18. Customary tort law in Sub-Saharan Africa

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The essential properties of a thing are those which one observes universally wherever that thing exists and which pertains to it alone. If, then, we wish to know what crime essentially is, we must extract the elements of crimes which are found similar in all criminological varieties in different social systems. None must be neglected. The juridical conceptions of the most inferior societies are no less significant than those of the most elevated societies; they are not less instructive. To omit any would expose us to the error of finding the essence of crime where it is not. Thus, the biologist would have given vital phenomena a very inexact definition, if he had disdained to observe mono-cellular organisms, for, solely from the contemplation of organisms of higher types, he would have wrongly concluded that life essentially consists in organization. 1

The starting point of any analysis of the law of torts must be consideration of those rights tort protects. 2

1. INTRODUCTION

The diversity and complexity of the African Continent has been well documented and recognised. In one such commentary, Dr. Kwame Nkrumah stated that:

Africa and its islands, with a land area of some twelve million square miles … could easily contain within it, and room to spare, the whole of India, Europe, Japan, the British Isles, Scandinavia and New Zealand. The United States of America could easily be fitted into the Sahara Desert. Africa is geographically compact, and in terms of natural resources potentially the richest continent in the world. 3

And so in such a continent where there are diverse political, social, cultural and economic conditions and systems, it is not an easy task to generalise. 4 However, in spite of this diversity, it is possible to discern certain common legal, political, social, economic and cultural conditions and problems. 5 These derive from the traditional past, common aspirations and from shared experiences under colonialism. 6 On the bases of shared colonial experiences and common socio-cultural values, norms, beliefs and practices, generalisations can be made about legal and other patterns of life in Africa. Sub-Saharan Africa, the focus of this chapter, geographically refers to Africa south of

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1 Durkheim, E. The Division of Labour in Society (Collier Macmillan Ltd, 1864/1933) at 70.
4 Ibid at 9.
5 Ibid.
6 Ibid at 13.

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the Sahara. Politically Sub-Saharan Africa includes African countries which are fully or partially located south of the Sahara. The Sahara is bound by the Atlantic Ocean to the west, the Atlas Mountains and the Mediterranean Sea to the north, the Red Sea to the east and the valley of the Niger River to the south.

Professor Emile Durkheim in the above quotation calls for a definition or explanation of crime not only from the point of view of the ‘most elevated’ societies but also from the perspective of the ‘most inferior’ societies. Professor Durkheim’s admonition is premised on his position that the attributes of a thing are better appreciated or understood from a universal rather than a particularistic approach. Thus, according to Durkheim, crime would be better understood if it was approached from the comparative perspective, that is, by defining what crime is as understood in all societies, big or small, developed and developing. Therein lies the wisdom in seeking to understand tort law from Western and non-Western perspectives. Tort law, in other words, would be better understood if it was taught or studied in its varietys and forms as applying in varying socio-cultural contexts.

Therefore, taking into consideration the ultimate goal of this book, this chapter must really be unique in terms of its scope and focus. Thus, in seeking to define the scope of the chapter, the question arose whether the topic, ‘Tort Law in Sub-Saharan Africa’ as previously proposed was not too broad. For the topic as framed required an examination of both the common law tort and indigenous tort law in Sub-Saharan Africa. Common law tort as known in Western Europe and in America is not in any way different from common law tort in Africa. Most African countries were British colonies and, therefore, retained the general doctrines of the common law as known and applied in the United Kingdom. Those African countries that were ruled by France essentially are governed by the civil law system. Thus, in a volume that seeks contribution on non-Western systems of tort, it would have been quite mundane to write on tort law in Africa as received from Western systems. This contribution will, therefore, concentrate specifically on the indigenous tort system in Sub-Saharan Africa. For a major and significant difference between African legal systems and Western and American systems of legal thought is in the area of the application of indigenous or customary law in general and in particular in the area of customary tort law. Western legal systems are based, generally, on centralised law-making and centralised law enforcement by government and its agencies, whereas the African legal tradition in addition to its centralised nature also involves indigenous law based on local custom and enforced by central government and customary institutions.

Thus, in a book of this type which provides a unique opportunity to contribute from an African perspective, it is significant to focus on the core issues that would make an exciting and productive contribution and that would provide a fresh reading to those who are not familiar with non-Western legal systems and traditions in Africa. ‘Tort Law in Sub-Saharan Africa’ as previously proposed for the chapter was, therefore, qualified by the word ‘customary’ to narrow the focus to indigenous conceptions of tort law in Sub-Saharan Africa. The goal is to focus on what is unique about tort law in Sub-Saharan Africa. And, in adopting this approach, it is noted nevertheless that:

[...]there is a range of approaches to the study of other legal systems, from an emphasis on the strange to the familiar; from what is unique to what we have in common. Imagine that
studying foreign legal systems is like a trip to the museum – a chance to look and marvel at the artifacts of other people. The law is a complex artifact and thus when looking to the law of other countries, we should not expect to find a perfect fit or coherence with our own view of law, even if the law comes out of the same tradition or ‘family’.7

As Roederer says, comparativists should not, on the other hand, expect other legal systems to be completely different either, ‘with no similarity in the sets of laws and no similarity in the values, principles, and theories that justify those laws’.8 Extending the metaphor of the museum a step further, he notes that ‘we are able to learn from a trip to the museum, in part because of the many connections, in both form and sustenance, between the artifacts there and our own artifacts’.9 Law, which provides solutions to common problems faced by a diversity of cultures that have been shaped by a diversity of histories in a diversity of environments, is no different.

Thus, the primary goal of this chapter is not to present an ‘exact fit’ of what tort law has always been thought and taught to be. It is less likely for such an exact fit to be found when delving into traditions, customs and cultures and how these inform and shape the content, meaning and scope of the law. As noted by Roederer, ‘if we are only looking for what is strange or different we may be missing out on those aspects of other people’s practices that can be fruitfully linked to aspects of own practices’.10 This explains why even in adopting an indigenous approach to tort law in Sub-Saharan Africa it nevertheless remains significant to briefly look at the common law of tort as received from Western systems by Sub-Saharan Africa.

The approach here, then, is comparative, involving an integrative comparative view of the law. This approach sees the law as a social control or social behaviour regulatory mechanism. In this sense, the law is seen in functional terms where it serves to regulate or order social behaviour and relations for the peaceful existence and functioning of human society. The integrative comparative view of the law recognises that law is shaped and defined by the social and cultural context. Each human society has its own value system and, because of this, what each society recognises as acceptable or unacceptable, proper or improper that the law has to regulate or otherwise is influenced by the value system. The law is a product of society and not imposed from without. The integrative view of the law also recognises that human beings are human beings irrespective of their colour, ethnic origin or geographical location. Thus, in each human society there is value for life, property rights and so on. It is, therefore, possible for societies across the world to have common legal norms as to how to protect human life, order social behaviour and social relations, and safeguard the right to property. Law is a product of peculiar societal, cultural value systems as much as it is a product of universal values that cut across cultures and times. So although colonisation may have introduced most parts of the world to the Western system of legal thought, it is possible

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8 Ibid at 440.
9 Ibid at 440.
10 Ibid at 441.
that even without the influence of colonisation there could still have been commonalities in the content of the law between Africa and its colonisers. The law is a function of specific societal values as it is a function of universal values that cut across cultures, colours and locations. The chapter thus addresses its subject not just from legal standpoints but also from sociological perspectives.

The approach of this chapter, then, is to look at indigenous tort law as a function of African mores and value systems in the context of an increasingly globalised world and within the context of the historical experiences of Sub-Saharan Africa. The focus is on tort law as rooted in the Sub-Saharan African cultural context but also as influenced by Africa’s historical and political experiences with the foreign world. The broad questions to answer are: What are the rights or interests protected by the indigenous tort system in Sub-Saharan Africa? How different is the protection of rights or interests by the indigenous tort system in Sub-Saharan Africa from that in the Western world? The specific issues to be covered are further raised below.

2. THE RECEIVED COMMON LAW TORT IN SUB-SAHARAN AFRICA

The discussion of the tort law from an African indigenous law perspective will shed light on how the cultural context shapes and defines the content, scope, meaning and effect of the law. The differences in the application of the law of tort in substance, procedure and outcomes between Western Europe and America, on the one hand, and Africa, on the other hand, as shown below, can only be explained in terms of socio-cultural variables.

It is significant, then, to begin with a definition of tort and a description of the purposes of the law of tort under Western systems so that the point about what tort law does and what it does not do in Western and non-Western cultures can be made clearer.

