Journal of Law, Policy and Globalization
ISSN 2224-3240 (Paper) ISSN 2224-3259 (Online)
Vol.38, 2015

Ascertainment of Customary Law: A Question of Law or of Fact or Both?

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Introduction

Perhaps, one element of colonialism that most traumatized the Gold Coast before independence is the fact that native or customary law was tagged 'foreign' and subjected to customarily unknown tests of validity. This fact gave Gold Coasters, and particularly nationalists, intense nausea and goose pimples. Indeed, for the nationalists in the Gold Coast, English law was, or at least ought to have been considered as, the guest of the indigenous customary law. However, the British regarded the received English law as the common law of Ghana and viewed native customary law as foreign and unknown. The native customary law therefore had to be proved as any other fact before it could be accepted as a rule of law.

Smith J, an English judge in the Gold Coast, held in ***Hughes v Davies and Another***[2] that "[a]*s native law is foreign law it must be proved as any other fact*."

It was a matter of grave concern for all nationalists and local jurists that native law was regarded as foreign in its own land of origin. Rejecting that misunderstood view in his Fante Customary Law, John Mensah Sarbah (1884) Sar FCL 265 had this to say:

"*It cannot, therefore, be correct to say, as has sometimes been said, that the native laws and customs are foreign matters which, unless proved, cannot be recognised or noticed by a judge*."

In the celebrated case of in ***Angu v Attah***[3] the Privy Council stated that:

"*As is the case with all customary law, it has to be proved in the first instance by calling witnesses acquainted with the native customs until the particular customs have, by frequent proof in the courts become so notorious that the courts take judicial notice of them*."

This rather supposedly bizarre view of the indigenous customary law became known as the rule in ***Angu v Attah***. This treatment of the customary law was not only disliked by jurists; it was vehemently opposed by politicians and nationalists. Dr Kwame Nkrumah so robustly inspired African jurists and nationalists to quickly find a way of reversing what he described as "***travesty of the local custom***" which had been made foreign in its own land of origin. In venting his spleen at this mischaracterization of the indigenous customary law as exotic law, Dr Kwame Nkrumah, in his usual nationalistic posture, made the following comments in his address at the formal opening of the Accra Conference of Legal Education and of the Ghana Law School on 4th January 1963:

"*African law in Africa was declared foreign law for the convenience of colonial administration which found the administration of justice cumbersome by reason of the vast variations in local and tribal customs. African law had to be proved by experts. But no law can be foreign in its own land and country and African lawyers, particularly in the independent African States, must quickly find a way to reverse this judicial travesty."*[4]

From the foregoing words of outrage, one may ask whether the Colonial masters, and for that matter the English Jurists, were entirely wrong in characterizing native law as exotic. Differently put, were the colonial masters justified in treating native law as a question of fact? I propose to attempt a justification of the much-criticised rule in *Angu v Attah* (supra).

Justification for the Rule

The rule that native custom had to be strictly proved as any other fact could be justified in a number of ways.

The foremost justification is that, since the foreign judges administering the law before and after ***Angu v Attah***(supra) were not personally knowledgeable in native custom and having regard to the "*the vast variations in local and tribal customs*" (as admitted in Dr Nkrumah's statement), the colonial masters may be said to be right in treating customary law as a question of fact, and not a question of law. The rule avoided any attempt by native litigants to put anything up in argument as a rule of customary law. Proof of customary law by experts was therefore necessary, hence the rule in ***Angu v Attah***(supra).

Another justification for the rule is that even modern Ghanaian judges cannot make any claim to universal knowledge of customary law in Ghana. Customary practices in Ghana differ from one community to the other[5]

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[2] (1909) Ren 550 at 551
[3] (1916) PC `24-'28, 43
[4] Cited by David A Nii-Aponsah in *The Rule In Angu V Attah Revisited [1987-88] VOL. XVI RGL 281—292*
[5] Article 11 (3) of the 1992 Constitution defines customary law in the following terms: "*For the purposes of this article, "customary law" means the rules of law, which by custom are applicable to* ***particular communities*** *in Ghana.*"(author's

Thus customary law, unlike other components of law, is community specific. The rule that customary law was to be treated as foreign law on its own soil must have been made for the benefit of the expatriate colonial judges who were deemed to be ignorant of the rules of customary law, hence the insistence on frequent proof of customary law so that the court might take judicial notice of them. Although the rule was subjected to criticism on national grounds, there is no doubt that the doctrine of judicial ignorance of customary law contributed much to the process which led to the recording of customary law in the pages of the law reports.[1] No one judge can honestly claim to be abreast of all existing customary laws in Ghana today. How then can we condemn the characterization of customary law as a question of fact by customarily unsophisticated foreign judges? It is submitted that the rule was necessary in the utmost interest of justice.

The rule concerned itself with the mode of ascertaining alleged customary law rules and did not seek to relegate local customary law as foreign law. It may be argued that what the foreign judges sought to know was the nature, scope and effect of alleged customary practices.

More importantly, the foreign judges believed the existence of native customary law. If this were not so, they would not have proposed or accepted any offer to prove the existence of any alleged customary law. They would have totally barred any attempt to have the existence of alleged customary law proved. All that they sought to do was that, being not personally acquainted with the local custom, its existence needed to be proved by experts in cogent and satisfactory manner.

It has been suggested that the rule itself has shown a remarkable resilience, viability and indestructibility and now rules from its supposed grave and its apparition steals daily into the courts to haunt them[2].

