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ENFORCING THE LAW ON CHILD MAINTENANCE IN SUB-SAHARAN AFRICA: A CASE STUDY OF GHANA

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ABSTRACT

Legal enforcement of women's and children's rights under family law in the countries of sub-Saharan Africa has generally been weak. Using Ghana as a case study, this article investigates the challenges confronting the Department of Social Welfare and the Family Tribunal as they endeavour to enforce child maintenance agreements in Ghana. Semi-structured interviews with social workers reveal a raft of obstacles to enforcement. These include the mis-match between legislative provisions that require cash payments in a context of subsistence farming and integrated household livelihood strategies that involve material, not financial exchange. The study also identifies ethnocentric biases in statutory provision that disregard customary law concerning child care resulting in conflict between legislation and prevailing societal norms. The article links these findings to a consideration of child maintenance legislation in other African jurisdictions. It concludes by proposing reform of extant legislation on child maintenance in Ghana and elsewhere in the sub-Saharan region in order to achieve consonance between statutory provision and socio-economic reality. It is argued that this will enhance the ability of state agents to enforce the law.

PROBLEMS OF LAW ENFORCEMENT IN SUB-SAHARAN AFRICA

Enforcement of the law is a perennial problem across the sub-Saharan region principally due to the failure to translate constitutional rights into enforceable legal provisions, widespread corruption among the police and judiciary, poorly resourced law enforcement agencies, and problems of access to formal justice institutions (Bissessar, 2009; Nyamu-Musembi, 2006; Transparency International, 2009). The Ghanaian state is no different in this respect. Tankebe (2008) found that mistrust of the Ghana Police Service remains widespread due to corruption and police brutality, while the Ghana Integrity Initiative (2005) revealed that Ghanaians assessed the police and judiciary as

amongst the most corrupt public bodies. Ako and Akweongo (2009: 48) studying the ineffectiveness of legislation outlawing female genital mutilation (FGM), noted that despite its prohibition by a 1994 amendment to the Criminal Code of 1960, there had been only two convictions and prevalence remained high at over 50% in 2000 among some ethnic groups of Upper East Region. UNICEF (2008: 75) cites a higher prevalence rate of 80% among the rural population of Upper East and avers that this is 'a testament to the fact that as a cultural practice, it would take more than just legislation to eradicate it'. Ako and Akweongo (2009: 50) discovered that key state institutions charged with responsibility for monitoring, preventing, and prosecuting instances of FGM were grossly under-resourced.

Using legislation to enforce people's rights is exceptionally problematic in the political and socio-economic environment of most sub-Saharan countries. This article draws on a qualitative study that examines in detail the range of factors thwarting the successful enforcement of child maintenance obligations under the Children's Act 1998 in Ghana. It links the findings to wider considerations of how legislation operates in sub-Saharan countries and why it is often ineffectual in upholding the rights of individuals. It proposes a number of changes to how the law is formulated and used to enforce rights in the socio-economic conditions of sub-Saharan Africa.

CHILD MAINTENANCE UNDER THE CHILDREN'S ACT 1998

Ghana was the first country to ratify the Convention on the Rights of the Child (CRC) which it signed in 1990 without any reservations. The CRC is given legal force at national level by the Children's Act 1998. This statute applies to all individuals under 18 years of age and settles on them a right to education and maintenance (s.6) while placing a corresponding duty on parents to 'supply the necessaries of health, life, education and reasonable shelter' (s.47). In circumstances where parents divorce or separate or have never lived together, the legal requirement to maintain any child of their union remains. As most children in Ghana continue to reside with their mothers after marital breakdown or the end of an informal union, this is usually in the form of a cash transfer from a father to a mother. When a voluntary arrangement acceptable to both parties cannot be reached, recourse is initially to the Department of Social Welfare and the intervention of social workers. While District Assemblies (local government) are charged under s.16(1) to 'protect the welfare and promote the rights of children', this duty is actually discharged by the Department of Social Welfare at district level. The Department is vested with investigatory powers into children's welfare under s.16(2) and s.19(1) of the Children's Act 1998.

In circumstances where the mediation and oversight of social workers fail to achieve regular child maintenance payments from a non-resident father, recourse is then to the District Court sitting as a Family Tribunal. By virtue of s.35, these tribunals 'have jurisdiction in matters concerning parentage, custody, access and maintenance of children'. They comprise of a chairman who presides over a panel of between two and four other members, one of whom must be a social welfare officer, normally a qualified social worker (s.34). The Family Tribunal is empowered to issue a Maintenance Order against those with parental responsibility that legally compels parents or guardians to provide maintenance for their children, including support for basic education (s.48). Section 51(2) stipulates that this is to be in the form of a 'periodic payment or lump sum payment'. Sections 47 and 48 concerning the duty of a parent to maintain and the right of one parent to apply for a Maintenance Order against the other are phrased in gender-neutral terms. However, s.51 clearly envisages that it will be mothers who apply for Maintenance Orders and fathers who meet the expenses of both a mother's pregnancy and post-natal care in addition to funding the costs of a child's day-to-day care and education.

Under s.48(1) of the Children's Act 1998, a parent or guardian of the child or any other person who has custody of him or her may apply for a Maintenance Order. The Department of Social Welfare may also apply to the Family Tribunal for a Maintenance Order by virtue of s.48(2)(c). When considering making a Maintenance Order, a Family Tribunal is required to consider the following matters under s.49 of the Children's Act 1998:

(a) the income and wealth of both parents of the child or of the person legally liable to maintain the child,
(b) any impairment of the earning capacity of the person with a duty to maintain the child,
(c) the financial responsibility of the person with respect to the maintenance of other children,
(d) the cost of living in the area where the child is resident,
(e) the rights of the child under this Act, and
(f) any other matter that the Family Tribunal considers relevant.

