Introduction

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Pluralism is part of the fabric of legal systems in most, if not all, African countries. The traditional institutions and customary law that regulated ancient civilizations and societies on the African continent have changed over the years to keep pace with historical events and the evolution that the continent has witnessed. Once the sole source of law, customary rules have had to adapt to significant change brought by colonial rule and then decolonization. In addition to customary law, most sub-Saharan African countries are now bound by domestic constitutional law, statutory law, and common law, as well as international and regional human rights treaties.

In many countries, constitutional law, statutory law, and common law have superseded most or all customary law. In others, domestic constitutions now enshrine the right to culture and oblige courts to apply customary law where applicable, although subject to constitutional and statutory law.[1] Yet this picture of customary legal systems subordinated to constitutional and formal legal rules does not accurately portray the much more complex reality on the ground. In villages, towns, and cities across the African continent, peoples' lives continue to be regulated by customary laws. Traditional legal systems are often the only ones functioning in remote corners of the continent, where the reach of the State is at best limited and at times non-existent. Even where available, the formal legal system, with its linguistic obstacles, intricate rules, formalities, and expense, is often out of reach of the poor or uneducated. In addition, the persistence of long-standing expectations and social practices informed by customary law has given rise to many problems in enforcing contradictory constitutional or statutory law.

[1] See, e.g., S. Afr. Const. 1996, §31(1) ("Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community-(a) to enjoy their culture, practise their religion and use their language;"); §211(3) ("The courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law.").

Customary laws and institutions constitute comprehensive legal systems that regulate the entire spectrum of activities from birth to death. In many places, customary law continues to govern civil and criminal affairs, including family relations, traditional authority, property rights, and succession. In some instances, the application of customary law is problematic as there is potential conflict between the protection and application of customary law and other domestic and international human rights norms, such as gender equality. The editors of this book, who are all affiliated with the Leitner Center for International Law and Justice at Fordham Law School in New York, have conducted fieldwork in a number of different countries in Africa and authored publications that illustrate the ongoing importance of customary law and the difficulties that arise in navigating competing bodies of law.[2]

Notwithstanding the significant role customary law continues to play in people's lives, there has been a notable lack of contemporary scholarship on the status and role of customary law across the African continent. In response to this lack of scholarship, the Leitner Center convened a two-day conference in October 2008 in partnership with the Faculty of Law at the University of Botswana. The conference brought together leading academics, judges, stakeholders, policy makers, and experts to discuss the future of African customary law. A total of twenty-eight papers were presented at the conference along with remarks from the Attorney General of Botswana and traditional leaders from Sierra Leone and a roundtable discussion with members of the judiciary from South Africa, Botswana, and Ghana.

This volume, *The Future of African Customary Law*, includes revised versions of a number of the papers that were presented at the conference, in addition to new contributions from scholars and experts in the field, and is aimed at policy makers, scholars, members of the judiciary and legal profession, students, and at a broader audience including all those with an interest, either personal or professional, in African customary law. This volume is intended to promote research to understand customary law, explore its continued relevance, its rules, and its evolution to ensure that this legal system contributes to addressing the needs of the continent. The arguments and insights offered by the authors are the authors' own. The editors have attempted to include authors who present many of the divergent views that exist on the subject of the appropriate role and future

[2] *See, e.g.*, Jeanmarie Fenrich & Tracy Higgins, *Promise Unfulfilled: Law, Culture, and Women's Inheritance Rights in Ghana*, 25 FORDHAM INT'L L.J. 259 (2001); Tracy E. Higgins, Jeanmarie Fenrich & Ziona Tanzer, *Gender Equality and Customary Marriage: Bargaining in the Shadow of Post-Apartheid Legal Pluralism*, 30 FORDHAM INT'L L.J. 1653 (2007); Chi Mgbako, Jeanmarie Fenrich & Tracy Higgins, *We Will Still Live: Confronting Stigma and Discrimination Against Women Living with HIV/AIDS in Malawi*, 31 FORDHAM INT'L L.J. 528, 576–578 (2008); Mehlika Hoodboy, Martin Flaherty, & Tracy E. Higgins, *Exporting Despair: The Human Rights Implications of Restriction on U.S. Health Care Funding in Kenya*, 29 FORDHAM INT'L L.J. 1 (2005).

significance of customary law in Africa. Accordingly, the editors do not necessarily endorse all arguments included in this volume. The book primarily focuses on Anglophone African countries, with the exception of chapters focusing on Rwanda and Senegal.