THE RULE LIVES ON TODAY

The independent Ghana has made several attempts to abolish the rule with the view to raising the local custom to a revered status of law properly so called. These attempts have received legislative footing. When the time came for the colonial Courts Ordinance to be replaced by the Courts Act, 1960,[3] it was easy for the legislature to purport a change of the rule. Under the new law, the court was given the discretion to consult recognised textbooks, refer to reported cases or to order the holding of an inquiry if it entertained any doubt as to the content or existence of any rule of customary law.[4]

Section 55(1) of Courts Act, 1993 (Act 459) states that: "*Any question as to existence or content of a rule of customary law is a question of law for the court and not a question of fact.*" The Evidence Decree[5], provides that all questions of law are to be decided by the court.

Haunted by the 'doubtful' nature of native customary law and the existence of variations in local custom, the draftsmen legislated in section 55(2) of Act 459 that:

"If there is ***doubt as to the existence or content of a rule of customary law*** *relevant in any proceedings before a court, the court may adjourn the proceedings* ***to enable an inquiry to be made under subsection (3) of this section*** *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."*[6]

Particularly interesting is section 55(4) which states that:

"*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 its opinion which may be laid before the inquiry in written form.*"

These provisions had earlier been enacted in Acts/Decrees like Courts Act[7]; Courts (Amendment) Decree[8]; Courts (Amendment) (No. 2) Decree[9]; Courts (Amendment) Law[10], etc. From these provisions, it is manifestly clear that even in modern times, there is still a great measure of uncertainty in the contents of native customary law. It is still possible that a particular custom may not be found from any identifiable source. In such cases, the court has the discretion to make an inquiry to ascertain the fact of the alleged customary practice. This practice gives rise to duality of test for ascertaining the existence of customary law. It cannot therefore be said that any question as to existence or content of a rule of customary law is a question of law for the court and not a question of fact. In support of this view, the case of ***Fulani And Another v. Issah***[11] is instructive. In this case the trial

emphasis)

[1] Professor Ekow Daniels W C, Development Of Customary Law [1991-92] VOL. XVIII RGL 68—94

[2] David A Nii-Aponsah in *The Rule In Angu V Attah Revisited [1987-88] VOL. XVI RGL 281—292*

[3] CA 9. See also The Courts Act, 1971 (Act 372), s. 50.

[4] Professor Ekow Daniels W C, Development Of Customary Law [1991-92] VOL. XVIII RGL 68—94

[5] 1975 (NRCD 323)

[6] Author's emphasis

[7] 1971 (Act 372)

[8] 1972 (NLCD 101)

[9] 1972 (NRCD 137)

[10] 1987 (PNDCL. 191)

[11] [1980] GLR 319-332

magistrate had based his decision on expert evidence of Fulani customary law in determining the true father of a child born out of wedlock. In allowing the appeal, the court held that:

"*It is my view, therefore, that in the proceedings such as there were before the trial court, it was for the court to determine the existence or otherwise of a particular customary law, namely, Fulani customary law or the content of a rule of such customary law, after having heard the parties, consulted text-books and other sources as the magistrate may consider appropriate;* ***and it is only when the court is still in doubt after such exercise that he may hold an inquiry and perhaps seek the assistance of an expert on that particular system of customary law.***"[1]

This dual test of ascertaining customary law has found pronouncement in many cases in Ghana[2]. There seems to be a confused method for ascertainment of customary law in Ghana. Order 11 rule 11(2) of the High Court (Civil Procedure) Rules, 2004 (C.I. 47) states that: "*Where the party pleading relies on a rule of customary law, the 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.*" This provision is the same as that which was contained in the colonial statutes. For instance, The High Court (Civil Procedure) Rules, 1954 which states:

" *In all cases in which the party pleading relies upon a native law or custom, the native law or custom relied upon shall be stated in the pleading with sufficient particulars to show the nature and effect of the native law or custom in question and the geographical area and the tribe or tribes to which it relates*."

There also seems to be a resurfacing of the repugnancy test. Under article 26(2) of the 1992 Constitution, it is provided that: "*All customary practices which dehumanise or are injurious to the physical and mental well being of a person are prohibited*." The word 'injurious' may be taken to mean 'repugnant' to acceptable principles of good health. The 1992 Constitution itself admits that not all customary practices pass the test of legality. Before any custom passes as customary law, it still has to satisfy certain yardsticks. For instance, section 69A of Criminal and Other Offences Act, 1960 (Act 29) expressly outlaws female genital mutilation, a practice which is still largely and openly accepted in certain parts of the country as a custom.

Conclusion

The purported attempt to abolish the rule in ***Angu v Attah*** (supra) must reveal the unguarded chauvinistic instinct of the independent Ghana and a desire to disassociate with anything done by the colonial administration. This is an amazing infidelity to the rule as stated. The seemingly unsuccessful attempts of the draftsmen to toll the death-knell of the rule in ***Angu v Attah***(supra) as demonstrated in section 55 of the Courts Act[3], sounds the bell of vindication of the English judges who were practically 'foreign' to the customary practices of Ghanaians. It is suggested that the mode of ascertainment of customary law in Ghana is a question of both law and fact.

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[1] Author's emphasis
[2] See Sarkodee I v. Boateng II [1982-83] GLR 715-772; Opoku v Nyamekye [1999-2000] I GLR 653 – 697
[3] 1993 (Act 459)

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