In addition, under s.50(1), the Family Tribunal may request a *social enquiry report* from a social welfare officer and where it does so, is bound to take cognisance of this report when making its determination. Once a Maintenance Order has been issued according to s.52(1), it is for the person who has custody of the child to decide how the cash received under it should be spent to benefit the child. Normally, such an order continues in force until a child's 18th birthday. The legal requirement to maintain may extend beyond this date if the child is undertaking a course of further education (s.54(1)). There is provision under s.55 for

Maintenance Orders to be varied or discharged should circumstances merit such a change. Failure to maintain a child as required by s.47 of the Children's Act 1998 is a criminal offence punishable under s.59 by a fine up to ¢2 million or a term of imprisonment up to 6 months or both.

In practice, the responsibility for overseeing child maintenance is shared between the Department of Social Welfare and the Family Tribunal system with cases being brought to the attention of the District Offices of the Department of Social Welfare in the first instance and only on their failure to supervise a voluntary arrangement does the case go before the Family Tribunal. It is only on reaching the Family Tribunal that a legally enforceable Maintenance Order can be issued. At this stage, social workers from the Department remain involved either as a panel member or as the author of the social inquiry report upon which the panel will base its decision. In practice, social workers are much more closely involved in maintenance cases than is the Family Tribunal. For example, out of an average of 1,000 child maintenance cases registered annually by the Ashanti Regional Office of the Department of Social Welfare, around 900 are handled by the Department with only 100, or 10% of the total, being transferred to the Family Tribunal for legal settlement (Myjoyonline.com, 14 April 2010). Similar figures emerge from the Tema Metropolitan Office with around 200–250 cases being brought to the attention of its social workers each year of which just 10% are forwarded to the Family Tribunal. The rest are reported as having been settled by the Tema Metropolitan Office (ghanaweb.com, 30 March 2010). It follows that social workers employed by the Department of Social Welfare are the professionals most closely involved in dealing with child maintenance. This study therefore focuses on the experiences of social workers at the Department of Social Welfare.

RESEARCH METHODOLOGY

Permission was obtained from the Director of the Department of Social Welfare in Ghana to conduct face-to-face interviews with social workers in any district office. District offices were purposively selected to provide a range of urban, peri-urban, and rural localities across a number of different regions. Fifteen district offices located across Greater Accra, Volta Region, Ashanti Region, and Northern Region were selected. A letter was sent to the head of each district office explaining the research and inviting participation from qualified social workers. In all, 30 qualified social workers comprising 16 female and 14 male practitioners employed by the Department of Social Welfare agreed to participate in the study. This field research complied with the research governance

framework of the University of London and formed part of a Ph.D. study completed in 2005.

Semi-structured interviews of around 1-hour duration were conducted by the author with each social worker. These were audio-recorded in English, which is the official language of Ghana. They were then transcribed by the author and given back to research participants for amendment. The amended transcripts were used to update the Microsoft Word electronic versions of the interviews. These were in turn up-loaded to NVivo, a computer software program designed to facilitate the manipulation of textual material. Data analysis was conducted drawing on the scholarship of Miles and Huberman (1994) and adapting their system of descriptive and pattern coding. Recurrent themes emerging from the interviews concerning child maintenance are explored in this article using excerpts from interviews that succinctly articulate a particular theme or issue. Opinions expressed by only a few practitioners in the study were treated as outliers and disregarded. As NVivo automatically assigns a number to each line of an interview transcript on upload, it is these electronically generated line numbers that appear at the end of interviewee quotations so as to indicate their location in the database.

THE DEPARTMENT OF SOCIAL WELFARE IN GHANA

The Department of Social Welfare (2004) headquartered in Accra and comprising 10 regional offices that administer 110 district level offices describes itself as structured around five core functions that are:

1) Community care programmes,
2) Child rights and protection,
3) Justice administration,
4) Specialized residential services, and
5) Functions at district level.

Under its core function of Child Rights and Protection, the Department of Social Welfare (2004: 1) is charged to undertake responsibility for the following matters:

- Child survival and development,
- Supervision of day care centres,
- Maintenance of children,
- Child custody,
- Paternity,
- Family reconciliation, and
- Running of children's homes.

Issues concerning the maintenance of children fall under the Child Rights Promotion and Protection Unit of the Department of Social

Welfare that exists at both regional and district levels. It is within this organisational context that social workers respond to cases of child maintenance.

THE PROBLEM OF CHILD MAINTENANCE

Social workers were asked through a series of probes during interview to describe the problem of child maintenance in Ghana and their understanding of its causes. Almost all practitioners alluded to poverty, unplanned pregnancies, teenage parenthood, marital breakdown, and casual sexual relationships as key contributors to inadequate financial provision for children. These are of course the familiar causes of inadequate child maintenance identified in the literature of developed countries (Parkinson, 2007; Skinner and Davidson, 2009). However, the accounts of social workers in Ghana reveal additional aspects to these perennial issues that raise fundamentally different challenges in terms of policy formulation and its legislative implementation. Polygamy, exceptionally high fertility rates and widespread absolute poverty are highlighted by both urban- and rural-based social workers as contributory factors in the failure to maintain children. Two practitioners working respectively at Ejisu District Office in rural Ashanti and a sub-Metro Office in Kumasi, the regional capital of Ashanti exemplify the experiences of all research participants:

> Just farming our local foodstuffs, they do not do any large scale farming, as I said they are peasant farmers . . . we have that culture that you can marry more that one so sometimes they have so many wives and it becomes a problem for them and they have a lot of children too. [EQ272-276]

> You know these women who are out in the street selling, they do not have any recognised employment, they earn so low they are not able to cater well for their children, that is why they come here. Most of them are not well married, the necessary rites have not been performed. Like I was saying they enter into friendship and they have six, seven up to about ten children and when they make demands on the man they throw them out of the home and the children become a problem for them. [ER469-476]

These observations are further substantiated by the data from national surveys. In Ghana, approximately 39% of the population lives on <$1.25 a day the lower international poverty line (World Bank, 2009: Table 2). Deprivation is greatest in the northern savannah where it is three times the national average and is concentrated among agricultural workers, the majority of who are subsistence farmers (UNDP, 2007: 25–6). Agriculture together with the informal sector accounts for 91% of employment in Ghana, leaving an exceptionally small formal sector where workers receive a salary. Hence the vast majority of Ghanaians

are self-employed in small-scale income-generating activities, in subsistence farming or casual very poorly remunerated work. This figure is made up of 54% of the population who are said to be self-employed and 30% (mostly women) who are engaged in unpaid family labour (ibid., 28). Exacerbating the incidence of poverty are high fertility rates that remain at around 4.4 (UNDP, 2007: Table 11.3). Inevitably, this reduces the standard of living for family members as greater numbers of children per family mean that the national child to woman ratio is 0.64 in a situation of already straitened circumstances (UNDP, 2007: Table 11.3).

