

## LEGAL REGULATION OF THE ACTIVITY OF COURTS OF CUSTOMARY LAW IN THE REPUBLIC OF GHANA

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### Abstract

The article is aimed at monitoring the reforms in the field of civil justice, arbitration and mediation in foreign countries (Ermakova et al., 2018) as part of the course "Civil Procedure of foreign countries". The article includes the following subsections: 1) Sources of legal regulation of the activities of customary law courts in modern Ghana; 2) Competences of customary courts; 3) The law applicable in settlement of disputes by the courts of the customary law of Ghana; 4) The Ashanti Traditional Tribunals in Ghana.

It is concluded that the justice administered by the courts of the customary law of Ghana cannot be considered as a relic of the past, which will soon disappear from the life of modern society. This is not the fact. In recent decades, the system of ordinary courts has proven itself to be extremely positive in Ghana. The judicial system of Ghana was formed according to the norms of the 1992 Constitution and the Courts Act 1993. Ten years later, in December 2001, the Community and circuit tribunals were abolished as unable to cope with their duties. Their place was taken by the courts of customary law. Thus, at present, part of the lower courts of Ghana is customary law courts. They are not free from shortcomings, including corruption. However, the role and importance of ordinary courts in the public life of the country should not be underestimated.

The information presented in this article may serve postgraduate students and law students a theoretical basis for the preparation of dissertation research, reports, term papers and diplomas.

**Keywords:** Ghana law, customary law, customary law courts, Ashanti courts.

## 1 INTRODUCTION

In Africa, customary law and traditional institutions are of great importance, not only as symbols of cultural identity but also as practical ways of managing people. Increasingly, the role of traditional leadership in both legal and political institutions is recognised as an essential part of governance. Even the World Bank recognised their role in economic and legal development. Traditional institutions operate in a pluralistic legal

system, often together with constitutional democracy and as part of it. (Slater, 2014). In Africa, traditional justice systems have survived in various forms, serving large populations, located mainly in rural communities. It is important to note that the norms and practices that form the basis of customary law in African societies are neither homogeneous nor static. (Aiyedun, 2016).

The 2006 World Development Report Background Document indicated that in many developing countries the system of customary courts operating outside the state regime is often the dominant form of regulation and dispute resolution, covering up to 90% of the population in some parts of Africa. For example, in Sierra Leone, approximately 85% of the population falls under the jurisdiction of customary law, defined in the Constitution as “the rules of law that are customarily applicable to specific communities in Sierra Leone”. Over 90% of land transactions in countries such as Mozambique and Ghana are based on customary law (Chirayath et al., 2005)

The legal system of Ghana is based on English common law and customary law (Frolova et al., 2017). Ghana has more than 100 different ethnolinguistic groups. Gold and then the slave trade attracted European colonialists to this region of Africa. At the end of the 15th century, the Portuguese captured the country, followed by Dutch, Danish, English and Swedish explorers. In the early 19th century, the British began to dominate the “Gold Coast”, expanding their control further inland. By 1902, most of modern Ghana became a British colony, and in 1956 Volta joined Ghana. The British policy of indirect rule used local leaders in the government and administration, so the traditional authorities retained their jurisdiction over the internal affairs of their communities. After the Second World War, in 1957, Ghana achieved independence. Ghana became a republic following the 1960 Constitution.

## **2 METHODOLOGY**

The authors would like to state that this work is a research study explicitly prepared for students in order to lay out the basics of legal regulation of the activities of customary courts in Ghana in the most accessible form. The information presented in this article should serve as a base for graduate students and law students for the preparation of dissertation research, reports, term papers and diploma papers. General information about the customs and customary law of African countries can be found in the works of Russian authors: reference book “Methods for resolving disputes in different systems of law” 2017 (Artemyeva et al., 2017). The work is also based on research by foreign authors: Aiyedun Adenike, Ordor Ada (2016); An-Na'im Abdullahi A., Candler Charles Howard (2018); Arnot Bob (2015); Chirayath Leila et al (2005); Crook Richard C. (2004); Fenrich Jeanmarie and McEvoy Mary (2014); Sarpong G. A. (2005); Slater A. (2014). The work uses such regulations as: Constitution of the Republic of Ghana; Chieftaincy Act of 1971; Courts Act of 1993; Intestate Succession Law 1985; Marriage of Mohammedans Ordinance 1907.

