



2009

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Recommended Citation

Julie A. Davies & Dominic N. Dagbanja, The Role and Future of Customary Tort Law in Ghana: A Cross-Cultural Perspective, 26 *Ariz. J. Int'l & Comp. L.* 303, 303–04 (2009).

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THE ROLE AND FUTURE OF CUSTOMARY TORT LAW IN GHANA: A CROSS-CULTURAL PERSPECTIVE

Julie A. Davies* & Dominic N. Dagbanja**

I. INTRODUCTION

Customary law, a set of established norms, practices, and usages derived from the lives of people,¹ has thrived in Africa, and in Ghana in particular, for as long as anyone can remember. For many Ghanaians, the rules governing topics such as family law and social relations, succession, and certain dignitary torts are as necessary as air yet just as imperceptible. Indeed, customary law is embedded in and inseparable from the fundamental ethos and values of Ghanaian and other African societies. The source of its legal validity is the cultural expression of the particular society where it is practiced. Although under colonial rule customary law was sometimes questioned or even rejected by colonial courts, in modern Ghana it is recognized as part of the laws of the country in the Constitution of the Republic of Ghana (“1992 Constitution”).² Yet Ghana, like many other countries

* Professor of Law, University of the Pacific, McGeorge School of Law. We appreciate the financial support of the University of the Pacific and the insightful and careful research of Daniel Vandekoolwyk, Class of 2010. Professor Kojo Yelapaala suggested that this topic merited study, and a small chapter on it is included in JULIE A. DAVIES & PAUL T. HAYDEN, *GLOBAL ISSUES IN TORT LAW* (2008). We benefitted from the comments and suggestions of Professor Kojo Yelapaala of Pacific-McGeorge and Professor Fatou Kiné Camara, of Université Cheikh Anta Diop de Dakar, Senegal. We are also grateful to the staff of the Library of Congress (at Jefferson and Madison) for their support in the identification of the relevant sources of literature.

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1. There are many efforts to define custom and customary law. According to one source, “[c]ustom in general is essentially the perception of a way to behave and, as a source of law, a common perception of how to behave in accordance with the other members of society Custom is not word or writing; it is gesture.” Jacques Vanderlinden, *What Kind of Law Making in a Global World? The Case of Africa*, 67 *LA. L. REV.* 1043, 1065 (2007). As a customary law expert, A. N. Allott explained that not all custom becomes customary law. Custom is part of the “raw material out of which a customary norm is manufactured.” A. N. ALLOTT, *JUDICIAL AND LEGAL SYSTEMS IN AFRICA* 5 (1962). Some authors prefer different terminology. One author prefers the term “chthonic law.” See H. PATRICK GLENN, *LEGAL TRADITIONS OF THE WORLD* 74–75 (3d ed. 2007). Because the Constitution of the Republic of Ghana refers to customary law, that is the terminology employed here.

2. See GHANA CONST. art. 11(2)–(3).

in Africa, has experienced enormous changes due to globalization³ and urbanization. It has absorbed the common law of England, its former colonizer. Its tort law reflects modern legal issues, such as vehicular negligence, that are resolved on the basis of British common law rules as accepted and adapted by Ghanaian courts. However, Ghanaian tort law must also grapple with the inadequacy of the inherited British law to recognize and provide remedies for indigenously- and culturally-defined injuries. A significant number of tort cases raise issues that implicate customary law, and the choice of that law⁴ by litigants makes a profound statement about the values of Ghanaian society and the role of law in preserving them. This article considers both the role customary law has played in the past and whether customary tort law will play a significant role in the future. Will it become a relic studied in legal history or anthropology classes, or will it continue to serve its unique role within Ghanaian society? We believe its future is dependent on the desire of the Ghanaians to invoke its protections and embrace its values and on the ability of Ghanaian judges to rethink its meaning in a changing society.

For one of us, a native of Northern Ghana, this question about the future of Ghanaian customary tort law is far from academic. It is a problem with which Ghanaian judges and jurists have been grappling for some time, and as the pace of development accelerates, the problem takes on greater meaning. A period of study in the United States (U.S.) has served to focus attention on the role that customary tort law, as an expression of culture, plays in Ghanaian society and has provided the occasion to ponder its meaning from afar. For the other of us, a native of the U.S. who has yet to visit Ghana, the role and future of customary tort law *is* an academic question, but a useful one. It provides a unique lens through which we can re-examine well-accepted principles of U.S. common law torts, such as slander, intentional infliction of emotional distress, and even the rules of parental responsibility. Though we bring different interests and perspectives to the issue, we are of the same mind in recognizing the continuing utility of Ghanaian customary tort law in the lives of many Ghanaians and in perceiving the values it reflects as worthy of consideration.

To appreciate and understand customary tort law in Ghana, we focus first on the role of customary law generally and its place in the Ghanaian legal and societal structure. It is then possible to consider the subset of Ghanaian customary law dealing with what we recognize as tort principles. Drawing on the work of noted Ghanaian judges, jurists, and scholars, we place customary tort law in the

3. See Vanderlinden, *supra* note 1, at 1047 (stating that for more than a century Africans individually and collectively have borne the brunt of the impact of globalization, being subjected to the unilateral choices of European, and later, North American nations).

4. Ghanaian decisions address choice of law issues that arise between the customary and the common law in some detail. Generally, when the parties are Ghanaians, they may choose to have the dispute resolved under customary law. See *Nkrumah v. Manu*, [1971] 1 G.L.R. 176 (Ghana) (discussing choice of law issue).

context of similar tort law in the civil law tradition and also compare it to corresponding common law principles. Finally, we consider the possible role of customary tort law in the future. There are many factors that we believe will influence whether customary tort law flourishes or expires. Some factors relate to broad societal forces and trends, such as the impact of religion, the availability of education, or migration of people from their traditional homelands. The other part of the equation is people, including the chiefs who know, interpret, and apply customary law daily, and judges, who have occasion to view customary tort law as part of their case load and to consider where it fits in a modern society. Ultimately, though, the future of customary tort law rests on whether it continues to be accepted and practiced by the people of Ghana.

II. THE CONTENT, SCOPE, AND ROLE OF GHANAIAN CUSTOMARY TORT LAW

We begin this section by recounting the role of customary law in the lives of Ghanaians prior to and during colonization, and in the years since independence. The legal status of customary law during these periods is of particular importance to gain an understanding of the role of customary law in modern Ghanaian society. With that foundation, we progress to a full description of Ghanaian customary tort law. To fully appreciate the similarities and differences between Ghanaian customary tort law and the approaches taken in other legal systems, we compare it with the principles that other systems use to address similar types of problems.

A. History and Evolution of Ghanaian Customary Law

Long before the formation of the modern country now known as Ghana, and long before the colonization of those lands by the British, there were well-developed tribal or ethnic groups in the West African territories for whom custom *was* law.⁵ Linguistically and ethnically diverse, these populations lived by a set of rules particular and peculiar to their society and community, and the rules of any other tribe were foreign law.⁶ When the British began to install a central government, the concept of customary law, as distinguished from their own common law system, appeared for the first time.⁷ During this colonial period of approximately 140 years, the British recognized the force of African customary law, establishing a dual court system with some courts administering “general

5. See N. A. Ollennu, *The Changing Law and Law Reform in Ghana*, 15 J. AFRICAN L. 132, 133 (1971).

6. See *id.*

7. See *id.*

law,” or the law they brought with them, and native and local courts administering primarily customary law.⁸ The Supreme Court of Ghana was empowered to enforce the customary law in cases where the parties were Africans if the law was “not . . . repugnant to natural justice, equity and good conscience,”⁹ or to any other enactment.¹⁰ In addition to this legal authority to veto particular aspects of customary law that they found repugnant, the British imposed various conditions on the applicability of customary law. For example, although the courts were to give effect to native customs, they could only do so when the customs existed at the date of the passage of the Supreme Court Ordinance in 1876.¹¹ Rules of customary law were treated as questions of fact, subject to re-litigation in each case; this ensured that any customary rule or practice could repeatedly be subjected to the repugnancy test.¹² As Vanderlinden describes it, “[i]n order to become ‘civilized,’ Africans and their laws had to give up all mechanisms linked to the prevalence of social harmony for the benefit of the adjudicatory legal process favored in Europe.”¹³

In 1957, Ghana gained independence from the British colonial administration. In 1960, the newly formed country of Ghana designated issues of customary law as questions of law for the court, not questions of fact,¹⁴ and enacted a constitution that promptly eliminated the “repugnancy clause.” Casting off the British attempt to solidify customary law, the Courts Act provided that if a court had any doubt as to the existence or content of customary law in any proceedings, the judge could, after reviewing cases, textbooks, and other sources, adjourn the proceedings to consult with persons possessing knowledge of the customary law.¹⁵ In these ways, the Republic of Ghana sought to reclaim and preserve its customary law.

However, by the time of independence, Ghana, like other Anglophonic African countries, had absorbed or “received” English law. Statutes had been enacted locally to apply to Ghana, and many “received” English statutes were in force as well. In addition, there was “received” English common law, supplemented by local judicial precedent.¹⁶ All post-independence constitutions have continued this dual legal system consisting of enacted statutes and regulations, common law decisions of the Ghanaian courts, and customary law.