Polygynous marriage, which is widely practiced among the societies of West Africa, is estimated to constitute between 20–50% of all marriages in the region (Omariba and Boyle, 2007: 528). This adds another layer of complexity to the maintenance of children as a number of studies in Ghana and elsewhere on the African continent reveal. Children of polygamous marriages are found to have poorer health outcomes than those of monogamous unions evidencing higher rates of morbidity and mortality (Gyimah, 2009; Omariba and Boyle, 2007). This is attributed to the tendency of husbands to allocate material goods to their preferred wives. The customary obligations of men towards extended family members also results in less capital being available to share among his own wives and children. A greater number of dependent children reliant on the material wealth of just one father inevitably mean that resources are spread thinner (Omariba and Boyle, 2007: 530–1).

According to Bove and Valeggia (2009: 22), aggravating the impoverishment of polygynous families is that the practice tends to be 'associated with patrilineal, patrilocal, gerontocratic, pronatalist agrarian societies that limit women's access to land, inheritance, support from natal kin, and sources of formalized power'. Consequently, women are economically, socially, and politically constrained in the degree to which they can cater for their children when polygynous husbands fail to remit money to them. This is despite the custom among many ethnic groups in Ghana of spouses holding separate purses, which permits wives to retain money earned from petty trading or selling farm produce. For of course women's income-earning ability, particularly in rural areas, is greatly limited by the social and economic constraints of a patriarchal power structure that makes access to credit, property ownership, and decision-making exceptionally difficult (Kotey and Tsikata, 1998; Nukunya, 2003).

CHILD MAINTENANCE PAYMENTS AND DEFAULT RATES

When considering the amount of child maintenance, it needs to be remembered that Ghana is a low-wage economy with a per capita Gross

National Income of $670, a figure that is entirely comparable to other Medium Human Development sub-Saharan countries (World Bank, 2009: Table 1). This contrasts starkly with a per capita Gross National Income of $47,580 for Americans and $45,390 for British citizens (World Bank, 2009: Table 1). Consequently, what may appear to a North American or European as insubstantial sums of money, for those living on or near to $1.25 a day, ostensibly small amounts of cash can be relatively large proportions of income. This is clearly recognised by social workers, who employed in the formal sector, are nevertheless well aware of the commonly impoverished circumstances of the fathers referred to the Department of Social Welfare over disputed child maintenance payments. The excerpts below testify to the efforts of social workers to mediate between fathers' ability to pay and the basic needs of children. At the time of data collection, the Ghanaian currency the Cedi was caught in an inflationary spiral and ¢10,000 was equivalent to £1.00 sterling or US$1.50:

> Here we take it that somebody who does not work at all should give a child 2,000 cedis a day, so that means a man would have to pay 60,000 cedis for a child a month, so that is the minimum we have here. But people come and they fall below that minimum, some say they cannot afford the 2,000 cedis a day so we sometimes take 45,000 or 50,000 cedis for the children. Some people are also very good they mention very high numbers, some of them suggest about 200,000 cedis for a child here for a month, that is for two children, one child is 100,000 cedis. [EL187-194]

> In some [Family Tribunals] the minimum is 30,000 cedis depending on what the person is capable of doing. Some of them, they have a lot of children and they are not earning much. You consider those things before you award the maintenance. Some of them themselves will even say I want to give 100,000 cedis, I want to give 150,000, I want to give 80,000. But where they are not able to give anything substantial, that is when the [Tribunal] decides the amount they should give. But in some [Tribunals] the minimum is 50,000 cedis. [EE803-810]

Social workers across urban and rural district offices participating in this research reported an average of ¢100,000, equivalent to £10 or US$15, as a stipulated monthly child maintenance payment. But it is patent from the interview extracts above that this can differ considerably as between district offices and as between Family Tribunals depending on the outcome of negotiations with the father and his circumstances. But there are additional considerations for social workers in Ghana that are unlikely to be a consideration in the award of child maintenance payments in Britain or the USA. That is the financial responsibilities that a man holds, not only to his own wife or wives and children but also under customary law to his lineage and wider kin group. Customary law poses a further challenge to the formalised judicial systems of

sub-Saharan countries. The former comprises rules and mores handed down through generations constituting a body of tradition concerning roles, responsibilities, duties, entitlements, and norms of behaviour that are underpinned by notions of morality and spiritual belief systems (Nukunya, 2003).

The Constitution of the Republic of Ghana (1992) under art.11 recognises the customary laws of the ethnic groups that comprise Ghanaian society which the provision defines as 'the rules of law which by custom are applicable to particular communities in Ghana'. Nukunya (2003) in his comprehensive study of Ghanaian society observes that while modernity in the form of globalisation, urbanisation, and Westernisation have diminished adherence to customary law, it continues to exert a pervasive influence upon urban populations and a forceful one in rural areas. There can be substantive conflicts between duties and corresponding rights under customary law as against those granted by statutes passed by the Ghanaian legislature. A social worker appointed as a Social Welfare Officer to the Family Tribunal panel under s.34 of the Children's Act 1998 explains the matters taken into consideration in deciding the amount of maintenance to be paid:

> We weigh it, we look at the background of the person, his other commitments. You know the extended family system, he may be the breadwinner of all these people and because the children may be one or two we listen to them and then I will advise. Instead of ¢100,000 I may advise the chairman to make it ¢80,000 so that he can be able to maintain the other children [EN38-43].

