the institution of chieftaincy, provided a means of maintaining social order and retaining the society's collective character. The British tolerated customary law to a point under the colonial system. It applied unless it was deemed "repugnant to natural justice, equity and good conscience." The repugnancy clause, in addition to certain other characteristics of colonial law, weakened the stature of customary law, but did not destroy it. Upon independence, in 1957, Ghanaians set about to develop a legal system that preserved and respected customary law. They retained English common law and statutes, but also the rules of customary law applicable to particular communities in Ghana. Any Ghanaians who wish to have their dispute governed by customary law may choose to have the case decided under its principles. Thus, in Ghana today, there is a robust common law, statutory law, and, as part of the common law, there is customary law.

The focus of our research is examining Ghanaian customary torts with a goal of understanding their meaning and purpose within Ghanaian society, contrasting them in the process with U.S. torts that address similar injuries, and finally, thinking about the future of Ghanaian customary tort law in a society that is increasingly modernized, and in the process, changing in many different ways. The customary torts we examine in greatest detail are dignitary or family torts. There is a marked contrast between the U.S., and for that matter, the Ghanaian common law approach to the topics, and their treatment under customary law principles.

Ghanaian customary tort law is very receptive to claims of verbal insult. Sometimes the claims are referred to as slander, but there is no requirement that they be false, factual or even believable. There are many examples. Courts have held that calling someone “a useless fool,” “crazy”, a “slave”, a witch, or “a useless lawyer” is an actionable tort. There is no “slander”-like requirement that special damages be proven, nor are there very technical rules to sort the claims. Unlike our limitations on actions for emotional distress, there are no harm thresholds such as “severe injury” or “physical manifestations”. The notion so deeply engrained in U.S. law that mere insults are not actionable is utterly foreign to Ghanaian customary tort law. The fact that the received English common law, like U.S. law, would not provide a remedy for some of these abuses has been viewed as irrelevant, at least by some Ghanaian judges. Many years ago, J.B. Danquah, in a book on Cases in Akan Law expressed the view that the English sense of dignity and respect for feelings was blunted and atrophied, as compared to the feelings of the ordinary Ghanaian.

The reason for this particular aspect of customary tort law, like many other rules of customary tort, is explained by the purpose that customary law serves within Ghanaian culture and society. African societies have a collective focus that Western society does not, and in Ghana, the family, in its extended form, is the unit around which social organization pivots. Many words that we westerners would view as insults easily dismissed and forgotten are viewed in Ghana as indictments of one's family and, if believed or circulated, they could negatively impact the social structure within a region. They might trigger warfare between groups, or a feud that has the potential to destabilize a region. What is said about an individual reflects on the family; whether it is an implication that the family is not of good lineage, not who they represent themselves to be, or of a bad character, any of it could be destructive and destabilizing. Disputes based on violations of customary law enlist the time and authority of chiefs and judges in a private law system that traditionally supplants criminal penalties. It provides a system of dispute resolution that takes the offense seriously, and invests effort to restore harmony to the groups and individuals in conflict.

Ghanaian customary law also recognizes the tort of seduction, whereas in most U.S. courts, this type of theory, whether called criminal conversation or alienation of affection, has been judicially or legislatively abolished. Our justification for abolition in our system is that recognition of such matters brings the government into bedrooms in an unwarranted matter, or that these torts are fodder for blackmail and manipulation in an age of no-fault divorce. In Ghana, seduction is an interruption of a relationship between family groups – with potentially devastating stigma, financial loss, and a breach of harmony. The action is recognized in favor of the parent of the seduced child. The

occurrence of a seduction speaks to a breach of the collective responsibility to raise children observant of custom and responsive to traditional values. The defendant is undermining the institution of family and the authority of parents and elders on which society is based. Customary rules also impose liability on a father when his son has engaged in sexual dalliances with a woman and commits a tort of seduction. The father has the obligation to raise the money to arrange for the marriage of a son who is of legal age to marry, and if the father has not done so, the father is answerable for moral shortcomings of the child. We in the U.S., of course, broadly reject most forms of parental liability for wrongdoings of children.

As a lawyer and law professor schooled in U.S. tort law, some of these principles seemed at first more curious than anything else. But upon further reflection, they provide fascinating insights into many questions that we grapple with constantly, and they give different answers. Seemingly small injuries are taken seriously, and time is invested to heal the breach of peace and harmony. The rules have developed to reinforce a different value system, and a societal structure that has served Ghanaians well for centuries prior to the colonization by the British.

