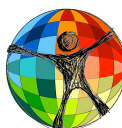


# Traditional Legal Institutions through a Rule of Law Lens: the Chieftaincy in Ghana



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# Introduction

Whether it is invoked by conservative religious leadership or libertarian institutions, the rule of law is an ancient catchphrase with modern political currency.<sup>1</sup> It is increasingly the measure of the legitimacy of a legal system. Countries appearing to stray from this principle are subjected to intense pressure to undertake a myriad of reforms.<sup>2</sup> In Africa, customary law and institutions have enormous importance, not only as symbols of cultural identity, but as practical ways of governing people. Increasingly the roles of traditional leadership in both legal and political institutions are being recognized as an important part of governance.<sup>3</sup> Even the World Bank has recognized their role in economic and legal development.<sup>4</sup> Customary institutions operate in pluralistic legal systems, often alongside and as a part of constitutional democracies. Yet despite their importance for African countries in cultural, legal and economic terms, the coexistence of these legal orders is far from stable and predictable. As the importance of African customary law grows, so does the importance of understanding when and how these institutions create or subvert the rule of law in their countries.

Ghana is a particularly apt example to undertake a study of African customary institutions. In Ghana, customary law is not only explicitly incorporated in the constitution alongside the common law, but so is the main institution through which it is asserted, the chieftaincy. Post-independence Ghana has consistently moved towards a greater role for chieftaincy and customary law through the constitution and the courts. Currently the

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<sup>1</sup> Brian Tamanaha, *On the Rule of Law: History, Politics, Theory*, (Cambridge: Cambridge University Press, 2004) at 2.

<sup>2</sup> Roberto Laver, "The World Bank and Judicial Reform: Overcoming "Blind Spots" in the Approach to Judicial Independence" (2012) 22:2 Duke J Comp & Int'l L 183 at 183.

<sup>3</sup> Werner Zips & Markus Weilenmann, "Introduction: Governance and Legal Pluralism – an Emerging Symbiotic Relationship?" in Werner Zips and Markus Weilenmann, eds, *The Governance of Legal Pluralism: Empirical Studies from Africa and Beyond* (New Jersey: Transaction Publishers, 2011) at 8.

<sup>4</sup> Janine Ubink, "Land, Chiefs and Custom in Peri-Urban Ghana. Traditional Governance in an Environment of Legal and Institutional Pluralism in Werner Zips and Markus Weilenmann, eds, *The Governance of Legal Pluralism: Empirical Studies from Africa and Beyond* (New Jersey: Transaction Publishers, 2011) at 82 [Ubink 2011].

institution of chieftaincy has both law making and adjudicative responsibilities. Family law and land disputes are often addressed through the chieftaincy. Ghanaian legislation provides that a percentage of intestate inheritance is disposed of through customary law.<sup>5</sup> Thus the role of Ghanaian chiefs is of immediate and practical importance to the Ghanaian legal system.

Furthermore, the Chieftaincy is also culturally vibrant, inspiring both pride and deference from politicians and courts alike. Because of its importance courts often have interactions with customary law and the chieftaincy. This has given rise to a Ghanaian common law of chieftaincy. However, the system operates in a murky theoretical landscape which obscures its practical functioning. Somewhere amidst the practical reality and the theoretical fog lies the idea of the rule of law.

This paper is an examination of the possibility of reconciling African customary law with a constitutional understanding of the rule of law using the Ghanaian institution of chieftaincy as a case study. In the first section of this paper, the theory and criticism of the rule of law will be examined with reference to the customary legal systems of Africa. Part two will focus on the institution of Chieftaincy in Ghana in particular and its role in shaping legal and political institutions in that country will be examined with reference to the theory of the rule of law. I will argue that focusing on elements of the rule of law that are amenable to traditional legal systems can have a much more positive effect on communities that attempting to hold them to rigidly formalistic legal standards.

## **Part I. The rule of law**

The clearest understanding of the rule of law is one that acknowledges its lack of coherence. The rule of law is a concept that has long been in danger of sliding into a

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<sup>5</sup> Gordon Woodman, "Ghana Reforms the Law of Intestate Succession" (1985) 29: 2 J Afr L 118 at 122 [Woodman].

conceptual morass by the constant demands made upon it by a myriad of actors. This has driven many recent attempts to give coherence to an understanding of the principle, while acknowledging its fuzzy nature. This makes definition of the rule of law important for anyone seeking to broach the subject. In general there is agreement that the rule of law is best understood as a series of interconnected principles or themes.<sup>6</sup> These principles generally fall into a few categories, some associated with formal but morally empty systems of law, some theories that advocate both formal and substantive rights-based rule of law, some which emphasize the consent based nature of the rule of law, and some which emphasize the equality of all persons before the law.<sup>7</sup>

Many understandings of the rule of law are cross cutting and interdependent. For example most descriptions of the rule of law envision a legal system with predictable, stable and general rules. However, past these common threads the diversity in the rule of law theory is astounding. One useful conception of the rule of law comes from Brian Tamanaha. He identifies three themes which run through the various understandings of the rule of law. These themes are useful because while they are interlinked, each theme emphasizes different elements and consequences of the rule of law. They are also useful because they focus on the vision and purpose of the rule of law: that government is limited by law, that law upholds the requirements of formal legality and that law rules rather than people.<sup>8</sup>

The broadest understanding of the rule of law focuses on the way it limits government action.<sup>9</sup> In this it acts as a restraint on tyranny. This element speaks to the relationship between governments and the people living under them. According to Tamanaha there are two senses in which the governments must operate within this limiting framework. First they

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<sup>6</sup> TRS Allen, *Constitutional Justice: A Liberal Theory of the Rule of Law*, (Oxford Scholarship Online: 2003) at 2 [Allen]; Tamanaha, *supra* note 1 at 114.

<sup>7</sup> John Hasnas, "The Depoliticization of Law", (2008) 9:2 *Theor Inq L* 529 at 532-534 [Hasnas]; Tamanaha, *supra* note 1 at 3, 91-92; David Pimentel, "Legal Pluralism in Post-Colonial Africa: Linking Statutory and Customary Adjudication in Mozambique", (2011) *Yale Human Rts & Dev LJ* 59 at 64 [Pimentel].

<sup>8</sup> Tamanaha *ibid* at 114.

<sup>9</sup> *Ibid*.

must operate within a valid positive law, and second the government cannot change the law in any way they like.<sup>10</sup> Formerly this limitation was performed by divine or customary law, but now is performed by substantive constitutional rights.<sup>11</sup> Whenever anyone has the power to make or enforce law this element of the rule of law will come into play.<sup>12</sup> The language of restraint is very common in discussions about the rule of law, whether it is phrased as restraint on arbitrary power, or limitation of government action.