8. See ALLOTT, *supra* note 1, at 20.

9. See Supreme Court Ordinance, 1876, § 19 (Ghana).

10. See *id.*

11. See W. C. Ekow-Daniels, *Development of Customary Law*, 18 REV. GHANA L. 68 (1991–1992).

12. See *id.*

13. Vanderlinden, *supra* note 1, at 1048.

14. See Ekow-Daniels, *supra* note 11; see generally Courts Act, 1993, § 55(1) (Ghana).

15. See Courts Act § 55(2).

16. See C. Ogwurike, *The Source and Authority of African Customary Law*, 3 U. GHANA L.J. 11 (1966).

The 1992 Constitution, Ghana's most recent, states that the laws of Ghana comprise various sources, including the current constitution itself, statutes enacted by Parliament, and the common law.¹⁷ The rules of customary law, defined as "the rules of law which by custom are applicable to particular communities in Ghana," are part of the common law of Ghana.¹⁸

The scope and content of customary law in Ghana is very broad. S.Y. Bimpong-Buta called customary law "the living embodiment of the country's cultural heritage."¹⁹ The late Chief Justice, George Kingsley Acquah, described it well, stating:

Ghana, like most nations, is made up of a number of ethnic communities, each with its own deep-rooted customary practices and offences handed down from generation to generation. . . . Some of the customary practices and offences are related to the history of the founding fathers of the community, others to particular incidents in the lifetime of the people, others to marriage and puberty rites of the women, and others to the day to day life in the community.²⁰

Customary law possesses a number of characteristic traits including flexibility, popularity, adaptability, and a communal focus. Because customary law reflects the practices of the people, it has the capacity to change, and thus to avoid the fossilization that characterizes some civil codes.²¹ The fact that customary law is unwritten enhances its adaptability. Its popularity is vital to its survival; when a group stops following a practice, it loses force.²²

Despite social, economic, political, and external influences and pressures, the essential features of customary law remain intact because the law has been instrumental in maintaining the social equilibrium among groups related by kinship.²³ Unlike the U.S. or Europe, where criminal law occupies a large role in maintaining social order,²⁴ customary law serves much of that function in

17. See GHANA CONST. art. 11(1).

18. See *id.* art. (11)(3). Article 26(1) entitles every person "to enjoy, practise, profess, maintain and promote any culture, language, tradition, or religion subject to the provisions of th[e] Constitution." *Id.* art. 26(1).

19. See Seth Yeboa Bimpong-Buta, *Sources of Law in Ghana*, 15 REV. GHANA L. 129, 129 (1983–1986). The matters covered by these customary practices include the acquisition of rights in land and matters involving family relationships, such as husbands and wives, parents and children, marriage and divorce, and chieftaincy. See *id.*

20. G. K. Acquah, *Customary Offences and the Courts*, 18 REV. GHANA L. 36, 36 (1991–1992).

21. See Ekow-Daniels, *supra* note 11.

22. See *id.*

23. See *id.*

24. See Vanderlinden, *supra* note 1, at 1048.

countries where it is used.²⁵ This use of customary law underscores the dual and plural nature of African law. At the traditional level, society does not prosecute or punish an offender, but the initiation of a complaint brings to the forefront not only the individual's interest, but also the collective interest in addressing conduct that may disrupt the "necessary harmony that society needs to survive."²⁶ Remedies may range from apologies to compensation.²⁷ This communal focus is evident in the Ghanaian customary tort law.

Although Ghanaians rejected the assertion that colonial courts should tell them when customary law was "repugnant to natural justice, equity and good conscience," they recognized that there might be a need to prune their own customary law rules if they were outmoded or against public policy. This is done in several ways. The 1992 Constitution states that "[a]ll customary practices which dehumanise or are injurious to the physical and mental well-being of a person are prohibited."²⁸ It established the National House of Chiefs and the Regional House of Chiefs and requires these institutions to study, interpret, and compile customary laws with the goal of eliminating customs and usages that are "outmoded and socially harmful."²⁹ In addition, a Law Reform Commission was founded that has the power to propose new laws or changes in the existing law.³⁰ The work of that Commission resulted in the enactment of the Intestate Succession Law,³¹ which sought to unify the law relating to intestate succession because various ethnic regions previously followed different succession rules.³² Finally, the Ghanaian courts themselves have at times held a custom to be contrary to statute or natural justice. For example, in one case, appellants were charged with the criminal offense of cremating a corpse without lawful authority.³³ They asserted as one ground of defense that the custom in the locality required that the deceased, who had violated a custom but was not purified before death, should be cremated rather than afforded a burial. Although the head of family and paramount chief gave evidence testifying to the custom and the appellants appeared genuinely to believe they had done no wrong, the court upheld their conviction, finding the custom outmoded and contrary to public

25. Criminal law is also an essential part of their legal systems, but private resolution of disputes among individuals and their family groups can avoid engagement of the criminal process.

26. See Vanderlinden, *supra* note 1, at 1048.

27. See *id.*

28. GHANA CONST. art. 26(2).

29. See *id.* arts. 272(b)-(c), 274(3)(f).

30. See Law Reform Commission Decree, 1975, N.R.C.D. 325, § 2 (Ghana).

31. See Intestate Succession Law, 1985, P.N.D.C.L. 111 (Ghana).

32. This change was intended to more fully protect the interests of spouses, particularly widows. See Jeanmarie Fenrich & Tracy E. Higgins, *Promise Unfulfilled: Law, Culture, and Women's Inheritance Rights in Ghana*, 25 *FORDHAM INT'L L.J.* 259, 268 (2001).

33. See *Foli VIII v. The Republic*, [1968] G.L.R. 768 (Ghana).

health rules that required the permission of a medical officer before setting fire to a dead body.

B. A Description of Customary Tort Law in Ghana

Ghanaian customary tort law, like other areas of customary law, serves the purpose of maintaining social equilibrium by redressing injuries that may be individual or collective in nature. The injuries that would most disrupt the societal balance are those that interfere with familial relationships. The Ghanaian family is regarded as the basic unit and foundation of society, and its stability and cohesion is essential for the organization, productivity, and indeed, survival of the individual and the larger community.³⁴ Professor W.C. Ekow-Daniels notes that from the standpoint of customary law, the family is a collective or corporate unit that remains undiminished by the death of its members.³⁵ Customary torts may threaten this ongoing genealogical unit, rupturing the bond among its members or the social order between families. If members of the family are impugned through insults, abusive language or words injurious to reputation, or if family bonds and promises are broken through such actions as the customary tort of seduction, the essence of the family's identity and its place within society are placed in question. This is one reason customary torts are taken so seriously. Ghanaian customary tort law, however, provides more than a deterrent to disruptive social behavior. Inherent in the concept of a broad and highly cohesive family is the acceptance of unwavering responsibility for one's family members and thus a notion of parental liability that is more expansive than normally found in a common law system.³⁶

This focus on the group and customary law's protection of the collective interests in Ghana is best understood by recognizing that every culture falls in a different place on the continuum between individualism and collectivism. As Jeanne M. Brett explains:

34. The downside to a society based on kinship and solidarity is that when conflict arises among individuals, it always carries the risk of escalating to pit one group against another. This is the reason that traditional African societies exercised great care to contain individual conflicts and prevent them from escalating. See GEORGE B. N. AYITTEY, *INDIGENOUS AFRICAN INSTITUTIONS* 9 (1991).

35. See Ekow-Daniels, *supra* note 11. A consecrated stool or skin is the corporate seal of the family, in which the souls of the deceased members are believed to reside. All legal title to the family's property is vested in the stool or the skin itself, and never in the occupant of the stool or skin, for these are merely temporary custodians of the family's assets. See *id.*

36. See Frances M. Deng, *The Family and the Law of Torts in African Customary Law*, 4 *HOUS. L. REV.* 1, 1-2 (1966) (discussing the concept of justice that requires family members to answer for the torts of another).

[This continuum] distinguishes between cultures that generally place individuals' interests above those of the collective and cultures that generally place collective needs above those of individuals. In individualist cultures social, economic, and legal institutions promote the autonomy of individuals, reward individual accomplishment, and protect individual rights. In collective cultures institutions promote interdependency of individuals with the others in their families, work establishments, and communities by emphasizing social obligations. Individual accomplishment [as well as failure] reflects back on others with whom the individual is interdependent. Legal institutions support collective interests above individual interests.³⁷

The collective focus of society in Ghana is reinforced by the descent system, which categorizes individuals into lineages, families, and clans.³⁸ Given Ghanaian society's corporate and collective character, it follows that customary tort law in Ghana would focus on the group. In collective cultures, collective interests generally take precedence over self-interests although people from collective cultures also have self-interests that are important and protected.³⁹

Before describing Ghanaian customary tort law in greater depth, it is useful to place it in the context of the tort law of other legal systems that similarly offer redress for dignitary and family torts that fall outside the protection of the common law. As the Ghanaian jurist S.K. Date-Bah observed, "customary law is not alone in providing a remedy against insult and affronts to personal dignity and

37. JEANNE M. BRETT, *NEGOTIATING GLOBALLY: HOW TO NEGOTIATE DEALS, RESOLVE DISPUTES, AND MAKE DECISIONS ACROSS CULTURAL BOUNDARIES* 32–33 (2d ed. 2007).