## **3 RESULTS**

### **3.1 Sources of legal regulation of the activities of customary law courts in modern Ghana**

After a series of military coups in 1966-1993 Ghana has become a civil state with a democratic system of government. The Constitution of the Fourth Republic came into force in 1993. However, as early as the period of military rule, in 1968, the Ghana Law Reform Commission was established, which was tasked to revise the statutory and customary law and propose reforms. The first program of the Commission identified inheritance and marriage law as one of the main areas requiring attention. The Commission drafted the following regulations: 1) Maintenance of Children Decree, 1977, which was later replaced by the Children's Act, 1998 and the Inheritance Act in the absence of a will 1985 (Intestate Succession Law, 1985). The Maintenance of Children Decree established the Family Tribunals to deal with complaints about the maintenance of children during the existence of the marriage and after the divorce. Ghana's Succession Law protects children in communities where they are not entitled to a share in the property of their deceased parents. (Artemyeva et al., 2017).

The 1992 Constitution of Ghana in art. 11 fixes the list of legal sources of the country: “The Constitution; legislation; existing laws; and common law. Existing laws are defined as written and unwritten laws of Ghana, valid in the country before the adoption of the Constitution, and adapted according to the provisions of the Constitution. (Frolova et al., 2017).

Article 270 (1) of the Constitution of Ghana recognises the institution of the chieftain (chieftaincy) along with the traditional councils of the chiefs under customary law, and Art. 272 establishes that the National House

of Chiefs should conduct a consistent study and codification of customary law to establish uniform rules and evaluate such laws in order to eliminate those customs that are outmoded and socially harmful.

The constitutional judicial system of Ghana includes state courts and tribunals of customary (traditional) law - Traditional courts. These include National House of Chiefs, Regional House of Chiefs, and Traditional Councils.

Islamic law is applied by ordinary (traditional) courts within the broader category of customary law (An-Na'im, 2018). Customary (traditional) law tribunals operate by the Constitution of Ghana and a number of other regulations. Among them: 1) Courts Act 1993, 2) Marriage of Mohammedans Ordinance 1907, 3) Matrimonial Causes Act 1971, 4) Wills Act 1971, 5) Chieftaincy Act 1971.

### **3.2 Jurisdiction of customary law courts**

The jurisdiction of the courts of customary (traditional) law of Ghana includes the resolution of the following issues:

- Marriage Age, Marriage Guardianship: Muslim law determines that marriage is in the presence of a groom, bride, and two witnesses; marriage under duress is punishable under the Criminal Code;
- Marriage Registration: Muslim law specifies that marriage must be registered within one week;
- on Polygamy: under the laws of Ghana, all marriages contracted under customary law are potentially polygamous;
- on Obedience and Maintenance of a wife and children: The Ghana Penal Code establishes the responsibility of a husband for not complying with the duty of maintaining a wife and children;
- on Divorce - Talaq: Talaq is governed by Islamic law and the traditional law of Ghana;
- on Judicial Divorce: a) one can dissolve the marriage under customary law by going to court under the Matrimonial Causes Act, 1971; b) divorce claims for Muslims are resolved under Islamic law, and the court must determine postpartum benefits and guardianship issues;
- on Post-Divorce Maintenance / Financial Arrangements: the court must determine the amount of alimony and other marital benefits;
- on Child Custody and Guardianship;
- on Succession: after the death of a Muslim whose marriage was registered under the Marriage of Mohammedans Ordinance, the property is transferred following Islamic law; The Wills Act of 1971 provides for freedom of will, but following customary law, it applies to the testator.

It should be emphasised that the system of ordinary courts has proven itself very positively in Ghana. The modern judicial system of Ghana was formed according to the norms of the 1992 Constitution of Ghana and the Courts Act 1993. After ten years, in December 2001, the Community and circuit tribunals of Ghana were abolished as inconsistent with their duties. (GhanaWeb, 2002). They were replaced by the courts of customary law. This was directly stated by the Minister of Justice of Ghana - Nana Addo Dankwa Akufo-Addo. The judges, magistrates and chairpersons of the tribunals approved the proposal of the Minister of Justice to abolish the system of tribunals at the annual general meeting of the Association of Judges and Magistrates in Accra in 2001.

### **3.3 Law applicable in the settlement of disputes by the courts of the customary law of Ghana**

The constitution authorises formal courts to apply both statutory and customary law in settlement of disputes (Crook, 2004).