The book is divided into six parts. Part One, titled "The Nature and Future of Customary Law," considers broadly what constitutes customary law and how this body of law differs from legislation and common law. In Chapters 1 and 3, Gordon R. Woodman and Abdulmumini A. Oba offer views on the significant characteristics of customary law. Chapter 3 also discusses the historical development of customary law and the impact of colonialism on the normative content of customary law. The chapters included in Part One also discuss the legal context in which customary law currently operates in various states in West and Southern Africa, and consider state recognition of customary law today and the existence of, and difference between, "official" customary law and "living" customary law. These chapters also discuss the future relevance and influence of customary law with respect to both official and unofficial law and, in Chapter 2, Chuma Himonga considers the potential of living customary law to protect human rights.

Part Two, titled "Ascertainment, Application, and Codification of Customary Law," considers the process to determine the content of customary law; the form and status of customary law; and how the scope of its application has been limited in some countries. In Chapter 4, Janine Ubink considers various methods utilized to ascertain rules of customary law by scholars and judges in African state courts. The chapter focuses in particular on the difficulties presented by situations of change and conflict when customary norms are contested, and utilizes a case study regarding customary land management in Ghana to illustrate many of the issues that arise in such cases. In Chapter 5, George Otieno Ochich considers the historical and current place of customary law in Kenya's legal system, and the manner in which the application of customary law has been severely limited in Kenya.

Part Two also discusses efforts to codify customary law and evaluates the effect of codification projects on the development of customary law and coherency in its application. In Chapter 6, Laurence Juma examines the experiences of the Kingdom of Lesotho with the codification of its customary law in the Code of Lerotholi. Juma attempts to determine what, if any, influence the Code has had on the administration of justice, the institution of chieftaincy, the structure of the legal system, and the practice of democracy.

In contrast to the codification project in Lesotho, Manfred O. Hinz in Chapter 7 discusses a project in Namibia undertaken by traditional communities to "self-state" or make and ascertain the customary law themselves. Hinz discusses how the self-stating project differs in process and effect from codification, although both result

in written texts. Interestingly, and in contrast to the efforts elsewhere to alter the customary law of intestate succession through national legislation or case law, Hinz discusses efforts to develop and harmonize the customary law of intestate succession in Namibia through the process of self-stating to improve the plight of widows. In Chapter 8, Chi Mgbako and Kristina Scurry Baehr consider the work of paralegal organizations to resolve justice disputes in Sierra Leone and Liberia. Mgbako and Baehr examine some of the challenges paralegals encounter in working in legal dualist systems and document how paralegals advocate for the positive development of customary law, utilize the formal system to check injustice in customary forums, and provide mediation as an alternative to both the formal and customary systems, among other approaches.

In the final chapter of Part Two, Justice Joseph B. Akamba and Isidore Kwadwo Tufuor consider the sources and scope of customary law in Ghana. Akamba and Tufuor focus in part on the development of customary law through court decisions and maintain that courts today apply emerging principles of social development and public policy to shape and modify customary law rules. This chapter also considers the future of customary law in Ghana and a new customary law ascertainment and codification project being undertaken by the National House of Chiefs and the Law Reform Commission in Ghana.

Part Three considers the role and power of traditional authorities. Digby S. Koyana analyzes the evolution and the primary features and functions of traditional courts in South Africa in Chapter 10. Koyana considers some of the unique aspects of traditional courts that are often criticized, including the prohibition of legal representation, basic record keeping and lack of codification of the customary law, the informal distinction between civil and criminal cases in these courts, and the conciliatory rather than retributive nature of traditional courts. Koyana also discusses advantages traditional courts offer over magistrate or other state courts, and argues for the continued utility of the traditional courts based on their strengths, such as accessibility, affordability, simple procedures, and use of the local language of the parties, among others.