38. Descent is the process by which a "direct genealogical connection is traced between an individual and his forbearers or offspring for the purpose of recruitment into kin groups." G. K. NUKUNYA, *TRADITION AND CHANGE IN GHANA: AN INTRODUCTION TO SOCIOLOGY* 19 (2d ed. 2003). There are two main descent groups: clans and lineages. A clan is "a group of people, male and female, who are believed to have descended through one line only (male or female) from a common putative ancestor or ancestress." *Id.* A lineage is "a group of people, male and female, who are descended through one line only from a common ancestor or ancestress." *Id.* at 21. The lineage is a segment of the clan found in one locality. Thus, the difference between a clan and a lineage is that members of lineage "are localized and know the genealogical ties that connect them to their founding ancestor or ancestress." *Id.*; see also Kojo Yelapaala, *Western Anthropological Concepts in Stateless Societies: A Retrospective and Introspective Look at the Dagaaba*, 17 *DIALECTICAL ANTHROPOLOGY* 431, 446–47 (1992) (explaining these concepts in more detail).

39. See BRETT, *supra* note 37.

. . . it is no sign of backwardness for it to provide such a remedy.”⁴⁰ First, Ghanaian customary tort law is similar to the customary tort law of certain other African countries, such as Nigeria, Uganda, and Kenya to mention a few.⁴¹ It stands to reason that the underlying social structure and the practices that reinforce it would be similar; the borders and institutions of the modern state are fairly recent and artificial divisions. Second, under Roman law, the form of delict called *iniuria* protected people from insults.⁴² *Iniuria* had a much broader scope than providing redress for defamation.⁴³ Roman law spread through Europe and the British Isles and, eventually, to South Africa, where it became part of the “received” law. Roman-Dutch law includes protection of various types of individual feelings, providing greater remedies for injury than the common law.⁴⁴

European civil law provides a final example of broader protection for dignity and feelings than the common law affords. While Roman law was replaced with customary law when the Roman Empire fell, it “came crashing back” into Europe during the eleventh, twelfth, and thirteenth centuries.⁴⁵ Eventually, the civil law tradition emerged in Europe, as exemplified by the Napoleonic Code in France.⁴⁶ The Code included criminal defamation laws that are still in effect and serve largely to protect members of the government from insult.⁴⁷ French law recognizes a distinction between *injure*, which protects from insult and outrage, and *diffamation*, which protects reputation.⁴⁸ The influential French Code spurred other countries to adopt similar codes, some broader than the French, criminalizing insults.⁴⁹ These laws included protection of royal families and national symbols from dishonor.⁵⁰ Thus, numerous other countries impose either criminal or civil liability for insults as distinguished from defamation,

40. S.K. Date-Bah, *Reflections on the Law of Defamation in Ghana*, [1973] 10 U. GHANA L.J. 129, 135.

41. See, e.g., Jill Cottrell, *The Functions of the Law of Torts in Africa*, 31 J. AFRICAN L. 161, 164 n.26, 165, 177–179 (1987); T. Olawale Elias, *Insult as an Offence in African Customary Law*, 53 AFR. AFF. 66, 66 (1954).

42. See ANDREW BORKOWSKI & PAUL DU PLESSIS, TEXTBOOK ON ROMAN LAW § 10.4 (3d ed. 2005); see also Elena Yanchukova, Comment, *Criminal Defamation and Insult Laws: An Infringement on the Freedom of Expression in European and Post-Communist Jurisdictions*, 41 COLUM. J. TRANSNAT’L L. 861, 863 (2003).

43. See Date-Bah, *supra* note 40, at 134–35.

44. See CHITTHARANJAN FELIX AMERASINGHE, DEFAMATION AND OTHER ASPECTS OF THE ACTIO INIURIARUM IN ROMAN-DUTCH LAW 320–26 (1968); Cottrell, *supra* note 41, at 165; Date-Bah, *supra* note 40.

45. See GLENN, *supra* note 1, at 132.

46. See Yanchukova, *supra* note 42.

47. See *id.*

48. See Date-Bah, *supra* note 40.

49. See Yanchukova, *supra* note 42, 887–88.

50. See *id.*

although the interests they seek to protect are different from those embodied in customary tort law in Ghana.⁵¹

African customary tort law “rigorously discourages any conduct, whether by word or deed, that is likely to lead to a disturbance of the peace of the community.”⁵² Insults have the potential to trigger an explosive outbreak among people who live together in a very tight-knit society⁵³ and, for that reason, they are taken very seriously. Justice Sophia Akuffo of the Supreme Court of Ghana explained their significance in a criminal defamation case, stating that:

[r]ecent events in certain parts of this country prove that our society is presently one in which expressions and allegations against persons, whether oral or written, can have far-reaching consequences (both as a result of the public acting upon the allegations or the accused person seeking to defend himself), including breach of the peace, mob action, mass hysteria and even loss of lives. Allegations made against persons, whatever be their station in life, still have the potential power to cause immediate effect.⁵⁴

Ghanaian customary law reflects this view; courts have found the tort of slander applicable when a plaintiff is called a “witch,”⁵⁵ “slave,”⁵⁶ “prostitute,”⁵⁷ “useless fellow and a non-native of the town,”⁵⁸ “mad woman,”⁵⁹ and “hopeless lawyer and a hopeless M.P.”⁶⁰ In one famous case, the plaintiff was told during an angry exchange that “her vagina stinks.”⁶¹ In another case, the plaintiff claimed damages because she was “hooted at in public in a Ghanaian village” by someone

51. Increasingly the European Court of Human Rights has found the application of some of these laws problematic in light of these countries’ ratification of the Convention for the Protection of Human Rights and Fundamental Freedoms (“ECHR”). See JULIE A. DAVIES & PAUL T. HAYDEN, *GLOBAL ISSUES IN TORT LAW* 245–52 (2008) (discussing impact of the European Court of Human Rights and its interpretation of the ECHR); see also Yanchukova, *supra* note 42, at 877–83 (discussing the landmark decisions of the European Court of Human Rights).

52. Elias, *supra* note 41.

53. See *id.*

54. Republic v. Tommy Thompson Books Ltd., [1997–1998] 1 G.L.R. 611, 644 (Ghana).

55. See Afriyie v. Dansowah, [1976] 2 G.L.R. 172 (Ghana); Abotchie v. Nuumo, [1974] 1 G.L.R. 142 (Ghana).

56. See Nkrumah v. Manu, [1971] 1 G.L.R. 176 (Ghana); Ampong v. Aboraa, [1960] G.L.R. 29 (Ghana).

57. See Serwah v. Sefa, [1984–1986] 2 G.L.R. 390 (Ghana).

58. See Sogbaka v. Tamakloe, [1973] 1 G.L.R. 25 (Ghana).

59. See Adjuah Attah v. Abbah Attah, [1961] G.L.R. 77 (Ghana).

60. See Bonsu v. Forson, [1962] 1 G.L.R. 139 (Ghana).

61. See Wankiyiwa v. Wereduwaa, [1963] 1 G.L.R. 322 (Ghana).

alleging she had stolen money.⁶² While allegations of theft would, of course, impair reputation, it was clear that the grievance encompassed insult as much or more than injury to reputation.⁶³

These insults are taken seriously by judges, in large part because they may affect and damage the group to which the complainant belongs as much as, if not more than, the complainant individually. Although under the common law many of these insults would fall beyond the reach of the law, due to Ghanaian culture and history, the words have a power to them that is as explosive as any slander *per se*.⁶⁴ For example, witchcraft and wizardry are believed to be inherited⁶⁵ and to signify a predisposition to harming others. An allegation of slavery has negative implications for an entire ethnic group, signifying that they are not who they purport to be, or that they are not of good lineage, or that they are servants of a lower social status.⁶⁶ This is true even though slavery has long been abolished.⁶⁷ Accusations of prostitution or adultery implicate a family group because sexual relations outside of marriage, or in betrayal of one's spouse, threaten the union that has been created between the families of the bride and the groom and bring shame on them.⁶⁸ Physical traits, such as a lack of intelligence or talent, have an obvious bearing on one's heredity and upbringing and, hence, may insult the collective from which the individual descends.

Another form of customary tort liability arises when a wife or child is seduced to leave the family home. While the torts of seduction and enticement have frequently been abolished in common law systems, Ghana retains both common law and customary law variants.⁶⁹ The common law torts in Ghana protect the fairly narrow interest of the husband in the comfort and society of the enticed wife, or for the loss of her services.⁷⁰ In contrast, the customary tort of seduction seeks to protect the integrity and moral character of the family of the parties involved. In fact, one of the elements of the tort, in addition to proof that

62. See *Adai v. Kwabena*, [1970] No. 30/67 Civ. (Ghana), discussed in Date-Bah, *supra* note 40.

63. See *id.*

64. The allegation that a woman is a prostitute would be slander *per se*, and actionable without special damages under the common law rules. See *infra* note 83 and accompanying text.

65. See Deng, *supra* note 36, at 23 (discussing the link between witchcraft and the family among the Dinka and the Nuer people).

66. See Kwame Anthony Appiah, *A Slow Emancipation*, N.Y. TIMES, Mar. 18, 2007 (discussing the continuing stigma of descent from slaves in the Ashanti region more than one hundred years after abolition of slavery).