The second theme Tamanaha discusses is the idea of formal legality. This theme is one of the most common, particularly invoked by the World Bank and others who focus on its ability to facilitate market transactions.<sup>13</sup> Formal rule of law requires creating public, prospective laws which are general, equal in application and certain.<sup>14</sup> As pointed out by Tamanaha and others formal legality may be morally empty.<sup>15</sup> It imposes no requirements that law is just and formally legal laws may be discriminatory or even evil. Ironically it is this substantive emptiness which makes it amenable to broad application according to the World Bank.<sup>16</sup> Requiring form alone enables many different political and legal systems to claim they follow the rule of law, however unjust their society may be. One of the most important upshots of formal legality is that it provides for individual autonomy by clarifying what actions are allowed. This fits well with liberal market theories, allowing actors the freedom to engage in market transactions at a lower cost.<sup>17</sup> Formal legality and its implications are of enormous

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<sup>10</sup> *Ibid* at 115.

<sup>11</sup> *Ibid*.

<sup>12</sup> *Ibid*.

<sup>13</sup> *Ibid* at 119.

<sup>14</sup> *Ibid*.

<sup>15</sup> *Ibid* at 95; Allen *supra* note 6 at 22.

<sup>16</sup> *Ibid* at 94.

<sup>17</sup> Thomas Carothers, "Promoting the Rule of Law Abroad: the Problem of Knowledge", (2003) 34 *Rule of Law Series, Democracy and Rule of Law Project*, (Carnegie Endowment for International Peace) at 8 [Carothers].

importance to the theory of rule of law, and many references to rule of law consciously or unconsciously make reference to formal legality.

The third theme discussed by Tamanaha is the rule of law not man. This theme is also evident in rule of law theory. It also sometimes called rule by reason.<sup>18</sup> This thread focuses on the ability of law to shield the public from the whims of human nature.<sup>19</sup> It emphasizes laws disassociation with any one ruler such as the king. The consequences of this theme include the equal dignity of all citizens which implies fair treatment and respect for individual autonomy.<sup>20</sup> It also emphasizes the duty of procedural fairness, judicial independence, and democracy.<sup>21</sup> The consequences of this theme tend to overlap with the first theme of limiting governmental action, which also requires judicial independence.

Tamanaha's framework is a useful way to approach the rule of law because it focuses on the underlying justifications and aspirations of the rule of law and not just the myriad of its consequences. The outward consequences of rule of law theories are incredibly diverse and range from independent judiciary, separation of powers to the requirement for general, stable and prospective laws, the duty of fairness and due process, to the equality of citizens before the law and even the sole requirement that there be a law.<sup>22</sup> Rather than sifting through all the consequences that are said to flow from the rule of law, exploring these themes allows the most important consequences to float to the top. It also focuses a practical and theoretical discussion about the rule of law.

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<sup>18</sup> Allen, *supra* note 6 at 2.

<sup>19</sup> Tamanaha, *supra* 1 note at 122.

<sup>20</sup> Allen, *supra* note 6 at 3.

<sup>21</sup> *Ibid.*

<sup>22</sup> Allen, *supra* note 6 at 2-3; Hasnas, *supra* note 7 at 533.



## Part II. Customary law and the rule of law

Increasingly rule of law promotion schemes focus customary law and traditional leadership as both targets for and agents of legal reform.<sup>23</sup> Customary legal systems are part of many African constitutional democracies, constituting a distinctly African form of legal pluralism. Legal pluralism in this paper is taken to mean the operation of two or more distinct legal traditions within the same polity.<sup>24</sup> In many African countries several forms of governance are woven into the political, cultural and legal landscape.<sup>25</sup> They interact to create a multifaceted and diverse legal order, from which parsing out the customary elements and the state elements can be difficult. Studying customary legal systems as separate and distinct legal orders is overly simplistic. Bearing this in mind, the first part of this paper necessarily will refer to a somewhat idealized, constructed idea of customary law. This analysis will be made concrete in the next section of the paper focusing on the institution of chieftaincy in Ghana.

A study of customary law is a study of the particular constellation of legal power in a given country. Customary law and traditional leaders have an important role to play in the state and are powerful cultural and community symbols. They may provide added value to the legal systems they are part of by adjudicating disputes, performing marriages, administering land, engaging in development projects, or representing their communities on the larger political stage.<sup>26</sup> In some areas they have the value of being more accessible and responsive to local conditions than state run court systems.<sup>27</sup> They may also enjoy more

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<sup>23</sup> Ubink 2011, *supra* note 4 at 81; Franz von Benda-Beckmann, Keebet von Benda-Beckmann & Julia Eckert, "Rule of Law and Laws of Ruling: Law and Governance between Past and Future", in Franz von Benda-Beckmann, Keebet von Benda-Beckmann & Julia Eckert, eds, *Rule of Law and Laws of Ruling: On the Governance of Law*, (Oxford Scholarship Online, 2009) at 2-3 [Benda-Beckmann 2009].

<sup>24</sup> Pimentel, *supra* note 7 at 59.

<sup>25</sup> Markus Weilenmann, "Between Ethnicity, Competing Powers and Legal Change", in Werner Zips & Markus Weilenmann, eds, *The Governance of Legal Pluralism: Empirical studies from Africa and Beyond* (Transaction Publishers: New Jersey, 2011) at 110 [Weilenmann].

<sup>26</sup> Nana Arhin Brempong, "Section I – Chieftaincy: An Overview", in Irene K. Odotei & Albert K. Awedoba (eds.), *Chieftaincy in Ghana: Culture, Governance and Development*, (Sub-Saharan Publishers, Legon, Accra: 2006) [Brempong].

<sup>27</sup> *Ibid.*

legitimacy and be more accessible than state adjudicative processes by being rooted in the practices of the community and therefore being familiar to the population.<sup>28</sup>

However legal systems incorporating customary law have also demonstrated significant weaknesses. The integration of customary and state law was done in service of colonial government in pursuit of indirect rule leading to less than healthy systems of regulating power.<sup>29</sup> Thus, African customary institutions as with state institutions prove to be vulnerable to corruption and many lack effective checks and balances.<sup>30</sup> It has also proved difficult to stabilize the place of customary systems on their broader constitutional democracies.<sup>31</sup> Given the immense cultural and political significance of these institutions in contemporary African society, understanding how and when they might build or detract from the rule of law is an important task.

The first step in understanding customary law in Africa is to undo the presumption that customary law operates independently from state law. The overwhelming evidence is that state law and customary law are not separate entities. A cursory examination of multitude of constitutions from across Africa demonstrates that customary law is incorporated as a source of law at the highest levels. On the other hand, interactions between traditional leadership, customary law and state (colonial) law are well documented from the earliest colonial encounters.<sup>32</sup> Furthermore, legal anthropologists and western codifiers have exerted

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<sup>28</sup> Pimentel, *supra* note 7 at 64-65.