In Chapter 11, Wazha G. Morapedi discusses a surprising resurgence of the institution of chieftaincy in the 1990s in many African countries and offers reasons for this resurgence. Morapedi then discusses in detail the institution of chieftaincy in Botswana, both historically and post-independence, and the roles and duties chiefs have been accorded by the state and how customary law has enabled the institution to remain relevant with respect to judicial and administrative functions in Botswana. Finally, in Chapter 12, Ernest Kofi Abotsi and Paolo Galizzi consider traditional leadership and governance in Ghana. Abotsi and Galizzi examine the history, challenges, and opportunities for the institution of traditional leadership within a modern democracy and evaluate the effect of the current constitutional guarantee for

chieftaincy and its practical workability and structural efficiency under the current governance system.

Part Four considers customary land tenure, property rights and intestate succession, and efforts to reform these areas of customary law. In Chapter 13, Sandra F. Joireman examines the relationship between customary land tenure and the role and authority of customary leaders throughout Sub-Saharan Africa. Joireman first discusses the different systems of land holding introduced in the colonial period (private and customary) with the different attendant rights and control and enforcement systems. Joireman then considers the various groups who benefit from customary systems of land tenure, such as the customary leaders who control customary land, and those who are left in a more vulnerable position with respect to property rights due to customary tenure systems, such as migrants and women. Joireman then proposes a set of criteria that can be used to evaluate the impact of customary land tenure and customary authority structures on social welfare and offers recommendations for the future based on the outcome of her analysis.

In Chapter 14, Janet L. Banda considers the variety and efficacy of contemporary land reforms targeting customary tenure. Banda critiques the approach of the World Bank and others that emphasize transformation of existing indigenous tenure systems, and in particular formalization of customary interests in land through title and registration as a means of achieving tenure security and economic growth. Banda offers other approaches for reform that affirm customary tenure systems while working to correct inequitable access to land and enhancing tenure security.

In Chapter 15, Christa Rautenbach and Willemien du Plessis consider the status of the customary law of succession in South Africa and whether this body of law has been improved or abolished by the many judicial and legislative changes that attempt to bring it in line with the constitutional guarantees of gender equality and other rights.

Part Five addresses customary criminal law. Thomas W. Bennett, in Chapter 16, discusses the place of customary criminal law in the South African legal system. Bennett focuses on the jurisdiction recently given to traditional courts to hear cases involving certain customary criminal offenses and considers whether such recognition of customary crimes presents issues with respect to South Africa's constitutional law, political structure and human rights guarantees. In Chapter 17, Roelof H. Haveman considers the *Gacaca* or the traditional justice system in Rwanda and its transformation for use to try suspects involved in the 1994 genocide in that country. Haveman examines important characteristics of the transformed *Gacaca*, which are intended to help rebuild the country by ending impunity for perpetrators of the 1994 genocide and fostering reconciliation among Rwandans.

Finally, Part Six includes chapters that consider the relationship between customary law, human rights, and gender equality. In Chapter 18, Tracy E. Higgins and

Jeanmarie Fenrich explore the tension between traditional legal systems and the commitment to gender equality embodied in international treaties and the domestic constitutions of many African states. Higgins and Fenrich consider whether a pluralist legal structure provides a means of reconciling this tension and examine case studies from Ghana, Tanzania, and South Africa in order to illustrate the strengths and limitations of such a model.

Also in Part Six, Ben Kiromba Twinomugisha considers the relationship between customary law and women's rights in Uganda. Although he recognizes that many customary norms and practices are discriminatory, Twinomugisha rejects the view that customary law is universally contrary to gender equality. Rather, he argues that there are aspects of customary law that are empowering for women and that, given that customary law is a flexible, living system of law, areas of customary law that are discriminatory can be adapted to comply with international and domestic obligations regarding women's rights. Johanna E. Bond in Chapter 20 considers the extent to which international and regional human rights treaties, and in particular the new Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa, can be used to reform customary law so that it better complies with international human rights norms regarding gender equality.

Finally, in Chapter 21, Fatou K. Camara investigates pre-colonial African customary laws and practices in an effort to identify human-rights-friendly rules and values that different African communities have in common and that can be relied on to promote socio-legal reforms and thereby achieve a long-awaited "African Renaissance."