67. See GHANA CONST. art. 16(1).

68. See generally Deng, *supra* note 36, at 4–11 (discussing the meaning of adultery in Africa).

69. See L.K. Agbosu, *Seduction Actions in Ghana: Benya v. Lawani*, 16 REV. GHANA L. 171 (1987–1988).

70. See *id.*

the victim of seduction left the home and suffered a wrong at the hands of the defendant, is that the incident brought disgrace on the family.⁷¹ From a policy perspective, the tort recognizes that by breaking the bonds of marriage through seduction, or by seducing an unmarried woman, a defendant is disrespecting the traditional norms, and undermining the institution of the family and the authority of parents and elders that sustain the health, unity, and cohesion of the family and society at large.⁷²

Under principles of customary law, a father is liable for a son's misconduct with a woman if the father has not obtained a wife for the son by the time the son has reached puberty.⁷³ As explained by Justice Wiredu, who later became the Chief Justice of Ghana, the rule holding a father primarily liable for the immoral conduct of his son is based not only on the physical control exercised by a father over his son, but on the responsibility to give the son a moral upbringing and to make provisions for his future marriage.⁷⁴ Justice Wiredu explains the principle as the complement to the customary tort of seduction; it would be unconscionable and strange to recognize a parent's cause of action against the seducer of his unmarried daughter and "then exonerate him of reciprocal responsibility for the immoral conduct of his son."⁷⁵ To be sure, Wiredu recognized that in some cases a parent should escape liability,⁷⁶ but he reaffirmed his belief in the correctness of the general liability principle.⁷⁷

Ghana's customary torts are differentiated not only by their broader-than-common-law reach, but also by their remedies. In customary law actions, the goal of the plaintiff is to restore his or her standing in the community and not to make money. John Mensah Sarbah, a famous lawyer who wrote on Ghanaian customary law, described the remedies as consisting of public retraction in addition to payment of a small fine. The confession of disgraceful behavior would

71. *See id.*

72. *See id.* Agbosu suggests that given changes in Ghanaian society, at least in some urban areas, courts might update the elements of the customary law action for seduction if they ascertain that mores have changed. *See id.*

73. "Not only is a father liable to maintain his child, but if he fail [sic] to obtain a wife for his son on reaching the age of puberty, he is liable for damages arising from the son's misconduct with any woman." *Addae v. Asante*, [1974] 2 G.L.R. 288, 291 (Ghana) (quoting JOHN MENSAH SARBAH, *FANTI CUSTOMARY LAWS* 39 (2d ed. 1904)).

74. *See Gyan v. Dabrah*, [1974] 2 G.L.R. 318, 323-24 (Ghana).

75. *See id.*

76. *See id.* To escape liability for the son or daughter's misconduct, a parent must establish that the son or daughter has been emancipated out of boyhood, attained the age of manhood and is in control of his or her own affairs. *See id.*

77. *See id.* This particular rule is perhaps best understood as part of a broader concept of family liability. Membership in a family carries rights, such as common ownership of property and the right to sit in on family council meetings, as well as responsibilities, such as the obligation to discharge family debts. *See OLLENNU'S PRINCIPLES OF CUSTOMARY LAND LAW IN GHANA* 149 (N.A. Ollennu & G.R. Woodman eds., 2d ed. 1985).

provoke jeers and sneers that were punishment enough for the offender.⁷⁸ Professor S.K. Date-Bah explains that because the fine is payable to the plaintiff, and not to the *stool*,⁷⁹ it is more in the nature of damages than a criminal sanction.⁸⁰

C. Comparison with U.S. Common Law Principles

In almost all respects except damages, Ghanaian customary tort law is broader and more encompassing than U.S. common law.⁸¹ The common law of torts suggests several avenues that might apply to the types of cases brought under customary law, the most relevant of which are slander and intentional infliction of emotional distress. Slander, though it descends from the broader Roman concept of *iniuria*,⁸² is not a tort that is easy to establish. Although, under common law principles, slander is a strict liability tort, the requirement that the plaintiff prove special damages (pecuniary loss) in all but cases falling within the areas considered slander *per se*⁸³ makes it likely that many slander actions will fail.⁸⁴ Even if the plaintiff could prove special damages, or that the alleged defamatory statement falls within a *per se* category, she could not prevail without proving in addition that the statement was defamatory in that it would tend to lower the plaintiff in the esteem of a “substantial and respectable minority” of the

78. See Date-Bah, *supra* note 40 (citing JOHN MENSAH SARBAH, *FANTI CUSTOMARY LAWS* 113–14 (3d ed. 1968)).

79. Literally, a stool is the seat of the Chief or other similarly placed individual who rules over a particular community. It is a symbol of authority in Southern Ghana. The Northern Ghana equivalent of a stool is the “skin.” These concepts are often personified. Thus, land may be called stool land or skin land, meaning land belonging to the community. The 1992 Constitution provides a definition for “stool,” though it is not a helpful one. Article 295(1) defines stool as “includ[ing] a skin, and the person or body of persons having control over skin land.” GHANA CONST. art. 295(1). Thus, a stool or skin in one sense represents a person, or body of persons, who will have authority over skin land or stool land.

80. See Date-Bah, *supra* note 40, at 143.

81. One might, of course, contrast Ghanaian customary law with the common law of many other countries, or with the common law of Ghana itself. The comparison with U.S. law was selected because of the authors’ greater familiarity with it. There are great similarities between the English, Ghanaian and the American common law of torts, but we have not attempted to cover all bases.

82. See *supra* notes 42–43 and accompanying text.

83. See DAN B. DOBBS, *THE LAW OF TORTS* § 408, at 1141–42 (2000) (“Slander *per se* is that which charges a (1) serious criminal offense or one of moral turpitude, (2) a ‘loathsome’ and communicable disease, (3) any matter incompatible with business, trade, profession, or office, and sometimes, (4) serious sexual misconduct.” (footnotes omitted)).

84. See *id.*

community.⁸⁵ The alleged defamatory statement must allege actual facts that would be “reasonably believable.”⁸⁶ Even if slander *per se* is alleged and the other elements of the common law case are proven, a plaintiff in the U.S. may be required to meet the very demanding “actual malice” standards imposed by *New York Times v. Sullivan*⁸⁷ or *Gertz v. Robert Welch, Inc.*⁸⁸ For the plaintiff who navigates these obstacles, recovery is possible, and potentially large, particularly if the plaintiff can demonstrate that the statement fell within a slander *per se* category.⁸⁹

Some statements that fall within the boundaries of Ghanaian customary law certainly could also be litigated as common law claims in the U.S. or in Ghana, but many could not. Calling a woman a “prostitute” clearly impugns chastity or sexual mores,⁹⁰ and hooting out an allegation of theft qualifies as an accusation of a crime of serious moral turpitude.⁹¹ However, at least in modern common law jurisprudence, comments charging a person of being a “slave,” “crazy,” or “useless” are unlikely to be viewed as potentially slanderous or believable and would more probably be considered abuses merely uttered to blow off steam that do not support a claim.⁹² Even if a claim can be stated, the complexity of common law defamation actions⁹³ usually necessitates that the plaintiff retain an attorney, thus posing an additional barrier to recovery.

Under U.S. law, another way to approach some of the insults for which customary law allows recovery⁹⁴ would be to frame them as claims for intentional

85. See RESTATEMENT (SECOND) OF TORTS § 559 cmt. e (1977); see also *id.* § 403, at 1127.

86. See *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 57 (1988) (affirming Court of Appeals ruling that ad parody of plaintiff was not reasonably believable and hence libel claim must be dismissed).

87. See 376 U.S. 254 (1964) (requiring proof of knowledge of falsity or reckless disregard for truth in a case brought by a public official).

88. See 418 U.S. 323 (1974) (private plaintiff must prove fault to recover actual damages, and knowledge of falsity or reckless disregard for truth to recover presumed and punitive damages).

89. See, e.g., *Purgess v. Sharrock*, 33 F.3d 134 (2d Cir. 1994) (anesthesiologist awarded \$3,500,000 when defamation by employer caused him to lose job); *United Ins. Co. of Am. v. Murphy*, 961 S.W.2d 752 (Ark. 1998) (insurance agent awarded \$600,000 in action against her employer); see generally Jay M. Zitter, Annotation, *Excessiveness or Inadequacy of Compensatory Damages for Defamation*, 49 A.L.R.4th 1158 (1986).

90. See RESTATEMENT (SECOND) OF TORTS § 574 cmt. b.

91. See *id.* § 571.

92. See *id.* § 566 cmt. e.

93. See DOBBS, *supra* note 83, § 401, at 1119–20.

94. Ghanaian customary law recognizes the interest in compensating for hurt feelings. For instance, in *Wankyiwaa v. Wereduwaa*, the defendant spoke and published a statement about the plaintiff that “her vagina stinks.” The plaintiff brought an action in slander for damages. Affirming a judgment in her favor, the High Court, per Justice Apaloo, stated: “In this country, where words of abuse are taken seriously, it would, in my

infliction of emotional distress.⁹⁵ Although under U.S. law this tort is intended to be very narrow, in keeping with the courts' suspicion of pure emotional injuries, it also has the potential to be quite broad. The narrowness of the tort is evident in cases that refuse to impose liability for insults, even when the insults consist of racial epithets of the worst kind. The Restatement (Second) makes a distinction between words that are "merely offensive" or "mere insults" that must be endured in our rough and tumble society and conduct that is "extreme and outrageous," or beyond that which is tolerable in a civilized society.⁹⁶ To Ghanaians living under the customary rules, the dichotomy between "extreme and outrageous conduct" and "mere insults" does not make sense.⁹⁷ Calling an African-American one of the most insulting epithets possible to utter would surely be on par with calling someone a slave, yet, in the U.S., it is rarely actionable standing alone.⁹⁸ Although U.S. torts scholars, such as Richard Delgado⁹⁹ and Jean Love,¹⁰⁰ have criticized the narrowness of the U.S. approach and explained the harm to plaintiffs, the courts have not been persuaded. In part, this is because of their belief that the First Amendment protects such speech, even if it is hurtful, and limits the state's ability to protect the victims.¹⁰¹

Despite the narrowness of intentional infliction as it applies to insults, its breadth may allow it to encompass certain dignitary torts that injure the family, at least if they do not conflict with contrary law within the state. As Daniel Givelber has argued, intentional infliction of emotional distress "provides no clear

opinion, be socially intolerable if customary law provided no sanctions against a man who finds pleasure in injuring *the feelings* of his neighbour by vituperation. . . . [A]buse by itself is a wrong redressible by damages according to customary law." [1963] 1 G.L.R. 332 (Ghana) (emphasis added).