<sup>29</sup> A.N Allot, "What is to be Done with African Customary Law? The Experience of Problems and Reforms in Anglophone Africa from 1950" (1984) 28 J Afr L 56 at 59 [Allot]; Jill Zimmerman, "The Reconstitution of Customary Law in South Africa, Method and Discourse", 17 Harvard Blackletter LJ 197 (2001) at 200 [Zimmerman].

<sup>30</sup> Ubink 2011, *supra* note 4 at 90-91; Stuart Yeh, Corruption and the Rule of Law in Sub-Saharan Africa, 4 African Journal of Legal Studies (2011) 187 – 208 at 191 [Yeh].

<sup>31</sup> Pimentel *supra* note 7 at 59.

<sup>32</sup> Zimmerman, *supra* note 29 at 200.

considerable influence on customary law as well, changing and evolving its character and identity over time.<sup>33</sup>

In this way examining customary law is not so much about parsing it from state law. It is rather about studying the legal systems of African countries to understand what complexities arise from their particular brand of legal pluralism. Studying the rule of law in pluralistic African polities is more about studying the confrontation between transplanted colonial systems of governance and their customary legal systems as it is about evaluating customary law for adherence with rule of law principles. Each of Tamanaha's themes presents an opportunity to study this confrontation and try to understand how plural legal systems can provide stability, accountability and access to justice.

## **Limitation of government authority and customary law**

As discussed one goal of the rule of law is to limit the government action and prevent tyranny. In constitutional democracies the source of this limitation is the constitution and is performed through judicial review via a right of appeal. In many African democracies the constitution also aspires to this limiting function. However, in African democracies with functioning customary dispute resolution and decision making institutions, subjecting these systems to a constitutional right of judicial review is contested. Two of the main problems with judicial review of customary law are first, its association with colonial cooption of customary laws and second, its implications for the ownership and integrity of customary law.<sup>34</sup>

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<sup>33</sup> Janine Ubink, *In the Land of the Chiefs: Customary Law, Land Conflicts and the Rule of the State in Peri-Urban Ghana*, (Leiden University Press, 2008) at 24 [Ubink 2008].

<sup>34</sup> Allot, *supra* note 29 at 59-60.

Under colonial governance in much of Africa traditional institutions were coopted to facilitate colonial rule. To control colonial ruler their power was tied to the state.<sup>35</sup> In South Africa traditional leaders were allowed to rule subject to the administrator's ultimate authority. In 1878 their customary law was codified by an all-white board.<sup>36</sup> In Mozambique colonial authorities also built their legal system on the superior state approach. Local authorities could govern only to the extent that the colonial regime allowed.<sup>37</sup> As in much of British Africa, although a presumption of customary law was allowed, the courts used repugnancy clauses to oust customary law they did not like. Colonial administrators in Ghana also used repugnancy clauses and chiefs for indirect rule. The colonial government even installed traditional leaders in rural areas formerly run without chiefs in order to consolidate control over the population.<sup>38</sup> The idea that the state is superior to traditional leaders and their laws is still intact today.<sup>39</sup> These examples indicate the extent to which customary legal institutions are ingrained within the colonial power structure.

Attempts by African governments to limit customary law in service of the rule of law can be thought of as an evolution of the colonial system of indirect rule. It is a corollary of the superior state approach. This is why the right of appeal to common law courts in African countries is contested by both opponents and proponents of traditional leaders.<sup>40</sup> Almost all governments with customary legal systems have some form of the right of appeal from them to the mainstream court system. A right of appeal is necessary in legal systems where customary law is incorporated into the constitution. If constitutional protections are to be

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<sup>35</sup> Zimmerman, *supra* note 29 at 200

<sup>36</sup> Zimmerman, *supra* note 29 25 at 200.

<sup>37</sup> Pimentel *supra* note 7 at 73.

<sup>38</sup> Ubink 2008 *supra* note 33 at 21.

<sup>39</sup> Pimentel *supra* note 7 at 75.

<sup>40</sup> AKP Kludze, "Chieftaincy Jurisdiction and the Muddle of Constitutional Interpretation in Ghana" (1998) 12:1 J Afr L 37.

meaningful and their provisions the source of legal authority, then all law in the country must be submitted to them. This is a direct consequence of the rule of law.

Some argue that right of appeal to non-customary courts also cause the local community to lose ownership of their laws. Pimentel also points out that once a decision has been made by a court regarding a customary law issue, the community effectively loses control of the custom.<sup>41</sup> The decision will stand as a precedent independent of the community and can go on to have a life of its own.

Another potential problem with the right of appeal to state courts is that in attempting to limit customary decision makers it may destroy the very laws they seek to apply. As Alott points out creating a right of appeal to customary laws has the effect of removing their customary nature.<sup>42</sup> If they are no longer customary, they lose their reason for being. Despite the problems with mainstream courts reviewing customary law, there may be no alternative in many countries. Customary institutions have been transformed by their encounter with colonial law. Because this encounter distorted and removed many of the checks and balances that restrained their power in the past, traditional law the way it is now cannot provide its own limiting mechanisms.<sup>43</sup> Because colonization resulted in enormous power being concentrated in the hands of African leaders, this limitation is all the more important.<sup>44</sup> The right of appeal could also be seen as a logical consequence of the encounter between these two legal systems. If customary law has altered the content and sources of the constitutions of many African countries, then it is unsurprising that customary law will also be altered through a right of appeal.

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<sup>41</sup>*Supra* note 7 at 79.

<sup>42</sup> *Supra* note 29 at 60.

<sup>43</sup> *Ibid* at 59; Ubink 2011, *supra* note 4 at 92-95.

<sup>44</sup> Yeh, *supra* note 26 at 191.

In many countries traditional leadership have destroyed communities through corruption and lack of accountability. In Ghana Chiefs often expropriate stool land from famers and sell it for personal gain.<sup>45</sup> Customary law has also been used to justify human rights abuses.<sup>46</sup> In both South Africa and Mozambique traditional rule is often associated with discrimination against women and violations of gender equality rights demonstrating a need to limit customary laws which discriminate against women.<sup>47</sup> In many of these cases encounters with colonial state law have caused or exacerbated these negative effects. If African countries cannot provide other ways of limiting the actions of traditional leaders, in absence of other checks and balances on the use of customary authority, a right of appeal to a separate entity will be necessary.

Pimentel offers some solutions for ensuring the place of customary law within state centered constitutional democracies. He criticizes the right of appeal to constitutional court systems as demeaning to customary institutions.<sup>48</sup> While acknowledging that the exact linkages between state law and customary law will vary, he suggests that customary law is maximized through presumptive jurisdiction for the traditional forum of the dispute.<sup>49</sup> Through this principle of maximization state courts will have to defer to community based adjudication.