Professor Winfield is of the view that tortious liability arises from the breach of a duty fixed by law towards persons, breach of which can be redressed by an action for ‘unliquidated damages’.11 In other words, tortious duties, liabilities, obligations and rights are, in the main, fixed by the law independent of any agreement between the parties concerned. Similarly, tort is defined as a ‘branch of the civil law relating to obligations imposed by operation of law on all natural and artificial persons. It concerns the basic duties one person owes to another whether he likes it or not.’12 Equally, tort is seen as an injury to a person by negligence or through committing an act that is proscribed by community standards and that tort is one of the common causes of action that can be used to recover damages.13

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12 Brazier and Murphy above note 2 at 2.
From the foregoing, it can be said that functionally, the law of torts defines the obligations imposed on a member of society to his or her fellows and the provision of compensation for harms caused by breach of such obligations. The law of torts is also seen as protecting fundamental human interests in that it concerns those situations where one person’s conduct causes or threatens to cause harm to the interests of others. Since it is not every human desire that can qualify as a legally protected interest, society must determine which of the many human interests are so fundamental that the law should recognise those interests and compensate those whose interests are violated by others. It is in this context that the societal origin of the tort law can be established.14 Professor Rogers similarly observed that tort law is concerned with the allocation or prevention of losses in society, which may result from injury to the person, damage to physical property, damage to financial interests or injury to reputation. The granting of redress by the law for any of these injuries means that some person or group of persons would be required by the law to do or refrain from doing something. This redress may take various forms including monetary compensation (damages) and injunction to prevent the occurrence of harm in the future (‘preventive’ function of tort).15

Very interesting points may be encapsulated from the definitions and the purposes of the law of tort as outlined above. One such primary point is that tort law emanates from a source outside of individuals involved in a tortious dispute; it is proscribed by community standards, mores and values. The significance of this point lies in the fact that it sheds light on the communal, community or societal origins of the law of tort. This point is very important for appreciation of the law generally and indigenous tort in particular in Sub-Saharan Africa; African society being group- rather than individual-oriented. A second interesting point to isolate from the various definitions is that the primary function of tort in terms of remedies is to restore the injured party, as far as monetary compensation can do so, to his or her original position. This compensatory focus whittles down the ‘preventive’ function of tort, namely, the use of injunction to restrain threatened or foreseeable harm, as Professor Rogers suggested above. Indeed injunction is rarely sought in tort cases, with perhaps the sole exception of nuisance actions. The preventive power of tort, at least in a common law system, is more in the form of deterrence – the threat of damages.

What, then, are the kinds of interests protected by common law torts and what kinds of wrongdoings are considered sufficient to violate those interests? An outline of these issues is a necessary foundation for a meaningful comparative discussion of the kinds of interests protected by indigenous tort law in Sub-Saharan Africa and the kinds of wrongdoings that may violate these interests. Regarding the kinds of wrongdoing considered sufficient to violate interests protected by the common law of tort, it may be said that these involve deliberate, intentional or negligent invasion of an interest. The relationship of plaintiff and defendant or the nature of the defendant’s damaging activity may also give rise to strict liability.16 And among the interests protected by common law tort are intentional or negligent invasion of personal (privacy and

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14 Brazier and Murphy above note 2 at 2–4.
16 Brazier and Murphy above note 2 at 7.
reputation) and proprietary interests; interests in economic relations, business and trading interests; interests in intellectual property; and negligent interference with personal, proprietary and economic interests.17

The ‘foreign’ tort law system in Sub-Saharan Africa functionally is not different from the Western conceptions of torts as outlined above. By ‘foreign’ tort system I mean the system of tort law as introduced in Sub-Saharan Africa during colonialism. In Africa Must Unite Dr. Kwame Nkrumah stated that colonialism and ‘its attitudes die hard, like the attitudes of slavery, whose hangover still dominates behaviour in certain parts of the Western hemisphere’.18 It must be added that colonialism and its attitudes are less likely to die in Africa because Africans after colonialism have themselves fully embraced and entrenched the legacies of colonialism rather than redesigned or reconstructed their governance and other regulatory mechanisms to suit their own peculiar culture and interests. The effect of colonialism in Africa is that African legal systems have become dual in nature, consisting of the received colonial law and the indigenous law as it existed before the coming of the colonisers. Under the Constitution of the Republic of Ghana 1992, for instance, the laws of Ghana include the common law, which is defined as comprising the rules of law ‘generally known as the common law, the rules generally known as the doctrines of equity and the rules of customary law including those determined by the Superior Court of Judicature’19 (emphasis added). The rules generally known as the common law and the doctrines of equity are basically judge-made law of the English legal system.20 These doctrines by the definition of common law under the Constitution of Ghana form part of the laws of Ghana. This is not only theoretically so; practically the common law as so defined has been applied by the courts even more than customary tort law. The point to be made is that the doctrines of the common law and equity, including those on common law tort, as known and applied in the English legal system, have remained part of Ghanaian and other Sub-Saharan African legal systems. The function of the common law tort system in Sub-Saharan Africa generally has remained to protect the various rights as outlined above based on the principles of the common law as applied generally in Europe and America.

In light of the above outline and consistent with the admonition in the quotation at the beginning of this chapter, namely that any analysis of the law of tort must begin with consideration of those rights tort protects, this chapter outlines the rights protected by indigenous tort law, the remedies for violations and the procedures that must be followed or applied to redress an injury. Specific issues to be addressed include:

- What interests does customary tort law in Sub-Saharan Africa protect?
- What types of conduct are these interests protected against?
- What are the remedies for breach of a duty fixed by an indigenous tort law?
- How may a breach of a duty imposed by tort law be enforced?

17 Ibid.
20 Williams, Glanville. Learning the Law (Stevens & Sons, 1982).
3. THE LEGAL SYSTEMS IN SUB-SAHARAN AFRICA

This chapter cannot do justice to the issues mentioned above without first looking at the nature of Sub-Saharan African legal systems, for it is within such systems that indigenous tort law can be situated. In this regard, it is of crucial importance to state that the most fundamental feature of general legal systems of Sub-Saharan Africa is that they are mainly based upon systems of legal thought introduced from outside Africa. This is explained by the facts of legal and political histories of African countries. Colonialism imposed upon Africa the colonial powers’ systems of legal thought, the basic characteristics of which still exist in the continent even today.21

Prior to the arrival of the British and other colonisers, Sub-Saharan Africa had its own indigenous legal systems which were for the most part customary in origin and type. The indigenous customary laws of the various Sub-Saharan African societies were not necessarily uniform. There were points of similarity transcending ethnic groupings. There were, however, variations in structure and content between the legal systems of communities which were at different stages of economic and political development, or which had adopted different social and kinship systems or religious beliefs and cultural practices.22 A major point of similarity among these customary laws throughout Africa is that they are largely unwritten. Colonisation has had the most far-reaching impact on African systems of legal thought which existed before then. This point has been very well made by Professor Allot:

[The] arrival of European powers wrought a fundamental revolution in Africa legal arrangements, the results of which are with us to this day. The nature of the revolution varied somewhat with different colonial powers, but in general each power first introduced its own legal system or some variant of it as the fundamental and general law of its territories, and, second, permitted the regulated continuance of traditional African law and judicial institutions except where they ran counter to the demands of colonial administration or were thought repugnant to ‘civilised’ ideas of justice and humanity.23

The British and other colonisers introduced their laws mainly for the benefit of their subjects and others who fell under their protection. The indigenous populations remained subject to their own laws, with some administrative intervention to prevent the grosser abuses and inhumanities. With time, social and economic development led to a situation where more and more Africans chose to deal with their relationships by methods known to European law.24 The history of African legal systems today, then, is mainly the story of what African countries are doing with the legal heritage derived from local and foreign sources. Integration of the laws is said to be one of the more pressing problems. Modernisation of legal systems in line with the imperatives imposed

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22 Ibid at 10.
by the needs of nation-building and rapid educational and economic development is also urgent.25

At the end of the colonial period, roughly the late 1960s, the basic dualism of legal and judicial systems remained. The indigenous and introduced laws continued side by side.26 It follows that African legal systems are dual in nature, consisting of the received foreign law and customary laws. Generally, then, the sources of law in Sub-Saharan Africa exemplified in the case of Ghana include the constitutions, enactments made by Parliament, orders, rules and regulations made by any person or authority under a power conferred by the constitutions of the various countries, the existing law (including laws made under colonial administration), the common law (including the received English common law) and customary law.27

4. THE FOUNDATION OF CUSTOMARY TORT LAW IN SUB-SAHARAN AFRICA

Customary tort law is a component of the broader indigenous legal system covering property, marriage, governance, succession, inheritance and so on. Therefore, it is pertinent to look at the nature of customary law in Sub-Saharan Africa for a better appreciation of the indigenous tort system. This requires an examination of what customary law is and the source of its legal validity.

