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The resilience of traditional legal systems in addressing social injustice in Kenya

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Abstract

In Africa, law and society are intertwined in a complex relationship. Pre-colonial communities had developed elaborate dispute resolution mechanisms that were geared towards enhancing justice. Achieving justice was a means to ensuring that there was harmony, stability and prosperity in society. Colonialism imposed foreign laws and legal structures that severely disrupted the organization of pre-colonial societies. After independence, while African states maintained the imposed legal system and structures, the traditional legal system was also retained but relegated to a low status. In promoting social justice, African governments enacted new constitutions and infused liberal values in old constitutions. They constitutionally entrenched a number of independent offices and they significantly expanded the bills of rights. However, recent events have shown that the executive, judiciary and legislature are engaged in conflicts that are adversely affecting the stability of African societies. Of concern is that these conflicts could jeopardise these formal institutions' capabilities to address social injustice. Consequently, traditional justice mechanisms appear to offer alternative approaches to achieving social justice. In Kenya, the values in traditional African legal systems have now been recognized in the 2010 Constitution and statutory law. These principles are drawn from values shared by most Kenyan communities. In addition, Kenya's Constitution mandates the courts to encourage alternative dispute resolution mechanisms, especially those based on traditional legal systems. Therefore, traditional African justice mechanisms have proved resilient under the onslaught of foreign legal systems. Because communities in urban areas are not completely divorced from their rural ties, the same traditional justice mechanisms are still used. As such, many disputes are solved at the family, clan or community level without being escalated to the formal justice mechanisms. This paper argues that there are important principles that could be extrapolated from such traditional legal systems in order to secure justice in "formal" (legal) institutions.

Keywords: *Kenya, decolonisation, traditional legal systems, social justice*

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Introduction

The end of the Cold War coincided with the rise of liberal democratic states and the decline of communist ones. Adoption of liberal democracy appeared to reduce the number of revolutions and

inter-state wars. Consequently, it was concluded that we had reached the "end of history".[1] However, several decades since the making of that declaration, there are still problems with reification of liberal democracy.[2] Initially, African states copied the constitutional structure of their colonial masters. For those African polities colonized by the British, the situation was unique because Britain has never had a (strictly speaking) written constitution. Yet, Anglophone African states were required to craft written constitutions in order to gain independence from their colonisers, For Anglophone Africa, the Nigerian Constitution was the blueprint for other African states. The Nigerian Constitution contained a Bill of Rights inspired by the European Convention on Fundamental Human Rights. The Constitution also established the tri-partite form of government, comprising the Executive, the Judiciary and the Legislature. However, these Constitutions were enacted without the involvement of the masses. Instead, the African elite negotiated for independence with Europeans by promising to protect the interests of the European settler population. The institutions created through this process were thus illegitimate in the eyes of the populace.

In most cases, Anglophone African states' independence constitutions placed more power in the Legislature. However, for several reasons, the Executive was able to coerce the Legislature into amending the Constitution in order to concentrate power in the Executive. Between the 1960s and 1970s, many African states were led by dictatorial regimes, whose main concern was survival and capital accumulation. Consequently, these regimes curtailed civil liberties through instrumentalist laws while co-opting opposition groups by using public goods. Thus, the next phase of democratisation that occurred in the 1990s involved the legislation of human rights. Many states adopted constitutions that contained elaborate human rights provisions. In addition, several states established independent offices to oversee government actions. While these developments have made positive changes to people's lives, there is a risk in uncritically hailing them. It appears that these laws and institutions are incapable of dealing with the unique circumstances of African societies. As a result, Africans have been unable to solve their social problems using these institutions. In fact, these institutions have become antagonistic to each other. A major reason for the dysfunctional laws and institutions is that they are often diametrically opposed to the values espoused by indigenous institutions.