95. The elements are enumerated in RESTATEMENT (SECOND) OF TORTS § 46 (1965), which provides: "(1) One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm."

96. *See id.* cmt. d.

97. In the Ghanaian context, at least at the customary law level, no such distinction is made, although not every word of abuse is actionable. *See Wankiyiwa*, [1963] 1 G.L.R. 332.

98. *See* DOBBS, *supra* note 83, § 305, at 830–31 ("Courts are clearly reluctant to impose liability for epithets, racial or otherwise, in the absence of repetition or aggravating factors.").

99. Richard Delgado, *Words That Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 HARV. C.R.-C.L. L. REV. 133 (1982).

100. Jean Love, *Discriminatory Speech and the Tort of Intentional Infliction of Emotional Distress*, 47 WASH. & LEE L. REV. 123 (1990).

101. *See* MARK A. FRANKLIN, ROBERT L. RABIN & MICHAEL C. GREEN, *TORT LAW AND ALTERNATIVES* 914–15 (8th ed. 2006).

definition of the prohibited conduct.”¹⁰² It does not objectively describe the acts intended to be encompassed within the tort, and thus “fails to provide clear guidance either to those whose conduct it purports to regulate, or to those who must evaluate that conduct.”¹⁰³

Ironically, this lack of clarity has prompted plaintiffs, who are injured because a defendant has broken up their families, to attempt to redress the injury through the action for intentional infliction of emotional distress.¹⁰⁴ The common law torts that used to address these family injuries directly were “criminal conversation,” which involved sexual intercourse by an outsider with a husband or wife, or “alienation of affections,” which occurred when outsiders tried to interrupt the relations among family members.¹⁰⁵ While these torts were long recognized by the common law courts, more than half of the states in the U.S. have abolished them by judicial decision or statute.¹⁰⁶ One court reasoned that the tort of criminal conversation was a means of exacting revenge and might ruin the defendant’s reputation.¹⁰⁷ Further, the court believed that because the wrongful conduct involved sex, a tort action with its risk of damages liability would be unlikely to deter the defendant.¹⁰⁸ Actions for breach of promise to marry¹⁰⁹ and seduction¹¹⁰ have likewise been abolished in many places. Thus, in the U.S., plaintiffs try, and a few succeed, in recasting these injuries to the family as intentional infliction of emotional distress cases.¹¹¹ Many courts see these claims as efforts to circumvent the abolition of the family and relationship torts and do not permit them.¹¹²

The case law makes it apparent that, whether denominated as alienation of affections, criminal conversation or intentional infliction of emotional distress, at least some people in the U.S. still perceive the need for redress in situations

102. Daniel Givelber, *The Right to Minimum Social Decency and the Limits of Evenhandedness: Intentional Infliction of Emotional Distress by Outrageous Conduct*, 82 COLUM. L. REV. 42, 51 (1982).

103. *Id.*

104. See FRANKLIN, RABIN & GREEN, *supra* note 101, at 920–922; see also DOBBS, *supra* note 83, § 442, at 1245–49.

105. See DOBBS, *supra* note 83, § 442, at 1246–47.

106. See *id.* at 1247–48.

107. See *Neal v. Neal*, 873 P.2d 871 (Idaho 1994), cited in FRANKLIN, RABIN & GREEN, *supra* note 101, at 920–21.

108. See *id.*

109. RICHARD A. LORD, WILLISTON ON CONTRACTS § 62:29 (4th ed. 2002).

110. DOBBS, *supra* note 83, § 443, at 1249, 1252.

111. Compare *C.M. v. J.M.*, 726 A.2d 998 (N.J. Super Ct. Ch. Div. 1999) (recognizing intentional infliction claim for effect of wife’s adulterous affair on husband and children), with *McDermott v. Reynolds*, 530 S.E.2d 902 (Va. 2000) (rejecting intentional infliction claim on similar facts), and *Bouchard v. Sundberg*, 834 A.2d 744, 757 (Conn. App. Ct. 2003) (rejecting claim).

112. See, e.g., *McDermott*, 530 S.E.2d 902.

similar to those raised by the customary tort of seduction.¹¹³ It is unclear whether their reasons are actually retaliation and damages, as the courts suggest, or a desire for healing. Unlike the situation in Ghana, it is unlikely that a judgment in favor of the plaintiff in the U.S. will restore the harmony of a family group, because litigation rarely has that effect. However, the core desire to right the wrong committed to a family unit through tort is a commonality with Ghanaian customary law. Many U.S. courts have chosen to view these injuries to the family unit as non-cognizable in tort, despite widespread acknowledgement of the injury in other contexts.¹¹⁴

There is nothing in U.S. law that approximates the customary Ghanaian rule obligating a father to answer for the moral shortfalls of his son when the father has not properly arranged the young man's marriage. As a general rule, parents are not vicariously liable for the torts of their children.¹¹⁵ Children may hurt others through negligence or intentional torts, but while they may be held personally liable for the damages they inflict, the courts believe it would be highly unfair to impose the cost on the parents.¹¹⁶ Under the law of negligence, parents have affirmative duties to control or monitor the conduct of their children to prevent physical harms to others if the parents have both the ability to do so and knowledge of the need to do it.¹¹⁷ In such instances, the parents are held accountable for their own negligence. It would be inconceivable to find parents at fault or vicariously liable for a child's sexual dalliances.¹¹⁸ Children are expected to make their own way in the world as far as finding love and marrying, and it would be viewed as unjust to blame a parent for moral lapses of an unmarried son.

With regard to remedy, it seems fair to say that the Ghanaian customary remedies are powerful, yet relatively gentle, while the U.S. common law remedies range from extremely harsh to non-existent. Ghanaian jurist S.K. Date-Bah compared common and customary law remedies in the context of lawsuits for insult or slander and concluded that the customary remedies had distinctive advantages.¹¹⁹ Because damages are minimized in customary law, people have a

113. See DOBBS, *supra* note 83, § 442, at 1245–49.

114. See generally Paul R. Amato, *The Consequences of Divorce for Adults and Children*, 62 J. MARRIAGE & FAM. 1269 (2000) (detailing the harmful effects divorce can have on all family members).

115. See DOBBS, *supra* note 83, § 340, at 935; but see 59 AM. JUR. 2D PARENT AND CHILD § 103 (1987) (liability may be imposed in some instances by statute, for example, for vandalism, destruction of property or taking a vehicle without permission).

116. See WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS § 123 (4th ed. 1971).

117. See RESTATEMENT (SECOND) OF TORTS § 316 (1965).

118. See, e.g., *Bowen v. Mewborn*, 11 S.E.2d 372, 374–75 (N.C. 1949) (rejecting argument that because the father gave his son “lustful and lascivious” advice he should be liable for his son's sexual misconduct); see also *Zapalski v. Benton*, 444 N.W.2d 171 (Mich. Ct. App. 1989) (parents could not foresee sexual misconduct on the part of their child).

119. See Date-Bah, *supra* note 40, at 139.

disincentive to sue for financial gain, or as Date-Bah puts it, to sell their good name for money.¹²⁰ The common law remedies lack the public dimension of name clearing that accompanies the customary remedies.¹²¹ Many common law jurists would agree with Date-Bah's critique of common law damages in defamation cases.¹²² It is frequently asserted that many plaintiffs want nothing more than to clear their names or to gain an apology, and it is difficult to do so.¹²³ At the same time, in the rare instances where presumed damages are imposed, the common law rules have the potential to be economically burdensome. This can even occur in situations where there is no culpability on the part of the defendant.¹²⁴

The common law rules pertaining to damages for intentional or negligent infliction of emotional distress generally require that the plaintiff plead and prove a specified level of harm. In general, they require proof of "severe injury," with some requiring evidence of actual physical injury in addition to the emotional harm.¹²⁵ These requirements are in large part a response to the mistrust in the U.S. of the genuineness of emotional distress claims and the view that hurt feelings are not an injury worthy of the legal system's intervention. If a plaintiff cannot meet these harm thresholds, no remedy is available, even if the defendant's conduct was intentionally hurtful. Once again, this rule system stands in stark contrast to the rules of Ghanaian customary tort law.

120. *See id.*

121. *See id.*; *see also* Janet Daniels, *Protecting the Chastity of a Modest Matron*, 1 REV. GHANA L. 27, 31 (1973) (arguing that customary law would have provided a more reasonable result in a common law defamation suit brought against a university. Daniels posits that the customary remedy would have allowed the plaintiff to salvage her honor while the university would not have been "mulcted" in damages. Further, the customary remedy would have discouraged future litigation which, in the author's view, did not advance women's rights.)