As with many legal concepts, customary law does not lend itself to easy definition. This is understandably so given the differing cultural contexts in which customary law exists and functions in both Europe and Africa. Customary law has been variously defined in Ghana as ‘a rule or body of rules which obtains and is fortified by established usage’28 or ‘any uncodified rule or rules having the force of law and not repugnant to the laws of Ghana, whereby rights and correlative duties fortified by established usage have been acquired or imposed’.29 It has equally been defined as a ‘set of established norms, practices, and usages derived from the lives of people … 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.’30

The definition of customary law as contained in article 11(3) of the Constitution of Ghana is pertinent. The Constitution defines customary law as ‘rules of law which by custom are applicable to particular communities in Ghana’. This definition is similar to the definition of customary law in Nigeria and Zimbabwe, where customary law is defined respectively as consisting of ‘customs accepted by members of a community as

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25 Ibid at 13.
26 Ibid.
28 Gold Coast Colony Native Administration Ordinance (No. 18 of 1927) s. 2. This law is no longer in force.
29 Local Courts Act (No. 23 of 1958) s. 2. This law is no longer in force.
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binding upon them’31 and as the ‘law of the indigenous people of Zimbabwe’.32 The Constitution of Ghana, in defining customary law as ‘rules of … custom’, shows that the framers of the Constitution recognised customary law as law. It suggests that customary law is law not because it is defined in the Constitution. The source of the legal validity of customary law resides outside the Constitution itself; its legal validity derives from ‘custom’ practised by the people. Custom refers to ‘a traditional and generally accepted way of behaving or doing things’,33 or a ‘practice that has been followed in a particular locality in such circumstances that it is to be accepted as part of the law of that locality’,34 or a ‘practice that by its common adoption and long, unvarying habit has come to have the force of law’.35 The practices of the people and custom thereof are the source of the legal validity of customary law. African customary law is thus, in origin, ethnic law. Therefore, the reference, for instance, to ‘particular community’ in article 11(3) of the Constitution of Ghana must be understood as referring to particular ethnic groups in Ghana.

Each ethnic group in Sub-Saharan Africa has its own customs, norms and practices. Therefore, customary law can be as varied and diverse as the number of ethnic groups in Sub-Saharan Africa. In the Federal Republic of Nigeria, the Supreme Court is required to observe and enforce native law and custom.36 And in Liberia the ethnic population ‘is the source of the vast body of native laws and customs administered by the government and is the reason for the special parallel system of courts established for its benefit’.37 In Sub-Saharan Africa, the acquisition of rights in land, family relationship – husband and wife, child and parent, marriage and divorce – and chieftaincy are governed by customary rules and practices as well as by laws made by Parliament.38

From the foregoing, it can be said that common values as to rights and wrongs and as to what is acceptable and what is not acceptable in society regulated by common cultural norms are the foundation of African customary law and therefore the Sub-Saharan African tort system. In other words, if customary law is premised on the custom and practice of particular ethnic groups in Sub-Saharan Africa, then the ‘collective or common conscience’, defined as the ‘totality of beliefs and sentiments common to the average citizens of the same society’ which ‘forms a determinate

31 Abilade, A. O. Nigeria Legal System (Sweet & Maxwell, 1979) at 83.
system and has its own life',\textsuperscript{39} is core to the foundation and legal validity of customary
tort law in Sub-Saharan Africa. In defining the collective conscience as the ‘totality of
beliefs’ Professor Emile Durkheim meant that the collective conscience occurs through-
out a given society. He also conceived of the collective conscience as being an
independent, determinate cultural system although it is realised through individual
consciousness.\textsuperscript{40} Similarly, and perhaps more specifically, the foundation of African
customary law is collective representation, that is, the norms and values of specific
collectivities such as the family, occupation, state, and educational and religious
institutions. Unlike the collective conscience, collective representations are not reduc-
tible to individual consciousness but the result of the substratum of associated
individuals; they transcend the individual because they do not depend on any particular
individual for their existence and their span is greater than the lifetime of any
individual.\textsuperscript{41}

Why do the collective conscience and collective representations serve as the
foundation of law and order in African contexts? This is so because kinship (social
relationships derived from consanguinity, marriage and adoption) remains the funda-
mental basis for the organisation of social groups and relationships and around which
the fabric of social life is built and regulated in Africa. These relationships based on
kinship are governed by specific rules and patterns of behaviour, reciprocal duties,
obligations and responsibilities.\textsuperscript{42} The kinship system, particularly in rural Africa,
prescribes statuses and roles to people who are in particular relationships. It determines
the rules, duties and obligations of individuals and groups in all aspects of life in which
these individuals and groups interact.\textsuperscript{43} Kinship in Africa, among others, determines
property relations, inheritance and succession, and political and legal obligations. Even
etiquette ‘is affected by [the] kinship system because what is at issue involves the
principles of seniority, the respective positions of men and women in society, of old and
young, father and child, mother and child as well as husband and wife among others’.\textsuperscript{44}

An important aspect of kinship which makes all of these possible is the descent
groups\textsuperscript{45} (clan or lineage) within which individuals exist and operate. Kinship allows
for the reckoning of relationships between individuals and among groups in society.
Professor Max Assimeng was, therefore, right when he noted that the kinship system
‘affects all individuals in society for the following reasons: as human beings we are
born into a family, brought up in a family, continue to live, think, and act in a family,

\begin{itemize}
  \item Durkheim, above note 1 at 79.
  \item Ibid at 87.
  \item Nukunya, G. K. \textit{Tradition and Change in Ghana: An Introduction to Sociology} (2nd ed.,
University of Ghana Press, 2003) at 1, wherein the author defines kinship systems as ‘[t]he
patterns of behaviour associated with relatives in a society, together with the principles
governing these behaviours’.
  \item Ibid.
  \item Ibid at 18.
  \item Ibid at 19, wherein the author describes descent as the process by which direct
genealogical connection is traced between an individual and his forebears or offspring for the
purpose of recruitment into the kin group.
\end{itemize}
and will die as members of a family’. 46 This is to emphasise the group-oriented, collective nature of the social organisation of African societies and how it shapes the indigenous tort system which is the focus of this chapter. It is these collectivities in the form of the family and descent groups that define legal rights and wrongs for the collectivity and for the individual. It is in this sense that it is apposite to say that collective representations define and shape the content of the law in Africa.

Customary tort law, then, can only be understood within this backdrop, otherwise it will not make sense. In view of the community orientation in the origin of tort law in Africa, the basis of liability of most indigenous torts is direct or strict so that intention plays a less significant role in the determination of liability as often is the case under the common law system, though not all the time. The idea is that what wrongs the individual may well wrong the group of which he is a member, and any such wrong must be taken seriously. In short, it ‘is the assent of the native community that gives a custom its validity and … it must be shown to be recognised by the native community whose conduct it is supposed to regulate’. 47

5. THE INTERESTS PROTECTED BY CUSTOMARY TORT LAW IN SUB-SAHARAN AFRICA

It should be stated at the outset here that the practices and various forms of tort to be outlined are still prevalent in most parts of Sub-Saharan Africa, although the common law is gaining more solid ground in the sense that many more people are turning more to it than to customary law. Christianity and Western education systems are taking many Africans out of African traditions. Once people abandon the belief in tradition and practice, they are less likely to make claims under customary law. Current cases on customary tort law in terms of numbers, therefore, are less likely to match the numbers of common law tort cases. The customary tort principles are well established and are not in doubt. It is also to be noted that torts corresponding to Anglo-American property torts (trespass or nuisance or conversion) or battery or assault and negligence are not common under customary tort law. Most of these torts (which may be described as ‘received’ or ‘foreign’ torts) are often litigated on the basis of common law tort principles as known under the Anglo-American tort systems. Therefore, there are not different or unique remedies for these torts under the Sub-Saharan African legal systems than is the case under the Anglo-American torts. This is based on the fact of the introduction of the English common law system in Sub-Saharan Africa, as discussed above. The focus here, therefore, is on tort law as peculiar to the legal system in Sub-Saharan Africa.