Dissatisfaction with Western institutions has re-ignited the interest in indigenous institutions. Africans are realising the need to tap into the positive aspects of indigenous values in order to craft effective institutions. Consequently, many African states have re-introduced aspects of traditional institutions in order to address social injustice. This paper will first highlight the current conflicts within the justice system in Kenya and the resulting inequities. Second, this paper will give an overview of some traditional justice systems, setting out the values that are relevant for Kenya's

[1] Fukuyama, F. (1989) "The End of History?" (16) The National Interest 3–18.
[2] Huntington, S.P. (1996) The Clash of Civilizations and the Remaking of World Order, Simon & Schuster, New York; Kagan, R. (2009) The Return of History and the End of Dreams, Vintage Books.

socio-political situation. Third, this paper will demonstrate the appropriateness of those traditional legal systems in the contemporary context.

The crisis of African institutions

At independence, most African states adopted the structure of government of their colonial masters. This usually entailed the enactment of a Constitution and a tri-partite structure of government. The tri-partite structure of government is essentially a European tradition that was imposed upon most colonized states. To ensure harmony between the three arms of government, an underpinning principle in constitutional law has been the separation of power. The aim of the separation of the power is aimed at preventing concentration of public power and its abuse. However, there is no strict separation of power under Kenya's legal and institutional framework. Instead, there is a system of checks and balances that is meant to contain the excessive tendencies of each organ of government. However, such a structure often leads to conflict between the various government agencies.

The 1963 Constitution was drafted with the intention of securing the interests of minority communities such as the white settlers and the small tribes. Thus, the constitution contained a Bill of Rights and a system of devolved government. However, in 1969 Constitution, a new constitution had to be enacted in order to neatly capture the numerous amendments made to the 1963 Constitution. The 2010 Constitution was enacted in reaction to the excesses caused by the concentration of public power in the Executive, and particularly the presidency. However, caught up in the euphoria of a "second liberation", Kenyans appear to have gone overboard in spreading public power in a variety of legal provisions and institutions. Instead of crafting a constitution suited for the unique circumstances of nation, Kenyans copied bits and pieces from constitutions of other states. The end result has been that the independent bodies and liberal laws are being manipulated by the ruling elite to the detriment of the masses.

The main institution for addressing injustice in Kenya is the judiciary. Kenya's judiciary comprises subordinate courts (magistrate, *kadhi*, and court martial) and superior courts (the High Court and other courts of the same status, the Court of Appeal, and the Supreme Court). The common feature with this system is the adversarial nature of the process of resolving disputes. In both civil and criminal processes, there are usually two opposing sides, meaning that a win for one is a loss for the other. Of course, this is an overly simplistic summation that does not capture the complex interests involved when parties present their cases. However, despite the philosophical justification for this approach to achieving justice, it is still adversarial and individualistic. In addition, this system is fraught with challenges that make it difficult for the underprivileged to access justice. First, the system is highly technical, with numerous rules and legalese. Second, the infrastructure is inadequate as people in remote areas have to travel great distances to the nearest court stations. Third, there are not enough court personnel, which leads to delays in handling cases. Fourth, the

courts and advocates charge fees that are often inordinate.[3] Fifth, due to the rigid nature of the formal justice system, the populace often avoid the courts, perceiving them to be "agents of oppression".[4] In fact, the capacity of the courts to handle the myriad of disputes in society is limited.[5]

Consequently, over 80% of Kenyans feel that they do not have adequate access to justice through the formal court system.[6] The government has attempted to reform the judiciary in order to address some of these problems. However, these reforms have not been comprehensive and the problems still persist. In addition, because the judiciary is dependent on the executive for funding, the judiciary suffers whenever judicial officials make decisions that are antagonistic to the executive. In light of the flaws in the formal justice system, it is inevitable that the populace would seek alternative mechanisms. The most reasonable mechanisms would be indigenous justice institutions.

Positive indigenous African institutions as the solution

As has been shown above, the African states suffers from structural contradictions. Because the state lacks legitimacy, Africans treat it with suspicion. Analysing the African state using Western theories such as dependency theory, modernisation theory or statist theory has not offered concrete solutions. It is suggested that the solution lies in reconstruction of the state on the basis of positive African history and traditions. This entails prioritising African interests and reconnecting with the structure of indigenous institutions.

