Promoting Rule of Law in Customary Tribunals in Ghana

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Introduction

In 2005, the United Nations Development Programme (UNDP) established the Commission on the Legal Empowerment of the Poor to examine the link between exclusion, poverty and the law.3 Following three years of research, the Commission issued a report identifying four “pillars” of legal empowerment deemed crucial to allow the poor to become active partners in development programs.4 The first pillar was rule of law and access to justice.5 More recent studies have found that in some developing countries up to 80% of disputes are resolved through customary justice systems rather than the formal or state legal system.6 In sub-Saharan Africa, it is estimated that customary law governs the lives of more than 75% of the population who may have little knowledge of or access to formal state law.7 In particular, for rural and other marginalized communities without the physical, financial or educational means to access formal state systems, customary justice systems provide the only available system of justice, notwithstanding the well-documented problems with such systems, such as discriminatory treatment of women and violations of other international human rights norms.8 Given this reliance on customary systems of justice, there is both a need and an opportunity to improve the quality of justice in many developing countries by working to promote rule of law within these customary law systems.

This article discusses one effort to promote the rule of law within the customary or traditional court system in Ghana. Fordham Law School’s International Law and

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2 Deputy Campaign Manager, Rashida Tlaib for State Senate, Detroit, Michigan.
4 Id. at 31.
5 Id. The other three included property rights, labor rights and business rights. The Commission ceased to exist after publishing its final report but the Commission’s findings became part of UNDP’s Initiative on Legal Empowerment of the Poor, which focuses on four key “livelihood rights” that mirror the Commission’s four pillars. See Initiative on Legal Development of the Poor, UNDP.org, http://www.undp.org/legalempowerment.
7 Ubink & van Rooij, supra note 6 at 8.
Development in Africa (ILDA) Clinic partnered with Kwame Nkrumah University in Science and Technology (KNUST) in Ghana on a project to record and publish online the decisions of the highest customary law tribunals among the Ashanti, the largest ethnic group in Ghana. Publishing customary law decisions is intended to promote transparency and accountability in the traditional authorities’ decision-making and to allow for clarity and consistency in the substance of the relevant customary law. The success of the project will be determined by whether the online database of caselaw is updated, accessed and utilized moving forward.

**Background**

*The Nature of Customary Law*

Customary law may be defined as “a normative order observed by a population, having been formed by regular social behavior and the development of an accompanying sense of obligation.” Once the sole source of law in pre-colonial sub-Saharan Africa, customary law has now been largely subordinated to domestic constitutional law, statutory law and common law. Nonetheless, customary law continues to regulate family law matters, traditional authority, property rights and succession in many countries. Even where there is contradictory domestic statutory law, customary law is often still applied due to long-standing social practices and community expectations as well as a lack of knowledge of or access to the formal legal system.

While customary law continues to have a wide reach, it presents difficulties in terms of ascertaining the substantive content of the law given that it remains largely uncodified, differs for each of the more than 800 ethnic groups in Africa, and...
continuously adapts and changes as a community changes. Since customary law derives its authority from adherence to particular norms in a community, customary norms that are no longer observed by a community are no longer part of the customary law for that community. This further complicates the effort to ascertain the content of the law, however, for it cannot be determined solely by reference to a written act or court decision but must be verified by ongoing observance by the relevant community. This has also led to a divergence between “official customary law” as determined by formal court decisions, written codes, and other written documents and “living customary law,” ascertained from the unwritten practices observed by the members of a particular community. Moreover, in practice, the content of customary law is often contested by members of a particular ethnic group who have conflicting interests or claims at stake.

In communities governed by customary law, rights and responsibilities are largely determined based on gender, kinship, age, and birth order. The disparate treatment afforded men and women under such systems has been well documented and often criticized. Customary law systems are also criticized for perpetuating existing social hierarchies and power structures within a community that disadvantage the poor and other marginalized groups.

Customary Law and Traditional Institutions in Ghana

Ghana has a pluralist legal system, inherited from its colonial past, which consists of both formal or state law and customary laws. The 1992 Constitution formally recognizes this pluralist legal system, identifying the sources of law in Ghana as the Constitution, enactments of Parliament, rules and regulations made under a power conferred by the Constitution, laws in existence immediately before the coming

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16 Oba, supra note 14, at 60; Woodman, supra note 10, at 15.
19 Woodman, supra note 10, at 12–13; NUKUNYA, supra note 9, at ch. 2.
21 Woodman, supra note 10, at 12–13; Ubink & van Rooij, supra note 6, at 5–6.
into force of the Constitution, and common law, which includes rules of customary law.\textsuperscript{22} The Ghanaian Constitution defines customary law as “the rules of law which by custom are applicable to particular communities in Ghana.”\textsuperscript{23}