PART ONE

The Nature and Future of Customary Law

1

A Survey of Customary Laws in Africa in Search of Lessons for the Future

Gordon R. Woodman

1.1. INTRODUCTION

The role of customary laws in the twenty-first century, whether in Africa or elsewhere, is of great theoretical interest. It is important, however, that the present discussion makes a contribution to legal development in Africa. I seek here to discern the lessons that can be learned from past experience of customary laws in Africa and that may assist in determining future policies toward customary law.

I do not argue for the adoption of particular policies. As an outside, although fascinated, observer of customary laws in Africa, it is not for me to say what ought to be done about them in the future. An observer may only help by suggesting the various future courses of action that are open, pointing out what, in the light of experience, may be feasible and what is not. This is an attempt to draw useful generalizations from the considerable volume of information in the literature.

Two further qualifications are needed. First, I concern myself here with Sub-Saharan Africa only. Second, the abundant evidence of the vast variety in the content and form of customary laws in Sub-Saharan Africa entails that there is almost certainly an exception to any generalization somewhere. Attempts have been made to generalize about the substance of specific branches of customary laws in Africa.[1] These are instructive, but still it may be suggested that every particular customary law needs to be studied before it can be concluded that any such generalization of it is true. In this chapter I consider generalizations about the nature of customary laws in Africa in less specific terms, but nevertheless skepticism is needed. Although the propositions I suggest may be true of many instances of customary laws, all that follows in this chapter should be understood with this qualification.

[1] *See, e.g.*, Taslim Olawale Elias, The Nature of African Customary Law (Manchester University Press 1956).

The only completely accurate generalization is that there are no completely accurate generalizations.[2]

1.2. IDENTIFICATION OF THE SUBJECT MATTER

Our subject matter is customary laws that exist in Africa. We do not intend to engage in much theoretical debate. Nevertheless, if we are not clear about our topic of discussion, we shall not produce realistic conclusions, and to define our topic, some theoretical discussion is necessary.

In referring to customary laws that exist in Africa, I use the plural term to avoid any possible implication of a denial of the variety of customary laws on the continent. Furthermore, I refer to those existing in Africa, not to African customary laws, to avoid implying that there is necessarily a distinctive difference between African customary laws and non-African customary laws.

A customary law may be defined as a normative order observed by a population, having been formed by regular social behavior and the development of an accompanying sense of obligation. A normative order is a body of interrelated norms, or of rules and principles. It has been argued that customary laws in Africa, at least those which existed in the past, should not be seen as bodies of norms, because "rules per se had no particular value for African societies" in the period before colonization.[3] Because of concern over this possibility, scholarship on customary law concentrated for a time on the study of disputing processes.[4]

It is not possible to debate this issue fully here. However, it may be noted that studies of disputing processes show that, although the outcomes of disputes may not be determined by the mechanical application of previously published norms, the disputes have originated in and been structured by norms. Disputes are conflicting claims over normatively defined entitlements and obligations, not warfare between total strangers. Moreover, disputing processes follow procedures set by norms.[5]

[2] For a similar cautionary preliminary statement, *see* Thomas W. Bennett, *Comparative Law and African Comparative Law*, *in* The Oxford Handbook of Comparative Law 641, 643 (Mathias Reimann & Reinhard Zimmermann eds., Oxford University Press 2006).

[3] Thomas W. Bennett, Human Rights and African Customary Law under the South African Constitution 2 (Juta 1995); *cf.* Thomas W. Bennett, Customary Law in South Africa 1–33 (Juta 2004).

[4] *See, e.g.*, Richard L. Abel, *Case Method Research in the Customary Law of Wrongs in Kenya I*, 5 E. Afr. L.J. 247 (1969); Richard L. Abel, *Customary Law of Wrongs in Kenya: An Essay in Research Method*, 17 Am. J. Comp. L 573 (1969); Richard L. Abel, *A Comparative Theory of Dispute Institutions in Society*, 8 Law & Soc'y Rev. 217 (1973); Simon Roberts, Order and Dispute: An Introduction to Legal Anthropology (Penguin Books 1979).

[5] *See* Philip H. Gulliver, Social Control in an African Society: A Study of the Arusha: Agricultural Masai of Northern Tanganyika (Routledge & Kegan Paul 1963); Philip H.