This particular social worker was based at a district office in Kumasi, the provincial capital of Ashanti Region, home to the Ashanti people that are the largest ethnic grouping in Ghana. The Ashanti are matrilineal which means that the children of an Ashanti marriage belong to their mother's lineage. Traditionally on marriage, whether monogamous or polygynous, a wife will continue to reside among her matrikin and not in a matrimonial home with her husband. Under customary law, children do not inherit from their father, but from their maternal uncle who may also exercise parental authority over them in place of their father. This also means that uncles within a matrilineal system have an obligation to support their nephews and to a lesser extent nieces (Nukunya, 2003).

Other large ethnic groups such as the Ewe of Volta Region and Mole-Dagomba in Northern Region adhere to a patrilineal system, which means that duties and entitlements concerning the maintenance of children are vested in the male line with children belonging to the patrilineage. Consequently, a father of a child will have responsibilities not just towards his own children but towards the families of his close male kin. This is not acknowledged under s.49 of the Children's Act 1998 that lists the matters a Family Tribunal must take into consideration

in setting the amount of the child maintenance payment. Although s.49(f) does permit it to have regard to 'any other matter which the Family Tribunal considers relevant', this caveat is far from a recognition of additional financial obligations that men, whether living within matrilineal or patrilineal systems, have under customary law.

Urbanisation and Westernisation have attenuated traditional living arrangements and the customary mores that sustained them in Ghana, as elsewhere in sub-Saharan Africa. Nevertheless, it still remains the case that most families adhere to some extent to matrilineal or patrilineal forms of social organisation and recognise customary obligations towards their own matrilineage or patrilineage in addition to those to spouse and child (Nukunya, 2003). It is these additional responsibilities to provide financial support to extended family members that social workers at district office and Family Tribunal level attempt to reconcile with the legal obligations of parents under s.47 of the Children's Act 1998 to maintain their children. Despite the efforts of social workers, both at district office level and as panel members of Family Tribunals, to mediate realistic yet affordable maintenance payments for fathers, districts participating in this research consistently reported default rates in the region of eighty percent.

WHY FATHERS DEFAULT ON PAYING CHILD MAINTENANCE

Poverty pervades the accounts of social workers. While this may be a familiar theme in post-industrial countries regarding matters of child maintenance, the extreme nature of deprivation is not. Ghanaian social workers are confronted with circumstances that impact on child welfare in ways far beyond the experience or contemplation of professionals charged with enforcing child maintenance agreements in North America or Europe. A social worker in Tolon District, Northern Region, where according to Ghana Statistical Service (2007: Table A1.6) just over half of households live on or near to the absolute poverty line, reported that:

> From about May going through June, July, August is it very difficult for, them sometimes people just take one meal during this time, they do not eat in the morning or afternoon and the children will be crying out of shear hunger. [EAD221-224]

This observation, typical of many social workers, is corroborated by research. In a study carried out in Upper East, Armar-Klemensu et al (1995) found that 40% of households surveyed were food insecure during the pre- and post-harvest seasons, 30% were food insecure during one or other of these periods while the remaining 30% were chronically food insecure. A study in Northern Region of 300 mothers with children under 2 years revealed that of the 92.7% who farmed approximately half

reported that the crops harvested were not sufficient to feed the household for the coming year. In consequence, 47% of mothers reported skipping meals during the lean season while 19% stated that their husbands also did the same in the face of periodic household food shortages (Wontewe et al, 1997). UNDP (2007: Table 1.2) in its compilation of statistical information from a variety of sources discovered that nationally almost 20% of children under the age of 5 years were malnourished with the incidence being much greater in rural areas. Plainly, seasonal aspects of poverty can create insurmountable difficulties for non-resident fathers paying child maintenance, most particularly in rural areas where seasonal absolute poverty is most pervasive. But this is not the only problem connected with impoverished circumstances. A social worker from Tamale the provincial capital of Northern Region explains:

> The maintenance, for instance you see here people are not used to giving money for feeding. When you stay together you just manage and feed yourself. The man will do the farming and the woman will take care of the ingredients. The man will farm and will give her corn or maize for the house. Then normally women do some trading, so from the market they also buy their food ingredients and come. But when they separate or divorce and the child's maintenance will have to come in, you see that there is a problem. This man finds it very difficult to remove money and to pay 30,000 cedis a month, sometimes he comes and says 'I cannot get' but the child too must eat. Sometimes we may have to agree that if the man can give food, foodstuff, it is all right. [EAA200-210]

Across the African continent family members living in deprivation engage in a complementary set of economic activities to meet the basic survival needs of the household (Dani and Moser, 2008; Francis, 2000; Verma, 2002). Nukunya (2003) in his sociological study of Ghana avers that despite rural/urban migration and the dislocation of many families, the urban and rural poor continue to depend on the traditional forms of family organisation. These allocate age and gender prescribed economic and domestic tasks to household members in a way that seeks to maximise the material and cash benefits that flow to the household. These domestic and economic activities are interdependent as indicated by the interviewee above. For instance in rural and peri-urban areas, typically a woman may grow her own crops on land to which she has usufruct rights, but not ownership, while also working on her husband's farm without payment. She will process some of this produce for family consumption and sell what is not needed to feed the household. Government of Ghana (2003: 69) estimated that the agricultural sector comprised 80% of small holdings where farmers were dependent on household labour alone. Patently, families living on or near to subsistence levels are engaged in the exchange of labour and goods rather than cash. Yet there is no acknowledgement of this at a legislative level. Instead s.51(2) of the Children's Act 1998 states that the maintenance must be a

'periodic payment or lump sum payment'. Meanwhile social workers are left to reconcile the gap between statutory provision and daily reality.