While this approach presents several difficulties, particularly when it comes to forum shopping, and conflict of laws, it has the benefit of allowing the customary elements of legal systems to be more consistent with practice on the ground. Another way of approaching the problem could be to encourage traditional checks and balances in the traditional system.

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<sup>45</sup> Ubink 2011, *supra* note 4 at 82.

<sup>46</sup> Pimentel *supra* note 6 at 69.

<sup>47</sup> Zimmerman, *supra* note 29 at 209-211.

<sup>48</sup> Pimentel *supra* note 6 at 80.

<sup>49</sup> *Ibid.*

Some places have moved towards electing chiefs to increase accountability. Increasing checks and balances within customary systems themselves would help with the coherence of customary law and insulate it from overly zealous courts applying foreign norms.

When judicial review is unavoidable, a solution to the problems with the right of appeal may arise from other western legal principles. Canadian administrative law has developed ways of reviewing administrative tribunals for legality while showing deference to their particular expertise. Judicial review of administrative action in Canada requires courts to evaluate whether tribunals have complied with fundamental norms, depending on the administrative decision maker, a court will determine how much deference is appropriate and review the decision based on this deference. It is possible that this approach could be taken in countries reviewing the decisions of traditional leadership as well. This approach could take the principle of maximization of customary law into account, and could allow courts to determine when it is appropriate to intervene based on the traditional decision maker and the decision they made.

The rule of law requires that the actions of those in power are limited by fundamental legal norms. In modern African legal systems incorporating traditional legal systems, the right of appeal with all its problems will continue to be a reality. However, if customary legal systems were imbued with more checks and balances and submitted to a thoughtful appropriate measure of judicial review from the outside, the negative aspects of traditional leadership could be minimized while its benefits are maximized. This not about "submitting" traditional systems to the rule of law, but rather using Tamanaha's themes to understand ways to strengthen the positive aspects of these plural legal systems and limit the negative ones.

## Formal Legality and the Rules of Customary Law

The idea of formal legality is incredibly important to the rule of law. Formal legality is frequently explicitly or implicitly referenced in discussions about the rule of law. In western society formal legality is associated with prospective, clear, stable and publicly promulgated laws. The idea of formal legality emphasizes the equality of legal actors, an independent judiciary, due process and it may require the right to a fair hearing.<sup>50</sup> Formal legality allows individuals to plan their behaviour by knowing in advance what the state will allow. Thus it is frequently invoked to support market based economies by allowing more freedom of action.<sup>51</sup> These requirements are biased towards written law. Though not impossible, in a complex society it would be difficult to achieve the desired level of clarity, generality and public promulgation without written laws. Because of this, non-written customary law fits uncomfortably into constitutional democracies which require writing to function in line with this element of the rule of law.

The rule of law under formal legality boils down to the promulgation of general rules.<sup>52</sup> The law is envisioned as a set of rules which function as guide for behaviour by allowing individuals to predict what actions will be allowable. One of the fundamental ways this is done in western society is through written statutes and case law which is made public. Despite the fact that very few people in western countries actually know anything about the law that is supposed to guide them, it is this element that is said to facilitate market transactions.<sup>53</sup> This sometimes prompts countries to advertise their adherence to the rule of

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<sup>50</sup> Tamanaha *supra* note 1 at 120.

<sup>51</sup> *Ibid.*

<sup>52</sup> Tamahana *supra* note 1 at 96.

<sup>53</sup> Carothers, *supra* note 17 at 5.



law in hopes of attracting investment. It is also why billions of dollars have been spent on promoting the rule of law around the world.<sup>54</sup>

While customary law constitutes a body of rules, their underlying nature conflicts with this type of formal legality. Customary law by nature is supposed to be flexible and based on local practice. The requirement for prospective and clear rules does not sit comfortably with unwritten norms based on practice. However these rules may be understood and capable of guiding the actions of a local community, it will not be helpful to outsiders attempting to do business in the community. This is especially true in Ghana where 80 percent of the land is administered by chiefs through customary usage.<sup>55</sup>

Because plural legal systems are the norm, coexistence is necessary. There are several ways in which courts and law makers try to create predictability in face of this coexistence. One way to solve the problem is to develop a written system of customary law. In this way it should not be a surprise that many African states have engaged in programs to codify or otherwise attempt to set down customary law in writing.<sup>56</sup> This approach to customary law was an important part of colonial authority's approaches in several African countries and could also be said to come under the superior state theory.<sup>57</sup> This was the approach taken by the South African colonial administration in 1878.<sup>58</sup> Ghana's constitution also invests chiefs with the responsibility of maintaining and codifying Ghana's customary laws, as will be discussed further on.

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<sup>54</sup> *Ibid.*

<sup>55</sup> Ubink 2008, *supra* note 33 at 21.

<sup>56</sup> Zimmerman, *supra* note 25.

<sup>57</sup> Pimentel, *supra* note 7 at 77.

<sup>58</sup> *Ibid.*

The codification of customary law presents an obvious problem. Writing customary law down removes its essential nature. As with the right of appeal, although codifying customary law may make it easier for judges trying to figure out what the law is, how can we call law customary when it is not based on customs, but on a draft prepared by central government?<sup>59</sup> The justification for customary law will have disappeared. Codifying customary law also excludes customary law being practiced on the ground. As demonstrated in South Africa, this may mean that customary law is separated into that applied by the court and that lived by the people themselves resulting in a loss of ownership.<sup>60</sup>

Another solution that courts have used to reconcile state centered constitutionalism with local customary laws is through legal anthropology. This approach involves seeking out experts in traditional customs and using their testimony as expert opinion evidence to ascertain the gist of the customary law. This is also called ascertainment. However, as with codification much of the textbook law is both dated and tied to colonial projects of indirect rule.<sup>61</sup> It also relies on the statements of male elders and case methodology both of which demonstrate problems.<sup>62</sup>

Methodology is very important to the legal anthropology. Ways of ascertaining customary law have gone from legal realist's preoccupation with trouble cases to descriptive and process based ways of studying dispute resolution mechanisms.<sup>63</sup> More recently scholars have recognized the fluid and negotiable nature of customary law.<sup>64</sup> This recognition makes it difficult to justify attempts at ascertainment. Ascertainment in this sense is like trying to nail

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<sup>59</sup> Allot, *supra* note 29 at 60.

<sup>60</sup> Pimentel, *supra* note 7 at 79-80.

<sup>61</sup> Zimmerman, *supra* note 29 at 213.

<sup>62</sup> *Ibid.*

<sup>63</sup> Ubink 2008, *supra* note 33 at 26.