A. Verbal Torts: Insults and Abusive Language as Injury in Law

As emerged from the foregoing, customary law in Africa or Sub-Saharan Africa has evolved from years of practice and usage among the various communities in the continent. The functions of the common law of tort have already been outlined above as including appeasement, justice, deterrence and compensation. The predominant function of the modern common law of tort is that of compensation. The object of compensation has mainly been achieved by the common law through loss-shifting on the basis of fault. The loss is shifted from the plaintiff to the defendant who either intentionally or negligently caused the loss or on the basis of strict liability. In all of these, there are two competing interests which the law of tort seeks to protect. The first is the individual plaintiff’s interest in his security. This interest could also be protected through strict liability which does not take into consideration whether the injury complained of is attributable to the fault of the tortfeasor. The focus of the law here is on the victim, so that all questions relating to the mental state of the defendant at the time of the commission of the tort are not taken into consideration. The second competing interest is the individual defendant’s interest in freedom of action. Promoting the individual plaintiff’s interest in security through strict liability means qualifying the individual defendant’s freedom of action. Thus, promoting the individual defendant’s freedom of action means doing away with or qualifying the strict liability requirement. The doctrinal foundations of these modern principles of tort were laid in the nineteenth century. It was thought that imposition of liability on entrepreneurs and other men and women of action for losses they had caused without any fault was likely to dampen their enthusiasm for entrepreneurship. Hence the development of principles requiring fault committed intentionally or negligently.

Customary tort law of Sub-Saharan Africa on its part focuses on the security and dignity of the individual. Therefore, customary law of tort places a lot of emphasis on strict liability. It seeks to enforce violations of community standards proscribed in society even if the wrong is against just an individual. And in so doing both individual and communal interests are taken into consideration and protected. In view of the collective and ethnic orientation of societies in Africa what is tortious or not is actually based on the estimation of the community as to what conduct is acceptable or not acceptable. The function of customary tort law in Sub-Saharan Africa, then, is to maintain social equilibrium by redressing injuries that may be individual or collective in nature.

The above is so because the Sub-Saharan family is the basic unit and foundation of society, and its stability and cohesion are essential for the organisation, productivity and, indeed, survival of the individual and the larger community. Customary torts may

48 Williams, G. ‘The Aims of the Law of Tort’ (1951) 4 CLP 137.
49 Brazier and Murphy above note 2.
50 Date-Bah, S. K. and Fiadjo, A. K. Materials on Torts (Faculty of Law, University of Ghana, 1990).
51 Ibid.
52 Ibid.
53 Davies and Dagbanja above note 30 at 309.
threaten this ongoing genealogical unit by breaking 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. Therefore, because of the over-riding importance of the maintenance of social equilibrium in African society, customary law rigorously discourages any conduct, whether by word or deed, that is likely to lead to a disturbance of the peace of the community. This explains why the content of the customary tort law of slander throughout Sub-Saharan Africa is that words that impute witchcraft, adultery, immoral conduct, crime and all words which sound to diminish a person’s reputation are actionable without proof of special damage.

Judicial decisions on the matter from Ghana, Nigeria, Kenya and Uganda among others can make this point clearer. A Ghanaian case in point is Attiase v. Abobbtey. The defendant called the plaintiff a ‘prostitute’ and said she practised prostitution in her shop. The plaintiff alleged that this imputation was slanderous and sued the defendant. The trial court held that calling a woman a prostitute while she is not in fact practising prostitution constitutes defamation of character and accordingly awarded the plaintiff monetary damages. The circuit court set aside the decision and on appeal to the Court of Appeal re-instated the decision. Justice Ollennu ruled that ‘under the customary law publication of defamatory words are actionable, if false, and it does not matter whether they may be rejected at common law as mere words of vulgar abuse uttered in the heat of a quarrel,’ and concluded that ‘the words proved to have been published are words which produce injury to the reputation of the plaintiff and having been found by the local court to be false, are actionable.’

Regarding remedies, Justice Ollennu explained that formerly customary law provided two remedies for slander, namely (a) an order for retraction and apology, and (b) award of damages. According to the judge, when an unqualified apology was published, heavy damages might not be awarded but damages could be awarded without an order to recant. In interpreting this case, Professor Date-Bah observed that it:

clearly shows that under the customary law any defamatory imputation proved to be false is actionable, irrespective of whether there can be proof of any special damage to the defamed person. It would seem thus that the customary law provides an avenue for circumventing any requirement as to proof of special damage.

54 Ibid.
56 (1969) Current Cases, Ghana 149 ((hereafter ‘CC’).
57 Ibid.
58 Ibid.
59 Date-Bah, S. K. ‘A Restatement of the Application of the Customary Law of Slander’ [1970] II No. 2 RGL 150. It should be stated that this case involving the prostitute is not the best example of the differences between common law slander and slander under customary law. This is because calling someone a prostitute is slander per se and, therefore, actionable without proof of special damages. Cases involving other kinds of insults are, factually, a better illustration of the difference.
This case, according to Date-Bah, seems to render the traditional common law distinction between libel and slander of little practical importance in defamation actions where a Ghanaian is the plaintiff. This is because the decision recognises the customary law tort of slander which is actionable per se and does not require proof of special damage as may be the case under common law. 60

Attribution of witchcraft to a person is also actionable under customary law. In the Ghanaian case of Abotchie v. Nuumo61 the defendant admitted saying: ‘Tell your sister [the plaintiff] that the reason why I do not speak to her is that she is a witch and she leads a gang of witches to come and eat me up.’ The court stated that words imputing witchcraft are actionable without proof of special damage and held that the defendant must be made liable for the full extent of damage caused to the plaintiff’s reputation. According to the court, under customary law publication of false defamatory words is actionable even if this may be rejected at common law. In a common law jurisdiction a court would likely say that no reasonable person would believe such assertion or claim as to witchcraft and the possibility of succeeding under common law on account of an accusation of witchcraft is quite a mirage. This is possible under customary tort law of the particular ethnic group whose custom has been invoked before the law courts.

A plaintiff alleging slander or defamation would have to provide evidence of the exact words complained of and where remedy is available under the common law and customary choose between the two legal systems. Thus, in Bogya v. Boakye62 the defendant lost two of his sheep. After searching fruitlessly for the lost sheep, the defendant caused a gong-gong (bell) to be beaten in the village to the effect that he had lost two of his sheep and that whoever found them should send them to him for a reward. The gong-gong message proved futile. Eventually, the defendant traced his sheep to the plaintiff. The plaintiff alleged that the defendant had caused a gong-gong to be beaten to the effect that he was a thief who had been stealing other people’s livestock. The plaintiff then sued for damages for slander. The plaintiff claimed that as a result of the gong-gong message, he had lost the respect which the people of his village had had for him. The court dismissed the claim. According to the court, the plaintiff failed to establish that he was himself sure of the words complained of as having been published by the defendant or to establish that the defendant published or authorised the publication of those words. According to the court, in an action on slander, the actual words spoken must be set out verbatim in order that the defendant might know the certainty of the charge and might be able to shape his defence. And where the words were not defamatory in themselves but only by reason of extrinsic circumstances, the plaintiff must insert an innuendo averring the precise defamatory meaning conveyed to those persons to whom the words were published. If the defendant traversed the innuendo, the burden is on the plaintiff to show that the words were understood to bear the meaning which he thereby assigned to them. 63

On the question of whether to apply the common law or customary law to the case, the court stated that words proved to have been uttered by a defendant imputing an
indictable offence committed by a plaintiff were actionable per se under the common law. Accordingly, in an action for slander where the plaintiff complains that he has been falsely accused of being a thief, it does not really matter which branch of the law is selected, common law or customary law, since in either case the law does not require proof of special damages. The plaintiff may decide in such a case to go by either the common law or customary law, depending upon the size of the damages and the jurisdiction of the court in which he wishes to commence his action.\(^{64}\) In the opinion of the court, the quantum of damages awardable in such an instance should have some relation to the seriousness or otherwise of the injury and to the extent of the damage done. This, according to the court, made irrelevant any difference between the damages awardable in a common law action for slander and those awardable under customary law. In all cases of assessment of damages, according to the court, the question should be left to the discretion or good sense of the court after proof of damage. Similarly, in the Ghanaian case of \textit{Sogbaka v. Tamakloe},\(^{65}\) the issue came before the court as to whether in an action for slander a party needed to elect the system of law applicable to the proceedings. It was held that in an action for slander a party need not elect which law he is proceeding under. If it appears on the whole facts that the law applicable is customary law, it should prevail. It must be said that for certainty in the applicable law, the parties must be made to specify the law they wish to apply to their claims: customary or common law.