The Constitution authorizes formal courts to apply both statutory and customary law in resolving disputes.\textsuperscript{24} According to the Courts Act of 1993, customary law can be applied by state courts as long as the rules meet the requirements of “equity and good conscience” and they are not incompatible with any existing statutory law.\textsuperscript{25} Thus, though customary law is recognized as a legitimate and enforceable source of law, it can be amended by the Constitution and statutes of Ghana, which constitute higher forms of law.\textsuperscript{26}

The Chieftaincy Act of 1971 established institutions and procedures for defining and interpreting rules of customary law, which were further confirmed in the 1992 Constitution.\textsuperscript{27} The Chieftaincy Act authorized the National House of Chiefs (“NHC”) to undertake the progressive study, interpretation and codification of customary law, declare any customary law relating to any subject in any region, and to alter customary law.\textsuperscript{28} It also provided statutory recognition to the Regional House of Chiefs (“RHC”) in each of the ten regions in Ghana and standardized their structure and functioning.\textsuperscript{29} The NHC and each RHC is responsible for appointing a Judiciary Committee, which exercises power to adjudicate issues relating to traditional institutions and affecting traditional communities.\textsuperscript{30} In formal court cases involving customary law issues, these committees may advise judges and correct perceived deficiencies on customary law matters.\textsuperscript{31}

\textsuperscript{24} Richard C. Crook, \textit{Access to Justice and Land Disputes in Ghana’s State Courts: The Litigants’ Perspectives}, 50 Legal Pluralism 1, 3 (2004).
\textsuperscript{25} Courts Act of 1993 (Act No. 459/1993), § 54.
\textsuperscript{26} Statutes have been enacted to address some of the inequalities created by certain customary practices. For example, the Intestate Succession Law of 1985 changed customary law rules relating to intestate succession to create new legal protections for widowed spouses. Christine Dowuona-Hammond, \textit{Women and Inheritance in Ghana, in Women and Law in West Africa: Situational Analysis Of Some Key Issues Affecting Women} (Akua Kuenyehia ed., 1998).
\textsuperscript{28} Chieftaincy Act of 1971 (Act No. 370/1993), § 40. The NHC is currently working with the Ghana Law Reform Commission on a project (ACLP project) to research and codify a unified system of customary law in the country. The project has been ongoing since 2006 and is being supported by the German Development Cooperation (GTZ). \textit{See ACLP Project Goes Through Nationwide Validation}, \textit{Savannah News} (Jan. 24, 2011), http://savannahnewsblogspotcom.blogspot.com/2011/01/aclp-project-goes-through-nationwide.html.
\textsuperscript{29} Chieftaincy Act of 1971 (Act No. 370/1993), § 6.
\textsuperscript{31} \textit{Foster M. Mijiga, National Democratic Institute, The Role of Traditional Leaders in a Democratic Dispensation} 16 (1998).
The Ashanti Traditional Tribunals in Ghana

The Ashanti are the largest sub-group among the Akan, the largest ethnic group in Ghana.\(^{32}\) The highest traditional courts for the Ashanti are the Asanteman Council and the Kumasi traditional Council, both of which are presided over by the Asantehene or King of the Ashanti, currently Osei Tutu II,\(^{33}\) and the the Asantehemaa Court, presided over by the Queen Mother of the Ashanti, currently Nana Afia Kobi Serwaa Ampei.\(^{34}\) The Asanteman Council hears cases related to matters governed by customary law and has jurisdiction over all Ashanti people in Ghana. The Kumasi Traditional Council, which has statutory authority,\(^{35}\) has jurisdiction to hear and determine all matters affecting chieftaincy in the Kumasi Metropolitan Area as well as portions of the Ashanti and Brong Ahafo Regions.\(^{36}\) The Asantehemaa Court hears cases of social and personal conflict involving women, such as matters of curses, insults, accusations of witchcraft or disputes over land use or labor contribution.\(^{37}\) The proceedings of these tribunals are videotaped and some are later transcribed. The public is afforded limited access to these records. Below these three tribunals, paramount chiefs and queen mothers have authority over tribunals in the smaller towns and villages within the Ashanti region.\(^{38}\) Matters that frequently come before local traditional authorities for resolution involve land disputes, conflicts affecting chieftaincy, and family law matters, such as marriage and its dissolution, succession issues and custody matters.\(^{39}\)

The Ascertainment of Customary Law Project

The ILDA Clinic at Fordham Law School promotes a human-rights based approach to development, giving students the opportunity to create and implement projects that foster development by advancing human rights. Past projects have focused on improving education, healthcare, prisoners’ rights and access to justice.\(^{40}\)