<sup>64</sup> *Ibid.*

jello to a wall. Old projects of ascertainment are particularly vulnerable as it is highly likely that the law will have changed.

Based on these ascertainties courts often develop alternative common law systems of customary law which have little in common with dispute resolution mechanisms operating in the communities where the cases originate. Courts with little knowledge of customary law may create an alternate line of rules which are not applied on the ground. If these rules are applied, they may be applied in ways the court never expected and could not predict. There is also the problem that the language of the state system is probably different from the local system. Some African countries speak hundreds of different languages. This certainly does not offer the level of stability and predictability sought by formal legality.

In many ways, the problems of writing and ascertainment are related to the problems with a general right of appeal to the state court system. Courts attempting to implement unwritten customs may have the effect of destroying their nature. Adjudication of customary laws by common law courts inevitably results in crystallizing them in writing.<sup>65</sup> As with the right of appeal this presents a difficulty for ownership of the customary and traditional laws as well as conflicting with their practice-based flexible nature.

Reconciling customary legal systems with a formalistic version of the rule of law is a difficult proposition. If it is really necessary then there will need to be major changes in the way customary law is administered and thought of. However, top down approaches clash with the very nature of customary law. Moreover there have been decades of effort to promulgate the rule of law around the world and it is not clear what if any effect these efforts have had.<sup>66</sup> Attempting to reconcile customary law with formal legality on a particular, minute level may not be worth the effort. However, because doing business with the outside

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<sup>65</sup> Allot, *supra* note 29 at 66.

<sup>66</sup> Carothers, *supra* note 17 at 8.

world is a reality in a broad way some elements of formal legality may truly help guide economic interactions.

## **Rule of Law not Chief?**

The third strand of the rule of law highlights the neutrality and equality of law. As with other themes the consequences of this idea are interconnected and diverse. The rule of law here focuses on an independent judiciary and the duty of fairness, as well as the limitation of government action, this theme emphasizes the human element in the legal process as well as the principle of non-discrimination. It hints at the internal, psychological effects of law and power on human beings, thus it is connected with the theme of limiting arbitrary authority and tyranny through its psychological effects.<sup>67</sup> It is also strongly associated with democratic ideals.<sup>68</sup> One of the rationales of promoting rule of law in African countries is to encourage the promulgation of democracy.<sup>69</sup> Thus focusing on the rule of reason in the rule of law implicates questions of governance, equality and democracy.

These ideas do not necessarily harmonize with the idea of a divine or even secular kingship. According to Dicey, one of the most important elements of the rule of law was the fact that the king or queen could be tried at common law.<sup>70</sup> The sovereign was not above the people. As with other aspects of traditional leadership, colonial interactions have changed the dynamics of traditional power. One consequence of colonial systems of indirect rule was to concentrate power in the hands of very few chiefs and traditional leaders.<sup>71</sup> This absolute power was then made dependent on allegiance with the colonial authority. The system

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<sup>67</sup> Tamanaha, *supra* note 1 at 137.

<sup>68</sup> Allen, *supra* note 6 at 29-30.

<sup>69</sup> Carothers, *supra* note 17 at 6.

<sup>70</sup> Tamanaha, *supra* note 1 at 115-116.

<sup>71</sup> Yeh, *supra* note 26 at 192.

greatly reduced the legitimacy of traditional leaders while allowing them to escape judicial scrutiny so long as their politics were favourable to their colonial masters.<sup>72</sup> The practice of subverting both customary and state law for personal gain has become normalized in this context. This power structure has resulted in widespread corruption amongst both traditional and state leaders all over Africa.<sup>73</sup>

This element of traditional societies also presents problems for democratic ideals closely connected with rule by reason. Constitutional theories of rule of law presume that one of their supporting institutions will be democracy. Thus the focus on equality, rule of law and democracy are mutually reinforcing. In some countries and regions chiefs are elected, but in many places they are not. There are also many areas where the kingship is handed down through the male line.<sup>74</sup> Both the element of inheritance and exclusion of female rule do not harmonize well with the idea of separating law from human frailty. It creates a situation where the people applying the law are in a different class from the people they are applying it to. As mentioned there is overwhelming evidence that this disparity in power is in fact exploited and has negative effects for people living under them.<sup>75</sup>

In one way, equality and rule by reason are theoretically difficult to reconcile with a system of customary law which at its very heart includes inherited power. However even in democracies there is inequality between the governed those in power. It would be hard to argue that the state of true equality and true rule by reason exists in any state. Class, wealth, race and a myriad of other issues create power dynamics between people who are theoretically supposed to be equal under the law. Also, even in democracies law is not

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<sup>72</sup> *Ibid.*

<sup>73</sup> *Ibid.*

<sup>74</sup> Zimmerman, *supra* note 33.

<sup>75</sup> Ubink 2011, *supra* note 4 at 92.

applied in a vacuum. It is applied and created by people.<sup>76</sup> This is why the interconnected themes of limitation of government action by an independent judiciary are also important. However, considering that these inequalities and problems exist in all countries that claim to be ruled by law, inequalities arising from the inherited power of chiefs is probably possible to reconcile with the rule of law if their arbitrary actions are limited by it.

## **Conclusions on Customary Law and the Rule of Law**

Customary legal systems are at tension with some aspects of the rule of law. Their flexible practice based unwritten nature makes interaction with constitutional state courts difficult. This pressure is changing the face of customary law, moving it towards written anglicized law. Economic pressures are also pushing legal systems to change their customary elements. Money is a powerful motivation for reform in this arena. Furthermore these legal systems association with colonial governance have played a large role in their evolution, eroding their connection with the people they are supposed to serve. In this way we can see that colonial histories and economic pressures are continuing to shape customary legal systems affecting the promulgation of the rule of law. Surprisingly, outside pressures such as colonial influences have affected the rule of law more than anything, despite adherence in their own countries and outward encouragement for rule of law reforms.

What is needed are innovative ways of addressing the problems with customary law based on an understanding on their strengths as much as their weaknesses. Legal professionals need to be educated about the consequences of making decisions based on customary law, while law makers examine effective ways of introducing checks and balances back into the system. Unfortunately colonial histories and their concentration of power in so few hands has and will continue to be a stumbling block in this area.

How do people contest the acts of chiefs acting in their own self-interest?

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<sup>76</sup>Tamanaha, *supra* note 1 at 123.