Africa's history is replete with examples of ancient but sophisticated polities and whose characteristics still survive in some contemporary communities. While African societies varied in many respects, there were many common aspects.[7] In particular, socio-economic and political institutions were inherently democratic. Where there was a paramount chief or king, they held power and property in trust for the community and not as absolutists. In addition, a system of checks was provided by a council of elders and other organisations. Moreover, the people participated in decision-making, most importantly through village assemblies. This system was held together by custom and tradition, which were passed down from generation to generation. These positive aspects of African society provide a basis for some ideas on reconstructing the African state.

[3] Muigua, K. (2015) 'ADR under the Court Process: A Paradox?' in Alternative Dispute Resolution and Access to Justice in Kenya, pp. 125-127 at 126.
[4] Peil, M. and Oyeneye, O. (1998) Consensus, Conflict and Change: A Sociological Introduction to African Societies, EAEP, Nairobi, p. 280.
[5] Galanter, M. (1981) "Justice in Many Rooms: Courts, Private Ordering and Indigenous Law" 19 Journal of Legal Pluralism 3.
[6] Kameri-Mbote, P. and Aketch M. (2011) Kenya: Justice sector and the rule of law, Open Society Foundations, Nairobi, p. 160.
[7] Muiu, M. and Martin, G. (2009) A New Paradigm of the African State, Palgrave Macmillan, New York, p. 47.

Most communities in pre-colonial Kenya were acephalous and they followed an age-grading system comprising elders and youth. The elders would sit as a council when legislating or adjudicating disputes.[8] In contrast to the formal justice system, traditional justice systems were based on ensuring that disputants would live harmoniously after resolution of the dispute.[9] Even in criminal matters, restorative justice, as opposed to retributive justice, was usually the main goal of traditional justice systems.[10] Traditional justice systems were anchored on various values. Humanness, captured in the words *ubuntu* in southern Africa and *utu* in eastern Africa, ensured that all individuals had equitable access to natural resources despite living communally.[11] Reciprocity fostered collective security by privileging communal over individual interests.[12] Another common value was respect for other members of the community and for the environment. As long as each person respected the other, then conflict was avoided.[13]

The advantage of traditional justice systems is that they are culturally appropriate, flexible and inexpensive.[14] The normative content of traditional justice systems was the customary law of the respective community.[15] The institutions that comprised the justice system included the family, the clan, the age-set, the council of elders, and the tribe.[16] Each of these institutions was an integral level in the dispute resolution process of the community. The mechanisms of conflict resolution in traditional justice systems resemble what are currently termed alternative dispute resolution (ADR) mechanisms. Africans often made use of consensus, negotiation, consensus, mediation and arbitration, depending on the level of animosity between the disputants.[17]

While ethnic communities are numerous in Kenya, they share similar customary norms. These customary norms have proved to be resilient over the course of Kenya's history. Despite the hegemony of the formal legal system in Kenya, the informal legal norms are still applied by

[8] Tignor, R.L. (2015) Colonial Transformation of Kenya: The Kamba, Kikuyu, and Maasai from 1900-1939, Princeton University Press, New Jersey, pp. 11-13.
[9] Muigua, K. and Kariuki, F. (2015) 'Alternative Dispute Resolution, Access to Justice and Development in Kenya' Strathmore Law Journal, p. 4.
[10] Kariuki, F. (2014) 'Applicability of traditional dispute resolution mechanisms in criminal cases in Kenya: Case study of *Republic v Mohamed Abdow Mohamed* [2013] eKLR,' 2 Alternative Dispute Resolution Journal 202-228.
[11] Muigua, K. (2018) "Traditional dispute resolution mechanisms under article 159 of the Constitution of Kenya 2010", accessed 1 December 2020, available at <http://kmco.co.ke/wp-content/uploads/2018/08/Paper-on-Article-159-Traditional-Dispute-Resolution-Mechanisms-FINAL.pdf>, accessed 1 December 2020, p. 4.
[12] 'Muigua, K. (2017) "Traditional Conflict Resolution Mechanisms and Institutions", available at <http://kmco.co.ke/wp-content/uploads/2018/08/Traditional-Conflict-Resolution-Mechanisms-and-Institutions-24th-October-2017.pdf> accessed 1 December 2020, p. 5.
[13] Ibid., p. 6.
[14] Kariuki, F. (2018) 'Community, Customary and Traditional Justice Systems in Kenya: Reflecting on and Exploring the Appropriate Terminology', available at <http://kmco.co.ke/wp-content/uploads/2018/08/Paper-on-Traditional-justice-terminology91-1.pdf> accessed 1 December 2020, p. 2.
[15] Ibid., p. 12.
[16] Muigua, K. (2017) "Traditional Conflict Resolution Mechanisms and Institutions", supra, pp. 6-9.
[17] Ibid., pp. 10-12.