Under § 54 of the Law of the Courts of 1993, customary law may be applied by state courts, "if legal norms comply with the requirements of "equity and good conscience" and they are not incompatible with any existing law. Thus, while customary law is recognised as a legitimate and enforceable source of law, it can be amended by the Constitution and the statutes of Ghana, which are the highest forms of law. Some customary laws of Ghana have been amended by statutes. For example, the Intestate Succession Law 1985 changed the rules of customary law relating to inheritance between members of the deceased's family in order to create legal measures to protect widowed spouses and their children.

The Chieftaincy Act of 1971 established mechanisms and procedures for the definition and interpretation of

customary law, which were enshrined in Art. 22 of the 1992 Constitution. In § 40 of the 1971 Chieftaincy Act, it was fixed that the National House of Chiefs ("NHC") had the right to study, interpret and codify customary law; to formulate any customary rule relating to any subject in any region, as well as to modify customary law (Fenrich, 2014).

The Chieftaincy Act secured official recognition of the Regional House of Chiefs ("RHC") in each of the ten regions of Ghana, standardised their structure and functioning. The National House of Chiefs and the Regional House of Chiefs of each region are responsible for the formation of the Judiciary Committee, which exercises authority over issues relating to traditional institutions and affecting traditional communities. In formal court cases concerning customary law issues, these Judicial Committees can advise judges and correct deficiencies in the application of customary law.

### **3.4 The Ashanti Traditional Tribunals in Ghana**

Ashanti is the largest ethnic group in Ghana, with a population of 3.3 million. Ashanti preserves the cult of the ancestors (asamanfo), the object of which was the leaders and elders, and the cult of the forces of nature (especially the river spirits and other reservoirs). The highest traditional courts for Ashanti are the Asanteman Council and the Kumasi Traditional Council, headed by Asantehene or King of the Ashanti, currently Osei Tutu II.

The Asanteman Council deals with matters governed by customary law and has jurisdiction over all Ashanti residents in Ghana. The Kumasi Traditional Council, which has legislative powers, has the competence to hear and identify issues that affect the primacy in the Kumasi metropolitan area, as well as parts of the Ashanti and Brong-Ahafo regions.

For women, there is the Asantehemaa Court chaired by Queen Mother of the Ashanti, now Nana Afia Kobi Serwaa Ampei. English lawyer Bob Arnot wrote that most often women file complaints not directly to the ordinary (traditional) court, but through the wives of the traditional rulers (leaders). The wife of a traditional ruler fulfils two roles: first, she advises and encourages female applicants and facilitates their access to traditional justice. Counselling and support give women applicants confidence in their words (Arnot, 2015).

Asantehemaa Court deals with social and personal conflicts involving women, such as curses, insults, accusations of witchcraft, or disputes over land use or labour input. The meetings of these tribunals were videotaped, and some were later decoded. The public has limited access to these records (Fenrich, 2014).

Below these three tribunals, there are the courts of chiefs and queens Ashanti in small towns and villages in the Ashanti region. Issues that are often addressed by these local traditional tribunals include land disputes, conflicts affecting chieftaincy, and family law issues such as marriage and its dissolution, inheritance and custody issues.

## **4 FINDINGS**

It should be emphasised that the justice administered by the ordinary courts of Ghana cannot be regarded as a relic of the past, which will soon disappear from the life of modern society. This is not true. In recent decades, the system of ordinary courts has proven itself to be extremely positive in Ghana. It must not be ignored that the judicial system of Ghana was formed according to the norms of the 1992 Constitution and the Courts Act 1993. Ten years later, in December 2001, the Community and circuit tribunals of Ghana were abolished as unable to cope with their duties. Their place was taken by ordinary courts. Thus, at present, part of the lower courts of Ghana is customary law courts. These courts are not free from defects, including corruption. However, the role and importance of ordinary courts in the public life of the country should not be underestimated.

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## **REFERENCE LIST**

Aiyedun Adenike, Ordor Ada (2016). Integrating the traditional with the contemporary in dispute resolution in Africa. URL: [http://www.scielo.org.za/scielo.php?script=sci\\_arttext&pid=S2077-49072016000100009](http://www.scielo.org.za/scielo.php?script=sci_arttext&pid=S2077-49072016000100009)

Accessed 07.11.18.

An-Na'im Abdullahi A., Candler Charles Howard (2018). Ghana. Constitutional Status of Islam(ic Law). URL: <https://scholarblogs.emory.edu/islamic-family-law/home/research/legal-profiles/ghana-republic-of/> Accessed 12.11.18.