## Part II. The institution of chieftaincy

Because of the diversity in African pluralistic legal systems, any theoretical approach to understanding how they function must include a practical study of the actual practical operations of these systems. My experiences in Ghana provided a fascinating example of how these systems can operate. The institution of chieftaincy provides a fascinating example of the impact that customary systems can have on state legal systems and vice versa. While initially the chieftaincy was used as a tool for indirect rule, through successive governments it has grown into an institution of independent, political, legal and cultural significance. Currently Ghana has one of the strongest institutions of traditional leadership in all of Africa.<sup>77</sup> Ghanaian traditional leaders are positioned as social and cultural leaders who have responsibility to govern in areas not covered by local or central government.<sup>78</sup> The constitution envisions traditional rulers as joint guardians of the basic interests of the state. Chieftaincy also coexists with a relatively peaceful and stable democracy. For these reasons Ghana makes an excellent case study for an exploration of chieftaincy through a rule of law lens.

The institution of chieftaincy has survived largely intact through colonial administrations, independence, military junta and finally relatively stable democratic rule. During colonial administration it was a central part of the policy of indirect rule, where colonial authorities used traditional institutions to assist in ruling. In Ghana some chiefs were even created in areas that had been ruled through communitarian law.<sup>79</sup> After independence there was much debate over whether customary law should survive and in what form. Eventually those who argued that chieftaincy could co-exist with central government won

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<sup>77</sup> Ubink 2008, *supra* note 33 at 20.

<sup>78</sup> Brempong, *supra* note 26.

<sup>79</sup> *Ibid* at 27.

out. Chieftaincy was constitutionalized and has remained a part of the constitution ever since.

## **The general legal framework of chieftaincy**

The 1979 Ghanaian constitution was first to integrate the system of chieftaincy into the constitution. The constitution established a national and regional houses of chiefs who were responsible for hearing appeals of chiefs decisions. A right of appeal from the national house to the Supreme Court is included. It also prohibited the government from deskinning or destooling a chief. The 1992 Constitution retained many of the provisions on chieftaincy, but added that chiefs must step down if they wanted to run for election in the state government. It also reduced the links between party government and chiefs (ibid 30-35). These were clear attempts to keep state politics and chiefly politics separate. Customary law is currently recognized as a source of law by article 11 of the 1992 Constitution. The source of customary law's authority according to the Constitution is immemorial custom. Article 267 of the Constitution vests all stool lands in Ghanaian chiefs on behalf of and according to the fiduciary duty to their peoples. This article also prevents freehold interest in stool land from being granted to any person or body of persons it also requires that any disposition or development of stool land be reported to the regional lands commission. Chapter twenty two of the Constitution sets up the institution of chieftaincy and prevents the state from involvement with the deskinning or destooling (removal) of chiefs. This section also provides for chief representation in state bureaucracy, as well as preventing chiefs from participating in state elections.

Much of the chief's power comes from their role as the administrators of stool land. An analogy could be drawn between stool land and crown land, though the regimes that control the two are different. The stool or skin, like the crown, are Ghanaian symbols of chiefly power. Land under chief control is therefore called stool land. Stool lands account for 80



percent of the land in Ghana.<sup>80</sup> As mentioned according to the Constitution this land is held in trust by the chiefs on behalf of their people. Allodial title is held commonly by the community.<sup>81</sup> Community members have usufructory rights to land, which can only be inherited, not purchased or sold giving the chieftaincy power over successions in Ghana.<sup>82</sup> It should be noted however that this picture of the tenure system can be contested. Some chiefs believe that the royal family owns all land and treat it as such.<sup>83</sup> Because stool lands can only be inherited and not sold, chiefs also have an important role to play in inheritance and successions. Under the current statutory regime from ¼ to all property in an intestate succession may be allocated according to customary law.<sup>84</sup>

## Part III. Chieftaincy and the rule of law

### Limiting the chieftaincy through law

Limiting the actions of chiefs in Ghana is extremely controversial. Ghana's government has indicated that they prefer not to interfere with the workings of the Chieftaincy, and Ghana's culture and history make people wary of adversarial disputes against and between public institutions. Thus, there has been much controversy in Ghana regarding the right of appeal from customary decisions of the chiefs. This conflict is in many ways emblematic of the tension between the requirement and need to limit the actions of African leaders of and the fear of interfering too much with traditional forms of governance and law making. Because the Ghanaian *Constitution* entrenches both a right of appeal and customary law as a valid source of law, this tension is inevitable.

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<sup>80</sup> *Ibid* at 21.

<sup>81</sup> Ubink 2011, *supra* note 4 at 84.

<sup>82</sup> *Ibid*.

<sup>83</sup> *Ibid* at 85.

<sup>84</sup> Woodman, *supra* note 5 at 122.

The 1992 *Constitution* changed slightly the wording regarding appellate jurisdiction in Ghana. Article 140 of the new *Constitution* provides that the high court, subject to the provisions of the *Constitution*, is the original appellate court for all civil matters. This was a change from the previous *Constitution* which did not say that the high court had jurisdiction over “all” matters.<sup>85</sup> Article 273 of the *Constitution* provides that the national and regional houses of chiefs have original jurisdiction over matters arising from the chieftaincy. Finally article 267 creates a right of appeal to the high court for contestation of stool lands disposed of without approval of the regional land council. Section 57 of the *Courts Act* limits the appellate jurisdiction of all Ghanaian courts except for the Supreme Court. The 2008 *Chieftaincy Act* repeats many of these provisions and provides the structure and administration the regional and national houses of chiefs as well as the traditional and divisional councils and the judicial committee of the national house of chiefs.

After the enactment of the 1992 *Constitution*, the Ghana Bar Association initiated a case in the Supreme Court asking for a declaration that the high court had jurisdiction in chieftaincy matters conferred by article 140 of the *Constitution*. They sought to have section 57 of the *Courts Act* and section 25 of the old *Chieftaincy act* (which ousted the jurisdiction of the high court) declared unconstitutional. The Bar Association lost their case, with the entire Supreme Court agreeing that the High Court did not have jurisdiction in chieftaincy matters. Their decision was based on a construction of the entire *Constitution* that they felt carved chieftaincy out of the general jurisdiction of the high court. They did not believe that the high court judges had the competency to judge matters of chieftaincy.<sup>86</sup> The supreme courts characterization of the issue carves out chieftaincy from the normal civil law over which the high court has authority.<sup>87</sup> Ghanaian jurisprudence before this only

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<sup>85</sup> Kludze, *supra* note 40 at 38.

<sup>86</sup> Kludze, *supra* note 40 at 58-59.