But just as in the United States, tort law has changed over time to eliminate traditional causes of action in the interests of greater societal good, the question is whether customary tort will survive urbanization and globalization. Ghanaians have the choice to invoke common law causes of actions and remedies; in some instances, these remedies might be superior to customary law, while in other instances they clearly would not. As Ghanaians leave their traditional ethnic regions, will they find customary principles continue to be relevant to their lives? Will they be able to retain the knowledge

and understanding of these principles necessary to legitimate them? Will they come to see them as anachronistic, or sexist? These are the questions we have been considering, and I turn to Dominic to provide some of our thinking.

Dominic N. Dagbanja, Esq.

I would like to thank Professor Ellen M. Bublick for facilitating my participation in the Conference.

My presentation is on the future of customary tort law in Ghana. I will focus on the legal status of customary law in Ghana and its place and future in the social structure of Ghana generally. The reason for this approach is that, customary tort law in Ghana will be better understood and appreciated within the general normative structure in which it exists and functions.

Many social, cultural, institutional and legal factors will likely influence the future of customary tort law in Ghana. The Constitution of the Republic of Ghana, 1992 includes the rules of customary law as part of the laws of Ghana. Thus customary law, generally, has the same status as other sources of law in Ghana.

The Constitution of Ghana does more than stipulate customary law as a source of law in Ghana. The Constitution also underscores the importance of traditional and indigenous norms by obligating the State to take steps to encourage the integration of appropriate customary values into the fabric of national life. Other provisions speak to the obligation of the State to foster development of Ghanaian languages and pride in Ghanaian culture, as well as to ensure that appropriate customary and cultural values are adapted and developed as an integral part of the needs of society. The institution of Chieftaincy, consisting of traditional rulers of the various ethnic groups, is protected by

the Constitution. The National and Regional Houses of Chiefs are also charged with the study, interpretation and possible codification of customary law, with a view to evolving a unified system of rules and compiling the customary laws and evaluating those customs and usages that are outmoded and socially harmful.

The Constitution also provides that customary practices which dehumanize or are injurious to the physical and mental well-being of a person are prohibited. This provision is a standard for determining the legal validity of customary practices that are alleged to have fallen afoul with this constitutional provision. Therefore, the continued application of some customary practices may be based on their constitutionality.

Notwithstanding the protection and affirmative support that Ghana law gives to customary law, Ghanaian judges seem to disagree both as to the scope of their roles in deciding whether to enforce customary law and as to the merits of whether to uphold certain customary practices. There have been a number of cases where Ghanaian judges have criticized customary tort principles. In one of the most famous cases, one judge was critical of the customary tort of slander, and indicated that it was time that the law was changed. The Judge thought that in light of the drastic changes brought by modern civilization, the law in Ghana had more serious problems to tackle than idle insults. In contrast, other judges have held that in Ghana where words of abuse are taken seriously, it would be socially intolerable if customary law provided no sanctions against a person who finds pleasure in injuring the feelings of others.

Ghanaian judges, then, have shown a willingness to rethink and reevaluate issues of customary law despite the support it finds in the Constitution of Ghana and have declared that a number of customary law practices unenforceable.

Ghanaian citizens may be the ones with the most influence over the application of customary tort law in the future. Its future depends on the desire of citizens to invoke its protections and embrace its values. The prevailing religions in Ghana may influence what people perceive as offensive and whether they seek to recover for it. Further as Ghanaians attend school and attain higher education, they may reject traditional Ghanaian practices and in the process, the customary law tradition. This is particularly so as most Ghanaian educated men and women tend to be Christian or Moslem. It may also be that changes in the structure of society will fragment customary practice. Although the institution of Chieftaincy is still vibrant, there may come a time when even the Chiefs cannot give a good reason why a rule is in place, and if this is so, people may not be willing to follow it.

In conclusion, the constitutional legal infrastructure is highly protective and affirmatively supportive of customary law. This legal structure ensures customary law a significant role in Ghanaian society for as long as Ghanaians continue to want it. Thus, its future will depend on whether Ghanaians will continue to seek recovery using customary tort law rather than availing themselves of common law torts and whether courts will give effect to the customary practices. The future of customary tort law then will remain largely subject to these social, cultural, legal and institutional factors.