Arnot, Bob. (2015) How traditional justice in Nigeria is changing. 24 February 2015. URL: <https://www.britishcouncil.org/voices-magazine/how-traditional-justice-nigeria-changing> Accessed 07.11.18.

Artemyeva, Yu.A., Ermakova, E.P., Kovyrshina, N.A., Rusakova, E.P. (2017) Methods for resolving disputes in different systems of law. Tutorial. M., Ed. Infotropic.

Chirayath, Leila et al (2005). Customary Law and Policy Reform: Engaging with the Plurality of Justice Systems. URL: [http://siteresources.worldbank.org/INTWDR2006/Resources/477383-1118673432908/Customary\\_Law\\_and\\_Policy\\_Reform.pdf](http://siteresources.worldbank.org/INTWDR2006/Resources/477383-1118673432908/Customary_Law_and_Policy_Reform.pdf) Accessed 01.02.19.

Crook, Richard C. (2004) Access to Justice and Land Disputes in Ghana's State Courts: The Litigants' Perspectives, 50 Legal Pluralism 1, 3. URL: <https://www.tandfonline.com/doi/abs/10.1080/07329113.2004.10756576> Accessed 12.10.18.

Ermakova, E.P., Rusakova, E.P., Sitkareva, E.V., Frolova, E.E. (2018) Main Components of Protecting Consumers of Financial Products in Asian-Oceanic (APAC) Countries// International Journal of Engineering and Technology (UAE) Published on:, Vol 7, No 4.38 (2018). P. 157.

Fenrich, Jeanmarie and McEvoy, Mary (2014). Promoting Rule of Law in Customary Tribunals in Ghana. November 06, 2014. URL: <http://harvardhrj.com/2014/11/promoting-rule-of-law-in-customary-tribunals-in-ghana/> Accessed 20.09.18.

Frolova, E.E., Belikova, K.M., Badaeva, N.V., Belozerova, I.I., Ulyanishchev, V.G. (2017) The Concept of Real Right in India and South Africa: Specifics of National Regulation and Trends of Harmonization of Law.// Journal of Advanced Research in Law and Economics. Vol. 8. no. 3. pp. 799-812.

GhanaWeb (2002). Circuit Tribunal System Abolished.

URL: <https://www.ghanaweb.com/GhanaHomePage/NewsArchive/Circuit-Tribunal-System-Abolished-30162> Accessed 12.10.18.

Sarpong, G. A. (2005) Customary Water Laws And Practices: Ghana. URL: [http://www.fao.org/fileadmin/templates/legal/docs/CaseStudy\\_Ghana.pdf](http://www.fao.org/fileadmin/templates/legal/docs/CaseStudy_Ghana.pdf) Accessed 12.11.18.

Slater, A. (2014). Traditional Legal Institutions through a Rule of Law Lens: the Chieftaincy in Ghana// Volume 2, Number 1 //Spring 2014. URL: [https://www.mcgill.ca/humanrights/files/humanrights/ihri\\_wps\\_v2n1\\_-\\_angelaslater.pdf](https://www.mcgill.ca/humanrights/files/humanrights/ihri_wps_v2n1_-_angelaslater.pdf) Accessed 12.11.18

### **Regulations:**

Constitution of the Republic of Ghana. URL: <http://www.ghanaweb.com/GhanaHomePage/republic/constitution.php> Accessed 02.10.18.

Chieftaincy Act of 1971//Ghana legal. URL: <http://laws.ghanalegal.com/acts/id/81/chieftaincy-act> Accessed 02.10.18.

Courts Act of 1993//Ghana legal. URL: <http://laws.ghanalegal.com/acts/id/116/courts-act> Accessed 02.10.18.

Intestate Succession Law 1985. Ghana // Food and Agriculture Organization of the United Nations.URL: <http://extwprlegs1.fao.org/docs/pdf/gha140393.pdf> Accessed 16.10.18.

Marriage of Mohammedans Ordinance 1907// Resource Equity is a 501(c)(3) nonprofit organization. URL: <https://landwise.resourceequity.org/record/1771> Accessed 16.10.18.

Marriage Ordinance 1951.// Resource Equity is a 501(c)(3) nonprofit organization. URL: <https://landwise.resourceequity.org/record/1771> Accessed 16.10.18.

The Children's Act, 1998. Ghana // UNESCO. URL: <http://www.unesco.org/education/edurights/media/docs/f7a7a002205e07fbf119bc00c8bd3208a438b37f.pdf> Accessed 16.10.18.