The \textit{Bogya v Boakye} case illustrates the fact of common law standards of proof of a claim being applied to a customary tort law claim. Since customary tort law claims are often founded on unwritten communication, the rule on proof needs to be flexible to accommodate the mode in which the alleged wrong was carried out and which forms the basis for proof of the claim.

Another area of distinction between the common law and customary law is whether words uttered in the heat of anger can constitute defamation. In the Ghanaian case of \textit{Afriyie v. Dansowah}\(^{66}\) the plaintiff brought an action against the defendant for slander. The words complained of were that the plaintiff was a witch and that by her witchcraft she had killed one Atta Maame and had taken over the stall of the deceased in the market and occupied it, and that every person in the regional market knew that the plaintiff was a witch. By reason of the words complained of, the plaintiff said she had been greatly injured in her character, credit and reputation, adding that since the defendant uttered those words, customers feared to buy things from her. The trial court dismissed the action on the grounds that the words complained of were uttered in the heat of anger and were not actionable. On appeal it was held that the trial judge, by dismissing the slander action at customary law on the ground that the words were spoken in the course of a quarrel and in the heat of passion and therefore were not actionable, failed to draw the necessary distinction between slander at common law and slander at customary law. According to the appellate court, slander as known and recognised by customary law is actionable per se; that is, it is actionable without the English requirement of proof of actual or legally presumed pecuniary or special damages.

\(^{64}\) Ibid at 921.


\(^{66}\) [1976] 2 GLR 172.
damages. According to the court, defamation under customary law is wider than under common law in the sense that under common law it is only in exceptional cases that a plaintiff can succeed in an action for slander. Customary law, however, fully recognises and provides remedies for insulting words or language. The position is different under common law, where for a plaintiff to succeed, he or she may be required to prove special damages. Also at common law, words which are uttered in the heat of passion and are vulgar abuse are not actionable.

The other cases in which slander has been established in Ghana include the use of such words as ‘you are a slave’, ‘fool, a mad and crazy woman’, ‘thief’ or ‘useless man’, ‘hopeless lawyer … a hopeless M.P.’, ‘witch’ and ‘slave and beast’. In *Nkrumah v. Ataa* the court awarded the respondent damages against the appellant for defamation on the ground that he said the respondent had slept with a man on the appellant’s bed and urinated on the bed sheet. In dismissing the appeal, the court was of the opinion that a ‘woman’s chastity is a jewel that adorns her character. For a man, without justification, to soil it in the manner the defendant did and additionally, to make her a laughing stock by saying that she wets the bed and also flatulates as she walks is to invite the condemnation of the court’. On damages, the court noted that the essence for bringing an action for slander under customary law as also under common law is to clear the plaintiff’s good name and not merely to make money. And so long as this principle of customary law is maintained, recanting slanderous words (that is, an unreserved withdrawal of the slander and all imputations made, with expression of regret in a manner that gives satisfaction to an aggrieved person, and the fact that such publication of apology is or will be made) will be taken into consideration in assessing pecuniary damages.

Similarly, in *Tufuor v. Beng* the defendant accused the plaintiff of stealing his cocoa. The plaintiff sued for slander. The words complained of were: ‘A young man like me I have planted my cocoa and you, an elderly person had gone to steal some’, and, ‘You should be ashamed of yourself. You stole my cocoa and would not allow my relations to travel in your car. Have you planted cocoa before?’ The court ruled that the words were, in their natural and primary meaning, defamatory of the plaintiff and actionable per se. In *Wankyiwaa v. Wereduwaa* the defendant said the plaintiff’s ‘vagina stinks’. The trial court was satisfied that the respondent abused the appellant concerning her private parts in terms that would be most objectionable to any

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73 *Bonsu v. Forson* [1962] 1 GLR 139.
77 Ibid at 21.
self-respecting woman and awarded damages against the defendant.\textsuperscript{80} On appeal the circuit judge reversed the decision on the ground that the words used by the defendant-appellant were used in a quarrel when the plaintiff was also abusing the defendant and therefore the words could not ground an action in defamation. The circuit judge decided the case by the well-known principle of the common law that vulgar abuse spoken in heat is a good defence to an action for slander. On appeal to the High Court, it was held that the words constituted mere vituperation not redressable at common law and that the circuit court should have decided the matter by customary law and not by common law principles. According to the court, ‘abuse by itself is a wrong redressable by damages according to customary law’.\textsuperscript{81} The High Court reasoned that the words implied that ‘the plaintiff was habitually unclean in her essential female part’ and in that case ‘it would be actionable without proof of any special damage’.\textsuperscript{82} And on the question of whether damages should be awarded for such abuse, the learned judge stated in words that are instructive both on the distinction between the common law of England and on why insulting language must be regulated in the Ghanaian context:

I cannot think of any reason why on principle there should be none. The fact that the law of England provides no remedy is quite beside the point. The society of England is different from the society of Ghana. 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 neighbour by vituperation.\textsuperscript{83}

The position of the law in Ghana today on imputation of unchastity to a woman is not different from the position of the law in England in the 1800s. Before 1891 the common law required special damage to be proved where the defamatory words imputed unchastity to a woman. This state of the law was thought to be defective and it was remedied in 1891 by the Slander of Women Act, 1891 which enacted that ‘words spoken and published … which impute unchastity or adultery to any woman or girl shall not require special damage to render them actionable’.\textsuperscript{84} This enactment brought the common law on the same footing as the Ghanaian customary law of defamation. The Slander of Women Act, 1891 may have been influenced by customary tort law in former British colonies such as Ghana. The customary position in Ghana before and after these changes in England has since remained fundamentally unchanged.

In other Sub-Saharan African societies such as Kenya, Nigeria, Uganda and Central Africa, the attitude of the indigenous customary law to abuse or insult as an offence is no different from that in Ghana. Among the Kamba of Kenya it is an offence punishable with a fine to insult a person of superior age-grade level. Accusations of witchcraft are seriously viewed by the Azande of Central Africa and are referred to the prince’s oracle, particularly where a person is accused of causing the death of another. In Uganda when an editor in an article called the Prime Minister of Uganda’s central

\textsuperscript{80} Ibid at 333. \\
\textsuperscript{81} Ibid. \\
\textsuperscript{82} Ibid. \\
\textsuperscript{83} Ibid at 335. \\
\textsuperscript{84} (54 & 55 Vict. C. 51) s. 1.
province of Buganda ‘a useless fellow’ he was sentenced by a Native Court to a term of eighteen months’ imprisonment. Similarly, Chief Alkali of Zaria, Nigeria, sentenced to six months’ imprisonment one Mallam Bargo Giwa for going to the house of the local district Head and calling him ‘a useless and worthless District Head’. The Ibos of Umueke Agbaja in Eastern Nigeria regard a false accusation by one person against another as a serious offence attracting a fine.85

In sum, under customary law false words which cause or produce any injury to the reputation of another are defamatory and are actionable. Therefore, words imputing witchcraft, adultery, immoral conduct, crime and all words which sound to diminish a person’s reputation are actionable.86 The law against witchcraft ‘is particularly severe, inasmuch as it generally extends to all under the same roof; as it is supposed they possessed some portion of the malign influence’.87 What makes words imputing witchcraft a civil wrong is that ‘it is believed to be hereditary and to call a person … wizard or witch, implies that every member of such person’s family is possessed of an evil spirit capable of doing infinite mischief, and the less one has dealings with any of them the better’.88 The law, therefore, seems to have been settled since 1844 when in Agah Aguah v. Quamina Efée89 the defendant was ordered to pay costs and was fined for having charged the plaintiff with practising witchcraft.

It then becomes clear how the collective conscience or collective representations define customary tort law; an injury to the individual is not just an individual injury but also an injury to the community of which the individual is a member. In other words:

[These insults are taken seriously ... 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 [African] culture and history, the words have a power to them that is as explosive as any slander per se. For example ... [a] 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 lower social status ... 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. Physical traits, such as lack of intelligence or talent, have obvious bearing on one’s heredity and upbringing and, hence, may insult the collective from which the individual descends.90

Insult or abuse accordingly becomes civil wrong when it amounts to something analogous to the English conception of contempt of court or defamation of character or seditious libel.91 But slander in the customary sense protects not just false statements that injure reputation and character, but also verbal insults that injure the dignity and

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87 Ibid.
88 *Afriyie v. Dansowah* [1976] 2 GLR 172 at 175.
89 Sarbah above note 86.
90 Davies and Dagbanja above note 30 at 313.
91 Elias above note 85 at 66–69.
feelings of the victim. One principle of the English law of defamation that fits into this African community definition of insults as tort is the requirement that defamation be determined based on 'right thinking members of society generally', suggesting that community standards are important in determining tortious liability. A major difference between common law and customary tort law is that customary law also considers abuse or vituperation to be actionable per se. This is not the case with the common law. Native law, therefore, provides more remedies than common law.