Social workers endeavouring to negotiate workable maintenance agreements find themselves caught between formal law and customary law. Another social worker from Kumasi speaks for many research participants by describing the contradictory law-bound imperatives that practitioners endeavour to finesse:

> Let me say that we are a bit fortunate to have that extended family system. So sometimes what we can do is maybe draw in other family members. So we sometimes fall on other family members, not necessarily the man who has been brought to the agency for maintenance to be awarded, but we may go further to invite the uncle, the grandfather and a whole lot of other extended family members, sometimes that also helps. But the nature of the law is such that you cannot be so firm on such people, you cannot take an uncle to the Family Tribunal for failing to maintain his nephew's son or daughter, so that is it. [EO83-91]

As the speaker of this extract works in Ashanti Region, he is referring to the obligations under customary law that apply to a matrilineal family system. In this case, the practitioner sought to involve the child's maternal uncle and other maternal male relatives who traditionally have welfare responsibilities towards the children of the matrikin. Equally, were a practitioner to be working with a family from an ethnic group subscribing to a patrilineal system he or she would be seeking to involve relatives from the father's patrilineage. But the Children's Act 1998 only provides that parents or legally recognised guardians are liable to maintain a child under s.6 and s.47. It follows that there are no statutory obligations requiring matrikin or patrikin, who under customary law are liable to maintain the child, to do so.

Article 26(1) of the Constitution of the Republic of Ghana (1992) provides that 'every person is entitled to enjoy, practise, profess, maintain and promote any culture, language, tradition or religion subject to the provisions of this Constitution'. This right is qualified by art.26(2) that specifies that 'all customary practices which dehumanise or are injurious to the physical and mental well-being of a people are prohibited'. It would be hard to argue that child care obligations borne by lineage members, instead of a mother or father, are a form of dehumanising or injurious cultural practice. Yet the Children's Act 1998 is a statute that makes virtually no concession to customary law, traditional family forms, or the social and economic exchanges between kin that these entail.

MOTHERS' ACCESS TO THE FAMILY TRIBUNAL

Women seeking redress through the legal system can encounter social hostility and often stigma. In Ghana, this can sometimes assume a

sinister and extreme form, as one practitioner from Manponteng District Office in Ashanti Region explains that a mother:

> . . . often and oftentimes will have to resort to court action or social welfare action. You know the custom in this African community, people will point fingers at you the mother, you are a litigant, they can even attribute your attitude to being a witch or something of that sort. So to save your own image in the community then, they do not even attempt any more, so the men go scot free and the children become the sole responsibility of the women. [EP299-305]

As indicated by the social worker above, Ghana remains a pervasively patriarchal society in which women experience considerable political, social, and economic disadvantages relative to men (UNICEF, 2008: 76). The country had a Gender-related Development Index of 0.524 for 2007 that is a compound index for several indices measuring gender differences in life expectancy at birth, literacy, school enrolment, and standard of living. This ranked Ghana 126th in the world in terms of gender equality, a place substantially below that of nations of North America and Europe, but positioned similarly to most other sub-Saharan countries (UNDP, 2009: Table J). By contrast, the UK has a Gender-related Development Index of 0.943 and is ranked 17th while that for the USA is 0.942 that is ranked 19th for gender equality among the world's nations (UNDP, 2009: Table J). Consequently, most Ghanaian women find themselves politically, socially, and economically disempowered in the context of small, often agrarian or semi-agrarian communities where they are well known. The same gender inequalities and close knit communities are also extant in urban areas (Nukunya, 2003). As the interviewee alludes, cultural and spiritual beliefs can be deployed by community members to discourage mothers from seeking assistance from the Department of Social Welfare or the Family Tribunal. In the interview excerpt above, women accessing the formal legal system are liable to be accused of being witches. In Ghana, it is women and very rarely men who are sometimes accused of witchcraft. This is a most serious allegation that can result in women being ostracised from their community, being physically assaulted or murdered (Adinkrah, 2004).

A social worker practising in Volta Region, and articulating the experiences of many research participants, surmised that:

> Women may not be able to come to the Department or access the courts because either they are ignorant of what Social Welfare does or else they live in remote areas where the cost of transport makes it difficult for them to come to us. I think people are not aware of the Department's existence or what it does, there is a need for public information about our activities and the help we can give. [EM529-534]

Other interviewees reported that fathers involved in maintenance disputes were not aware of the Children's Act 1998 or their obligations under it. Undoubtedly, ignorance of the law is compounded by the

high levels of illiteracy among both men and women. National figures for those aged 15 years and above reveals that adult illiteracy is as high as 79% among women and 67% for men in the savannah areas of Upper West Region. This compares to lower figures in Greater Accra of 25% for females and 12% for males (UNDP, 2007: 31). These are comparable to male and female adult literacy levels in many other sub-Saharan countries (World Bank, 2009: Table J). The Law Reform Commission (1998) for Ghana (established to modernise the law) collated a number of national surveys that taken together revealed that legislation designed to protect and promote the rights of women and children had little practical impact, especially in rural areas. It concluded that, 'generally laws have achieved very little results because most people have little or no idea about the laws in operation' (Law Reform Commission, 1998: 20). In this connection, the Commission specifically referred to laws concerning child maintenance as well as those relating to criminal acts against women and children. But this is far from the whole picture. Even when a woman is aware of her rights and how to pursue them, she is confronted by another set of obstacles. These are succinctly described by two social workers, the first from Sogakofe District in Volta Region and the second from Kumasi city in Ashanti Region, who relate the experience of many practitioners involved in the research:

> The women will say they do not have money to go to the courts to let us enforce our laws here because we are supposed to send our cases to the Family Tribunals for the enforcement. When you ask the woman, 'I will just write an introductory letter to the Tribunal registrar', the woman will say 'I do not have money' because there is no court in the district now for us. We have to fall on one in the adjoining district, you will pay about 2,000 cedis to get there from here. For that reason when you want to send their cases to the court the women are not willing. [EY117-125]

> . . . [filing fees] sometimes it deters the woman from going further and we are constrained too because for a case for maintenance to be filed the woman needs about 40,000 cedis, to be able to go through the processes, but sometimes they do not have it. So you may advise that it is better we forward this case to the Family Tribunal but because her finances cannot meet it she goes and she does not come back. [EO71-76]

These two extracts reveal several financial barriers to accessing the Tribunal system for women. The first concerns the distance to the nearest Tribunal and the cost of travel. This most detrimentally affects rural women who must travel greater distances in circumstances of inadequate physical infrastructure consisting of un-surfaced and neglected road networks often subject to flooding and impassibility during the rainy season. Given that the highest levels of poverty are concentrated among female-headed households in rural areas the

highest transport costs of travel to the Family Tribunal are borne by the poorest members of Ghanaian society (UNDP, 2007: Tables 2.4.6, 3.1, 3.3). The costs of actually filing a case are an additional barrier. Other social workers participating in the research mentioned 'filing fees' ranging from ¢30,000 up to ¢50,000 that have to be paid prior to a maintenance case being listed for hearing at the Family Tribunal.