122. *See, e.g.*, George E. Frasier, Note, *An Alternative to the General Damage Award for Defamation*, 20 STAN. L. REV. 504 (1968) (arguing that general damages neither adequately protect a plaintiff's reputation, nor adequately promote the free flow of accurate information in media).

123. *See id.* at 505 (arguing that money damages are ineffective in addressing injury to one's reputation because money will not likely rehabilitate reputation and may actually harm the plaintiff, who will be seen as a "scoundrel concerned not with vindicating his reputation but with collecting a money judgment.").

124. *See, e.g.*, *Snead v. Redland Aggregates Ltd.*, 998 F.2d 1325 (5th Cir. 1993) (affirming jury verdict of \$1 in compensatory damages and \$500,000 in punitive damages and concluding that the Constitution imposes no minimum standard of fault in private person/private concern libel cases).

125. *See* DOBBS, *supra* note 83, § 306, at 832–33.

III. THE FUTURE OF GHANAIAN CUSTOMARY TORT

Ghanaian society today is more complex than in years past. Its legal system must be responsive to a wide diversity of needs and traditions. It must serve people in modern cities and rural villages who seek redress under both common and customary law principles. The justice system utilizes the expertise of judges, who range from western-educated lawyers to traditional Chiefs who, with or without formal legal training, perform many dispute-resolution functions. It must serve not only English speakers, but individuals in many ethnic groups who prefer to speak in their mother tongues.

As Ghanaians move from their traditional homelands to avail themselves of educational and employment opportunities, one wonders whether they will continue to abide by customary practices and seek customary law remedies for wrongs committed against them. Many factors will likely influence the future of customary tort law. One important consideration is the extent to which Ghana's legal system, Constitution, laws, and other societal institutions protect and promote customary law. As our analysis below demonstrates, the legal system is highly protective and affirmatively supportive of customary law. The 1992 Constitution 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 the 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.

A. The Role of the Constitution, Laws, and Other Institutions

The 1992 Constitution includes the rules of customary law as part of the laws of Ghana.¹²⁶ Because of this, customary law is on a par with common law rules, statutes, and the Constitution itself,¹²⁷ as well as other "existing law" as sources of law in Ghana. In drafting the Constitution, the framers defined "existing law" to include the unwritten laws existing before the Constitution came into force.¹²⁸ The inclusion of customary law and existing law in our view reflects the framers' desire to recognize and protect the socio-cultural diversity of Ghanaian society, which includes no less than forty-six ethnic groups, each of

126. See GHANA CONST. arts. 11(1)(e), (2); *see also supra* note 2 and accompanying text.

127. Unless "customary practices . . . dehumanise or are injurious to the physical and mental well-being of a person," in which case, they "are prohibited." GHANA CONST. art. 26(2).

128. *See id.* art. 11(4).

which has its own indigenous cultural norms, mores, and values that regulate social conduct and economic life.¹²⁹

The Constitution of Ghana also gives every person the right “to enjoy, practise, profess, maintain and promote any culture, language, tradition or religion subject to the provisions of th[e] Constitution.”¹³⁰ The regulation of the social life and conduct of the community through customary law is one way of expressing and professing cultural beliefs and practices; customary law is an expression of cultural beliefs and practices. Any effort to affirmatively curtail the adherence to customary tradition and the reliance on customary law to enforce it would derogate the right to enjoy, practice, and profess one’s culture. Of course, there are limits. The Constitution provides that “[a]ll customary practices which dehumanise or are injurious to the physical and mental well-being of a person are prohibited.”¹³¹ This provision merely authorizes other Ghanaian institutions, such as the courts or the House of Chiefs, to invalidate a customary practice on a case-by-case basis, and thus does not undermine the general applicability of customary law principles in Ghanaian society.

The Constitution of Ghana does more than protect the rights of Ghanaians to practice and enjoy their traditional ways. Article 39 underscores the importance of traditional and indigenous norms by providing that “the State shall take steps to encourage the integration of appropriate customary values into the fabric of national life through formal and informal education and the conscious introduction of cultural dimensions to relevant aspects of national planning.”¹³² Other provisions speak to the obligation of the State to foster development of Ghanaian languages and pride in Ghanaian culture,¹³³ as well as to “ensure that appropriate customary and cultural values are adapted and developed as an integral part” of the needs of society and that traditional practices that are “injurious to the health and well-being of the person are abolished.”¹³⁴ These affirmative obligations on the State ensure that customary practices will be taught and respected.

The institution of chieftaincy is protected by the Constitution,¹³⁵ and chiefs are the repositories of customary law.¹³⁶ Parliament is prohibited from making laws that “detract[] or derogate[] from the honour and dignity of the institution of chieftaincy.”¹³⁷ Chiefs, along with their councils, serve important

129. See Acquah, *supra* note 20; Ogwurike, *supra* note 16.

130. GHANA CONST. art. 26(1). Article 21(1)(b)–(c) provides for freedom of thought, conscience, and belief and freedom to practice any religion and to manifest such practice. See *id.* art. 21(1)(b)–(c).

131. *Id.* art. 26(2).

132. *Id.* art. 39(1). A Ministry of Culture has been created to achieve these goals.

133. See GHANA CONST. art. 39(3).

134. *Id.* art. 39(2).

135. See *id.* art. 270(1).

136. See Acquah, *supra* note 20.

137. GHANA CONST. art. 270(2)(b).

judicial and advisory functions in the community,¹³⁸ such as the settlement of disputes, maintenance of peace and order, and championing development initiatives. Today, even in urban environments, chiefs advise as to what custom and usage is and settle disputes between people. The National and Regional Houses of Chiefs are also charged with the “study, interpretation and codification of customary law, with a view to evolving, in appropriate cases, a unified system of rules . . . and compiling the customary laws” and evaluating “those customs and usages that are outmoded and socially harmful.”¹³⁹

The constitutional provisions discussed above, the maintenance of the institution of Chieftaincy, and the creation of a whole ministry on culture make clear that customary law in general, and customary tort law in particular, are an important part of Ghana’s legal system. The National House of Chiefs or the Regional House of Chiefs might decide to eliminate or consolidate certain practices, reducing the breadth of legally-accepted customary practices, but it appears unlikely that customary tort law will disappear altogether.

B. The Role of the Courts

Given the prominence of customary law in the Constitution and the support for it in institutions such as the various Houses of Chiefs, it is surprising how actively judges analyze and scrutinize customary tort law. There have been a number of cases where Ghanaian judges have criticized customary tort principles. In one of the most famous, *Nkrumah v. Manu*,¹⁴⁰ Justice Taylor was critical of the customary tort of slander and indicated he thought it was time that the law was changed. He could see the rationale for it in the days when village communities were small and the spoken word was the only means of social or commercial communication.¹⁴¹ However, Taylor thought that in light of the drastic changes brought by modern civilization, Ghana had “more serious problems to tackle than silly vituperation.”¹⁴² Professor Date-Bah agreed with Taylor that the law should develop to deny Ghanaians civil remedies for insults.¹⁴³ This view flew in the face of J.B. Danquah’s assertion in his book, *Cases in Akan Law*, that “[t]he delicate

138. In the days before colonization, head chiefs, or kings, held power over their various indigenous states, and under them were chiefs of regional districts and villages. See Acquah, *supra* note 20.

139. GHANA CONST. art. 272(b)–(c); *see generally* Chieftaincy Act, 1971, §§ 40–46 (Ghana).

140. [1971] 1 G.L.R. 176, 181–82 (Ghana).

141. *See id.* at 181.

142. *Id.* at 182.

143. *See* S.K. Date-Bah, *The Law of Slander in Ghana: A Sequel to Attiase v. Abobtey*, 3 REV. GHANA L. 164 (1971).

feelings of the average African are not half as blunted and atrophied as those of the average European”¹⁴⁴

While Justice Taylor’s view was that the law should not cater to the Ghanaians’ sensitive feelings, other judges have disagreed. In *Wankiyiwaa v. Wereduwaa*,¹⁴⁵ Justice Apaloo acknowledged that the offending statement was made to the plaintiff in anger and constituted plain vituperation, but stated:

[t]he fact that the law of England provides no remedy is quite beside the point In this country, where words of abuse are taken seriously, it would in my opinion, be socially intolerable if customary law provided no sanctions against a man who finds pleasure in injuring the feelings of his neighbor by vituperation.¹⁴⁶

Similar disagreements emerged between judges with respect to the customary law rule holding a father liable for his son’s misconduct with a woman. In one case, Justice Edusei stated that it was against good conscience to permit this custom to exist,

[in] present times, when present-day children are asserting their freedom of action and thought in diverse ways. If the son is old enough to know what is sex, and in these days when there is nothing esoteric about sex, I cannot see by what stretch of legal ingenuity a parent should be saddled with his son’s irresponsibility.¹⁴⁷

Another Ghanaian judge reached the opposite conclusion in a case decided the same year. Justice Wiredu acknowledged that:

it is an undeniable fact that the present days’ events cannot be said to be the same as in the past when any talk of free love was intolerable, sex by the youth . . . has become a common feature in our society and therefore justifies a call for a new look and consideration of this aspect of the custom¹⁴⁸

However, Justice Wiredu viewed disregard of the custom as a highly undesirable and also unjustifiable development. In his mind, it would encourage parental

144. J. B. DANQUAH, *CASES IN AKAN LAW* xxiii (1928).

145. [1963] 1 G.L.R. 332 (Ghana) (the case in which the plaintiff was told that “her vagina stinks”).