<sup>87</sup> *Ibid* at 48.

recognized the division between civil and criminal law.<sup>88</sup> It is argued that removing the high court's jurisdiction over civil matters tramples on a citizen's fundamental right to access the regular courts of the land.<sup>89</sup> These criticisms demonstrate the difficulties of figuring out how to limit the actions of the institution of chieftaincy while on one hand being respectful to the institutions and on the other hand ensuring justice and fairness to citizens. Those who criticized the decision were outraged that citizens would be prevented from accessing justice in the forum of their choice and felt that the *Constitution* did not set out this type of power for the national house of chiefs.<sup>90</sup> This conflict demonstrates the level to which the idea of the rule of law is woven into societies with customary components. It should be noted that these criticisms come from and on behalf of Ghana's political elite. However, although there are indications that rural populations are more amenable to customary legal systems, the point is that most Ghanaians feel allegiance to both.<sup>91</sup>

How people in rural areas think about the chieftaincy and the rule of law demonstrates the need to go outside the usual legal avenues to limit the actions of government. Even farmers who resist the chiefs that "sell" land they may have occupied for generations do not contest the authority of the chief to deprive them of land.<sup>92</sup> Though a legal process for contesting these decisions exists, according to Ubink other processes such as involving the local assembly or unit committee as well as creating village committees are used to challenge bad decision making by chiefs.<sup>93</sup> In these cases on the ground dispute resolution techniques may be far more effective than the long costly process of going to court. In these contexts court decisions are reduced to paper law which do not inform the normative system

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<sup>88</sup> *Ibid.*

<sup>89</sup> *Ibid* at 53.

<sup>90</sup> *Ibid.*

<sup>91</sup> Brempong, *supra* note 26.

<sup>92</sup> Ubink 2011, *supra* note 4 at 87.

<sup>93</sup> *Ibid* at 89.

by which people govern their lives. In this respect the limiting functions that the *Constitution* aspires to are practically useless.

These two stories, one about a dispute involving limiting state court's ability to review customary law and another about how rural populations seek to limit unfair uses of chiefly power demonstrate that the goal of limiting arbitrary authority can be met through a variety of actors and processes.<sup>94</sup> If the rule of law is seen as the product of a societal consensus on fundamental rights, how the limiting function happens in real life is clearer.<sup>95</sup> Social consensus can change rapidly, as it has in Canada since the introduction of the *Charter*. In constitutional democracies ostensibly the limiting function is performed by a constitution in which very few citizens have ever had any input into or explicitly agreed with. Western judges involved in judicial review respond to changes in fundamental social values in response to pressure from larger society. People living under customary systems using whatever means they have at their disposal respond to changing social norms via a variety of different legal and social mechanisms. A broader understanding of how law can limit government action would recognize that both in Canada and abroad, society participates in choosing what laws benefit us and which ones should be changed through a variety of channels, and not just through abstract and immutable constitutional law.

## Formal legality and chieftaincy

Because the chieftaincy plays a central role in the administration of land, chiefs are implicated in important economic decision making. In fact, Ubink argues that the reason the chieftaincy has survived in Ghana for so long was tied to desire for control on the part of the colonial administration and their failure to gain control of land through other means.<sup>96</sup> Later attempts to title land or otherwise gain control over stool land have also failed, leaving

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<sup>94</sup> Franz von Benda-Beckmann, "Law out of Context: a Comment on the Creation of Traditional Law Discussion", (1984) 28 J afr L 28 at 30.

<sup>95</sup> Allen, *supra* note 6 at 4.

<sup>96</sup> 2011, *supra* note 4 at 94.

chief's power over land intact.<sup>97</sup> In the beginning people, not land, were seen as commodities by chiefs. Land was given to 'outsiders' in order to consolidate the power. However, as land has become more and more economically valuable, chiefs have changed their approach to land.<sup>98</sup> These approaches vary from chief to chief, from community to community. Their choices in relation to land depend on many complex factors. However one thing they do not seem to rely on is formal legality in the sense of common, general, public rules. This because of the lack of a codified system of rules, but also may be traced to power dynamics in Ghanaian communities.

Because of the recognized problems of ascertainment the codification of chieftaincy has been on the agenda since it was entrenched in the 1992 *Constitution*. However thus far, chiefs have not gotten very far on this project. There are several reasons for this. One is the enormous cost of organizing a large study of customary law and usage.<sup>99</sup> Another reason is the difficulty of agreeing, even within local tribes as to the content of these laws.<sup>100</sup> There are also problems associated with who could be considered as authoritative sources of customary law.<sup>101</sup> There is also the fact, common to customary law, that these laws are periodically updated according to practice. In short setting down customary law would be an enormous and expensive project causing endless legal wrangling.

One of the most powerful economic pressures in Ghana currently is the pressure put on chiefs to convert stool land from farm land to residential land. This is an economically motivated movement which is making a lot of chiefs and their families very rich. This is particularly so in peri-urban areas where land is becoming more and more valuable.

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<sup>97</sup> Ubink 2008, *supra* note 33 at 15-16.

<sup>98</sup> Ubink 2011, *supra* note 4 at 81.

<sup>99</sup> Brempong *supra* note 26 at 38-39.

<sup>100</sup> *Ibid.*

<sup>101</sup> *Ibid.*

Interestingly what the actors involved in these land transfers seem to forget is that the essence of customary land law in Ghana is the inalienability of the land from the stool.<sup>102</sup> While on one hand actors on the ground seem to treat these land transactions as permanent, the title to these lands is seriously flawed.<sup>103</sup> This demonstrates how non-written customary norms may present problems for those who try to do business in these areas without understanding the nature of the customary laws that will apply.

In the absence of codified laws, Ghanaian courts have adopted several of the approaches which have been used generally since before independence to try and ascertain customary laws. Ascertainment in Ghana is difficult, not only because different localities have different law, but because even within localities there are conflicts over what the actual customary law is.<sup>104</sup> Under colonial law it was mainly the ruling groups who put forward their views as to what the customary law of a given area was.<sup>105</sup> Nowadays Judges still rely on elders and other rulers, but also have an opportunity to hear more voices on the matter. Unfortunately, this does not necessarily make their job easier. Deducing customary law from struggles on the ground is even more difficult than calling in experts to say what it is.<sup>106</sup> These problems have lead Ghanaian courts to depend on a separately developed common law of chieftaincy.<sup>107</sup> This law, while it does not necessarily reflect customary practices on the ground, at least has the advantage for courts of offering some measure of predictability and stability. This seems to be the best the Ghanaian court system could come up with in order to both satisfy the formal requirements of the rule of law, while acknowledging the authority of customary law. This allows Ghanaian courts to at least be consistent with themselves, if not

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<sup>102</sup> Ubink 2008, *supra* note 33 at 51.

<sup>103</sup> *Ibid* at 86

<sup>104</sup> *Ibid* at 189.

<sup>105</sup> *Ibid*.

<sup>106</sup> *Ibid* at 190.