Despite the existence of the Legal Aid Board instituted under the Legal Aid Scheme Act 1997 (Act 542) to provide legal assistance to impoverished litigants involved in civil and criminal cases, including those concerning the custody and maintenance of children, no social worker mentioned recourse to this agency. There appears to be no recourse to public funds for those availing of justice through the Family Tribunal system. The Children's Act 1998 made provision under s.61 for the Chief Justice to waive part or all of the 'filing fees' that are payable for an application to the Family Tribunal via statutory instrument. This apparently has not occurred as a result of which poor rural and urban woman face insurmountable financial barriers in accessing the formal justice system.

ENFORCEMENT OF CHILD MAINTENANCE AGREEMENTS AND MAINTENANCE ORDERS

All social workers participating in the study reported problems with enforcement of voluntary maintenance agreements negotiated at the district offices of the Department of Social Welfare. The problems are best summed up in the interview extract below from a practitioner based in a rural office in Ashanti Region:

> The difficulty is non-payment. When you commit a man to pay some amount towards the care of the child or his children in fact it is not easy to score success in that. Somebody may comply for one, two, three months and will not be seen in the office again. So a review of the case will have to be put into place and sometimes you have to advise for the case to be referred to the Family Tribunal. As I said already even the Family Tribunal sometimes, most often are not successful, because what would deter the men is to put them into prison. But in this case if you put the man into prison who will contribute towards the care of the child, so it is not done. All that they know is once you will not be imprisoned he will comply for sometime and relax. [EP288-298]

In this excerpt, the social worker makes clear that high default rates occur both in relation to voluntary agreements mediated by practitioners working out of the district office and in relation to Maintenance Orders issued by the Family Tribunal that are legally binding. There is one inaccuracy in the social worker's account as s.59 of the Children's Act 1998 gives the District Court sitting as a Family Tribunal the discretion to either imprison or fine a recalcitrant father or both. This said, it is of

course a familiar dilemma for courts regardless of jurisdiction to be confronted by parents with child care responsibilities who breach court orders in relation to contact, custody, or maintenance. Imposing a large fine or a custodial sentence plainly undermines their ability to fulfil their parental responsibilities. Returning to the above interview extract, and the claim that default by men was as common after the issuance of a Maintenance Order as it was after mediation of a voluntary maintenance agreement by social workers. This was reported by all social workers based in district offices participating in the study. A social worker from a sub-metro office in Accra, the capital, describes the impact of this state of affairs both on the mothers involved and on morale among social workers themselves:

> . . . but what [women] go through in the Family Tribunal, coming every time, going up and down, sometimes the men will not pay the money after some months you have to get them arrested, they come to court, all those difficulties you go through to get the men to just come and give maybe 50,000 cedis for a whole month for a child. If [the mother] can use that time going up and down to do something, to earn more than the 50,000 cedis to take care of that child, I think it would be better. We talk to them in court but I think they should know so that they do not even come to court, I think it is a waste of their time. [EE783-791]

In this excerpt, the costs and delays of obtaining a Maintenance Order and the repeated court applications to ensure its enforcement is contrasted with the small amounts of money that are actually set for child maintenance by the Family Tribunal. At the time of the research, ¢50,000 was just £5.00 or US$7.50. Of course, proportionately this is a much larger sum of money in the context of a low-wage economy such as Ghana compared to the high-income countries of Europe and North America. Nevertheless, even in a country where one-third of the population live below the international poverty line of US$1.25, this still translates into US$37.50 a month approximating to ¢251,250. So for a poor single parent, household living on or close to the international poverty line of US$1.25, the sum of ¢50,000 in child maintenance from a non-father is actually the equivalent of one-fifth of total monthly income. Hence for an impoverished mother, this is not an insubstantial sum. But, the point being made by the practitioner above, who articulates the perspective of many of her colleagues, is that the time and cash inputs required from the mother in circumstances where effective enforcement is unlikely means that the monthly maintenance payment is not worth a mother's effort. It is this realisation on the part of staff at the Department of Social Welfare that confronts them with the dilemma of whether or not to advise mothers to attempt to enforce their rights through the Family Tribunal system or paradoxically to advise that they would be better not engaging with the judicial process.

Many social workers participating in the study suggested that were the Department of Social Welfare given statutory power to enforce maintenance agreements this would lead to higher rates of payment, less barriers for women to surmount in availing of legal redress and ultimately better outcomes for children. But there are problems with this proposal. The Ghanaian population numbers 23,000,000 as against the number of social workers employed by the Department of Social Welfare that stands at <1,000. Such a state of affairs is greatly worsened by the lack of logistical support and funding available to underpin the activities and interventions of frontline staff. The International Monetary Fund (2006: 138) in their review noted that the annual budget allocation for the Department of Social Welfare from central government was just £250,000 (US$375,000) and that 'the department is hampered by inadequate funding, low quality of staff and logistics'.