B. Familial and Marital Torts: Adultery and Enticement

The customary tort system in Sub-Saharan Africa also protects interruption with familial or marital relationships by enticement or seduction and through protections against adulterous conduct. These protections are founded upon the nature of the family and marriage systems in Sub-Saharan Africa. The Sub-Saharan African family is of particular importance to the society and the individual. It is within this social institution that the individual is born; the institution is responsible for the socialisation of the individual and the individual lives within, dies within and is buried by the family. Even after death, the individual may remain an essential part of the family; he or she may qualify as an ancestor or ancestress, having lived to a ripe old age and having led a responsible life. He or she may therefore be worshipped and continue to be a source of blessing to the living members of the family. Thus, within the African context, the family is not just made up of the nuclear family consisting of husband, wife and children, as is mostly the case with Anglo-American societies; it also includes the living and the dead and all persons who trace their lives through a common known or putative ancestor or ancestress. The legal implication of this is that the integrity and the name of the family as an institution are of crucial importance to each individual member of the family. Anything that threatens the name and integrity of the family and the smooth relations among its members is seriously frowned upon.

The family is founded upon marriage and marriage in the African context is both a union of a man and a woman and an alliance between two families. Marriage binds people together. Therefore, its consequences or incidents affect large groups of people. The rights and duties arising out of family relationships are generally shared in common. Who is entitled to what, or who owns what, depend on a number of factors including the nature of the right or obligation in question and the proximity of the blood relationship involved. The values underscoring the importance of marriage and the family thus form, in part, the foundation of customary tort law of adultery, enticement and seduction.

i. Adultery

Adultery is a civil wrong in Sub-Saharan Africa and demands compensation. So strong is the feeling against adultery that it is believed to result in spiritual contamination likely to cause death to the woman, her husband, her children or a relative, unless the

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92 Sim v. Stretch (1936) 52 LTR 669 at 671.
wrong is redressed and certain rites are carried out. This is so because adultery is perceived not only as an interference with a man’s procreative rights; it also defiles a woman in the eyes of the husband, the community and the deity. Therefore, adultery is taken seriously. Among the Frafra ethnic group of the Upper East Region of Ghana, for instance, adultery on the part of a woman is a serious civil wrong and forms one of the grounds for divorce. Thus, where a Frafra woman commits adultery the husband has an automatic right to divorce her. If the husband chooses to continue with the marriage traditional purification rites have to be performed and the woman is made to cook outside of the marital home for the children to eat. The belief is that if these rites are not performed and the marital relationship is continued, the children of the marriage, the man, woman herself or any combination of them will die. In fact, among Frafra a child born out of wedlock belongs to the husband of the woman although there is a judicial decision seeking to hold such custom as unacceptable. If the husband chooses to divorce the wife the man who commits the adultery with the wife may be asked to pay damages covering the bride price. The husband cannot, however, claim such damages without the support of the wife’s family.

There is a similar customary practice among Konkombas of the Northern Region of Ghana. Among Konkombas, if a woman commits adultery the husband may either divorce her or he may choose to continue with the marriage. If he chooses to continue with the marriage customary rites including sacrifices to the ancestors have to be performed to purify the woman. Even upon the performance of such rites, the woman is not allowed to participate in widowhood rites upon the husband’s death. Such a woman cannot eat food and meat prepared out of rites and sacrifices made to the ancestors during the husband’s funeral since it is believed that she can go blind if she eats such food and meat. If the husband chooses to end the marriage the man who commits adultery with the woman may be asked to pay the bride price to the injured husband. Among the Kusasi, where a wife is involved in adultery, in accordance with custom, the elders have to purify the woman before the husband can take her back as his wife if he does not intend to divorce her. The purification ceremony involves the provision of two sheep, one cock, a new cloth and beads for the wife and ‘pito’ (a local drink common in Northern Ghana). Damages may be awarded against the man who commits the adultery to cover the costs of these items.

In the above-stated and similar societies in Africa and elsewhere polygyny is permitted but polyandry is not. Where polygynous marriage is allowed, the man is permitted to marry more than one wife. Polyandrous marriage is the reverse of polygynous marriage. Thus, where polyandry is practised, the woman may marry more than one husband. Thus, because the societies referred to above are polygynous or polygamous in the sense that customary law allows the man to marry more than one wife, the prohibition against adultery appears to be tilted against the woman. This does not necessarily mean, though, that the prohibition against adultery is discriminatory. If there is the issue of discrimination at all, it has to do with the broader practice of polygynous or polyandry, whereby a man or a woman is allowed to marry more than one wife.

94 Ibid.
wife or more than one husband while not making the same opportunity available to the other party. Even then, the issue of discrimination does not arise at all, when a custom or an edict which confers certain rights and privileges on certain members of a society while not according the same to other groups is accepted by members of the society generally as the proper way the people want to regulate or order their social relations, interactions or lives generally.

ii. Enticement and seduction

The common law tort rules in relation to enticement and seduction are said to be tinged with the old idea that those who interfere with a man’s rights over his wife or child are meddling with more or less valuable servants of his rather than outraging his domestic feelings. In other words, at common law a husband’s right to a cause of action for the enticement of his wife and seduction of a child has its historical roots in the master–servant relationship and loss of service. Lord Goddard, in the English case of Best v. Samuel Fox & Co., Ltd., said that all the authorities showed that the action which the law gave to a husband for loss of consortium was founded on the proprietary right which, from ancient times, it was considered the husband had in his wife. The interest protected by the tort of enticement at common law today is the loss by the husband of the comfort and society of the enticed wife. The action is therefore not based, as in the case of the seduction of a child, on proving loss of service. Liability is automatic and is not dependent on carnal knowledge of the wife by the enticer. Thus, although the historical roots of seduction and enticement actions are traceable to the master–servant relationship and its associated loss of service, it is the latter as an essential ingredient of the tort of seduction that distinguishes it from enticement actions.

According to Dr. L. K. Agbosu, not enough attention is always paid to the difference between the two torts in the adjudication of cases in Ghana when the term ‘seduction’ is applied to customary situations. In the view of Agbosu, the common law draws a distinction between the two torts but in Ghana actions which might be classified as enticement at common law are labelled together with the inducement and persuasion of a child to leave the home as customary seduction. An illustrative case is Benya v. Lawani, where the court declared that the plaintiff was entitled to recover damages at customary law not only for the loss of service but also in respect of his injured feelings.

It is the loss of service as an essential ingredient of the tort of seduction that distinguishes it from enticement actions. In Akan customary law of Ghana, an action for seduction is available to a man whose wife or child has been induced or persuaded to leave and has in fact left the home. Two essential elements appear to form seduction in Akan customary law: (a) the wrong done to the seduced woman; and (b) the disgrace

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99 [1952] AC 716 at 731.
100 Agbosu above note 98.
101 Ibid.
102 Unreported Judgment, Suit No. 1302/85, 12 April 1988, High Court, Accra, Ghana.
103 Agbosu above note 98.
brought upon the family. Thus, to establish liability for seduction at customary law the plaintiff must prove that: (a) the victim of seduction left the home as a result of the inducement and persuasion of the defendant; (b) the conduct of the defendant did the victim of seduction a ‘wrong’; and (c) the whole incident has brought disgrace upon the family. In the Ghanaian case of Addison v. Acheampong Justice Edusei pointed out that:

Under customary law if a man seduces an unmarried girl like the plaintiff’s daughter, he is automatically liable to pay damages to her and her family for the wrong done to her and the disgrace brought on to her family. It is not necessary to prove loss of service in actions for seduction in customary law since the seduction of a girl is an invasion of her legal right which gives rise to a claim for damages. The parents of the seduced girl are equally entitled to claim damages because dishonour and disgrace have been brought upon them.