146. *Id.* at 335.

147. *Addae v. Asante*, [1974] 2 G.L.R. 288, 291 (Ghana).

148. *Gyan v. Dabrah*, [1974] 2 G.L.R. 318, 323 (Ghana).

abdication of a duty to control the moral conduct of children and encourage “unchecked moral degeneration of youth generally.”¹⁴⁹ Thus, even considering the custom in a modern context, Justice Wiredu came out in its favor.

Ghanaian judges, then, have shown a willingness to rethink and reevaluate issues of customary law despite the prominence and protection it enjoys in the current and previous constitutions of Ghana. They have declared that a customary law permitting trespass on tenants’ land and the cutting of palm trees was unenforceable, asserting that “[w]e cannot imagine an arrangement more ruinous of agricultural enterprise, subversive of expansion and consequently prejudicial to national development”¹⁵⁰ They have also been willing to invalidate a custom that discriminates solely on the basis of sex, such as a rule forbidding a woman from succeeding to her father’s property because succession was patrilineal.¹⁵¹ But it is likewise clear that they have disagreed with one another as to whether it is appropriate to disregard a custom, such as destruction of crops, when it does not constitute a serious offense. In one case, the High Court opined that even if a custom might appear to conflict with the common law or appear to be contrary to public policy or to lack a clear moral objective, a court should be slow to reject it or suggest a change.¹⁵²

Perhaps the internal conflict is best summed up by the fact that two years after he had agreed with Justice Taylor that Ghanaians should no longer be able to bring suit for insults and vituperation, S.K. Date-Bah thought better of his views, and in a subsequent article, he questioned whether it is “unenlightened for the law of torts to provide a remedy against abuse,” and whether it is “permissible to use the law of torts to change a particular feature of the mores of the Ghanaian community.”¹⁵³ On the merits of the question, he noted that refusing to provide a remedy for insult will not necessarily make Ghanaians less sensitive to it. “It may merely lead to insulted Ghanaians taking the law into their own hands or at least speaking ill of the law for not giving just redress to their felt grievances.”¹⁵⁴

In sum, notwithstanding the fact that the customary law is part of the laws of Ghana under the 1992 Constitution, Ghanaian judges sometimes encounter difficulty when asked to decide cases where customary law controls. They may disagree with one another as to the scope of their authority to decide whether to enforce customary law in the face of a challenge that it violates the Constitution. As one Ghanaian Supreme Court justice observed, there is an enormous difference between the judges and the communities in which they sit,

149. *See id.* at 323–24. Justice Wiredu’s position is consistent with current Ghanaian statutory law; *see e.g.*, Children’s Act, 1998 (Act 560), § 6(3)(a)(b) (recognizing a parent’s duty to protect a child from “neglect, discrimination, violence, abuse, exposure to physical and moral hazards and oppression.”).

150. *See Attah v. Esson*, [1976] 1 G.L.R. 128, 132 (Ghana).

151. *See Akrofi v. Akrofi*, [1965] G.L.R. 13 (Ghana).

152. *See Abaye v. Akotia*, [1982–1983] G.L.R.D. 109 (Ghana).

153. Date-Bah, *supra* note 40, at 133.

154. *Id.*

both in terms of education and socio-economic class.¹⁵⁵ To the extent that customs differ from one ethnic community to another, full-blown choice of law issues must be resolved. Yet, despite the challenges, a homogeneous English common law of torts would not do justice to the ethnic diversity of Ghana.¹⁵⁶ Ghanaian judges will continue to navigate these legal and policy questions in the coming years.¹⁵⁷

C. The People

As it stands now, 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. Several factors can be identified as potentially undermining the hold of customary tort law in Ghana. First, the prevailing religions in Ghana may influence what people perceive as offensive and whether they seek to recover for it. Ghana is a largely Christian country, with a Muslim minority. There are also a significant number of Ghanaians who believe in and practice a traditional African system of worship and belief. Neither Christianity nor Islam sanctions the belief in witchcraft and wizardry, but traditional religions do. It may be that, in the future, people will find it preposterous to seek relief under the customary tort of slander for being called witches or wizards because they have ceased to believe in witchcraft.

Second, as Ghanaians attend school and attain higher education, they may reject traditional Ghanaian practices. This is particularly so as most educated Ghanaian men and women tend to be Christian or Muslim. Their education, combined with their belief system, may well diminish the customary law tradition. 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

155. See Mobido Acran, *The Clash of Legal Cultures: The Treatment of Indigenous Law in Colonial and Post-Colonial Africa*, 39 AKRON L. REV. 465, 479 (2006) (noting that many of the judges are western-educated and not particularly well-grounded in customary law).

156. See S.Y. Bimpong-Buta, *Customary Mores and the Sale of Photographs of a Married Woman*, 5 REV. GHANA L. 23–27 (1973) (“Just as customary rules as to inheritance and succession governing every citizen in Ghana depend upon the tribe or society to which that person belongs, so it is that each tribe or society in Ghana has its own beliefs and estimation as to what constitutes [a tort].”).

157. South African judges are facing similar challenges to those faced by the Ghanaian judges because it has only been in the post-apartheid period that they have been authorized to apply customary law. See T. W. Bennett, *Re-introducing African Customary Law to the South African Legal System*, 57 AM. J. COMP. L. 1, 5 (2009) (critiquing some of the South African decisions applying customary law).

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. This would seem to be true, for example, with customs permitting trespass and destruction of property.

Finally, the fact that Ghana has a robust common law system clearly will have some impact on the invocation of customary law rights and remedies. While some of the customary torts clearly fall outside of the common law rules, people may choose to avail themselves of the common law causes of action when they have a choice, particularly if the remedies are more generous in terms of damages.

Although all these factors may dissuade people from invoking customary law, there are still many reasons for customary law to continue. The corporate and group nature of the Ghanaian descent system, the communal aspect of Ghanaian culture, the role of the family, and the role of customary law in maintaining the structure of society are fully intact in Ghana and not likely to change soon. Customary law is still more inclusive than the common law in its vision of what constitutes a “wrong” and more generous with respect to remedies. To the extent that the Chieftaincy institution and other traditional institutions perform their duties properly, these cases will not need to be brought to courts. The use of Chiefs as part of the dispute resolution process, along with community tribunals where no legal representation is needed, makes customary torts an accessible and practical way to solve problems. All of these factors suggest that Ghanaians will continue to utilize their customary torts.

IV. OUR INDIVIDUAL PERSPECTIVES

A. Ghanaian Perspective

As a Ghanaian and a member of the Konkomba ethnic group, I grew up in a typical rural village, Dagbanjado, in the Northern Region of Ghana, where customary law was the only normative system that maintained and regulated social life and relations. The principles that underlie customary tort law were ingrained in me very young. I was taught not to undermine the name and dignity of the family. I witnessed forms of social control, such as the public singing of the name and offense of a person who stole something, that were very effective in preventing departure from customary norms. Thus, my perspective on customary tort law is colored not only by legal analysis but also by my life experience. I firmly believe in the continued importance of customary law to Ghanaian society.

The law, whether embodied in statute or case law, sets a minimum rule of conduct. The decorum, peace, and stability of every human society—developed and underdeveloped—depends on the existence of certain norms, values, or shared expectations, and indeed a collective conscience that go beyond the confines of

codified law or judicial decisions.¹⁵⁸ In other words, values, norms, and standards beyond statute or common law are a functional prerequisite for an orderly, predictable, and stable society. This is particularly important in a society such as Ghana where the values and normative systems are ethnically diverse and this diversity is cherished and upheld.

As our analysis above demonstrates, there are many types of conduct which may injure members of the community or society either as individuals or as a group for which there is no common law or statutory remedy. The relevance of Ghanaian customary law then lies in the fact that it provides relief and remedies where individuals or groups who feel injured in one way or the other would otherwise have had no such relief or remedy. Further, its importance lies in the fact that it emphasizes that which binds and holds people together, rather than what pulls them apart. This is not surprising given the corporate nature of the descent groups in Ghana.

In *Nkrumah v. Manu*,¹⁵⁹ one of the now classic cases on the customary tort of slander, Justice Taylor's opinion expressed the view that customary law had become irrelevant in modern civilization. He stated:

I must say though that it is about time the customary law of slander took on a more enlightened garb and moved so to speak with the demands of modern times. When village communities were small and the written word was unknown to customary law the only means of social and commercial intercourse was the spoken word. It was therefore essential for the preservation of the peace of those small communities that idle insults which ridicule and may therefore ruin a person be discouraged by the body politic. With the very drastic changes which modern civilization has imposed on community and rural life throughout

158. As early as 1935, McCardie, J., observed the limitation of statute law and judicial decisions in the case of marital life as follows:

I should like to add three things, in view of several questions raised in the speeches or arguments of counsel. Firstly, it seems to be clear that the position as between husbands and wives and third parties calls for reconsideration by the law in view of the new status of married women. Secondly, the rights of a married woman to form her independent friendships and enjoy her own amusements can never be solved by the law but must be determined by the standards of loyalty, of courtesy, and of good sense; and, thirdly, that the comfort and happiness of married life rests not on statutes or decisions but on matters that lie beyond and above the realm of law.

Place v. Searle, [1932] 2 K.B. 497, 510.