THE IMPLICATIONS FOR CHILD MAINTENANCE IN GHANA

The analysis has focused on the structural aspects of social, economic, and legal systems in Ghana that interfere with the operation and enforcement of the law on child maintenance. But this is not to deny that many practitioners also alluded to individual causes for the non-payment of child maintenance. A number described instances of incensed fathers punishing their ex-partners by withholding child maintenance payments to the detriment of their own children. Others referred to polygynous marriages in which wives used the leverage they derived from the interdependence of activities sustaining household livelihood systems to withdraw material support from their husband so as to prevent him from supporting an estranged or divorced wife and the children of their union. A few practitioners concluded that some men did not pay because they were simply unprepared to bear the cost and inconvenience of financially supporting their children. These are common reasons for default and are reported across jurisdictions (Parkinson, 2007; Skinner and Davidson, 2009). In Ghana, as elsewhere, individuals have agency and can exercise this to frustrate the best of laws. What the findings of this research do demonstrate is that structural factors in Ghana augment and exacerbate the common problems associated with non-payment. They also increase the barriers lone mothers face in obtaining child maintenance from fathers.

What this study of child maintenance in Ghana reveals is that social workers whether negotiating voluntary agreements through the district offices of the Department of Social Welfare or imposing Maintenance Orders as a panel member of the Family Tribunal are being required to enforce legislation that is fundamentally at odds with the economic and social realities of the lives of the majority of Ghanaians. Conditions

of absolute poverty and subsistence living combined with household livelihood strategies, which involve exchanges of material resources as opposed to cash, challenge the very notion of child maintenance *payments*. The complexity of intra-family exchange in integrated livelihood systems is ignored by the Children's Act 1998 that is predicated on a purely cash economy. Lack of access to financial capital is also implicated in the constraints placed on women generally, but poor rural women in particular, when cash is required to access Family Tribunals located at a distance or to pay 'filing fees' in order to have their case listed. The emphasis of child maintenance provisions on access to cash by both fathers and mothers is not the only disconnect between legislative ideal and social reality. Polygyny, high fertility, split marital residence, and the practice of separate purses for spouses among some ethnic groups receive no legal consideration in the Children's Act 1998. The notion of a nuclear family implicitly underpins this statute. The result is a complete circumvention of customary law concerning the maintenance of children.

Patrilineal inheritance and succession among Ghanaian peoples, which are common elsewhere in the sub-Saharan region, and matrilineal systems, codify obligations of extended kin towards the children of the lineage. The disregard of these in the Children's Act 1998 means that social workers and other state agents are left to implement laws that fundamentally conflict with accepted norms in ways that cut across kinship provision for children. Consequently, social workers are confronted by intense resistance from fathers when trying to implement the child maintenance provisions of the Children's Act 1998, yet are simultaneously unable to buttress customary laws that oblige fathers and paternal kin to take care of their children, or the maternal male kin of mothers in the case of matrilineal systems. Conversely, the statute also ignores the obligations that a man may owe under customary law to other children of the lineage and not just his own offspring.

UNICEF (2008: 77) in its review of the implementation of the CRC in Ghana admits that, 'the reality remains, even in the face of all the constitutional provisions and the fine injunctions of the CRC and CEDAW, that in Ghana the practices proscribed by these provisions are integral to people's way of life. These are people steeped in their traditional ways of life, who were not directly consulted before formulation of the laws or ratification of the treaties, and in any case are not even aware of the treaties' existence'. To remedy this, UNICEF merely suggests more education, but not reform of the law (UNICEF, 2008: 77). This is an entirely inadequate response to the enormity of the problem that confronts the State in implementing the provisions of a statute that run so profoundly counter to customary law. Were formal law to be more consonant with customary law, it would undoubtedly give state actors greater leverage in their negotiations with parents and

their kin to ensure sufficient resources in cash or kind were directed to children on the breakdown of a marriage or in the wake of a casual sexual relationship. This is not an argument for the wholesale adoption of customary law, some of which endorses harmful traditional practices such as FGM and child marriage. But it is contended here that by simply airbrushing all traces of customary law out of child maintenance provisions, this creates insuperable problems for implementation in a context where customary law could positively contribute to the care of children.

Although adult illiteracy, particularly the elevated levels found among rural women, clearly impedes widespread knowledge of the rights of parents and children under the Children's Act 1998, these will not be resolved by translating the statute into more local languages, training up professionals, and generally sensitising more communities as advocated by UNICEF (2008: 90–1). The underpinning assumptions of the Children's Act 1998 are fundamentally flawed. They articulate an ethnocentric notion of the household predicated on Western nuclear family forms and the economic conditions of post-industrial societies. This state of affairs is not particular to Ghana. Across the African continent, the domestication of the CRC has meant the adoption of national legislation predicated on the nuclear family and a cash economy.

THE IMPLICATIONS FOR CHILD MAINTENANCE IN SUB-SAHARAN AFRICA

This article has used Ghana as a detailed case study to illustrate the difficulties encountered by state actors when implementing legal provisions concerning child maintenance. Ghana is not alone in this respect. Similar legislative provision exists in many other sub-Saharan jurisdictions. For example, Kenya's Children Act 2001 requires parents to provide for the health, education, and general welfare of their children under ss.6, 7, 8, and 9 while under s.91 child maintenance is defined as the payment of cash sums. Likewise in Uganda, ss.4–6 of the Children Act 1997 place duties on parents or (on their demise) guardians, to meet their children's welfare needs and requires maintenance payments in cash under s.76(7)(a). In Zambia, the Affiliation and Maintenance of Children Act 1995 makes similar provisions under ss.3 and 9 and s.10(1) respectively. Nigeria has comparable legislation in the form of the Child Rights Act 2003.

Like Ghana, all these statutes articulate a nuclear conception of the family, ignore indigenous and widely observed family forms and disregard the realities of materially based livelihood systems of the rural and urban poor. They also rely on women's access to the court

system in order to enforce maintenance payments by fathers. All these countries have similar human and economic development indices to Ghana (World Bank, 2009: Tables H, I, J, and L). Indeed, their societies share many similar family forms and livelihood strategies to that of Ghana (Dani and Moser, 2008; Francis, 2000; Verma, 2002). Perusal of the legislation on child maintenance of other African States reveals the same paucity of consideration for customary law or recognition of traditional family forms. There are signally few studies of child maintenance elsewhere on the African continent. But this study would indicate that given cross-country similarities in terms of legislation, socio-economic, and cultural context, research if undertaken in other sub-Saharan countries would reveal similar systemic failings.