Kenyans when dealing with dispute resolution, land and marriage.[18] The resilience and persistence of the informal legal system justifies the raising of its status in the national legal framework. Such a raised status would be in recognition of the actual socio-legal context of Kenya, since the majority of the populace have to contend with the plurality of legal systems. In fact, most people living urban and rural areas of Kenya have at one time had to settle a dispute using one of the traditional institutions mentioned earlier. Most Kenyans still have ties to traditional justice institutions, which makes this system more accessible than the formal justice system.

The partial co-option of traditional justice systems in Kenya

In light of the challenges faced by the judiciary, Kenyans enacted a socially transformative constitution in 2010. The Constitution of Kenya 2010 lays the groundwork for recognising traditional justice systems by espousing the values inherent in those systems. Article 10(2)(b) of the 2010 Constitution sets out the national values and principals, which include "human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized". This provision is the foundation for making the formal justice system more egalitarian while inviting the adoption of the traditional justice system. For instance, article 22(3) of the 2010 Constitution requires the Chief Justice to make rules that ensure court proceedings are not affected by technicalities. In addition, article 48 of the 2010 Constitution requires the state to ensure access to justice for all persons. Also, article 60(1)(g) of the 2010 Constitution urges "communities to settle land disputes through recognised local community initiatives. Moreover, article 67(2)(f) of the 2010 Constitution directs the National Land Commission "to encourage the application of traditional dispute resolution mechanisms in land conflicts." Ultimately, Article 159 of the 2010 Constitution reiterates the above provisions, and then explicitly directs the judiciary to promote the use of traditional dispute resolution mechanisms. Legislation also recognises the use of traditional dispute resolution mechanisms.[19] In addition, there are several court cases that were withdrawn after the parties used traditional justice mechanisms to settle their dispute.[20]

Despite the explicit recognition of traditional dispute resolution mechanisms through formal law, the two systems do not operate in harmony at present. First, article 159(3) of the 2010 Constitution restricts the use of traditional dispute resolution mechanisms if they are "repugnant to justice and morality". This phrase is vague and perpetuates the inferiority accorded to customary law by the colonial masters. Second, the traditional justice system is still viewed with suspicion by judges in the formal justice system.[21] Third, there is lack of a comprehensive policy and legal framework on

[18] Okoth-Ogendo, HWO (2003) "The Tragic African Commons: A Century of Expropriation, Suppression and Subversion" 1 University of Nairobi Law Journal 107-117 at 113.

[19] For example, s.8(f) of the *Commission on Administrative Justice Act*, No. 23 of 2011; ss. 39-41 of the *Community Land Act*, 2016, No. 27 of 2016; s. 20 of the *Environment and Land Court Act*, No. 19 of 2011; s. 5 (f) of the *National Land Commission Act*, No. 5 of 2012.

[20] *Ndeto Kimomo v Kavoi Musumba* [1977] KLR 170; *Republic v Mohamed Abdow Mohamed* [2013] eKLR; *Republic v Juliana Mwikali Kiteme and 3 others* [2017] eKLR.

[21] *Republic v Abdulahi Noor Mohamed (alias Arab)* [2016] eKLR; *Dancan Ouma Ojenge v PN Mashru Limited* [2017] eKLR.

traditional justice systems. Consequently, courts and other government agencies are unable to cohere with the traditional dispute resolution mechanisms.[22] In addition, where legislation provides for mechanisms such as mediation,[23] the approach used is likely to lead to a superficial settlement as opposed to a meaningful resolution of a dispute.[24]

In order to enhance access to justice in Kenya, it is essential that traditional justice systems are given more prominence than is the case at the moment. There are several ways of giving traditional justice systems a more crucial role in Kenya. First, a comprehensive policy and legal framework should be set in place so that the entire justice system works in synergy. On the one hand, this would ensure that the decisions of one system are recognized and enforced by the other. On the other, this would ensure that there is adequate funding given to traditional justice systems. Second, the judiciary should generally require that disputants use traditional justice systems before approaching the formal legal system. This would greatly reduce the backlog of cases in courts. Third, traditional justice mechanisms should be taught in schools as well as publicised in various fora. This would ensure that the populace internalizes the values underlying these systems.