The common law action of enticement is of relevance to both the parent–child relationship and the husband–wife relationship, whereas seduction is applicable only to the parent–child relationship. In Mawusi v. Zottor, Justice Francois considered the distinction between enticement, and customary law and common law tort of seduction. In his opinion, in enticement actions under the common law, the essential requirement is proof by the plaintiff that his wife’s departure from the matrimonial home was the direct result of the defendant’s enticement. In enticement actions, the plaintiff’s success depends on his ability to prove that but for the defendant’s persuasion and inducement, the wife or child in question would not have left home. Furthermore, Justice Francois ruled that he knew of no customary law equivalent of the action of enticement. Similarly, in Kyere v. Pokuaa Justice Annan denied a remedy to a plaintiff who had alleged that his customary law wife had been induced to stay away from the matrimonial home by the second defendant. The judge held that there was no customary law tort of enticement and that the common law tort of enticement does not apply to customary law marriages. The customary law does, however, have an action in seduction which can be brought by a husband against anyone who commits adultery with his wife.

John M. Sarbah writing on the customs of the Fanti people of Ghana stated, for instance, that where a married woman is seduced, her seducer is bound to pay to the husband as damages a fine or penalty called ‘Brabbu’, which is for the pacification of the injured husband and is not less than the value of the dowry and all the marriage expenses. The author similarly stated that, among the Fanti, if a man seduces an unmarried woman, he is liable to pay her family damages for the wrong done her and the disgrace brought on her family. He described the remedy for the seduction of a married woman as damages and as a ‘fine or penalty’, suggesting that the seduction of a married woman is considered among the Fanti as a more culpable conduct than the

104 Ibid.
105 (1970) CC 77.
106 Unreported Judgment dated 21 November 1969 delivered at the High Court, Ho, Ghana.
107 Unreported Judgment of Annan J. dated 27 November 1969, delivered at the High Court, Kumasi, Ghana.
108 Sarbah above note 86.
seduction of an unmarried woman. The common law of tort on enticement and seduction has fundamentally changed in other jurisdictions. 109

Among the policy reasons behind seduction at customary law, it has been argued that the customary law of seduction in the past was based on traditional society’s conceptions of morality or immorality in the context of sexual relations. 110 The views were closely associated with the social organisation of society. As noted above, the family is regarded as the unit and foundation of society. The stability, unity and cohesion of society are essential for an orderly organisation of society. Marriage brings about the union of families. In traditional society, therefore, it will be out of step with social norms for a young man to seduce an unmarried woman and more so a married woman. 111 Thus, where the seduced woman becomes pregnant and the pregnancy becomes publicly known, this may be regarded as outrageous and disrespectful to constituted traditional authority and sacred social norms that sustained the health, unity and cohesion of the family and society at large. 112 The purpose of the customary tort of seduction, then, is the protection of the moral character of the traditional family in matters of sexuality. The customary tort of seduction is also concerned with the loss of service by the seduced girl’s parents and preservation of the moral character of the family. 113 Damages awarded for seduction of a married woman are meant to pacify the injured feelings of the woman’s husband. The English case of Pritchard v. Pritchard and Sims 114 also shows that enticement at common law awarded damages for the injury to the woman’s husband’s honour, feelings, pride and the disruption of his family life.

6. TORT LAW LITIGATION IN SUB-SAHARAN AFRICA

This section will outline, in brief, tort law litigation processes and requirements: choice of law, methods of litigation and the status of customary law in terms of when the courts may recognise and apply it or refuse to recognise and apply it. The scope is limited to Ghana for want of access to current and reliable data in other Sub-Saharan African countries.

109 It has been observed for instance that: ‘[t]he 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. 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 … 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. Many courts see these claims as efforts to circumvent the abolition of the family and relationship torts and do not permit them’ (Davies and Dagbanja, above note 30 at 318).

110 Agbosu above note 98.

111 Ibid.

112 Ibid.

113 Ibid.

A. Choice of Law

Since there are different ethnic groups with different customary tort laws in Ghana and other Sub-Saharan African countries, how is determination as to which customary tort law applies at a particular time to be made? This section throws light on when customary law may apply or may not apply where the parties to a tort action are both Ghanaian.

The relevant provisions on the choice of law regarding the application of the common law or customary law where the parties to a suit are both subject to customary law are provided for in the Courts Act, 1993 (Act 459) sections 54 and 55. Under Act 459, a court when determining the law applicable to an issue arising out of any transaction or situation is to be guided by the following rules. Under this law references to the personal law of a person are references to the system of customary law to which the person is subject or to the common law where the person is not subject to any system of customary law. The rules are that the law applicable to any issue arising between two or more persons is, where they are subject to the same personal law, that same personal law. Where two or more persons are not subject to the same personal law, the court is required to apply the relevant rules of their different systems of personal law to achieve a result that conforms to natural justice, equity and good conscience.

On ascertainment of customary law, section 55(1) of Act 459 provides that any question as to the existence or content of a rule of customary law is a question of law for the court and not a question of fact. If there is doubt as to the existence or content of a rule of customary law, the court may adjourn the proceedings to enable an inquiry to be made after the court has considered submissions made by or on behalf of the parties and after the court has considered reported cases, textbooks and other sources that may be appropriate to the proceedings. The inquiry is to be held as part of the proceedings in such manner as the court considers expedient. The decision as to the persons who are to be heard at the inquiry is one for the court and the court may request a House of Chiefs, Divisional or Traditional Council or other body with knowledge of the customary law in question to state his or her opinion which may be laid before the inquiry in written form. The court is reserved the discretion to apply such principles of the common law, or customary law, or both, as will do substantial justice between the parties. In one case it was stated that the tort of enticement does not seem to have well-recognised principles in customary law and that the principles and the remedies known to the common law tort of enticement must be adopted and applied, as that would be the only way to meet the requirements of justice, equity and good conscience.

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115 Act 459 s. 54(1).
116 Ibid sec. 54(1) Rule 5.
117 Ibid sec. 55(2).
118 Ibid sec. 55(3).
119 Ibid sec. 55(4) & (5).
120 Ibid.
121 Mate v. Amanor [1973] 1 GLR 469.
B. Methods of Litigation

In Ghana the rules of procedure governing the commencement of civil actions are the same whether the action is commenced under statutory law, customary law or under the common law. The procedural law, among others, is the High Court (Civil Procedure) Rules, 2004 (CI 47).122 Civil proceedings are commenced by a writ of summons indorsed with a statement of the nature of the claim and the relief or remedy sought in the action.123 CI 47 in Order 11 Rule 1 further requires the plaintiff to serve a statement of claim on each defendant at the same time that the writ or notice of the writ of summons is being served on the first defendant. The statement of claim specifies the allegation being made against the defendant124 and must state specifically the relief or remedy which the plaintiff claims against the defendant.125

A provision of particular significance among the rules for commencement of civil proceedings in relation to customary law including customary tort claims is Order 11 Rule 11(2), wherein it is stated that: ‘[w]here the party pleading relies on a rule of customary law, that rule shall be stated in the pleading with sufficient particulars to show the nature and effect of the rule in question and the geographical area and ethnic group to which it relates’. In other words, where a particular rule of customary law is being relied on in an action, the rule must be identified in the pleading with an indication of its origin in terms of geography, and the nature and effect of the rule. This provision overrides previously decided cases before CI 47 which were of the view that a party should not plead a rule of customary law.

Also of significance in this context is Order 57 Rules 1 to 3, which apply to actions for defamation, specifically actions for libel and slander. The rules require that before a writ is issued in an action for libel it should be endorsed with a statement giving sufficient particulars of the publication in respect of which the action is brought to enable them to be identified. Where in an action for libel or slander the plaintiff alleges that the words or matters complained of have been used in a defamatory sense other than their ordinary meaning, the burden is on the plaintiff to give particulars of the facts and matters on which the plaintiff relies in support of the sense alleged. And where in an action for libel or slander the plaintiff alleges that the defendant maliciously published the words or matters complained of, the plaintiff need not in the statement of claim give particulars of the facts on which the plaintiff relies in support of the allegation of malice. If, however, the defendant pleads that any of those words or matters are fair comment on a matter of public interest or were published on a privileged occasion and the plaintiff intends to allege that the defendant was actuated by express malice, then the plaintiff must serve a reply giving particulars of the facts and matters from which the malice is to be inferred. Libel and slander causes of action

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122 CI in full means Constitutional Instrument.
123 Ibid Order 2 Rules 2 and 3.
124 High Court (Civil Procedure) Rules 2004, (CI 47), Order 2 Rule 1. See also Order 11 Rule 6(2).
125 Ibid Order 11 Rule 15.
are statute-barred after the expiration of two years from the date on which the cause of action accrued.\textsuperscript{126}

C. Internal Conflict of Laws

Who can change or amend customary law? What happens if customary law conflicts with statutory or common law? What are the standards by which customary law may be declared invalid? These are the questions to be addressed in this section.