The argument made is for an overhaul of legislation on child maintenance both in Ghana and in other African countries in ways that do not contravene the CRC yet which integrate the positive or neutral aspects of customary law concerning children's maintenance into formal legal provision. This would give effect to art.11 and art.26(1) of the Constitution of the Republic of Ghana (1992) guaranteeing the right to enjoy any cultural practice so long as it does not dehumanise or harm others. It also offers a route to formulate legislation more consonant with the customary practices of many peoples in sub-Saharan Africa and therefore is less likely to encounter hostility, resistance, or incomprehension. At the same time, attention must be given to the actual circumstances of people living at or near the poverty line and the material exchanges that support household livelihood systems. Legislation throughout the sub-Saharan region needs to reflect the centrality of material exchange among kin and not confine itself to cash payments in the maintenance of children. In addition, African legislatures need to recognise the often grossly disadvantaged economic position of women relative to men and to remove the greater financial barriers they confront in accessing the court system.

LAW REFORM IN GHANA

It seems appropriate to conclude by endeavouring to concretise these propositions in relation to Ghana's Children's Act 1998. In the first instance, the requirement for 'filing fees' should be dropped, thus allowing women much easier access to the Family Tribunal. Given the small amounts involved, it is difficult to see how this can be a necessary or significant source of revenue for the government. By contrast, the amounts charged are substantial sums for those living on or near to absolute poverty. In Ghana, as already discussed, women-headed households are disproportionately represented among the poorest sections of society. Secondly, the requirement for a maintenance

payment under s.51(2) should be amended to enable a person liable for child maintenance to offer material provision instead of a cash sum. It would seem perfectly feasible for the social inquiry report to recommend an arrangement involving material provision or some exchange in kind in addition to a reduced cash payment. It would be for the Family Tribunal to make a final determination on this where the parties could not agree. These are of course the easier amendments to make to the legislation.

The incorporation of customary law into a national law such as the Children's Act 1998 that is designed to impose the same duties and grant the same rights to all citizens is plainly problematic. There are seventeen major ethnic groups in Ghana that hold to a number of different cultural practices concerning child maintenance. The processes of Westernisation, globalisation, and urbanisation have resulted in an even greater diversity of family forms. This has occurred through attenuated kinship networks created by rural–urban migration and sometimes emigration, adaptation of customs to changing socio-economic circumstances, and the impact of the Western media (radio, television, and internet) that has brought new influences to bear upon people's beliefs and values. The conundrum is how to protect fundamental human rights and guarantee equity in terms of rights and responsibilities while at the same time enforcing customary law that differs as between ethnic groups and from which a substantial number of people within an ethnic group may demur in favour of more nucleated family forms and obligations. In resolving this difficulty the work of Alston (1994) regarding children's rights and that of Shachar (2001) regarding women's rights in multicultural contexts is particularly instructive.

Alston (1994: 19) conceives of children's rights as a set of 'concentric circles of increasing responsiveness or flexibility to cultural factors as we move further away from the central and less flexible norms'. The norms at the centre of Alston's schema are those that are consonant with the physical and mental integrity of the child. Therefore, harmful traditional practices, such as FGM, which physically violate a child and cause distress would still remain unlawful. However, matters concerning child maintenance would fall within outlying circles and allow for more cultural flexibility. This means that legislation need not be prescriptive as it addresses matters that are increasingly removed from basic human rights. While ensuring *someone* maintains a child is plainly necessary to that child's survival, it would be difficult to argue that *who* actually maintains the child is an issue on the same power in terms of basic human rights. Therefore, maintenance of a child per se would be a norm placed at the centre of Alston's schema, but who is legally required to do so would not. This approach permits differentiation between those issues that require prescriptive legislation to protect fundamental human

rights and those issues around which cross-cultural variation should be allowed for within legal frameworks. The implication here is that while the Children's Act 1998 should make provision for a child's maintenance, it should not be prescriptive as to who holds that responsibility. While such an approach opens up space for different customary practices, it also potentially imposes customary law upon those who no longer subscribe to it. Additionally, it threatens to reify cultures that are in fact fluid constellations of beliefs and observances that change over time.

As Shachar (2001: 1) avers 'the basic dilemma here is how to divide authority in the multicultural state in a fair and just manner, in order to strike a balance between the accommodation of minority group traditions, on the one hand, and the protection of individuals' citizenship rights, on the other'. Embedding customary law in national legislation without any safeguards potentially undermines the rights of individual members of an ethnic group who may be disadvantaged by aspects of customary law or who may not personally subscribe to it. Codification of customary law in national legislation also arrests its adaptation to the challenges of modernity. Shachar (2001) answers these conundrums by proposing what she terms 'transformative accommodation' in relation family law. This is based on the notion of plural jurisdictions whereby a woman can decide to have her case decided under customary law or according to national law. Shachar (2001: 120–1) argues for a *no-monopoly rule* that means that neither the state nor the ethnic group has exclusive judicial power over a subset of sensitive social matters, which Shachar terms *sub-matters*. Instead, both judicial systems would exist independently of one other offering each litigant the choice to pursue his or her case in either jurisdiction in relation to a limited number of pre-defined social *sub-matters*, such as marriage, the division of property and child maintenance. To these propositions, Shachar (2001: 122–3) adds a safeguard; that a litigant be able to enter or leave either jurisdiction at predetermined *reversal points*. This is to be distinguished from appealing from one jurisdiction to another as a higher form of law or to a higher court in the system. What Shachar (2001) envisages is competition between different jurisdictions in which both national legislators and opinion leaders of an ethnic group are under some pressure to modify their laws as litigants vote with their feet and move between different jurisdictions to obtain justice. Undoubtedly, Shachar's idea of 'transformative accommodation' raises new challenges for the enforcement of law in Ghana and other African jurisdictions. But, it also offers the possibility of greater concordance between national law and customary law thus reducing the incomprehension and resistance that those charged with enforcing aspects of family encounter. Arguably greater concordance would attract higher rates of compliance and therefore require less policing. The jury is of course still out.

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