Conclusion

The African state is in disarray. For a long time, some African states have struggled to maintain prolonged periods of social stability. Historically, the recurrent conflicts and lack of social cohesion are attributed to the structural disruption caused by the trans-Atlantic slave trade and colonisation.[25] The first phase of globalisation (colonialism and imperialism)[26] was justified under the legal theory of discovery,[27] among other legal doctrines,[28] and scientific racism.[29] Colonial governments initiated racially discriminatory policies and laws that brought about coterminous ethnic administrative units.[30] Many Africans were confined to 'native reserves' that were ethnically homogenous. This resulted in the solidification of ethnicity among the African population, preventing inter-ethnic interaction and leaving an autocratic political culture whose

[22] 'Kariuki, F. (2018) "African Traditional Justice Systems" available at <http://kmco.co.ke/wp-content/uploads/2018/08/African-Traditional-Justice-Systems.pdf> accessed 1 December 2020.
[23] Ss. 59A-59D of the *Civil Procedure Act*, Chapter 21, Laws of Kenya.
[24] Muigua, K. (2018) "Access to Justice and Alternative Dispute Resolution Mechanisms in Kenya", available at < http://kmco.co.ke/wp-content/uploads/2018/09/ACCESS-TO-JUSTICE-AND-ALTERNATIVE-DISPUTE-RESOLUTION-MECHANISMS-IN-KENYA-23rd-SEPTEMBER-2018.pdf> accessed 1 December 2020, pp. 13-15.
[25] Muiu, M. and Martin, G. (2009), supra, p. 4.
[26] Baxi, U. (2006) *The Future of Human Rights*, 2nd edn, p. 237.
[27] Molinero, N.A. (2006) 'From the Theory of Discovery to the Theory of Recognition of Indigenous Rights: Conventional International Law in Search of Homeopathy' in Meckled-Garcia, S. and Çali, B. (eds) The Legalization of Human Rights: Multidisciplinary Perspectives on Human Rights and Human Rights Law, Routledge, London, New York, 165-181 at 167.
[28] Anghie, A. (2006) 'The Evolution of International Law: Colonial and Postcolonial Realities' 27 Third World Quarterly 739-753, at 742.
[29] Thompson, L. (1985) The Political Mythology of Apartheid, Yale University Press, New Haven, p. 13.
[30] Bennett, G. (1963) Kenya, A Political History: The Colonial Period, Oxford University Press, London, 13.

repercussions are still felt today.[31] It also lay down the roots of clientelism (the exchange or brokerage of specific services and resources, e.g. land or jobs, for political support) and patronage (politically motivated distribution of favours to groups, usually ethnic or sub-ethnic) that are perverse in Kenya's political practice.[32]

These issues have continued to bedevil the justice sector, to the extent that traditional justice systems are seen as inferior to the formal justice system. However, as has been shown above, Kenyans are still connected to their traditional institutions. These institutions play a vital role in resolving disputes that do not end up in the formal justice system. Essentially, the traditional justice systems are currently reducing the workload of the courts, despite their lack of proper union with the formal system. This paper argues that there are numerous benefits that could be derived from synergism of formal and informal justice systems.

[31] Elkins, C. (2005) Britain's Gulag: The Brutal End of Empire in Kenya, Pimlico, London.
[32] Muigai, G. (2004) 'Jomo Kenyatta and the Rise of the Ethno-Nationalist State in Kenya' in Berman, B., Eyoh, D. and Kymlicka, W. (eds.) Ethnicity & Democracy in Africa, James Currey/ Ohio University Press, Oxford/ Athens, p 200-217.