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32 *NUKUNYA*, supra note 9, at 33.
33 Interview with Mr. Kofi Badu, Chief of Staff to the Asantehene, in Ghana (Nov. 8, 2011).
36 For an overview of the Kumasi Traditional Council, see *Manhyia Palace,* MANHYAONLINE.ORG, www.manhyiaonline.org.
37 See generally Stoeltje, supra note 34.
38 Interview with Mr. Kofi Badu, supra note 33.
In 2011, the ILDA Clinic, in partnership with faculty and students at KNUST in Ghana, developed a proposal for a project, the Ascertainment of Customary Law ("ACL") Project, to record and publish the decisions of the Asanteman Council, Kumasi Traditional Council and the Asantehemaa Court. The ACL Project anticipated that recording and publishing the decisions of these traditional courts would increase the accessibility of their decisions, benefiting both traditional and formal courts. It was proposed that published decisions could be used by traditional leaders to assure greater uniformity, by lawyers and judges in formal courts to understand and apply customary law, and by the general population to understand what the local laws are and how they will be applied. At the same time, ongoing decisions by the customary tribunals would allow the customary law to continue to change and evolve as the customary practices of Ashanti communities change, thereby avoiding the ossification problems associated with other "official" customary law.

In order to determine the best method for recording and publishing the decisions of the Ashanti traditional courts, students from Fordham Law School and KNUST researched the customary laws and structures in Ghana and the recording and codification of customary law efforts in other African countries. This research culminated in a week long fact-finding mission, during which students and faculty interviewed a number of traditional leaders, state officials and legal practitioners in Ghana. Based on this research, the ACL Project team proposed to record the decisions of the Asanteman Council, the Kumasi Traditional Council and the Asantehemaa Court and upload them to an online database where they could be easily accessed by the public and all interested parties. The Asantehene approved the project and appointed a three-member Committee to work on this with the ACL Project team. The project was implemented over the course of the following eight months.

The ACL Project developed a prototype for recording the decisions, which was based on the format used by South Africa in recording traditional court cases. South Africa continues to recognize traditional or customary courts in addition to formal courts and has a system of law recording for each of these systems. Section 18 of the South African Traditional Courts Bill sets forth the requirements for recording traditional court proceedings. Traditional Courts Bill, art. 18 (2008). According to this
model was used to ensure that each case was transcribed in a simple and uniform format. Each case was assigned key terms that identified its content. A database was created with a search function where the decisions could be uploaded and then easily retrieved based on their content, date of the decision and names of the parties.

The ACL Project then adopted the Kenyan model of using law students to record and publish court decisions. On the days that the Councils sat, KNUST students were able to record current decisions and prepare them for publication. When the tribunals were not in session, the students reviewed and formatted older decisions contained in the archives. The website hosting the database was launched in 2013.

Concluding Observations

To date, the database contains the summaries of 31 of the cases that have come before the highest Ashanti customary tribunals since 2003. The vast majority of the cases included in this database address disputes over customary land and chieftaincy. While a positive step, the volume of decisions that have been transcribed has lagged behind the numbers the ACL Project team originally envisioned. And there has not yet been analysis of the extent to which the recorded decisions have been relied upon or used in active matters before lower customary tribunals, state courts or accessed by any other interested parties.

The project has also highlighted some practical challenges that arise when changes are proposed to established traditional systems. Much of the initiative for the ACL Project has been driven by entities outside the customary system, in particular by law schools in the United States and Ghana. As with many human-rights-based initiatives, there is persistent competition for scarce resources. While the ACL project is not overwhelmingly costly, it still requires dedicated personnel to provide access to the tribunals and videotapes of the proceedings, as well as to maintain the recording process and ensure accurate transcription and indexing. This places demands on local partners with limited resources who are not being compensated for their efforts and who may not have other adequate incentives to prioritize this project over the many other demands on their time. In places with successful case reporting systems, such as South Africa and Kenya, the projects are supported by the domestic governments of each country.

section, a traditional court must record a) the nature of each dispute or charge, b) a summary of the facts of the case and c) the decision of the court, including the sentence, order or sanction of the court. Id.

Despite limited resources, Kenya has created a successful law reporting system at almost every level of its formal court system by using innovative techniques, including utilizing law students to record case decisions, which are then published online. Kenya Law Report: NCLR Home, http://www.kenyalaw.org/klr/index.php.

The online database can be viewed at http://aclrep.org.
Success in changing the system, however modestly, also requires support from those with power within the system. Whether explicit or implicit, stakeholders in the existing system can be expected to have biases in favor of the status quo, or at least against rapid change to the status quo. Even where those at the top of an organization support a given initiative, the success of the initiative will turn ultimately on the cooperation of many throughout the organization, and ensuring adequate communication and collaboration with that constituency is an essential part of a project of this nature that must be carried out over time.

In Ghana, the ACL project has laid the foundation to promote greater access to justice and rule of law within the customary law system of the Ashanti. The long-term success of the project will be determined by whether or not the database of customary decisions continues to be expanded and utilized by traditional authorities within the customary system as well as those operating in the formal legal system.