The case law in Ghana abounds with instances where the courts have rejected some of the customary rules of practice on such grounds that the rules are obsolete, unreasonable, contrary to statute, and “repugnant to natural justice, equity and good conscience.” In \textit{Abangana v. Akologo}\textsuperscript{127} the plaintiff and his wife, members of the Frafra ethnic group, married under Frafra customary law. While the marriage was still intact, the woman left her husband and had children with the defendant, also a Frafra. There exists a Frafra custom to the effect that children born by a married Frafra woman outside marriage belong to the lawful husband. In the instant case, two children were born to the woman following amorous relations with the defendant. The question to resolve was whether a custom which deprived a man of his natural child was repugnant to principles of equity, good conscience and natural justice so as to be rejected. The trial magistrate concluded that the custom was to the credit of the plaintiff, in that the plaintiff had paid full dowry and, secondly, did not divorce the woman at the time the woman had children with the defendant. The trial court ruled that the defendant could not be the father of the children when they were born from an unbroken marriage as the custom stood. On appeal, it was held that the order of the trial court that the defendant should hand over the two children to the plaintiff on the basis of this customary rule of practice was repugnant to principles of equity, good conscience and natural justice. In \textit{Odifie v. Panin}\textsuperscript{128} the court in an action for damages for slander between parties subject to Akan custom stated that the principle that at customary law an action for slander lay at the instance of the person slandered was well established, but the customary remedy of recanting was ‘obsolete’ and needed to be developed by judicial process through an award of adequate damages. \textit{Nkrumah v. Manu}\textsuperscript{129} held that custom must change with changing times. The judge therein reasoned that it was ‘about time the customary law of slander took on a more enlightened garb and moved so to speak with the demands of modern times’.\textsuperscript{130}

There are other judges who are of the view that, however obsolete or outmoded a custom may be, it is the people who practise the particular custom who can change the custom. In one of the erudite judgments on the matter it was stated that the:

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\text{[R]equired change [in custom] must be effected by those who practise it not by the court … [T]he court can only express its disapproval for same and suggest a consideration for its amendment or change. The court may therefore not be in a position to prescribe sanctions}
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against those who may wish to practise the custom. The courts are bound only to apply sanctions which are prescribed by statute against the practice of certain customs which are in themselves very serious criminal offences carrying death or heavy sentences; for example human sacrifice and other serious offences. It seems that where the observance of a particular custom may only amount to a misdemeanour or other minor offences like breach of the peace, unlawful assembly, and damage to property, nuisance, etc, the court must be slow to prescribe sanctions or even suggest a change. There may be a moral objective upon which the practice of a particular custom rests, and even though the set ideal may not commend itself to a modern thinker of a sophisticated mind, the courts must be slow in rejecting outright customs that may not, for some reason, commend themselves to them in these modern times.131 (emphasis added)

Clearly, then, there are divergent views held by judges in Ghana as to when a particular custom may be held to be valid or invalid. I side with those who maintain that change in custom can be done by those who practise the particular custom. Customary law emerges from custom and practice and is applicable to particular ethnic groups. Customary law is not put in place by a law-making body but is recognised as being part of the sources of law of the various ethnic groups in Sub-Saharan Africa. If customary law emerges from custom and practice, as it does, then the source of its validity lies in the particular community and its people who practise the particular custom. The law-makers of customary law, then, are the people who practise the particular custom, and if this is so it is the people themselves who can change or amend the particular customary practice. In that sense neither judges nor parliamentarians have any business to do with abolition or abrogation of custom except where custom conflicts with the supreme law of the land.

Parliament itself, as representative of the people and law-making body, in my view, has limited power to amend customary law;132 In this regard, it is recognised that customary law is ethnic group-specific; applying as it does to the specific ethnic group that practises the custom. Customary law has specific, local application to each ethnic group in Ghana and Sub-Saharan Africa. It is also acknowledged that the general law-making power is vested in each law-making body in each country of Sub-Saharan Africa and that the laws made by such law-making bodies usually have general application throughout the particular country. Each law-making body represents the collectivity and the collective will and the laws made by any such law-making body may be meant to represent the collective interests of the entire country. It follows, then, that custom and, for that matter, customary law may only properly be subordinated to statutory law where statutory law and other rules made by designated state law-making bodies are truly national in character in the sense of applying to everybody irrespective of their ethnic background. If custom conflicts with such law, it must give way to the enacted law which has wider national application and implications. Thus, except for the case of a custom of a particular ethnic group offending statutory law that has national


132 Parliament cannot, in my view, for example, seek to amend a particular custom by judging the particular custom in terms of the custom of another particular ethnic group when the custom of the latter ethnic group does not reflect the generally accepted way of doing things in the country.
application, it will, with due respect, be absurd for a judge or even the law-making body as a group to say that customary law which the people still practise has no application because it is obsolete or contrary to natural justice, equity and good conscience.

The concepts of obsoleteness and contrariness to natural justice, equity and good conscience are too broad and elastic standards for measuring the continued validity of a custom. Often when custom is struck down by a judge as being contrary to natural justice, equity and good conscience, these concepts remain fused and one is not able to tell exactly what elements of natural justice, equity and good consciences custom has offended. Is the obsoleteness or contrariness of a particular custom to natural justice, equity and good conscience to be measured in the estimation of the judge or the people who practise the custom? And whose good sense is used as the yardstick: that of the judge or the nation at large?

7. CONCLUSION

Customary tort law in Sub-Saharan Africa is real and has its roots in the socio-cultural context. The general conclusion to draw is that customary tort law is broader and more encompassing than the common law of tort. Sub-Saharan customary tort law recognises and redresses several types of harm that common law systems view with great scepticism. One example is slander, which, under customary tort law, is broad enough to encompass not only false statements that injure reputation and character, but also verbal insults that injure the dignity and feelings of the victim. Under the common law no action for slander lies for mere words evoked by heat or passion or for mere vulgar abuse.133 Under common law in an action for slander, there may be the requirement to prove special damage, which is not easy to establish. It is the contrary in Sub-Saharan African customary tort law which not only protects the individual interest in protecting their name and integrity but also that of the family and other social units within which the individual is born and lives. US and UK law have added further protections that may apply to slander defendants – making it even harder to recover, and expressing a policy judgment that favours freedom of speech and protection of defendants in a way not embraced by customary law.134 Another unique aspect of customary tort law is its protection against interruption of familial or marital relationships through enticement or seduction. Common law courts have largely concluded that these interests no longer merit protection through the tort system.

Customary law also possesses a number of characteristic traits, including being flexible, popular, adaptable and communal in focus. Customary law reflects the practices of the people and as such it has the capacity to change easily, as and when the people who apply it deem fit. Judicial decisions under the common law of tort are hardly reversed or quashed and can hardly change because of the doctrine of precedent. Customary law, however, loses its force when the people stop following the practice

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which underlies the particular customary law. Customary tort law in Sub-Saharan Africa has a collective focus given the collective focus of African societies, unlike the common law, which is much more individual-focused.

And in terms of remedies, customary tort law remedies have been described as:

powerful, yet relatively gentle, while ... common law [remedies] range from extremely harsh to non-existent ... Because damages are minimized in customary law, people have a disincentive to sue for financial gain or ... to sell their good name for money. The common law remedies lack the public dimension of name clearing that accompanies customary remedies.\textsuperscript{135}

It follows from all of the foregoing that customary tort law in Sub-Saharan Africa, which is deep-rooted in custom and practice, has a momentous role to play in the maintenance of social order and social relations. This is particularly so when customary tort law provides for causes of action and remedies for injuries that are not available under the received common law in Sub-Saharan Africa. In short, ‘customary law plays a more important role in the geo-political landscape than many observers recognize’.\textsuperscript{136}

In this regard, Sub-Saharan African institutions and individuals responsible for the making, interpretation, implementation and enforcement of laws need to give conscious attention to the preservation of customary tort law and other indigenous laws that play significant functions in the regulation of social life and relations in Sub-Saharan Africa. This is one of the ways Africa can also keep intact its identity as a continent with unique people. Customary law must be preserved against the backdrop of the need for change where necessary and proper in the national interest.

\textsuperscript{135} Davies and Dagbanja above note 30 at 319–320.
\textsuperscript{136} Ibid at 332.