<sup>107</sup> *Ibid*.

with practiced customary law. Generally speaking court developed customary law has upheld usufructory rights of farmers who are dispossessed of their land.<sup>108</sup> Unfortunately a serious bottleneck in the Ghanaian court system prevents even the common law of customary law to reach individual citizens.<sup>109</sup>

The difficulty of reconciling formal legality with customary law is clearly demonstrated by the problems facing Ghanaian courts. The biggest question that is asked is: What is the customary law? Without knowing what the law is, it cannot be general, predictable, prospective or stable. As such, the current configuration of customary law presents serious challenges to a formal understanding of the rule of law. It indicates that more effort and thought is needed to determine how customary laws can be explained and reproduced in a fair manner.

## **Rule by Reason and the Chieftaincy**

The Ghanaian system of chieftaincy is certainly not a democracy. Furthermore as a patriarchal society it is not exactly amenable to women as traditional leaders, though separate institutions such as the Queen mothers exist for women to provide input.<sup>110</sup> Inherent in the system of chieftaincy is the idea that the chiefs and people are not equal. While Ghanaians recognize that accommodating an inheritance based system of leadership in a republic is a paradox, few modern day Ghanaians would be ready to relinquish an institution which has come to be emblematic of their cultural distinctiveness.<sup>111</sup> Ghanaian chiefs themselves admit that a system in which they police themselves is not ideal.<sup>112</sup> For this reason some chiefs may view the mainstream legal system as a support

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<sup>108</sup> *Ibid* at 51.

<sup>109</sup> *Ibid* at 177.

<sup>110</sup> Brempong, *supra* note 26 at 38.

<sup>111</sup> *Ibid* at 40.

<sup>112</sup> Kludze, *supra* note 40 at 62.

rather than a hindrance to traditional rule.<sup>113</sup> However, the result of this discussion is not so much that lack of equality and democracy that are an issue, but ensuring that chiefs are limited in the uses of their authority. As discussed above, the reality is that no political system is immune from power imbalances between the rulers and the ruled. As Tamanaha points out, the state in western liberal societies is an institutionalized apparatus of power.<sup>114</sup> By this definition the chieftaincy could also be conceived as just another apparatus through which power is wielded. If citizens living in these territories do not object to this formulation of institutional power, then why should anyone else?

As the above discussion indicates, limitation by law is probably a more worthy goal for institutions than “rule by reason”. This is because while the limitation of arbitrary authority and tyranny has practical positive implications for those living under these regimes, the idea of “rule by reason” has little practical value. Thus an examination of the rule of law which focuses on the goals and outcomes of its application demonstrates that strict adherence to all its norms is not necessarily required for a healthy society.

## Conclusion

In attempting to show that that African traditional institutions can both challenge and conform to the rule of law, I have attempted to demonstrate that reform in these systems is about more than measuring them up to a yardstick. Rather than focusing on whether these institutions ‘measure up’ we should be focusing on how they achieve benefits for people in practice while minimizing negative impacts of power on the lives of people. This leads theoretically to a focus on the broadest goal of the rule of law, which is the limitation of arbitrary authority and tyranny. Focusing on this element, rather than formal legality, which is more commonly pursued, allows for more flexibility in assessing systems for their adherence

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<sup>113</sup> *Ibid.*

<sup>114</sup> Tamanaha, *supra* note 1 at 138.



to the rule of law. Unfortunately it is not amenable to the simplistic checkmark system used by several organizations engaged in the task of trying to “implement” the rule of law.<sup>115</sup> However, it offers the advantage of allowing a multiplicity of legal systems, actors and institutions to carry out the task of limiting tyranny in a society.

In Ghana, the cultural authority and accessible nature of the institution of chieftaincy provides several competitive advantages compared to the Ghanaian court system. By instituting better checks and balances, and ensuring that the actions of chiefs do not stray into the territory of tyranny, traditional leadership could be a compliment to the rule of law and the Ghanaian legal system rather than a hindrance. The biggest problem with regulating these customary legal systems is their interaction with the broader legal system. The right of appeal creates an interaction with formal legality that is difficult to reconcile. However, there are various techniques, for example drawing from Canadian approaches to administrative law, or principles of maximization suggested by David Pimentel that could assist courts in attempting to ensure stability and predictability in their legal systems, although it should be noted that stability may sometimes have to be put aside in favour of flexibility.

Finally, these observations do not only apply to traditional institutions in Africa. In Canada courts also struggle with *Constitutionally* recognized Indigenous claims to self-determination and recognition of their legal traditions. Many of the struggles facing African courts regarding ascertainment and accommodation apply to some measure in Canada as well. Thus understanding how the rule of law interacts with indigenous legal traditions in Canada could present a fruitful area for further study.

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<sup>115</sup> Carothers, *supra* note 17 at 6.

# Bibliography

## Statutes

*Constitution of the Republic of Ghana*, 1992.

*Chieftaincy Act*, 2008, Act 759.

*Courts Act*, 1992, Act 459

## Other Authorities

Allot, A.N, "What is to be Done with African Customary Law? The experience of problems and reforms in Anglophone Africa from 1950" (1984) 28 J Afr L 56.

Allan, Trevor, *Constitutional Justice: a Liberal Theory of the Rule of Law*, (Oxford Scholarship Online, 2003).

Bennet, T.W., "Re-introducing African Customary Law to the South African Legal System", 2009, 57 Am J Comp L 1.

Carothers, Thomas, "Promoting the Rule of Law Abroad: the Problem of Knowledge", (2003) 34 Rule of Law Series, Democracy and Rule of Law Project, (Carnegie Endowment for International Peace).

Hasnas, John "The Depoliticization of Law", (2008) 9:2 Theor Inq L 529.

Laver, Roberto, "The World Bank and Judicial Reform: Overcoming "Blind Spots" in the Approach to Judicial Independence" (2012) 22:2 Duke J Comp & Int'l L 183.

Pimentel, David "Legal Pluralism in Post-Colonial Africa: Linking Statutory and Customary Adjudication in Mozambique" (2011) 14 Yale Hum Rts & Dev LJ 59.

Rautenbach, Franz & Willemien du Plessis, "African Customary Marriages in South Africa and the Intricacies of a Mixed Legal System: Judicial (In) Novatio or Confusio" (2011-2012) 57 McGill L J 749.

Tamanaha, Brian, *On the Rule of Law: History, Politics, Theory*, (Cambridge UK: Cambridge University Press, 2004).

Ubink, Janine, *In the Land of the Chiefs: Customary Law, Land Conflicts and the Rule of the State in Peri-Urban Ghana*, (Leiden University Press, 2008).

---, Janine, "Land, Chiefs and Custom in Peri-Urban Ghana: Traditional Governance in an Environment of Legal and Institutional Pluralism" in Werner Zips and Markus Weilenmann, eds, *The Governance of Legal Pluralism: Empirical Studies from Africa and Beyond* (New Jersey: Transaction Publishers, 2011).