159. [1971] 1 G.L.R. 176 (Ghana).

the country it seems to me that the law has more serious problems to tackle than silly vituperation.¹⁶⁰

Agreeing with Justice Taylor, Professor Date-Bah observed that the more salutary course is for the law to develop along lines aimed at promoting greater tolerance. In his view, life in a democratic community demands a high degree of tolerance and it is desirable on policy grounds that attempts are made to blunt the unduly sensitive feeling of the average Ghanaian towards insults by denying him a civil remedy for mere vituperation. Professor Date-Bah noted where the insult is such as is likely to lead to a breach of the peace, the law may intervene through the criminal law. But where the criminal law test is not satisfied, the law should not grant damages to an insulted party merely to assuage his feelings.¹⁶¹

In my view, both Justice Taylor and Professor Date-Bah were wrong in their rejection of the customary tort of slander. Justice Taylor's reference to the imposition of changes by modern civilization is problematic. He seemed to suggest that the sensibilities of Ghanaians as to what amounts to intolerably offensive conduct or comments as defined by the community should be discarded as a result of changes *imposed* by modern civilization. What "civilization" was he writing about and whose civilization is it? In any case, if those changes "imposed" by modern civilization are indeed an *imposition*, why should

160. *Id.* at 181–82.

161. *See* Date-Bah, *supra* note 143. Professor Date-Bah later doubted his own position. In a subsequent article, Date-Bah seemed to contradict himself when he said:

[T]he present writer believes that the law may be used in all its branches as a legitimate instrument of social change. Where such social change requires changes in community values, it is again thought that the law is a legitimate instrument to employ. However, though legitimate, it will not always be an efficacious instrument. The view is probably least efficacious as an instrument of change where it is seeking to overturn age-old community values. Where such values are sought to be changed, other more directly educational institutions such as the formal schools, the churches, the individual family units in which young children are socialised, etc. may be more important agents of change than a changed legal rule. A point that may therefore be made in response to Taylor J.'s dictum is that refusing to provide a tort remedy for insult will not necessarily make Ghanaians less sensitive to insult. It may merely lead to insulted Ghanaians taking the law into their own hands or at least speaking ill of the law for not giving just redress to their felt grievances.

Date-Bah, *supra* note 40.

And he admitted at footnote 10 that: "The present writer wrote approvingly of Taylor J.'s criticism in (1971) 3 R.G.L. 164, esp. at p. 167, but is now not so sure whether he ought to have been so approving." *Id.*

Ghanaians give up their ways of life in the name of such so-called “modern civilization?”

Further, although I agree with Professor Date-Bah that tolerance is an admirable value in a society, the desire for tolerance does not and should not mean that members of the community should discard and disregard legitimate claims as defined by their communities that are, or should be, remediable. What is defined as slanderous at customary law is defined not by the individual, but by the community; the collective sense of what is wrong and unacceptable cannot be discarded in the name of modernization. Professor Date-Bah’s willingness to relinquish the realm of customary law to criminal law represents too narrow a view of societal wrongs. What may offend the collective conscience may not amount to a breach of peace, and if a breach of peace were to be used as the basis for liability, many defamatory wrongs would go unredressed. If the people decide to maintain their values and normative system in the face of modernization, those values and normative system should be respected.

In my view, the people who practice the particular customary beliefs and practices are the lawmakers, and their practices should be deferred to in most instances. Those who can change or “amend” customary law are the very people who practice the particular custom. Not even Parliament may intervene, unless customary practices “dehumanise or are injurious to the physical and mental well-being”¹⁶² or the health of a person,¹⁶³ in which case a judge may declare the particular custom null and void. Absent apparent contradiction with the constitutional provisions, a judge in Ghana has no basis for reducing customary practices to a nullity. In a number of the cases cited above, the decisions of the judges did not meet this yardstick. The judges tended to base their decisions on what they perceived ought to be the law in the light of social change rather than what the law is. They overlooked the important role customary law still plays as the normative base binding together Ghanaian society in so many parts of the country.

Notwithstanding my criticism of certain decisions, I recognize and admire the questions these judges have asked about the place of customary tort law in an evolving society. The structure of the Ghanaian legal system invites and indeed requires judges who are fully versed in the common law tradition and in customary law, and this is no small task for some. No doubt the debate will continue, and I hope that Ghanaians will pursue it with full understanding of the role of customary law generally and customary torts in particular in Ghanaian society.

162. *See* GHANA CONST. art. 26(2).

163. *See id.* art. 39(2).

B. American Perspective

My perspective on customary tort law in Ghana is that of an outsider; therefore, I cannot suggest whether it should thrive or perish in the future. Although I have no vested interest in Ghanaian customary tort law, I believe Ghana's experiences hold many useful lessons relevant both to the role of customary law and to torts in particular. First, customary tort law allows us to examine in a new context many of the issues that U.S. torts scholars think about on a regular basis. One of these issues is how we conceive of injury for purposes of defamation and other dignitary torts. The breadth of Ghanaian customary law makes the distinctions between insults and defamation seem insignificant, blurring the validity of the careful and arcane lines we tend to draw in the British and American common law tradition. While our society is not organized in a manner that allows words to undermine an entire clan, the Ghanaians' willingness to accept and redress this type of injury gives credibility to the claim that perhaps we have understated the injuriousness of certain courses of conduct by excluding them from the tort system.

The existence of a remedial alternative to courts, administered cheaply and without great societal cost or legal representation, is also instructive. In essence, the remedies of the justice system are always at hand, and a departure from that model would seem to be a loss for the Ghanaians. In many torts disputes, from defamation to medical malpractice, it has been observed that sometimes all that is really desired is a simple remedy: an apology or a clarification. The American system is woefully inadequate to provide those remedies.

Turning to insights about customary law more generally, Ghana is noteworthy in its commitment to the retention of its customary law and its development of institutions that can monitor the course the law takes in the future. There are inevitable tensions between modern concepts such as non-discrimination on the basis of sex¹⁶⁴ and strong gender roles in customary practice.¹⁶⁵ It will be a challenge for Ghanaian courts and institutions, such as the

164. Various international laws require that Ghana treat women as equals of men. *See* Fenrich & Higgins, *supra* note 32, at 264–68. Ghana's domestic law also makes this commitment. *See id.* at 285–94.

165. Ghanaian customary law is not uniformly male-focused. Some ethnic groups, such as the Akan, are matrilineal. *See id.* at 270. However, some scholars have argued that customary laws relating to marriage and family rights confer asymmetrical rights and obligations, with benefit tilting toward males. *See id.* at 274–82. Others argue that as legal reforms affecting the status of women have taken place, the policy makers confront pressure from certain, often elite, constituents, as well as from other countries, to adopt changes that will modify the traditional gender roles. They often also face resistance to these changes from the rural population that adheres to these ideas and structures. *See* Gwendolyn Mikell, *Culture, Law, and Social Policy: Changing the Economic Status of Ghanaian Women*, 17 *YALE J. INT'L L.* 225 (1992) (arguing that women in developing

House of Chiefs, to continue to weave a legal tapestry that incorporates different world views, but their capacity to do so may well determine whether these two systems can continue to coexist in harmony.

Finally, customary law plays a more important role in the geo-political landscape than many observers recognize. Westerners are prone to suggesting the importance of exporting the “Rule of Law” (meaning common or civil law) to other countries and are often unlikely to recognize that customary law is in place and functioning. In Afghanistan, for example, once one ventures outside of Kabul, customary law is used in tribal settings to resolve disputes.¹⁶⁶ Countries such as Ghana that have given thoughtful attention to the role of customary law and its integration with other legal principles could be invaluable in providing insights to other countries as they seek to attain peace and stability.¹⁶⁷

V. CONCLUSION

Ghanaian customary tort law is a vibrant and living source of protection against the injuries that Ghanaians consider most serious: individual harm, social upheaval, chaos, and destruction of the family unit that anchors all of society. Just as the common law changes through judicial accretions, at times reversing its conception of what constitutes an injury or whether a remedy ought to be awarded, Ghanaian customary law has the potential to change. Although customary law is protected by the Constitution, laws and institutions of Ghana, the people who adhere to the norms and values embodied by customary law can change or reject it. They may in time do so, if they begin to see some practices as contrary to their own interests. But until that time, the judges and legislators who comprise Ghana’s legal establishment should respect customary practices. These values and norms have sustained Ghana’s many ethnic groups through periods of enormous social and political upheaval; the purposes they serve are multi-faceted and important. Just as common law tort principles provide a snapshot of society’s values, customary law principles reinforce the essence of Ghanaian diversity and

countries can best improve their economic status through the development of local cultural organizations that do not come into conflict with cultural traditions).

166. See *Afghanistan: In Search of Justice: Rural Afghans Resistant to Official Judicial System* (National Public Radio broadcast Dec. 17, 2008) (describing the authority of jirgas, or tribal councils, despite efforts to rebuild the country’s judicial system with the help of international aid), available at <http://www.npr.org/templates/story/story.php?storyId=98331042>.

167. George Ayittey suggests that the indigenous court system’s emphasis on reconciliation and the promotion of social harmony to resolve disputes and conflicts while seeking justice has worked so well that modern African societies ought to consider establishing an “international” court using those principles. The history of strife between groups within a country and between African countries surely makes this suggestion worthy of serious consideration. See AYITTEY, *supra* note 34, at 68–69.

ethnicity and the ethos of the multi-faceted groups that comprise the people of Ghana.

